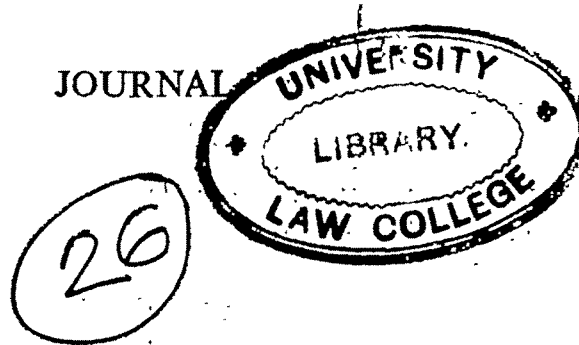
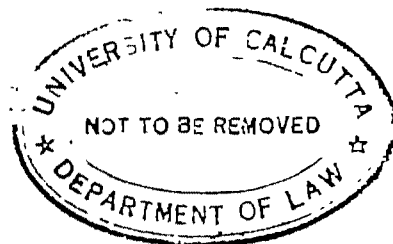


THE BOMBAY LAW REPORTER

CUR - H64486-26-LP2433



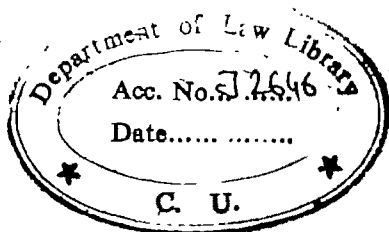
EDITORS :
DHIRAJLAL KESHAVAL THAKORE, B.A.,
BARRISTER-AT-LAW,
AND
MANHAR RATANLAL VAKIL, B.A., LL.B.,
BARRISTER-AT-LAW.



Vol LXI—1959.

BOMBAY:
THE BOMBAY LAW REPORTER OFFICE
KRISHNA MAHAL, 63 MARINE DRIVE.

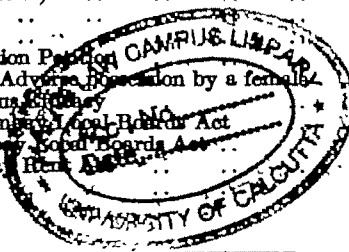
[All Rights Reserved]



CONTENTS

ARTICLES

		PAGE
Advocacy	61 Bom. L.R.J.	88
Bombay Regulation VIII of 1827	61 Bom. L.R.J.	54
Court-fee on Returned Plaint	61 Bom. L.R.J.	129
Definition of Religion in Indian Law	61 Bom. L.R.J.	17
Definition of Religion in Indian Law	61 Bom. L.R.J.	88
Doctrine of Dual Ownership of Building Leases under the Bombay Rent Act	61 Bom. L.R.J.	118
Dr. M.R. Jayakar	61 Bom. L.R.J.	58
Drafting of the Indian Contract Act	61 Bom. L.R.J.	83
Hon. Mr. Justice J.C. Shah	61 Bom. L.R.J.	145
Hon. Mr. Justice Tendolkar	61 Bom. L.R.J.	23
International Law and Roman Law	61 Bom. L.R.J.	65
Is the Constitution of India Federal?	61 Bom. L.R.J.	97
Is the Law of Contempt a Reasonable Restriction?	61 Bom. L.R.J.	1
J.C. Shah (Hon. Mr. Justice)	61 Bom. L.R.J.	145
Jayakar (M.R.)	61 Bom. L.R.J.	58
Mr. Justice Tendolkar	61 Bom. L.R.J.	23
Nature of Proof in Election Petition	61 Bom. L.R.J.	40
Nullity of Marriage and Adverse Possession by a female	61 Bom. L.R.J.	81
Saptindaship and Religious Endowments	61 Bom. L.R.J.	177
Section 102 C of the Bombay Local Boards Act	61 Bom. L.R.J.	161
Section 118 of the Bombay Local Boards Act	61 Bom. L.R.J.	115
Section 28 of the Bombay Rent Act	61 Bom. L.R.J.	151
Tendolkar (Mr. Justice)	61 Bom. L.R.J.	23



LP2432
CLEANINGS

A point on Cruelty	7
A. I. D.	80
Admission of Confessions	186
Advice to Students	15
Aerial Crop Dusting	168
An eye for an eye	8
"As soon as possible"	187
Automatism: Burden of Proof	62
Bye-Laws: Noisy Instruments	25
Case of Wrongful Dismissal	170
Causa Omissus	126
Change of Christian Name	8
Child Delinquents: Psychiatrist's view	124
Contempt of Court	188
Councils Duty to cite Authorities	60
Criminal Investigation	169
Damages	9
Damages and Tax	92
Defaming the Dead	47
Development of Case Law	172
Doctor's Duty to tell	28
Evidence	9
Fair Wear and Tear	25
Forging a Will	171
Grave Offence	61
Green for Danger	79
Highway	10
House of Lord and Precedent	18
"Household"	110

	PAGE
Indecent Activities with Children	91
Insulting Conduct	118
Larceny: Thing of "Value"	138
Law and the Lawyers	122
Law relating to Abortion	124
Lawyers and Lawn Tennis	174
Le Crime Passionnel	190
Lonely employment	140
Marriage of an epileptic	48
Master's Liability for Servant's Goods	5
Matrimonial Home: Ownership	46
Moving with the Times	167
Mushrooms	178
Negligence: Injury from Golf Ball	15
Negligence of Fellow Servants	140
Negligent Injury to the Domestic Relations	107
New Milk and Dairies Regulations	111
New Plan for Studying the Law	93
New "Victorianism"	29
Nice Cup of Tea	186
No Damages for Perjury	78
No Negligence	126
Novation and Proper Law of Contract	188
Nullity: Approbation	63
Obscene Publications	26
Out of Court	12
Passing off and Voices	189
Perjury: Civil Liability	109
Popular Delusion	184
Privileged Documents: Litigation	14
Prostitution	25
Reasons of Fact and Law	142
"Reckless" in statute creating offence	127
Recruits for the Profession: Scottish and American Problems	62
Reportability: Law and Fact	170
Res Ipsa Loquitur	127
Rights of an Author	165
Roots: Liability in Nuisance	168
Rule of Law and the Delhi Conference	120
Sensitive Mink	186
Servant injured on Another's premises	118
Servants' injury as Breach of Contract	184
Shoppers and Shopkeepers	173
Silence as Consent	28
Solicitor	184
Solicitor's Lien	47
Statutory Offence: Mens Rea	166
Summary Dismissal	171
Tortfeasors: Contribution	185
Treasure Trove	174
Unqualified Midwives	63
Violence Provoked by Nagging	14
What is efficiency?	94
Will: Attesting Solicitor	125
Wintle v. Nye	77
Wrongful Dismissal	173

REVIEWS

<i>Bibliography of Indian Law.</i> By Charles Henry Alexandrowicz	16
<i>Bombay Court-fees Act, 1959.</i> By D. H. Chaudhuri	176
<i>Bombay Village Panchayats Act, 1958.</i> By D. H. Chaudhuri	176
<i>Cattle-Trespass Act.</i> By Y. H. Rao	80
<i>Central Sales Tax Act, 1956.</i> By R.V. Patel	80
<i>Central Sales Tax Act, 1956.</i> By K.V. Tamhane	80
<i>Commentaries on the Evidence Act.</i> By V. B. Raju	64
<i>Commentary on the Hindu Code.</i> By P.C. Ghose	143
<i>Company Law.</i> By F. R. Ginnwala	16
<i>Co-ownership and Partition.</i> By Shambhudas Mitra	143

	PAGE
<i>Criminal Trial.</i> By Y. H. Rao	80
<i>Digest of Statutes, Central and Kerala, Vol. I.</i> By Joseph M. Madathil	128
<i>Elements of Indian Company Law.</i> By Sohrab R. Davar.	
Sixth edition by Khورشید D. P. Madon & Rustom S. Davar	159
<i>Extraordinary Legal Remedies.</i> By S. K. Kapur and P. M. Mukhi	128
<i>Finance Acts, 1958 & 1959.</i> By A. N. Aliyar and T. A. Ramachandran	160
<i>Fundamental Rights and Constitutional Remedies.</i> By V. G. Ramachandran	64
<i>Hindu Marriage Act, 1955.</i> By P. V. Deolalkar	43
<i>Hindu Succession Act.</i> By Deoki Nandan Agarwala	43
<i>Identification of Thumb Impression and the Cross-Examination of Finger Print Experts.</i> By N. K. Mehta	143
<i>Income-tax Cash Credits and Secret Profits.</i> By M. K. Shakhdwipi	144
<i>Indian Stamp Act.</i> By Jahnabi Charan Bhaumik	144
<i>Individual and the State.</i> By M. C. Chagla	81
<i>Industrial Law Digest.</i> By N. K. Khare and L. B. Bhide	82
<i>Jurisprudence.</i> By M. J. Sethna	82
<i>King's Government and the Common Law.</i> By Sir Charles Ogilvie	82
<i>Law of Income-tax in India.</i> By V. S. Sundaram	128
<i>Law of Torts.</i> By Balbir Sahai Sinha	64
<i>Mitra's Limitation Act.</i> By B. C. Mitra	144
<i>Modi's Text Book on Medical Jurisprudence.</i> Edited By N. J. Modi	160
<i>Potter's Outline of English Legal History.</i> By A. K. R. Keraly	82
<i>Principles of Equity.</i> By G. P. Singh	64
<i>Principles of Hindu Law.</i> By Sir D. F. Mulla, Twelfth edition by Mr. Justice Sunderlal T. Desai	81
<i>Recognition in the Law of Nations.</i> By Satyavrat R. Patel	160
<i>Sale of Flats.</i> By Edward F. George	113
<i>Sale of Goods Act and the Indian Partnership Act.</i> By Sir D. F. Mulla. Edited by Kalkobad S. Shavaksha	160
<i>Shorter Constitution of India.</i> By Durga Das Basu	144
<i>Special Marriage Act, 1954.</i> By D. H. Chaudhuri	16
<i>Specific Relief Act.</i> By K. N. Bhaumik	143
<i>Supreme Court Digest of Labour Law Cases.</i> By V. B. Kher	112
<i>Three New Taxes.</i> By A. C. Sampatha Iyenger	64
<i>Trial of August Sangret.</i> By Macdonald Critchley	112
<i>Workmen's Compensation Act and other Social Insurance Legislation.</i> By Jitendra Kumar Mitra	143
<i>Yearly Digest.</i> By N. Ramaratnam	144
<i>Young Lawyer.</i> Edited By Prof. K. H. Nagrani	128

The
Bombay Law Reporter.
JOURNAL.

January 1959.

IS THE LAW OF CONTEMPT A REASONABLE RESTRICTION?

THE question may be posited whether the words "in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause" in art. 19(2) of the Constitution of India do not relate to any existing law or do not prevent the State from making any law in relation to contempt of Court? The actual wording in art. 19(2) is somewhat clumsy, and if the words "security of the State...decency or morality" are left out in the clause, then what remains relates to contempt in rather bad English.¹ One way of reading the clause is stated to be¹ that the words "in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause" do not relate to any existing law, or do not prevent the State from making any law in relation to contempt of Court, defamation or incitement to an offence. In the instant case¹ the Court said:

"...It is, however, unnecessary for the purpose of the present case to decide the point; for even assuming that the Constitution makes the existing law relating to contempt of Court, subject to reasonable restrictions on the exercise of the right of freedom of speech we are inclined to think that the whole law of contempt of Court, as it stood on the date of the coming into force of the Constitution, answers the test of reasonableness."

In *Bijoyananda v. Balakrushna*² it was clearly posited that 'the power to punish for contempt is inherent in a Court of record', and this has been recognised from the earliest times in England. The High Courts in India were created Courts of record by Letters Patents. By the Government of India Act, 1935, as well as by art. 215 of the Constitution the Supreme Court of India and the High Courts are the Courts of record and it is essential for the administration of justice and protection of individuals that the Courts should be able to punish summarily acts of contempt because in the words of Blackstone, "this power is an inseparable attendant upon every Superior Tribunal."

So art. 19(2) in no way does curtail the inherent right of the High Court to deal with contempt of Court. On the other hand, it recognises the already existing power of the High Court.³ On the question of reasonableness if we have the interest of fair administration of justice in view, such a limitation on the right of freedom of speech or freedom of press cannot but be held as reasonable.³ For instance, when police are investigating soon after an offence and before they file the charge sheet if publications are made in the press as to the truth or falsity of one version or the other, such publication is bound to react on the minds of witnesses and jurors. Such a publication with knowledge that a proceeding is imminent will have a clear and substantial tendency to interfere with the fair course of justice and as such would constitute contempt.⁴ This is a perfectly reasonable restriction placed on such irresponsible journalism. The term 'reasonable restriction' in art. 19(2) refers not merely to future laws but also in a way to the existing laws.³ Before the amendment

(1) *The State v. Editor Etc., Mathrubhumi*, [1955] A.I.R. Orissa, 38, at p. 39, following [1953] A.I.R. Orissa 249 and [1953] A.I.R. All. 342.

(2) [1953] A.I.R. Orissa 249.

(3) *Lakhan Singh v. Balbir Singh*, [1953] A.I.R. All. 342.

(4) *The State v. Editor, etc., Mathrubhumi*, [1955] A.I.R. Orissa 38.

of 1951 the entire law relating to libel, slander, defamation, contempt of Court, etc. was excluded from the operation of art. 19(1)(a). There was then no question of reasonableness of the law or future law relating to the matters outlined in sub-cl. (2). After the first Constitutional Amendment of 1951, if the existing law or future law relating to the matters mentioned in sub-cl. (2) contravenes the limits of reasonable restriction on the exercise of the right of freedom of speech such law will be void. (Vide *Lakhan Singh v. Balbir Singh*.)

Merely because 'contempt' is not defined either in the Constitution or in the Contempt of Courts Act, it cannot be termed as unreasonable. It is felt unnecessary to define the term as it carries a set meaning given to it by judicial pronouncements of both Indian and English Courts.⁵ No doubt justice is not a cloistered virtue and as Lord Atkin stated⁶ she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men. No wrong is committed by any one who criticises in good faith in private or public the public act done in the course of justice.

"...The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune." (p. 158)

Hence they cannot be immune from the operation of the law of contempt if they act to the contrary. It will, therefore, be a reasonable restriction to prevent freedom of speech descending into an offence of contempt of Court by the penal provision of the law.

The test of reasonable restrictions has to take into account the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time etc.⁷ Judged by these standards the law of contempt of Court as it exists to-day is indeed reasonable. Narasimham J. said⁸ the words 'existing law' in art. 19(2) or cl. (10) of art. 366 when it refers to the law of contempt should not only be deemed to refer to statute law but the entire case law on the subject.

The law of contempt as laid down by the British and Indian Courts has been held to impose only reasonable restrictions on the guarantee of freedom of speech.⁹ Even after the 1951 Constitutional Amendment of art. 19(2), the previous law of contempt has continued to be in force and deemed quite reasonable. The American Courts have evolved the test of clear and present danger.¹⁰ Fortunately this test is quite unnecessary in India.¹¹

In *Schenck v. United States*¹⁰ it was posited that the Court must determine whether or not the words of contempt used were of such nature as to create a clear and present danger that they will bring about substantial evils. In *Bridges v. California*¹² Black J. delivering the opinion of the Court said (p. 203):

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

But four dissenting Judges in the same case adverted to this clear and present danger test and said (p. 220):

"...The Constitution, as we have recently had occasion to remark, is not a formulary. Nor does it require displacement of an historic test (the test of reasonable tendency) by a phrase which has gained currency on March 3, 1919 (*Schenck v. United States* (1919))

(5) *Legal Remembrance v. Bibhuti Bhushan*, [1954] A.I.R. Pat. 203.

(6) *Andre Paul v. Attorney-General*, [1936] A.I.R. P.O. 141, following *Queen v. Grey*, [1900] 2 Q.B. 36.

(7) *The State of Madras v. V. G. Row*, [1952] A.I.R. S.C. 196.

(8) *State v. B.P., N.T. & P.*, [1952] A.I.R. Orissa 318.

(9) *Re v. Daily Mirror: Smith*, Ex parte, [1927] I.K.B. 845.

(10) *Schenck v. United States*, (1919) 249 U. S. 47, *Bridges v. California*, (1941) 86 Law ed. 192.

(11) [1953] A.I.R. All. 342, in citation 12 and [1955] A.I.R. Orissa 36 in citation 7.

(12) (1941) 86 Law edn. 192.

249 U.S. 47). Our duty is not ended with the recitation of phrases that are the shorthand of a complicated historic process. The phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of a tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional dimension."

• In *Craig v. Harney*¹³ it was held

"The vehemence of the language used is not alone the measure of the power to punish for contempt of Court. The fires which it kindles must constitute an imminent, not merely a likely threat to the administration of justice. The danger need not be remote or even probable; it must immediately imperil."

It will be noted that these divergent views of American Judges have in a way diluted and confused the application of the law of contempt of Court. In *Lakhan Singh v. Balbir Singh*¹⁴ these American pointers were fully canvassed and it was decided

"There was still strong difference even in America about the application of the clear and present danger test to cases of contempt. We are not bound to apply any such test. Conditions in India are different from those prevailing in America. The language of our Constitution after the amendment of Article 19 requires us to see whether the restrictions are reasonable."

The test in India is negative while the American 'clear and present danger' is a positive test.

Our negative test of 'reasonable restrictions' is more near to the American conception of 'reasonable tendency' as envisaged in the minority judgment of the American Supreme Court in *Schenck v. United States*.¹⁵ 'The clear and present danger' test has led to these results in America:—

1. Mere criticism of a Judge is not punishable however untrue¹⁶, deliberate¹⁷, unfair¹⁸ or intemperate.¹⁹ The words imputed must make out a clear and present danger to the administration of justice.

2. Even if the criticism was in respect of a pending proceeding—e.g. a labour dispute it must be shown that an unfair disposition of the pending proceeding was the immediate result.²⁰

In India what is needed as proof is the tendency to bring the administration of justice into contempt, to prejudice the fair trial of any cause which is the subject of civil or criminal proceeding, or in any way to obstruct the course and cause of justice. The obstruction may be actual or merely a definite tendency. What the general public will feel and how the administration of justice is likely to be lowered in the estimation of the public is the criterion. There is absolutely no need to apply the 'clear and present danger' test. Mere reasonable tendency or apprehension is sufficient. In America the Constitution guarantees free speech unequivocally. Liberty is subject in America to due process. In such a context, a strict standard is recognised and a clear and present danger is expected if the freedom of speech is to be curtailed. But in India the law of contempt is constitutionally subject to reasonable restrictions only and not to the clear and present danger test. Liberty of speech in India is demarcated in art. 19(1)(a) and the restriction is specified in art. 19(2). The basis of contempt in India rests yet under the English concept as disclosed by numerous judicial decisions. This 'contempt' which is not defined in the Contempt of Courts Act or in the Constitution is the creature of judicial decisions. Such judicial background cannot but make them reasonable, and *a fortiori*, the application of the clear and present danger is quite out of place in India. Existing law of contempt is recognised by the Constitution, and therefore it would appear one cannot attack the reasonableness of the existing law. But under

(13) (1947) 91 Law edn. 1548.

(14) [1953] A.I.R. All. 342, followed in *The State v. Editor etc., Mathrubhumi*, [1955] A.I.R. Orissa 38.

(15) (1919) 249 U.S. 47.

• (16) *Pennakamp v. Florida*, (1946) 328

U.S. 331.

(17) *Ibid.*

(18) *Craig v. Harney*, (1947) 333 U.S. 367.

(19) *Bridges v. California*, (1941) 314 U.S. 281.

(20) *Ibid.*

art. 19(2), when the State does create any restriction by any new statute after the Constitution came into force, the yardstick of reasonableness can be applied to the same to test its constitutional validity in a Court of law. In effect it would appear that there is no constitutional question at all pertaining to the existing law of contempt as on the date of the coming into force of the Constitution.

Of course the determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive for it is subject to the review jurisdiction of the Court.²¹ The concept of 'reasonable restriction' seeks to strike a balance between the freedom guaranteed under art. 19(1) and the social control exercised by cl. (2). In this context is not social control needed so as to prevent contempt of the Courts of justice in the land? Contempt provisions are not there to protect the person of the Judge. It is there more to protect the impersonal judgeship that adorns the seat of justice. It is wrong to suppose that the law of contempt contributes to the vanity of a Judge who is power-conscious. Contempt is no respecter of persons. It affects all alike, the Judge, the lawyer, the witness, the press and the public. We will presently analyse how the Judge also can be penalised for contempt of his own Court.

Judges of the High Court can take cognizance of contempt of themselves and also inferior tribunals subordinate to them. In the words of Justice Wilmot in *Rex v. Almon*²² which memorable unreported case is the basic foundation of the English law of contempt and which stands approved in numerous English and Indian decisions:—

"It is not their (Judges') own cause but the cause of the Public which they are vindicating at the instance of the Public...and so if the seat of Justice abuses that confidence and an impression is created in the Public mind that the Judge is excitable, indecorous and insulting to party, or counsel, then the confidence of the public is shaken, in the administration of Justice...and whenever their allegiance to the Law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice and in my opinion calls out for a more rapid and immediate redress than any obstruction whatsoever, not for the sake of the Judges as private individuals but because they are the channels by which the King's Justice is conveyed to the People."

The question is should not the divine seat of justice and the pure stream of unsullied justice emanating from it be safeguarded from any fouling or obstruction of the same by whomsoever? Is this not a reasonable restriction in the interest of the fair administration of justice? If lawyers or witnesses offend this rule they are made liable to the penalty imposed by the law of contempt. But are Judges immune from this restriction? For instance, if the Judge uses indecorous words and indulges in unseemly, indecent and even outrageous language out of all proportion to the needs of the occasion quite unbecoming of a Judge, will it not be a reasonable application to extend the law of contempt to him also, in so far as he has sullied the seat of justice which for the nonce he was occupying and has brought the seat of the administration of justice to contempt and public ridicule? To that extent has he not obstructed personally as a person the free flow of administration of justice administered by him as a Judge?

Such a situation arose in a Lahore case, *Muhammad Shafi v. Quadir Baksh*.²³ In that case of rival lessees of a cinema; arraigned in proceedings under s. 145, Criminal Procedure Code, before the First Class Magistrate, Lahore, the respondent's counsel represented to the Court that he had obtained an injunction order from the sub-judge against the petitioner from proceeding with the s. 145 proceeding. Instead of this innocuous matter being disposed of on a simple proposition that there was no injunction as against the First Class Magistrate, the Magistrate fell out on the counsel for the petitioner, called the sub-judge foolish in passing such an order and named the sub-judge as well as the lawyer who obtained the order as fools. He further got up from the chair and hurled

(21) *Chintamani Rao v. State of M. P.*, (1952) S.C.A. 759.

(22) (1785) Wilmot's Notes 243.

(23) [1949] A.I.R. Lah. 270, F.B.

out abusive epithets against the poor lawyer as having done a crime for which the lawyer should be sent behind prison bars, that he would teach him a lesson and so forth. The advocate moved the High Court which took serious notice of the two-fold contempt of abusing the sub-judge and abusing the lawyer as an Officer of Court. Their Lordships even refused to accept an apology and sentenced the First Class Magistrate to a fine of Rs. 50. We invite a full reading of the judgment which in effect makes it clear that a Judge who exceeds his limits, and intemperately scandalises a lawyer in Court, also commits contempt. We may add that the Judicial Officers Protection Act (XVIII of 1850) will not afford protection to the Judge in such cases as 'good faith' is enjoined. In s. 77, Indian Penal Code, also the immunity to Judges from criminal action is conditioned by 'good faith'.

But if, therefore, 'bad faith is clear', the immunity disappears. So the law of contempt must be deemed quiet reasonable in restricting the right of speech by the Judge if he exceeds his limits and enters the domain of 'bad faith'. So also the lawyer if he exceeds the bounds of strong advocacy and indulges in abuse vilifying the Judge or a witness in Court, his fundamental right of speech from which flows the rules of advocacy also, should be curtailed to the extent needed to keep up the prestige and dignity of the Court. This should be deemed quite a reasonable restriction.

No right should be abused. The restriction is merely to prevent the arbitrary or excessive use of the right so as not to endanger a more sacred right namely the maintenance of the dignity and prestige of Courts of justice so as to create confidence in the public in the administration of justice. The law of contempt, therefore, answers the test of reasonableness as regards

- (1) the nature of the right infringed,
- (2) the purpose of the restriction,
- (3) the extent and urgency of the evil sought to be remedied thereby.

The nexus between the restriction (Law of Contempt) and the right of free speech is too clear to be further elaborated. The nature of the right of free speech in a Court of law or in relation to it is not absolute. It is circumscribed by the rules of procedure and the right of Courts to protect its dignity from the contemptuous onslaughts on it by any one acting under the guise of the exercise of freedom of speech. The extent of the evil and the urgency to remedy the evil is also self-apparent.

We may, therefore, conclude that the Law of Contempt as it exists to-day in India by statute or by force of judicial decisions is quite reasonable. That is why the Constitution framers recognised in arts. 129 and 215 the existing powers of the Supreme Court and the High Courts in relation to contempt of Court. Article 19(2) would appear to recognise this also. The restriction referred in cl. (2) does not appear to be for the existing law of contempt but to any future law. Even if it is construed that the test of reasonableness can be applied to any phases of the existing law of contempt, we may say the above discussion points out to only one conclusion; that the law of contempt does conform to the test of reasonableness.

V. G. RAMACHANDRAN.

GLEANNINGS.

MASTER'S LIABILITY FOR SERVANT'S GOODS

THERE are plenty of decisions on a master's liability in respect of personal injury suffered by a servant but few in regard to goods of the servant lost or damaged in the course of employment. We may conveniently sub-divide the matter under headings as below.

THEFT

The general rule is that a master is not under a duty to prevent the theft of a servant's goods: an attempt to make him liable was unsuccessfully made

in *Deyong v. Shenburn*, [1946] K.B. 227, where the plaintiff was employed as an artiste to play Widow Twankey and to provide his own costume. He left the costume in the theatre after a dress rehearsal and it was apparently stolen owing to a defective lock on the dressing-room door. One wonders what value it had to the thief. The plaintiff put his claim on the basis of an "unsafe system of work," thereby inviting the Court to enlarge that concept from personal injury to property, but the Court of Appeal refused to do so. The same rule has been applied in the case of a claim against an occupier on the ground that loss of goods means that the premises are "dangerous". The Court of Appeal in *Tinsley v. Dudley*, [1951] 2 K.B. 18 (following *Ashby v. Tolhurst*, [1937] 2 K.B. 242), rejected the argument that where an invitation is extended to an invitee it extends to his goods so as to imply a duty to protect the goods against theft as well as against danger arising from the state of the premises. It is considered that the Occupiers' Liability Act, 1957, which by s. 1(3)(b) extends the common duty of care to goods, does not alter this position.

By contrast, there is a duty to take reasonable care of a lodger's goods imposed on a landlady of a boarding house, but where a servant "lives in" there is no corresponding duty on the part of the master to take the care which a boarding-house keeper would be required to take (*Edwards v. West Herts Group Hospital Management Committee*, [1957] 1 W.L.R. 415).

There is, however, one exception, and possibly two. In the case of a factory within the Factories Acts, 1937-48, it is enacted by s. 43(1) that adequate and suitable accommodation for clothing not worn during working hours must be provided. In *McCarthy v. Daily Mirror Newspapers, Ltd.*, [1949] 1 All E.R. 801, it was held that in considering whether accommodation is suitable the employer must take into account the possibility of theft. The second exception which may possibly be operative was mentioned in *Deyong v. Shenburn*, *supra*, namely, that there may be a duty on a master to take care to prevent theft of tools of a workman left on the employer's premises.

The master will, however, be indirectly liable for theft or other wrongful deprivation amounting to conversion where the act is an act by another servant committed in the course of his employment even though the act be done for the wrongdoer's personal benefit only and not for the benefit of the master (*Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716).

DAMAGE

Another passage in *Deyong v. Shenburn* propounds the view, *obiter*, that there may be a duty on a master to prevent damage to clothing as much as to the person of a servant. "If through such a breach his clothes are torn off his back and he suffers no personal injury he may be entitled to recover damages...", said du Parc, L.J.

There is an interesting passage by the learned Lord Justice on the limitations of *Donoghue v. Stevenson* (which had been cited in argument). His Lordship said: "It is not true to say that wherever a man finds himself in such a position that unless he does a certain thing another person may suffer, or that if he does something another person will suffer, then it is his duty in the one case to be careful to do the act and in the other case to be careful not to do the act. Any such proposition is much too wide. There has to be a breach of duty which the law recognises, and to ascertain what the law recognises regard must be had to the decisions of the Courts." At the same time it is submitted that the latter part of this passage is not a ground for pleading novelty as a defence.

BAILMENT

Whether a bailment arises between master and servant in regard to the servant's property brought on to the employer's premises must depend on the facts of the case, and it will often be difficult to be sure about this. A bailment requires an acceptance by the bailee, so that goods brought on to the premises without the knowledge of the master would not be within the concept of bail-

ment, but the question arises whether knowledge will sometimes be implied. Suppose a master provides a cycle rack for cycles: it may well be that there is a bailment of such cycles as are placed in the rack by anyone properly using the premises.

The duty of a bailee whether gratuitous or not is generally regarded as a duty to take such care as in the circumstances may reasonably be expected (*Newman v. Bourne & Hollingsworth*, [1915] 31 T.L.R. 209). He is not liable for accidents not caused by his negligence or the negligence of persons for whom he is responsible, but he is liable if he deviates from the terms of the bailment.

AS OCCUPIER

The duty of a master as an occupier of premises towards his servant in regard to dangers in the premises is apparently the common duty of care by virtue of the Occupiers' Liability Act, 1957, both in regard to goods and personal injury. This follows from the following considerations:

1. Section 5(1) says that where persons enter premises or bring goods to them in the exercise of a right conferred by contract, the duty owed them in respect of damage due to the state of the premises, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care. This appears applicable to servants, but it does not apply to contracts made before the commencement of the Act.

2. Section 1(3)(b) lays down that the rules enacted in relation to an occupier of premises and his visitors shall "apply...in respect of damage to property..."

This duty may be hived off on to the landlord where the master is a tenant and a danger arises by the landlord's failure to repair in accordance with a covenant to do so (s. 4).

NOTICES LIMITING OR EXCLUDING LIABILITY

It is an interesting question whether a master can limit his liability to his servant by a warning notice (whether in respect of danger to person or property). It is a fundamental rule of the law of contract that a notice may form part of a contract provided that it came to the knowledge of the other party (or ought to have come to his knowledge as a reasonable man) before the contract was concluded. But it is submitted that that rule has no application to the present problem: a warning notice for this purpose is a means of complying with the duty of care and not a term of any contract. But where there has been a breach the action could presumably be founded in tort rather than in contract and the question would then arise whether a warning notice was part of a contract to bar actions in tort.

The solution would seem to be this: that there are two kinds of notice. There is the notice which says "We will not be responsible for this, that or the other," which is meant to be a term or condition on which the premises are to be used, and the notice which says "Warning: this floor is dangerous, go the other way" which may be a sufficient compliance with the duty of care. —S.J.

A POINT ON CRUELTY

Those who are called up to advise in matters relating to divorce will wish to note the case of *Clark v. Clark*, (1958), *The Times*, June 25, where the Court of Appeal refused to grant a decree in favour of the wife on the ground of her husband's alleged cruelty, with which the decision of Mr. Commissioner McKee in *Ward v. Ward*, [1958] 1 W.L.R. 693, should be compared. In *Clark v. Clark*, *supra*, the petitioner maintained that her husband "ceased and refused to have sexual intercourse... and did so deliberately, notwithstanding her frequent protestations and requests that sexual intercourse should take

place between them, and in the knowledge that by his refusal he was causing her great distress and unhappiness," and contended that on this ground alone she was entitled to dissolution of her marriage which had previously been consummated. Counsel for the petitioner admitted that he had not been able to find a case where refusal of sexual intercourse had been the main or only issue to be considered. Hodson, L.J., accepted the medical evidence that the wife was suffering from "sex starvation" but thought that this did necessarily mean that her petition should succeed. His Lordship cited *Kaslofsky v. Kaslofsky*, [1951] P. 38, where Bucknill, L.J., had said, in a case where the wife had refused sexual intercourse, that her husband could not rely on this fact in support of his petition on the ground of cruelty unless he could show that she had refused "because she knew it would injure his health and because she wished to inflict unnecessary pain and suffering on him." Denning, L.J., endorsed this view by saying that the husband must prove that the wife's conduct was "aimed at" him in so far as her actions or words were actually or physically directed at him. In *Clark v. Clark*, *supra*, the Court upheld the decision of Judge Howard, who had refused a decree because, in his opinion, the husband might not have refused sexual intercourse with a view to being cruel to his wife; there might have been a number of other explanations. It would seem that to have held that in such circumstances the petitioner should be awarded a decree regardless of motive would have established refusal of sexual intercourse as a matrimonial offence in the legal sense.—*S.J.*

CHANGE OF CHRISTIAN NAME

As frequently happens where doctors give newly born children little chance of survival, a hospital chaplain was recently called in to christen twin girls and he chose the names Ann and Sarah. Happily the twins did not die, but the parents thought that the names which their children had been given by the chaplain were old-fashioned and sought, unsuccessfully, to have them baptised again in the names Dawn and Marlene. Perhaps the clearest statement of the law governing the alteration of Christian names may be found in *Re Parrott: Cox v. Parrott*, [1946] 1 Ch. 183, and the judgment of Vaisey, J., in that case confirms that nobody can alter or part with a Christian name by deed poll. However, a Christian name may be legally changed by Act of Parliament or by exercise of a bishop's discretionary powers on confirmation, as explained in Phillimore's *Ecclesiastical Law*, 2nd ed., vol. 1, at p. 517, and illustrated in *Coke's Institutes* 1, 3a. A third possibility is the "adding" of a name on adoption, but his Lordship regarded this method as anomalous. In the case of the twins, although the use of one of these methods was unlikely to have been a practical possibility, the law did not completely frustrate the wishes of the parents as the registrar concerned agreed to accept the names Dawn and Marlene as additional to Ann and Sarah, presumably acting under the powers vested in him by s. 13 of the Births and Deaths Registration Act, 1953. There may also be instances where a Christian name may be added, but not substituted, by use and reputation.—*S.J.*

AN EYE FOR AN EYE!

WE do not agree with Lord Goddard that the function of the criminal law is deterrence and not reform. Obviously deterrence is a factor, and a most important one, in our penal code, but in our opinion it is part of the duty of the Courts to take into account the prospects of reformation. In the narrow sense it is arguable that sentences of imprisonment protect the public in two ways; the threat deters and the imposition prevents, but the problem is deeper than this. The best protection for the public is to turn criminals into honest men—or honest enough not to fall foul of the law. The Courts would be failing in their duty if they were not to take into account the possibility or otherwise of permanently protecting the public by treating an offender in such a

way that he does not offend again. It is a question of balancing the probabilities. At one end of the scale it is usually wrong to allow liberty to a dangerous and hardened criminal merely because of the outside chance that in favourable conditions he might reform. At the other end it is usually wrong to sentence to imprisonment a first offender, even though guilty of a serious crime, merely *pour encourager les autres*. It may well be that the function of the Courts should finish with conviction or acquittal and that sentencing should be entrusted to others, but so long as the system remains as it is the Courts cannot evade their responsibilities. We can agree with Lord Goddard that the causes of crime are the same as in the days of the Old Testament. It does not follow that the remedies should be the same.—S.J.

DAMAGES

THE principle that one who proves breach of a bargain is to be placed, as far as money can do it, in as good a situation as if the contract had been performed applies just as much to cases of hiring as to cases of sale of goods: so held by the Court of Appeal (Jenkins, Parker and Pearce, L.JJ.), reversing Pilcher, J., in *Interoffice Telephones, Limited v. Robert Freeman Company, Limited*, (1957) 3 All E. R. 479). Where, therefore, the plaintiffs had contracted to supply on a twelve-year rental basis interoffice telephone equipment to the defendants and the latter, on moving to other premises already so equipped, repudiated the contract, it was wrong to take into account the profits which the plaintiffs might have made by hiring out the same equipment to others during the period. There was no lack of such equipment and a notional re-hiring would not have diminished the loss sustained by the plaintiffs, since the substituted customer would be taking on hire the equipment taken back from the defendants instead of other equipment which the plaintiffs could have supplied. In so holding the Court of Appeal applied the principle stated by Buckley, L.J., in *In re Vic Mill, Limited*, (108 L.T. Rep. 25; [1913] 1 Ch. 183; *affd.* *ibid.* 465). It was doubtful whether the learned Judge had ever been referred to this case, and he had not had the advantage of seeing the decision of the Court of Appeal in *Charter v. Sullivan*, ([1957] 1 All E.R. 809), which had been given only a day before his own judgment.

The Court of Appeal seldom interferes with the amount of damages awarded by a trial Judge and will only do so when it is of opinion that the Judge has proceeded on an entirely erroneous basis. Nevertheless, the beginning of the judicial year witnessed three decisions by the Court of Appeal in which this was done. In one of them, *Phillips v. Price*, (*The Times*, 30th October), the damages were reduced; in two of them, *Wilson v. Pilley*, ([1957] 3 All E.R. 525), and *Clarke v. E. R. Wright and Son*, ([1957] 3 All E.R. 486), they were increased. In estimating the appropriateness of the amount awarded, an important factor would seem to be the permanence or otherwise of the injury in question.—L.T.

EVIDENCE

ONE of the questions in *Corko v. Corko*, ([1958] 1 All E.R. 224)—a husband's petition and a wife's cross-petition for divorce—was whether the wife had committed adultery. Immediately after the occasion on which adultery was alleged to have taken place the wife, at the co-respondent's suggestion, telephoned her doctor asking him to examine her. The doctor refused on the ground that any evidence he could give would be valueless. Mr. Commissioner Blanco White, Q.C., was assisted in coming to the conclusion that the wife was innocent by her statements on the occasion of this request. The Court of Appeal (Hodson and Sellers, L.JJ., Morris, L.J., dissenting) held that the evidence should not have been admitted, since statements made by the wife subsequent to the alleged adultery and in the absence of her husband were of no probative value. The wife's conduct and statements revealed at most consciousness of innocence that the doctor would not find any physical proof of guilt. Morris, L.J., dissented on

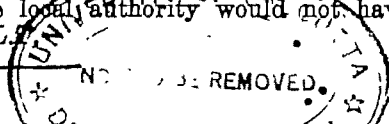
the ground that, if the wife and co-respondent genuinely believed that any immediate examination by a doctor could or might establish whether they had recently had intercourse, their willingness to submit to such examination ought not to be regarded as irrelevant. The weight of such evidence was for the trial Judge. The appeal was dismissed, the Court holding that adultery had not been proved, apart from the evidence in question.

In *Alderman v. Alderman*, ([1958] 1 All E.R. 391), Sachs, J., held that an admission of adultery made by an infant co-respondent to an inquiry agent, after having been cautioned, could be given in evidence in a husband's petition for divorce, and in granting a decree costs were awarded against the co-respondent. His Lordship observed that no authority of any sort had been quoted to him in aid of the submission that an infant's admissions made before commencement of proceedings should be excluded from evidence in matrimonial causes or that they should not be given whatever weight the Court might consider it proper to attribute to them; nor could his Lordship find any reason on general principle why there should be a rule of that nature.—*L.T.*

HIGHWAY

In *Baxter v. Stockton-on-Tees Corporation*, ([1958] 2 All E.R. 675), the Court of Appeal (Jenkins, Parker and Pearce, L.JJ.), reversing Barry, J., held that a widow was not entitled to damages in respect of the death of her husband from injuries sustained by him when riding a motor bicycle as a result of coming into collision at mid-night with the kerb of an approach island in the roadway. The road had been constructed by a county council and taken over under s. 82 of the Local Government Act, 1929, by the defendant corporation. The former was not entitled to relief in respect of non-feasance, since an authority which constructed a roadway under statutory powers was not in relation to this immunity in the same position as an owner dedicating his land to the public as a highway. There was no dedication here: the way was public from first to last. Such a public authority was under a positive duty to take reasonable care to construct the road properly. But an authority which took over the road, as had the corporation in this case, was only liable for non-feasance and the action should have been held to fail in limine on that footing. The theory that the corporation inherited from the council the duty to light or provide some other form of warning was untenable having regard to *Nash v. Rochford Rural Council*, (116 L.T. Rep. 129; [1917] 1 K.B. 384). Works of this kind could not be classed as maintenance; and, if they could, the doctrine of immunity for non-feasance would prevail.

Section 35(1) of the Public Health Acts Amendment Act, 1890, provides: "All vaults, arches, and cellars under any street, and all openings into such vaults, arches, or cellars in the surface of any street, and all cellar-heads, gratings, lights, and coal holes in the surface of any street, and all landings, flags, or stones of the path or street supporting the same respectively, shall be kept in good condition and repair by the owners or occupiers of the same, or of the houses or buildings to which the same respectively belong." In *MacFarlane v. Gwialter*, ([1958] 1 All E.R. 181), the Court of Appeal (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), reversing Judge Glazebrook, held that one who was injured as the result of the dangerous condition of a grating which had formed part of the highway at the time of dedication was entitled to damages at the hands of the occupier of the property to the cellar window of which it admitted light. The grating was to the knowledge of the occupier in bad condition and it constituted a dangerous trap. The Court rejected the arguments (1) that the above quoted sub-section applied only to structures which had not been the subject of dedication; (2) that, if the grating had been the subject of dedication, it was wrong to introduce a "middle term" rendering the occupier liable since the local authority would not have been liable in the absence of misfeasance.—*L.T.*



MASTER'S DUTY TO SERVANT INJURED BY DEFECTIVE PREMISES OF A THIRD PARTY

THE extent of a master's duty towards his servant and what will suffice to discharge that duty has recently been much litigated. The purpose of this article is to examine the position when the master directs the servant to carry out work on premises occupied by a third party.

Three decisions by Courts of first instance first require consideration. In *Taylor v. Sims and Sims*, (167 L.T. Rep. 414; [1942] 2 All E.R. 375), an employee of a firm of contractors was under orders to repair the roof of a bomb-damaged house. He was seriously injured owing to the collapse of the floor, which had been tested almost immediately after the explosion and was then thought to be safe. Lewis, J., experienced very great difficulty in imposing a duty on the master to see that premises over which he has no control whatever are reasonably safe for the servant whom he orders to work there. He thought it "a very curious proposition that, when a householder asks a contractor to come in and paint his house, unless the contractor goes over the whole house to see that every floor is safe or takes reasonable steps to see that the house is safe, he, the contractor, is liable if the floor collapses and one of his workmen is injured." But, if the master was under any duty, it had in any event been discharged.

It will be seen that three issues are involved:—

- (1) Whether the master owes any duty at all in such circumstances.
- (2) Whether the duty, if he has one, is to see that the premises are reasonably safe.

(3) Whether, although some duty is owed, it is less stringent than this, and what standard of care will be required to avoid a breach of the duty.

The matter was again considered in *Cilia v. H. M. James and Sons*, ([1954] 2 All E.R. 9). A plumber's mate was employed by the defendants to carry out installation work on the ground floor of an unoccupied house. During the operation the storage tank in the loft above began to overflow, and when the mate went up to remedy this he was electrocuted owing to a defective electric conduit covered by steel plates. An action was brought against the master to recover damages on behalf of the estate and under the Fatal Accidents Acts, and it was alleged that the master had been negligent in failing to inspect the loft.

Byrne, J., expressed his entire agreement with the view that "the employer was under no duty, having regard to the fact that his workman was not to work on the employer's premises... to take all reasonable steps to see that the premises were reasonably safe." As he robustly observed: "I cannot imagine that we have yet reached the stage, if a householder finds that his storage tank in the loft is overflowing and there is obviously something wrong with the ball-cock or the valve, and he, therefore, sends for his builder and tells him that he wants a plumber to attend to this, that the builder would then have to go into the house and test every electric point and, perhaps, see whether the roof of the loft was quite safe or whether it was likely to fall in when the plumber went up to attend to the tank. Among other things it would, I should have thought, make attention to a ball-cock a prohibitive item for any householder." It would, of course, be otherwise if the builder was aware of the danger.

In *Hodgson v. British Arc Welding Company, Limited*, (174 L. T. Rep. 379; [1946] 1 All E. R. 95), on the other hand, Hilbery, J., assumed that the master did owe a duty as regards the safety of the premises, although on the facts of the case it had been discharged. There a welder employed by sub-contractors was injured by falling from a defective plank, which formed part of scaffolding erected inside a ship by experienced shipwrights who were the head contractors for the repair of the ship. The contention that the sub-contractors ought to have inspected each separate piece of scaffolding was not accepted. The master could not be blamed for neglecting to "inspect with the eye of an ignorant person the work which was being done with the eye of knowledge and skill."

Law Lib.
Acc. No. 7246

The master's liability has now been reviewed by the Court of Appeal in *Wilson v. Tyneside Window Cleaning Company*, ([1958] 2 All E.R. 265), in which a window cleaner of great experience unsuccessfully sued his master in respect of injuries received when the handle of a window by which he was supporting himself while cleaning came away. The injured man had often cleaned this window before; he knew the woodwork was unsound and that it was unsafe to trust to handles, but he had not been specifically instructed about the danger of using handles, nor given general safety instructions except that if a window presented unusual difficulty he was to obtain further orders before proceeding. The Court of Appeal held that in all circumstances the master owes a duty to take reasonable care for the safety of his men, but the performance of the duty must vary with the facts of the case. In support of the duty the Court placed reliance on its own previous decision in *Biddle v. Hart*, (97 L. T. Rep. 66; [1907] 1 K. B. 649), where a stevedores' workman unloading a ship was injured because the tackle used for the purpose, which had been supplied by a third party, was defective. It was held that the master owed a duty in respect of the tackle.

With respect, it may be pointed out that the decision related to the plant which was actually being used in the work done, and not to premises which were incidental to the work done. This distinction would appear to be recognised by Buckley, L.J., who says of one of the judgments in the Court below: "This sentence implies that in this case there is found plant which is outside the region for which the employer would be responsible. I agree that this is so if the plant was not connected with or used in the business of the employer." And Farwell, L.J., thought that the master could not succeed in *Biddle v. Hart* "unless he can induce us to affirm the proposition that anyone who uses tackle ... which is gratuitously lent to him is not bound to take reasonable care to see that that tackle is in proper condition." This seems a long way from the situation in *Wilson v. Tyneside Window Cleaning Company*.

While the extension of the master's duty does give rise to a more flexible test, it may not be improper to hope that the standard of care required will not be unduly rigorous, and that practical considerations of feasibility and relative expense will be given full weight. It seems clear that the duty does not extend, as had been argued, to ensuring that the premises of the third party are as safe as reasonable skill and care can make them. Nor will a detailed preliminary inspection by the master always be necessary, as, for instance, when a plumber sends his servant to mend a leak in a private house (per Pearce, L.J., in *Wilson v. Tyneside Window Cleaning Company*). "A window cleaning employer cannot, for example, be expected to lay out the job window by window," as Parker, L.J., pointed out in *Drummond v. British Building Cleaners, Limited*, ([1954] 3 All E.R. 507). Other relevant points are that the master must take additional care as regards his system of working when the men are ordered to work on premises which he does not occupy, and he must in general accept the risk if he instructs them to work in damaged or dilapidated buildings which cannot be made safe. It is not, however, necessary that he should give repeated and frequent warnings of a danger which is obvious to the men, although it is otherwise if the danger is insidious and concealed.—*L.T.*

OUT OF COURT

THE Society's Distinguished Speaker this year was Lord Monckton, who took as his subject "The Lawyer out of Court," and was largely concerned with the strength and weaknesses which are apt to characterise members of the profession in the political field. A lawyer who went into politics, he indicated, reaped the advantage of one who had subjected himself to the discipline necessitated by the obligation to present his case before a tribunal at a stated time on a named day. A lawyer must have had to work and think. Lord Monckton expressed himself as driven to the conclusion that many who had escaped the

discipline of the law or some similar educative discipline were deficient in those things. It was good not to be at liberty to express views loosely or at large. Moreover, the lawyer became "an expert in finding the common ground, at locating the fruitful basis for co-operation." In those words Mr. John J. McCloy, the distinguished American lawyer, statesman and business man, had rightly fastened on the lawyer's role in effecting compromise.

On the other hand, the lawyer in the political field appeared, superficially at least, to be at a disadvantage because he saw more clearly than some others both sides of the question, and that might make him hesitant and undecisive. He must also overcome the handicap of being regarded as legalistic, even pettifogging, in his approach and of being too fluent to carry the conviction of sincerity. He must overcome too the disadvantage of having been confined by the dictates of his brief, which were not conducive to creative, comprehensive thought and action. Lord Monckton described the 19th century as a thin period for the lawyer statesman, but recalled that the present century has seen greatness come to many lawyers. Nevertheless, it seemed that lawyers were still unpopular in the House of Commons, at least compared with America, where in the 85th Congress lawyers had a representation of 61 per cent. in the House of Representatives and 59 per cent. in the Senate. After the last general election 19 per cent. of the members of the House of Commons were lawyers. Lord Monckton's theme is capable of almost indefinite expansion. Many lawyers are conscious of the ills to which he referred and to which they are exposed by the daily pursuit of an exacting profession. With them, as with those immersed in other professional activities, technical competence is apt to breed a myopic outlook. But qualities of vision and character, and the sense of proportion they engender, will find recognition in all fields and are of no less value within the legal profession than beyond it. These are the hallmarks of the distinguished practitioner of law no less than of the lawyer who makes his mark in the political arena.—L.T.

THE HOUSE OF LORDS AND PRECEDENT

THE position occupied by the House of Lords in the judicial hierarchy invests it with a notional inerrancy, which involves as a logical consequence the principle that the House is bound by its own decisions. It is hardly surprising that the strict application of precedent occasionally gives rise to difficulty. It involved, for example, in *Nash (Inspector of Taxes) v. Topham and Sons Brewery (Brighton), Limited*, [(1951) 2 All E.R. 869], a consideration of the *ratio decidendi* in *Usher's Wiltshire Brewery, Limited v. Bruce*, [(1915) A.C. 433], a fact which drew from Lord Reid the observations that it was "very unsatisfactory to have to grope for a decision in this way" but that the need to do so arose from the fact that the House of Lords had debarred itself from ever reconsidering any of its own decisions. It mattered not how difficult it was to find the *ratio decidendi* of a previous case, that ratio must be found. It mattered not how difficult it was to reconcile that ratio when found with statutory provisions or general principles, that ratio must be applied to any later case which was not reasonably distinguishable.

Recently, in *London Transport Executive v. Betts* (*The Times*, June 26) the House of Lords regarded itself as bound by its decision in *Potteries Electric Traction Company, Limited v. Bailey*, [(1931) A.C. 151], to conclude that an omnibus depot was not an "industrial hereditament" qualifying for relief from rates under s. 3(1) of the Rating and Valuation (Apportionment) Act, 1928. The basis of the argument against this conclusion was that maintenance did not include repairs but only included such minor operations as oiling, greasing, inflating tyres and perhaps making adjustments and cleaning. The structure and wording of s. 3, Lord Reid observed, were such that at first sight this argument was attractive. He could not, however, accept it because it was not consistent with the decision of the House in the *Potteries* case. It had long been established practice, he said, that any decision of the House in a previous

case on a question of law, such as the interpretation of a statute, should be regarded as binding, and should be followed, whether or not the question was adequately argued or considered, and however much their Lordships might disagree with the decision. He would not himself be against a modification of this strict practice, but so long as it existed, he did not think he was entitled to depart from it.—*L.T.*

PRIVILEGED DOCUMENTS: LITIGATION

THE subject of the recent decision of Havers J., in *Seabrook v. British Transport Commission* (*The Times*, July 9, 1958) was a series of documents consisting of accident reports and returns made by the defendants' officers and servants and correspondence passing between them relating to an accident in which the plaintiff's husband was killed. The dead man's widow, his administratrix, sued the defendants for negligence and breach of statutory duty as her husband's employers. The question arose on discovery. The defendants objected to producing the documents, which included a statement by a fellow worker of the deceased, on the grounds that they were made by their officers or servants after litigation was in contemplation and in view of any such litigation wholly or mainly for the purpose of obtaining and furnishing to the defendants' solicitor evidence and information to enable him to conduct the defence of any action that might result.

The plaintiff submitted that the documents came into existence as a result of a well established system of inquiries, which were made irrespective of contemplated litigation, and that although they might have had a subsidiary purpose that, if a claim were threatened, they should be submitted to the defendants' solicitor, that was not their main or dominant purpose. To be privileged, it was argued, the substantial purpose of the documents must be their submission to the defendants' solicitor. This view did not commend itself to the learned Judge, who stated that even if the documents were made for purposes other than submission to a solicitor, and even if the latter purpose was not the primary one for the documents' existence, the documents in this case were privileged. His Lordship observed that in these days whenever a fatal accident occurred it was probable that a claim would ensue. In the result his Lordship upheld Master Clayton, who held the document to be privileged, but gave leave to appeal.—*L.T.*

VIOLENCE PROVOKED BY NAGGING

IN *King v. King*, [(1952) 2 All E.R. 584], Lord Normand said: "The general rule in all questions of cruelty is that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. Wilful accusations may be made which are not true and for which there are no probable grounds and yet they may not amount to cruelty. To take an obvious example, they may have been provoked by the cruel conduct of the other spouse." This passage dealt with the converse of the position considered by a Divisional Court of the Probate, Divorce and Admiralty Division (Lord Merriman, P., and Collingwood, J.) in *Douglas v. Douglas* (*The Times*, November 20), where the Court rejected the argument that nagging and words could never justify any form of violence. The wife appealed against the dismissal by magistrates of a summons against her husband in which she had alleged persistent cruelty, and the Court held that nagging could be made the basis of a plea of provocation for violence.

Another argument advanced on behalf of the wife which the Court rejected was that, because persistent cruelty was, in a magistrate's Court, a subject of complaint by a wife and was not yet a subject of complaint by a husband, the Court ought not to take into account such matters as nagging by the wife or anything which might be a matter of complaint by a husband in the Divorce Court, in considering the question of provocation to any form of physical vio-

lence. Lord Merriman, P., stated that this argument overlooked the fundamental point that cruelty, save for the element of persistence, which was necessary in magistrates' Courts, was, in every other respect, subject to precisely the same test, whether the matter was dealt with in the High Court or a magistrate's Court. A third argument was that even in the Divorce Court nagging could be made a matter of substantive complaint in an answer or cross-petition but could not be made the basis of a plea of provocation in connection with an allegation of violence. The answer to that was that nothing less than all the circumstances, on both sides, had to be considered before the issue of cruelty could be answered.—*L.T.*

ADVICE TO STUDENTS

Not only those about to go to university but also graduates whose examination days are far behind them may have been surprised to read Professor H. L. Elvin's advice to a group of young people about to enter a university for the first time. He is reported to have told them to "cut as many lectures as possible" in view of the "terrible danger that you will go to as many as possible and believe that you've been working." He freely admitted that lectures are advantageous if matter not found in text-books is passed on to students and the lecturer is able to bring the subject to life in a quite unusual way, but if the lecturer gives only what may be found in the books which the student should read for himself, in the opinion of Professor Elvin, who is the director designate of the Institution of Education in the University of London, those lectures should be avoided. He believes that too many students go to lectures for the purpose of evading "hard personal reading." Many students may also have been pleasantly surprised by Professor Elvin's contention that if they work for ten hours a day they will probably get a third, if they work for six hours, a second, but if they work for four hours they stand a good chance of getting a first. In making this suggestion he is in good company. Many years ago John Locke formed a similar view and said that "the great art of learning is to undertake but little at a time." However, whatever form "work" may take and for whatever time it may last, we doubt whether the majority of students in the faculty of laws will act upon Professor Elvin's advice and rely on their own reading of text-books and law reports for the purpose of passing their examinations. The wisdom of his advice cannot be questioned, but we wonder how many law students will be wise enough to arrange and conduct their studies in accordance with it.—*S.J.*

NEGLIGENCE: INJURY FROM GOLF BALL

We are indebted to an American reader for a brief note on a decision given by the Michigan Supreme Court at Lansing in a case in which a small boy, aged seven, while playing about on a municipal golf course was struck by a golf ball and so injured that he lost his right eye. His parents sued the municipality concerned, but lost the action on the ground that the boy had been warned against playing on the course and thus stood in the role of a trespasser. On appeal the High Court gave judgment for the plaintiffs holding that the warning to the child was not sufficient, and one of the Judges of the Court expressed the view that a child was far too valuable to society to hold that trespass cancelled any legal duty otherwise owed to him by a landowner who knew of the danger in which the child was placed. Whether that decision will be followed by other Courts in the United States remains to be seen. As far as this country is concerned, the legal position of a child who is trespassing is so unsatisfactory and the authorities are so tangled and complex (see the article at [1954] 104 L.J. 675) that it would be difficult to predict how a case of this kind would be decided here; an unsuccessful attempt to deal with this problem by statute was made when the Bill leading to the Occupiers' Liability Act, 1957, was

before the House of Lords. It is, perhaps, also remarkable that there are very few reported cases dealing with injuries on golf courses. In *Castle v. St. Augustine's Links*, ([1922] 38 T.L.R. 615), judgment was given for the plaintiff, a taxicab driver, who was injured by a golf ball struck from the course on to the adjoining public highway, but the case's main claim to fame rests securely on the fact that it provides judicial authority for the proposition that "everybody who plays golf slices at times". In *Cleghorn v. Oldham*, ([1927] 43 T.L.R. 465), the plaintiff was injured when the defendant struck her with her club while demonstrating a correct swing. Swift, J., gave judgment for the plaintiff. A more recent decision is *Potter v. Carlisle and Cliftonville Golf Club, Ltd.*, ([1939] N.I. 114), where the plaintiff, whilst putting on a green was struck by a ball driven by another player from an adjoining tee and lost the sight of an eye. The action against the club failed on the ground, *inter alia*, that the injury which the plaintiff received was due to a risk of the game, yet in *Batcliffe v. Whitehead*, ([1933] 3 W.W.R. 447), a Canadian decision on almost identical facts, the defendant was found guilty of negligence and thus could not escape liability on the ground that the plaintiff had accepted the risks incidental to the game.—*L.J.*

REVIEWS.

Company Law. By F. R. GINWALLA, B.A., LL.B. BOMBAY: N. M. Tripathi Private Ltd., Princess Street. Demi 8vo. Pages LVI+211. Price Rs. 10.

THIS is a very instructive and interesting monograph on the Indian Companies Act. Part I explains the economic aspect of the Act, Part II analyses the report of the Companies Act Amendment Committee. The sections are adjusted in accordance with changes proposed in the report. The case law which is restricted to the Companies Act of 1956 is fully dealt with in Appendix 3, and is arranged in the order of sections of the Act. Precision and lucidity have been the chief characteristics of the annotations. The anomalies and infirmities in the Act have been clearly pointed out. There are two Appendices dealing with technical details. The learned author has discussed the various aspects of the Company Law with great clarity and sound judgment. The book is bound to be very helpful to legislators when the new Company Bill comes on the legislative anvil.

The Special Marriage Act, 1954. By D. H. CHAUDHARI, B.Sc., LL.B., Pleader. CALCUTTA. Eastern Law House (Private) Ltd., 54, Ganesh Chunder Avenue. 1958. Second Edition. Size: Demi 8vo. Pages vii+340. Price Rs. 8.

IN preparing this edition the learned author has incorporated at appropriate places cases decided after the publication of the first edition and has also added fresh matter in some of the notes. Rules framed by some High Courts and State Governments have been given in the Appendices. The book has undergone a thorough and careful revision.

A Bibliography of Indian Law. Edited by CHARLES HENRY ALEXANDROWIEZ. LONDON. Oxford University Press. Amen House. 1958. Size: Demi 8vo. Pages ix+69. Price Rs. 4.50.

THIS is a first systematic bibliography of Indian law comprising treatises and text books published in the course of the last twenty-five years. It is arranged according to different topics of law in order to facilitate easy reference. The book will serve as a useful guide to legal practitioners and law students.

The
Bombay Law Reporter
JOURNAL.

February 1959.



THE DEFINITION OF RELIGION IN INDIAN LAW.

An example of the as yet uneasy blending of Indian and foreign legal ideas is the problem of the Court's jurisdiction to define 'religion' and to determine the content of a particular religion. This is a fit subject to be written upon by a Christian, since Christians in Europe and Commonwealth countries generally are heirs to acute and at times highly embarrassing controversies on the nature of law and religion and the relationship between them. Christians can easily detect the penetration into Indian legal history, and into the customary attitudes amongst lawyers, of certain compromises which were worked out in Europe—compromises which were beneficial to countries torn by civil strife, but not necessarily relevant to modern India. A Christian may safely write on the legal aspects of non-Christian faiths, without fear of being suspected of hidden motives, or of trespassing upon topics where specialised, and in particular traditional, learning would be appropriate.

There seems to be a distressing conflict of decisions, or, to be more accurate, of the *rationes* underlying the decisions, on this subject. Problems have arisen in the fields of constitutional law, in the law of charities (both from the fiscal and the testamentary standpoints), and in the law relating to State supervision of trusts. It is not inconceivable that similar difficulties may arise in other contexts, particularly where privileges are awarded to persons possessing, or to persons other than those possessing, religious qualifications.¹ In the Hindu law we have latent difficulties where rights are lost by reason of conversion, or of ceasing to be a Hindu by religion.² The whole problem is complicated by the fact that whereas deep religious feelings are daily drawing together thinking people of all sects and religions, the mass of the public (as is always the case) is gradually discarding its superstitions, and with them its only genuine contact with religion. Each succeeding generation is less superstitious, less concerned with irrational ceremonies and taboos, and at the same time more materialistic and impatient of any restraints which religious teaching would impose on its freedom. In India the ancient plasticity of dogma, the tendencies towards sectarianism and at the same time syncretism, are in danger of giving way to the current tendencies which not only deny authority to the Vedas and the *sutras*, but also (unlike the Buddhists of old) are utterly indifferent to the old inducements, namely the avoidance of sin and rebirth, and the attainments of supersensory merit.

Constitutionally India attempts to be a secular State: in fact she is a multi-religious State tending towards a secular State. The intention of the founders of the Constitution was that no State advancement should be given to any religion, that no one should be penalised for his religion, that religion should not be the criterion in the selection of candidates for State employment, and that—to put it in homely language—religion should be a matter for the individual conscience, a question between Man and his Maker, and not a potential source of conflict between the citizen and the State. No one who has read the Indian

* 1. See *Narayan Waktu v. Punjabrao*, (1958) 60 Bom. L. R. 776.

2. There are, to the common lawyer's eye, far too many discriminations against persons leaving Hinduism in the Acts forming the Hindu Code. That in the Hindu Succession

Act, 1956, against the descendants of a convert seem inappropriate in a secular State, particularly in view of the fact that a Christian may be succeeded on intestacy by relations who are Hindus: *Benoy Kumar v. Panolamba*, [1958] A.I.R. Cal. 177.

Law Reports for the past dozen years can feel that this intention has been happily carried through, either by Legislatures inspired by pious fervour, or by Courts who have had the very painful and delicate duty of accommodating religious sentiments with the letter of the law and the plain intention of the founding fathers of the Constitution. It is easy to find fault with decisions, but in this paper an attempt will be made to suggest a constructive doctrine and this is put forward in the confidence that the Constitution gives us a sure, as well as practical, guide.

First, what does the Constitution say about religion? We must cite once again the principal provisions.

"Art. 25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. . .

Art. 28. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law."

Supreme Court decisions make it clear that here we have a scheme which takes advantage of the judicial experience gained in the United States, Australia and elsewhere, with the fortunate result that it is seldom necessary to go outside the words of the Articles for a definition of 'freedom of religion' as known in India.³ There is, however, an obvious loop-hole. It was found, though not much adverted to, in the very important case of *M. H. Quareshi v. State of Bihar*.⁴ Public order, morality, health, fundamental rights, and legislation concerning secular and political activities, etc., as well as reform of a social nature, such as the abolition of untouchability, etc., list finally the grounds and the means according to which freedom of religious profession and practice may be curtailed. This list is obviously taken from experience *outside* India, coupled with the experience gained by India during earlier days of British (and other European) rule. It must be remembered that 'religion' to Europeans, in so far as it applies to *conduct*, is concerned mostly with *prohibitions*. One must not eat this or that, one must not take certain oaths, one must not participate in certain ceremonies or secular activities.⁵ When Christians of particular sects began to claim that their

3. *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamikal of Sri Shirur Math*, [1954] S.C.R. 1005, 1028. The point adverted to in this paper is not observed in Durga Das Basu's excellent *Commentary on the Constitution of India*.

4. [1958] A.I.R. S.C. 731. It is to be observed that the composition of the Court, which consisted of four Judges besides the Chief Justice of India, did not include a Muslim.

5. Latham C.J.'s extremely able judgment in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth*, (1943) 67 C.L.R. 116 at 123 and following—repeatedly approved in India—lays stress upon the fact that religion for many, and particular primitive and also non-western communities (at p. 125), implies positive conduct of a kind which may

attract disapproval in modern societies. It is important to note that Art. 25 deliberately avoids the negative attitude towards the active content of religion revealed by s. 116 of the Australian Constitution Act, as understood by Latham C.J.: 'religion should, for political purposes, be regarded as irrelevant'. Whether or not religious activity is directed to 'anti-social' ends it is protected in India, unless the exceptions apply: in Australia the good citizen is presumed unlikely to indulge in anti-social acts sanctioned by religion; in India there is no comprehensive presumption regarding the acts sanctioned by religion, and the very concept of society's requirements may be open to debate. Consequently, the loop-hole is very important. A highly unpopular religious practice may be protected under art. 25, and cow-slaughter by Muslims for religious purposes is a splendid example.

religion required them to *do* rather than *abstain from doing*, it was inevitable that where they were a small minority their claims should be held invalid if they conflicted with State policy. The techniques adopted to achieve this solution differed in the United States, where a short way with religious pretensions is traditional (for the original colonists were intent not upon toleration so much as upon their various 'conscientious vagaries' being respected to this extent, that, subject to the law of the land, they should not suffer for their consciences), and in Australia, where the wording of the Constitution Act suggested a more liberal protection. But the outcome was the same. In India in the period 1772-1871 it was axiomatic amongst the European residents that Indians favoured in the name of religion practices which were obnoxious to Christians and in many cases possibly or certainly harmful to individuals and to the community in general. No one doubted that it was the duty of the government to suppress them. But action to prevent human sacrifices, religious suicides, offensive displays such as hook-swinging in the name of religion, *sati*, and other aberrations intended to awaken awe or religious zeal, was delayed because it was believed that Indian consciences might be hurt, and that civil unrest would result. In an age when the Europeans had little doubts of their own rectitude the claim that religion implied *activity*, doing as well as abstaining, was met by the proposition that the State could properly curtail freedom of activity, since the individual's conscience could hardly be hurt if his failures in the field of religious obligation were the result not of his own neglect, but of the State's inhibition. This attitude has been retained to some extent in modern times. Reformers have prohibited the dedication of *devadasis* (no doubt rightly) without anxiety as to the trespass upon religious doctrines; they have prohibited other activities such as child marriages, sometimes with the sanction of reformed religious beliefs. The reform of the Hindu law, and the (much qualified) abolition of untouchability, both affront religion as understood in India but the old European approach is maintained, on the ground that the majority can decide, and freedom of *conscience* is not affected. For example, the soulless man's freedom to believe that he ought to marry a second wife in the lifetime of the first is not affected by the State's rule that if he does so he will go to goal! So, illogical as it all is, it is settled that the State may interfere with religious practice for the reasons listed in arts. 25 and 26. But what of other interference with religious practice? Surely that is prohibited by the Constitution? It would seem from the Supreme Court case cited above that it is. And we have ample authority from other cases. The religious requirements that the inner sanctum of a temple should not be entered at certain times or at any time by unqualified persons, and also that certain properties should be dealt with in a particular way or that no property belonging to an endowment should be used for purposes other than those of the endowment itself, have been accepted as inviolable, notwithstanding well-meaning statutes. It was the intention of the promoters of anti-untouchability legislation that all temples should be open to all Hindus, and political movements from the pre-Independence days have sought to equate Hindus, Jains, Sikhs etc., as the wording of the second explanation to art. 25 (not cited above) indicates fairly clearly. Yet it has been held that Jain temples are not open to Harijans other than Jain Harijans (if any there be).⁶ There are, therefore, religious practices which cannot be interfered with by a Legislature, for they are not economic, financial, political or secular, nor have they come within the scope of legislation for social welfare, reform, or temple-entry. How, then, can one justify the Madras Animals and Birds Sacrifices Prohibition Act, 1950, an Act which aims to prevent Hindus from practising their religion by sacrificing animals or birds? Such sacrifices are unquestionably religious practices, although they are not approved by more 'respectable' sects of Hinduism. The sacrifice of a buffalo may not be regarded everywhere as a meritorious act, but can the Legislature inhibit such an act, seeing that it is

6. *State v. Purokhand*, [1958] A. I. R. M. P. 243 (Indore).

not economic, financial, political, etc.⁷ The fundamental right to freedom of religion, it must be remembered, is intended for the protection of minorities and in particular unpopular minorities.⁷ The Madras Act has not been challenged because no prosecution has been brought against an offender sufficiently powerful to pursue the point. But the Acts passed to prohibit the slaughter of cattle impinged (as they were expected to impinge) upon a widespread, numerous, and respectable body of people, namely the Muslim butchers, who bought cows and buffaloes from Hindu dairymen, and the Muslim hide-and-gut-dealers who lived upon the proceeds of such slaughter. In the *Animal-slaughter* case it was decided that the prohibition of the slaughter of all cows was valid. This was notwithstanding the case for the butchers that art. 25 was infringed by the Acts in question.

The Supreme Court was very candid. That freedom of religion meant freedom to practise religion and to do acts extending far beyond mere expressions of belief was already established in unambiguous terms in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swaminar of Sri Shirur Mutt*,⁸ and in *Ratilal Panachand Gandhi v. The State of Bombay*.⁹ The American concept of religion as a mere question of belief was unhesitatingly rejected, and the sapient dicta of Latham C.J. in the High Court of Australia were approved.¹⁰ It is quite clear that in India the right to do what the religion commands is protected by the Constitution, unless contrary legislation is saved by one of the listed exceptions. It was perfectly clear that the sacrifice of a cow by a Muslim on Bakr-Id was a religious obligation. The obligation is expressed in some such form as this: for each person a sheep, or a cow or a camel for seven persons, or *failing these animals* or the means to acquire them, a gift in charity. Plainly where a cow was available the Muslim family had not merely a religious duty but a perfect right to have a cow slaughtered for them. If Muslim rulers at times, out of respect for Hindu sentiment, prohibited animal-slaughter, as Hindu rulers themselves did at times (but usually for stated periods only—soldiers and manual labourers at all times ate meat when they could get it), there is no proof that slaughter for bona fide religious purposes was forbidden—indeed the presumption is all the other way. Thus the Supreme Court were faced with a dilemma: either the religious duty was protected, in which case the Acts were invalid even in respect of cows; or, if the Acts were to be upheld on other grounds, the alleged right under art. 25 was no right at all, because it was defective in some way. Unfortunately (and this is written with great respect for the learned Judges, for a majority of whom the writer has a warm personal regard as well as professional admiration) the Supreme Court came to the conclusion that the alleged right was no right at all, on the ground that because there was an option to slaughter a sheep or a cow—an option which, with the candour characteristic of this remarkable decision, they agreed might well be illusory in particular cases—the deprivation of one arm of the option would not be an interference with religious freedom, since there was in their own words

“...no material on the record before us which will enable us to say, in the face of the foregoing facts, [i.e. the option, and the instances of prohibition of slaughter by Muslim emperors] that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea.”¹¹

We know that the Supreme Court is not bound by its own decisions—a facility of which, outside Constitutional questions, it cannot be expected to take frequent advantage—but one day it will want to distinguish this case. Knowing this the learned Judges have very carefully emphasised that the Islamic religious position was not argued before them with any vigour and that no doctor of Islamic law appeared to depose as to the theological or customary position.

7. Per Latham C.J. in the *Adelaide Com-*
pany case at p. 124.

8. *Off. sup.*, at p. 1025.

9. [1954] S.C.R. 1055, 1065, s.c., 56 Bom.

L.R. 1184, 1190.

10. See n. 5 above; [1954] S.C.R. 1055, 1065.

11. [1958] A.L.R. S.O. 731, 740.

Thus in any similar matter a better-prepared case might well be successful: but before we can hope for that the underlying principle must be established, firstly that religious practices are not to be curtailed unless they come clearly within the exceptions, and secondly that the Court has no jurisdiction to decide argumentatively and of its own judicial knowledge what is the content of a particular religion. Both propositions are more than hinted at in this very case, but the second requires further exploration since it is already in danger of being controverted.

• It is all very well for a Legislature to say, "The Vedas do not require such-and-such an act; there is no sanction in the *sastras* for your usage; what you are up to is no better than *sati* and hook-swinging, and just as the British prohibited those so we shall prohibit your activities". This may well be unconstitutional, or it may come, as in the case of the *devadasis* and the Hindu Code, within the exceptions. But it is quite another thing for the Court to say, "What you claim to be your religion is nothing of the sort. You say you are a Hindu, but Hinduism does not know any such usage as this. You say you are a Muslim, but there is nothing about this in the Quoran." In the *Animal-slaughter* case the Supreme Court were very cautious, and covered themselves carefully with ample description of the type of information before them. But they imported into their decision judicial reasoning of a type which an Islamic theologian cannot accept, and to decide questions of Islam with the aid of non-Islamic precepts (such as that the presence of an option destroys the obligatory character of each item in the command which is expressed alternatively) is a very questionable proceeding.¹² This is not the first time the Supreme Court has undertaken such responsibility. The case of *Saraswathi Ammal v. Rajagopal Ammal*¹³ has not attracted much notice, but it is a most important instance of the Court's deciding that a particular belief, unquestionably of a religious character, was not consistent with Hinduism, and was not on that account a basis for such secular recognition as an established Hindu belief could claim.¹⁴ The decision gives ground for anxiety, particularly when everyone knows that Hinduism has no creed or hierarchy, and at a time when even backward and criminal tribes are becoming 'Hinduised' and are being claimed as members of the 'Hindu' fold. The authorities upon which the Supreme Court relied in that case are not without their weaknesses. In *Kunhamutty v. Ahmad Musaliar*¹⁵ the Madras High Court held that to create a valid trust for religious purposes there must be a charitable object, and a dedication for the purpose of reciting the Quran over a private person's tomb did not create a valid wakf. The indignation which has been aroused by the Privy Council decision as to what was not a valid wakf should serve as a warning that the English law of charities is a poor guide to determining what is in India a valid dedication or bequest for religious purposes. What is senseless and superstitious to one may be valid for another, and the sanctity of tombs in popular Islam is notorious. Upon this weak foundation was built one of the *rationes* in *Draviasundaram v. Subramania*,¹⁶ that the direction that money should be spent on the building of a tomb (*samadhi*) and its maintenance did not constitute a charitable endowment (and was not a gift for religion), whereas if the deceased had been a true *sanyasi* his burial and the upkeep of his *samadhi* might have other implications. In English law the maintenance of tombs of private persons is well known not

12. "...what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself": [1954] S.O.R. 1005, 1025.

13. [1953] A.I.R. S.O. 491.

14. At p. 495 they distinguish somewhat uneasily the important and correct case of *H.R.E. Board v. Narasimham*, [1939] A.I.R. Mad. 134, to which Varadachariar J., holding that the very occasional worship of 66 stones was public religious worship, and that the building enclosing them was a temple, said, "The test is

not whether it conforms to any particular school of Agama Sastras; we think that the question must be decided with reference to the view of the class of people who take part in the worship. If they believe in its religious efficacy, in the sense that by such worship they are making themselves the object of the bounty of some super human power, it must be regarded as 'religious worship'."

15. [1935] A.I.R. Mad. 29.

16. [1945] A.I.R. Mad. 217.

to be a charitable or religious purpose, but can the same be said in India, whether of Muslims or Hindus? The usages of Lingayats in this respect ought perhaps to be investigated more closely. For the test is not what is said in the texts, but what the public actually believe. Upon *Draviasundaram Pillai* was based the somewhat similar, and, it might be thought, equally oppressive decision in *Veluswami v. Dandapani*.¹⁷ A recent Bombay decision applies the same technique: a dedication to an existing foundation, whatever its motives, is one thing, but a dedication for worship at a place of *samadhi*, a type of worship having no charitable connotation (in the current sense of that word) though having a hold on the sentiments of unorthodox or uninstructed people, will be void: *Rangrao Bhagwan v. Gopal Pundlik*.¹⁸ The Court's readiness to decide what is religious without reference to custom or actual belief could hardly be illustrated better than by the two examples that follow, vastly as these differ *inter se*. In *Chhotalal Lallubhai v. Charity Commr., Bombay*,¹⁹ Shah J. said:

"...We do not think that the other bequests can be regarded as religious. A bequest to Panjrapole, i.e. a home meant for maimed, aged and deformed animals, can by no stretch of imagination be regarded as a religious bequest. Similarly, a bequest for practising kindness to all forms of life cannot, in our judgment, be regarded as a religious bequest; and a bequest for providing food to pilgrims visiting temples or providing clothes to Jain male and female Sadhus and Sadhis cannot also be regarded as a bequest for religious purposes."

The learned Judge continued to remark that there is a vital difference between the nature of the bequest or trust and the motive with which the benefit of the bequest or trust is given. It can cogently be argued that Jain theory regards such gifts as religious gifts, and the giving of them a religious duty. If the Court is at liberty to apply *a priori* tests of what is religious, drawn, in the case of charities, from English cases (where the technical considerations, in the field of religion, may be quite irrelevant), and in constitutional and fiscal cases from a regard only for orthodoxy or for literary sources, there seems to be something amiss with the conception of religion in the secular State. The second example, taken from Madras, namely *Kalandai v. Gnanavaram*,²⁰ is likewise seemingly oppressive in that, far ahead of its time, it lays down that a manager of a Hindu joint family may validly dedicate joint family property to religious purposes, that is to say, for the purposes of a Church. Chandrasekhara Ayyar J., whose authority none will question, actually said:

"...The Hindu religion has been the most tolerant religion of the world and the very idea that pious and charitable purposes should refer to and mean objects that can be said to promote a particular faith, creed, or dogma is foreign to its ideals. True piety transcends castes and creeds and whatever is done to advance belief in God and His rule over the universe can be said to be an act of broad-minded piety."

It is submitted that Shah J. should have enquired what were the beliefs of the Jain sect to which the testator belonged, and Chandrasekhara Ayyar J. should have enquired whether the Hindu caste in question had (as they quite possibly had, cf. customs in Travancore) a belief in the mutual co-operation of Christians and Hindus in matters of religion.

It is submitted, finally, that the correct test to apply is that of usage, proved in evidence, by witnesses in Court or by affidavit. We must take as our leading authority the admirable judgment of Davar J. in *Jamshedji C. Tarachand v. Soonabai*.²¹ The beliefs of Parsis were determined from the evidence of members of the community, and not merely from sacred books: the beliefs were inconvenient, but the learned Judge held that "a secular Judge is bound to accept the belief of the community". This was quoted with approval by the Supreme Court in *Ratilal Panachand's* case, and as their Lordships of the Supreme Court say in that very case²² "no outside authority has any right to

17. [1946] A.I.R. Mad. 485.

18. (1957) 60 Bom. L.R. 675, 677.

19. (1957) 69 Bom. L.R. 349, 353.

20. [1944] A.I.R. Mad. 156, 157.

21. (1907) I.L.R. 33 Bom. 122, s.c. 10 Bom. L.R. 417.

22. At p. 1190.

say that these are not essential parts of religion...." In other words the definition of religion itself, and the determination of the content of a particular religion, as well as the decision as to what practices are or are not enjoined by religion (and so protected by the Constitution) must all be left to the community itself, and the Court cannot substitute its own judgment or skill for the beliefs and theological techniques of the community in question.

On the subject of charitable bequests, and the difficult problem of whether bequests for *dharma*, and other similar vague terms, are or are not valid, we have many old cases and conflicting trends of decision. It may be that the anomalous and unsatisfactory rule which is often traced to *Ranchordas Vandra-wandas v. Parvatibai*²³ will one day be overruled by the Supreme Court. But that subject must await fuller treatment. In the meanwhile it is certain that customary approaches to such matters can be consulted by the Court in purely secular connections, for we have the instance in *Govindlalji v. Commr. of Inc-tax*²⁴ of the Court's insistence that judicial notice may be taken that members of a community regard it as a religious obligation to make payments to an individual who would apparently not qualify as a proper *patra*, that is to say donee, according to the *dharmaśāstra*: so that the community's belief as to the absolute obligation to make such gifts, notwithstanding criteria applicable by orthodox Hinduism, was actually relied upon by the revenue authorities, and it was held rightly relied upon, for the purpose of assessing the donee to income-tax. As for the *Animal-slaughter* case it is submitted that the correct decision in this regard would have been that the impugned Acts were void in so far as they attempted to deprive Muslims of their fundamental right to freedom of religious practice, and that, in view of considerations enlarged upon elsewhere in that judgment, it would have been proper for the Acts to prescribe an age-limit or some other criterion for this purpose. Islam does not require that a young or tender animal should be sacrificed: religious freedom is not impaired if the only legally available cows are old cows unfit for giving milk or producing calves, and the Acts could have permitted the slaughter of animals for bona fide religious purposes providing that in the case of cows they were over a certain age. The fact that this care was not taken (we must contrast the terms of the Bombay statute) raises the inference that the legislation was sectarian and sentimental rather than economic, and goes far to rebut in this instance the presumption that the Legislature is the appropriate arbiter of its duty.

J. DUNCAN M. DERRETT.

MR. JUSTICE TENDOLKAR.

ON January 23, 1959, a portrait of the late Hon. Mr. Justice S. R. Tendolkar was unveiled by the Hon'ble Mr. H. K. Chainani, Chief Justice, Bombay High Court, in Court Room No. 31, High Court, in the presence of a large gathering of members of the Bar and Attorneys of the High Court.

In requesting his Lordship the Chief Justice to unveil the portrait, Mr. H. M. Seervai, Advocate General, said:

My Lord the Chief Justice, Judges of the Bombay High Court, ladies and gentlemen:

It is less than a year ago that Mr. Justice Tendolkar passed away, but it was the desire of all his friends, inside and outside the Bar, that a suitable memorial should be raised to his memory. We knew that his most enduring memorial was in the memory of those who practised before him, and, so far as the law was concerned, in the pages of the law reports. But we desired that a

23. (1899) L.R. 26 I.A. 71. But compare *dicta* of Subramania Ayyar J. in *Parthasarathy Pillai v. Thiruvengada Pillai*, (1907) I.L.R. 30 Mad. 340, cited in 60 Bom. L.R. 875, 877; also the judgment of Patanjali Sastri J. (as he then

was) in [1946] A.L.R. Mad. 485 that a gift 'for the worship of God' was not void for uncertainty and *cy pres* would apply.

24. (1958) 60 Bom. L.R. 926, 927.

portrait indicating his fine and vivid personality should remain in the Court in which he had worked so long and so well. We knew for a fact that he greatly admired the portrait which had been painted by Mr. Pithawalla of his learned leader Sir Jamshedji Kanga. In fact he liked it so much that he kept a copy of it in his own chamber. We, therefore, engaged Mr. Pithawalla to paint the portrait, and I believe, when it is unveiled, you will find that it presents a striking picture of the late Judge.

There is little to be said on an occasion like this, for the Bar has paid its unmistakable tribute to the late Judge. But a few facts have come to light after he died, which have added greatly to his stature, for we did not know when he sat in this Court for the last time on the 20th of January, 1958, that for months he had known that he was suffering from an ailment of which the end was certain and which nothing could avert. Knowing this he faced the end with an unflinching eye, continued to come to the Court till the last day on which he could work, and then went home.

This portrait will remind us, as we sit in this Court, of a fine and masterful Judge, and so far as those who practised before him are concerned, this Court seems to us to be full of him, and as we look at his fine face it will recall to us the great occasions in which high and important constitutional matters were decided firmly, resolutely and fearlessly. I think no better tribute can be paid to a Judge than that the Bar has estimated his work as worthy of its highest praise, and in this particular matter I happen to know that the Bench fully shares the view which the Bar has taken.

It remains for me to thank the artist who painted this portrait, who unfortunately has suddenly passed away, to a member of the Bar Mr. Oak who completed part of the work which had remained unfinished, to the several friends and donors who have contributed so generously to the fund which has been set up, and to the members of the staff and office of the High Court who have done their best to make all arrangements for this occasion. We are thankful to my Lord the Chief Justice for coming here to unveil this portrait. It is fit and proper that the seniormost colleague of the late Judge should unveil the portrait which has been put up in his memory. May I request my Lord the Chief Justice to unveil the portrait.

In unveiling the portrait Hon'ble the Chief Justice Mr. H. K. Chainani said:

Mr. Advocate General, brother Judges and friends:

You have rightly observed that on an occasion like this much may not be said. I thank you for inviting me to unveil the portrait of the late Mr. Justice Tendolkar. I accepted your invitation with great pleasure, because he was not only a colleague with whom I had worked together in the High Court for several years, but he was a great personal friend. I did not know him before I came to the High Court. But soon after I came here, I realised that he was a masterful personality, who commanded universal respect and admiration. He was a kind-hearted and a good friend, and he endeared himself to everyone who came in contact with him. To all his colleagues he was a source of considerable strength. In his untimely and premature death, we all suffered a great personal loss.

As a Judge, Mr. Justice Tendolkar dedicated himself to justice. In him, there was a rare blend of a clear head, keen and sharp intellect, quick grasp, sound commonsense, and a profound knowledge of law. To those great qualities were added courage, impartiality, independence, and a high sense of devotion to duty. His judgments, which most of us have read, are remarkable for their precision and lucidity of expression. He was a great, good and wise Judge, who upheld and maintained the best traditions of this Court.

I, therefore, regard it as a great privilege to be asked to unveil his portrait. May his portrait inspire the lawyers, who practise in this Court, to prepare

their cases thoroughly and to present them forcefully, but accurately and fairly. May it also inspire the Judges, who work in this Court, so that like him they may administer justice wisely, impartially, and fearlessly.

GLEANINGS.

FAIR WEAR AND TEAR

Taylor v. Webb ([1937] 1 All E.R. 590) is overruled. Though the decision that the principle of *Taylor v. Webb* was wrong was reached by the House of Lords in a case on the Rent Act, 1957, *Regis Property Co., Ltd. v. Dudley*, ([1958] 3 All E.R. 491), it is in this respect of general application to all repairing covenants in leases where liability for fair wear and tear is excepted. The principle of *Taylor v. Webb* was that the exception for fair wear and tear relieved the tenant not only from the immediate effects of wear and tear but also from the obligation to take any steps to avert any consequential damage. The decision of the House of Lords restores the law as it was before *Taylor v. Webb*. Thus, if want of repair is alleged and proved, it is for the tenant to show that the want of repair is within the exception. The exception for fair wear and tear is limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. The tenant remains bound, however, to take such steps as are required to prevent the consequences flowing originally from wear and tear producing others which wear and tear would not directly produce. The example given by Talbot J., in *Haskell v. Marlow*, ([1928] 2 K.B., at p. 59), whose judgment was approved by the House of Lords, was that of a tile falling off a roof. The tenant would not be liable for the immediate consequences, but if through the hole in the roof so caused by fair wear and tear water got in and rendered part of the house uninhabitable, that latter damage would not be within the exception for fair wear and tear, and the tenant would be liable for it.—*L.J.*

PROSTITUTION

THE general feeling of the House of Commons appeared to be in favour of increasing the penalties imposed on prostitutes for soliciting but stopped short of sending them to prison. We find this aspect of the Wolfenden Report more difficult than the other. No one is idealistic enough to imagine that it is possible to abolish prostitution; the only question is how to put an end to a public nuisance and in particular how to diminish the revolting evil of the men who live on the earnings of prostitutes. We agree with Mr. Anthony Greenwood, who is in favour of heavier fines for prostitutes but would reserve imprisonment for those who organise prostitution and who profit from it. We must have a sense of proportion. If the resources now at our disposal enabled us to attempt the reformation of thousands of prostitutes there would be an argument for detention, but they do not and, in our opinion, there are more urgent claims. The Government's provisional view is that imprisonment, even if only invoked in the last resort, would go a long way to help, partly because it would give probation officers the opportunity to persuade prostitutes from their folly before they were beyond redemption.—*S.J.*

BYE-LAWS: NOISY INSTRUMENTS

THE ice cream van fitted out with a musical box and an adjustable electric amplifier to attract its customers, a familiar sight in our streets, has now become immortalised by finding its way into the law reports. It has for some time been a matter of absorbing interest to local authorities whether the van's

chimes constitute a "noisy instrument" for the purposes of s. 54(14) of the Metropolitan Police Act, 1839 (which appears to place postmen who wish to use a horn or other noisy instrument in the performance of their duties in a most privileged position) or would come within the good rule-and government bye-laws of local authorities. There is in general existence a bye-law prohibiting any person, for the purposes of selling any article in any street, from shouting or using any noisy instrument in such a manner as to cause annoyance to inhabitants. In *John v. Heath* (*The Times*, April 24, 1958, p. 5) music lovers along with music haters were offended, for while "Toni's" van was playing the Anniversary Waltz on the loudspeaker, "Wall's" van appeared in the same street in Dunstable emitting a series of five melodious notes at frequent intervals. Only one annoyed witness was called before the justices, but, in the view of the Divisional Court, that was quite sufficient. In *Raymond v. Cook*, ([1958] 3 All E.R. 407), the scene shifts to Westleigh, Havant, and this time there was a solo performance from "Toni's" van which seriously disturbed the day-time slumbers of two inhabitants of the town who were night workers. The bye-law being of a similar type, it was argued that a distinction ought to be drawn between a musical and a noisy instrument, but the Divisional Court were content to assume that an instrument may be both musical and noisy—which few of us will dispute seriously—and once the justices were satisfied that the instrument was likely to cause annoyance it was unnecessary that there should be any evidence whether one or more people were in fact annoyed by it. So the local authorities appear to have won the day, even outside Glamorgan where, we are told, is to be found the only local Act which directly restricts the use of loudspeakers for trading in the street.—L.J.

OBSCENE PUBLICATIONS

THERE is a wide measure of agreement that both substance and language of the law relating to obscene publications stand much in need of change. A Bill, introduced last year with the backing of the Society of Authors was considered by two Select Committees. The findings of the Second Select Committee were embodied in the Obscene Publications Bill which was introduced—again as a Private Member's Bill—on November 10. The Bill sought to enact, by cl. 1, that any publication should be deemed to be obscene "if its effect as a whole is such as to tend to deprave and corrupt persons to or among whom it was likely to be distributed, circulated, offered for sale or let on hire". The literary, artistic, scientific or other merits of the work in question were to be taken into consideration, and in any prosecution or other proceeding the author of the publication alleged to be obscene was to have the right to be heard in its defence. It may well be that the definition of obscenity lacks the precision that is needed if unnecessary controversies over the question of the literary or artistic value of a publication are to be avoided. Even so, it is surely a matter for regret that the Bill did not secure a second reading, and that yet another opportunity of improving the law has been postponed for some time, if not lost altogether.—L.J.

SILENCE IS CONSENT

It is a rule of universal law that if a man, either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have lawfully been done without his consent, and he thereby induces others to do that from which they would otherwise have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have given faith to his words or to the fair inference to be drawn from his conduct. In such cases proof of positive assent or concurrence is unnecessary: it is enough that the party had

full notice of what was being done and the position of the other party is altered (*Cairncross v. Lorimer*, (1860) 3 Macq. 827).

On this rule is founded the law of consent or, more properly, acquiescence. Acquiescence implies that a person abstained from interfering whilst a violation of his legal rights was in progress. If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection whilst the act is in progress he cannot afterwards complain: this is the proper sense of acquiescence (*Duke of Leeds v. Earl of Amherst*, (1846) 2 Ph., at p. 124, *per* Lord Cottenham, L.C.).

In another sense acquiescence implies that a person refrains from seeking redress when a violation of his rights of which he did not know at the time is brought to his notice. Here the term acquiescence is an element of laches.

Acquiescence operates by way of estoppel. It is quiescence in such circumstances that assent may reasonably be inferred, and is an instance of estoppel by words or conduct (*De Bussche v. Alt*, (1878) 8 Ch.D. 286). The estoppel rests upon the circumstances that the party standing by in effect makes a misrepresentation as to a fact, namely, his own title. A mere statement that he intends to do something, as to abandon his right, is not enough (*Jorden v. Money*, (1854) 5 H.L. Cas. 185; *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, (1873) L.R. 6 H.L. 352).

Consequently, if the whole circumstances are proper for raising this estoppel, the party acquiescing cannot afterwards complain of the violation of his right. For this purpose the lapse of time is of no importance. He is estopped immediately by his conduct; and hence the effect of acquiescence has been expressly preserved by the Limitation Act, 1939, s. 29.

The principle of estoppel by representation applies both in law and in equity, though its application to acquiescence is equitable (*R. v. Butters* (*Inhabitants*), (1796) 6 Term. Rep. 554). The term appears to apply only to estoppel as a bar to a claim for equity (*Evans v. Bicknell*, (1801) 6 Ves. 174; *Burrows v. Lock*, (1805) 10 Ves. 470).

This is not, of course, to say that mere silence or inactivity, in the absence of a duty to speak, amounts to a representation (see *Welch v. Bank of England*, [1955] 1 All E.R. 811 (not answering a letter), and *Leslie and Co. v. Works Commissioners*, (1914) 78 J.P. 462 (party to a contract not estopped from denying its true construction by failing to answer a letter in reference to its meaning)). If a person's consent to a particular act is required, he may be under a duty, when he knows that it has been done without his consent, not to stand by for so long that another is induced thereby to do that from which otherwise they might have abstained; and he cannot afterwards question the legality of the act to the prejudice of those who have given faith to the fair inference to be drawn from his conduct (*Greenwood v. Martins Bank, Ltd.*, [1933] A.C. 51; *Cairncross v. Lorimer* (*supra*)).

A duty to speak arises where a person knows that someone else is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring property in ignorance of his title to it (*Stroud v. Stroud*, (1844) 7 Man. & G. 417).

It is the duty of a person who knows that another is relying on a document bearing a forgery of his signature to give notice of the forgery without delay (*Greenwood v. Martins Bank, Ltd.* (*supra*)). *A fortiori*, it is clearly the obligation of one who has by his own mistake led another into an incorrect belief to correct that belief as soon as the mistake has been discovered (*Holt v. Markham*, [1928] 1 K.B. 504).

One who stands by and allows another to proceed and interfere with his legal rights in the hope that they will eventually arrive at an agreement is not, however, estopped from asserting that the proposal is *ultra vires* when it is found that no mutual agreement can be reached (*Jackson v. Knutsford Urban Council*, [1914] 2 Ch. 686).

Where a person has a right of election between two courses mere silence or

inactivity does not amount to an election. But it is the duty of a person who has to make an election not to be silent so long as to lead another person, either the person against whom the election is made, or a third party, to alter his position in the belief that the first person has elected to let things remain as they are; and, by so doing, he will be precluded from making a different election (*Young v. Bristol Aeroplane Co., Ltd.*, [1946] 1 All E.R. 98).

It is on the foregoing that Jenks' maxim *qui tacet consentire videtur* (Cent. 32) is based, which brings us back to the title of this article.—L.J.

DOCTOR'S DUTY TO TELL

THE substance of *Chapman v. Bix*, (*The Times*, November 11, 1958), is that where a doctor makes a preliminary examination of a patient and then tells him to see his own doctor, the doctor who first examined him has a duty to ensure that the second doctor has a sufficiently full picture of the first examination and the findings to ensure that proper steps continue to be taken on behalf of the patient.

In this case, the action was brought by the widow of the deceased, who had been working in the cutting room of a butcher's shop when the knife had slipped and had caused a wound in his abdomen. A telephone call was put through to a local hospital which was a "cottage hospital" without any resident surgical staff. The defendant was a doctor who used that hospital and happened to be present. He acted without delay, going straight away to the shop after ordering a bed to be got ready at a fully equipped hospital. He made an examination of the deceased at the shop and formed the impression that the knife had not penetrated the abdominal wall but that the wound was a mere "nicking". On a further examination at the cottage hospital, using a probe, he again thought that the wound was superficial. He had the wound stitched, told the deceased that it was superficial, and advised him to see his doctor that evening.

The deceased's doctor called and was told that the defendant had said that the wound was superficial. Consequently, the doctor dismissed the wound as of no further significance, and diagnosed subsequent pain and nausea as due to other causes. But the deceased was worse next day and he was sent to another hospital with a note: "Probably due to acute appendicitis." An examination showed a half-inch wound of the small bowel, and, as the diagnosis came too late, death ensued.

Mr. Justice Barry took the view that there was in this case no reflection on the defendant's general professional reputation, since he clearly acted with great promptitude and keen interest. The Judge is reported as having said "There was here no attack on the defendant's bona fides; nor was there any suggestion that he did not try to do his best for this unfortunate man. He showed a very keen and helpful interest in the case... On the evidence it was impossible to suggest that the defendant was negligent in not arranging for an immediate operation. His diagnosis was clearly wrong but the evidence did not establish that it was a negligent diagnosis. It was a unanimous medical view that there was extreme difficulty in ascertaining the depth of an abdominal wound."

It seems that some professional men consider that an exploratory examination is always necessary where the skin has been penetrated; others that careful observation is required for some hours.

In case these remarks concerning the absence of any reflection on the defendant's professional reputation seem out of place, in view of the fact that he was found to be negligent, it should be said that it often happens that negligence arises from both want of skill and want of care, but the two are combined under the one head of want of care. Consequently a finding of negligence against a professional person is an ambiguous finding in that regard unless the Judge makes clear that there was no want of skill. The basis on which want of skill

is treated as negligence in an expert is that it is careless for anyone to profess to be an expert who has less skill than that which may reasonably be expected of an expert.

His Lordship came to the conclusion that steps should have been taken to ensure careful observation of the deceased for eight to ten hours, either at a hospital or at home where there was a relative apprised of the symptoms to be looked out for. That was not done nor was the deceased's doctor made aware of what examination had and had not been made. It might be sufficient to send a long and complicated message by a patient, but unless he was the right sort of person to convey such a message the first doctor should get in touch with the second and explain the position. His Lordship said that because of the frightful risk involved if a penetration of the abdomen were undiscovered and untreated, he was bound to hold the defendant guilty of negligence in law.

In the above case the deceased from the point of view of treatment fell between two stools. Neither doctor failed to exercise care from the medical point of view, and if the first doctor did not send on any message one feels that the reason may have been that there seemed no reason to do so, since apparently the first doctor's conclusion was that the wound was superficial. It is said that there is great difficulty in ascertaining the depth of an abdominal wound, but this would be known as much to one doctor as another, and the need for careful observation would also be known.

The nature of the injury in the above case appears to have been one with exceptional dangers, but whatever the injury may be one would suppose that the test of negligence is whether it is the usual practice amongst professional men of reasonable skill to ensure that when a patient is passed on to another doctor that doctor is informed of all facts which are foreseeable as likely to be relevant for further treatment. The answer must surely be in the affirmative and the inquiry then becomes one of fact as to what was relevant in the particular case and whether it was communicated. The means of communication chosen will obviously also be relevant.—S.J.

THE NEW "VICTORIANISM"

FOR a very long time our vision of Soviet Russia was a blood-boltered tyranny and slave-camp, a composite picture of the horrors of the French Revolution and its dictatorial aftermath. But time, like an ever-rolling stream, flows on and the human landscape changes, and gradually we have been becoming aware that the sequel even of revolution and dictatorship is not (for better or for worse) all that any of us might have imagined. From what we hear of the Soviet world there is abroad there a strong element of something for which it is hard to find any word except "Victorianism." There is deliberately propagated an earnest sense of moral purpose and of the virtues of industry. There is the serious, straightforward approach to the arts. There is the confident, forward-looking belief in the unlimited possibilities for human happiness in the new wonders of industry and science. There is the faith in Progress. There is the sense of a beneficent imperial mission to lesser breeds without the law; although the actual word "imperial" is not used, the atmosphere of expanding influence is much the same. There is also the sublime trust in peace through strength. How well that great English nineteenth-century peace song, "We don't want to fight," could be adapted to the present mood. You remember it—something like this:

"We don't want to fight,
But, by jingo, if we do,
We've got the ships, we've got the men,
And we've got the rockets too."

It is amusing to contrast this impression with that which returning travellers bring back from Warsaw of the French-men of Eastern Europe, the Poles, their restless, lively intellectual curiosity, their gaiety and love of entertainment and their appreciation of feminine elegance. The French were never Victorians.

Of course (as you may suspect), Victorian moral earnestness and industry is not the whole picture by a long chalk. There is a great importance in being earnest if you want to get on, but the Soviet has other problems, and one of them is: What shall we do with the drunken comrade? That problem and what the Russians are doing about it is not altogether without interest to ourselves, since in 1957 there was a rise of 11 per cent. in the number of offences proved. This followed a similar rise in the previous year. It is true that the City of London's figure of 397 convictions per 10,000 residents is one of those misleading frolics of statistics, because the resident population is very small and the working population very large, but Liverpool following with 81 convictions per 10,000 has not the same mitigating explanation. Well, what do the Russians intend to do about it? There has been a certain righteous primness in the propaganda against the old traditional national sport of hard drinking, but Mr. Krushchev recently announced legislation which (if it is enforced) promises a common-sense remedy, a rule, so far as spirits are concerned, of "one bar, one drink." Of course, the determined drinker will go to another bar. "Let him go," says Mr. Krushchev. "If there are people who want five tots they will have to go to five bars. They will sober up as they go from one to the other." The notion of the five bars "pub crawl" is eminently sensible, but it takes a good deal of ruthlessness to make the Russians law-abiding.

Another interesting lapse from high moral purpose is that the Russians share our problem of a juvenile crime-wave, complete with an indigenous species of Teddy Boy called "stilyagi," from the Russian word for "style." Their stilyahness takes the form of narrow trousers, bright shirts, wide-shouldered jackets. They tend to be addicted to drunken assaults, and it is reported that the death penalty (mostly confined to political offences) is being extended to killers of that description. It is a very distressing phenomenon in a country which believed it had eliminated the economic and social basis of crime. Is there a Hogarth in the Union? He had better get busy on an up-to-date version of the decline and fall of the Idle Apprentice. Or perhaps that Victorian classic "Eric, or Little by Little" might be translated and transposed to fit another social scene. Reared in the good influences of school and factory, the stilyagi start on the downward track with their taste for their curious clothes, which their mothers weakly encourage by "mutilating" their trousers. Then come Rock 'n' Roll records illegally made from old X-ray plates. Another step and it is a decadent addiction to cocktails. Their restlessness is fostered by "The Voice of America" on the radio. Their wages are no longer sufficient for their needs. Crime is the logical and necessary sequel and here they are, fully fledged gun and knife boys. The Russians with their wave of juvenile crime have their own pet diagnosis, as we have with ours. But, instead of being tempted to say "Yah!" to each other, it would be interesting to inquire what it is we have in common that we produce such curiously similar phenomena.—S.J.

A.I.D.

LORD READING, writing in the *Michaelmas*, 1958, number of the *Oxford Lawyer*, expresses his view that for a wife to be given artificial insemination by a donor without her husband's consent is not at present a ground for divorce but that it would be in the general interest to make it so; the further opinion is expressed that it is no solution to the legal problems raised by artificial insemination to bring the whole practice of A.I.D. within the scope of the criminal law. In his article entitled "Some Legal Aspects of A.I.D.," Lord Reading indicates some of the problems which will face the Departmental Committee on human artificial insemination and its legal consequences, under the chairmanship of the Earl of Feversham, when it drafts its recommendations. Must a "test-tube baby" be illegitimate? Where marital intercourse continues alongside artificial insemination, can there be certainty that the husband is not the father? How should parentage be entered on the registration

of the child's birth? Although the British Medical Association is collecting evidence from doctors and others with experience of artificial insemination, we understand that it is not yet certain whether that Association will give evidence to the Committee. It would be a pity if the Committee is deprived of information from any knowledgeable source to assist its members in reaching conclusions and making recommendations on this difficult subject involving, as it does, much both in the way of human happiness and legal pitfalls.—S.J.

REVIEWS.

The Individual and the State. By the Hon. Mr. M. C. CHAGLA. BOMBAY: Asia Publishing House. 1958. Demi 8vo. Pages: xi+132. Price: Rs. 9.75.

IN this book the eminent author has collected his speeches, broadcasts and writings which emphasise tolerance and understanding in the country at large. He rightly points out that "Truth has many facets...and it is a grievous sin against the Light to imagine that some of us have gazed at Truth in all her splendour and have been specially commissioned to proclaim it." The eminent author is not concerned with the trappings of democracy, viz., adult suffrage, an elected Parliament, and a Government enjoying the confidence of Legislature. But in his opinion what is important is a democratic spirit, a democratic outlook on life, and a democratic attitude of mind. There is nothing more important today than the consolidation of our national interest and the strengthening of all those forces which unify and not divide. One may glibly talk about a Welfare State. But what about the liberty of the individual? It is wrong merely to emphasise freedom, and to point out that law places restraints and compulsions upon the actions of the individual. The contents of the book are divided into three Parts. Part I contains speeches delivered on various topics, such as Individual Freedom and Welfare State, International Court, Constitution of India, Legal Profession and Art of Advocacy. Part II deals with several renowned personalities, for example, critical tributes are paid to Lokmanya Tilak, Vithalbhai Patel, Bhulabhai Desai, Vallabhbhai Patel, J. B. Kanga and Paul Robeson. Part III comprises miscellaneous topics such as Human Right's Day, Integrated Education and Working Journalist. Thus the book embodies a great variety of topics. It is a unique collection of speeches and writings of a great and renowned Judge.

Principles of Hindu Law. By the Right Hon. Sir DINSHAH FURDUNJI MULLA, K.T., C.I.E., M.A., LL.D. Twelfth Edition by: the Hon. Mr. Justice SUNDERLAL T. DESAI, Judge, Bombay High Court. BOMBAY: N. M. Tripathi Private Ltd., Princess Street. 1959. Roy. 8vo. Pages: lx+1203. Price: Rs. 21.

WE welcome a new edition of this wellknown work by a learned Judge of the Bombay High Court. The Indian Parliament has made many important and far reaching modifications in the old Hindu law since the publication of the last edition by enacting the Hindu Marriage Act, the Hindu Succession Act, the Hindu Minority and Guardianship Act, and the Hindu Adoptions and Maintenance Act. These enactments have abrogated several principles of Hindu law which were in force before their promulgation. The outstanding feature of the modifications made in the old Hindu law is that all disparities in the rights of men and women and disabilities based on caste or sex are eliminated in matters of marriage, succession, and adoption. The learned author has added a very enlightening Introduction to this edition with particular reference to the sources of Hindu law. This edition as a whole has undergone a thorough and careful revision in the light of pertinent cases reported since the publication of the previous edition. The four recent enactments and comments thereon are published separately at the end of the main work. The commentary on the pro-

visions of the new Acts is very instructive and illuminative. This edition maintains the high degree of excellence of all previous editions and is bound to be very popular with the profession at large.

Jurisprudence. By M. J. SETHNA, Ph.D. (Bom.), Barrister-at-Law, Professor of Jurisprudence, Government Law College, Bombay. BOMBAY: Lakhani Book Depot, Girgaon. Second Edition. 1959. Demi 8vo. Pages: XLIII+689. Price: Rs. 13.25.

In this very instructive work the learned author has propounded several new thought provoking theories pertaining to the important subject dealt with. His theories of "Mind Behaviours" and of "Personality of the Corporation" are very instructive. The Chapters dealing with Custom, Legislation, Precedence, Legal Rights, Liability, Property, Persons etc. open a vast vista of useful knowledge. In this edition the author has added many important decisions and brought the book up-to-date. He has very carefully revised and enlarged the whole work both in topics and treatment. The footnotes are full of Indian case law on the interpretation of statutes. The introduction deals with various schools of thought including the Hindu and Mahommedan systems of Jurisprudence. We have nothing but unstinted praise for this excellent work which is sure to rank as a leading authority on the important topic of Jurisprudence.

Industrial Law Digest, 1955-1957. Compiled by N. K. KHARE, B.A. and L. B. BHIDE, B.A., LL.B. BOMBAY: N. M. Tripathi Private Ltd., Princess Street. 1958. Roy. 8vo. Pages xx + 250. Price: Rs. 15.

THIS is the third volume in the Industrial Law Digest series covering three years from 1955 to 1957. Important decisions on Industrial Law reported during this period have been included in this volume. To facilitate reference a subject index and a table of cases are given. The table of cases has been arranged with the name of the employer company appearing first for the purpose of easy reference. Employers, Trade Unions, Officials and Tribunals dealing with industrial disputes will find this volume very useful.

Potter's Outlines of English Legal History. By A. K. R. KERALFY, Ph.D., LL.M. LONDON: Sweet & Maxwell Limited, 2 & 3, Chancery Lane. Fifth Edition. 1958. Demi 8vo. Pages: xvi+285. Price: 25 s.

THE previous edition of this book has become very popular with students of legal history. The present edition has been fully revised and many portions have been re-written, and several important additions have been made. Students of law are sure to find this edition very instructive.

The King's Government and the Common Law, 1471-1641. By SIR CHARLES OGILVIE, O.S.I., O.B.E., M.A. OXFORD: Basil Blackwell. 1958. Demi 8vo. Pages vii + 176. Price: 21 s.

THIS book indicates the great influence of the theory and practice of the Common law on the political, economic, and constitutional history of England in the 15th, 16th and 17th centuries. The gradual process of development of the English legal system, both civil and criminal, is carefully traced. The sanctity of private property is the main basis of English law. The book discloses how Charles I unsuccessfully tried to overcome the stronghold of the prerogative of the subject. It further shows that the monarchy had a much freer hand in criminal matters. This is a very interesting work tracing the gradual development of the Common law of England.

The
Bombay Law Reporter.
JOURNAL.

March 15, 1959.

• • THE DRAFTING OF THE INDIAN CONTRACT ACT.*

A LETTER signed by about a score of persons at the top of English Literature in the early twenties at the time of Byron's centenary requesting the authorities to accord Byron a proper place in Westminster Abbey was criticized in one of the issues of the London Mercury of that time as containing about a score of mistakes not one of which any one of these great writers writing by himself could have committed. No wonder then that the Indian Contract Act, which passed through at least three different stages at which different sets of draftsmen worked on it, suffered from the process in many ways, though it is on the whole considered to be one of the best drafted statutes, drafted in an age when men were generally not hustled into producing draft statutes to meet the ephemeral needs of some government frantically attempting to meet an emergency or to appease the electorate. The Indian Law Commission in England produced a good draft embodying the combined effect of Common Law and Equity on contracts. Thereafter, the Legislative Department in India revised the draft. In this process, they seem to have had for a model the draft Civil Code of New York as they could get no English statute on the subject and they believed that the English law of contracts would be properly incorporated in the Code of a State that was believed to have adopted the English law on the subject. This draft was ultimately not accepted even by the State of New York itself and has in some ways proved to be the evil genius of the Indian Contract Act. In the third important stage, came the great Sir James Stephen with his revision of the Act and his addition of introductory definitions couched in a style different from that of the rest of the Act.

The writer of this article is aware of the many virtues of the Indian Contract Act as a piece of legislative drafting. He has also had the benefit of the various comments made by high judicial authority and of juristic observations like those of Pollock and Mulla on some of the defects of the Act. He has observed a few others. This, however, is only a humble attempt at showing in one article some of the defects in what might be regarded as the parent part of the Act—ss. 1-75 dealing with general principles, so that at some opportune moment, say, when the Legislature recognises the *sui juris* status of the children that still remain with it (Indemnity and Guarantee, Bailments and Pledges and Agency)—two other children having already been granted such recognition in 1930, the Legislature might remove these gaucheries from the parent revealing thereby its enduring greatness.

The first mistake is seen in the very first section—that of an unnecessary and misleading comma between the word 'contract' and the words 'not inconsistent with'. The relevant paragraph runs thus:

"Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act."

The effect of the comma as their Lordships of the Privy Council observed in *Irrawaddy Flotilla Company v. Bugwandass*¹ is to connect the expression "not inconsistent with the provisions of this Act" with the clause with which it was not intended to be connected, viz., "nor any usage or custom of trade" as well

*By Prof. K. R. MEHTA, Advocate (O.S.); (Universities of Bombay and Karnatak);
Chairman, Board of Studies in Law, University Hon. Professor, Law College, Bombay.
of Bombay; Post-Graduate Teacher of Law 1 (1891) L.R. 18 L.A. 121, at p. 127.

as the clause with which it was obviously intended to connect it, viz., "nor any incident of any contract". This seems to be the result of careless punctuation. The probability of the two commas enclosing a clause connecting the clause preceding the first comma with the clause following the second comma has been lost sight of. This mistake had repercussions in *Kuverji Tulsidas v. The Great Indian Peninsula Railway Company*² and *Moothora Kant Shaw v. The India General Steam Navigation Co.*³ It had also to be considered in *In the matter of McCorkindale*⁴. Thus for about twenty years after the Act was enacted this comma continued to cause confusion.

The definitions in s. 2 are no doubt drafted by a master. They are, however, drafted in a style different from that of the vast majority of the sections in the Act. Some confusion is created in s. 2 by the use of the word 'promise' in two different senses. Thus in cl. (b) 'promise' is used in the sense of contract or agreement whereas in the same section in cl. (d) 'promise' is used in the ordinary sense of the term. Clause (e) merely adds to the confusion. Further, it would have made for greater clarity if the English word 'offer' had been used for 'proposal'. Apart from the brevity secured by the cognate word offeree (for which 'propose' has no equivalent cognate), the word proposal seems to be confined to an offer to be bound by a promise. The result of this is that in the case where a person offers not a mere promise but an act, e.g., to sell and deliver a ring on the spot and the other party takes the ring on the spot and becomes liable to pay for it, the seller does not appear to make a proposal under the Act. This is perhaps not what the draftsman intended and such a conception of offer would at Common Law cause surprise in England, particularly as the word 'proposal' is synonymous in English use with 'offer' (*vide* Pollock and Mulla, 8th edition, at p. 13).

Further, an unnecessary confusion is created by the use of the word 'offer' in s. 38 in the phrase "offer of performance" which is a different thing altogether from an offer in the sense of a proposal. In view of the word 'proposal' getting mixed up in Common Law with the word 'offer', it would have added to the clarity of the Act if the word 'tender' had been used in s. 38.

When referring to the use of the word 'promise' in two different senses in the same section, we are reminded of the words 'reciprocal' and 'implied' which qualify the word 'promise' in s. 8 and s. 9 respectively. The distinction sought to be drawn between 'express promise' and 'implied promise' in s. 9 creates some confusion as 'implied promise' is a term generally used in English text-books to denote what are otherwise known as 'quasi-contracts' and are referred to in Chapter V of the Act as "Certain relations resembling those created by contract". An 'implied promise' thus generally means a fictitious promise whereas s. 9 uses this expression for an actual promise "made otherwise than in words". Further, a term which may on a true construction of the words of a contract be said to be implicit or implied therein in addition to what is expressed in words is 'implied', but in the sense of s. 9, such a term would not be 'implied'; for it is *contained in the words* in spite of its being not apparent on the face of the words. Read with s. 3, s. 9 would appear to suggest that where signs or other representations (such as the firing of a gun twice at sunset on the other bank of a river in spite of the acceptor to communicate his acceptance in the manner suggested by the proposer) are used to communicate (a proposal or) an acceptance, the promise would appear to be implied whereas ordinarily the law would regard it as express.

Even s. 3 is not happily worded. To say that "The communication of proposals... (is) deemed to be made by any act or omission of the party proposing... by which he intends to communicate such proposal... or which has the effect of communicating it" is to suggest something which the Act obviously does not intend to enact, viz., that an act or omission by which the proposer intends to communicate a proposal is communicated under s. 3 even if it has not that

² (1878) I.L.R. 3 Bom. 109, at p. 118.

³ (1888) I.L.R. 10 Cal. 166, at p. 185.

⁴ (1890) I.L.R. 6 Cal. 1.

effect and that were it not for s. 4 such an inchoate communication would be valid. The word 'or' might be replaced by the word 'and'.

Reverting to s. 8, we may observe that the word 'reciprocal' before the word 'promise' does not fit the commonest class of cases it is meant to cover. If A sends goods to B on approval and B keeps them with the intention of buying them, he accepts the consideration for his promise to pay, but as A in such a case does not couple the goods with any promise of his own, B's promise coupled with his keeping the goods constitutes the acceptance, but could hardly be dubbed 'reciprocal' as defined in s. 2(f) as there is no promise from A.

It is also doubtful whether by framing ss. 10 and 11 in such a way as to make a minor's contract not merely voidable but void, the draftsman really intended to depart from the rule of Common Law and to incorporate the rule of Hindu law. The latter suggestion of Their Lordships of the Privy Council does not fit into the general scheme of the Act, viz., to consolidate the English law of contracts with only such alterations as local circumstances necessarily require. If Their Lordships had rested content with saying that they would only follow the cardinal rules of interpretation, it would have been sufficient to justify their decision in *Mohori Bibee v. Dhurmodas Ghose*.⁵

The use of the words 'to deceive' in s. 17 both in the main body of the section and in cl. (4) appears to create a distinction. Clause (4) by referring to 'any other act fitted to deceive' makes it clear that those in the preceding clauses are all acts fitted to deceive and cl. (5) refers to other acts which whether in fact fitted to deceive or not are in law so considered. Unless the expression 'fitted to deceive' is used to mean something different from 'with intent to deceive', where is the necessity for cl. (4) at least as at present worded? If it is, as Pollock and Mulla say, used only by way of abundant caution and is meant only to exhaust all categories of such acts, where is the necessity for the use of the words 'means and includes'? Further, in the body of s. 17, the words 'with intent to deceive another party thereto or his agent or to induce him to enter into the contract' might lead one to the conclusion that the fraud might not be the inducing cause of the contract in order to render it voidable. Pollock and Mulla in their commentary state clearly that "under the Contract Act we are concerned with the effects of fraud only so far as consent to a contract is procured by it". This is no doubt the correct position. Would it not then be better to make it clear in this section instead of in the Explanation to s. 19?

The law on the subject of consideration is not dealt with in one place, nor is it dealt with in the proper order, nor is attention paid to a very important aspect of it, viz., its reality. The main proposition, viz., that consideration is essential to a contract is stated in s. 25 not only far removed from the definition in s. 2, but after the Act tells us in s. 23 what unlawful consideration is. This again is mixed up with a quite different element, viz., the object of a contract. Unlawful consideration and unlawful object could have been treated separately. The important element of reality is hardly mentioned except by implication and that too only in Explanation 2 to s. 25.

Section 2, cl. (d) runs as follows:—

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

This definition might be improved in the following respects:

(a) Even if the above language is to be kept intact, two 'promises' being referred to, the second promise at the end of the definition might be distinguished from the first by the addition of the words 'of the promisor' at the end of the definition.

(b) Further, the words 'at the desire of the promisor' imply a somewhat more active movement on the part of the promisor than is sometimes actually

⁵ (1903) L.R. 30 I. A. 114, s.c. 5 Bom. L. R. 431.

the case especially in protracted negotiations that finally result in a contract. It is suggested that words like "with the consent express or implied of the promisor" would, being wider, be more suitable. Perhaps the word 'prior' might be placed before the word 'consent' in order to avoid any confusion with s. 25, Explanation 2.

(c) The definition might make it clear that consideration might take the form not merely of 'some right, interest, profit or benefit accruing to one party', but even of 'some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other' in return for the promise received (*Currie v. Misa*⁶). It may take the form not merely of abstention or forbearance but of abandoning something which might cause the party so abandoning something to suffer a detriment or loss without any actual benefit correspondingly accruing to the other party (though of course it must have been suffered at the desire or with the consent of that other).

A more comprehensive and clearer definition would therefore be couched in some such words as follows: "Consideration is any act of the promisee or a third person from which the promisor or a stranger derives a benefit, profit or advantage or by which any labour, detriment or inconvenience is sustained by the promisee or a third person if such act is performed or such labour, detriment or inconvenience is suffered with the (prior?) consent express or implied of the promisor". The word 'act' could mean both the positive act of doing something and the negative act of abstaining from something and therefore need not be amplified in the definition.

A curious instance of carelessness disfigures s. 23, the relevant portion of which (as invariably printed in various texts) is as follows:

"The consideration or object of an agreement is lawful, unless—
it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or
is fraudulent; or

involves or implies injury to the person or property of another; or
the Court regards it as immoral, or opposed to public policy."

The subject of the second, third and fourth clauses is 'it' and this should have been repeated before each of these clauses, if the section is to be printed as above, i.e., as it is found printed in the texts including the authentic text. The way the section is printed is perhaps responsible for an unnecessary ugliness; but the semi-colons in the first four clauses and the dash after the word 'unless' show that the draftsman intended the section to be printed in this manner only. Further, even if 'it' in the first clause were printed with 'unless' so as to show that 'it' was intended to be the common subject of the four clauses that follow, 'it' would then have to be read with the fifth clause reducing the sentence to a grammatical absurdity. Two courses only are open to the draftsman, neither of which he has taken. Either the word 'it' might be repeated before the second, third and fourth clauses, or the dash and the semi-colons might all be dropped and the whole of this first paragraph of the section written continuously with commas as the only punctuation marks and without breaking up the paragraph as is at present done into separate lines for each clause. Further, the comma in the last line between 'immoral' and 'or' is, according to the accepted rules of punctuation, unnecessary.

Further, the dubious implication of the word 'or' in the phrase "the consideration or object of an agreement" might be misleading and could easily have been avoided by merely drafting two separate sections—one for 'lawful consideration,' the other for 'lawful object'.

We may here mention briefly a few other matters. The addition of the words 'or seize' after the word 'detain' and 'or seizing' after the word 'detaining' in s. 15 might have rendered the section more comprehensive. Perhaps, these words were not used as it might have been thought that the unlawful

seizing of property fell under the words 'act forbidden by the Indian Penal Code' and unlawful detaining did not.

Section 14 refers, at it were, in the same breath, to coercion, undue influence, fraud and misrepresentation, which merely make a contract *voidable* and to 'mistake subject to the provisions of ss. 20, 21 and 22' which when operative makes the agreement *void* (see s. 20).

Further, the addition of the word 'existing' before the word 'mistake' in the first paragraph of s. 20 is necessary, because, as would appear from *Chandan-mull v. Clive Mills, Ltd.*,⁷ if the mistake is as to a future event, the contract is binding and may be avoided at some future date if the expected event does or does not occur and the section itself only speaks of 'the agreement' being 'void' which would mean that it is void *ab initio*.

The term 'contingent contracts' in Ch. III might have been replaced by the more familiar expression of English law—'conditional contracts'.

Section 70 runs as follows:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Illustration (a) is as follows:

"A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them."

It is clear, therefore, that the enjoyment must be by a more or less voluntary or deliberate act and some such words as these should be inserted before the word 'enjoys': otherwise a curious situation would arise in a case like the following: X having agreed to paint the wall of A's compound paints by mistake a part or the whole of the compound wall of A's neighbour B. B cannot help enjoying the benefit of it, but is he bound to pay anything to X? There is obviously no contract or quasi-contract here. As Pollock, C. B., observed: "I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?" (*Taylor v. Laird*⁸). For that matter, is that evidence of any quasi-contract?

The decision of the Privy Council in *Sri Shiba Prasad Singh v. Maharaja Srish Chandra Nandi*⁹ has now made it clear that the words "money...paid or anything delivered by mistake" in s. 72 include both money paid by a mistake of fact and money paid by a mistake of law, i.e., a payment which was not legally due and which could not have been enforced. For seventy-six years, however, the Courts took the view that 'mistake' was used in the same sense as in ss. 20-22, i.e., a mistake of fact making an agreement void under s. 20 and a mistake of law under s. 21 not affecting its validity. If the term 'mistake' had been clearly defined for the purpose of s. 72, the wrong notion that prevailed in this matter for so many years would not have gained currency. In the same section, the word 'coercion' is used, but as pointed out by the Privy Council in *Seth Kanhai Lal v. National Bank of India*¹⁰ the word is used in its ordinary sense. If the Act solemnly defines 'coercion' in s. 15 in a particular way, the draftsman should have confined the meaning to certain sections by some such words as "For the purposes of ss. ...". In the absence of any such words, the definition would seem to control at least the sections that follow in the Act. In the alternative, the use of some such equivalent as 'compulsion' in s. 72 might have at least made for greater clarity.

The writer need not repeat here that this article is not intended to detract from the greatness of the Indian Contract Act. He believes, however, that every great statute which goes beyond mere regulation of details is in the words of Sir Frederick Pollock "a work of art", and almost every work of art can

7 (1947) 52 C.W.N. 531.

L.R. 17.

8 25 L.J. Ex. at p. 312.

10 (1913) L.R. 40 I.A. 56, s.c. 15 Bom.

9 (1949) L.R. 76 I. A. 244, s.c. 52 Bom. L.R. 473.

always be improved upon with the ultimate object of nearing absolute perfection.
 "On the earth, the broken arches..."

[Copyright reserved by the author.]

THE DEFINITION OF RELIGION IN INDIAN LAW.

POSTSCRIPT

THE Supreme Court having, in the constitutional cases of the *Shirur Matt* and *Ratilal Panachand*, approved the contention that religion is far more than a mere matter of belief, and that the question regarding practices, whether they are religious or not, must be decided according to the tenets of the sect or community in question and not merely the dicta of any particular literature or the opinions of the Judges themselves, it follows that attempts, such as those noticed above, to define 'religion' with reference to criteria other than those accepted by the communities in question are repugnant to what we may call the 'better'—and certainly the better considered—doctrine laid down by the supreme tribunal. The Supreme Court has recently affirmed this 'better' view in a striking case that arose, it is true, not under the Constitution, but under the Penal Code: but the implications of the judgment are equally relevant with the constitutional cases.

In *S. Veerabadran Chettiar v. E. V. Ramaswami Naicker*¹ an appeal by special leave from the order of a Judge of the High Court of Madras was allowed, and an exceptionally severe rebuke was administered not only to the respondents whose misbehaviour had led to the complaint, but also to the learned Judge who 'clearly misdirected himself'. The reader's attention is drawn to the ominous words with which the judgment ends, and which emphasise the Supreme Court's opinion that s. 295 of the Penal Code *does* penalise destruction, etc., of an object 'however trivial or destitute of real value in itself' which is 'held sacred' by any class of persons with the intention of thereby insulting the religion, etc. The facts of the matter were not in evidence, because the complaint had been wrongly dismissed *in limine*, but they appear to have been common knowledge and not in dispute. A member of a society of religious reformers gave notice of his intention to break a mud image of the god Ganesa in public, made a speech defaming the religious beliefs of certain Saivites, and broke the image in the presence of large numbers of them. The learned Judge took the view that a mud image, like an abandoned idol, pictures on the wall of a room, or puppets in a shop, was not an object held sacred within the meaning of the section. From the point of view of the *dharmaśāstra* it is probably true that unless an idol is properly *pratishthita* and continues thereafter undefiled it is not fit for worship. But, as the Supreme Court show with great emphasis, this is not the test to apply here, and the Judge's attitude was 'cynical'. Without (it is true) hearing any evidence on the point, their Lordships say,

"...it is a well-known fact that the image of Lord Ganesa or any objective representation of a similar kind, is held sacred by certain classes of Hindus, even though the image may not have been consecrated...nor is it absolutely necessary that the object, in order to be held sacred, should have been actually worshipped...Courts have got to be very circumspect in such matters, and to pay due regard to the feelings and religious emotions of different classes of persons with different beliefs..."

This contrasts very happily with the case of *Saraswati Ammal* (cit. sup).

J.D.M.D.

ADVOCACY*

ADVOCACY is a branch of the practice of the law entirely neglected by many solicitors, undertaken with reluctance by some, and practised with distinction and substantial profit by a few. It cannot be taught by law schools, coaches or text-books. It must be learnt from practice. The only help that the experience-

1 [1959] S.C.J. 1.

* By Sir Sydney Littlewood in S.J.

ed advocate can give to the less experienced is to tell the things that he has found useful in his own work.

The solicitor-advocate

Advocacy in itself can be a very profitable branch of practice. For a solicitor it offers two advantages. It gives him opportunities to help his client when in difficulties and it enables him to bring and keep his own name before the public. As to the first of those, when a client finds himself a party to proceedings in Court or before a tribunal, generally he would much prefer his case to be handled by the solicitor he knows and trusts than by someone he has never met before. As to the second, the Council of the Law Society will not allow advertising, but it encourages the solicitor to become an advocate, and many a successful advocate has built up a good general practice because his name has been before the public so often by reason of his appearances as an advocate.

With the great increase in administrative tribunals and public inquiries, advocacy becomes more and more important. In 1955 there were 6,558 town planning appeals, in 1956 there were 6,699, in 1957 there were 6,921, and I am told that 1958 looks like producing even more. Some of these were trifling affairs, but many of them were of great importance and large sums were at stake. Again, the compulsory purchase of land is becoming more frequent, and in connection with that the advocate is often needed.

In many of these matters the solicitor works closely with his client and so gets a detailed knowledge of the matter in hand which he finds difficult to pass to a barrister in a brief. That is particularly the case in town planning appeals. In such a case, if the solicitor is an advocate, he has a great advantage over the barrister, who is kept so far removed from the practical side by the rules of his branch of the profession. In short, there are many occasions when the solicitor-advocate has advantages over the barrister.

Law of evidence

All too many advocates do not know and understand the law of evidence. It is not enough to know that you must not ask a leading question and to know that you must exclude hearsay. The whole of the law of evidence must be known and understood. I think the most useful book on evidence is Stephen's Digest of the Law of Evidence. It is a small book, but difficult to read. Nevertheless, the man who has read it and taken pains to understand it will find himself far better equipped than the many he will encounter who have never taken that trouble. It has always been a matter of regret to me that more attention to the law of evidence is not paid in the solicitors' professional examinations. Advocates often have to wait in a Court until their case comes on. Stephen's Digest of the Law of Evidence is a small book and could be comfortably carried about, and time spent in waiting for a case could be usefully employed in studying it. When you take a point on evidence or when a point is taken against you it is a pleasant feeling to be sure that you know.

When to employ counsel

Whenever a client has said to me: "Shall I have a barrister?" I have said: "By all means." That was not because I lacked faith in myself, but because I always remember the tale of the unsuccessful litigant in the county Court who had been represented by a solicitor, and who said to his friends: "It would have been very different if I'd had a proper lawyer with a wig." I had one interesting example of the employment of counsel going against a client's interest. On instructions, counsel was employed to do a case before magistrates in front of whom I regularly appeared. My client was convicted by the magistrates but the conviction was quashed on appeal. After the case, but before the appeal, I saw one of the magistrates and told him I was surprised that he and his colleagues had found my client guilty. He said: "We were sure you knew he was guilty because you had counsel. If you had thought him innocent you would have done it yourself."

Preparation of the case

It is impossible to overstate the importance of the preparation of a case. It does not matter how competent the advocate is, he can never do justice to a

case if he has not spent time on its careful preparation. I know that there are many advocates who think that they have a heaven-sent gift that enables them to walk into Court, pick up a few notes from a clerk, and without any preparation deal with a case. Those people may be able to make a show but they fail their client.

In preparing and in conducting a case, it is a mistake to allow your client's feelings to be your feelings. You can help him much more if you deal with the matter objectively and above all if you are fearless in the advice that you give him. It is easy to give advice that is palatable, but to give unpalatable advice is often the best way to help. Therefore, in preparing your case, never allow your judgment to be impaired by sympathy for your client. It is quite possible to do your case and do it really well while having no sympathy at all with your client. I can illustrate this by telling a story of my own articulated clerk days. My principal was a splendid advocate and on one occasion I went to Court with him when he was appearing for a man charged with an offence against decency. In those days the Probation of Offenders Act was rarely used. My principal put up a magnificent plea for probation, a plea that almost brought tears to my young eyes, and affected the Bench so much that they acceded to his request. As my principal and I left Court together I said to him, "I was very pleased with that result, weren't you?" He turned to me and said, with feeling, "No. The dirty fellow should have been sent to prison."

The preparation of a case always involves eliciting the facts and sometimes looking into the law.

As to facts. You must take your own client's story and take this as fully as you can. If you take it too briefly you are liable to find something cropping up in Court that takes you by surprise and, if things go wrong, your client will think, and probably say, that if only he had been given the opportunity he would have told you that. Do not be satisfied with your client's own version of facts. Check that with whatever you can. Sometimes it is possible to check with facts given by other witnesses; sometimes documents will help, and sometimes a visit to a site will show whether your client's story is right or wrong. Check in every way that you can and, where you find any inconsistencies, get them settled before you go to Court. Nothing is more damaging to a case than to have something that your own witness has said disproved either by another of your own witnesses or by a document in your possession, or a fact that should have been in your knowledge. Such careful preparation takes time, but it is never time wasted. I know time is money, but I shall say something of that later.

I have mentioned a visit to a site. In motoring cases, accident cases, planning appeals, and any other case where the locus or site is important, a visit should be made by the advocate himself.

When you are satisfied that you have all the facts, turn to the law, and if there is a legal point, see that you have it thoroughly prepared. Do not rely on text-books, but look up the cases upon which the writer of the text-books has based his proposition. If you have not done this you may find, when you get to Court, that your opponent has, and while you quote a line from Stone or Chitty or Salmond or some other text-book your opponent produces the case upon which the author has based that line and says, "But my friend should read the judgment, where he will find..." and then comes something for which you are entirely unprepared.

Professional witnesses

In the preparation of your case you will have decided whether a professional witness is necessary. Such witnesses are often necessary in cases before magistrates' and county Courts, but even more frequently are they necessary in cases before tribunals. Professional witnesses are expensive but often indispensable. When I have decided that I need professional witnesses I tell my clients why I need them, whom I suggest, and the probable cost. If I am authorised to engage professional witnesses I always see those witnesses myself and tell them exactly what I need, and ask how far they can help me.

"Briefing" the client

It is important to see that your client is aware of his position throughout and that is particularly true in the case of defendants to criminal charges before magistrates. It is no unusual thing to see a defendant who is represented taken completely by surprise when he is asked by the Bench whether he wishes to be tried summarily or to go for trial. That look of surprise is a bad mark for the solicitor. The client should have been told of his rights and have had them carefully explained before he got to Court.

Court Tactics

When the advocate has got together all of his witnesses' proofs and satisfied himself about the law, he should make up his mind what line he is going to take when he gets into Court. I know this sounds elementary but it is no uncommon thing to see an advocate who has not done that. It is a sad sight. He flounders all the time, makes points that are bad, misses points that are good and is no help to his client, the Court or himself. It is true that in a magistrates' Court one may be taken by surprise because the prosecution produces something unexpected. This rarely happens to the advocate who has prepared his case with the thoroughness that I recommend, but on those rare occasions the experienced and well prepared advocate will adjust his own plan of campaign according to the new circumstances without difficulty.

I want to turn now to the Court or the tribunal.

The advocate should make himself acquainted with the procedure of the Court or tribunal before which he appears. The man who appears regularly in a magistrates' Court knows the procedure of that Court and the man who goes regularly to the county Court knows county Court procedure. Some tribunals, such as the Lands Tribunal, have their own rules of procedure and the solicitor who is appearing before such tribunal for the first time should make a point of studying those rules. There are, however, tribunals where there are no written rules: for instance, inquiries held by inspectors of the Ministry of Housing and Local Government are not, at the present time, subject to rules, but in practice a procedure has grown up. The solicitor who is appearing before such a tribunal or inspector for the first time should take steps to find out what the procedure is. Frequently he will be able to find another solicitor who can help him with advice, but if he cannot, when he gets before the tribunal he should ask the chairman or the inspector, as the case may be, if he would be good enough to let him know what is the procedure. He will always get the guidance he seeks.

Demeanour—and some "don'ts"

There are a few general propositions that I would like to make with regard to the advocate in Court.

Be well dressed. In my very early days a chairman of a Bench made a point of seeing me after I had appeared in Court in a coloured soft collar and telling me that he thought I would make a better impression if I wore a stiff white one. I have always been thankful for that piece of advice.

Be respectful to the Court. This does not mean be servile; there are many times when one must stand up to a Court, but this can be done in a respectful way. There can never be any excuse for being rude to the Court.

When addressing a Court look straight at the Judge or the Chairman. Too many advocates look down at their papers while they are speaking.

Speak up, try to avoid a monotonous voice, and do not drop your voice at the end of sentences.

Do not try to be slick. It does not pay in the long run.

Be courteous to your opponent. This is often difficult but it shows handsome returns.

Never deliberately mislead the Court. It may produce a satisfactory result on one occasion, but the solicitor-advocate usually appears before the same Court time and time again, and if once he has misled that Court, he will never be trusted again. It is an excellent thing to be trusted by the Courts before whom you appear. I have known solicitors who have been so completely trusted

by magistrates that they have almost been a menace because the magistrates were always satisfied that those solicitors were right.

Do not make admissions unless you are quite sure that thereby you cannot harm your case. This should not be carried to foolish extremes, but if there is a burden of proof upon your opponent leave him to discharge it.

Prior Observation

When I appear before a Court or tribunal for the first time I do my utmost to assess the character of the person or persons before whom I am appearing. In the magistrates' Court, if you are not first on, you can often help yourself a good deal by watching the behaviour of the various magistrates in the cases that precede yours.

The Opening

The object of the opening is to enable the Court to appreciate the law and the evidence that will be put before it. The method of opening must differ from Court to Court. The advocate appearing before lay magistrates should remember that, even if the Chairman is a lawyer, it is a lay tribunal, and the advocate should make sure that they all understand the case to be presented to them. It is a mistake to make the opening longer than is necessary, but with magistrates it is equally a mistake to leave them in a position where they do not understand the case which is to be put to them. The advocate should keep the Court interested. Photographs and models help to do that, and an apt quotation is sometimes useful. Before magistrates the solicitor for the defence has the right to address the magistrates before calling evidence or after calling evidence, or (with leave) both, but if he exercises his right to address the Court twice, the prosecution have a right to address the magistrates at the conclusion of his final speech. I know that most advocates defending before magistrates elect to address the magistrates at the close of a case and not to open. That is sound in the majority of cases, but if the defence is complicated it is important that the magistrates should understand it before they hear the witnesses, and my own experience has been that, by a defence being opened, magistrates often receive the evidence of the defence witnesses in a more favourable way than they would otherwise have done. Whether, when a defence has been opened, it is wise to address the magistrates at the close of the evidence and so give the prosecution another opportunity, is a matter to be decided by the advocate in each case.

When opening a case before a county Court Judge or a stipendiary magistrate it should be remembered that he is a lawyer and that it is probably not necessary to open in the same detail as before lay magistrates.

When opening before a tribunal where the members are specialists and when opening before an inspector, it is wise to remember that you are dealing with specialists, and to open on the basis that they understand the matter to be discussed as well as you do. (They probably understand it a good deal better than you do, but never let them or your client know you think that.)

May I repeat something that I have said earlier: if, in the course of opening, you quote cases, have the reports there.

Calling Evidence

Before an advocate goes to Court he should have decided in which order he will call his witnesses. The only guidance that can be given on that is to call them in the order that will present the most coherent story to the Court.

Examination-in-Chief

Examination-in-Chief is much more difficult than many people think. The temptation to ask leading questions is one to which the most experienced advocate falls at times, and, of course, we all know the advocate who asks them deliberately. When an advocate persistently asks leading questions of his own witnesses, magistrates are very ready to think that the case is weak, even though the advocate is not pulled up by his opponent.

The advocate must get from his witness every bit of useful evidence that that witness can give, and this is not always easy. If a witness does not give the answer that you want, never let him think you are getting impatient with

him, because the probabilities are that he has not given you the answer because he is nervous and if you make him more nervous he will get worse. I find that if I cannot get the answer I want I usually get it if I put my question another way or by putting a series of questions. There are occasions when the witness will not give you the answer that you want, try how you will. I remember a county Court Judge saying to me once, "You can take a horse to water but you can't make him drink." When you reach that stage there is nothing for it but to abandon the question.

Re-examination

Re-examination is very important but seems to be incompletely understood by many advocates. The object of re-examination is to clear up anything injurious to your case that has come out in cross-examination. Here, again, the advocate must know what he wants to do. My own practice is to write down as the cross-examination proceeds any point made in cross-examination that I think needs to be and can be cleared up on re-examination. Sometimes some of those points are cleared up before the cross-examination is finished and I cross them off. In re-examination I only deal with the points that remain.

There are occasions when the cross-examination reminds you of something that you failed to bring out in chief and yet the question that you would like to put cannot be said to arise out of cross-examination. Usually a little thought will find a way round this, but it is wise to have in mind how you will relate your question to the cross-examination when your opponent jumps up and says, "This does not arise out of my cross-examination."

Cross-examination

Cross-examination needs much thought.

First, assess the witness you have to cross-examine and on that assessment decide how you will deal with him. Some witnesses will respond best to kindly treatment, some to firm treatment. By the time the witness has given his evidence in chief you should have made up your mind which course you will adopt.

An advocate should always know exactly what he wants when he starts to cross-examine. Many ask questions for the sake of asking questions, and ask questions on points that do not affect their own case at all. This tends to irritate the Court and helps no one. If you know exactly what you want you will cease cross-examining as soon as you have got it. In my view, it is a mistake to ask any question in cross-examination unless it is directed to something that you have already decided you want to elicit. It is true that there are times when you have to approach your point in a roundabout way, but, even so, every question that you ask while proceeding in that roundabout way should lead up to the point that you seek to establish or destroy.

There are instances, and they are not infrequent, where there is no point in cross-examination. In such cases do not cross-examine.

Closing Speech

I have already referred to the value of a closing speech. Never start a closing speech in a mood of despondency. I have often known a good closing speech to alter completely the previously half-formed opinion of a Court. The closing speech needs more thought than some advocates give to it. A closing speech should be constructive; it should have as its object the driving home of the main points of your case. Having watched numbers of advocates, I believe that many of them get up to make their final speech without having given a thought to what it is to be or what ground it is to cover. As a case proceeds I make a note on a separate sheet of paper of everything that I ought to deal with in my final speech. As in the case of my notes for re-examination, some of these notes sometimes have to be struck out because of something that has happened subsequently to their being made, but, by means of these notes, when I start my closing speech I know what I have to deal with and, I hope, get an orderly speech.

With the final speech, as with an opening speech, keep the Court interested, look straight at the Judge or Chairman, press your points hard, but avoid repetition. I like to see an advocate in his closing speech addressing the Court

as though the Court had no option but to find in his favour. That spirit is infectious.

When appearing before magistrates I have often been asked by a client to combine in my closing speech a plea for leniency in the event of the Court deciding against me on the question of guilt. When such a combination is attempted magistrates regard it as an acceptance of the fact that the defendant is guilty. I have always advised a client against that course, have explained the difficulties of combining the two pleas and advised that he should make up his mind which plea he wanted put forward. If a client thinks he is not guilty, he should let his advocate fight the issue of guilt and, in the event of the magistrates being against him on that point, let the advocate ask to be heard before the magistrates pass sentence. He cannot demand that as of right, but it is unusual for magistrates to refuse such a request. I may say that as a result of following that practice I have had many people plead guilty who originally intended to plead not guilty, and I cannot recall a case where it has not paid, but let me add I have always insisted upon the client making his own decision.

After the case

If a case goes against an advocate he should take the decision with a smile. It will not help him in the case he has just lost, but it may help him a lot in the next one.

One great difference between the barrister-advocate and the solicitor-advocate is that the barrister-advocate can leave the Court without seeing the client, but the solicitor cannot do that. Not infrequently the client feels sore at an adverse decision and immediately talks of an appeal. Save in a case where a defendant has been given a prison sentence it is always wise to wait a day or two before discussing the question of an appeal. The client will then be calmer and it may be that the advocate will be able to think more clearly than he could have done in his first disappointment at losing.

Particular Courts, etc.

Space does not permit of my dealing with the many Courts and tribunals before which a solicitor has a right of audience, but there are one or two to which I should like to make reference.

Consistory Courts: I only once appeared in a Consistory Court and did so without robes, to the disgust of the chancellor. I lost my case!

Coroners' Courts: At onetime solicitors had no *right* of audience before a Coroner but appeared by his permission. That has been changed and by the Coroners' Rules of 1953 any person who, in the opinion of the Coroner, is a properly interested person may examine witnesses either in person or by counsel or solicitor. The rules of evidence are not strictly followed in Coroners' Courts and hearsay evidence is fairly commonly admitted.

Commissioners of Taxes: The solicitor who appears before Commissioners of Taxes should make himself thoroughly acquainted with tax law in so far as it affects the matter in hand. He will find a paper delivered at the Oxford Week-end Course in 1957, entitled "Taxation," helpful. Copies of this pamphlet can be obtained from The Law Society, price 2s. 6d.

There are two kinds of Commissioners who hear appeals against tax assessments—General Commissioners and Special Commissioners.

General Commissioners are unpaid local men, the sort of people you would have on a bench of magistrates, and they act for separate divisions throughout the country. The majority of appeals before them are now conducted by accountants, and the Revenue case is presented by an inspector of taxes, who is sometimes, but by no means always, a capable advocate.

Special Commissioners are a very much more expert body sitting mainly in London.

In many appeals there is a right to elect whether to be heard by General or Special Commissioners, and the tendency is for cases involving points of law to go to the Special Commissioners. Counsel is usually employed, but solicitors have an equal right of audience.

Both types of Commissioners hear cases in private. The taxpayer, on whom the onus of proof lies in all appeals against assessments, opens his case, and then his witnesses, if he is calling any, are examined, cross-examined and re-examined in the ordinary way. The Revenue answer and the taxpayer has a right of reply. There is one vital thing to remember, and that is that, if you lose and want to appeal to the High Court, you must express dissatisfaction with the decision immediately it is given.

Appeals to the High Court can only be taken on a point of law. This means that the presentation of the facts to Commissioners is often of crucial importance, and solicitors would have a valuable service to perform if they were more ready than they are at present to make themselves familiar with tax law and accept instructions to appear before Commissioners.

Lands Tribunal: The matters dealt with by this tribunal require a specialist's knowledge, but there is no reason why the solicitor should not acquire this. He should bear in mind that he is an advocate and look to expert witnesses to deal with technical matters, but he himself should be sure that he understands these technical matters before he goes before the tribunal.

Inquiries: Under this heading I group public inquiries on development plans, public inquiries on planning appeals, and public inquiries on compulsory purchase orders. Here there is great scope for the solicitor-advocate, and in my view the volume of this work is likely to go on increasing. The advocate who wishes to practise in this field successfully should do all that he can to learn about planning. By this I do not mean the law of planning, for law very rarely enters into these inquiries, but the practice of planning. I know that for the busy practitioner this is not easy, but he can learn much by reading regularly the *Journal of Planning and Property Law*, and in addition I would recommend him to become a subscriber to *Town and Country Planning*, a journal published monthly by the Town and Country Planning Association, 28 King Street, Covent Garden, London, W.C.2, and to the *Journal of the Town Planning Institute*, which is published by the Town Planning Institute, of 18 Ashley Place, London, S.W.1.

Public inquiries on planning appeals often involve very heavy work and long hearings. Hearings of up to three days are by no means uncommon and even longer hearings are known. The work of preparation can be heavy, but it is important because these appeals are decided very largely on facts and it is the solicitor's duty to see that all relevant facts are properly put before the inspector. At these inquiries written proofs are commonly used, copies being supplied to the inspector and interested parties. At the present time there are no written rules of procedure, but the procedure is well-established and the same procedure always followed.

In heavy appeals it is my practice to prepare proofs well in advance of the date of the inquiry. When they are all ready I have a meeting at which all witnesses (professional and otherwise) are present. I read each proof and invite comments from all present. It is surprising how often proofs have to be altered as a result, in spite of the care that has gone into their preparation. These meetings are often long affairs (my longest lasted 6½ hours), but they are always worth while.

At public inquiries there is an atmosphere of informality which the advocate who is accustomed to Courts may find disconcerting at first. Sometimes local feeling runs high, there are many members of the public present, and they are liable to show their feelings notwithstanding warnings from the inspector. It would be quite easy to lose one's temper, but that would be a great mistake. In those cases one sometimes gets a constant stream of witnesses going into the box who express in varying terms of vehemence their opposition to what you are supporting. Usually it is a mistake to cross-examine those "witnesses."

I have mentioned the importance of professional witnesses in some planning appeals. The Law Society is often asked to supply names of people who can give expert evidence and is usually able to meet the request.

Planning appeals were the subject of another paper at a Law Society's Week-end Course. Copies of that paper can also be obtained from The Law Society, price 2s. 6d.

Fees

I want to conclude this article with a few words about the solicitor-advocate's charges.

From time to time it is suggested that there should be a scale of advocate's fees. I am most strongly opposed to this. Earlier I said that advocacy had to be learnt by practice. The young solicitor who wants to become an advocate should be prepared to accept any work that he can get that will take him into the Court and not to worry about the fee that he can get for it. He has to learn, he can only learn by conducting cases in Court and clients will not employ the inexperienced man if they can get an experienced man at the same price. If he takes an intelligent interest in the work and perseveres, in time he will find himself able to command fees that will show him a profit, and if he develops into a good advocate he will be able to get fees that would certainly not be contemplated by any scale.

I know of no reason why a solicitor should not be as good an advocate as a member of the Bar, and I see no reason why fees for a first-class solicitor-advocate should be any less than the fees for a first-class barrister-advocate.

I have emphasised the importance of careful preparation of a case. This involves time and time must be paid for. For my own part, I would much rather not undertake a case than undertake it at a fee which would mean that I cannot give the time that is necessary for proper preparation. For many years I have told clients that and find it is not difficult to make them understand.

GLEANINGS.

MATRIMONIAL HOME: OWNERSHIP

THE old-established doctrine that equity leans towards equality is peculiarly applicable to disputes as to ownership of the matrimonial home. From this doctrine stems the general rule that, on a purchase in the husband's name or in joint names out of money provided by both parties, whether in equal or in varying shares, the house will generally be treated as belonging in equity to the parties in equal shares. The latest decision, *Richards v. Richards*, ([1958] 3 All E.R. 513), deals with a case where the facts as a whole did not permit the application of the doctrine. The property there was purchased in the names of the wife and her father out of money contributed by the wife and her parents. The wife's payments were made out of one of her bank accounts which she had had since before her marriage and into which she had paid, during her marriage, her own earnings and monthly naval allotments credited to her by her husband out of his service pay. The husband, who was abroad, was unaware of the purchase at the time it was made; when he heard of it, he sent to his wife a small cash contribution and subsequently increased his monthly naval allotments. The Court of Appeal held on those facts that the husband had no beneficial interest in the house, *inter alia*, on the ground that in so far as moneys previously paid by the husband to the wife may have been used to pay for the purchase, they were paid unconditionally to the wife and were not payments by way of housekeeping allowance; consequently, the wife was not accountable to the husband for them. The case differs from *Silver v. Silver*, ([1958] 1 All E.R. 523), where the arrangements at the time of purchasing the house were made with the concurrence of the husband, and from

Rimmer v. Rimmer, ([1952] 2 All E.R. 863), where both husband and wife had a part in the arrangements when a house, bought in the husband's name, was to serve as their matrimonial home.—*L.J.*

DEFAMING THE DEAD

- THERE can be little doubt that, in English law, in order to maintain an action in respect of defamatory words published concerning a deceased person, his relatives must show that their own reputations, and not merely that of the deceased, have been damaged. Libel and slander are essentially personal wrongs and a right of action on either of these grounds dies with the person defamed. It can be said with certainty that an action for defamation does not survive for the benefit of the deceased's estate (s. 1(1) of the Law Reform (Miscellaneous Provisions) Act, 1934) but the publication in question may be a criminal offence if the words are likely to provoke the members of the deceased's family to a breach of the peace (*R. v. Topham*, (1791) 4 Term Rep. 126). In this respect the law would seem to be the same in Scotland (see *Broom v. Ritchie*, (1904) 6F. 942 (Ct. of Sess.), and in other parts of the Commonwealth, but in New South Wales a Defamation Bill is now giving rise to heated controversy. The Legislatures of Queensland, Tasmania and Western Australia have already enacted that a person can bring an action for a libel on a deceased member of his family if the words are likely to injure his own reputation or induce other persons to shun, avoid, ridicule or despise him, but there are those who fear that the Government of New South Wales is about to go one stage further by providing that a person may sue for damages when a dead relative has been defamed by historians without showing injury to himself. However, it should be emphasised that the New South Wales Government maintains that the principal object of the Bill is merely to codify the existing law relating to defamation following the pattern of the Queensland Code. The Bill is expected to become law next week.—*S.J.*

A SOLICITOR'S LIEN

As a general rule, where a client discharges a solicitor, the solicitor can seek to enforce payment of his costs by withholding delivery of such of the client's papers as may have come into his possession in his professional capacity. In *Lord v. Wormleighton*, (1822) Jac. 580, Lord Eldon said "the discharged solicitor ought to be able to make use of the non-production of the papers in order to get what is due to him," but this does not mean to say that he is able to retain documents if he is thereby preventing persons other than his client from exerting their rights. No one can create a lien beyond his own interest, and this has been recognised at least since *Marsh v. Bathoe*, (1744) Ridg. 256. We assume that the line of authority which has its roots in this case was followed by Wrangham, J., when he affirmed a decision of Mr. Registrar Compton Miller to the effect that a solicitor (we will refer to him as "solicitor B") should deliver certain papers to solicitor C. A petitioner in a suit for divorce originally instructed solicitor A but he discharged that firm and instructed solicitor B who took over the papers at the same time giving a written undertaking to respect the lien of solicitor A. Solicitor B was later discharged and the petitioner then instructed solicitor C. Solicitor B contended that he had a lien on the papers. Wrangham, J., rejected this argument on the ground that divorce proceedings, having regard to the public interest involved, are in the same category as those cases where there is the interest of a third party. The Court of Appeal has now overruled this decision [*Hughes v. Hughes*, (1958) *The Times*, 31st July] and the judgment of the Court was delivered by Hodson, L.J. His Lordship conceded that divorce affected status and that the public interest was involved, but as divorce proceedings *inter partes* were still litigation he saw no reason why a litigant who sought to put away his wife should

be in a better position in this respect than a litigant in any other civil proceedings. It would be odd, he remarked, if the petitioner was "able to get solicitors' work done for nothing by the simple expedient of changing his solicitor as often as he chose, leaving a trail of unpaid costs in his wake and demanding the papers without payment when he had no just cause to complain of the solicitors instructed and discarded."—*S.J.*

MARRIAGE OF AN EPILEPTIC

TOWARDS the end of last term, Collingwood, J., granted a decree of nullity to a wife petitioner on the ground that, at the time of the marriage, her husband was suffering from recurrent attacks of epilepsy of which she was entirely ignorant. Section 8 of the Matrimonial Causes Act, 1950, enabled the Court to hold that the marriage was voidable on this ground as it was satisfied that the petitioner was at the time of the marriage ignorant of her husband's condition, proceedings were instituted within a year of the marriage and the petitioner had not allowed sexual intercourse since her discovery of the existence of this ground for a decree of nullity. If the petitioner discovers that the respondent is subject to these fits and the Court cannot be satisfied on any one of these points, epilepsy in itself does not provide a sufficient ground for relief. Following the reasoning of Lord Merriman, P., in *Leng. v. Leng.*, [1946] 2 All E.R. 590, it does not seem to be open to the petitioner, if unable to rely on the provisions of s. 8, to maintain that the unfortunate respondent is guilty of "constructive desertion". To argue otherwise would, in effect, be to contend that epilepsy, apart from the statutory provisions referred to above, is in every case a ground for dissolution of marriage.—*S.J.*

REVIEWS.

The Hindu Marriage Act, 1955. By P. V. DEOLALKAR, M.A., LL.B., Pleader. NASIK: 46, Main Road. 1959. Demi 8vo. Pages xii+321. Price: Rs. 10.

THE Hindu Marriage Act codifies the law relating to marriage among Hindus, and overrides ancient Hindu law relating to marriage. It introduces the institutions of judicial separation and divorce and recognises the principles of social equalities. The learned author has attempted to bring out in clear terms the precise significance of its various provisions. He has carefully compared many of the provisions of the Act with the provisions of allied Acts such as the Matrimonial Causes Act of England and the Indian Divorce Act. His exposition in the comments is brief but lucid. It has been suggested that the provisions in respect of registration of marriage under the Act should be uniform in all the States. Similarly, the law in respect of publication of proceedings under the Act should be uniform throughout the country. Certain anomalies existing in the Act have been clearly pointed out. There is a very thoughtful and illuminating foreword by Mr. Justice P. B. Gajendragadkar of the Supreme Court. The profession will find the book useful and instructive.

The Hindu Succession Act. By DEOKI NANDAN AGARWALA, Advocate. ALLAHABAD: Ram Narain Lal. 1959. Royal 8vo. Pages viii+230+xviii. Price: Rs. 6.

IN this book each section of the Act has been carefully analysed and references to all relevant cases bearing on each section have been given. Extensive quotations from important cases have been given to elucidate various points. The conflicting decisions on some of the controversial points have been carefully summarised, and the learned author has expressed his own opinion thereon. Section 14 of the Act seems to be very controversial and it has been dealt with by most of the High Courts. The book is sure to be helpful to all who have an occasion to deal with the law of Hindu Succession.

The
Bombay Law Reporter.

JOURNAL.

April 15, 1959.

NATURE OF PROOF IN ELECTION PETITIONS.*

THE question in regard to nature of proof in election petitions is highly interesting both because it gives rise to heterochromous arguments and also because two conflicting views are propounded on this point, the first view being that the Legislature has made the procedure provided in the Civil Procedure Code applicable to the trials of election petitions and hence it is essentially a civil proceeding, that the person proceeded against, namely, the respondent is not an accused in law and that the applicability of the rules of decision of criminal cases being inconsistent with the spirit and requirements of the Representation of the People Act, the nature of proof should be the same as that in a civil proceeding; whereas the second view being that in an election petition, there are charges of corrupt practice which are of a criminal nature, that the consequences of an erroneous decision holding a person guilty of corrupt practice will be very grave both to the individual and to the society, that the success of a returned candidate is the verdict of the people, that the trial of an election petition is not of a civil nature and that it is almost a criminal inquiry and hence the standard of proof required is the same as in criminal cases.

Section 90 of the Representation of the People Act, 1951, lays down that subject to the provisions of the Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act V of 1908) to the trial of suits, and that the provisions of the Indian Evidence Act, 1872 (I of 1872) shall, subject to the provisions of the Act, be deemed to apply in all respects to the trial of an election petition. Section 3 of the Evidence Act gives the definition of "proved" by saying that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The aforesaid definition indicates the degree of certainty which is required to treat a fact as proved and is so worded as to provide for two conditions of mind; first, that in which a man feels absolutely certain of a fact, in other words "believes it to exist" and, second, that in which, though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence. Absolute certainty in this work-a-day world is seldom to be had in the affairs of life, and we are frequently obliged to act on degrees of probability which fall very short of it and hence what is required in a legal trial is not absolute certainty. Practical good sense and prudence consist mainly in judging aright whether in each particular case, the degree of probability is so high as to justify one in regarding it as certainty and acting accordingly. Though the rules of evidence in civil and criminal cases are in general the same, still the probative effects of evidence in civil and criminal cases are not always the same and hence we find that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for conviction in a criminal case. Best says that there is a strong

*By Ram Keshav Ranade, LL.M., District and Sessions Judge, Ratnagiri.

and marked difference as to the effect of evidence in civil and criminal proceedings, that in the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged is serious, a much higher degree of assurance is required, and that the serious consequences of an erroneous condemnation both to the accused and society have induced the laws of every wise and civilised nation to lay down the principle that the persuasion of guilt ought to amount to a moral certainty or such a moral certainty as convinces the minds of the tribunals, as reasonable men, beyond all reasonable doubt. Unlike criminal cases, in civil cases it cannot be said that the benefit of every reasonable doubt must necessarily go to the defendant. In other words, it may be said that whereas in a civil case a mere preponderance of probability is a sufficient basis of decision, in a criminal case persuasion of guilt must amount to such a moral certainty as convinces the minds of the tribunal as reasonable men beyond all reasonable doubt; that in a criminal case before the Court is called upon to convict a person, it has to satisfy itself that possibility of his innocence is ruled out, but in a civil case all that is necessary to insist upon is that the proof adduced in support of a fact is such that should make a prudent man to act upon the supposition that it exists, and that acting on the well-established principle that it is better that ten guilty men should escape than that one innocent man should suffer, Courts always insist on a much higher degree of proof in criminal cases than in civil cases. The aforesaid distinction is nowhere enacted in the Evidence Act but is based upon the rules of prudence and is founded on public policy. The special rules and principles applicable to criminal cases may be epitomised in brief as follows:—

- (1) Everyone is presumed to be innocent until the contrary is proved.
- (2) Proof must amount to a moral certainty and must exclude all reasonable doubt.
- (3) The benefit of doubt must be given to the accused.
- (4) The onus of proving everything essential to the establishment of the charge against the accused always lies on the prosecution.
- (5) Suspicion, however strong, is not legally tantamount to proof.
- (6) If an accused person offers an explanation which is reasonably true, it should not be rejected and the accused must be acquitted the reason being that the main burden of proof of establishing guilt of the accused beyond reasonable doubt rests upon the prosecution.
- (7) Proof of the case against the accused person depends not upon the absence or weakness of explanation on his part but on positive affirmative evidence of his guilt.
- (8) Stronger proof is required in criminal cases than in civil cases on the principle that it is better that 10 guilty men should escape than one innocent man should suffer.
- (9) When there is circumstantial evidence against the accused, then in order to justify the inference of guilt, the incriminating circumstances must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

So far as an election petition is concerned, it is strongly and seriously argued that the rules of decision of criminal cases are inconsistent with the spirit and requirements of the Representation of the People Act, that there is no presumption of any kind in favour of the respondent, that he could have no benefit of doubt and that the nature of proof in the case of election petitions should be the same as that in civil cases. The argument in favour of the view that the nature of proof in election petitions should be the same as in civil cases may be adumbrated in brief as follows:—

- (1) The nature of proof in election petitions rests upon the character of the proceeding, and in this respect it is to be noted that s. 90 of the Representation of the People Act provides that subject to the provisions of the Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits.
- (2) Election proceedings are initiated by the presentation of a petition

either by a candidate or a voter and the main relief claimed consists of two declarations, namely void nature of the election of the returned candidate and a declaration that a candidate other than the returned candidate has been duly elected. Thus, in essence the proceeding is one which pertains to the establishment of rights and is of a civil nature.

(3) The proceedings before the Election Tribunal can under no circumstances be said to be criminal proceedings especially when the position of the respondent who is the successful candidate is not in law that of an accused and hence he would not be entitled to have the proceedings against him decided on the general principles applicable to prosecutions based on technicalities peculiar to criminal trials.

(4) Since an election petition is to be tried in accordance with the procedure applicable to the trial of suits, the petition can not be justifiably compared to a complaint. The petitioner makes some averments of facts and law against the respondent and he desires the Court to give a judgment and naturally the burden of proof of the facts for establishing the case will be on him. However, just like in a suit, there may be various issues in an election petition and the burden of proof of some of them may be on the petitioner and of some of them on the respondent and in such cases if the petitioner establishes the facts on which he relies, naturally it will be for the other side to establish his contention and then the burden of proof will be said to have shifted to him.

(5) Regard being had to the procedure and the rules of evidence it is not proper to accept the principle of never shifting character of the burden of proof in an election petition.

(6) It cannot be gainsaid that the respondent is to put forth his case by way of written statement in answer to the allegations made against him and since even issues are required to be framed, the whole trial of an election petition is exactly similar to the trial of a civil suit.

(7) The provisions of the Evidence Act are applicable to the trial of an election petition and s. 3 of the Indian Evidence Act which defines proof and which governs the trial of election petitions does not make any distinction between civil and criminal cases regarding proof.

(8) Being a party to the proceeding, the respondent is to give evidence in his favour and also is to be examined on oath by the Tribunal and this circumstance shows that the election petition is not a criminal proceeding.

(9) It is not the nature of the issues to be tried that will determine the nature of the trial and attract the rules governing proceedings, but it is the nature of the Court or Tribunal that is material and that will show that an election proceeding is a civil proceeding and not a criminal proceeding.

(10) If we examine the provisions of the Representation of the People Act regarding corrupt practice, we will find that many acts which constitute corrupt practice are not in fact criminal in nature but they have been banned because of their relation to election. The ordinary acts such as treating and common hospitality, appeals on the ground of religion, use of religious symbols, hiring vehicles for conveyance of others or incurring expenses cannot ordinarily be said to be repugnant to lawful behaviour or public morals. However, if they are practised for inducing others to vote for particular candidate, they become corrupt and come within the mischief of the Act. Many corrupt practices are not offences as such under criminal law and the inquiry in respect of them is purely of a civil nature.

(11) The reasons on the strength of which a presumption of innocence has been claimed in election cases, are neither sufficient nor so compelling as those that are the basis for raising the same presumption in criminal trials. The functions of a sovereign democratic republic are carried out by the people through their representatives who constitute the legislative bodies and the Representation of the People Act has been enacted to make provision for the elections of the representatives who are chosen by the electors who themselves are the privileged citizens and have the necessary qualifications.

(12) Every citizen cannot *qua* a citizen claim the status of an elector. For the membership of either house of the Legislature also some qualifications are necessary. It cannot be argued that a presumption will be raised that every person is qualified for the membership of the Legislature similar to the presumption of innocence in favour of an accused.

(13) The result of a finding that a person has committed a corrupt practice is the disqualification of that person i.e. suspension of his electoral rights which is the creation of the electoral law. This disqualification can also be removed by the Election Commission and the consequences of an erroneous decision regarding the finding of corrupt practice cannot be said to be as great and as serious as those of an erroneous decision in a criminal case in which an innocent person is convicted.

(14) It cannot be said that it is better to allow 99 corrupt members to continue their seats in the Legislature than to unseat one uncorrupt member on the analogy of the maxim in respect of criminal trials that it is better that 99 guilty men should escape than that one innocent man should suffer.

(15) Such a maxim and the presumption of every individual being innocent in election inquiries will not advance the interests of the society or the State. The electoral law has not laid down any artificial presumption of innocence or uncorruptness or the rules of burden of proof beyond reasonable doubt and hence it is quite safe and rather desirable to follow the rules governing the decisions of civil proceedings in respect of standard of proof or the quality, quantity and force of evidence required for finding the truth in the case of election petitions.

(16) The rule of benefit of doubt is a necessary corollary of the rule requiring the rigid standard of proof beyond reasonable doubt and in inquiries of a civil nature where the Civil Procedure Code is made applicable, there is no scope for such a reasonable doubt and if at all such case arises, the matter of the proof of a particular fact is generally decided taking into consideration the burden of proof. In civil cases it cannot be said that the benefit of doubt must go to the defendant.

(17) It is well-known that in criminal trials the accused is not bound to open his mouth nor is he bound to give any explanation and by mere argument and suggestions taking the case against him within the pale of a reasonable doubt he can escape the consequences of conviction.

(18) The question of benefit of doubt is intimately connected with criminal proceedings, but the respondent in an election petition has no privilege to keep silent and there is no scope for benefit of doubt.

(19) It is also to be noted that there is no presumption in favour of the respondent and hence he is not entitled to any benefit of doubt. It is further to be noted that the rules of evidence in respect of confession and accomplice evidence which are peculiar to a criminal trial will not be applicable to a civil trial.

(20) Thus it can be said with sufficient force that the inquiry of an election petition is of a civil nature and the general principles governing decisions in civil cases regarding nature of proof will have to be adopted in that case.

In Election Petition No. 116 of 1957 decided on February 20, 1958 (*Shri. Prataproa Deorao Bhosale v. Shri. Shivram Sawant Khem Sawant Bhosale*, published in Bombay Government Gazette, Part IV C, dated June 26, 1958) the view adopted is that so far as election petitions are concerned, they are of a civil nature and the nature of proof in such is the same as the nature of proof in civil proceedings.

As against the aforesaid view, it may be noted that the charges of corrupt practice are of a criminal nature, that the consequences of an erroneous decision holding a person guilty of corrupt practice would be very grave both to the individual and to the society, that the success of a returned candidate is the verdict of the people, that the trial of an election petition is quasi-criminal, that the petitioner must establish the alleged corrupt practice beyond reason-

able doubt, that the burden of proof of the corrupt practices is exclusively upon the petitioner and it never shifts and that the standard of proof required is the same as in criminal cases and accordingly the charges must be proved beyond reasonable doubt and the respondent will be entitled to the benefit of doubt as an accused person. It is also to be noted that an election petition is not a matter in which only the two candidates are interested as plaintiff and defendant in a civil suit but the citizens at large have an interest therein and in such circumstances mere preponderance of probabilities should not be the basis of proof in an election petition as in civil cases.

Before deciding the point in question, some cases may be noted. It is held in *Dr. K. N. Gairola v. Gangadhar Maithani*¹ that in the case of allegations of corrupt practice, the burden of proof is on the petitioner and that burden never shifts, that the standard of proof is as in criminal cases and that the benefit of doubt will go to the respondent.

In *Sudhansu Sekhar Ghosh v. Satyendra Nath*² it is held that it cannot be laid down broadly that an enquiry into a corrupt practice is in the nature of a criminal case, and that the respondent is in the position of an accused person and that though the burden of proof is on the petitioner to prove a corrupt practice, still the respondent is not absolved from all liability to adduce evidence to disprove the case of the petitioner.

In *Abdul Rouf v. Makhtar Ali*³ it is held that the enquiry into corrupt practices under the law of election being of a quasi-criminal character, strict proof is to be demanded of the person bringing the charge to prove his case beyond all reasonable doubt, but that does not fully exonerate the person charged with such corrupt practice, from producing evidence, specially of facts within his special knowledge as he is bound to do under the provisions of s. 186 of the Indian Evidence Act.

It is held in *Bombay City South (N.M.U.) 1930*, Hammond, p. 191 that the standard of proof necessary to establish a corrupt practice of bribery should be that required at a criminal trial.

In *Sri Ram v. Mohammad Taqi Hadi*,⁴ it is observed that the charge of bribery is a serious one and the same kind of evidence is required to prove such a charge in proceedings arising out of an election petition as is necessary in criminal trials, and that in any event, clear and unequivocal proof is required before a charge of bribery can be held to have been established.

After having closely and carefully gone through the various cases and after having considerably cogitated thereabout, I think that when an election petition is being heard wherein a corrupt practice is charged against the elected member, the proceeding must in its very nature be looked upon as a quasi-criminal proceeding, that the charge of corrupt practice is a very serious charge and that the approach which is to be made to the inquiry by the Tribunal must be the approach which is to be made in regard to a criminal proceeding. Section 123 of the Representation of the People Act refers to corrupt practices and s. 141 thereof lays down that if any person is upon the trial of an election petition found guilty of any corrupt practice, he shall for a period of six years from the date of the conviction or from the date on which such finding takes effect, be disqualified for voting at any election. I am fortified in my view by the observations of their Lordships of the Supreme Court in *Harish Chandra v. Triloki Singh*,⁵ wherein it is said at page 456 that it should not be forgotten that charges of corrupt practices are quasi-criminal in character and that the allegations relating thereto must be sufficiently clear and precise to bring home the charges to the candidates. I may also refer to the decision in *First Appeal No. 381 of 1958* decided on September 19, 1958 (*Ahmedmiya Sherumiya Shaikh v. Chhippa Ibrahim Nuraji*, published in the *Bombay Government Gazette*, Part IV-C, dated January 15, 1959) wherein the view adopt-

1 (1953) 8 E. L. R. 105.

2 (1953) 4 E. L. R. 73.

3 (1952) 2 E. L. R. 340.

4 (1953) 8 E. L. R. 139.

5 [1957] A. I. R. S. C. 444.

ed by the Bombay High Court is that an election petition wherein there is a charge of corrupt practice is to be looked upon as quasi-criminal.

By way of epilogue and epitome, it may be stated that the argument that the nature of proof in election petitions should be the same as in civil cases can be successfully confuted and that the true and proper view is that the nature of proof in election petitions should be the same as in quasi-criminal proceedings. In an election petition therefore which involves charges of corrupt practices:

- (1) The respondent is to be presumed innocent until the contrary is proved.
- (2) The onus of proving everything essential to the establishment of the charge of corrupt practice lies on the petitioner.
- (3) Proof in regard to corrupt practice must amount to a moral certainty and must exclude all reasonable doubt.
- (4) Benefit of every reasonable doubt must be given to the respondent against whom a charge of corrupt practice is levelled.
- (5) Suspicion, however strong and grave it may be, cannot be legally tantamount to proof so far as the charge of corrupt practice is concerned.
- (6) If the respondent offers an explanation which is reasonably true; that should not be rejected and he would be acquitted of the charge in regard to corrupt practice because the main burden of proof of establishing the guilt of the respondent lies upon the petitioner beyond all reasonable doubt.
- (7) Proof of the case against the respondent is to rest not upon the absence or weakness of explanation on the part of the respondent but on the positive affirmative evidence of his guilt to be adduced by the petitioner.
- (8) In the case of circumstantial evidence against the respondent in regard to corrupt practice, the incriminating circumstances must be incompatible with the innocence of the respondent and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If there is a reasonable hypothesis inconsistent with the guilt of the respondent, then there would be a reasonable doubt about the charge of corrupt practice and the benefit of that doubt will go to the respondent.

BOMBAY REGULATION VIII OF 1827.*

THIS Regulation VIII of 1827 is kept alive and published in Bombay Code Vol. I, p. 9 in its present modified form. It contains 11 sections and three Appendices A, B, and C, with the forms of proclamations. Section 10 of this Regulation is very important. It is not applicable to intestate property which is dealt with by a Magistrate under the Bombay District Police Act, Bombay IV of 1890, s. 58(3).

This Regulation gives jurisdiction to a Zilla Court. The Zilla Court is nowhere defined under any of the laws that are prevalent and current in India. Therefore to take its ordinary meaning it would mean a District Court throughout the State. Then the question would naturally arise which is the District Court for Greater Bombay where there are no District Courts. The Courts in Bombay are the High Court, the City Civil Court, the Court of Small Causes and the Presidency Magistrates' Courts. None of these Courts are by any implication or otherwise a District Court. Then the next question that would arise would be that whether the entire population which is about 40 lacs of people that live in Greater Bombay have any remedy under this Regulation or not. So far as the mofussil is concerned anybody can walk up to the District Court and make an application under this Regulation. Then what about Bombay? In order to answer this question it would be necessary to trace the history of this Regulation and find out when this Regulation was passed and how was it being operated; and whether the very same powers that were exercised since 1827 by the Courts at Bombay are continued at present

*By M. G. Purohit, Advocate, (O.S.).

or not? Then the next question that arises would be which were the Courts that were exercising jurisdiction in 1827 and thereafter.

This Regulation was promulgated by the Directors of the East India Company in Bombay in 1827. It was repealed in part by Act XII of 1873. The application of s. 10 of this Regulation was restricted locally by Bombay Act IV of 1890, s. 58(3), which is the Bombay District Police Act. It has again been modified by the Adaptation of Indian Laws Order in Council. It is further adapted and modified by the Adaptation of Laws Order, 1950. Thus it will be seen that the Regulation is kept alive and operative till today. The Chief Presidency Magistrate at Bombay does issue even today an "heirship certificate" from the time since the said Regulation was passed in 1827. And such "Heirship Certificates" issued by the Chief Presidency Magistrate are accepted by the Government offices, mills and other semi-government bodies. But banks and other bodies do not accept them as valid representation to the estate of a deceased person. The State Bank and other Government banks do accept them. The reason for the refusal of some banks to accept these Heirship Certificates is that they think the Chief Presidency Magistrate has no such authority under law. This argument is erroneous as will be seen from the following previous history which will show how the Chief Presidency Magistrate has derived these powers.

Now in order to determine whether the Chief Presidency Magistrate has the necessary powers to issue such Heirship Certificates in Bombay is a point which can be determined by going through the history of Justice and Protection in the island of Bombay. This history of Justice and Protection is given in the *Gazetteer of Bombay City and Island*, Vol. II, p. 204, Chap. VII, heading Justice and Protection. At page 204 you find that when General Aungier arrived in Bombay he first made a systematic attempt to introduce Courts of law in 1669-70. He established two types of Courts. (1) Inferior Courts took cognisance of all disputes under 200 zeraphins. It consisted of a civil officer of the company assisted by native officers. (2) Superior Courts with higher jurisdiction consisted of Deputy Governor-in-Council which took cognisance of all civil and criminal cases. They were styled as Judges of the Courts of Judicature. At p. 206 you find that the Island of Bombay was divided into two distinct precincts; one comprehending Bombay, Mazagaon and Girgaum; the other comprising Mahim, Parel, Sion, Worli and the pakhadis thereto belonging. At p. 207 you find that George Wilcox was appointed a Judge on August 8, 1672, in charge of civil and criminal work. He was also in charge of the Register of Probate of Wills and Inventories of dead man's estates. After his death in 1674, Thomas Nicolls was appointed in 1675. He was succeeded by Captain Henry Gray who was granted the title of Chief Justice. Captain Gray and Captain Keigwin were appointed joint Justices of the Peace and sat together with Messrs. Ward and Day to hear all causes and try criminals. At p. 211 you find, in 1726 the Court served at one and the same time as a civil, criminal, Military, Admiralty and Probate Court; it even framed rules for the price of bread and wages of black tailors. At p. 212 you find, the directors of the company asked for the establishment of a Mayor's Court to deal with ordinary civil and criminal work. Connected with the Court of this date (1720-27) were the Vereaders (Procurator or Attorney) a body of native functionaries who looked after orphans and the estate of persons dying intestate, who also audited accounts like a Panchayat. About 1726 they were granted certain judicial powers which they retained until 1775. Even now the Mayor of Bombay is addressed as His Worship in view of the previous judicial, civil and criminal powers he had then. At p. 213 it is stated, the Court of Directors represented to the King and asked for permission to establish Mayor's Courts at Madras, Bombay and Calcutta. It was granted on September 24, 1726, and a new Charter was issued creating the Mayor's Courts consisting of a Mayor and nine Aldermen. The Court was declared a Court of Record, and was empowered to hear civil cases of all kinds. The Charter

further authorised the Governor and Council to hold quarter Sessions for trial of all offences except high treason. At p. 214 it says, William Henry Draper was appointed the first Mayor. At p. 218, it is stated, on January 8, 1753, a new Charter was issued which replaced the old Charters whereby the civil jurisdiction of the Mayor's Court was forbidden to entertain suits between natives of Bombay except with the consent of the parties. The jurisdiction of the Governor's Court in criminal matters was limited to offences committed within Bombay and the factories and places directly subordinate to it. The new Charter also created a Court of Requests for the summary disposal of small causes not exceeding 5 pagodas or Rs. 15 in value. At p. 220 it is stated, the Mayor's Court was abolished and was replaced by a Recorder's Court composed of a Recorder, the Mayor, and three Aldermen. And the Court was invested with the whole civil and criminal jurisdiction of the Mayor's Court and the Court of Oyer and Terminer. Its jurisdiction extended to ecclesiastical and admiralty cases. The first Recorder of Bombay was Sir William Syer being appointed in 1799. At p. 222 it states, the Recorder's Court was not free from irregularities. In 1825 Sir E. West animadverted severely upon the irregularities perpetrated by the magistrates of Police and the Court of petty sessions, which had been established in 1812. At p. 223, it says, in 1823 Recorder's Courts were abolished and a Supreme Court of Judicature was established by an Act passed in 1823. The first Chief Justice of Bombay was Sir E. West, then Recorder of Bombay. The Supreme Court of Judicature was duly opened on May 8, 1824. The new Court was invested with full power and authority to exercise and perform all civil, criminal, equity, admiralty and ecclesiastical jurisdiction within the island of Bombay and the factories subordinate thereto. It was invested with jurisdiction of King's Bench in England, and generally was granted all powers exercised by the Mayor's Courts and the Recorder's Courts. At p. 225, it mentions of the transfer of Sadar Diwani and Sadar Foujdari Adaulat from Surat to Bombay in 1827, and they were wholly independent of the Supreme Court. The inferior Courts in the Island of Bombay at this period were the Courts of the Police Magistrates including a Court for the Mahim division opened in 1830. At p. 226 you find, in 1858 Queen Victoria took over from the East India Company the direct government of the country. On August 6, 1861, an Act of Parliament was passed abolishing the Supreme Court, the Sadar Diwani Adaulat and the Sadar Foujdari Adaulat, and established instead the High Court, vested with entire jurisdiction, power and authority hitherto exercised by the three abolished Courts. At p. 233 it states, at the outset of the nineteenth century no special Regulations existed dealing with crime or with minor offences within the Island of Bombay, and such offences as were committed were punished under rules applicable to the whole of British dominions in Western India consisting of Surat, Salsette, Bombay and Bankot. But by 1812 public attention had been directed towards the need of reform in matters both police and sanitation; and on March 25, 1812, a "Rule, Ordinance and Regulation" was passed for the good order and civil government of the Island of Bombay, whereby, a senior and junior Magistrate of Police and a Court of Petty Sessions were created. At p. 235 it mentions, the Chief Presidency Magistrate was granted powers similar to those exercised by District Magistrates over subordinate Magistrates. These powers were subsequently confirmed by the Amended Criminal Procedure Code (Act V of 1898). The Chief Presidency Magistrate, apart from his ordinary magisterial duties and his control of his three colleagues, has various miscellaneous duties to perform within the limits of the Island of Bombay. Thus he is a Revenue Judge under the Bombay City Land Revenue Act II of 1876, Judge of the Court of Survey for the disposal of cases arising under the Indian Merchants Shipping Act VII of 1880, and the President of Marine Inquiries.

Thus it will be seen from the history of the establishment of various types of Courts in Bombay, the powers exercised by the Mayor's Courts and Recorder's

Courts were being exercised by the Police Magistrates. And the present Presidency Magistrate's Courts are the successors in title of those Courts exercising the same powers. The Chief Presidency Magistrate is also the Revenue Judge for the Island of Bombay. The Court Fees Amendment Act, XXXIV of 1949, s. 2 states: In this Act, the Collector shall include any officer authorised by the chief controlling Authority to perform the functions of a Collector under this Act. The Chief Presidency Magistrate is performing the same duties of a Revenue Judge even now. Besides, the Indian Succession Act, ss. 214 and 215, mentions a certificate granted under the Bombay Regulation VIII of 1827. Section 58(3) of the Bombay District Police Act mentions the Heirship Certificate. Section 390 of the Indian Succession Act also mentions such a certificate. Now the Bombay City Police Act and the Bombay District Police Act are abolished and a new Act called the Bombay Police Act comprehending both the Acts is passed wherein ss. 83, 84, 85 and 86 are similar to the provisions of the Bombay District Police Act. The Criminal Procedure Code also in ss. 516A and 517 and 523 are similar.

Now the word used in Regulation VIII of 1827 is the Zilla Court which is empowered to issue such certificates. The word Zilla is not defined in the said Regulation. It is not defined by the Civil Procedure Code nor by the General Clauses Act, Central as well as the Bombay Act. Thus it follows that the Zilla Courts which were functioning in 1827 were the Police Magistrates who were looking after the Probate and intestate matters. The present Chief Presidency Magistrate is the successor in title of those Police Magistrates. None of the later Acts have taken away any powers that were exercised by the Police Magistrates. And therefore, the Chief Presidency Magistrate in Bombay is the only authority and has powers to issue Heirship Certificates under the said Regulation VIII of 1827, which is kept alive by the Adaptation of Laws Order, 1950. And for the last several years in the past the Chief Presidency Magistrate of Bombay has been issuing such Heirship Certificates. If necessary the Government may be moved to define the word Zilla or amend the said Regulation by putting an appropriate word in place of the word Zilla so as to include the Chief Presidency Magistrate's Court as a Zilla Court for Bombay.

The Accountant General of Bombay does accept such Heirship Certificates issued by the Chief Presidency Magistrate. Mills and other semi-government bodies including the various municipalities also accept such certificates.

The ordinary meaning of the word Zilla is a District. Section 2, sub-a. (4) of the Civil Procedure Code defines the word district; and Bombay is considered a district for the purposes of the Civil Procedure Code. Therefore, the only Court that could be considered a Zilla Court in Bombay, from the previous history shown above is the Court of the Chief Presidency Magistrate. Because the High Court nor the City Civil Court nor the Court of Small Causes in Bombay are the District Courts within the meaning of the Civil Procedure Code.

The amended Court-fees Act, s. 12A, states that no court-fees are chargeable for granting succession certificate for the estate of deceased intestate below Rs. 1,000. The Succession Certificate Act, VII of 1889, also mentions the Heirship Certificates. Sir Dinshaw Mulla in his Mahomedan Law, Ch. V, mentions the grant of Heirship Certificates and they are accepted as valid. The Government Securities Act, s. 13, mentions an Heirship Certificate being issued by the Chief Presidency Magistrate in the Presidency towns upto the face value of Rs. 5,000. And in the mofussil the District Magistrate is the proper authority for the Government Securities Act. The definition given in the said Act says that the Chief Presidency Magistrate is the District Magistrate for Presidency towns.

There are a few authorities reported in the Law Reports. They are: *Shripat R. Kulkarni v. Vithoji M. Patil*¹, *Abaji Gopal v. Ramchandra Chimanaji*² and *Khanderao Rayajirav v. Ganesh Shastri*³.

DR. M. R. JAYAKAR.

On March 11, 1959, the members of the High Court Bar gathered together in the First Court to mourn the loss caused by the sad death of Dr. M. R. Jayakar.

The Hon'ble Mr. H. K. Chainani, Chief Justice, said:

Mr. Advocate General, Mr. Government Pleader and members of the Bar,

We meet today under a tragedy of death. We meet to mourn the death of a great son of this country and an eminent lawyer of this Court.

Dr. Jayakar was called to the Bar in 1905. He was enrolled as an advocate of this Court on the Original Side in the same year. He started practice on the Original Side, but, to use his own expression, he gradually gravitated to the Appellate Side, where he built up a very large practice. He took to public life at a very early stage of his career in 1916, where he distinguished himself in working for the freedom of this country. In 1923, when he was still very young, he was elected as a member of the Bombay Legislative Council. He then moved to the Centre and he became a member of the Central Legislative Assembly in 1926. Thereafter his career alternated between law and politics.

His great work as a lawyer received recognition in 1937, when he was appointed as a Judge of the Federal Court. Two years later he was appointed a member of the Judicial Committee of the Privy Council, where he worked till 1941. In that year he resigned his membership of the Judicial Committee of the Privy Council and then he returned to this country. Here he continued his public activities.

Towards the end of his career, he devoted himself to the cause of education. He was Vice-Chancellor of the new Poona University for eight years from 1948 till 1956, and he put that University on a solid and firm foundation.

He had also a very great love for this High Court, which he showed in 1948 when he presented to this Court the Kirtikar Law Library. He also gave to this Library securities of the value of Rs. 25,000.

By his death we have lost a great and eminent lawyer, a great educationist, and a true patriot. May his soul rest in peace.

Mr. H. M. Seervai, Advocate General, said:

My Lords,

On behalf of the Bar I desire to associate myself with what has fallen from My Lord the Chief Justice. We have come to mourn the loss of one of our members which is not the less keenly felt because for long he has ceased to be in active practice. So far as my connections go, he was a Professor of English in a College to which I am proud to belong and my Professor of Philosophy always used to say that he was second to none in the clarity of his thought and the precision with which he spoke English. He was also an illustration of a broad Victorian culture; of a man of independent means and considerable wealth who could have spent his time in ease but who preferred to devote his time to work for public welfare. The high offices which he filled—he was a Judge of the Federal Court and a Member of the Judicial Committee of the Privy Council—bear testimony to his great legal learning and repute. He was a very fine speaker and I recollect with pleasure listening to his arguments in this very Court before an Appellate Bench. It is a matter of regret that his

¹ (1867) 4 B.H.C.R. 178.

² (1884) P. J. 149.

³ (1887) 1 L.R. 11 Bom. 368.

and should have come so soon because some time before he died he has published the First Volume of his Autobiography and glancing over its pages, I see that he noted for himself that he was never a very good party man because he had essentially a judicial approach. He looked at the other man's point of view and that essentially judicial approach helped him to serve as a peace-maker on many important political occasions.

My Lord, at a time like this not much is required to be said. He himself has said a good deal in his Autobiography and we can only hope that the remaining portions of it are complete, even only in manuscript.

We would wish on behalf of the Bar to express our deep sense of sorrow at the loss of a very distinguished lawyer.

Mr. Y. V. Chandrachud, Government Pleader, said:

My Lords,

We meet today under the shadow of a grievous loss. Death has laid its icy hand on Dr. Jayakar and on behalf of the Bar, I associate myself with the sentiments which have been expressed by My Lord the Chief Justice and by the learned leader of the Bar.

The death of Dr. Jayakar removes from our midst a personality that was cultured and colourful. Dr. Jayakar was a man of many parts and in his versatility he combined within himself qualities which were apparently inconsistent and irreconcilable. Though he was a keen and trenchant debater, he, with his legal training, never failed to appreciate the other man's point of view. Though he was a powerful and picturesque orator, he displayed no particular passion to reach the masses. Education was perhaps his first love, but he took to it in the closing years of his life. It was after he resigned his membership of the Judicial Committee of the Privy Council that he became the first Vice-Chancellor of the Poona University.

Dr. Jayakar was a renowned scholar of Sanskrit literature and with his command over the English language and the mastery over Sanskrit literature, he gathered a lucrative practice. He was a noted Hindu law lawyer. It is said that in those old days a number of rich Hindu widows—and with no Death Duty and with small taxes, there were quite a few of them—used to consult Dr. Jayakar on matters, as for example, whether expenses for a pilgrimage to Benares would fall under the label of that fluid entity called 'legal necessity'. In his later years, Dr. Jayakar shifted his fidelity from Hindu law to Constitutional problems and it is well-known that he acted as a legal adviser to many a princely State in India.

As I said Dr. Jayakar was a man of many parts. It is not widely known that he had a passion for music. For several years, after a hard day's work, he found relaxation in playing the Sitar and he would not retire for the night unless he played the Sitar for a brief while.

It is a sad thought that Death, with one stroke, can destroy so much that is good. Dr. Jayakar is dead but his golden voice will continue to resound through the corridors of these Courts. We, of the Appellate Bar, can ill-afford to forget Dr. Jayakar. For us he will live through his munificent donation of the Kirtikar Law Library.

May his soul rest in peace.

Mr. N. H. Sethna, President of the Incorporated Law Society, said:

My Lord,

On behalf of the Incorporated Law Society and the members of my profession, I beg to associate myself with the sentiments expressed by your Lordship the Chief Justice, the Advocate General and the Government Pleader.

My Lord, there is very little which I can say of Dr. Jayakar except to strike a personal note that perhaps of all those who have gathered here I happen to

be the one person who learnt the Hindu law sitting at his feet and who subsequently briefed him in this Court and had the privilege of acting for him as a solicitor, since he and his family used to be the clients of my former firm M/s. Mervanji Kola and Co. As such, my Lord, I came into contact with him on several occasions and naturally could not fail to admire the manner in which he not only conducted his affairs, but also the manner in which he looked upon the large public interests, particularly during the political struggle which preceded the grant of independence to India.

My Lord, Dr. Jayakar's one great regret so far as Bombay was concerned was that large tracts of land, which formerly belonged to the Marathi-speaking people, went out of their ownership into other people's hands. He used to express great regret at that.

Moreover, my Lord, as a virtual founder, I may say, of the Poona University, he tried his level best to get munificent donations; and I know, as a matter of fact, that on one occasion he narrowly missed receiving the princely sum of Rs. 10 lakhs from a Parsi gentleman who died just before the cheque which he had passed could be honoured at the Bank. My Lord, that was one of his greatest regrets that such a munificent donation was lost to the Poona University which he considered as his pet.

My Lord, there is no doubt that it would be impossible easily to find a man with such versatility, so much energy and who could even before his death, when he was suffering from physical defect, did so much in the cause not only of the country, but generally of education and of law.

May his soul rest in peace.

The following resolution was passed at the Special General Meeting of the Kirtikar Law Library held on March 11, 1959:—

This Special General Meeting of the 'Kirtikar Law Library' places on record the profound sorrow of its members on the sad and sudden demise of Dr. M. R. Jayakar, the founder-father of this Library but for whose abiding interest in the members of the Advocates' Association of Western India, and but for whose munificent gift of very valuable law books, Government Securities worth Rs. 25,000/- and the glass cases, valued in the Trust deed dated 27th January 1943, at Rs. 1,00,000/-, in memory of his maternal grand-father Shri V. J. Kirtikar, this Library would never have come into existence.

This Special General Meeting further places on record with gratitude and admiration, its appreciation of the magnificent services rendered by Dr. Jayakar, to the country as a leading, scholarly and brilliant member of the Bombay Bar, as a profound Jurist, a noted Liberal Politician, as a Judge of the Federal Court, as a member of the Judicial Committee of the Privy Council, as an eminent Educationist, as an Original-Thinker, and author, and above all as a matchless Orator with a grand style, both inside and outside the Courts, whose heroic and sublime words inspired dignity, courage and patriotism among Indians every time and every where.

This Special General Meeting shares with the members of his family the deep sorrow on account of the irreparable loss caused by his departure from us and prays that his Soul may rest in peace.

GLEANNINGS.

COUNSEL'S DUTY TO CITE AUTHORITIES.

LORD BIRKENHEAD L.C. said [in *Glebe Sugar Refining Co. Ltd. v. Trustees of the Port and Harbours of Greenock**] that a point of considerable general importance had arisen upon which he thought it right to make some observations.

* (1921) W. N. 85, 86.

It was not, of course, in cases of complication possible for their Lordship to be aware of all the authorities, statutory or other, which might be relevant to the issues requiring decision in the particular case. Their Lordships were, therefore, very much in the hands of counsel and those who instructed counsel in these matters, and the House expected, and indeed insisted, that authorities which bore one way or the other upon the matters under debate should be brought to the attention of their Lordships by those who were aware of those authorities. That observation was irrespective of whether or not the particular authority assisted the party which was aware of it. It was an obligation of confidence between their Lordships and all those who assisted in the debates in this House in the capacity of counsel. It had been shown that Mr. Sandeman, Sir John Simon, and Mr. Macmillan were unaware of the existence of the section, which appeared to their Lordships to be highly relevant to, and indeed decisive upon, the matters under discussion here. Indeed, the circumstances in which leading counsel were very often briefed at the last moment rendered such an absence of knowledge extremely intelligible. But he himself found it very difficult to believe that some of those instructing learned counsel were not well aware of the existence, and the possible importance and relevance, of the section in question. It was the duty of such persons, if they were so aware, to have directed the attention of leading counsel to the section and to its possible relevance, in order that they in turn might have brought it to the attention of their Lordships. A similar matter arose in this House some years ago, and it was pointed out by the then presiding Judge that the withholding from their Lordships of any authority which might throw light upon the matters under debate was really to obtain a decision from their Lordships in the absence of the material and information which a properly informed decision required; it was, in effect, to convert this House into a debating assembly upon legal matters, and to obtain a decision founded upon imperfect knowledge. The extreme impropriety of such a course could not be made too plain. The learned counsel who had addressed their Lordships were acquitted of personal responsibility in this matter, but he very much hoped that the observations he had thought it necessary to make would prevent a recurrence of that with which he had dealt. It was possible that the views which their Lordships had formed upon this point would be reflected in the order which their Lordships might think proper to make.

A GRAVE OFFENCE

In *Reg. v. Moodie* (*The Times*, January 14) the Court of Criminal Appeal (Lord Parker, C.J., Stable and Donovan, JJ.) substituted a sentence of twelve months' imprisonment for one of three years passed by Ashworth, J., on the appellant, who had been charged with murder, set up the defence of diminished responsibility under s. 2 of the Homicide Act, 1957, and was convicted of manslaughter of his twelve-year-old daughter. The matter came before the Court on an application for leave to appeal against the sentence and the Court treated the hearing of the application as the hearing of the appeal. The child had been an idiot since birth. She could neither walk nor talk and was subject to seizures without warning, so that her mother and her father had to be with her all the time. The tragedy became worse as the child grew. The appellant, who bore an exemplary character, administered under extreme pressure of emotion a dose of a drug known as nembital and put something over the child's mouth to stop her breathing. She died peacefully in her sleep.

The Lord Chief Justice, delivering the judgment of the Court, said that this was clearly a most difficult case in which to pass sentence. If there were only the appellant to consider, one's sympathy would dictate the most lenient of sentences, but there were public considerations. Nothing that the Courts did should lead the public to believe that a killing of this kind was other than a grave offence. The trial Judge had taken the view that considerations of a

public character dictated a sentence of at least three years' imprisonment. But the Court of Criminal Appeal thought the circumstances were such that it was in a position to reduce the sentence. Persons such as the appellant were not criminals in the ordinary sense; they often acted in what they considered were the best of motives and the real deterrent, if deterrent there were, was not a question of how many years' imprisonment they would get.—*L.T.*

RECRUITS FOR THE PROFESSION: SCOTTISH AND AMERICAN PROBLEMS

In England, neither the quantity nor the quality of the human material seeking a legal career has yet given cause for serious alarm, although prophets have not been lacking who foresee a decline in both. Scottish concern, it appears, is with the shortage in number of legal apprentices, believed to be due to such causes as inadequate salaries, holidays, time off for study and personal supervision by partners. The Scottish Association of Law Students and Apprentices is to investigate the "long dissatisfaction with conditions in some legal offices" by issuing a questionnaire to all law apprentices in Edinburgh covering these matters (*The Times*, December 22). Complaints of this nature are certainly not unknown in England, but as yet do not seem to have led to any perceptible diminution in the annual flow of candidates entering articles. In the United States the President of the American Bar Association, writing in the December issue of the Association's *Journal*, expresses uneasiness at the competing attractions of science as a career in present conditions. The full impact of this, in his opinion, has not yet been felt, but it is evident that it is particularly in the sphere of quality of entrants that anxiety is entertained. The Board of Governors of the Association at the beginning of November authorised the institution of a programme to accelerate the recruitment of law students with emphasis on ability: this largely consists of increasing the number of "prelaw counsellors" in "undergraduate institutions of higher learning." The function of the prelaw counsellors is to give advice to students, if they are interested in or are considering the legal profession as a career, and each will be backed by an outstanding member of the legal profession to assist and collaborate with him in his contacts with members of the student body interested in law as a career. Other activities, including the organisation of "prelaw clubs" and vocational conferences, are contemplated. Are we in England thinking ahead in this way?—*S.J.*

AUTOMATISM: THE BURDEN OF PROOF

THE possibility of the accused relying on the fact that, at the time of committing the offence, he was in a state of automatism, was examined by the Divisional Court in *Hill v. Baxter*, [1958] 1 Q.B. 227. One of the points considered by their Lordships was the onus of proof where this defence is raised. Devlin, J., was satisfied that even in cases in which liability depends upon full proof of *mens rea* it is not open to the defence to rely upon automatism without providing some evidence of it. The accused should adduce evidence which shows that his irrational conduct was due to some cause other than disease of the mind, but where it amounts to insanity in the legal sense his Lordship found that it is well established that the burden of proof would start with and remain throughout upon the defence. This important decision has since been considered by the New Zealand Court of Appeal in *R. v. Cottle*, [1958] N.Z.L.R. 999. In that case Gresson, P., reviewed all the cases touching upon the defence of automatism and found that *Hill v. Baxter*, *supra*, was authority for saying that where "automatism is advanced by an accused as negating intent, or as showing him to have acted without any volition, the onus is no more than to provide some evidence upon which a finding of automatism could be based... Once that is done, there comes into operation the overall onus upon the prosecution... to prove the guilt of the accused..." His Lordship agreed with Devlin, J., that there would be great practical advantage if the

burden of proof in cases of automatism was the same as in the case of insanity, although he added the possible qualification that this should only be true when the case of automatism approximates to insanity. In the course of both judgments it was confirmed that as the law now stands insanity is the only matter of defence in which the burden of proof has been held to be completely shifted.—S.J.

UNQUALIFIED MIDWIVES

CHILDREN do not always select the most convenient time or place to be born and it is not uncommon to read of the attendance of an unqualified person upon a woman in childbirth on a train or a bus, or even in an aeroplane. It is unusual, however, to learn of the prosecution of a person without qualifications in this field for helping a woman to deliver her child, yet the Court at Bury St. Edmunds was recently confronted with such a case. A wife decided to dispense with medical attention and to rely on her husband as a midwife. It appears that she adopted this course because the family doctor objected to her husband being present at the birth of her child and there was, therefore, no question of the husband having rendered assistance to his wife in an emergency, although he maintained subsequently that his wife's decision "forced" him to assume responsibility for the delivery. We assume that the prosecution was brought under s. 9 of the Midwives Act, 1951, which provides: "If a person, being either a male person or a woman who is not a certified midwife, attends a woman in childbirth otherwise than under the direction and personal supervision of a duly qualified medical practitioner, that person shall, unless he or she satisfies the Court that the attention was given in a case of sudden or urgent necessity, be liable on summary conviction to a fine not exceeding £10." The section stipulates that its provisions are not to apply to persons who, while undergoing training with a view to becoming a duly qualified medical practitioner or certified midwife, attend a woman in childbirth as part of a course of practical instruction in midwifery recognised by the General Medical Council or the Central Midwives Board, and s. 35 safeguards duly qualified medical practitioners. In the case in question the husband pleaded guilty to the offence but was conditionally discharged.—S.J.

NULLITY: APPROBATION

It may be an answer to a suit for nullity of marriage that the marriage has been approbated, with full knowledge of the facts and of the law, by the party seeking relief. As Lord Watson found in *G. v. M.*, (1885) 10 App. Cas. 171, there is a "rule in the law of England that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect." In *Copham (otherwise Dobbin) v. Copham*, (1959) *The Times*, January 15, a husband maintained that his wife had approbated the marriage and therefore that she should be denied a decree of nullity on the ground that the marriage had never been consummated. He based this contention on two grounds, firstly, that the wife had taken out a summons under s. 17 of the Married Women's Property Act, 1882, after presenting her petition, and secondly, that from 1948 to 1956 she had continued to live with him, to all outward appearances, as a wife. However, Davies, J., could not accept the husband's submissions and held that the wife's action in taking proceedings under s. 17 was not inconsistent with her seeking a decree of nullity. As far as the second argument was concerned, his Lordship found that throughout the eight years the wife had remained in protest against the situation and there was evidence, which the Court accepted, that she had been positively misinformed by a Roman Catholic priest as to the legal remedy available to her.—S.J.

REVIEWS.

The Three New Taxes. By A. C. SAMPATH IYENGER, B.A., B.L. CALCUTTA: Eastern Law House Private Ltd., 54, Ganesh Chunder Avenue. 1959. Roy. 8vo. Pages LXXVII + 668. Price: Rs. 27.50.

THIS is a commentary on the three new taxation statutes recently enacted, namely, (1) The Wealth-tax Act, (2) The Expenditure-tax Act, and (3) The Gift-tax Act. India is the only country in the world in which the expenditure-tax prevails. Gift-tax exists in a number of countries. In no country in the world all these three taxes are simultaneously operating. The learned author has incorporated in the commentary all relevant case-law upto the end of 1958. He has taken pains to explain some of the abstruse provisions of these Acts in simple language and pointed out the lack of clarity due to infelicitous draftsmanship. Departmental circulars and Administrative Instructions under several sections have been clearly set out. In the Appendices to these Acts, Notifications of Central Revenue Board are embodied. Of all the commentaries published on these three Acts this is the most exhaustive work.

Commentaries on the Evidence Act, 1872. Vol. I. By V. B. RAJU, M.A., I.C.S. LUCKNOW: Eastern Book Company, Lalbagh Road. Second Edition. 1959. Roy. 8vo. Pages viii + 656. Price: Rs. 45 for three Volumes.

WE welcome the second edition of this important work. The rapid sale of the first edition fully justifies the utility and popularity of this work. In the commentary the object of each section has been clearly explained and the annotations are critical, analytical and explanatory. The comments are grouped in a logical order under several headings. The first volume contains commentary on sections 1-78 of the Act. The profession will surely find the volume very useful for purposes of reference.

Fundamental Rights and Constitutional Remedies. By V. G. RAMACHANDRAN, M.A., B.L. LUCKNOW: Eastern Book Company, 34, Lalbagh Road. 1959. Roy. 8vo. Pages XL + 572. Price: Rs. 20.

THE learned author has presented to the reader a detailed and elaborate analysis of Fundamental Rights emerging from the Constitution. Constitutional remedies available to the citizen have been carefully discussed. The work has been divided into two volumes. The first Volume comprises Articles 12 to 19. The second Volume will deal with Articles 20 to 51. Various standard works on Constitutional law and Comparative law in England and America have been freely referred to. The Indian case-law bearing on the subject has been brought up-to-date. The whole topic has been dealt with exhaustively.

Principles of Equity. By G. P. SINGH, B.Sc., LL.M. LUCKNOW: Eastern Book Company, Lalbagh Road. 2nd Edition. 1959. Demi 8vo. Pages xvii + 482. Price: Rs. 8.50.

THE present edition has been completely revised and the case-law has been brought up-to-date. Some of the topics in the first edition have been rewritten and some have been rearranged. Substantial additions have been made which go to clarify the subject. Students who have to study the principles of Equity will find the book serviceable.

Law of Torts. By BALBIR SAHAI SINHA, LL.M. LUCKNOW: Eastern Book Company, Lalbagh Road. 1959. Demi 8vo. Pages 25 + 375. Price: Rs. 7.

THIS book is written primarily for students of law. Leading cases have been discussed in detail and cases which have been prescribed by different Indian Universities for law examinations have been vividly described. The growth and evolution of specific wrongs are fully explained.

The
Bombay Law Reporter.
JOURNAL.

May, 1959.

INTERNATIONAL LAW AND ROMAN LAW.*

"We cannot possibly overstate the value of Roman Jurisprudence as a key to International Law, and particularly to its most important department. Knowledge of the system and knowledge of the history of the system are equally essential to the comprehension of the Public Law of Nations. It is true that inadequate views of the relation in which Roman law stands to the International scheme are not confined to Englishmen. Many contemporary publicists, writing in languages other than ours, have neglected to place themselves at the point of view from which the originators of Public Law regarded it; and to this omission we must attribute much of the arbitrary assertion and of the fallacious reasoning with which the modern literature of the Law of Nations is unfortunately rife. If International Law be not studied historically—if we fail to comprehend, first, the influence of certain theories of the Roman jurisconsults on the mind of Hugo Grotius, and, next, the influence of the great book of Grotius on International Jurisprudence,—we lose at once all chance of comprehending that body of rules which alone protects the European commonwealth from permanent anarchy, we blind ourselves to the principles by conforming to which it coheres, we can understand neither its strength nor its weakness, nor can we separate these arrangements which can safely be modified from those which cannot be touched without shaking the whole fabric to pieces."

—Sir Henry Maine: *Village-Communities in the East and West*.

I

THE term 'International Law' was coined by Jeremy Bentham. Till then the term most commonly used for the subject of our discussion was '*the law of nations*' with its equivalents in the other European languages. This term is used even to this day as the title to a number of books on the subject. Brierly's book is only one of many examples. The French equivalent '*le droit des gens*' has been commonly used throughout Europe for many centuries. Klüber, Laurent and Martens and a host of others have used it for the title to their works. Niemeyer uses the German word "*Völkerrecht*". The term 'law of nations' and similar other terms have been used on the basis of the popular expression of Roman Law—*jus gentium*. Attempts were sometimes made by some writers to distinguish the law of nations from the Roman *jus gentium*. Zouche used the term 'the law among nations'—'*jus inter gentes*'—as more appropriately conveying the meaning of the subject, for the Roman *jus gentium* was, strictly speaking, the private law generally of the Empire as contrasted with the '*jus civile*', the private law which applied only when both the litigants were Romans and which in the later years of Rome was, as we shall see below, in part absorbed and in part ousted by *jus gentium*. This term *jus gentium* further became mixed up, even to the extent of being identified, with the term '*jus naturale*', the law of nature, and so *jus gentium* in its wide sense, both because of its intrinsic merit as comprising the very best of

*By Prof. K. R. Mehta, Advocate (O.S.); Chairman, Board of Studies in Law, University of Bombay; Post-Graduate Teacher of Law

(Universities of Bombay and Karnatak); Hon. Professor, Law College, Bombay.

Roman Law and because of such virtual identification with this supposed universal law, became the very foundation of the Law of Nations or, as we now call it, International Law.

The interesting history of the great debt that modern International Law owes to the laws of Rome becomes clearer when the history of Europe and of law connected with these terms is fully understood. We therefore propose here, first, to deal with some of the ways in which *jus gentium* became identified with *jus naturale* and ultimately came to be regarded by the time of Gaius^{*} as the law for all Rome and how, further, in mediæval and early modern Europe, this *jus naturale* or the Law of Nature acquiring for certain interesting reasons even greater strength than before raised the importance of the *jus gentium* in the eyes of Europe, particularly in countries like Germany where the reception of Roman Law was the greatest, so that not only was Roman Law accepted as a part of municipal or State law in many European countries, but even the principles of the *jus gentium* in this very wide sense came to be regarded as the best principles to govern the relations between States and therefore the very basis of *jus gentium* in its widest sense as the law of nations, i.e., what we now call international law.

Secondly, we propose to give a detailed treatment of a number of cases that illustrate the magnitude of this debt of international law to Roman Law.

II

We therefore consider first the development in Roman times of *jus gentium* (and of necessity the development of *jus civile* and its partial absorption and partial ouster by *jus gentium* and also the development of *jus naturale* and its virtual identification with *jus gentium* which identification further strengthened the respect for *jus gentium*).¹ Right from 753 B.C. which is believed to be the year of the foundation of Rome to about the third century before the Christian era, Rome recognised only the law applicable and acceptable to its own nationals—the *jus civile*, based on the customs and religion of the cives—the Roman citizens or nationals. Early law being the result of custom, the term '*jus civile*' generally was at first applied only to these legal customs of the cives and later was extended to include the legislation that began to supplement the customs as the needs of social development increased the ambit of law. To these were added later the edicts of the Praetor as such early legislation also was not sufficient to cover the needs of social development.²

The non-Roman, who came to Rome either to settle there or to trade or to do some other work of his and return to his native land, could not have the benefit of *jus civile*, for early law in its application was national rather than territorial. Where, however, the Praetor Urbanus (who began his work in 367 B.C.) did try to give the non-Roman the benefit of Roman Law, he found that any attempt to administer justice according to the *jus civile* which alone was really Roman Law at the time but which was based on the peculiar customs of the Roman nationals would hardly give satisfaction to the non-Roman whom, to make matters worse, the Roman civis looked down upon as *hostis*, and who in turn disliked the idea of justice according to the law of the cives. These aliens or *peregrini*, as they came to be called, continued to increase in number with the increase of the wealth and power and commerce of Rome and a sepa-

1. For about four hundred years after the foundation of Rome, she continued to regard herself as a city-state and had, even *vis-à-vis* her Latin allies, her own rights and responsibilities on much the same lines as the Greek city-states. When her Empire spread, she regarded the states under her domination as provinces and a kind of Inter-Provincial law as distinguished from inter-municipal law evolved. Some writers have compared this organisation with the formation of quasi-federal states like

Canada and India, but the comparison does not hold good as there were many points of distinction between Provincial law and civil law in the Roman Empire, e.g., in the methods of transfer of ownership of land in Rome and of land in the provinces.

2. This produced the '*jus honorarium*' or the '*jus praetorium*' and in course of time became a skilful combination of this *jus civile* with the *jus gentium* which developed later.

rate body of rules slowly evolved out of a desire to do justice among the increasing peregrini. These peregrini, however, came from such a large number of nations, each with its own laws, that the Praetor could only accept those rules which were common to the various nations in their dealings with one another. A separate officer called the Praetor Peregrinus was therefore appointed for the first time (in 242 B.C.) to deal with cases concerning the peregrini and this law which was intended to consist of rules common to various nations and therefore generally acceptable to the peregrini who came from various nations was called the *jus gentium*—the law of the various gentes or tribes or nations. The Praetor Peregrinus, however great his learning or ability, could not be expected (except perhaps in mere theory) to know all the laws or even the principal laws of all the nations. Starting therefore with the assumption that what would appeal as just and fair to one's sense of what we would now call natural justice would normally be found in the laws of most nations, including, of course, Rome itself, he drew on a supposed Law of Nature or *jus naturale* for guidance wherever the *jus gentium* or rather his own knowledge of the laws of other nations failed him. This Law of Nature he sometimes tried to base on the philosophy of the Stoics, with their slightly misunderstood tenet of 'live according to Nature'.

III

The gradual identification of the Roman *jus gentium* with *jus naturale* began slowly with the efforts of the Praetor Peregrinus to do justice among people of various nations in ancient Rome and culminated in Gaius. In mediaeval and modern Europe a variety of causes further strengthened this identification. We shall, therefore, examine the history of this identification.

This idea of a Law of Nature was accepted in Rome with considerable enthusiasm by some of the greatest Romans. The enormous respect paid to it even at a fairly early stage in Roman history is reflected in the writings of men like Cicero. In a famous passage in his *De Republica*, he observes as follows:

"True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one Master and one ruler, that is God, over us all, for He is the author of this law, its promulgator, and its enforcing judge." (*De Republica*—III, XXII, 33).

Jus gentium therefore drew largely on the *jus naturale* by reason of such great respect paid to it. *Jus gentium* even absorbed some of the rules of mercantile custom, particularly as the peregrini had generally settled in Rome for the purposes of commerce.³ To some extent it also seems true that some of these rules of the *jus gentium* were only adaptations of the rules of the *jus civile* to suit the situation created by the increasing trade and commerce of the peregrini. There is no doubt, however, that *jus gentium* gained considerably in strength from its identification or close relationship with the Law of Nature. At last through the great jurists, the *jus civile* and the *jus gentium* mingled together into the Roman Law of Gaius and of Justinian—ancient Roman Law as we know it now. The term *jus gentium* signifying the actual shape the law took and the term *jus naturale* signifying the ideal towards which the effort was made in order to do justice to men who came from nations with different legal traditions ap-

8. Among the foreigners only the Carthaginians, it may be noted, enjoyed with the Romans the *jus commercium*, the other foreigners having been denied even this right.

peared to the Roman so near each other in meaning that he came to regard the two as very much the same if not identical. Gaius in his *Institute* says,

"The law that natural reason has appointed among all mankind is followed by all peoples alike and is called *jus gentium*...being the law observed by all mankind" (*Gaius Institutes* I).

These words mark the culmination of the identification in Gaius, though Justinian is careful enough to point out one matter in which they differed, *viz.*, that slavery which was sanctioned by *jus gentium* was opposed to *jus naturale*—the law of nature. (Justinian: *Institutes*, I). In the *Institutes* are quoted the following words of Gaius:

"The Roman people apply a law which is partly its own and partly is common to all men."

The very definition of *jus gentium* given therein and in the *Digest* provides the explanation of the cosmopolitan character of Roman Law. This claim to universal validity by Justinian for Roman Law constituted for posterity the greatest appeal of Justinian's law-books. The foundation of this universal validity purported to be a rational foundation which could be provided only by an absolute standard of justice. This standard is *jus naturale*. Its existence is attributed to a will superior to that of any law-giver.

"The laws of nature which are most equally observed by all nations remain always stable and inscrutable, enacted as they are by some kind of divine providence." (*Inst.* I, ii, II).

The influence of the belief that Roman Law—*jus gentium*—was the embodiment of natural justice was so great that the Roman system of laws continued for centuries to be regarded as universally valid because of its coincidence with the law of nature. This belief has remained in some measure to this day. Its strength continued to be so great that Leibnitz writing in 1670 to Hobbes said that in attempting to reduce Roman Law to its general elements he found that at least one half of it consisted of "pure natural law."⁴

Whatever the cause of this complete or almost complete identification of *jus gentium* with *jus naturale*, what is relevant for our purpose is that this *jus gentium*, mostly because it was for various reasons over a number of centuries (as seen above) identified with *jus naturale* came to be regarded as most conducive to the dispensation of justice everywhere, and not only absorbed and fully replaced the *jus civile* in Rome but was adopted in modern Europe as the basis for modern international law. Whatever criticism Pollock and others may offer of Maine's theories the following sentences of Maine in our opinion hold good to this day:

"Setting aside the Conventional or Treaty Law of Nations it is surprising how large a part of the system of International Law is made up of Roman Law. Wherever there is a doctrine of the jurists affirmed by them to be in harmony with the *jus gentium*, the Publicists have found a reason for borrowing it, however plainly it may bear the mark of a distinctly Roman origin."⁵

We would here add that even the International law relating to treaties in medieval and modern Europe reminds us somewhat of certain Roman rules concerning contracts (*vide infra*). It is also of interest to note that the parties to treaties even in this century are referred to as the 'High Contracting Parties'. In fact, the Covenant of the League of Nations begins with this very expression. Even Grotius while he distinguished treaties from contracts subordinated them to a broad concept of contract.

The French version of the term '*le droit des gens*' and the word '*gens*' in French get identified with the Latin '*gens*' and '*gentes*'. Even in first naming modern international law 'the law of nations,' the Publicists treated the Roman *jus gentium* as something so close to if not identical with the Law of Nature (*jus naturale*) that they considered that the rules of such *jus gentium* with its foundations in natural law and natural justice were the best rules

⁴ A.P.D'Antreves: *Natural Law*.

⁵ *Ancient Law*.

on which *jus gentium* in the wide sense of the law of nations could draw especially when the rules of custom either coincided with the rules of *jus gentium* or supplied no positive help in providing for certain situations for which rules had to be formed.

Further, this *jus naturale* became mixed up with Canon Law and thus attracted even greater respect in Europe. The medieval and modern European development of the law of nature gave it further strength.

An interesting development was that in the twelfth century Gratian in the *Decretum* took the extremely bold step of stating at the very head of the body of Canon Law as we now have it that the law of Nature is

"...nothing else than the golden rule comprised in the law and the Gospel which bids us do as we would be done by."⁶

St. Thomas defined the relation more fully by saying⁷ that they are not substantially different, but that natural law is divine law so far as revealed through the medium of natural reason. This identification was further carried over by the glossators into the teaching of Civil as well as of Canon Law. Azo even went so far as to explain Ulpian's *natura* by saying in effect that it is God Himself.⁸ The great strength this Law of Nature thus developed and with it the *jus gentium* by virtue of the above identification requires a fuller treatment than is possible here. One indication of how *jus gentium* and *jus naturale* together gained in strength in medieval and early modern Europe is seen in the peculiar fact that though some of the European jurists were aware of the points of distinction they used the verbal ambiguity of such terms to support their drawing on the *jus gentium* of Rome for the rules of the law of nations (International Law). Further, not only did Gratian, St. Thomas, Azo and others in Europe strengthen this law of nature, but as the Protestant writers did not accept the authority of the Church of the Canon Law and of Aristotle and the Roman disputants of the counter-Reformation were anxious to confute the Protestants on their own ground, the tendency of sixteenth century controversy as well as of Renaissance learning in general was to bring the texts of classical Roman Law into greater prominence. Thus a more definitely secular and legal cast was given to the whole treatment of the Law of Nature and the way was prepared for the great construction of Grotius.⁹

The process that followed has been briefly but effectively described by Maine in the following words:

"Having adopted from the Antonine jurists the position that *jus gentium* and *jus naturae* (sic) were identical, Grotius, with his immediate predecessors and his immediate successors, attributed to the Law of Nature an authority which would never perhaps have been claimed for it, if 'Law of Nations' had not in that age been an ambiguous expression."

Pollock is of the opinion that though Grotius did not suppose the modern rules of conduct between sovereign States to be contained in the classical *jus gentium*, yet as he set out to conciliate princes and their advisers, he did not refuse the help of a verbal ambiguity about the term *jus gentium*.¹⁰ Whatever the extent to which Grotius relied on Roman Law for the development of the theories of International Law, it is clear that Grotius like Gentilis took *jus gentium* as the *rule of natural reason attested by general agreement*. Suarez and Hooker had also used *jus gentium* in the sense of the law of nations (international law), though Suarez did recognise the two meanings of *jus gentium*. As throughout Western Europe (except in England), Roman Law was received as a kind of universal law, and as modern international law began to be rapidly developed at about this time, it is obvious that it incorporated some purely Roman legal conceptions. We are not sure that it is truly of as great importance for our purposes to consider here whether "Grotius and his con-

⁶ Pollock: "History of the Law of Nature."

⁷ *Prima Secundae* (See Pollock, *ibid*).

⁸ Maitland: *Bracton and Azo* 32, 33. (Pollock, *ibid*).

⁹ Pollock: "History of the Law of Nature."

¹⁰ Pollock's *Commentaries on Maine's Ancient Law*.

temporaries misunderstood the classical *jus gentium* or supposed the modern rules of conduct between sovereign States to be contained in it," as Maine would seem to suggest. Pollock is right in refusing to believe that Grotius could have been ignorant of the exact implication of the Latin expression *jus gentium* and in suggesting that Grotius took advantage of a verbal ambiguity to advance his own cause, but even Pollock admits that Maine's

"observations as to the application of Roman ideas in the modern law of nations and especially the treatment of every independent State, with regard to its territory as if it were an owner or claimant of ownership under Roman Law and the relatively modern character of purely territorial dominion show the author at his best."

We would therefore consider now some of the instances that show the indebtedness of International Law to Roman Law either direct as in Germany and other countries or by what Maine calls 'an irregular filiation' (when referring to the misconception of the term *jus gentium*).

IV

Before considering the broad principles of Roman Law (*jus gentium* and *jus naturale*) that underlie the foundations of International Law we think it necessary to consider briefly some interesting developments.

(A) A factor which increased the strength of this basis of modern international law is that in England many of the questions of International Law often arise in the Admiralty Jurisdiction and, as can be seen from the classical judgments of the great Lord Stowell, some of the most important questions arose from the exercise of belligerent rights at sea in the war against the French Republic and Empire. Lord Stowell in his judgments administered what was really *jus gentium* in the fullest sense. He regarded the Court of Admiralty as a Court of the law of nations. As he observed in his judgment in *The Maria*¹¹

"...the seat of judicial authority is locally here, in the belligerent country, according to the known law and practice of nations but the law itself has no locality."¹²

Lord Stowell seems to have treated with something like contempt the suggestion that nations are bound by the law of treaty only and that there is no other law of nations than that which is derived from positive compact and convention.¹³ He thus foreshadowed the increasing strength of the general principles of *jus gentium* in the broad sense of the law of nations.

(B) *En passant*, we may note another indication of the strength of this basis in the fact that the authority of Private International Law (though, contrary to what laymen believe, it is not really a part of International Law as generally understood among lawyers) was originally founded on considerations of natural justice. Though it is not *jus inter gentes* yet it has been sometimes regarded as a part of *jus gentium*.

(C) Yet another interesting development to note is that of the *law merchant*, which claimed authority independent of any particular State as being founded on general reason and on usage which had been approved as reasonable. This law merchant was adopted in England in the time of Lord Mansfield as part of the Common Law of England, and is itself a branch of the Law of Nature. It was accepted into the *jus gentium* as a part of *jus naturale*. Through the revival of the study in Europe as well as through the reception of Roman Law into Germany and other places in Europe, this law merchant influenced profoundly the Publicists and their writings on International Law. What is not often recognised, however, is the fact that while Roman Law served as a common standard for land commerce, the law for sea commerce had its birth in the code of the Phœnicians especially of the State of Rhodes—The *Lex Rhodia*.¹⁴ Rome, however, by widening constantly the scope of her *jus*

¹¹ See also *The Two Friends*, 2 Rob. 280, and *The Waltingham Packet*, 2 Rob. 82.

¹² 1 Rob. 341, 350.

¹³ See his remarks in *The Helena*, 4 Rob. 7.

¹⁴ Ashburner: *Rhodesian Sea Law*, London, 1909.

gentium and often identifying it with jus naturale seems to us to have absorbed a few of these rules which ultimately found their way into modern International Law.

V

Having thus traced the history of the great hold the Roman jus gentium acquired through the centuries over Europe and its laws particularly the law of nations for which jus gentium was sometimes claimed as an equivalent, we consider the broad principles of jus gentium and jus naturale that formed the basis of our law of nations or international law.

The process referred to above and summarized by Maine as resulting from the Antonine position that jus gentium and jus naturale were identical culminated in the hands of Grotius and his immediate predecessors and successors into a doctrine of the Law of Nature being accepted as a fundamental doctrine of the Law of Nations, viz., that just as all men according to the Law of Nature are equal so *all independent communities or States, however great or small in size or power, have full and equal rights in the absence of any definite reason for inequality.* It is true that even in modern international law superior force furnishes cynical reasons for such inequality as in the case of the veto in the UN (Security Council) and the permanent membership granted to the powerful nations.¹⁵ Nevertheless, this principle of the equality of nations as a principle cannot now be openly criticized by any nation.

The concept of 'tribal sovereignty' of the Middle Ages as exemplified in early titles like King of the Franks (instead of King of France) owes to a great extent its slow disappearance to feudalism which linked personal duties and therefore personal rights to ownership of land. Feudalism, however, fell into disrepute; but when before a Europe reeling under the horrors of the Thirty Years War Grotius's "De Jure Belli ac Pacis" came out, the views of a *State system* to which the Roman juriseconsults with their foundations in jus gentium and jus naturale were believed to have given their blessings and which was based on the analogy of the Roman law of property (title to a part of the surface of the earth) were readily accepted and State Sovereignty replaced tribal sovereignty and after the Treaty of Westphalia (the first piece of what may now be called "international legislation") the State System of Europe emerged in its full strength.¹⁶ An essential part of the State System is the above concept of the equality of States and these concepts of equality and of territorial sovereignty have in this manner been therefore based on the jus naturale with which the jus gentium of the Romans had become identified. These doctrines constitute two of the very foundations of modern international law.

VI

Having dealt with the evolution of territorial sovereignty from the doctrines of jus gentium, we consider the principles governing the acquisition of territory which International Law has derived from jus gentium. As Maine puts it:

"The rules which govern this acquisition together with the rules which moderate the wars in which it too frequently results are merely transcribed from the part of the Roman Law which treats of the modes of acquiring property jure gentium."

The methods of acquiring property which was res singulae as distinguished from acquiring property by universal succession were (a) *civiles modi*, the methods peculiar to Rome and to its jus civile, and (b) *naturales modi*, the methods common to all nations under the jus gentium. These latter got so mixed or identified with the jus naturale that Justinian himself was misled

15 Oppenheim I §168c.

16 Pollock is somewhat critical of some

parts of this theory of Maine.

(Institutes ii I ii) into calling them by far the oldest. The very expression *naturales modi* is tell-tale. These methods we consider below:

(i) *Occupatio* i.e. taking effective possession with intent to become owner and exclude every one else from the enjoyment of a res that belongs at the moment to nobody, e.g., *res nullius* or, if the res has been abandoned, *res derelicta*. A relevant case is that of *insula nata*, an island formed in the sea (J. ii I 22). In International Law *occupatio* takes the form of establishing sovereignty over territory over which no other State has exercised authority or which has been abandoned by the State formerly in occupation. As in *jus gentium* so too in International Law, the test is effectiveness of exclusion of others from control, i.e., the occupation should not be fictitious but real and should therefore be backed up by possession and administration. In the *Eastern Greenland Case* between Norway and Denmark¹⁷, the Permanent Court of International Justice held that occupation was effective if the claimant State displayed the will to exclude others and the intention to exercise sovereignty. What weighed with the Court was the fact that upto 1931 no State except Denmark had laid any claim to the territory. Similarly, in the recent *Minguiers and Ecrehos Case*¹⁸ where Britain and France both claimed certain islets in the Channel, the Court held in favour of Britain who proved the actual exercise by her of "State functions", i.e., acts of administration, sovereignty and exercise of jurisdiction.¹⁹

A further extension of this Roman doctrine of *occupatio* is seen in the decision of M. Huber as Arbitrator in the *Island of Palmas Arbitration*²⁰ where it was held that a mere act of discovery by a State is not enough to confer sovereignty, but that such inchoate title must within a reasonable time be completed by effective *occupatio*. The island was, therefore, adjudged to the Netherlands with their long continuous exercise of effective authority though the United States claimed the island as successor to Spain, the original discoverer.

(ii) The Roman method of *accessio* as a means of acquisition of territory both in our private law (vide the extended case of accession in our Transfer of Property Act, s. 63) and in International Law either of a *res nullius*, as in alluvion, or of a *res aliena* has received almost universal recognition. Lord Stowell's judgment in *The Anna*²¹ is in this respect remarkable. In 1805, during the war between Great Britain and Spain, the British ship *Minerva* captured the Spanish ship *Anna* near the mouth of the Mississippi. The United States claimed the *Anna* saying she was captured within the American three-mile limit. The claim was allowed on the ground that though the place of capture was more than three miles from the United States coast yet it was within three miles of some small mud islands composed of earth and trees which had drifted into the sea.

It is clear that the rules of Roman Law regarding the division of ownership over alluvial deposits in streams or rivers between the riparian owners are by analogy also applied in International Law. Any large international river, e.g., the Danube, would supply us with illustrations subject, of course, to special rules like those of the Danube Commission.

(iii) Though Grotius rejected for the purposes of International Law the Roman civil method of *usucapio* which applied to land in Rome, yet he accepted immemorial *prescription*. River and G. F. Martens have rejected this. Vattel, Wheaton, Hall and others, however, take the opposite view and do not even insist on prescription being immemorial. This seems to be an approximation not towards the *jus civile* method of *usucapio* but towards its *jus gentium* analogue of *praescriptio longi temporis* originally framed for land in the provinces and later after the abolition by Justinian of *usucapio* (in the case of land) enacted for all land whether a *fundus italicus* or a *fundus provincialis*.

¹⁷ Pub. P.C.I. J. (1933) Series A/B, No. 53.

¹⁸ I. C. J. Rep. 1953, 47, pp. 68-70.

¹⁹ *Stärke*, Ch. VII.

²⁰ 1923, American Journal of International Law (1923), Vol. 22, 875-6.

²¹ 5 C. Rob. 373.

In International Law, however, no definite period of time even as in *præscriptio longi temporis* can be laid down. Further, *bona fides* which, except to some extent in the three cases mentioned by Gaius of *usucapio lucrativa*, was regarded as essential in Roman law was not regarded as essential in International Law. This is perhaps in the very nature of things, for the result of superior force especially if acquiesced in by the other State over a long period of time is sometimes accepted in International Law as being in conformity with international order. The decision in *The Island of Palmas* case is, however, quoted as a precedent for the acceptance of *præscriptio* in International Law. The award itself is not based on *præscriptio* but Johnson in his 'Acquisitive prescription in International Law'²² does make out a case for title by prescription in International Law where possession is under a claim of sovereignty for a considerable length of time, publicly, peacefully and without interruption. He even extends this doctrine to what he calls *consolidation*—acquiring title by repeated acts of authority over a long period even over *res nullius*.²³

(iv) The concept of territorial sovereignty in international law and its relation to absolute title to property in Roman Law has already been referred to above.

(v) In one respect, however, viz., the acquisition of *jura in re aliena*, the influence of Roman Law has been regarded as tending to 'confusion' in International Law, viz., the doctrine of international servitudes. The attempt to rely on this doctrine in *The Wimbledon*²⁴ and in *The North Atlantic Coast Fisheries Arbitration* (1910)²⁵ did not succeed. The doctrine, however, of 'acquired rights' of non-coastal States, e.g., long established practices of fishing in the areas over which new sovereign rights are now claimed was expressly recognized by the International Law Commission in its final Draft of 1956.

Having dealt with the acquisition of *res singulae* in Rome and the way the principles have been almost bodily taken up in international law, we deal with the acquisition not of one *res* but of an aggregate of rights, i.e., *juris universitas*, viz., what in Roman Law is called Universal Succession. The idea of State succession is built up by Grotius into International Law in his *De Jure Belli ac Pacis*, II, XIV, 1, by analogy from this Roman Law of universal succession, viz., the substitution of the heir for a deceased person and the clothing of that heir with the rights and obligations of the deceased. This analogy holds good generally in the Law of State Succession.²⁶ As a result of the peculiar circumstances arising from the corporate personality of the State, however, the rules framed by Grotius cannot all be applied strictly.²⁷ For instance, after the Third Partition of Poland in 1795, the rights and duties to which Austria, Prussia and Russia succeeded varied with the different persons to or by whom they were owed before the partition. The matter is generally therefore determined by treaties. Oppenheim²⁸ does not accept fully the doctrine of general succession but accepts the operation of the doctrine of succession in specific cases. Brierly²⁹ seems to think that the theory does not give much help. It seems to us, however, that the rules based by Grotius on the Roman doctrine are of help at least in cases of *universal* succession.

VII

We may now refer briefly to treaties and the Roman Law of Contracts. To some extent the way in which the law relating to treaties was developed reminds us of the Roman Law of Contracts.³⁰

(i) As observed above, though Grotius distinguished treaties from contracts, yet he did subordinate his theory of treaties to a broad concept of contract.

²² British Year Book of International Law, 1950, 332, 354.

²³ Cambridge Law Journal 1955, 215-255.

²⁴ 1923, Pub. P.C.I.J. Series A, No. 1.

²⁵ Green's International Law through the Cases (1951), pp. 839 et seq.

²⁶ Fenwick, Part II, ch. VII E. referring

to Fekkenfeld: Public Debts and State Succession.

²⁷ Fenwick, *ibid.*

²⁸ Oppenheim: International Law, I, § 81.

²⁹ Brierly: Law of Nations, p. 86.

³⁰ Gould, p. 52.

Except for allowing resort in some cases to the doctrine of *rebus sic stantibus*, he emphasized the importance of keeping faith and of respecting treaties. This would appear to be based on the conception of *pacta sunt servanda*.

(ii) *Dolus* (fraud), (iii) *metus* (threat of harm or coercion) and (iv) fundamental mistake were cases where the Roman Praetor granted relief from the performance of contracts. Fraud, error and duress have generally been recognized in international law as grounds for avoiding treaties.

Though no clear case of fraud has been reported, yet something like it was alleged in the case of the settlement of the status of Batum at the Congress of Berlin when it was suggested that Prince Gortchakoff employed a map with a boundary altered and different from that earlier agreed to between him and Beaconsfield (Cecil's *Life of Lord Salisbury*). The matter was ultimately compromised.

A case of duress has been clearly made out in the forced establishment of the German protectorate over Bohemia by the German-Czech Treaty of March, 1939. There a distinction is sought to be made between duress against the negotiators on behalf of a State and duress against the State itself.³¹ We are of the opinion that while such a distinction might be sound in law, it would not secure international justice.

VIII

It will have been noticed above that Maine regards international law as being as much based on the Roman rules which moderate the wars as on the rules which govern the acquisition of property. We turn, therefore, to another foundation of International Law in the law of ancient Rome—the Law of War. The Romans gave to modern Europe the example of a State with legal rules for its foreign relations. The modern doctrine of *justum bellum* may be compared to the *jus fetiale* doctrine of conducting wars in a just cause. The concept of a just war as developed by Roman Publicists sought to distinguish lawful wars by their causes.³² Roman Law recognized four different just reasons for war.³³ These have all passed into modern International Law: violation of Roman territory, violation of the protection Rome insisted on her ambassadors being given (see the modern doctrine of immunity of envoys); violation of treaties; help given to a country at war with Rome (see the modern doctrine of an unneutral act.)

This concept of a just war was later developed by Western theologians.³⁴ These revived the *bellum justum* theory. The legal obligation to negotiate before using force was recognised by Roman Law. The College of Fetiales of Rome (a special group of twenty priests) presented Roman demands through ambassadors or heralds and asked for redress before Rome resorted to force. The prior demand for reparation, *rerum repetitio*, was necessary. If redress was in spite of such prior demand not forthcoming and if the fetiales gave a verdict that the foreign nation had violated its duties, war could be declared and it could in law be a just war. The prosperity and increasing power of Rome stunted, however, the further growth of the law of war. The growth of such an international law of war to regulate relations with peoples already brought under her sway became feeble, as Rome with her increasing might also began to regard those outside her vast empire as nations either to be conquered or to be held at bay (though even in this latter objective she sometimes did not succeed as in the case of the defeat and capture of the Emperor Valerian by the Iranian Emperor Shahpur or Sapor). Grotius basing his enunciations on Roman Law was emphatically of the opinion that a declaration of war was necessary, though some wars in the seventeenth and eighteenth centuries began without a formal declaration. The necessity of an ultimatum, however, was recognized by the nineteenth century. It speaks ill of our twentieth century

³¹ Fenwick, p. 440.

³² C. Phillpson.

³³ Oppenheim I, 76-77; Gould 39-40.

³⁴ Kelsen: *Law and Peace in International Relations*.

civilization, however, that an international rule, recognized by a chivalrous power like Ancient Iran and by the laws of Rome (till the latter becoming too powerful looked down upon the rest of the nations) and recognized in the time of Grotius even in spite of the barbarities that otherwise marked the wars of those ages, should have been so cynically violated in this century on several occasions, e.g., Pearl Harbour.

IX

The Roman *doctrine of postliminium*³⁵ which applied both in private law and in public law has been adopted in various forms by modern law notably in the rule of modern International Law under which acts which the invader was not competent to perform under international law are rendered invalid. For instance, public or private property illegitimately appropriated and sold may afterwards be claimed from a purchaser without payment of compensation.³⁶

X

We now deal with the influence of Roman Law on other parts of International Law governing the foreign relations of States:

(i) Grotius, who made the first effective plea for a larger freedom of the seas than certain naval powers were willing to concede, based his argument on principles derived from Roman Law, viz., that the Roman principle of *occupatio* governing ownership of land be applied by analogy to the open sea which just could not be occupied like land and therefore must have been intended by nature to be free to all. He further argued in his *Mare Liberum*, when defending the right of the Dutch to navigate the Indian Ocean to which Portugal laid exclusive claim, that the sea being inexhaustible in use was not susceptible of *occupatio* which was necessary in the case of things the utility of which could only be conserved for a particular State or person if they became its or his private property. It is to the credit both of Grotius and of Roman Law on which he drew so largely for his arguments that his view has succeeded while international law has not accepted the opposing views expressed in famous works like the posthumously published Notes of Gentilis in defence of Spanish claims or the work of Paolo Sarpi in defence of the claims of Venice in 1676 or the pleas in defence of English claims by John Selden in his *Mare Clausum* in 1618 or by Sir John Burroughs in his 'Sovereignty of the British Seas' in 1653. Till Bynkershoek published his *De dominio maris* in 1702 (when conceding effective occupation within the three-mile cannon-shot limit from the shore) and Vattel supported Grotius repeating his very arguments more than a century later in *Droit des Gens* (1758), Grotius was almost unsupported, but his effective use of the arguments based mainly on the Roman *occupatio* coupled with the force of events in later history, when the necessity of vast facilities for quick navigation and increasing commerce made itself felt, enabled his view to prevail in the end.³⁷

(ii) Legation as an institution for communication and negotiation with foreign Governments is traceable to (among other nations) Rome.³⁸ The protection and privileges afforded to legations rested, however, more on religion than on civil law. (Some fine examples of the influence of religion are seen in the *Shahnameh*, a subject which may be treated elsewhere.)

XI

The influence of Roman Law on the way in which matters of international law and relations are dealt with is greatest in the case of countries where the reception of Roman Law has been complete or almost complete.³⁹ The example

³⁵ Gould, 665.

³⁶ Hyde, *International Law* III 992; Hall, *International Law*, 8th edition, 1924, 162-66; Pottem: *Freedom of the Seas*, pp. 51-54.

³⁷ Fenwick, p. 418.

³⁸ Gould, p. 263.

³⁹ Buckland and Mc Nair, 14.

of extradition matters is very much in point. Extradition is based on treaties, not on custom. A number of Roman Law countries such as France and Germany refuse extradition of their own citizens and prefer that they be tried by their own Courts for grave crimes committed abroad. The Constitution of Yugoslavia of September 1931 contains an express provision forbidding the extradition of nationals. Article 112 of the Weimar Constitution also prevented such extradition. Great Britain does not accept this view. (See the case of *Tourville*). A consideration of the cases like extradition and State succession makes us, however, realize that international law is always in danger of being moulded by powerful nations to a shape that merely satisfies their self-interests rather than justice alone.

This is sometimes seen in a conflict between Roman Law and Common Law which extends sometimes to the field of International Law. Two examples will suffice. In *Hooper v. United States*,⁴⁰ the Court of Claims employing a Common Law doctrine stated that a treaty might become invalid for want of consideration, despite the fact that international law is acknowledged to be *generally* based on Roman Law which requires no consideration for contracts.

In the case of retaliation in the form of unrestricted submarine warfare by Germany, the United States opposed it on the Common Law reasoning by which the United States sought to extend to submarines the prohibition applicable to surface vessels. The German view was that International Law not being based on Anglo-Saxon Common Law but on modern Roman Law the maxim "what is not prohibited is permitted" applied in view of the invalidity of the Declaration of London as a result of Britain's failure to ratify it.

Another instance of the divergence of outlook is seen in the Common Law attitude of Lord Sumner in *The Kron Prinsessin Margareta*.⁴¹

"Valuable as the opinions of learned and distinguished writers must always be as aids to a full and exact comprehension of a systematic law of nations, Prize Courts must always attach chief importance to the current of decisions and the more the field is covered by decided cases the less becomes the authority of commentators and jurists."

To these words which embody even in such matters the Common Law attitude of the rule of *stare decisis* stand in some contrast two of the articles of the Statute of the International Court of Justice, the Court that deals with International Law, showing how International Law is based on Roman Law: Article 38:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) International conventions...
- (b) International custom...
- (c) the general principles of law recognised by civilised nations,
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

Article 59 says tersely:

"The decision of the Court has no binding force except between the parties and in respect of that particular case."

XII

Rome conquered many lands and nations with the power of her arms, but the Roman Empire could not last for ever. What the power of her arms failed to achieve, however, her laws have more than achieved. She has conquered a greater part of the world by her laws than by her arms and for a much longer duration of time. The influence of her laws on International Law will be permanently felt.

[Copyright reserved by the author.]

40 See Gould, *Int. Law*.

41 [1921] A.O. 486, 495.

GLEANINGS.

WINTLE v. NYE

IF regard is had to Lord Justice MacKinnon's warning to law reporters, which we quoted in "Judgments as Literature" last week, CIX L.J. 7, it seems probable that the case of *Wintle v. Nye* will not be reported. It established no new principle of law, nor modified nor negated any existing principle. Yet when a layman, having conducted his own case throughout the Courts, succeeds in the House of Lords after he has failed in both the High Court and the Court of Appeal, and succeeds on what was a question of fact, the case is sufficiently remarkable to repay examination. Colonel Wintle claimed as assignee of one of the next of kin of a Miss Wintle, who was born in 1871, made her will in 1937, made a codicil to it in 1939, and died in December, 1947. He maintained that when she executed her will and the codicil she did not know and approve their contents. There was no question of her testamentary capacity, but the issue was whether she understood what gifts she was making. In March, 1948, probate of the will and codicil was granted to the respondent, her solicitor and executor. In the action Colonel Wintle claimed that the Court should revoke the probate and should grant letters of administration to him and his co-plaintiff. The respondent counterclaimed for probate in solemn form. Thus the burden of proving that the testatrix understood and approved the will and codicil was on the respondent, Mr. Nye.

The burden of proof that the testatrix knew and approved the contents of her will and codicil was, we repeat, on Mr. Nye. He was admitted as solicitor in 1906 and he, and his father before him, had been solicitors to the testatrix and to her father and mother. In 1936, on the death of the testatrix' brother, Mr. Nye had been given a power of attorney over her affairs and managed her property for her. In 1937 the testatrix was considering making her will, which Mr. Nye, as her solicitor, would prepare. The net value of her estate was estimated at this time at £38,000. Her solicitor and a bank were to be executors and the residue was, according to a first draft, to go to eight hospitals. Various changes were made over quite a long period and in the result the bank was not appointed executor, her solicitor was sole executor, and the residue was left to him. The testatrix did not have separate advice, but her solicitor deposed that he had told her that she should consult another solicitor and that she had said that she did not wish to do so. Subsequently, in the early days of the war, a codicil was executed which cut out three reversionary legacies to charity which were contained in the will; this alteration was made allegedly, it appeared, for the benefit of the annuitant on whose death the legacies would be payable, but the result in fact would be that the residuary legatee would benefit.

The testatrix, we repeat, did not have independent advice and the burden of establishing her knowledge and approval of the will and codicil lay on the respondent, her solicitor and residuary legatee. In the House of Lords Viscounts Simonds said that the law was not in doubt and had been stated correctly by the Judge at first instance. The fact that a solicitor or other person who has prepared a will for a testatrix took a benefit under it created a suspicion that the person propounding the will had to remove. It might be a suspicion that was easily dispelled or it might be so grave that it could hardly be removed. In the present case the circumstances had been such as to impose on the respondent, who was seeking to propound the will, as heavy a burden as could well be imagined. In the summing-up in the Court of first instance the law had been correctly stated, but the Court had not been vigilant in scrutinising the evidence before the jury. The jury had had a general direction to regard with suspicion evidence given by the author of the will, but the Judge had neglected his own advice and had turned an indulgent eye on the facts proved in evidence; he had not examined them with the vigilant scrutiny that

the law required. So the appeal was allowed and the will and codicil were declared invalid in respect of the beneficial gifts to the respondent. The respondent was allowed his costs in the High Court out of the estate but bore his own costs in the Court of Appeal and the House of Lords. Much has appeared in the public press on the success of the appellant before the House of Lords, and, indeed, he deserves congratulation and the reward of his tenacity. The essential facts seem, however, to point fairly clearly towards the ultimate conclusion; and perhaps the true moral to be drawn from the course of the proceedings is that much depends on the way in which matters are presented before a jury of laymen.—*L.J.*

NO DAMAGES FOR PERJURY

IN giving judgment for the defendant on a preliminary point of law, that an action for damages will not lie at the suit of a person alleged to have been damaged by false evidence given against him, the Lord Chief Justice to a large extent relied on *Watson v. M'Ewan* [1905] A.C. 480, where (at p. 486) Lord Halsbury said: "It is settled law and cannot be doubted that the remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons the conduct of legal procedure by Courts of Justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of the evidence they have given. So far, the matter, I think, is too plain for argument" (*The Times*, July 24, 1958).

Is it then the position that the law bargains with the compulsive witness and says in effect: we compel you to come but because you come against your will no one can make a claim against you in respect of the evidence? If so, it is not a bargain to be proud of notwithstanding that there is a proviso to the effect that he may be indicted for perjury. It seems odd that a man can be made liable civilly for negligence and criminally, too, if the negligence is gross, yet for a deliberate act of falsehood in a Court of law he is relieved of civil liability as the price of getting his false and misleading statements on oath.

In practice indictments for perjury are rare mainly because of the difficulty of proving that a particular statement made by a witness was to his knowledge false. From this it is reasonable to assume that if perjury were civilly actionable it would not cause an appreciable lengthening of the civil cause list.

Apart from the quoted authority, arguments based on the fact that this type of action had been tried out centuries ago unsuccessfully, and that since then no action had been allowed, were advanced. A case of *Dampart v. Sympson* (1596), Cro. Eliz. 520, records that the Court refused an action for want of a precedent. The Lord Chief Justice interposed at the citation of this case (as reported) pointing out that prior to that time perjury had not been an offence: that it was the Star Chamber that took it upon itself to punish perjury—one of the few good things that it did.

For the plaintiff it was pointed out that in Coke's Institutes, Pt. III, c. 74, it was stated that a civil action could have been brought in the Star Chamber for damages; other authorities were quoted including *Skelhorn v. Harrison* (1597), Cro. Eliz. 714, which was an action on the case relating to bailors. At the mention of these bailors the Lord Chief Justice quoted from the "Pickwick Papers" referring to the incidents when Mr. Pickwick was arrested on a warrant after losing the action brought against him by Mrs. Bardell. He chose to go to the Fleet Prison after his attorney had described the attractions of the various prisons from which he might make his selection and after further arranging the proper timing so that a *habeas corpus* could be applied for when there was a Judge in chambers; and after Mr. Pickwick had arranged to have a chop before leaving.

There is a description of his arrival at Serjeant's Inn when he sees what

turn out to be two "men of straw" (as the Lord Chief Justice describes them, though Dickens does not mention this description nor that they usually had straws in their mouths). One of them followed Pickwick and in due course Perker, his attorney, explains that the man was "a bail".

"Yes, my dear sir, half a dozen of 'em here. Bail you to any amount, and only charge half a crown. Curious trade, isn't it?" said Perker, regaling himself with a pinch of snuff.

• 'What! Am I to understand that these men earn a livelihood by waiting about here to perjure themselves before the judges of the land at the rate of half-a-crown a crime?' exclaimed Mr. Pickwick, quite aghast at the disclosure.

'Why, I don't exactly know about the perjury, my dear sir,' replied the little gentleman. 'Harsh word, my dear sir, very harsh word indeed. It's a legal fiction, my dear sir, nothing more.' Saying which, the attorney shrugged his shoulders, smiled, took a second pinch of snuff, and led the way into the office of the judge's clerk."

Harsh word indeed, and yet no civil action by way of remedy in cases which are in no sense concerned with legal fictions!

Novelty is not normally a defence and it would be wrong to say that there were no grounds of justice as a basis for the action. Lord Halsbury's remarks quoted above if closely examined will be seen to be in somewhat loose language; the "immunity of witnesses from actions being brought against them in respect of the evidence they have given" could well apply on the basis that the evidence must have been believed by the witness to be the truth and an exception could well be carved out for perjurers. But the defence was not purely based on novelty: it was based on the proposition that this type of action had been tried out before (albeit so long ago as not to be necessarily a guide to modern thought on the problem) and those old actions had failed.

And so it is that one of the very foundations of the judicial and other processes—the oath, a vital matter in Anglo-Saxon procedure; an essential everyday authentication of declarations, affidavits and the like—may be broken without incurring any civil liability. Is the law not sometimes tied too close to history?—S.J.

GREEN FOR DANGER!

IN a recent case in the Queen's Bench Division, McNair J. expressed the view that it was regrettable if it was thought today that a driver crossing traffic lights at green was entitled to proceed "without taking any heed at all" of the possibility that other drivers might be breaking the law by crossing other lights at the same road junction while they were at red. It would seem, therefore, that his Lordship has cast at least a shadow of doubt over the decision of the Court of Appeal in *Joseph Eva, Ltd. v. Reeves* [1938] 2 K.B. 393, which has been recognised as authority for saying that a driver of a motor vehicle who enters a cross-road when the lights are in his favour is not under any obligation to assume that the driver of another vehicle may enter the cross-roads against the lights. It is true that a reasonable man must not expect that others will always observe due care in their conduct and, as Lord du Parcq found in *Grant v. Sun Shipping Co., Ltd.* [1948] A.C. 549, "a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common," but in *Joseph Eva, Ltd. v. Reeves, supra*, their Lordships went no further than to allow that a person who notices a vehicle on a crossing in disobedience to a red light is bound to take "all reasonably possible steps to avoid coming into collision with it" (*per* Sir Wilfrid Greene, M.R.). The Court of Appeal could not accept that the driver of a motor car properly on a crossing is obliged to assume that another vehicle might have started to cross in disobedience to a red light. We would not have thought that it was sufficiently "common" for motorists to ignore traffic lights to require a prudent man to guard against such a possibility.—S.J.

REVIEWS.

Criminal Trial. By Y. H. RAO, Advocate. AGRA: Wadhwa & Co., 45 Civil Lines. 1959. Roy. 8vo. Pages xxvii + 356. Price: Rs. 18.

THIS is the last volume in the scheme of the Criminal Law Series of six monographs relating to evidence in criminal cases. The learned author has been moved to publish this volume owing to the fundamental differences between the duties and powers of the criminal and civil Courts, between the rights and duties of Public Prosecutors and private counsel, between the degrees of proof necessary in criminal and civil cases, between the respective burdens of proof to be discharged by the parties in both proceedings, and between the lines of approach to and the standards of appreciation of the different kinds of evidence generally obtainable in the two classes of cases. The element of surprise is an inherent feature of a criminal trial. In a sessions trial in spite of the notice of prior committal proceedings, there is hardly breathing time to meet this disturbing element of surprise. This volume is specially designed to meet various forms of such surprise. The recent amendments to the procedural law have wholly changed the complexion of some of the fundamental features of a criminal trial. The learned author has clearly explained the changes thus made.

The Central Sales Tax Act, 1956. By K. V. TAMHANE, B.A., F.C.A. BOMBAY: Current Book House. 1959. Crown 8vo. Pages viii + 282. Price: Rs. 8.50.

THE Central Sales Tax Act came into force from July 1, 1957. It consists of only sixteen sections but they are somewhat of a complicated character. This Act is already amended by Act 16 of 1957, Act 5 of 1958, and Act 31 of 1958. The amendments made by Act 31 of 1958 have completely changed the nature of the incidence and overhauled the scheme of the Central Sales Tax levy. In this book the learned author has fully explained every section of the Act, and has quoted extensively from the decisions bearing on the Act. The sections are explained in a simple and clear language, so that the business community may fully understand the provisions and find the book useful.

The Cattle Trespass Act, 1871. By Y. H. RAO, Advocate. AGRA: Wadhwa and Company, 45 Civil Lines. 1958. Roy. 8vo. Pages viii + 80. Price: Rs. 5.

THE Cattle Trespass Act is a minor enactment of the Central Legislature. Offences under the Act rarely come up before Courts. Certain obscure provisions in the Act has been clearly explained, and a critical survey of cases bearing on the Act has been given. The commentary has been arranged under proper headings, and references to decided cases have been fully set out. Those who have to refer to this Act will find this book useful.

The Central Sales Tax Act, 1956. By R. V. PATEL, B.COM., LL.B., BOMBAY: N. M. Tripathi Private Ltd., Princess Street. 1959. Demi 8vo. Pages 165. Price: Rs. 5.

THIS book can be usefully read with the earlier book of the learned author entitled *The Central Sales Tax Act, 1956*. Full text of the Act, as amended up-to-date, has been given. Each of the amended section is carefully commented on. Important circular letters issued by the Collector of Sales Tax, Bombay State Notifications of the Central Government, rules published by the Union Government, and the Rules of the State of Bombay are incorporated. As an up-to-date book of reference on a complicated piece of legislation its utility cannot be gainsaid.

The
Bombay Law Reporter.
JOURNAL.

June 15, 1959.

NULLITY OF MARRIAGE AND ADVERSE POSSESSION BY A
FEMALE*

DURING the past year two decisions on Hindu law were given which are bound to have repercussions throughout India. Since there are few topics on the personal law of the Hindus which are not of wide importance, affecting the happiness of many thousands of families, the above claim for the two cases referred to in this article will at first sight appear somewhat vapid. The reader may judge for himself, from his knowledge of local usage and from the relative frequency of disputes affecting the matters in question, whether or not they are of such importance as to warrant close attention from the Bar in every State, and perhaps from the Legislature. Both cases appear to be sound on principle, so far as they go, and, with respect, disclose on the faces of the reports as recently published no patent grounds for doubting their having been correctly decided on their respective facts: but there is a great deal to be said about each of them. The first, *Bimla Bai v. Shankarlal*¹, will have a special interest for Bombay readers who recollect the *cause celebre*, *A. v. B.*,² decided to very general satisfaction (but for a small slip of the pen)³ by the late Mr. Justice Tendolkar. It deals with the vexed subject of nullity of marriage, and is the judgment of a single Judge of the High Court of Madhya Pradesh, Mr. Justice T. P. Naik, whose treatment of the case cannot but be admired in view of the total lack of authority and pitiful want of principle in the books upon which he was forced to rely. It is not a less outstanding judgment for its emanating from a single Judge, for in the opinion of many much respected Judges the judgment even of a single Judge should be followed in all coordinate jurisdictions, unless it is overruled, disapproved, or shown to be unsound. For the present *Bimla Bai's* case stands alone and is authoritative. The second case, opposite in several respects to the first, is a decision based upon the answer of a Full Bench. In *M. Saiyanarayana v. J. Veerajulu*⁴ the Andhra High Court overruled a celebrated Full Bench decision of the former Hyderabad High Court,⁵ on a subject which arises so constantly that the bulk of judicial authority already accumulated is crushing. There is much in this answer of the Full Bench which is most satisfactory: it disposes, once for all, of an anomalous and embarrassing decision of the Privy Council which had bedevilled Hindu law for nearly thirty-five years, and it brings the law into accord with logic. Our rejoicings at this admirable development are the greater for the fact that now in all States, particularly in Northern India and in Bombay, the unsatisfactory decisions which emerged in obedience to *Lajwanti v. Safa Chand*⁶, despite repeated efforts on the part of the Bar, are bound to terminate. The development in Andhra is certain to recommend itself throughout India.

*By J. Duncan M. Derrett, M.A. (Oxon.), Ph.D. (Lond.), Barrister-at-Law, Barcelona Prisoner in Comparative Law, Tagore Professor of Law for 1958, Lecturer in Hindu Law at the School of Oriental & African Studies, University of London.

¹ [1959] A.I.R. Madhya Pradesh 8.

² (1959) 54 Bom. L.R. 725, s.c. [1953] Bom. 487.

³ The defect of impotence was said to

render the marriage void whereas it was only voidable. See 54 Bom. L.R., J. 115f., also *Malla Reddy v. Subbanna* [1958] A.I.R. Andhra 237, s.c. [1958] Andhra W.R. 590.

⁴ [1959] A.I.R. Andhra 79.

⁵ *Gundarao v. Venkamma*, [1955] A.I.R. Hyd. 3, s.c. [1954] Hyd. 915, F.B.

⁶ [1924] A.I.R.P.O. 121, s.c. L. R. 51 L.A. 171; 5 Lah. 192; 26 Bom. L.R. 1117.

Yet it requires explanation. The rule laid down there cannot stand unqualified for there is a most important and very common class of cases in which it can be misleading; indeed, if it were to be applied to that class as well as to another class, to which it may safely be applied, we should at once be in conflict with an established line of authorities laid down in the Supreme Court. This article is intended, therefore, to investigate two *prima facie* welcome decisions.

1. NULLITY OF MARRIAGE FOR FRAUD.

Every textbook on Hindu law tells us,^{6a} in words that vary slightly, no doubt, but without substantial variation of meaning, that a marriage at Hindu law is voidable for force or fraud, whether the force be applied to the minds or persons of the spouses themselves, or either of them, or the fraud be used to deceive the spouses, or either of them, or their respective guardians, so that the latter enter into the marriage or betrothal arrangements and/or celebrate the marriage substantially by reason of the false impressions created by the deceit, and as a result of the inducement so created. But there is not a single authority in our books which directly supports the assertion. On the contrary all our authorities, from *Aunjona Dasi v. Prahlad Chandra Ghose*⁷ onwards, actually tend to establish in what circumstances a marriage brought about by deception, or accompanied by deception, may nevertheless be perfectly good in law, whether under the rule of *Factum Valet*⁸ or otherwise. *Dicta*, no doubt, abound, and the point seems to have been taken very much for granted. Norman J. in the case cited above says:⁹

"I think that the Court must have jurisdiction in such suit to declare the marriage void if procured by fraud or force, and celebrated without the consent of the necessary parties, or without the formalities necessary to render it a binding marriage according to Hindu law."

Once the problem of jurisdiction was solved in that early case no one has doubted but that fraud may, in some circumstances, avoid the marriage; but not a single instance has come to light (so far as the present writer knows) to guide us in respect of the most important question, what sort of fraud or misrepresentation will suffice to entitle the deceived spouse to petition for a decree of nullity, and in what circumstances he or she may lose the right to present the petition. The *dharmashastra* leaves us with the impression that once the marriage has been solemnized duly, it cannot be set aside for force or fraud. MM. Dr. P. V. Kane puts the matter succinctly¹⁰:

"...From this it appears that if the marriage rites (like *saptapadi*) have been performed, the ancient law-givers would not have declared the marriage null and void even if the girl had been carried away by force or married by fraud. In modern works on Hindu Law the proposition is stated that 'a marriage though performed with the necessary ceremonies, may be set aside by the court, if it was brought about by force or fraud.' This opinion is based on what was said in some decided cases e.g. *Aunjona Dasi*. . . 6 Bengal L.R. 243 at p. 254, *Venkatacharyulu v. Rangacharyulu*, I.L.R. 14 Mad. 316 at p. 320, *Mulchand v. Bhudhta*, I.L.R. 22 Bom. 812. But in none of these cases was a marriage, duly solemnized by the performance of the rites of *panigrahana*, going round the fire and *saptapadi*, set aside. There are mere *obiter dicta* in these cases to the effect that a marriage may be set aside by the court for force or fraud."

This is a very strange state of affairs. How could the *dharmashastra* have tolerated such a position, as it undoubtedly did! There can be only one answer, which has been constantly present to the minds of modern Judges. Once a girl has been deprived of her virginity she is not a fit object of normal matrimonial negotiations and to annul her marriage might place her in a very much worse position than to leave her to the mercy of the family which has acquired her by such dubious methods—a position which we happily note is

^{6a} For example Mulla, 12th ed., para. 427, Q., April 1958, 280f. p. 603.

⁷ (1870) 6 Beng. L.R. 243.

⁸ See *International and Comparative Law*

⁹ At p. 254.

¹⁰ *History of Dharmashastra*, vol. II, 538-9.

very gradually disappearing with the growth of education, later marriages, and the freer atmosphere created by the 'new look' of codified Hindu law.

Since MM. Kane wrote, however, authority on the subject of *force* has been forthcoming. Characteristically in that case also, namely *Ankamma v. Bama-nappa*¹¹, the marriage would not have been set aside, notwithstanding the force applied to the bridegroom at the ceremony itself, had the pretended marriage been consummated by intercourse afterwards. Fortunately for the parties they separated immediately after the ceremony, which was itself a sad reminder of the persistence of mediaeval habits amongst our contemporaries. However, we are in a position to know that the *dharmashastra* has been fundamentally modified by the Anglo-Hindu law, and we must presently see upon what basis this has taken place. Since force and fraud stand (apart from the *voidness*¹² of the forcible marriage) upon similar footings, what applies to the one will be helpful in relation to the other.

But at this point the reader will be restless: surely, he asks, this matter has been dealt with finally in our Hindu Marriage Act, 1955? The Act to *amend* and *codify* the law relating to marriage among Hindus¹² states plainly in s. 12:—

"12. *Voidable marriages*.—(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable; and may be annulled by a decree of nullity on any of the following grounds, namely:—...

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or fraud;...

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if—

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;..."

This purports to state the law relating to our subject both in respect of marriages solemnized before the Act as well as those solemnized after it. If it is applied to marriages solemnized before the Act, and it is alleged that the consent of the guardian was obtained by fraud, a difficulty arises since the identity of the guardian and the age from which that guardian exercises his authority would seem to be determined with reference to the Act itself, which differs in some particulars from the Anglo-Hindu law on the subject. The respondent may show that the guardian in the instant case was not the guardian indicated by the Act, and that, therefore, the case does not fall within the Act. In those circumstances we must fall back upon the Anglo-Hindu law, which is reserved by the provisions of s. 4 of the Act for just such *lacunae*. The matter is hardly of much importance, since the Act itself prescribes, as we have seen, that the petition must be presented within one year of the fraud ceasing to operate, even in the case of marriages solemnized before the Act, so that as time goes on such cases are likely to become rarer. But there is something to be said for the view that the provisions of the Anglo-Hindu law and the statutory law should be harmonised by Parliament, to avoid anomalous decisions, such as may be foreshadowed by the judgment of Naik J. which we are about to discuss. In the meanwhile it is to be noted that *Factum Valet* is abolished in respect of marriages brought about by fraud on the petitioner or the guardian in marriage, both where the petitioner is the bride and where he is the bride-

11 [1937] A.I.R. Mad. 332, a decision of Varadachariar, J.

11a. Void in English law and probably Anglo-Hindu law but not under the Hindu Marriage Act.

12 See the Act's title.

13 It is to be noted that no such provisions existed at ecclesiastical law, and therefore at English or Anglo-Hindu law of nullity. From where did this innovation come?

groom. But force and fraud are not defined, and we are thrown back upon the Anglo-Hindu law, which, as we have seen, gives us little assistance. Under the Hindu Marriage Act, it will have been noticed, force does not make a marriage void as it does at English law and, semble, Anglo-Hindu law but merely voidable.

The facts of *Bimla Bai v. Shankerlal* were simple. Bimla and her parents were told that Shankerlal was Kundanlal's son. So he was, but he was a dasiputra, son of Kundanlal by his *shudra* mistress, and therefore a *shudra* by caste. Bimla and her parents were Brahmans, and they would not have consented to the marriage if they had known that Shankerlal was a *shudra* by caste. The misrepresentation brought about the consent both of the petitioner and her guardian in marriage. The respondent argued that the statement that he was Kundanlal's son was literally true, and that if Bimla's guardian was deceived it was his own fault for not making sufficient independent enquiries. The learned Judge, citing English authorities,¹⁴ disposed of these points, for plainly a half-truth is no better than a lie in circumstances like these, and the lack of energy shown by the deceived guardian could not excuse the deception on the part of Shankerlal's father. 'Son', it was held, means *aurasa* or *dattaka*, and certainly not *dasiputra*.¹⁵ This is, with respect, absolutely incontestable. But we must note certain facts evident from the judgment, and also note the absence of reference to other relevant facts. The Hindu Marriage Act was not mentioned, although the appeal was heard in February 1958. The marriage took place in February 1952, and the Court below gave its decree in January 1957, so that it would appear that the spouses lived together for about four years before proceedings were commenced. This has a suspicious air, particularly since evidence was led to show that Shankerlal was excluded from the caste activities in which Kundanlal participated, a striking fact which must have become evident within a year of the marriage. Moreover, nothing is said in the judgment, and apparently nothing appeared in the pleadings, about the pretended spouses' conduct towards one another after the 'discovery' of the husband's caste. Did Bimla Bai leave his house immediately? If she stayed with him for more than a day or two her right to petition was cut off by s. 12(2) (a) (ii), unless she was kept in that house by force, which is nowhere suggested, or the remedy of nullity was available irrespective of the codifying statute.

Reading this extraordinarily interesting judgment one cannot escape the feeling that here was a case like *A. v. B.*,¹⁶ where the marriage might have been dissolved, instead of being annulled (though we are here in the dark as to whether Bimla had any grounds for divorce up her sleeve). The Court was petitioned in *A. v. B.* for nullity because, as the law then stood, no order for maintenance (alimony) could have been passed in the petitioner's favour. The right to alimony, coupled with the right to apply for variation in the amount awarded according to any change in the circumstances of the parties, is a decided embarrassment to the husband, and there are obvious attractions in nullity as opposed to divorce, particularly if the effect of nullity is to terminate the spouse's rights against each other. If Bimla's motives in applying for nullity were influenced by what Shankerlal's family were prepared to offer her in return for this method of approach, a question at once arises. Under the Anglo-Hindu law nullity could not give rise to alimony, but under the Hindu Marriage Act, 1955, it can. Section 25 is explicit:

"25. *Permanent alimony and maintenance.*—(1) Any court exercising jurisdiction under this Act may. . . on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum. . . as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and

¹⁴ *Peck v. Gurney*, (1873) 6 H.L. 377, 403;
Redgrave v. Hurd, (1881) 20 Ch. D. 1, 14.

¹⁵ - At p. 10.

¹⁶ (1952) 54 Bom. L. R. 725, s.c. [1953] Bom. 487.

the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent."

Thus where a spouse entitled to petition for nullity does not agree to the terms offered by the other side she can still insist upon alimony even where she has no grounds for petitioning for divorce. The peculiar attractions of nullity are somewhat diminished. But why after all was the Hindu Marriage Act not referred to in this case? The fact that the marriage took place before the Act is, of course, immaterial. We have no reason to believe that the guardian was other than that prescribed by the Act, and indeed the petitioner deposed to her having been deceived herself. Does the right to petition under the Anglo-Hindu law survive notwithstanding the codification carried through by the Hindu Marriage Act? This judgment seems to suggest that it may, and if this is correct, the limitations prescribed by s. 12(2) may be evaded.

The Anglo-Hindu law relating to fraud being, as we have seen, a modification of the *dharmaśāstra*, which, until this case, was never consulted in any judicial authority, we must look to the English ecclesiastical law which is its real source. Once the problem was solved whether such law could be applied in cases emanating from beyond the presidency towns the door was open for the introduction of English divorce and nullity law, which has in fact inspired many provisions in the Hindu Marriage Act and its State predecessors. We may confine ourselves for the present to fraud, and the authorities are to be found conveniently in J. Jackson's *Law relating to the Formation and Annulment of Marriage* (London 1951).¹⁷ Some of the authorities apply to an age which is past and to circumstances, such as the publication of banns, which do not directly relate to Indian conditions. But there is a large residue of authority showing that marriages may be annulled for fraud under circumstances as likely in India as in contemporary England. Jackson says (on p. 186) that where a marriage is annulled through lack of the consent necessary to create a marriage at ecclesiastical law, very clear and cogent evidence must be given to rebut the presumption that it has not in fact been given. The categories of subjective consent he subdivides. The first, the "non-existent mind", does not concern us. The second is "abuse of, or mistake as to the nature of the ceremony", again subdivided into "sham marriage", "mistake as to nature", "mistake as to effect"; the third is "mistake or error as to the person". He comments:

"Not all writers are agreed on the effect of fraud in relation to a ceremony of marriage induced thereby: this is because fraud, while sometimes talked of as an independent ground of annulment, in practice is a species of the genus mistake, in so far as mistake itself is a ground of annulment. The notions of the validation of void and the ratification of voidable marriages, and of the creation of marriages by estoppel, intrude into these cases."

In ecclesiastical law whereas force makes the ceremony *ipso jure* void (a proposition to which exception has been taken in isolated cases), the effect of fraud is not necessarily the same (and neither is the same under the Hindu Marriage Act), and Jackson convincingly contends that fraud makes it voidable only. The question of "sham marriages" need not detain us, but the law relating to a mistake as to the nature of the ceremony is best illustrated from *Mehta v. Mehta*,¹⁸ where a marriage was annulled which had taken place in Bombay and which had been represented to the petitioner as a ceremony of conversion to Hinduism. There are instances where a marriage has been annulled for mistake of the other party's identity, his status in life, his "quality" or "fortune", and these authorities are directly applicable to Indian circumstances.¹⁹ The qualification upon the general propositions are at least as important as the latter. The representation by a person of low birth that he was

17 *Lacey on Divorces*, 14th ed., 19, and 2 All E.R. 690. elsewhere, is most disappointing on this subject.

18 Jackson, p. 200, *Mehta v. Mehta*, [1945]

19 Jackson, pp. 203-4.

a substantial landed proprietor served to annul the marriage²⁰, so also an impersonation of a person of a known family by a complete stranger to it, when the bride would not have consented had she known his identity.²¹ But a marriage is not voidable because the bridegroom thought that the bride was wealthy and she turned out not to be so, or believed her to be a virgin and she was not. If however consent is induced by representations to those effects, which, in some Indian situations, might be implied rather than expressed verbally, and if these are reduced virtually to conditions, then the ecclesiastical lawyers were prepared to annul the marriage for breach of the condition, though in the case of virginity the matter seems not to have been beyond doubt.²² The case of concealed pregnancy is now dealt with by statute both in England and at Hindu law in India.

We may return to Naik J.'s judgment. Assuming that the Anglo-Hindu law was applicable, he found that the misrepresentation by Kundanlal took place not only before but actually at the ceremony itself. Everyone knows that at marriages between Brahmans the officiating Brahman recites Sanskrit texts which formally declare the subject matter of the transaction, the place and date, the identity of the donor of the virgin, his father's and grandfather's name, their caste, *gotra*, *pravara*, Vedic *Shakha*, and other relevant particulars. These recitations are made on behalf of the donor, and he adopts them, and they are supposed to be heard and acknowledged by the bridegroom, whose own identity, lineage, *gotra* and the rest are explicitly declared on his behalf, likewise in Sanskrit. Then the *kanya danam* takes place, and the virgin is transferred to her husband, the marriage being completed by ceremonies indicating the husband's acceptance of his wife and her accompanying him thenceforward. Everyone knows that these Sanskrit texts, which are memorised by the officiants from manuals compiled for the purpose from more or less ancient authorities,²³ are chanted or muttered, as the case may be, in a tone which does not encourage attentive listening, and that in four marriages out of five the very parties to the transaction themselves pay little attention, let alone the assembled company, who, if the priest chants loudly, usually drown his voice in conversation. But Naik J. holds that the Sanskrit verses are an express representation of the identity and caste of the intended spouses, and that mistakes in the *prayoga* as uttered may be evidence of fraud such as will go to the root of a marriage.

This is a very serious and novel development. That such *dharmashastric* material should be cited in a judgment at all is of great interest. The present writer has not come across another instance, for the only occasion when a High Court relied upon *prayogas* for deciding a point of law that comes to mind is that in *Venkatiah v. Kalyanamma*,²⁴ in which the Mysore High Court determined that an adoption does not relate back to the death of the adoptive father (a rule now no longer good law) because the texts recited at the gift of the boy implied the commencement of reciprocal duties from the moment of the gift and not earlier. But this novelty differs from the Mysore instance, because Naik J. is concerned with the evidential value of the *prayogas* in establishing the bridegroom's father's fraudulent intent, and not their usefulness in indicating the effect of the transaction itself. A more important implication is that the formulae recited at weddings must be listened to more carefully, and checked beforehand to eliminate any possible misrepresentations, lest it turn out that a disappointed spouse may urge that the marriage ceremony was completed by reason of reliance upon express undertakings by the other parties as to their caste, their ancestors' identities, their *gotra* and *pravara*, their Vedic

²⁰ *Wilson v. Horn*, (1904) 41 S.L.R. 312 (a Scots case).

²¹ *Allardys v. Mitchell*, (1869) 6 W.W. & A.B. (Ins., Rec. & Mat.) 45 (Australia). Jackson, p. 204.

²² Jackson's quotation from Ayliffe's

Paragon (p. 381) at p. 203.

²³ He quotes from the *Parashara Grihya-sutra*, and refers to the *Navaratra-vivaha-paddhati*, the *Shodasha-samskara-vidhi*, and the *Vivaha-samskara*, on p. 8.

²⁴ [1953] A.I.R. Mysore 92, r.s.

shakha, and the rest, and an apparently irrelevant detail, mistakenly uttered, might serve as a ground for nullity petition. Of course in *Bimla Bai's* case the misrepresentation was not in respect of a detail, and the bride's mistake induced by a fraudulent misdescription of the bridegroom, was undoubtedly sufficient to annul the marriage if she had not afterwards approved it, and if the Court had jurisdiction, as the learned Judge assumed, to annul it. The provisions of the Hindu Marriage Act may (for all we know to the contrary) have been complied with, but the matter is left obscure by the reported judgment.

* The implications may now be considered from another angle. Which of the following misrepresentations will go to the root of the marriage, and serve to annul the marriage for fraud?

1. A writes, "I have a beautiful virgin daughter D, who is sixteen years old, a matriculate, and owns Rs. 2,000. Her photograph is enclosed." The photograph is of E. D turns out not to be a virgin. She is not a matriculate. She has no property. The bridegroom and his guardian consent to the marriage on the faith of all these misrepresentations. As for her age, she is actually 13, or it may be, 18. Is either discrepancy material?

2. B says, "My son S is in perfect health; he is just returned from America with a Ph.D. in nuclear physics; he is certain to get a high government post." In fact S, who is known to the bride's family, is dying of tuberculosis; he has returned without a degree from a country other than America; and there is no prospect of his obtaining a government, or indeed any other, post. The marriage takes place.

3. A boy, X, meets a girl, Y, at college. He represents himself as the son of a wealthy and high caste businessman, whereas in fact he is the son of a struggling member of a scheduled caste. Y agrees to X's proposal of marriage, and the marriage is celebrated despite the objections of Y's parents, who do not discover the deception until afterwards. Y tires of X but cannot prove any matrimonial offence against him. Is the marriage voidable for fraud?

All these problems may be said to be unassisted by really substantial authority. But the general proposition, that, when the parties truly consent to marry each other, though they are under certain accidental misapprehensions as to each other's qualifications, etc., the consent is binding and the marriage valid, is almost certainly applicable here, and the present writer would tentatively suggest that nullity is more readily available in case 1 than in either case 2 or 3. But the law of nullity for fraud has to be built up in India upon somewhat uncertain and unexplored foundations, and the case of *Bimla Bai* serves to point out how little we know.

II. *M. Satyanarayana v. J. Veerajulu*²⁵ poses a problem of quite a different kind. The Full Bench, consisting of the Chief Justice P. Chandra Reddy and Kumarayya and Munikanniah, JJ., investigated the much discussed question whether a Hindu female can prescribe for an absolute estate in cases where she has not openly asserted an absolute title adversely to all the world.

The position when the question was referred to them was that some Judges were of the opinion that a widow could not acquire an absolute estate by adverse possession in any circumstances, while many more took the view, apparently more rational, that she could acquire by adverse possession an estate which would descend after her death, forfeiture, or surrender to the next heir of her husband etc., (the doubts that arises at this point must be postponed for the present), unless she asserted her title against the reversioner, manifesting the *animus possidendi* in such a way as to exclude the reversion entirely, when she might be able to turn the improperly acquired property into her absolute property. This anomalous position would not have been reached but for the Privy Council decision in *Lajwanti v. Safa Chand*,²⁶ which depended upon very special facts. An incautious *dictum* in their Lordships' judgment

²⁵ [1959] A.I.R. Andhra 79.

I.A. 171; 3 Lah. 192; 26 Bom. L.R. 1117.

²⁶ [1924] A.I.R.P.O. 121, s.c. L.R. 51

led directly to a train of decisions in India, attempting to show²⁷ that females could not take advantage of the law of limitation of actions to the same extent as males—a proposition which naturally aroused indignation. There is no need to repeat here the present writer's objections to the dictum in *Lajwanti's* case. These were set out at length in an article in *All India Reporter* about four years ago,²⁸ and the case has been explained in the Full Bench case discussed here.²⁹

The Full Bench's answer is as follows:

In the case where a Hindu woman not entitled to inherit an estate asserts her title as absolute owner, her title to the property is absolute. But where she does not assert her absolute title, still the nature of the title is the same, in the absence of evidence that she stepped into possession of the property in her right as heir of the last male holder or under an arrangement or an agreement.

This disposes finally of the eccentric notion that not only could a widow not acquire adversely to her deceased husband's or son's reversioners, etc., which is obvious if one is concerned with the estate itself in respect of which reversionary rights exist, but that she could not acquire an estate adversely to the same persons in property to which no reversionary rights had ever attached, unless (as some believed) she asserted manifestly that whether or not she was not entitled to the property in question she was acquiring it by adverse possession against all the world. Such assertions are bound to be rare in the nature of things, and it was evident that the reversioners of the deceased husband, or of the deceased son, or other deceased male relative whose property she had inherited, could have no claim to property which was not owned by their last male owner, unless the female voluntarily merged it with such property to which they did in fact have reversionary rights. And what of the case where there are several sets of reversioners, where she survived first her husband and then her son; or of the case where she is a married woman and holds no limited estate at all? Should there be a discrimination between the powers of a widow who has inherited, and one who has not? Fortunately all this is set at rest by the Full Bench, and other High Courts will no doubt gladly follow their example.

It may be objected that all this is of little importance, in view of the Hindu Succession Act, s. 14, which converted into an absolute estate any property possessed by a woman subject to a limited estate. But we now know that where a female entitled on June 17, 1956, to property for the limited estate known as the Hindu woman's estate, was "possessed" of that property, either because she retained the equity of redemption in respect of it, or was its lessor, or was entitled to recover possession of it from a licensee or, semble, trespasser, it is her absolute property.³⁰ It is, therefore, important to know whether property occupied and dealt with by a trespasser or adverse possessor is or is not converted into absolute property by the section; so that a female reversioner,

²⁷ A full list of instances would be very lengthy. Examples are *Umrao Singh v. Pirhi*, [1925] A.I.R. All. 369; *Tarif v. Phool Singh*, [1927] A.I.R. All. 274; *Dasa v. Dasi*, [1929] A.I.R. Lah. 327; *Mahajan v. Mt. Purcho*, [1930] A.I.R. Lah. 504; *Kishan Singh v. Mt. Partapi*, [1935] A.I.R. Lah. 537; *Gaya Deen v. Amravati*, [1955] A.I.R. All. 630; *G. Behara v. B. Behara*, [1957] A.I.R. Orissa 237. See also *Lakshmi Ammal v. Thangabool Asari*, [1953] A.I.R. Mad. 977. *Magarlatji Gordhanlalji v. Pureshottamlalji*, [1949] A.I.R. Bom. 80, appears to be unsound, but *Sompat Magho v. Surajmal*, [1957] 59 Bom. L.R. 1112 seems sound. *Harisingh Dangiy v. Ramchandra Dangit*, [1957] A.I.R.M.P. 238, still stands, likewise *Sitaram v. Gampal*, [1958] A.I.R. Bom. 140. The Supreme Court in *Mt. Kirpal Kuar v. Bachan Singh*,

(1958) 21 S.C.J. 438, distinguish *Lajwanti* neatly, thus indirectly lending great weight to the Andhra Full Bench decision which was nearly contemporary. *Lajwanti* is now as good as dead, an event anticipated by all textbook writers.

²⁸ A Strange Privy Council Decision, [1955] A.I.R. Journal 10f.

²⁹ At p. 82.

³⁰ *Krishna Dassi Saha v. Akhil Chandra*, [1958] A.L.R. Cal. 671; *Venkeyamma v. Veerayya*, [1957] A.I.R. An. P. 280; [1956] An. W.R. 988, *Arumuga Goundar v. Nachimuthu*, [1958] A.I.R. Mad. 459.

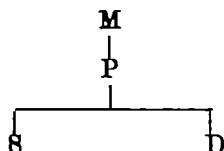
That an adverse possessor holding for 12 years before June 17, 1956, takes the property out of s. 14 is asserted in *P. Elliah v. P. Gangamma*, [1957] A.I.R. Andhra p. 778.

whose reversionary rights ripened into a title before the commencement of the Act, may know whether or not she now has absolute rights in respect of that property. We suspect that where the female limited owner was not "possessed" of the property when the Act came into force, because title had been acquired, by an adverse possessor prior to the commencement of the Act, the Act does not avail her, though it does not disturb her reversioner's rights. It is, therefore, important to know whether her rights, if, for example, she were herself a reversioner, have been extinguished by the adverse possession of (in our problem) another female. The view that reversioners are out of the picture since the commencement of the Act, attractive as it is on many grounds, does not seem to coincide with the law in Bombay State, is not the law in most States, and is probably wrongly stated as the law in a minority of States.³¹ We must consider, then, what effect this answer of the Andhra Full Bench will have upon reversioners, male and female, under the law as now constituted.

The new rule is that which was asserted by Indian High Courts before *Lajwanti's* case and occasionally afterwards,³² namely that a Hindu woman may by adverse possession acquire property which is her *stridhana*, and that only where she enters as a limited owner, as for example by right of heirship under the Anglo-Hindu law, does she acquire an estate which descends to the heirs of the last owner (male or female) and which cannot be alienated to the prejudice of such heirs.

But their Lordships do not advert to an important distinction. The facts of their case did not require them to do so, not those in the nearly contemporaneous and somewhat similar case in the Supreme Court^{32a}. The period of limitation was not in issue. There were in fact two possible classes of cases. In the first the true owner who was excluded by the adverse possession was himself an absolute owner. In the second he or rather she was a limited owner. It sometimes happened that property passed to reversioners twice or more in succession, because the actual reversioners who took after the end of the limited estate were themselves not fresh stocks of descent, and were themselves bound by the limitations of the limited estate, until, that is to say, the coming into force of the Hindu Succession Act. Let us compare the cases diagrammatically.

(I)



Here P dies before 1956, leaving, a mother (M), a son (S) and a daughter (D). Prior to 1956 a mother was not a heiress along with a son. In our illustration she occupies P's property and excludes S without any expression of intention as to the nature of her tenure. After 12 years, the Andhra Full Bench correctly asserts, the property is M's, assuming that S was not a minor while time was running against him. If she disposes of that property after the 12 years are completed S and D can take no action, even if the Hindu Succession Act happened to be passed before the 12 years were up.

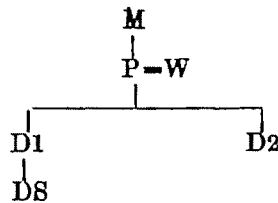
31 The matter is dealt with at length in *Anomalous Decisions from Patna on the Hindu Succession Act, 1956*, (1958) 21 S.C. J. J., 259, 264f. It is submitted that *Ramchandra Sitaram v. Sakharam Mahadu*, (1957) 60 Bom. L.R. 82, was correctly decided, and that the present writer's views on this point expressed at (1957) 59 Bom. L.R. Journal, 49f were wrong.

32 See [1959] A.I.R. Andhra P. 79, 82. *B. R. Ramanujachariar v. T. V. Kallasam*

Ayyar, [1925] A.I.R. Mad. 1066; *Raj Bahadur Singh v. Kanhaiya Baksh Singh*, [1927] A.I.R. Oudh 138; *Suroj Balli v. Tilokdhan*, [1928] A.I.R. Pat. 220; *Mukh Ram v. Mt. Sundar*, [1934] A.I.R. Lah. 270; *Udai Pratap Singh v. Narotam Singh*, [1946] A.I.R. Oudh 38; and *Thailambal Ammal v. Kesavan Nair*, [1957] A.I.R. Kerala 85, 90.

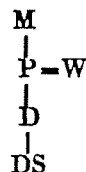
32a. *Kirpal Singh*, *cit sup.*

(II)



But in this case, again supposing a death before 1956, the mother holding adversely to the true heiress, W, will, it is submitted, not have obtained an absolute title against DS after 12 years. Nothing said by the Andhra Full Bench or by the former Hyderabad Full Bench, or in any of the earlier cases, authorises an adverse possessor to acquire, at the expense of a female limited heir, a title good against the reversion. W in our imaginary case suffered (but did not authorise or permit) her mother-in-law to treat P's property as her own. In failing to take steps to challenge M's position she was potentially injuring the reversion. The reversioners included her own daughters and her elder daughter's son. It is an established principle of law that a reversioner can recover from a trespasser property which he or she had acquired by adverse possession against the female limited owner.³³ No matter how many years the trespasser has been in possession, the reversioner can recover the property within a fresh period of limitation running after the limited owner's death. But if the actual reversioner turns out to be a female, her own neglect to recover the property is a further potential injury to the reversion, and the trespasser or his transferees are holding adverse merely to *her*. For the same reason as before they cannot protect themselves against a suit for ejectment from the next reversioner after this female owner's title has ceased. Thus, in our illustration, we may assume a course of events as follows: P died in 1940, leaving his widow, his two daughters, D1 and D2, D1's son, DS, and his own mother, M. M took control of the estate. In 1953 W died. D1 and D2 took no action against M before they died in 1955. The ultimate reversioner, DS, will not be debarred from recovering the property from M and/or her alienees until 1967 or after the expiry of 12 years from the commencement of his title on the death of the previous female owners, his mother and aunt. Thus it is incorrect, it is submitted, to say that a female can perfect her title to land by 12 years' adverse possession against *anyone*. M did not become the owner of P's property in 1952, and nothing but the inaction of a *male* reversioner for 12 years can perfect her title. This is because the true owners for so many years were themselves limited owners, and because, as the Supreme Court made clear in *Natvarlal Punjabhai v. Dadubhai*³⁴ in 1953, the reversioners cannot be prejudiced by the limited owner's permitting adverse possession to be acquired against *themselves*. Thus although W was debarred from recovering the property in 1953, DS, though he previously had no interest in the property, was not barred in 1955.

We may now consider the difficult position where a female reversioner was inactive in 1956 when the Hindu Succession Act came into force.



³³ See next note.

³⁴ (1953) 56 Bom. L.R. 447, s.c. [1954] A.I.R.S.C. 61; (1954) 17 S.C.J. 34; [1954] 1

M.L.J. 69, S.C. See also *Kalipada v. Palani Bala*, [1953] A.I.R. S.C. 125, and cf. *S. Ambalagan v. Neelamegam*, [1956] A.I.R. Mad. 160.

Here P died in 1940 and M took possession of his estate. W died in 1953 and D was then the reversionary heir, entitled to P's estate in 1956 when the Act began. D was, *ex hypothesi*, out of possession. Was she "possessed"? She had a right to eject M, for M's perfect title against W did not avail her against the reversioners, including D, and time began to run again in 1953 only. Is this right to eject sufficient to found a claim to be "possessed" within the meaning of s. 14, in which case, if she succeeded in recovering the property she would be an absolute owner, and could ignore the claims of DS? It is submitted that until authority is obtained we may suggest tentatively that she is not "possessed", for the adverse possession of M, although not so hostile to D's title as would have been D's own sale to a purchaser and his subsequent possession, is still hostile enough to make her chances of recovery depend upon chances such as Parliament *may* have had in mind when it chose the word "possessed". If this is correct DS is still a reversioner and, no matter what action D fails to take, on D's death DS obtains the right to divest M and M's alienees. If the other view is right and D is "possessed" it follows that by 1965 (and not earlier) M and her alienees are protected and cannot be disturbed.

In conclusion it seems that clarification of the position of the female owner whose title was limited when the Hindu Succession Act came into force is long overdue, and that to the now familiar problems of the woman who alienated improperly before the Act came into force³⁵ we must add the case of the female reversioner whose possession of the property is prevented by adverse possession on the part of a trespasser. Whether this trespasser is male or female, as we have seen, now makes no difference, but it is imperative that reversioners should know whether their rights in such cases survive or not.

Alike in the difficulties which they raise in practice, though very different in context, these two problems seem to demand attention from Parliament. Neither seems indeed to be a situation where rapid legislation is needed to give *ex post facto* jurisdiction and the like, as happened in the Bombay Hindu Divorce (Decrees Validation) Act, 1958 (Act 88 of 1958), but a careful review of the entire contexts, of nullity of marriage at Hindu law, and of the position of alienees from and adverse possessors against female Hindus whose titles arose before the Act of 1956, would be of no little benefit to the community.

GLEANNINGS.

INDECENT ACTIVITIES WITH CHILDREN

MR. BUTLER has asked the newly formed Criminal Law Revision Committee, under its chairman, Sellers, L.J., to consider how best to fill the gap in the law disclosed by the cases of *Fairclough v. Whipp* [1951] 2 All. E.R. 834 and *D.P.P. v. Rogers* [1953] 1 W.L.R. 1017, which established that a man who persuades a child to handle him indecently does not commit indecent assault. It has occurred to us that a possible solution would be to make it an offence for an adult to engage in any indecent activity or behaviour with or in the company of any child. There can be little doubt that the accused in the cases to which the Home Secretary has made specific reference would have been found guilty of such an offence, and it would seem that the same could be said of the prisoner in *R. v. Lawson* [1959] Crim. L.R. 134. In that case there was evidence that on two occasions the accused approached a boy of ten years of age and had a conversation with him about sex matters. He was indicted with having attempted to procure an act of gross indecency with a male person, but it was held that on these facts there was no case which could properly be left to the jury. *R. v. Miskell* [1954] 1 W.L.R. 438 was distinguished as, in

35 As in *Ramchandra Sitaram*, *alt sup.*

R. v. Lawson, there was no evidence of an unveiled or undisguised intention manifested by overt acts. Nevertheless, in such a case, the prisoner might have been guilty of the suggested offence of engaging in indecent activity or behaviour with or in the company of any child and we see no reason why this should not be so as he would then be punished "for doing an act which deserves the reprobation of every decent man" (*per* Lord Goddard, C.J., in *D.P.P. v. Rogers*, *supra*). It is, of course, already necessary in the case of any sexual offence to warn the jury against the danger of convicting on the uncorroborated testimony of the complainant (see, e.g., *R. v. Mitchell* [1952] 36 Cr. App. R. 79), but this requirement could well assume even greater significance if an offence similar to that suggested was brought into being.—*S.J.*

DAMAGES AND TAX

As the law stands at present, in assessing damages for loss of earnings through personal injury there must be taken into account the liability to tax which the injured party would have incurred if he had received the lost earnings. The *fons et origo* of that rule is *Gourley's case* ([1955] 3 All E.R. 796), and the principle there laid down has since spread to damages for trespass, for breach of a service agreement and for wrongful dismissal, as well as to compensation for compulsory acquisition, in so far as it is attributable to loss of profits. Few decisions in recent times have caused so much controversy; in fewer still has the theoretical soundness of the law been allowed to outweigh all other considerations—including justice. The problems set by the decision have been considered by two Law Reform Committees, those for England and Scotland, who, as Lord Denning remarked acidly in a recent debate in the House of Lords (213 *Hansard* H.O.L. 989), instead of finding a solution for the difficulties found a difficulty for every solution. It is, no doubt, true to say that the law as it stood prior to *Gourley's case* was over-generous to the injured person in giving him damages without deduction of tax, but normally, when a man, crippled for life in an accident, received a substantial sum he would invest it and thus pay tax on the interest or dividends which the investment brought in. This generosity to the injured person has been done away with since *Gourley's case*: the tax element is taken into account with the consequence that the wrongdoer is being treated over-generously, for the Inland Revenue are precluded from recovering the amount of tax which they could have claimed if the victim had not lost his earning capacity, and the burden of the resultant tax loss falls upon the general body of taxpayers who may, therefore, question the wisdom and justice of a principle that benefits only wrongdoers or, ultimately, their insurers.

Apart from general considerations, however, the application of the rule in *Gourley's case* may cause a host of difficulties in practice, of which *Phipps v. Orthodox Unit Trust, Ltd.* ([1957] 3 All E.R. 305) is as good an example as any, for it shows with what ease obstacles may be placed in the plaintiff's way. To advise a prospective plaintiff on the amount of damages he might be likely to recover in an action for personal injury has never been an easy task; now, there must be taken into account present and future rates of income-tax and surtax and, as *Beach v. Reed Corrugated Cases, Ltd.* ([1956] 2 All E.R. 652) shows, there is room for much refinement, such as calculating in advance the amount of covenanted annual payments out of unearned income so as to diminish the tax liability. The Scottish Law Reform Committee in their Report (Cmd. 635) drew attention to another little problem, raised in *Spencer v. Macmillan's Trustees* ([1958] S.L.T. 41), where the person claiming damages was an agent for principals whose identity was undisclosed and whose tax position may accordingly be unascertainable. It does not require much imagination to think of a foreign visitor to our shores who is unfortunate enough to suffer personal injuries here: will the Courts in that event have to go into the niceties of foreign systems of taxation so that the rule in *Gourley's case* can be kept sacro-

sanct? It is true that, as a result of the debate in the House of Lords, the promise has been given that "this important subject will be constantly considered by the Lord Chancellor's Department", and we would respectfully express the hope that we misunderstood the position if we detected in that promise a faint echo of a famous statement once made by the Duke of Wellington in the House of Lords: "The problem bristles with difficulties. Let us look it squarely in the face, and pass on". Perhaps it is not too late to ask what objections there can be to the scheme put forward by the Institute of Chartered Accountants of Scotland under which damages for personal injuries are to be awarded gross, and then paid into Court to be applied in the purchase of an annuity which would be subject to special fiscal provisions.—*LJ.*

A NEW PLAN FOR STUDYING THE LAW

OVER two hundred years ago a man of wit and fashion, writing in *The Connoisseur* (August 12, 1756, No. 133), suggested a new plan for studying the law. He said that if we look into the "several Inns of Court, the professed students of the law compose a very numerous body; but if we afterwards turn our eyes on those few, who are employed in exercising their talents in Westminster Hall, this prodigious army of lawyers shrinks to a very thin and inconsiderable corps". Thousands, he said, are disgusted with the way the study of the law is now managed and "conceive an unconquerable aversion to the white leaves and the old black letters". It is quite impossible to be at once a lawyer and a fine gentleman. And so he gave us the outlines of a treatise which he said he had written called *The Complete Barrister* or *A New Institute of the Laws of England*.

First, he recalled the advice given to students by Coke—six hours' sleep, six for study, four for prayer, two for meals and the rest to the Muses. This he considered both absurd and unfashionable. There is no mention of Vauxhall or Ranelagh, and who but a methodist would ever think of praying for four hours a day? So, knowing the "volatile dispositions of the young gentlemen of the present age" he has tried to square his precepts to their lives and "so contrived the matter, that amidst the keenest pursuit of their pleasures, they shall be engaged in the most improving course of the law".

Since laws are principally rules of action, why coop up a brisk young man to learn in his chambers? Let him venture abroad into the world. That is not only the best method, but it is the only one which "several inhabitants of the Inns of Court would ever follow". So he will tell us how one such spends his time; "and I cannot but congratulate the Bar, that so many young men, instead of blinding their eyes and bewildering their understandings with Coke, Plowden, Salkeld, etc., have sense enough to follow the same course of study".

He called his hero Tom Riot, sent to the Temple merely because, for a few years, his father did not know what to do with him. But "so unwearied has been his application to the new method" that his father and the rest of his friends will be surprised at his wonderful proficiency. Since a ready elocution is a prerequisite of a good counsel he advised a diligent attendance at the theatres. And in inns and coffee houses he has imbibed much rhetorical argument beside the more usual fare. Lord Coke himself calls conference the life of study, and so Tom Riot has put in a "frequent attendance at George's and the other coffee houses about the Temple, where every student has so many opportunities of benefiting himself by daily conversation with counsellors, attornies, clerks to attornies, and other sages of the law". He has a first-hand knowledge of the procedure in magistrates' Courts since he has so frequently been employed in "beating the rounds" and has in consequence been "taken into custody by the magistrate of the night". Furthermore; "certain impertinences of his tailor and other tradesmen have given him a very clear notion of the laws of arrest"; and the several sums of money he has borrowed at different times, repayable on his father's death, "have opened to him some difficult

points in conveyancing, by teaching him the nature of bonds and deeds", and unravelled to him "the intricate doctrines of reversion and remainder as well as the general nature of estates. Thus, he is continually improving; and whenever he shall happen to commit a rape, or a genteel murder, it will serve him for matter of instruction, as well as any history of the pleas of the Crown, and give him an insight into the nature of the practice and extent of the jurisdiction of our courts of justice".

By shooting he becomes conversant with the laws relating to the preservation of game; by dancing at the balls held during assizes he picks up all the learning of the circuit; and as his father is a Member of Parliament he gets to know, by canvassing for votes during elections, all about the law relating to elections—and to bribery.

Thus, by regarding his own life as a commentary on the law, the student learns by example and will improve "according to the eagerness with which he engages in his pleasures". What, he asked, could be more delightful?

He concluded with a word of advice applicable as much to the busy practitioner as to the student in chambers: "It is recorded of an eminent counsellor, of the North family, who, being one of the ablest practitioners at the Bar, was overloaded with business, that sometimes choosing to retire a while from hurry and perplexity, he would say to his clerk: 'Tell the people I do not practise this term'. This proper relaxation I always recommend to my pupils, and have some reason to think they are prudent enough to embrace it; for, as I am acquainted with several students on the new plan, and do not remember to have seen them doing any business in the Courts for some time, I suppose they had given notice to their clerks to tell the people that they did not practise in those terms".—*L.J.*

WHAT IS EFFICIENCY?

THOSE who follow the fortunes of the Law Society—they must be a large proportion of its 16,000 members—may well give a new twist to Pliny's aphorism "*Ex Africa semper aliquid novi*." By them it could now be translated "There's always something new from the annual conference." For a number of years the discussions at the annual conferences have provided flocks of new ideas and observations on the legal profession. This year's conference at Eastbourne was no exception. Is it the sea air which stimulates thought and speculation, or mere absence from the daily grind of the office and the burden of a responsible practice? Whatever may be the cause (and one suspects that the annual conference is only the occasion for expressing opinions which have been germinating throughout the year), the new president fired off volleys at Eastbourne in his inaugural address and winged quite a number of the flock of ideas which were flying round.

His address covered a wide field. He touched upon the responsibilities and the aims of a practising solicitor: he threw out hints that each solicitor in active practice today should try his best to keep himself up to date—no easy thing in a profession where practitioners tend to move in some degree of isolation and where the tradition of conservative thought and conduct is so very strong. "Let us see to it," he said, "that we are not justifiably to be looked upon as dry-as-dust theorists. Let us keep as far as we can up to date and abreast of current thought and modern methods." He postulated this eagerness to keep up to date as the first requirement of an efficient solicitor, and after that discussed some means of keeping up to date. The real purpose of a solicitor, he said, was to be found "in providing sound, sensible and practical advice and suggestions on the many facets of the problems to which modern life gives rise." One could hardly have a better yardstick to measure a solicitor's efficiency than that. One is quite sure that the president would not claim that assertion as being deeply original: nevertheless, although it may be fairly obvious, it needs stating and restating. Every solicitor should have a goal and a well marked course to it.

These desiderata in the make-up of a solicitor presuppose another quality which has no mention, namely absolute and unswerving integrity. The fair name of the law—and it has a fair name in this country and is the envy of the rest of the world—is in the hands of the law's practitioners and the benches of varying authority up and down the land. The average man has little contact with the law save with his own solicitor, and it is by that solicitor's conduct that the average man judges the law. All the other qualities so necessary for success are as nothing compared with the most vital of all, integrity of the highest type.

* Secondly, the solicitor should give sound advice. One takes that to mean that the advice is primarily sound in law. So your solicitor must study his law and note its developments through the decisions of the Superior Courts and the changes in practice. The need to study throws a heavy burden on a solicitor, for he cannot hope to know all the law; so he must specialise to some extent and leave what he cannot cover to his partners. He has a tremendous amount of administrative work to do and long periods of uninterrupted study are quite impossible except in bed from midnight onwards! To help him in the discharge of this function he knows the advantage of taking his points to counsel for advice, a course which is comparatively cheap still and which gives him a certain amount of protection from any possible charge of negligence.

Further, the advice must not only be sound—it must be sensible and practical. One takes those last two adjectives as directed towards the same end, namely, giving the client a clear-cut course of conduct to follow. For the client wants a practical solution to what is after all to him a very practical problem. He is not interested in the theory of the law except as to how it affects his rights and (more often than not) his pocket. It is sometimes difficult for a lawyer who is interested in the principles of law to remember that his client does not share that interest and that he would rather, as it were, win on a bad point than lose on a good one—which is more than can be said for theorists pure and simple. The client never sees himself as being an instrument for carrying out the law. He looks upon the law as something which he can use and behind which he can shelter. Bearing that in mind, the solicitor should shape his advice accordingly upon the most practical possible lines. His advice will be useless unless it is a workable proposition.

Whether or not the client accepts that advice is quite another matter. It may be the best advice in the world from the point of view of both law and practicality: but no matter. There is no guarantee that it will be followed. It has its best chance of success if the client really trusts the judgment of the solicitor tendering it. And in order to win that trust and to keep it the solicitor must keep himself up to date. In other words, he must be efficient.

Now efficiency is measured according to the resources available. You could not expect to have, say, a company prospectus drawn with the same degree of efficiency by a couple of elderly solicitors in partnership in the country as by a firm of City solicitors with a dozen partners. Conversely, the City firm might not show up half so well as the elderly couple where the sale of a farm with live and dead stock was concerned. It is a question of resources and experience, and that leads to some degree of specialisation. But in their respective fields the two firms may be equally efficient, though there is a tendency to regard large firms as more efficient than small. This arises possibly because the larger firms have great capital resources and can occupy larger and more impressive looking premises with bigger staffs and more modern equipment for coping with the office side of the work.

The President of the Law Society cited two descriptions of solicitors' offices from Dickens and said that they almost fitted some solicitors' offices visited in recent years. Lawyers in this country tend to cling to old-fashioned methods because, as has already been hinted, the cast of their mind is conservative, as is natural in a profession where the appeal is so often exclusively to precedent.

The client is not necessarily very much impressed by an old world atmosphere, nor, conversely, is he necessarily inspired by the use of mechanical gadgets. But he will tend to warm more to the firm which has an up to date system of filing the myriad documents which a lawyer must keep (in spite of what the public may think is the effect of the Cheques Act, 1957, his duty over receipts alone is heavy) than to the one which just keeps dusty bundles of papers tied up with tape under the vague superintendence of "old—who can put his finger on everything."

So far as the mechanisation of offices is concerned, it is remarkable what effect the war has had. Where offices were blitzed, firms had to move to other premises and this has led to a healthy sorting out in the process, with perhaps more up-to-date furniture and equipment. Take an example from those two strongholds of the law, the Temple and Lincoln's Inn. The former was badly hit: the new buildings, housing mainly counsel but with many solicitors as well, are light, spacious, dignified and with all modern conveniences, such as proper plumbing and lifts. But Lincoln's Inn, having escaped the war, remains very much what it has always been: the rooms are gloriously spacious and dignified but few modern conveniences such as lifts have yet been installed, though what aids to efficiency can be installed have been. No lawyer (for he is a member of a profession which lives by thinking for itself) is so foolish as to think that mere gadgets will guarantee efficiency. Nor will the client be so persuaded. What the client looks at is the "end-product", and the wrapping is neither here nor there. He would rather have good advice scribbled on the back of an envelope than bad advice presented in perfect type. The legal profession can be trusted to strike the proper medium between these two extremes, always remembering that the efficiency of a firm is measured against its resources and the reward which is asked for the work in hand. Young men starting small practices of their own may find abundant modern conveniences (especially a highly trained staff) beyond their means: they can, within their own spheres, be efficient nevertheless.

There is a complaint which one hears constantly levied against solicitors. It is this: "My lawyer is an awfully good chap. I trust him absolutely and respect his judgment. But oh, the delays! You put a matter into his hands and never hear another word for months." Now, one knows that the lawyer is himself subject to constant frustration in getting his information or authority from someone with whom he is negotiating (government departments are no exception) and that the delay is not his fault. Could not a lot of anxiety be allayed if solicitors were to send out to their clients so affected by delay short notes every so often (nothing elaborate is called for) to explain the situation—a kind of system of "sit-reps" such as was used in intelligence in the war? One feels that this would go a long way towards upholding the good name of solicitors where their reputation for vigour and despatch are involved.

In their efforts to be and to remain efficient in the light of modern requirements, firms of solicitors must always try to see to it that the partners have a fair balance of work distributed between the working members. Nothing discourages a young partner so much as to have to bear a disproportionate amount of work whilst the senior partners have an easy time. Exactly when elderly partners shall retire is, of course, a pure matter of private arrangement. But the senior partners who insist on staying on beyond their useful working lives should remember that often by doing so they upset the balance of the whole firm and endanger the efficiency of the partnership.

And so, as another year has come to its close and solicitors pause to consider their work, let them bear the address of the president in mind and turn their thoughts inwards with the question: "Am I efficient, and do I help to make my firm efficient?" The legal profession is not having an easy time in these modern, competitive days. Do not let it ever be said that lawyers are not up-to-date and efficient. Lawyers must see to it that they are both.—L.T.

The
Bombay Law Reporter.

JOURNAL.

July 15, 1959.

IS THE CONSTITUTION OF INDIA FEDERAL?*

THE Constitution of India is on the pattern of a Federal Democratic Republic. The three major characteristics of a federal system are: (1) supremacy of the Constitution, (2) distribution of powers and (3) authority of Courts. Thus under the first category all the three powers of the state, executive, legislative or judicial, are subordinate to the Constitution both at the Federal and State level. The second category entails a division of authority between the federal government and the States which are its constituents. Under the third caption the supremacy of the Courts as interpreter of the Constitution is essential to nullify any action of the federal or state Governments or their respective organs whenever such action runs counter to the mandatory provisions of the Constitution. A federal Constitution is clearly an attempt to reconcile the apparently irreconcilable claims of national sovereignty and state sovereignty. The constituent states of a federation may be the creator of the central government by agreeing to part with already existing sovereign power to the central agency; or the converse may be the case where the Central Government, which was priorly unitary, is rendered by the new federal Constitution formulated by the people or their representatives, to the position of a central federal government sharing its sovereign powers with the component administrative units.

Judged broadly under the above categories the Constitution of India is certainly federal. There are various types of federations such as found in India, America, Canada, Australia and Switzerland.

We are particularly concerned now with a controversy that has been raised recently by the opinions of Prof. K. C. Wheare¹, endorsed by Mr. N. Arunachalam², and that of Prof. C. H. Alexandrowicz³. Prof. K. C. Wheare has coined a phrase 'quasi federation' as applicable to India, but has not anywhere defined what a 'quasi federation' is. If it is said to be analogous to such terms as 'quasi judicial' or 'quasi legislative', the jurist has to pose the query, is 'quasi federation' derived from any source which was truly federal. We know judicial functions devolving by statute and quasi (though not fully judicial) functions delegated to certain bodies or tribunals by statute; similarly delegated legislation either by a statute or by the parent legislative body itself, under some power vested in it by law, can create quasi legislative organs. But what is the term 'quasi federal'? There is no legislative sanction for such a terminology at all in any of the Constitutions of the world. As Prof. Alexandrowicz states the term 'quasi federal' should only mean 'virtually federal'. But it does not take us farther than in a negative way stating 'India is not federal but quasi federal'. Is the latter capable of any decisive definition? It appears to be a 'loose' connotation taking us nowhere but landing us in a quagmire. We can understand terms such as 'federal', 'more federal'

*By V. G. Ramachandran, Project Director, Indian Law Institute, New Delhi. (Author of *Fundamental Rights and Constitutional Remedies*).

1 Vide 'Modern Constitutions' and 'Federal Government'.

2 Vide, The Year Book of Legal Studies, 1957, pp. 25-45. Article on 'The Indian Con-

stitutional Structure.' (Published by Department of Legal Studies, Law College, Madras).

3 Vide 'Constitutional Development of India' pp. 149-205. 'India a Federation' (International and Comparative Law Quarterly, Vol. VIII (1954) page 393); also his article 'Quasi Federalism' (The Lawyer, Aug. 1957 of The Madras State Bar Federation).

or 'less federal' as indicative of the degree of federalism exhibited in a Constitution. But to say 'quasi' imports an underlying idea that it is not federal. Ordinarily the tussle is between 'unitary' and 'federal'. In such an event either a Constitution is unitary or federal. Federalism cent. per cent. or diluted federalism of a lesser degree, one can understand. Can diluted federalism be unitary? It cannot. On that account can it be called 'quasi federal' as if there is an intermediate stage. A Constitution is either federal or not federal. The minimum requisites for federalism should alone be looked into for the purpose of classification. If quasi federation is to be in vogue, is it to be applied to all federations which are not 100 per cent. federal or is the nomenclature restricted to any country with less than 50 per cent. federalism and further, is any percentage fixable at all for introducing such a terminology. Wheare appears to feel America is the truly federal type. He says:⁴

"Among examples of a Federal Constitution there may be mentioned those of United States, Switzerland and Australia. In each case the Constitution sets out the matters upto which the Legislature of the whole country may make laws and it reserves to the States or cantons a sphere in which their Legislatures may operate, in legal independence of the Central Legislature and of each other."

Later, while dealing with Canada, the Professor feels a great difficulty and comes to a halting view that the Canadian Constitution may be called 'quasi federal'. The word 'may' has to be noted. It is only another way of saying 'Canada is not as federal as America.' Quoting the Professor's own words:

"The Constitution of Canada is more difficult to classify. It establishes an independent government for the whole Government, but it permits that government to exercise certain limited powers of control over the government of the ten provinces. Although there is a list of subjects enumerated in the Constitution over which the provincial Legislatures have exclusive authority and upon which the Parliament of Canada is unable to legislate, yet it is provided that the executive Government of Canada may veto provincial bills or disallow provincial acts. Moreover provincial judges are appointed by the Government of Canada and the formal head of the provincial Government—the Lieutenant Governor—is also appointed by the Government of Canada. These qualifications upon the strict Federal principle of independent and co-ordinate status between the general and provincial governments may lead us to regard the Canadian Constitution as not strictly Federal. It may be called Quasi Federal."

With all respect to Prof. Wheare, we can only say that Canada presents a less federal structure in its Constitution than America, but nevertheless it does not thereby become 'quasi federal' i.e., that which is not really federal. In reality in Canada the present Constitution dates from 1867 when the British North America Act was passed, uniting the then existing four provinces into a federation entitled the Dominion of Canada which later on increased to ten provinces.

The essentials of a federal type are there in the Canadian Constitution. There are (1) the units of the federation, (2) the power to amend the Constitution by the King or Parliament of Britain by an address presented by both Houses of the Dominion Parliament. This has to be backed by substantial public opinion in Canada. If the consent of the one or more of the provincial Legislatures is lacking, the convention appears to be that amendment be refused by the Parliament. (3) There is a definite division of powers between the dominion and the units, the opposite of the U.S.A. model i.e., the powers of the provinces are enumerated and the residue is left with the dominion. There is a definite State List on which the provinces could legislate. (4) The executive power enables the Government to be carried on in the name of the King through his Governor General who acts on the advice of the Dominion Cabinet Ministers, elected and responsible to the House of Parliament. (5) The legislative power is centred in the Dominion Parliament which consists of the King, the Governor General, the nominated Senate and the elected House of Commons.

4 Modern Constitutions by Prof. K. C. Wheare p. 27.

(6) The judicial power is vested in the Supreme Court of Canada. The two Federal Courts are the Supreme Court and the Court of Exchequer and Admiralty, the Judges of the superior Courts being appointed by the Governor General to hold office during 'good behaviour' and removable by an address by the Senate and the House of Commons. May be the Supreme Court of Canada is less powerful than that of America as its power to interpret the Constitution is reduced by the Governor General's power of disallowing provincial bills. But in another way it is more powerful than the American Supreme Court as it can hear appeals from provincial Courts on purely provincial law.

We have outlined the above broad features of the Canadian Constitution to indicate its federal nature. It may be clearly understood that the nature of federalism is more one of historical growth and based on a nation's necessity. To expect the same pattern of federalism in all countries is well-nigh impossible.

It is the fashion to regard America as the mother of federal Constitutions. But even there, there are certain features which are the antithesis of true and unalloyed federalism. We shall detail a few aspects of the same. It is argued that in America as the Congress has only enumerated powers, the residual powers are vested in the states or the people, thus making it appear that there is a very real division of powers, the states being as sovereign as, if not more powerful than, the centre. Unlike India or Australia there are no concurrent legislative lists in the U.S.A. But in actual practice this seemingly strong federal feature has been abused. During the national emergencies or when national interests required a broader concept of federal power, the Supreme Court of America was called in to rescue in its interpretative jurisdiction to invoke the doctrine of implied powers, the doctrine of immunity of instrumentalities and the doctrine of implied prohibition.

Thus in *McCulloch v. Maryland*⁵ the Court allowed the Congress to assume control over 'banking' in national interests though banking was not a listed federal item. The implied powers ferretted out the listed item 'coinage' to suit the occasion and this was deemed to comprise 'banking' also. Again in *United States v. South-Eastern Underwriters Association*⁶ the commerce clause was invoked as a positive power to bring in a non-federal item as 'insurance' under the implied federal power. This tendency to assume federal powers through the interpretative jurisdiction of the Supreme Court compelled Mr. Dodd, an American writer, to state—

"the scope of national authority has become a question of Government Policy and has substantially ceased to be one of constitutional law."

Under the doctrine of 'immunity of instrumentalities' the Supreme Court of America propounded in *McCulloch v. Maryland* that the power to tax involves the power to destroy. Ergo a state cannot tax the agencies or instrumentalities of a federal government as that would cripple the function of the federal government.

Under the third doctrine of implied prohibition the American Supreme Court held in *U.S. v. De Will*⁷ that the Congress power to regulate trade among states implies prohibitions regarding internal trade by state except indeed as a necessary and proper means of carrying into execution some other power expressly granted or vested.

Thus while we exalt the American Constitution as highly federal giving real autonomy to States, yet, in actual practice, this latter autonomy appears to be a mere smoke screen. The centre is given more power by invoking the above doctrines for the Supreme Court to interpret the Constitution in such a way as to yield more power to the Centre than what is contained in the Constitution. Shall we then call America as cent. per cent. federal? Assuredly not. It is very nearly on a par with Canada and India in the above matters. For the doctrine of implied power is thoroughly unnecessary for the federal systems of

⁵ (1819) 4 Wheaton 316.

⁶ (1944) 322 U. S. 533, 88 Law. ed. 1440.

⁷ (1860) 9 Wall 4.

Canada and India where, besides the residuary powers being vested in the Centre, there are double enumeration of powers such as federal and state items. India has another string in its bow in the long list of concurrent powers on the analogy of Australia.

The doctrine of immunity of instrumentalities is not wanted in India as the exemption of mutual taxation is specifically provided under arts. 285 and 289. Canada has rejected the doctrine on the ground that the validity of each legislation has to be tested intrinsically and not whether it would hamper the functions of another Government as interpreted in America (vide *John Deere Plow Company, Limited v. Wharton*⁸). Canada and India also do not need the doctrine of implied prohibition on account of the respective double and triple enumeration of powers.

In America though the States are vested with all reserve powers yet in practice they are so used as not to conflict with the needs of national government at the centre. Again in the Australian Constitution there is no treaty making power and this power is derived through judicial interpretation (vide *The King v. Burges: Ex Parte Henry*⁹ where it was possible to find the power to enforce international agreements despite its effect on state legislation). The same difficulty was felt in America though Art. VI gave adequate powers. In the Indian Constitution the Centre can legislate for the states during emergencies. There is no such specific provision in the American Constitution. But the Supreme Court of America came to its rescue to assure such power during war. The verdict of competency thus lay with the Court and not with the federal Legislature. The 'emergency' powers of Parliaments of India visualised in arts. 249 and 250, power to legislate for the State; art. 356, which enables the President to take over if the Constitutional machinery breaks down, are all absent in America. But this is circumvented thus. If there is resistance by a state to the execution of any law by the Congress or if federal authority is questioned by state government, the national government may exercise its military forces to compel the state to obey its laws, so as to maintain the indestructible union.¹⁰ Instead of this armed forces' invasion of a state we have in the Indian Constitution powers to suspend state rights and assumption of powers by the President during emergencies.

Now certain factors emerge from the above discussion. In America as the power of constitutional amendment is very rigid the Supreme Court is utilised to so interpret the Constitution as to meet any new national emergency. In India the amending process is not so rigid and so the Supreme Court of India has restricted powers of interpretation. In America though the Constitution apparently restricts the power of the centre, yet, in actual practice, it wields more power than the units. Ergo the criticism, that in Canada or India what is yielded by the letter of the Constitution to the state is far less than what is its due, falls to the ground, since in America, the resultant is the same in the actual working of the Constitution. What is directly set out in the Indian Constitution is indirectly practised in America. If so, what is the use of dubbing India and Canada as 'quasi federal' while America and Australia are termed as 'federal'. It all bespeaks of a lack of perspective and lack of decision. The term 'quasi' is a camouflage and a veritable conundrum leading the jurist into a needless hairsplitting mirage of 'words, mere words.'

It will be more appropriate to fall in with the reasoning of Mr. C. F. Strong who dealt on variations of the federal type thus:

"In the completely Federalised State, of which the United States is the most perfect example, the Court is absolutely supreme in its power to decide in cases of conflict between the Federal authority and the State authorities. In other cases the powers of Court are limited by rights granted to other authorities. Of this Switzerland affords the best example. For her not the Federal Court but the Federal Assembly is the final arbiter on all conflicts between the State and Federal authority...between these two ex-

⁸ [1915] A. C. 330.
⁹ [1938] 55 C.L.R. 608.

¹⁰ *The Proctor*, 13 Wall. 700. *U. S. v. Anderson*, 9 Wall. 56.

traces the several examples of variation in the matter of deciding conflicts between Federal and State authorities. In the Australian Constitution certain clauses exist which may be altered by the Commonwealth Parliament without reference to any other authority. In such cases there can be no question of infringing the rights of States."

Mr. C. F. Strong thus calls America as most federal and refers to Canada as 'less federal' than America,¹¹ Australia or Switzerland. He further speaks of Canada as a 'modified example' of a federal state.¹² He never uses the term 'quasi'. Again referring to the U.S.S.R. Mr. C. F. Strong said that it is nonetheless a federal state though it repudiated the methods of western constitutionalism. The U.S.S.R. as under the Stalin Constitution of 1936 in its federal aspects bears on paper at least a striking resemblance to some of those we have so far examined.¹³ Mr. Strong was uttering the bare truth when he said federalism varies in form from place to place and from time to time depending on so many factors, historical, geographical, economic and political.¹⁴ Thus the historical background of Soviet Russia necessitated a new philosophy of the political life, a regimented socialistic republic where the individual got submerged in the state's needs. The way of life was totalitarian and regimented to a pattern which clearly is antidemocratic. An alternate Government was impossible with only one recognised monolithic political party as the communist party. This is also the antithesis of democracy. But on paper the U.S.S.R. was a federal state with sixteen soviet socialist republics. There is an enumeration of powers on the U.S.A. model enumerated so far as the centre is concerned, the residue being relegated to the states. The executive power was vested with the council of ministers while the legislative power vested in the Supreme Soviet which consisted of two Houses, the Soviet Council of the Union and the Soviet Council of Nationalists.

Thus on paper the U.S.S.R. is a Federal Constitution, but in actual practice, it is antidemocratic and totalitarian. Shall we call U.S.S.R. as 'quasi' federal or the least federal indicating that the powers are not really shared between the units and the centre. It is a one party monolithic state though outwardly federal. It is best to call the U.S.S.R. as the 'least federal'.

The conditions for establishing federalism are (a) a desire for union, (b) the desire for local independence, (c) the absence of marked inequalities among the component units, (d) political education and legislation. It must be noted that three factors were present in varying degrees and forms before the Federal Constitution of America, Australia, Canada or India were ushered in. The problems of federal government were generally met by (a) satisfactory division of powers, (b) protection of the smaller units against dominance by the larger, (c) organisation of the relation among the units and (d) a satisfactory method of constitutional amendment.

As Mr. C. F. Strong says

"the greater the reserve powers with the Units, the more markedly Federal is the State whose Constitution permits such reserve to them."

The word used is 'more markedly.' So it is all a question of more federal or less federal and never was there any yardstick under the connotation of 'quasi federal.'

It may be apposite to recall what Prof. K. C. Wheare himself says as to the divergence of the law of the Constitution and the practice of it.

"Although the power of veto and disallowance have been exercised by the Government of Canada over Provincial legislation they have been used sparingly and they have done little to contradict in practice the independent status of the province. In Australia on the other hand where the law of the Constitution safeguards the independence of the States more strictly, the control of the Government of the Commonwealth of Australia over the Governments of the States has become so great that some observers would say that in practice the States of Australia are little more than the administrative agencies of the Commonwealth. This control has come chiefly from the greater financial resources

11 Vide Modern Constitutions.

12 Ibid p. 115.

13 Ibid p. 122.

14 Ibid p. 98.

of the Commonwealth and has shown itself particularly in the increased reliance of the States upon grants from the Commonwealth for the performance of most of their important functions. It may be said therefore that the Australian Constitution embodies a considerable measure of decentralisation or devolution, although in law it remains Federal. In Canada on the other hand though the Constitution in law is 'quasi federal' it is in practice nearer to Federalism than the Australian. In the class of quasi Federal Constitution it is probably proper to include the Indian Constitution of 1950, the Constitution of the West German Republic of 1949 and also that of the German (Weimer) Republic from 1918 to 1933; and the Constitution of the U.S.S.R. of 1936."

✓ We must note that Prof. K. C. Wheare was halting and rather indecisive in his phraseology. He says Canada may be called 'quasi federal'. He felt it probably proper to include India in the category. He also admits that countries which are more federal on paper are less or least federal in practice and vice versa. In such a context we feel that there is no background or justification for coining a new word 'quasi' federation to add to the confusion. Mr. Arunachalam quotes Prof. K. C. Wheare as saying

"If there is no sphere of activity reserved for the constituent communities and forbidden to the Central Government, the Union is not Federal, but legislative, or incorporative, as the Scots called it in 1707."

But this is not the case at all in India. The two basic requisites for a federation are stated to be (i) two separate governmental organisation for the centre as well as the state with its duplication of institutions, legislative, executive and judicial, (2) the respective spheres of the centre and the state in the above should be in writing.

Does not India answer to these basic standards of federation? Is there not separation of powers and two governments, the Union and the State in India? In the sphere of the Union Government arts. 52 to 78 deal with the powers of the executive while arts. 79 to 122 deal with the legislative aspect. The judiciary are referred to in arts. 124 to 147. In the sphere of the state government the executive (arts. 153 to 167), the legislative (arts. 168 to 212) and the judicial (arts. 214 to 237) aspects are detailed. The distribution of legislative powers are covered by arts. 245 to 255, administrative relations of states with the Union by arts. 256 to 263 and the emergency provisions by arts. 352 to 360. The three enumerated lists are given in sch. VII.

Are all these division of powers unreal? Does it all lead to such a vanishing point of federalism as to invoke Mr. Arunachalam's term 'quasi federal', or 'legislative or incorporative' etc. Mr. Arunachalam argues that

"When these very important aspects of a federal structure are noticed, any structure that may possess the trappings of a federal structure, where the autonomy that is assured to the units therein is precarious or at the pleasure of the centre, will not in any sense be entitled to the status of a Federal Structure, contractual, administrative or otherwise. Such a structure can only be quasi federal or legislative or incorporative as the Scots called it in 1707."

We may say this is bad logic and worse law. At any rate Mr. K. C. Wheare referred to cases where there is no power at all for the unit whatsoever, as legislative or incorporative. In that sense India cannot be assailed for the states have substantial though limited power. Mr. Arunachalam characterising that arts. 257 and 365 of the Indian Constitution reduce the federal character to a vanishing point, is indeed fallacious. It is merely a 'vanishing argument', for such emergency powers have been usurped by the American Congress under its police powers so as to safeguard the so-called indestructible Union by marching its military forces and the President exercising his supreme powers over the state concerned. We have already adverted to this aspect before. So Mr. Arunachalam appears to feel satisfied with the legal aspect on paper though the practice may be contra and most ugly. In the wake of this specious reasoning Mr. Arunachalam declares that Indian Federalism 'vanishes'. Did not American Federation vanish equally under those circumstances? Why this discrimination and causistry in reasoning? He excels in this

direction when he says "After all quasi institutions have come to stay in every branch of law". If the reference is to 'quasi judicial' or 'quasi legislative' they are derived under law by delegation, or directly by statute. He further adds 'Quasi means not exactly'. This is again a most imperfect way of describing the structure of a federation. Prof. Alexandrowicz rightly called this as too vague a term, and added:

"The use of 'Quasi' in legal terminology proved meaningful in exceptional cases only. For instance in the expression 'Quasi Judicial' the addition of 'quasi' serves the purpose of indicating the application of approximately judicial methods in administrative proceedings. It might also be conceded that in term 'Quasi legislative powers' the term 'quasi' proved helpful to justify and explain delegation of powers to the Executive. But in the expression 'Quasi Federation' the word quasi hints at a deviation from the Federal principle without indicating what kind of special position a particular quasi Federation occupies between a unitary State and a Federation Proper."

The Professor further suggests to Mr. Arunachalam to rather consider India as a 'federation with a vertically divided sovereignty' than as an administrative federation. It must be clearly understood that:

"Sovereignty is a unit and cannot be divided and what is divided in a Federal government is nothing more than powers of the Government. Thus Sovereignty is in the Federation itself and that is in the States formed by the Union and what is retained by the component members is merely local autonomy in respect of certain matters."

Prof. J. W. Garner¹⁵ refers to perfect and imperfect federal unions, the difference being only in the degree of federalism. This appears to be a better classification than 'quasi federal'. But we believe the better term to be used should be 'federal', 'more federal' or 'less federal' to indicate the degree of the federal structure in an approximate manner.

The opinion of Mr. Arunachalam that "the Constitutions of India and Canada share alike many common features that really cut across the essential principles of Federalism" is incorrect. What can be really asserted is that while there are certain basic features of federalism in India such as supremacy of the Constitution, division of powers and authority of Courts, yet there are certain unique features in the Indian Constitution peculiar to itself, some of which tend to suggest a leaning away from federal and towards centralisation of power in the Union Government. Federalism varies from place to place and from time to time in the history of the world. A country takes unto itself such a federal pattern as it could assimilate or find it necessary in its historical evolution. We shall now study the cases of America, India, Australia and Canada in their Federal characteristics. In the mode of formation a federal union may be formed by a voluntary agreement between a number of sovereign independent states for the administration of certain affairs of general concern such as in the U.S.A. or Australia. It may also be a unitary state transformed into a federal union as in Canada. In India even under the Government of India Act, 1935, the provinces could not be said to be in any sense sovereign like the states of the American Union. After the political awakening in the Canadian era and the British quitting India in 1947 the Constitution has been framed by the people of India assembled in the Constituent Assembly. The people of India wrought for themselves as set out in the preamble to the Constitution a Sovereign Democratic Republic to secure (a) justice, social, economic and political, (b) liberty of thought, expression, belief, faith and worship, (c) equality of status and opportunity, (d) fraternity assuring the dignity of the individual and unity of India. Just as the indestructible union of America was carved out by the Americans, the vision in India was for a United India for all time with no option to the component states to secede. With Pakistan out, the intensity of the peoples' wish was for ever preserving the unity of the rest of India.

The Constitution of India envisaged division of powers between the Union

15 Prof. J. W. Garner: Political Science & Government, pp. 286 & 163.

and the States. The old Indian States were also brought under the federal system. It was Sardar Patel's monumental effort that welded the princely India and the rest of India into one. The stress and strain of what were the old Native States, B-States when it had to be associated into a federal pattern with A-States (the old British provinces), C-States (the Chief Commissioner centrally administered areas) and D-States such as Andaman and Nicobar islands, all these required a constitutional set up of a federal type but giving sufficient power to the Centre, sufficient to pull together all these centrifugal and centripetal forces. The hegemony or multiple character of the people of India in their linguistic and religious differences called for a strong centre with defined enumerated powers. The States also were to be given autonomous powers limited by an enumerated States list. There were besides the Concurrent List which enabled both the Centre and the States to legislate, the former having precedence. The residuary powers were necessarily left to the Centre though in effect after such elaboration of three lists there can be hardly anything residuary.

While in America the state territory was unalterable, in India though the unity of India is assured, Parliament can re-organise the states or alter their boundaries (art. 4). This is not at all unfederal. The history and political reasons in India necessitated such a pattern. Linguistic agitation and the old princely states being allowed to be gradually drawn into the federal structure all necessitated such provisions. Now the task of princely states being absorbed is over and even the concept of B-States has vanished with the first constitutional amendment of 1951, Part A and B States now having same characteristics and federal governance. The linguistic urge had been subsequently nearly satiated with the reorganisation of states on a linguistic basis consequent on the States of fourteen States, the classification of States Parts A and B and C disappearing, the old C-States merging into the neighbouring States and States B receiving an equal status with States A. All the states of India are having as their head only Governors appointed by the President of India, the institution of Raja Pramuks being now obsolete. Despite the power to tax, the states have necessarily to look up to the Centre for financial help. In the legislative sphere the Centre has the supremacy particularly during national emergencies. Nevertheless the states are autonomous with their own government, its law-making Legislatures and its own judiciary headed by the High Court; all this is sufficiently federal and if the units have to lean on the centre on certain given occasions, it cannot make the Constitution unitary. In fact, in normal times the Government is federal, while in emergencies, there is a sort of unitary control by the centre.

This is indeed the unique and peculiar feature of Indian Federalism so as to weld together a variety of peoples and keeping intact the Union of India as the paramount objective. A federal pattern as that of America may create a lot of shocks and counter-shocks dissipating the country and the indestructible unity of India into warring units leading to the gradual disintegration of India into weak totalitarian principalities. In underdeveloped countries as India, the American pattern is most unsuitable and we must needs have checks and counter-checks on the federal growth of the Indian people. That is why the Constitution reserves all power to the Parliament to effect territorial changes in the unit. There is, therefore, nothing in vogue in India as the American equality of the states irrespective of their sizes or population. Under the Indian Constitution there is no equality of representation of the States in the Council of States since the creation of the Federal Union was not brought about by any agreement between the component states. The number of members to the Council of States varies from 1 to 31 for the various component States. This is intended to be so since in the political growth States A were more mature than the old States B, C and D. It was for the benefit of the federal union if more representation was given to the former states in the Council of States.

Again on account of the historic origin America yields to the component units the right to determine their own Constitution. For the Constitution of the United States (1787) simply drew up the Constitution of the national government leaving it in the main to the states to continue to preserve their original Constitution, or in the case of new admissions, to draw up their own Constitution or to amend them. But in India we had no such sovereign states to begin with when the Constitution of India was forged. The states were then mere administrative units and so in India as in Canada the Constitution embraces both the Union and the States.

*Again legislation by a state in India is subject to disallowance by the President when reserved by the Governor (art. 201). This is intended to have a sort of control by the federal chief, the President of the Indian Republic. It is with this view that the Governor of a state is appointed by the Union President to hold office during his pleasure (arts. 155-6). These provisions are absent in the U.S.A. or Australia but present in Canada. But this cannot efface the basic federalism of India or Canada. Only the Federation of the latter are more controlled and regulated.

In America national unity with state rights was reconciled by a logical division of everything essential to sovereignty. A dual polity was thus put in vogue such as dual citizenship, duality of officers and a double system of Courts at the federal and state level. But this was not possible in India which was a federal baby with divergent forces pulling and obstructing its future. So, as in Canada, India has only one union citizenship. Though the Union and States have their own public servants there is no clear cut division, one complementing the other in all necessary spheres of work. In the sphere of administration of justice, in India there is but one integrated system for administration of both the Union and State law. This unified system has stood the test of time during the 150 years of British regime and no case was made to bifurcate the Courts into Federal and State. Too much of such division will affect the essential unity of India which is but a hegemony of divergent castes and creeds. A centripetal force was needed to bind together these antifederal phenomena. In America, it was all one people and who were habituated to state sovereignty prior to the forging of the Constitution in 1857.

So the degree of federalism is more of historical growth. What is good for America is not necessarily good for India. A set rigid pattern of federalism will not generally help in the growth of true federalism. The peoples of a country can take in only the required dosage of federalism as is suitable to their growth. Overdosage may stunt or destroy their growth. Federalism is not like the set pattern of coats to wear. It is a cloak of varying organised patterns befitting each wearer and helping him to the next and superior status of federalism. As we analysed earlier even in America we find the centre more powerful than the states. Thus there can be practical difficulty in evolving a truly federal democracy (cent. per cent. and unalloyed). So long as the political consciousness, added by the economic and social factors, is not at a high ebb in the mass of the people, you cannot expect, a truly cent. per cent. federal type of government. Our imperfections are to be cured by a sort of direct or indirect unitary control even in a federal democracy.

Thus the Indian system which in the main presents a federal system for normal times has also the unique achievement of imparting to the federal system the strength of a unitary system in emergencies. As we stated elsewhere what we do directly in India is achieved in America by an indirect dubious method of judicial interpretation during national emergencies.

* As Mr. Durga Das Basu in his commentary on the Constitution of India says:

"But with all the above exceptions our Constitution with its distribution of powers and the duty of Courts to guard that remains normally and basically a Federal Constitution subject to specified exceptions. The exceptions are unique; but in cases where

the exceptions are not attached the Federal provisions are to be applied without being influenced by the existence of the exceptions."

In a way Indian federalism enshrines a principle of reconciling federation with nationalism. It is also a compromise between judicial supremacy and parliamentary sovereignty.

Mr. Justice William O. Douglas of America in his 1955 Tagore Law Lectures recognises the clear trend even in America towards "a strong and powerful national government." The impetus for that growth has in part been decisions of the Supreme Court from the time of Chief Justice Marshall to this date. It has in part been the increased use by Congress of the great arsenal of power contained in the Constitution. Powers long neglected e.g. power over inter-state commerce, have been increasingly used by the Congress since the turn of the twentieth century. The increased complexities of American life, the growth of industrialism, the disappearance of the frontier, the increase in population, the growing dependance of one part of the nation on the others—these were all powerful pressures creating the need and demand for federal regulations in fields where previously only the States regulated. The depression of the year 1930 emphasised the need for planning by the Central Government. The advent of two world wars made necessary the close integration of the national economy under the national government and the war powers of the Congress and the President, already mentioned, were ample for that purpose.

Thus we find an admission that modern life necessitated in America a swing back to the unitary pattern as a necessary emergent of federalism in national interests. In India we have a similar problem if not worse—what with its very huge population, want of monetary resources necessitating pooling at the Centre, the dependance of one State on another for its economic growth, the divergent linguistic and parochial forces which create obstacles to federal progress—all these necessitated a strong federal centre. Mr. Justice Douglas pithily adds:

"But India has launched on a vast programme of planning. The blueprints for the New India emanate from Delhi; and they embrace comprehensive programme of reconstruction, rehabilitation and industrialization. The Central Planning may produce in India problems of centralisation that parallel America's. If it does, it will affect the measure of Federalism actually existing. What is written in the constitution and in the reports is not always an accurate reflection of the Society covered by that legal system."

Mr. Justice Douglas has thus admitted that American centralism is high shadowing its federalism in national interests. India should copy America. This is his wish. But Mr. Justice Douglas adds:

"But as the trend towards centralisation continues, the need for safeguarding the rights and opportunities for home rule increases. America cannot be run and managed from Washington D. C. alone. And if experience is a teacher, India too will flourish only if local Governments are strong and independent."

So it is necessary to yield a great measure of local autonomy to the states though the central federal power is made strong in national interests. This is what the Indian Constitution does. It is possible that the states can be given more power by conventions and non-interference by the centre. The latter's powers should be used only when national interests and emergencies necessitate the same.

On the question of dual system of Courts, Mr. Justice Douglas says:

"The Dual system is in many respects cumbersome, expensive and productive of delay in the administration of justice. The Australian and Indian systems have much to be said for them. But the American system is part of the price we pay for federalism. That Federalism is quite different constitutionally from either Australia's or India's. It has presented difficulties and perplexities that the other Federal systems have not experienced."

These are indeed pregnant words, which the 'quasi federal' protagonists may ponder over. India's federalism is unique and good for itself. It is

sufficiently federal. America's federalism is not so perfect as it is stated to be. It has got its own drawbacks.

The interpretative role of a Judge in America whether he is a federalist or a staunch states' fighter, is paramount. The judicial trend of interpretation in America has always leaned towards federal and national interests.

So we may conclude that the Indian Constitution is mainly federal with unique safeguards for enforcing national unity and growth. It is no less federal basically than America. America's federalism, while on paper is of a higher degree, in actual practice the leaning is towards centralisation in national interests. So the legal quibble for such a term as 'quasi federal' has no justification at all. The term 'quasi' is a misnomer. India is federal and America more federal in the outlines of the Constitution. That is all that could be said. In practice there is not much difference between any two sets of federal countries, except that which is unique to her constitutional and historical growth. America while more federal on paper, in practice it conserves and assumes all the power for the centre. India has a clean cut outline with no such doubtful moorings. She possesses a unique federal Constitution. Federal in normal times and tending to be unitary in emergencies, it is by no means unfederal or quasi federal, if the latter term implies something not federal or not nearly federal. You may call it if you want 'federal convertible'.

GLEANINGS.

NEGLIGENT INJURY TO DOMESTIC RELATIONS

It is a fine tribute to the adaptability of our legal system that the principles of the law relating to the granting of damages for negligent interference with domestic relations should have been reconsidered a good half-dozen times since they were "settled" by the House of Lords in *Best v. Samuel Fox & Co. Ltd.* ([1952] 2 All E.R. 394). In the most recent of these reconsiderations, *McNeill v. Johnstone*, ([1958] 3 All E.R. 16), Devlin J., showed the ease with which the Courts can recompense "sympathetic" claims and still draw the lines of remoteness clearly in the individual case. In assessing this case, the present writer will survey a number of developments in this field and consider the position which the Courts have now reached.

The facts of *McNeill v. Johnstone* present no unusual difficulty but one or two points of novelty. The plaintiffs, husband and wife, were a United States Air Force officer and his French wife who had been injured by the defendant's negligence in a road accident in this country. To save hospital expenses, the husband sent his wife to a U.S. military hospital over 150 miles from their home (and the husband's base) at the time. Obtaining a month's leave without pay, he then visited his wife in the hospital, sometimes staying in an hotel in the vicinity, occupying bachelor's quarters attached to the hospital or returning home on other business. Their claim for special damages (the wife's general damages being admitted)—one month's salary, travelling expenses and hotel bills—the learned Judge allowed by half, ascribing the other half of the expenses incurred to the husband's business trips. These, he pointed out, were not sufficiently connected with the defendant's negligence to be within the bounds of compensation.

It is now clear that the Courts will not normally grant damages merely for the loss of the "companionship" attributes of *consortium*. The House of Lords made this clear in *Best v. Samuel Fox & Co., Ltd.* where, as a result of the defendants' negligence, the sexual capacity of the plaintiff's husband was destroyed and their Lordships refused to grant damages for such loss as this caused the wife. Similarly, in *Lampert v. Eastern National Omnibus Co. Ltd.*, ([1954] 2 All E.R. 719), Hilbery J., refused a wife's action on the ground that the defendants' negligence in injuring her and her husband's subsequent withdrawal from the home were not causally connected. In such cases, only the medical expenses directly incurred and such outgoings as the cost of tem-

porary domestic help will be recoverable (see *Best v. Samuel Fox & Co., Ltd.* per Lord Goddard, C.J., at p. 399, per Lord Porter, at p. 396; *Kirkham v. Boughey*, [1957] 3 All E.R. 153, 156, per Diplock J.).

Both these cases involved actions by *wives*, of course, but even had the plaintiffs been husbands, the observable policy is still away from granting damages for other than actual economic loss (cf. the writer's article "Injuries to Consortium in Modern Anglo-American Law" (1958) 7 I.C.L.Q. 417, at pp. 430-436).

Where the companionship element in *consortium* has some exceptional importance in the particular case, however, the Courts have been only too willing to recognise that it can have some financial counterpart. In cases such as the three most recent on this subject, the particular problem has been one of whether a husband can be compensated when he has stayed away from his employment until his wife has recovered from her injuries. In *Behrens v. Bertram Mills Circus, Ltd.* ([1957] 1 All E.R. 583), the plaintiff was a circus midget whose wife, also a midget and in fact his stage-partner, had been injured as a result of the defendants' failure to keep a performing elephant under control. Devlin, J., held that it would have been unreasonable for the husband to have gone on tour while his wife was unable to accompany him in view of their peculiar physical interdependence. When, as a result, he stayed in their caravan-home to enjoy her company until she had fully recovered, the Court reimbursed him his lost potential earnings for this period. So, in *McNeill v. Johnstone*, the fact that the plaintiff-wife was French and had only been in England for some two months gave her husband greater occasion to be constantly with her. Where the bounds of "peculiar dependence" will be drawn, of course, we do not know: it could well cover every variety of emotional relationship known to husband and wife and lead away from the 1952 refusal to assess *consortium* in terms of pounds and shillings. (Had the damage been purely to business interests, rather than domestic, the husbands would not have been able to recover either as partners (*Burgess v. Florence Nightingale Hospital for Gentlewomen* [1955] 1 All E.R. 511), or as employers (*Inland Revenue Commissioners v. Hambrook* [1956] All E.R. 338).

Later in 1957 came *Kirkham v. Boughey*, in which the fact-situation closely resembled that of *McNeill v. Johnstone*. There, the husband refused to return to his position in Nigeria but insisted on staying in this country to be near his injured wife. As a result, he was compelled to take employment at a substantially lower salary but Diplock, J. refused to allow him his lost earnings as special damages. His claim, the learned Judge pointed out, was not based on loss of *consortium*, on the expenditure of money as part of the duty of maintenance (hospital expenses and visits) or on any hypothetical duty of care owed to the husband *qua* husband. It was, in fact, *damnum absque injuria*. Diplock, J., distinguished *Behrens v. Bertram Mills Circus, Ltd.* by pointing out that the sum there claimed (£170 after deductions for other items) was so small that had the husband actually gone on tour, the cost of hiring domestic help together with the damages for loss of *consortium* would have exceeded the earnings lost by staying at home. If so, he concluded, the proper step to take was to mitigate damages by staying away from work.

In *McNeill v. Johnstone*, however, on a basically similar set of facts, Devlin, J., found himself compelled to explain a point of difference between his reasoning and that of Diplock, J.—a difference which really goes to the ultimate object of the law of torts. Liability having been established or admitted, the assessment of damages must be on the basis that the plaintiff is to be "put in the same position, so far as money can do it, as if the wrong had not been done to him" ([1958] 3 All E.R., at p. 19). Starting from this obligation to compensate, therefore, Devlin, J., examined the alternatives: the plaintiff (i) could have had his wife treated nearer their home and then claimed the hospital fees from the defendant, or (ii) he could have had her treated in the U.S.A.F. hospital, not travelled to see her and claimed damages for the loss of her *consortium*, or (iii) he could have behaved as in fact he did

and claimed his lost earnings, and the expenses of hospital visits. In all the circumstances, the third course of action was no more unreasonable than either of the other two and since they would have yielded compensation, the third should do the same.

- A number of points arise from a comparison of these two cases. In both of them, different criteria are used to measure the remoteness of the loss incurred and it is interesting to note that, had the *McNeill* criterion been applied to *Kirkham's* case, the plaintiff may well have recovered his lost earnings as an alternative to his potential claim for lost *consortium*, despite Devlin, J.'s claims to the contrary. The point is that neither test—the “least-financial-loss” standard by which Diplock, J. explained *Behrens v. Bertram Mills Circus, Ltd.*, or the “alternative-to-consortium” suggestion of Devlin, J.—can be adequate by themselves. First, if we are to ask simply which course of action cuts down the expenses incurred, we will be using an *ex post facto* criterion—completely disregarding the unpredictability of potential losses and the impossibility of making an accurate choice of the most mitigating course of action. Just as important, this test can take no account of the human desirability of the alternative actions or of the peculiar situations of dependence which may arise (see above). In cases like this, perhaps a bald financial determination of which was the wiser course to take may do no justice at all to the relative emotional conflicts involved.

Secondly, though, the “recompense-at-all-costs” attitude of *McNeill* cannot be fitted into the general legal picture very satisfactorily. Although in that particular case all alternative courses would have yielded comparable amounts, there will often be no factual relation between the size of the earnings forgone and potential damages for lost *consortium*. So although the claims may be alternatives by coincidence in some cases, in many instances (see, e.g., *Behrens v. Bertram Mills Circus, Ltd.*; *Kirkham v. Boughey*) they will be completely unconnected.

The writer would suggest instead a rephrasing of the test in terms common to the whole law of torts—whether or not the plaintiff's mitigation of his losses by temporarily giving up work was reasonable in the circumstances. Then, although a comparison of actual cash values would play an important part in assessing “reasonableness” retrospectively, the Courts would always have to consider the extent of the plaintiff's knowledge of the situation at the time he acted: peculiar need of husband for wife (or *vice versa*), the frequency of visits as related to the seriousness of the injury, the most suitable time to recommence work (remembering that the health of the patient rather than the pleasure of the visitor should be the primary concern: see [1957] 3 All E.R., at pp. 156-157). In no case need there be any estimate of the value of the *consortium* for purposes of comparison or otherwise but the simple consideration of the subjective reasonableness of the husband's intervention. Even the hypothetical possibility of *total resignation* in order to comfort an ailing wife will, of course, have to be weighed in the same scales: those of reasonableness. Which, of course, may perhaps lead to fairness—but not to predictability!—L.J.

PERJURY: CIVIL LIABILITY

At the end of the Trinity term Lord Goddard, C.J., held in *Hargreaves v. Bretherton* ([1958] 3 All E.R. 122) that an action for damages for perjury will not lie at the suit of a person alleged to have been damnified by false evidence given against him. Much old authority was quoted for the proposition that perjury did not provide a cause of action for damages; thus, in *Damport v. Sympson* ([1596] 2 Cro. Eliz. 520) the Court said that, there being no precedent, it was good argument that the action would not lie, and in *Eyres v. Sedgewicks* ([1620] 2 Cro. Jac. 601) the Court put the matter on the ground of public convenience and policy. To come to more modern times, in

Watson v. McEwan ([1905] A.C., at p. 486) Lord Halsbury, L.C., stated it to be settled law that "the remedy against a witness who had given evidence which is false and injurious to another is to indict him for perjury", and his Lordship went on to say that the conduct of legal procedure by the Courts involved, of necessity, the immunity of witnesses from actions being brought against them in respect of the evidence they had given. The plaintiff in the case here under review relied on equally respectable authority showing (*Coke's Inst.* III c. 74) that an action could have been brought in the Star Chamber by way of civil remedy for damages, and that in Lord Ellenborough's view in *Amey v. Long* ([1807] 1 Camp. 14) an action for damages would lie collaterally with a prosecution. Lord Goddard, C.J., in his judgment conceded that the passage in *Coke's Institutes* had given rise to argument, but there was no point in going into the history of the legislation since there was modern authority on the matter and although the point had been raised as long ago as the reign of Elizabeth I there was no case in which the action had been held to lie. As Jarvis, C.J., had pointed out in *Revis v. Smith* ([1856] 18 C.B. 126), it would be most inconvenient if an action for damages for alleged perjury, could be brought, when no one had been convicted of perjury, merely on the allegation of a person who said that perjury had been committed by which he had been damnified. Whether it is really desirable that a person who commits a deliberate act of falsehood in the course of legal proceedings should be exempted from any civil liability is a question which is, perhaps, not easy to answer; but whatever view is taken, the old authorities should not, we think, stand in the way of a fresh assessment of the problem.—*L.J.*

"HOUSEHOLD"

THIS word is important in many different connections. An obvious example is a gift in a will to the testator's "household servant," but its interpretation is of consequence in other ways and s. 269(5) of the Public Health Act, 1936, may be referred to by way of illustration. Section 269 empowers local authorities to control the use of movable dwellings, but sub-s. (5) provides that it shall not apply to a case where the movable dwelling is kept by its owner on land which he occupies in connection with his dwelling-house and is used for habitation by "members of his household." Who are the "members of his household"?

Re Draz; Savile v. Yeatman (1887), 57 L.T. 475, may supply an answer to this question. A testator bequeathed six months' wages to each of his "household servants" who should have been in his service for one year previously to his death. The problem arose as to the meaning of the words "household servants" and Kay, J., found that they meant "the testator's servants who formed part of his household—that is to say, who boarded in the mansion house and took their meals there at the expense of the testator." His Lordship concluded that the testator's coachmen and grooms, who did not board in the house, were not included in the gift as they were not members of his "household."

It seems that the term "household" may only apply to an establishment of which the person in question is the head. This follows from *English v. Western* [1940] 2 K.B. 156 where a policy of motor insurance excluded inability in the event, *inter alia*, of injury to any member of "the assured's household." The assured, a boy of seventeen, caused injury to his sister (they both lived with their father) in an accident and the clause referred to, which was found to be ambiguous, was construed *contra proferentes* as meaning any member of the household of which he (the assured) was head. The sister was not, therefore, a member of "the assured's household." *Wawanssea Mutual Insurance Co. v. Bell* [1957] S.O.B. 581 was a very similar case. The Supreme Court of Canada was asked to interpret a policy of motor insurance which expressly excluded liability in respect of the driving by the insured of any

automobile owned by "any person or persons of the household of which the insured is a member." The insured lived with an elder brother and while he was driving his brother's car he caused injury to another. Evidence established that the insured paid board to his brother, that his stay with him was of a temporary character, that he was not under the control of his brother and that it could not be said that he shared any responsibility of a householder. The Court decided that the insured was not a member of his brother's household and for that reason the policy extended to the risk.

In the course of his judgment Rand, J., distinguished between a person "of" a household and a person "in" a household. Although the insured was not a member "of" his brother's household, like the uncle in *Home Insurance Co. v. Pettit* (1932), 143 S. 839, who was temporarily a guest in the home of the insured's father, he may well have been "in" it during the period of his stay.

The word "household" is also important when used in a rather different sense. The meaning of the word "furniture" was considered at 102 Sol. J. 767, but what passes under a gift of "household furniture" or "household goods" (terms which appear to be synonymous) or "household effects"? Household furniture or goods would seem to include all personal chattels which contribute to the use or convenience of the householder in the house (*Nicholls v. Osborn* [1727], 2 P. Wms. 419) or to the ornament of the dwelling (*Field v. Peckett* (No. 2) [1861], 30 L.J. Ch. 813) but not such things as victuals, guns and pistols used in riding or shooting game. The clock of the house falls within the expression "household goods" if it is not a fixture (*Slanning v. Style* [1734], 3 P. Wms. 334).

The term "household effects" receives a much wider interpretation. For example, in *Re Wavertree; Rutherford v. Hall-Walker* [1933] 1 Ch. 837 a bequest of "household effects" was held to pass motor cars, consumable stores, garden implements and tools and movable plants and in *Johnston v. Doak* [1953] V.L.R. 678 it was decided that a similar gift included a motor car. In that case Lowe, A.-C.J., found that "the natural meaning of household effects confirms, that without more all household property used or intended to be used in the ordinary operation of her home is included in the expression used by the deceased."

A bequest of "all my household and personal furniture and effects" may also pass a motor car. This was decided in *Re Liverton* [1954] N.Z.L.R. 612 but, as Gresson, J., remarked, "every case must be considered upon the facts and circumstances of the case; no two are identical."—S.J.

NEW MILK AND DAIRIES REGULATIONS

THE Milk and Dairies (General) Regulations, S.I. 1959 No. 277, which came into operation on March 8, bring the former regulations up to date in the light of modern methods of milk production. Much of the existing procedure is simplified, so facilitating the production, handling and distribution of milk in up-to-date hygienic conditions. The changes made by the new regulations include modification of the registration required of a milk distributor who now has to be registered only with the local authority in whose area the premises from which the milk is distributed are situated: provision for payment of compensation by a local authority to a person sustaining damage or loss through being debarred from certain employment connected with milk because he is or has been in contact with a sufferer from a disease liable to cause infection of milk: widening of conditions for payment of compensation to farmers in connection with the serving of an infected milk notice, such a notice concerning tuberculosis now remaining in force until withdrawn instead of requiring renewal every twenty-four hours: when engaged in milking cows or in handling milk in open containers persons are now required to wear clean and washable overalls and head covering: open cuts and abrasions must be covered with a waterproof dressing and spitting and use of tobacco are prohibited: milk

vessels and appliances must be cleansed in a place where they are not liable to become contaminated and certain exemptions are granted in respect of bottles effectively cleansed in a bottle-washing machine: in certain circumstances suitable and properly trapped internal drains are permitted in a milking house not used for the housing of cows, and the Minister may permit milk to be cooled in a closed container in a milking house not used for the housing of cows which are machine-milked and where the milk passes direct to the churn in which it will be cooled.—S.J.

REVIEWS.

The Trial of August Sangret. By MACDONALD CRITCHLEY, M.D. LONDON: William Hodge & Co. Ltd. 1959. Demi 8vo. Pages xxxiv+233. Price: 18s.

THIS is an account of the murder trial of one August Sangret, a Canadian soldier of mixed blood. He murdered a girl of nineteen years of age who had drifted from one job to another. She was of a remarkable character, for although loose in morals, she was comparatively well-read and of considerable religious convictions. Sangret killed the girl stabbing her with a knife and smashing her head with a birch stake. This trial is of considerable medical interest, especially in the reconstruction of the skull from many small fragments of bones. It draws attention to the illiteracy of many of the troops, and portrays a vivid picture of camp followers and their strange life. Sangret was convicted and duly hanged. The characters of the chief actors hold attention of the reader throughout.

Supreme Court Digest of Labour Law Cases. By V. B. KHER. BOMBAY: Thacker & Company Limited, Rampart Row, Fort. 1959. Demi 8vo. Pages xv+259. Price: Rs. 12.

THIS is a digest of Labour Law Cases decided by the Supreme Court of India. The Supreme Court does not seat as a regular Court of Appeal over Industrial Tribunals, but it has extraordinary powers to grant to aggrieved parties special leave to appeal from the decision of any inferior Tribunal. Parties aggrieved by the decisions of Industrial Tribunals approach the Supreme Court and this has resulted in developing the case law on the subject. The decisions embodied in this volume enunciate principles and lay down norms by which all sections of the industry must govern themselves. They also serve as useful pointers for guidance to the adjudicators. Copious extracts from judgments have been given. The subject head notes have been alphabetically arranged so that on a given point it is possible to know what the Court has said. Decisions reported upto January, 1959, have been included in the body of the book. This book is sure to prove useful to those who have to deal with labour legislation in any capacity.

The Sale of Flats. By EDWARD F. GEORGE, LL.B. LONDON: Sweet & Maxwell Limited, 2 & 3 Chancery Lane. Second Edition. 1959. Demi 8vo. Pages xxiv+222. Price: 27s. 6d.

IN this book, which is first of its kind, the learned author deals with all aspects of flat sales. A new edition of this book became necessary owing to changes in the law. Several statutes made changes which necessitated the entire revision of the first edition. A fresh chapter dealing with co-operative flat scheme has been newly added. The utility of a work of this kind cannot be gainsaid.

The
Bombay Law Reporter.
JOURNAL.

August 15, 1959.

DOCTRINE OF DUAL OWNERSHIP OF BUILDING LEASES UNDER THE
'BOMBAY RENTS ACT OF 1947.*

RECENTLY, interesting controversies regarding the right of the occupant of the building owned by the tenants and constructed on the plots of the landlords have led to the discussion of recognition of the Doctrine of Dual Ownership of property under the Act. The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, does not directly deal with it. We have s. 5(8) defining "premises" as meaning, amongst others, any land not being used for agricultural purposes and Part II, dealing with the applicability of the Act to "premises" let out for residence etc. Section 15 of the Act prohibits transfer or assignment or sub-letting, except to the extent to which the transfer etc., is saved by the Notifications issued by the Government, under the proviso of the section. None of the Notifications issued so far, deals with a normal case of a tenant taking a plot on lease for building purposes and constructing a building and letting out the same to other tenants.

The first occasion for deciding a case, not covered by the Notifications under s. 15, arose in *Vinayak Gopal v. Laxman Kashinath*,¹ in which it was held that the mere fact that the plot cannot be used for residence, unless it is built upon, is no ground for excluding the plot out of s. 6(1) of the Rent Act. At page 596 his Lordship, Gajendragadkar J. observed

"...*Prima facie*, it appears to be reasonable that, just as the building constructed by the lessee, when let for residence, attracts the provisions of the Act, the open plot on which the building is erected for the purpose of letting it out for residence according to the terms of the original lease should also be regarded as constituting premises let out for residence. The right of residence is exercised both in regard to building and with regard to the open plot on which the building stands. In a sense, the open plot and the building constructed on it are so inextricably joined together that it would be idle to contend that it is only the building which is used for residence and not the open plot. The premises which are let for residence to the actual occupants would, therefore, include, not only the building, but also the land on which the building stands;..."

It is interesting to note that in this case it was also held that the occupant of the building would not become a sub-tenant and s. 15 would not be violated; the reasoning was (p. 597):

"...When a builder lets out a building to his tenants, technically he is not leasing out the open plot which has been let to him by the lessor, but he is letting out the structure built by him. If it is permissible to draw a distinction between the open plot which is the subject-matter of the first lease and the building which is the subject-matter of the second lease, then s. 15 may not affect the rights of actual occupants let in by the builder of the building. No doubt, this distinction may appear to be technical and notional; but...some of the unusual features which building leases of this kind disclose are inevitable result of the doctrine of dual ownership recognised under the Indian Law."

This doctrine of dual ownership has no room for operation, it appears, in a case where under an agreement between the lessor and the lessee, the lessee constructs the building at his own costs but agrees that the ownership of the

* By D. D. Sutarwaj, Civil Judge, J. D., 1 (1956) 58 Bom. L. R. 592.
Kalyan.

building shall vest in the lessor. In *Bhatia Co-operative Society v. Patel*,² the Supreme Court had an occasion to consider the applicability of the Rent Act to the plot or premises. In this case, the plot belonged to the Local Authority and was exempt from the operation of the Act, under s. 41(1) of the Act. It was leased out for constructing a building under an agreement that the building on completion would belong to the Local Authority. The building was constructed by the lessee at his own costs, as per terms of the agreement, and a portion of it was leased out to a tenant. In a suit for ejectment filed by the original lessee against the occupants of the building, the question arose, whether the building was exempt from the Rent Act and it was held that it was, because it belonged to the Local Authority i.e. original lessor of the plot. This decision of the Supreme Court was cited before their Lordships in *Vinayak Gopal's* case cited above and an argument was raised that in a case like this, where the plot and the building both vest in the lessor, the occupants of the premises let in by the lessee would fall within the mischief of s. 15; but it was rejected in the following terms (p. 597):

"...It would be noticed that this is a special type of case where the duality of ownership can have no play...and perhaps the question as to whether s. 15 would apply to the leases executed in favour of the occupants may have to be considered when it arises. But if it is held that the rights of the occupants... are hit by s. 15, it would not be difficult for the State Government to protect the tenants' rights by issuing appropriate notification under the relevant provisions of ss. 2 and 6 of the Act."

So far, no notification covering a case like this appears to have been issued by the Government. But a more interesting situation arose in a very recent pronouncement of the Supreme Court in *Dr. K. A. Dhairyan v. J. R. Thakur*.³ In this case, a parcel of land was leased out by the lessor to the lessee for twenty-one years, under an agreement that the lessee should construct a building on the land at the cost of Rs. 10,000 or more, within six months from the date of lease, and on the termination of the lease, either at the end of twenty-one years or earlier, the lessee had to surrender the possession including the building to lessor, without any compensation. The lessee constructed the building and let out the same to tenants. On the expiry of the term of the lease, the original lessor sued for a declaration against his lessee that he was entitled to the building, possession of the same, and receive rent of the same. The lessee's defence was that the lessor was not entitled to the declaration sought, but only to the rent of the land as per original lease to which the Rent Act applied. It was common ground that the land on which the building stood was protected by the Rent Act. Upon the construction of the terms of the lease, it was found that what was demised was only the land to the lessee and not the building. It was also found that none of the clauses of the lease positively stated that the building to be erected on the demised land would be of the ownership of the lessor and that the building would be deemed to have been leased to the lessee along with the demised land. It was found that on a proper construction of the lease, the ownership of the building was with the lessee, in which the lessor had no right while the lease subsisted. But it was held that it was open to the lessee by a special contract to hand over the building to the lessor without any compensation at the end of the term of the lease. Since the term of the lease had expired the Supreme Court granted the declaration in favour of the lessor as prayed for. It is rather interesting to note the arguments put forward against the lessor. Firstly, it was urged that even if there had been no demise of the building, possession of it could not be awarded to the lessor until the lease had been determined, which in law, it was argued, could not be determined so long as the lessee could not be evicted from the demised land of which he was a tenant within the meaning of the Rent Act and of which he

² (1952) 55 Bom. L. R. 199, S.C.

³ (1958) 61 Bom. L. R. 548, S.C.

became a statutory tenant. But this argument was rejected in the following terms:

"The Rent Act does not provide for the continuation of the lease beyond the specified period stated therein and all that the Act does is to give to the person, who continues to remain in possession, although the period of the lease has come to an end, the status of a statutory tenant."

In passing, it may be observed, that for all practical purposes, however, when a tenant becomes a statutory tenant, he holds on the same terms as before, and the Rent Act superimposes a disability on the landlord to claim possession, except on the grounds enumerated in the Act. The main difficulty was that the lessee was the statutory tenant of the land and the building, which was not demised, was on the very land. To recall the observations of his Lordship, Gajendragadkar J., in *Vinayak's* case, cited above, the open plot and the building constructed on it, are so inextricably joined together, that it would be idle to contend that it is only the building which is used for residence and not the land. If so, here was a case, where so far as the land was concerned, admittedly, the tenant enjoyed the protection of the Rent Act. But it was held that the defence did not hold good against the lessor, although the enjoyment of the building cannot be conceived apart from the enjoyment of the land beneath.

The second argument put forward against the lessor was that he could not get the declaration because he could not realise the rent, without entering upon the land on which the building had been constructed. It was rejected on a short ground that the lessor had not claimed a declaration to that effect. It is significant to note that their Lordships have nowhere suggested in this case that on account of specific agreement by the lessee to hand over the building to the lessor, the statutory right of the lessee in respect of the land beneath, had become extinct. On the contrary, the case is decided on the admitted basis, that the tenant continued to enjoy the protection of the Rent Act, in respect of the land. If so, can we dismiss the query of the tenant as unjust or irrelevant, if he were to say,

"while on the one hand, you have conceded my right to the land as a statutory tenant you have rendered it ineffective or illusory, by granting a declaration to the lessor that he is entitled to the rent of the building, on the other, although the enjoyment of the building cannot be conceived independent of the enjoyment of the land."

This indeed is a troublesome question difficult to answer in theory. There is no room for the operation of the doctrine of merger either in such a case.

It is respectfully submitted that in view of the present case law suitable amendments in s. 4, s. 15 and the introduction of an additional section by the Legislature, with a view to precisely regulate the rights of the parties in such cases, may be useful.

SECTION 113 OF THE BOMBAY LOCAL BOARDS ACT, 1923, AND CIVIL REVISION APPLICATIONS.*

In various Acts concerning local bodies remedy against the quantum of taxation is provided by way of an appeal to a Magistrate. In the Bombay Local Boards Act, 1923, that provision is made in s. 113. In the Bombay Municipal Boroughs Act, 1925, that provision is made at s. 110⁽¹⁾ and in the Bombay District Municipal Act, 1901, that is provided at s. 86⁽²⁾. These provisions in different Acts are very similar to each other and eventually some times they lead to an erroneous impression in respect of further remedies against the decision of the Magistrate. The subject of the present article is the remedy allowed at the High Court of Bombay of Civil Revision Application as directed against the decision of a Magistrate acting under s. 113 of the Bombay Local Boards Act.

* By Kusumkant D. Bhate.

Firstly, it may be mentioned that a Magistrate sitting as an appeal authority under s. 113 of the Local Boards Act, though a Judicial Magistrate, is not an inferior Criminal Court for the purposes of ss. 435, 438 and 439 of the Criminal Procedure Code, and it has been held¹ that no remedy by way of a criminal revision application is available against his decision. Further it may be noted that proceedings before a Magistrate in general under the local bodies Acts in a taxation appeal are in the nature of a civil proceeding. But it has been held² that a Magistrate acting under the provisions of s. 86 of the District Municipal Act (before amendment and addition of s. 86(2) and 86(A)) is not a civil Court but is a *persona designata* and as such no civil revision application lies against his decision to the High Court under the provisions of s. 115 of the Civil Procedure Code.

A change in law has been effected especially in respect of Municipal Acts by addition of s. 110(3) and 111(1) to the Municipal Boroughs Act, and s. 86(2) and 86(A) to the District Municipal Act whereby a special remedy of revision is provided to the District Court against the decision of the Magistrate who is acting respectively under the provisions of s. 110(1) and s. 86(2) of the said Acts. By course of judicial decisions it has been held³ and the *ratio decidendi* of these decisions is that the District Court acting as a revisional authority over the decision of the Magistrate is a *Civil Court* and hence the High Court has jurisdiction to interfere with his decision under the provisions of s. 115 of the Civil Procedure Code. Consequently, revision applications against the decision of the District Court in this behalf are proceeded with as civil revision applications and as this remedy under s. 115 is available there has been no occasion under the said Municipal Acts to invoke the provisions of arts. 226 and 227 of the Constitution of India and no special civil applications are filed in this behalf. It may also be mentioned that these proceedings though initially against the order of a Judicial Magistrate are treated as matters on the civil side.⁴

At this stage it may be observed that in the Bombay Local Boards Act there is no provision of revision against the decision of a Magistrate acting under s. 113 of the Act, as there is no parallel provision in the Bombay Local Boards Act similar to ss. 110(3) and 111(1) of the Municipal Boroughs Act and ss. 86(2) and 86(A) of the District Municipal Act, providing special remedy of revision to the District Court. It is, therefore, evident that there can be no remedy to the District Court by way of revision under the Local Boards Act. Consequently there is no further question of the High Court sitting in revision over the decision of the District Court (which alone can be treated as a subordinate civil Court). The Magistrate acting under s. 113 of the Bombay Local Boards Act is decidedly a *persona designata* and no remedy to the High Court against his decision appears to be available under the provisions of s. 115 of the Civil Procedure Code.

Reverting over to the main theme which arises out of certain directions in the unreported decision of Special Civil Application No. 2526 of 1955 filed in the High Court and the necessary facts of which are narrated at the reported case of *District Local Board, W.K. v. Kutuballi*⁵ (which was the same case as that of Special Civil Application No. 2526 of 1955 and which was converted into a C.R.A.). The facts of this case are that the Judicial Magistrate at Shahada acting under s. 113 of the Local Boards Act gave some decision against the Local Board of West Khandesh. The Local Board thereupon

1 In re *Dalwakhram*, (1907) 9 Bom. L. R. 1347; *Ahmedabad Municipality v. Vaddal*, (1928) 30 Bom. L. R. 1064.

2 *Vita Municipality v. Gangaram Tatyaji*, (1940) 43 Bom. L. R. 553.

3 *Surat Municipality v. Hamiduddin*, (1937) 40 Bom. L. R. 337; *Lokmanya Mills Ltd. v. Municipal Borough, Barri*, (1939) 41

Bom. L. R. 337 and *Municipal Borough of Ahmedabad v. Aryodaya Ginning & Manufacturing Company*, (1941) 43 Bom. L. R. 816.

4 *Lokmanya Mills Ltd. v. Municipal Borough, Barri*, (1939) 41 Bom. L. R. 337; *D'Monte v. Bandra Municipality*, (1950) 52 Bom. L. R. 537.

5 (1958) 60 Bom. L. R. 1235.

filed a criminal revision application under s. 435 of the Criminal Procedure Code in the Court of the Sessions Judge of West Khandesh alleging that the provisions of s. 113 of the Local Boards Act provides appeal only against the demand notice and the appeal was not competent before the Magistrate as admittedly no demand notice in that case was issued and hence the Magistrate was not competent to hear the appeal and that he had acted without jurisdiction. The Additional Sessions Judge who heard the petition did hold that under s. 113 of the Local Boards Act an appeal to a Magistrate without demand notice was not competent but also held that the Magistrate so acting was not an inferior criminal Court within the meaning of s. 435 of the Criminal Procedure Code and hence he rejected the Local Board's revision petition. Against this decision the Local Board filed the above mentioned Special Civil Application No. 2526 of 1955 wherein the High Court gave direction that the Local Board might file a civil revision application against the order of the Magistrate himself. The following is quoted in that behalf from *District Local Board, W.K. v. Kutuballi* (p. 1236) :—

"From this decision of the learned Additional Sessions Judge, West Khandesh, the Local Board approached the High Court by way of an application under arts. 228 and 227 of the Constitution of India. That application was heard by a Division Bench of this Court consisting of the learned Chief Justice and Mr. Justice Dixit. It was Special Civil Application No. 2526 of 1955. The learned Chief Justice and Mr. Justice Dixit upheld the view taken by the learned Additional Sessions Judge, West Khandesh, and held that under the Bombay Local Boards Act no criminal revision application lay from an order passed in appeal under s. 113. While passing this order the High Court directed that the Local Board might file a civil revision application, wherein they might challenge the order made by the learned Judicial Magistrate, First Class, Shahada, in the appeal decided by him under s. 113 of the Act."

It may further be mentioned that the matter thereafter was proceeded further as a Civil Revision Application No. 1822 of 1955 and the application was allowed as is reported at 60 Bom.L.R. 1235.

After the decision of Special Civil Application No. 2526 of 1955, application matters directed against the decision of the Magistrate acting under s. 113 of the Bombay Local Boards Act are filed and proceeded with as civil revision applications as under the provisions of s. 115 of the Civil Procedure Code.

In view of the earlier cited cases it is the accepted view that civil revision under s. 115 of the Civil Procedure Code is not available against the order of the Magistrate and that, that remedy is available only against the decision of the District Court, as the District Court has been held as a subordinate civil Court.

No remedy of revision by a special provision in the Local Boards Act is provided to the District Court and consequently the remedy of civil revision application to High Court under s. 115 cannot become available. It appears that at the stage of the decision of the Special Civil Application No. 2526 of 1955 it was not made clear to their Lordships that there is no provision in the Bombay Local Boards Act similar to s. 110(3) and s. 111(1) of the Municipal Boroughs Act. Even then it still remains that the civil revision application was directed against the order of the Magistrate himself. With great respect, it may be mentioned that the directions of their Lordships in Special Civil Application No. 2526 of 1955 ought to have been to file a Special Civil Application against the order of the Magistrate and the direction of their Lordships to file a civil revision application against the Order of the Magistrate and the implications thereof are in direct conflict with the earlier decisions of the High Court referred to above and hence the said decision of Special Civil Application No. 2526 of 1955 and its implications which are further ratified by the decision reported at 60 Bom.L.R. 1235 need to be reconsidered.

GLEANINGS.

INSULTING CONDUCT

SOME of our readers will have noticed in the Press not long ago a charge against two men of insulting conduct likely to cause a breach of the peace, contrary to the Public Order Act, 1936, s. 5. The men had been walking along a street with paint pots and brushes with the idea, apparently, of painting some slogan or other words on the house of Mr. John Stonehouse, M.P. A police constable knew in advance of their intention and stopped them as they were about to start work on the house. The magistrate before whom they were brought commended the constable for preventing the crime but dismissed the charge on the ground that, since the men had done nothing insulting as yet, they had not been guilty of any conduct likely to provoke a breach of the peace. It would be hard on painters if merely carrying their tools of trade were likely to result in a charge being brought against them! It is possible, however, that a charge of attempting to commit malicious damage could have been brought on the analogy of *R. v. Taylor*, (1859) 1 F. & F. 511. In that case Taylor had knelt down by a hayrick and struck a match intending to fire it, but, on noticing that he was being watched, he blew out the match and desisted from his attempt. It was held that he was rightly convicted of attempting to set fire to the rick.—S.J.

SERVANT INJURED ON ANOTHER'S PREMISES

A MASTER'S duty to his servant includes a duty to make the master's premises where the servant works as safe as reasonable care can make them (*Taylor v. Sims* [1942] 2 All E.R. 375). This is not a warranty of safety but it is a higher duty than the duty of an invitor to an invitee because in the case of an invitee it is a defence to prove that the matter complained of was obvious. In the case of a servant injured on his master's premises, although knowledge of the danger may have some influence on the question of contributory negligence, it is not a defence (*Smith v. Baker* [1891] A.C. 325).

It is probable that the above rule is not substantially affected by the Occupiers' Liability Act, 1957. Section 5 of that Act lays down that the common duty of care ("to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there": s. 2(2)), is owed to persons who enter premises in exercise of a right conferred by contract. It seems clear that a servant has a right to enter his master's premises by virtue of his contract of services and does so enter thereby. By s. 2(5) it is laid down that the common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another). This provision is a specific provision related to the general provision of s. 2(4) to the effect that in determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances of the case. Consequently, in the case of master and servant, it seems that the principles affecting the defences open to a master will be the same as they are now.

Servant on another's premises

Different considerations apply where the servant is working at the premises of another person. It has been held that in such circumstances the servant is an invitee of the third party and that the duty which the master owes in respect of his own premises is not owed by the master in respect of the invitor's premises (see *dictum* in *Cilia v. James* [1954] 1 W.L.R. 721). This makes a considerable difference to the remedies available to the servant since if

he knows of a danger such knowledge will be a defence to the invitor whereas it would not be one to a master in respect of his own premises (*London Graving Dock Co. v. Horton* [1951] A.C. 737 (H.L.)).

This is not to say that the master owes no duty to the servant in respect of the premises of other persons at which the servant has to work: he must "lay out the work" properly so that, for example, an employer of window cleaners must see that proper appliances are used by the cleaners having regard to the nature and condition of the premises the windows of which they are required to clean (*Drummond v. British Building Cleaners, Ltd.* [1954] 1 W.L.R. 1434 (C.A.)).

Third party employing independent contractors

The common-law position is not likely to be substantially affected by the Occupiers' Liability Act in regard to the above point, but in one respect there is a change: in *Thomson v. Cremin*, [1956] 1 W.L.R. 103 (H.L.), it was held that the occupier of premises as an invitor of another's servant who is working on his premises, is responsible for the negligence of persons who are, as regards the occupier, independent contractors and whose acts caused injury to the workman. By virtue of s. 2(4)(b) the occupier is not to be liable without more if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps as he reasonably ought in order to satisfy himself that the contractor was competent and had done the work properly.

A recent case

A recent decision on the problem arising where a servant is injured on the premises of another is *Smith v. Austin Lifis, Ltd., and Others* [1959] 1 W.L.R. 100. The accident occurred before the coming into force of the Act so that the old common law governed the case. It concerned a fitter whose job required him to service lifts. One of his jobs required him to visit the premises of the second defendants to service a lift of which the machine house was on the roof. Access to the machine house was by a ladder to double doors some eleven feet above the level of the roof. The plaintiff knew the premises and knew that the doors had fallen into disrepair and could not be properly bolted or secured. The bottom hinge of the left-hand door was broken and on the occasion in question the left-hand door had become wedged inwards; the right-hand door was swinging free unsecured but how this had come about was a matter for inference only, there being no direct evidence. To get into the machine house he climbed the ladder and held on to the left-hand wedged door, but it moved and he was thrown off balance so that he fell and was injured. The Court of first instance found that the door had been wedged by some unknown human agency and they rejected a contention that the door had been blown in by the wind.

The plaintiff sued both his employers and the occupiers and the trial Judge found them both liable, ascribing 20 per cent. of the blame to the employers and 80 per cent. to the occupiers. On appeal to the Court of Appeal it was held that they were not liable. The matter then went to the House of Lords, who were divided both as to the proper inferences to be drawn from the facts and as to liability. The majority held that the judgment of the trial Judge should be restored and they saw no reason to disturb the apportionment of blame. The basis of liability on the part of the occupiers was that the door was in a dangerous condition. The plaintiff did not appreciate the nature of the particular danger on the occasion in question, and, consequently, did not appreciate the risk to which he was exposed when he relied on the apparent security of the wedged door. To him as invitee, therefore, there was an "unusual" or "unappreciated" danger of which the occupiers had failed to give proper warning. The test of appreciation is subjective so that liability depends on the actual appreciation of the particular plaintiff. The principle of *London Graving Dock v. Horton*, *supra*, was applied but the result did not protect this

occupier because, unlike the facts in *Horton's* case, the risk was not fully appreciated.

Lord Denning pointed out that as a general proposition knowledge of the danger is not a bar but only a factor to be taken into account in considering whether a plaintiff willingly, accepted a risk or, to put it another way, whether the accident was due wholly or in part to his own fault. *Horton's* case was a particular decision on the position of a servant who sues the occupier of premises on which he is working instead of suing his employer. His Lordship also pointed out that *Taylor v. Sims, supra*, which suggests that the employer cannot be sued, must be read in the light of later decisions to the effect that "employers who send their workmen to work on the premises of others cannot renounce all responsibility for their safety... They must... take reasonable care to devise a safe system of work... and if they know or ought to know of a danger on the premises to which they send their men they ought to take reasonable care to safeguard them from it."—*S.J.*

THE RULE OF LAW AND THE DELHI CONFERENCE

THE rule of law, typifying its position in the English Constitution and its supremacy in the English legal system, was expounded as long ago as the 15th century (Year Book *xix*, Hen. VI) in the ancient maxim: "La ley est le plus hautes inheritance, que le roy ad; car par la ley il meme et toutes ses sujets sont rules, et si la ley ne fuit, nul roi, et nul inheritance sera." The accepted classic exposition of the place of the rule of law in the constitutional and political institutions of this country is that of Dicey in *The Law of the Constitution*.

As Dicey had it, the rule of law forms a fundamental principle of the Constitution, and he gave it three meanings. It means, he said, in the first instance, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority, on the part of the government. Englishmen are ruled by the law and by the law alone; a man may with us be punished for breach of law but he can be punished for nothing else.

It means again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law Courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

The rule of law, lastly, may be used as a formula for expressing the fact that in this country, the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source, but the consequence, of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have here been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the Constitution is the result of the ordinary law of the land.

Whilst this may be what Dicey said about the rule of law in 1885, it was not what the International Commission of Jurists said in its Declaration of Delhi of January 10, 1959. This declaration pronounced that the commission "recognises that the rule of law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance civil and political rights of the individual in a free society, but also to establish social, economic and cultural conditions under which his legitimate aspirations and dignity may be realised."

The commission then called on jurists in all countries to give effect in their own communities to the principles expressed in the conclusions above mentioned.

This is, indeed, a long way from the idealistic intellectualism of the 19th century. It may, therefore, be of use and interest to recount the background

to the conference at Delhi which led up to the above mentioned declaration—especially since it represents a most considerable development of the concept of the rule of law in the law of the Constitution.

The conference at Delhi had, as a basis for discussion, a working paper which postulated "respect for the supreme value of human personality as the basis of all law," and recognised that this requires not only a theoretical acceptance of the individual's spiritual and political freedom, but also the provision of a minimum standard of education and economic security.

The tentative definition which it was proposed for the rule of law was: The principles, institutions and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.

The Legislature in a free society, the document suggested, must accept certain minimum standards or principles of freedom for the individual, even at the cost of limitation of its own powers. These principles included a ban on retro-active penal legislation, the right to responsible government and the freedoms of religious belief, speech, assembly and association.

A study of the executive showed concern about the increase in delegated legislation, which, whilst recognised as a necessary and indeed inevitable practice in modern conditions, was one which it was essential should be controlled ultimately by a judicial tribunal independent of the executive.

In the criminal process it was concerned with the rights of the accused person, the definition of fair trial; and with the protection of the independence of the judiciary. The Attorney-General for India, in addressing the conference, pointed to three contemporary tendencies which constituted a threat to the rule of law. First, the emergence of military dictatorship which, on the pretext of more efficient government, deprived the individual of the right to free elections and the protection of an independent judiciary. Secondly, the more subtle challenge posed by totalitarian regimes functioning under a facade of democratic institutions, in evaluating which, it was suggested, the attitude of the state to the individual was the only true criterion. And, thirdly, the encroachments of governments, even in democratic countries, by means of delegated legislation, administrative rules, and officials who were judges in their own actions. Against such encroachments, it was suggested, constant vigilance was needed, especially perhaps in infant democracies where massive parliamentary majorities were the rule.

The Indian Prime Minister observed that, while the rule of law was synonymous with the maintenance of civilised existence, society was constantly changing and the law must adapt itself to these changes. The rule of law must keep pace with the rule of life. People must be allowed the opportunity to make changes. Where, for example, was the rule of law under foreign rule? All foreign rule, all imposed rule was outside the pale of law, as was every form of racial discrimination. Protection of the rights of the individual was not the sole function of law; it had also to protect society from individuals' selfish instincts. The Judge who sought to protect the individual from some action of the executive might be less in tune with the general mood of society than that executive was.

Commenting on the report which dealt with executive power, which he himself had helped to draft, Lord Denning said: "When I came to this congress I thought of the rule of law as being essentially concerned with protection of the individual from arbitrary power." Instead he had been struck by the emphasis laid, especially by emergent Asian and African countries, on such primary needs as efficient and uncorrupt government, a democratic Legislature and an independent judiciary.

Risking the obliteration of the distinction between legal and political spheres, he said that he realised that the rule of law was wider than he had thought

and was not limited to preventive negative function, but laid upon governments a positive duty—admittedly unenforceable in a court of law—to act for the welfare of their people. He compared this concept to the unwritten law in England whereby no government could even contemplate abolishing Courts of law or free speech, although the only sanction against that action lay in a mature and vigilant public opinion.

This is, of course, not the first time that flights on the wings of intellectualism to rarified conceptions have been brought down to earth to consider the facts of life.

This preoccupation by the conference with the facts of life was even more marked in the report of the legislative committee, which laid down that the function of the Legislature in a free society was to create and maintain conditions which would uphold the dignity of man as an individual, not only by recognising his civil and political rights, but also by assuring the social, educational and economic conditions essential to the full development of his personality.

Inevitably the detailed recommendations of the committees reflected an uneasy coexistence between the implications of these wider and narrower concepts. The legislative committee propounded that the Legislature must be restrained from trespassing upon certain fundamental human rights either by written constitutional safeguards or by respect for established standards of legislative behaviour and urged, that these restraints be enforced by judicial sanctions—a demand resisted by Mr. Elwyn Jones, Q.C., as a denial of the legislative supremacy of Parliament.

Then followed the previously cited declaration of Delhi.

The rule of law must, now, then be redefined from what Dicey postulated in the calm of the 19th century so as to be, in the dynamics of the 20th century, a rule of justice. The conception that the rule of law rests on the judiciary is now outmoded. It rests, in the final analysis, on the people.

The rule of law formerly has been held to mean that the individual must be protected from the legal institutions of his country. But today that meaning is insufficient. It is futile to speak of the liberty of the subject to the starving populations of countries which are penurious and where human urgencies are in question. The liberty of the subject cannot be construed as a liberty to starve in poverty, disease and ignorance.

The rule of law must nowadays be expanded to impose upon governments an injunction to ensure the welfare of their people.

The rule of law is now a living theory which should not only protect and succour the legal and political liberties of the subject, but must, in addition, establish and cultivate those other conditions of society which will enable him to fulfil his personality. In this context the following quotation is appropriate: "*Salus populi est suprema lex*" (13 Co. 139).—*L.T.*

THE LAW AND THE LAWYERS

A Murderer's Appeal

THE prisoner in *Reg. v. Rafik* (*The Times*, March 10) appealed against conviction of murder as a result of a fight in the course of which a knife was used, on the ground that the trial Judge, McNair, J., had failed to direct the jury on the defences of provocation and self-defence—despite the accused's denial in cross-examination that there had been any question of self-defence or provocation in his fight with the deceased. The said defences or either of them could have arisen only on the assumption that it was the deceased who attacked with the knife, since otherwise the accused could not have been provoked or forced to defend himself. The Judge presented the issue to the jury as being whether the accused had attacked the deceased or vice versa, and told the jury that the success of the prosecution depended on their being satisfied that it

was the accused who did the attacking and that the death was not accidental. In other words, under that direction the jury were not to find the accused guilty of murder if they believed that he was attacked and the death was accidental, or entertained a doubt about it. After a brief retirement the jury found the accused guilty, so that they must be taken to have concluded that the accused went for the deceased with a knife. Accordingly, there was no room or reason, in this particular case, for any direction as to self-defence or provocation. The Court of Criminal Appeal (Lord Parker, C.J., Devlin and Donovan, JJ.) upheld the conviction. The Lord Chief Justice, who delivered the judgment of the Court, declared that it did not wish to affect the authority of those precedents which had laid down that, if any evidence existed which could support a verdict of manslaughter, that evidence must be left to the jury, even though such evidence was denied by the accused, and even though the defence was not raised by his counsel.

If a man attacks another, the latter is entitled to defend himself; and the test as to what is fighting and what constitutes self-defence is that he who defends himself does not want to fight but resorts to violence merely because he is forced to it. Therefore the law completely exonerates the person who, while defending himself, knocks down his assailant and thereby unintentionally kills him, and his homicide is lawful: *Rex v. Deana* (1909, 2 Cr. App. R. 75). On the other hand, in no circumstances can the killing be justified or excused if committed under the influence of provocation in the technical sense of the term—that is, “some act or series of acts done by the deceased which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of control, rendering the accused so subject to passion as to make him for the moment not master of his mind:” per Devlin, J., in *Rex v. Duffey* ([1949] 1 All E. R. 932). In such circumstances the homicide does not cease to be unlawful, though it amounts to manslaughter only: *Reg. v. Mawgridge* (1706, 17 St. Tr. 57). If sufficient evidence were present for a reasonable jury to infer that provocation (in the technical sense of the term) did operate, it is open to the jury to find a verdict of murder or manslaughter: *Holmes v. Director of Public Prosecutions* (175 L. T. Rep. 327; [1946] 2 All E. R. 124). And the Judge is bound to draw the jury’s attention to such supporting evidence, even though the accused’s counsel has not raised the defence of provocation: *Rex v. Prince* ([1941] 3 All E. R. 37). It is equally his duty, in the absence of sufficient material for a reasonable jury to conclude that provocation operated in the above sense, to direct the jury that the available evidence does not support a verdict of manslaughter: *Holmes’s* case.

The Judge’s duty in the above circumstances arises from his general responsibility as regards evidence, especially in criminal trials, where the regular procedure has to be strictly observed and the parties have not, as in civil cases, even a limited latitude to compromise over it by mutual consent. Of course it is for him to decide whether certain evidence which it is proposed to tender on behalf of one side or the other is admissible or not. Again, whether or not the evidence adduced amounts to a *prima facie* case for the accused to answer is a pure question of law for the Judge to determine. And even though the accused does put his character in issue, the Judge may in his discretion refuse the prosecution leave to cross-examine him as to his previous convictions: *Maxwell v. Director of Public Prosecutions*, (151 L. T. Rep. 477; [1935] A. C. 309). Similarly, the prosecution can only call rebutting evidence by the Judge’s permission—*Reg. v. McKenna*, (1956, 40 Cr. App. R. 65)—which must also be obtained before a party who calls a witness can treat him as hostile and subject him to cross-examination: *Reg. v. Fraser* (1956, 40 Cr. App. R. 60). Indeed, whereas in civil proceedings the Judge has no power to call of his own accord a witness who he believes may be of assistance in the determination of the issue or issues before the Court, he has power in a criminal trial to call such a witness on his own initiative: *Reg. v. Thompson* (1876, 13 Cox C.C. 181); *Rex v. Day* 162 L. T. Rep. 407; (1940) 1 All

E. R. 402); *Reg. v. Wallwork* (1958, 42 Cr. App. R. 153). Finally, neither the prosecution nor the defence is entitled to examine or cross-examine such a witness without the leave of the Judge: *Reg. v. Cliburn*, (1898, 62 J.P. 232). That is why the trial Judge is expected to bring to the notice of the jury evidence of self-defence or provocation or both—when such is fit for their consideration—irrespective of such defence or defences having been put forward by or on behalf of the accused: *Rex v. Hopper* (118 L. T. Rep. 381; (1915) 2 K. B. 481); *Kwaku Mensah v. Regem* (174 L. T. Rep. 96; (1946) A. C. 83).—*L. T.*

LAW RELATING TO ABORTION

IN 1938, at the Central Criminal Court, an indictment was preferred against an obstetrical surgeon alleging that he had used an instrument with intent to procure the miscarriage of a certain girl, contrary to the provisions of s. 58 of the Offences against the Person Act, 1861. It appeared that in this case, *R. v. Bourne* [1939] 1 K.B. 687, the girl in question, who was fourteen years of age, had been raped by a soldier and as a result had become pregnant. The defendant formed the opinion that the continuance of the pregnancy would probably cause serious injury to the girl, injury so serious in fact as to justify its termination. Another doctor took the view, that, if the girl had given birth to the child, she would probably have become a mental wreck. With the consent of the girl's parents and as "an act of charity... unquestionably believing that he was doing the right thing," the defendant performed the operation openly in hospital. Macnaghten, J., directed the jury "that the burden rests on the Crown to satisfy you beyond reasonable doubt that the defendant did not procure the miscarriage of the girl in good faith for the purpose only of preserving her life." His Lordship added that, if they believed that the defendant was of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy would be to make the girl a physical or mental wreck, they were quite entitled to take the view that the doctor was operating for the purpose of preserving her life. In the event the defendant was acquitted. In a letter to *The Times* (2nd September), the Abortion Law Reform Association restated its contention that the present law relating to abortion, which is based on the Act of 1861 and *R. v. Bourne*, bears no relationship to modern medical practice and they call for new legislation "to embody specific grounds on which legal abortion can be recommended and performed by qualified medical practitioners." The Association recalls that in 1939 the Interdepartmental Committee on Abortion recommended the clarification of this aspect of the law, but in December, 1957, Mr. Butler told the House of Commons that he could not see the "practical need" for reform. On 3rd April of this year he was asked on what evidence he had arrived at this conclusion and in a written answer he simply stated: "On the decision in the case of *R. v. Bourne*."—*S.J.*

CHILD DELINQUENTS: PSYCHIATRISTS' VIEW

THE Royal Medico-Psychological Association, whose Child Psychiatry Section is generally regarded as being the representative body of child psychiatrists in this country, has now published the memorandum which it has submitted to the Committee of Children and Young Persons. In cases of children in need of care and protection or beyond control, the Association suggest that the element of emotional neglect is frequently of outstanding importance and that this is often found in children from the many homes which are not only broken in the usual sense but also from those which appear to be adequate yet are really broken, as the parental relationship is one of indifference, or smouldering hostility, and lacks the vital emotional quality upon which true family life depends. Neglect of this character can rarely be satisfactorily relieved by criticism, di-

rect advice or legal action but can best be prevented by the numerous community agencies which seek to preserve family life and arrest the deterioration of relationships in the home. These agencies should be encouraged to co-operate with the child psychiatric services and legal action should be resorted to only when all other methods of approach have failed. The Association are of the opinion that a certain number of older delinquent children appear to be capable of continuing the process of social development only within a controlled environment and they contend that this group is in urgent need of scientific observation and study. They are not the first to recommend the raising of the age of criminal responsibility and they argue that the utmost discretion should be employed in communicating the contents of psychiatric reports to parents or to the children concerned. Undue publicity of cases appearing before juvenile Courts which, although the name of the child may be withheld, often leads to notoriety, should be avoided and some of the magistrates on the juvenile panel should come from the younger age group of family men and women. Whenever possible, the remand of the child at home is the procedure which they prefer, but it is the belief of the Association that there is need for an increase in hostel accommodation for disturbed adolescents and that greater facilities for the psychiatric observation and treatment in hospital of certain children from juvenile Courts should be made available.

While we have never imagined that juvenile delinquency is confined to these shores, those who accept the doctrines of Marx must be a little disturbed to read of widespread hooliganism, drunkenness and theft in Moscow and other large Russian towns. Gangs of young people, armed with razors, knives, steel wires, and even revolvers, are said to roam the streets. How do the Russians approach this problem? They employ day and night patrols of members of the Communist Youth League, armed with nothing more than their bare fists, to break up and correct the behaviour of these gangs of their less public-spirited comrades. We would not be surprised to find that there are some in these islands, not necessarily fellow-travellers, who are sympathetic towards the adoption of such methods to combat a certain type of offender and offence, but with all its failings, whatever they may be, the British approach to the young criminal would seem to us to be preferable.—S.J.

WILL: ATTESTING SOLICITOR

It is well settled that the provision in a will whereby a solicitor is to be entitled to receive professional remuneration for his services is in the nature of a legacy. It would, however, be fatal to his right to receive any benefit under the will, if he had been one of the attesting witnesses, for he is then precluded, by s. 15 of the Wills Act, 1837, from claiming any beneficial interest under the will (*Re Pooley* (1833) 40 Ch.D. 1). What is the position of an attesting solicitor who, by his appointment as a trustee after the testator's death, becomes the object of a charging clause in the will which might enable him to charge for his services? This exceedingly difficult question, on which there is no direct authority, arose in *Re Royce's Will Trusts* ([1958] 3 All E.R. 586). Wynn-Parry, J., there decided that the solicitor was disqualified, by s. 15 of the Act of 1837, from taking any benefit under the will even in those circumstances, principally upon the ground that "the only safe view to adopt is that if a man attests a will he should not in any way be enabled to take any benefit under that will—not even if he only enters a class intended to benefit by the will after the will has been proved". On the face of it, this seems a hard decision, particularly since there are authorities, such as *Re Trotter* ((1899) 1 Ch. 764) and *Thorp v. Bestwick* ((1881) 6 Q.B.D. 311) which tend to show that events subsequent to the attestation—such as the marriage of a beneficiary to an attesting witness—do not render the gift invalid. It may be thought also that the right to charge for services which were, in fact, rendered, would not, in normal par-

lance, be termed a gift, but it is, of course, too late in the day to argue that the inclusion in a will of a charging clause in favour of a professional trustee does not amount, in law, to a gift or a bequest.—*L.J.*

CASUS OMISSUS

It is pleasant occasionally to turn from the daily tread-mill and consider the byways of the law. The byway which in this article it is proposed to consider is that of *casus omissus* or the lacuna in the law, which may be described as a point for which provision should have been, but has not been; made in a statute.

In respect of *casus omissus* in a statute reference may be made to Coke's maxim: *ad ea quae frequentius accidunt jura adaptantur* (2 Inst. 137). Laws cannot be so worded as to include every case which may arise, but it is sufficient if they apply to those which more frequently happen. This maxim was forcibly applied by Lord Blackburn in *Dixon v. Caledonian and Glasgow and South Western Rail Cos.* ([1880] 5 App. Cas. 820); and two other judgments of Lord Blackburn, *Clarke v. Write* ([1861] 6 H. & N. 862), and *Dalton v. Angus* ([1877] 6 App. Cas. 818) demonstrate that it also has force as a principle of common law.

It is a general rule that penal enactments, other than an executive measure designed to prevent a public danger, are to be construed strictly, and that the legal meanings of the words used are not to be departed from, unless it appears from the context that Parliament has intended them to be used in a popular or wider sense. They are not to be extended by equity or enlarged by parity of meaning. A *casus omissus* cannot be supplied in a statute creating an offence (*Broadhead v. Holdworth* [1877] 2 Ex. D. 321, and *R. v. Murry* (1898) 57 J.P. 136).

However, as to equitable interpretation of *casus omissus* in a statute, in *Sparrow v. Oxford, Worcester and Wolverhampton Ry. Co.* ([1852] 21 L.J. Ch. 731), Lord Cranworth, L.J., said that if there had been a *casus omissus* he thought it ought to be construed in a way most favourable to those who are seeking to defend their property from invasion . . . a manufactory does not cease to be one because another person has a right over it.

There is also, however (and not always realised) *casus omissus* in relation to the unreported case. The unreported case has a peculiar place at law, and recourse has, again, to be made to a maxim of Coke: *casus omissus et oblivioni datus dispositioni communis juris relinquitur* (5 Co. 37). "A *casus omissus*", observed Buller, J., "can in no case be supplied by a Court of Law, for that would be to make laws" (*Jones v. Smart* [1785] 1 Term Rep., at p. 52).

It must be remembered, unfortunately, that this is not a universal truth, because, even today, to the consternation of the reader, reference may be found in judgments to unreported cases: *q.v.*, *Cottam v. Eastern Counties Ry. Co.* ([1860] 30 L.J. Ch. 217) (which related to the negligence of trustees), where Sir William Page-Wood, V.-C., cited the views of Sir John Leach in an unreported case of *Goldney v. Bower* (circa 1828); and reference to the former case and the latter (unreported) case was made by Harman, J., in so recent a case as *Welch v. Bank of England* ([1955] 1 All E.R. 811), when dealing with a case of estoppel by conduct.—*L.J.*

NO NEGLIGENCE

THE plaintiff alleged [in *Prince v. Gregory and Another*, Vol. 227 Laws Times, p. 38] that the defendant had been guilty of negligence in placing or leaving the lime mortar in the gutter when he knew that children habitually played in the road, and that he had caused or permitted the existence of a danger in the road which he knew, or ought to have known, to be an allurement to children, and had failed to take any reasonable steps to prevent children from coming into contact with it. It was argued for the second

defendant that a householder was doing a reasonable thing in leaving the lime mortar in the gutter outside his house for the purpose of which he required it, and it was not reasonably within his contemplation that some boy would come along and pick up some of it and throw it at a passer-by or the plaintiff, who happened to be a boy playing in the street. In the course of a judgment with which Hodson, L.J., expressed agreement Ormerod, L.J., said that the argument from the case above cited could be carried almost *ad infinitum* to other things where something was left anywhere. Something left in a playground was a very different thing from something left in the street, which was not there for playing with but for an entirely different purpose, and in those circumstances it was reasonable to take the view that this was not a question which should be left to a jury. It was a reasonable thing for the householder to leave the lime mortar in this particular position. There was no reason why he should anticipate that some mischievous boy would pick it up and throw it at another small boy. The statement of claim, so far as it affected the second defendant, should therefore be struck out.—*L.T.*

"RECKLESS" IN STATUTE CREATING OFFENCE

ONE of the most interesting of the cases reported during last term was that of *Reg. v. MacKinnon* ([1958] 3 All E.R. 657), which was decided at the Central Criminal Court on September 22, by Salmon, J., sitting with a jury to try a charge, involving a number of defendants, of inducing persons to enter into contracts to acquire shares by making reckless statements and forecasts. The case involved the construction of s. 12(1) of the Prevention of Fraud (Investments) Act, 1939, which, so far as material to the present purpose, provided: "Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person—(a) to enter into... (i) any agreement for...acquiring...securities...shall be guilty of an offence..." The offender was liable to penal servitude (not exceeding seven years) for which now read "imprisonment" (Criminal Justice Act, 1948). The Crown contended that the word "reckless" in this section meant no more than "very careless," and that anyone who very carelessly made a false statement, promise or forecast and thereby induced another to enter into any agreement for acquiring securities committed a criminal offence, even if he honestly believed in the truth of what he wrote or said. For the defence it was contended that "reckless" meant not caring whether the statement, promise or forecast was true or false, and that if an accused person honestly believed the truth of what he had said or written he could not be guilty of an offence under the section.—*L.T.*

RES IPSA LOQUITUR

As a general rule, the plaintiff is required to prove negligence, but his task is often made easier by the application of the maxim *res ipsa loquitur*. This doctrine was recently considered by the Manitoba Court of Appeal in *Kullberg's Furniture, Ltd. v. Flin Flon Hotel Co., Ltd.* (1959), 16 D.L.R. (2d) 270. The plaintiff was lessee of business premises which were self-contained but formed part of a building in which his lessor, the defendant, operated a hotel, certain rooms of which were situated immediately above the plaintiff's furniture store. It seems that on several occasions water leaked through the ceiling of the plaintiff's premises from rooms under the exclusive management and control of the defendant and that on two of those occasions furniture displayed in the plaintiff's store was damaged. The defendant called no witnesses and offered no evidence to explain or contradict these facts. Their Lordships held that the rule *res ipsa loquitur* was applicable and that the judgment in favour of the plaintiff should be affirmed. Unlike *Richards v. Lothian* [1913] A.C. 263, where the jury found that the damage "was the malicious act of some

person," there was no evidence to justify an inference or finding that the escape of water from the defendant's hotel was the consequence of the acts of a third party. Schultz, J.A., reminded the defendant that in *Walsh v. Holst & Co., Ltd.* [1958] 1 W.L.R. 800 the defendants had tendered evidence which satisfied the Court that they had not been negligent and therefore the action failed. In the absence of similar evidence by the defendant in the case with which they were then confronted, their Lordships found that the doctrine of *res ipsa loquitur* entitled the plaintiff to succeed. The burden of proof had shifted from him and it had not been discharged.—S.J.

REVIEWS.

Extraordinary Legal Remedies. By S. K. KAPUR, B.A., LL.B., and P. M. MUKHI, M.A., LL.B. DELHI: Eastern Book Company, Kashmeri Gate. 1958. Roy 8vo. Pages vi, Part I, Pages 383; Part II, Pages 208; Schedule I, Pages 93; Appendix I, II, III, Pages 80; Index Pages xxx. Price Rs. 37.50.

THE object of this work has been to present a detailed and comprehensive study of the several articles relating to constitutional remedies in the Indian Constitution. Articles 32, 136, 226 and 227 provide a charter within the compass of which any person in India can approach the Supreme Court or the High Courts for speedy and effective remedy. This work affords to the lawyer seeking a constitutional remedy for his client to find within its pages a commentary on such remedies. In the appendix are given rules made by the Supreme Court and several High Courts relating to writ petitions. The bare text of relevant articles of the Constitution is incorporated for ready reference. Where a section of any Act has been referred to, the text of the section has been reproduced in the footnotes. This is a very remarkable work and the learned authors deserve all praise for their conscientious effort to produce a magnificent work dealing with the principles and the case law bearing on the Indian Constitution.

The Law of Income-Tax in India. By V. S. SUNDARAM, Formerly of the Indian Audit & Accounts Service. MADRAS: The Madras Law Journal Office. Eighth Edition. 1959. Roy 8vo. Pages 118+1135+colxxxiv. Price Rs. 40.

THIS is a very exhaustive commentary on the Indian Income-tax Act, 1922, as amended upto June 15, 1959. The comments and the critical exposition of the provisions of the Act have proved valuable not only to lawyers but also to those who have to deal with this Act. The case law, which is fully dealt with, is brought down to-date. This edition has been carefully and thoroughly revised and will be found extremely useful for purposes of reference.

Digest of Statutes, Central and Kerala. Vol. I Central Statutes. By JOSEPH M. MADATHIL, B.A., LL.B., Advocate. ERNAKULAM-1: Kerala Law Times. Roy 8vo. Pages vi + 517. Price Rs. 15.

AN attempt has been made in this work to give a synoptical indexing of various statutes in two volumes. Volume I comprises of Central Statutes. Volume II will deal with statutes of Travancore, Cochin, Travancore-Cochin, Kerala, and Madras as far as they are applicable to Malabar. The statutes are systematically arranged showing the various stages of progress initiated by Acts or Ordinances. An Index referring to the various articles of the Constitution is annexed at the end.

The Young Lawyer. Edited by Prof. K. H. NAGBANI. BOMBAY: The Law College, Dinshaw Vachha Road.

THIS is a very well got up magazine dealing with various topics of legal interest to students of law. There is a large number of interesting photographs. It contains interesting articles in Hindi also.

The
Bombay Law Reporter.

JOURNAL.

September 15, 1959.

COURT-FEE ON RETURNED PLAINT.*

IN a recent decision of the Bombay High Court, *Brindalal v. Gokal & Hoffman*,¹ given by a single Judge of that Court, it has been held that if a plaint is returned under O. VII, r. 10, of the Code of Civil Procedure, 1908, and it is re-presented in another Court situate in a State different from the State in which the Court returning the plaint is situate, fresh court-fee is required to be paid in respect of the plaint in accordance with the scale of court-fees in force in the State in which the plaint is re-presented. The decision appears to have been based on two grounds. Firstly it is said that since the coming into operation of Part III of the Government of India Act, 1935, on April 1, 1937, the Court-fees Act, 1870, though till then a Central Act, thereafter continued to be in force as a Provincial Act, in various provinces in India. Secondly it is said that to hold that fresh fee is not necessary would result in a curious position. It is said that one State would pocket the court-fee and the Court in the other State would try the suit at the cost of such other State. It is further said that if under the rules in force relating to the refund of court-fee in the State in which the plaint is re-presented, plaintiff afterwards becomes entitled to a refund of the whole or part of the court-fee paid in respect of the plaint, the State which did not receive any part of the fee will have to refund the whole or part of the fee as the case may be out of its own pocket.

It would appear that the principal ground on which the decision is based is the first of the above two grounds, and it is, therefore, necessary to examine the validity or otherwise of the premises that the Court-fees Act, 1870, continued to be in force in each of the provinces in India, from April 1, 1937, as a piece of provincial legislation. The reason put forward in support of the same is that by virtue of s. 292 of the Government of India Act, 1935, all previous laws in force immediately before April 1, 1937, including the Court-fees Act, 1870, continued to be in force in India notwithstanding the repeal of the earlier Government of India Act, and as under the Government of India Act, 1935, every Act must be either a Central Act or a Provincial Act, the Court-fees Act, 1870, must be either of the two; and since it was only a Provincial Legislature that could alter, repeal or amend the Court-fees Act, 1870, because of the distribution of the legislative powers between the centre and the provinces under the Government of India Act, 1935, the said Act must be taken to have continued in force in various provinces as a piece of provincial legislation.

Before examining each of those reasons it would be convenient to invite attention to the state of law relating to court-fees previous to the Government of India Act, 1935. The Court-fees Act, 1870, when enacted was undoubtedly a Central Act. It appears that till 1920, the Provincial Legislatures (Local Legislatures as they were then called) had no authority to touch a Central Act. By virtue of Devolution Rules of 1920, framed under the provisions of the Government of India Act, 1919 (s. 129A) some revenues appear to have been allocated to the Provinces. Section 45A of the Government of India Act,

* By G. K. Dabke, Advocate, Thana.

1 (1958) 61 Bom. L. R. 996.

1919, appears to be a source of authority for those rules. Sub-section (1) of that section was as follows:—

"45A. (1) Provision may be made by rules under this Act—

(a) for the classification of subjects, in relation to the functions of government, as central and provincial subjects, for the purpose of distinguishing the functions of local governments and local legislatures from the functions of the Governor-General in Council and the Indian legislature;

(b) for the devolution of authority in respect of provincial subjects to local governments, and for the allocation of revenues or other moneys to those governments;"...

Rule 3 of the Devolution Rules framed under s. 45A read with s. 129A was as follows:—

"3. (1) For the purpose of distinguishing the functions of the local governments and local legislatures of Governor's Provinces...from the functions of the Governor-General in Council and the Indian Legislature, subjects shall in those provinces be classified in relation to the functions of Government as central and provincial subjects in accordance with the lists set out in Schedule I.

(2) Any matter which is included in the list of provincial subjects set out in Part II of Schedule I shall, to the extent of such inclusion, be excluded from any central subject of which, but for such inclusion, it would form part."

Material portion of r. 14 of the Devolution Rules, 1920, was as follows:—

"14. (1) The following sources of revenue shall, in the case of Governors' provinces...be allocated to the local Government as sources of provincial revenue, namely:—

(a) ...

(b) receipts accruing in respect of provincial subjects;"...

Entries 17 and 20 in part II of Schedule I of the Devolution Rules, are relevant for the present purpose and they were as follows:—

"17. Administration of Justice, including constitution, powers, maintenance and organisation of courts civil and criminal within the province, subject to legislation by Indian Legislature as regards High Courts, Chief Courts and Courts of Judicial Commissioners, and any courts of criminal jurisdiction.

20. Non-judicial stamps, subject to legislation by the Indian Legislature, and judicial stamps subject to legislation by the Indian Legislature as regards amount of court fees levied in relation to suits and proceedings in the High Courts under their original jurisdiction."

All the above provisions will be sufficient to show that provinces became entitled to the revenue arising from the sale of judicial stamps in 1920 and not 1937. Further the Local Legislatures appear to have been conferred with power to alter, amend or repeal certain classes of Central Acts at the same time, as will be clear from the provisions of s. 80A of the Government of India Act, 1919, which was as follows:—

"80A. (1) ...

(2) The local legislature of any province may, subject to the provisions of the sub-section next following, repeal or alter as to that province any law made either before or after the commencement of this Act by any authority in British India other than that local legislature."

The above provisions will show that it is not correct to say that Provincial Legislatures became entitled to alter, amend or repeal the Court-fees Act, 1870, by virtue of the Government of India Act, 1935. It is noteworthy that right from 1922, various Local Legislatures have passed a number of amendment Acts in order to increase the revenues of the respective provinces, while the Central Legislature has almost not touched the said Act since 1920, presumably because the Centre lost all interest in revenue arising from sale of judicial stamps.

It is quite true that between 1920 and 1937, both the Central Legislature and the various Provincial Legislatures enjoyed concurrent power to legislate with respect to court-fees, in spite of the fact that it was a provincial subject under

the Devolution Rules referred to above. The powers of the Central Legislature (Indian Legislature as then called) extended to all topics in spite of the fact that some topics formed part of provincial subjects. Section 65 of the Government of India Act, 1919, conferred legislative powers on the Indian Legislature functioning at the centre. Clause (a) of sub-section (1) thereof was as follows:—

"65. (1) The Indian legislature has power to make law—

(a) for all persons, for all courts and for all places and things, within British India;" Section 84(2) of the said Act also further clarified the position. That sub-Section was as follows:—

"(2) Nothing in the Government of India Act, 1919, or this Act, or in any rule made thereunder, shall be construed as diminishing in any respect the powers of the Indian Legislature as laid down in Section Sixty-five of this Act, and the validity of any Act of the Indian legislature or any local legislature shall not be open to question in any legal proceedings on the ground that the Act affects a provincial subject or a central subject, as the case may be, and the validity of any Act made by the Governor of a province shall not be so open to question on the ground that it does not relate to a reserved subject."

In view of this consideration it is said that because the Central Legislature had also power to legislate with respect to court-fees, it could not be said that the Court-fees Act, 1870, was in force as a provincial piece of legislation in various provinces before April 1, 1937. The fact that Provincial Legislatures got exclusive power to legislate with respect to court-fees in 1937, it is presumably urged, makes all the difference and turns the Court-fees Act, 1870, into a provincial law. It is, therefore, now necessary to see whether this assumption is correct or otherwise.

It is to be noted that the Court-fees Act, 1870, is not confined to fees taken or paid only in Courts of justice. It also relates to fees taken by or paid to other judicial or executive authorities or officers. (See arts. 9 and 6 in the First Schedule and arts. 1, 3, 10 and 11 in the Second Schedule). It may be further noted that court-fee is payable in respect of applications or other documents filed not only before the officers or authorities functioning under the provincial governments but also those functioning under the Central Government, such as customs or income-tax authorities or officers. Moreover court-fee is not only payable when documents are filed in a Court or before an officer, but also when certain documents are issued or furnished by them. When certain certified copies are issued or furnished by Courts or other officers including executive officers, court-fee is required to be paid at the time of issuing or furnishing the same whether they are thereafter filed in any Court or office or not. This is the position under the provisions of the Act, though in some States court-fee in respect of such copies is remitted by state governments under s. 35 of the Act, if the same are issued or furnished for private use. It would thus be clear that the scope of the Court-fees Act, 1870, is much wider than the topic 'fees taken in courts' referred to in entry 1, in the Seventh Schedule of the Government of India Act, 1935, though largest part of court-fees is paid in respect of plaints or memoranda of appeals filed in Courts of justice.

Perusal of all the three Lists in the Seventh Schedule to the Government of India Act, 1935, will show that the Court-fees Act, 1870, does not wholly fall within the words "the administration of justice; constitution and organisation of all courts except Federal Court, and fees taken therein," contained in entry 1 of the Provincial Legislative List and entry 54 of the same List, with respect to which alone Provincial Legislatures enjoyed exclusive power to legislate. The Act also fall within entry 59 of the Federal Legislative List and entry 36 of the Concurrent Legislative List. The aforesaid four entries correspond respectively to entries 3 and 66 in the State Legislative List, entry 96 in the Union Legislative List and entry 47 of the Concurrent Legislative List set out in the Seventh Schedule to the Constitution of India, 1950. It would,

therefore, be clear that the Central Legislature did continue to have power even after April 1, 1937, to alter amend or repeal the Court-fees Act, 1870, in so far as it fell within entry 59 of the Federal Legislative List and entry 36 of the Concurrent Legislative List of the Government of India Act, 1935, and still continues to have such power in so far as the Act falls within the scope of entry 9 of the Union List and entry 47 of the Concurrent List of the Constitution of India, 1950. It would not, therefore, be correct to say that the Central Legislature completely lost the power to alter, amend or repeal the Court-fees Act, 1870, and the various provincial Legislatures alone came to enjoy such power on April 1, 1935. It may be noted in this connection that the recent Bombay Court-Fees Act, 1959, which apparently replaces the whole of the Court-fees Act, 1870, so far as that State is concerned, does not really repeal the whole of it, but the repeal is expressly confined to that part which falls under entries 3 and 66 of the State Legislative List and entry 47 of the Concurrent Legislative List. In other words, it does not repeal the same in so far as it falls within the scope of entry 96 of the Union List and to that extent at least the said Act is still operative even in the State of Bombay.

But even apart from this consideration, it is submitted, with respect, that the proposition that the Court-fees Act, 1870, which was originally a Central Act, continued to be operative as a Provincial Act in various provinces does not appear to be supported by any constitutional principle or authority. In support of the proposition, s. 292 of the Government of India Act, 1935, is sought to be pressed into service. It was as follows:—

"292. Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the laws in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

It is, however, difficult to see how the provision would be of any assistance to the proposition. The purpose suggested does not appear to be the real purpose of the section. Its precise purpose is set out by Gwyer C.J. in *United Provinces v. Atiga Begum*². After quoting the said section, his Lordship observes (p. 24, col. 1):

"...The purpose of s. 292 was clearly to negative the possibility of any existing Indian law being held to be no longer in force by reason of the repeal of the law which authorised its enactment; and it is a safeguard usually inserted by draftsmen in similar circumstances."

In order to correctly appreciate the above observations it would be necessary to bear in mind some basic principles relating to legislation. Power to legislate is derived from a constitution, written or unwritten. A piece of legislation owes its birth to the Legislature that enacts it. It also owes its continued life to the same Legislature, and if the said Legislature becomes extinct, the piece of legislation would lapse with it. When one Constitution is replaced by another, the Legislatures created by the earlier Constitution become extinct and new Legislatures with identical or different powers are created by the new Constitution to take their place. Strictly constitutionally speaking the new Legislatures are not successors of the old ones. They may be of entirely different type and composition. They cannot be said to inherit the laws enacted by the old Legislatures. All laws enacted by the old Legislatures lapse with their extinction. If that were not so, provisions like s. 292 of the Government of India Act, 1935, or art. 372(1) of the Constitution of India, which are normally found in almost all Constitutions would have been wholly redundant. Thus the real purpose of s. 292 of the Government of India Act, 1935, was to preserve intact the then existing laws (Central or local), without affecting their origin or quality, as they would otherwise have lapsed with the extinction of the Legislatures which created them, or repeal of the provision that previously

preserved them, by reason of the repeal of the Government of India Act, 1919. It was not its purpose to classify the said statutes into Central and Provincial Acts according to the distribution of legislative powers under the Government of India Act, 1935.

Again the proposition that under the Government of India Act, 1935, Acts can either be Central or Provincial is also only partially correct. It would be correct to say that all statutes enacted after the Act came into force would bear either of those two descriptions. But the laws already in existence on April 1, 1937, do not owe their continued life to any of the Legislatures created by the Act but to s. 292 of the Act itself. This is thus the third category of laws that would operate after April 1, 1937. It is, therefore, difficult to accept the position that as from April 1, 1937, the Court-fees Act, 1870, transformed itself into so many replicas as the then number of provinces in India, and each replica separately operated in respective provinces as a piece of provincial legislation.

There is no direct provision saying that when a plaint is returned and re-presented in another Court, no fresh fee is necessary. But once a document is duly stamped it continues to bear that stamp even after the stamp is cancelled. Cancellation of the stamp does not destroy it and make the document unstamped, when it is again filed in a Court or an office. Cancellation of stamp is provided only to ensure against its fraudulent use over again in respect of another document. Certified copies if stamped at the time of issuing the same, the stamp is cancelled at the very moment, but they are not required to be stamped over again when filed in Court. Similarly when a copy of decree filed with an application for execution is withdrawn after the execution case is disposed of and is filed with a subsequent application for execution it is not required to be stamped afresh. For the very reasons a plaint when returned for presentation to the proper Court is re-presented therein is not required to be stamped afresh (see *Prabhakarbhat v. Vishwambhar Pandit*³ and *Mahadaji v. Joti*⁴).

It is, however, said that this position would be quite correct if both the Courts are situate in the same State, but if not, the position would be different. It is said that it would create difficulties as the scales of fees in different States may be different. This reasoning is hardly convincing. If the court-fee computed according to the scale in force in the State in which the plaint is re-presented exceeds the fee already paid in respect of the plaint, it would be legitimate to call upon the plaintiff to pay the difference. But it would be contrary to the provisions of the Court-fees Act, 1870, to say that the Court will not recognise the stamp already affixed, on the ground that it was not issued by the State in which the Court is situate.

There does not appear to be any provision in the Court-fees Act, 1870, that empowers a government to direct that within its territory only such stamps as are issued or sold by it shall be used. Section 26 empowers the State governments to make rules directing that stamps to be used in different cases shall be impressed or adhesive or partly impressed and partly adhesive. Section 27(a) empowers them to make rules as to supply of stamps and s. 27(b) as to number of stamps to be used. But no further powers are vested in State Governments. Thus once a stamp is issued by any competent authority functioning under the Court-fees Act, 1870, it has got to be recognised throughout India.

Another difficulty pointed out is that one State would pocket the fee and another State would be required to refund the same either in whole or in part out of its own pocket. But this has hardly any relevance to the correct interpretation of the provisions of the Act. Sections 13, 14 and 15 are the only provisions regarding refund and it is difficult to see in what cases coming within their scope the difficulty referred to above would arise. All other provisions regarding refund are creatures of either the provincial or State Acts

3 (1884) I. L. R. 8 Bom. 313.

4 (1892) I. L. R. 17 Bom. 425.

or rules made by provincial or State governments under s. 35 of the Act. It would be open to the governments concerned to modify the rules in such a way as to ensure against the said difficulty. The rules may provide that no claim for refund would be admissible if the fee is not paid to the State concerned. But it is submitted, with respect, that this difficulty would be hardly any justification for construing the Act in a different way. There does not appear to be any warrant for the proposition that court-fee is required to be paid on behalf of any State under the Act. That would amount to adding to the statute words which are not there.

It is true that the above discussion is only of academic interest so far as the State of Bombay is concerned, because that State has now enacted its own Court-fees Act, 1959, which has come into force on August 1, 1959. This Act replaces the Court-fees Act, 1870, except in so far as it falls within the scope of entry 96 of the Union List. Now, therefore, possibly only such stamps as are issued under the State Act or deemed to be issued under the same will have to be used in all Courts in the State of Bombay. The litigants, however, deserve protection against double taxation. Every government owes a duty to the subjects to grant such protection. It may, therefore, be justly suggested that the State of Bombay and every other State which may have enacted or may hereafter enact a Court-fees Act of its own to replace the Court-fees Act of 1870, should make a provision for refund of court-fees when a plaint is returned for presentation to a Court outside the State or when a suit is transferred from a Court situate in one State to a Court situate in another State.

GLEANINGS.

SOLICITOR

Rutter v. Sheridan-Young ([1958] 2 All E. R. 13) raised an interesting point on solicitors' remuneration. A client agreed to pay a lump sum as remuneration for work done in connection with acquiring a lease. The solicitor informed the client erroneously that he was entitled to charge on the basis permitted by the second schedule to the Solicitors' Remuneration Order, 1883, as amended by the Solicitors' Remuneration Order, 1953, but he was not entitled to do so as regards the greater part of the work because he had not made a written election in compliance with art. 6 of the former order, as amended by the latter, before undertaking the work. The Court of Appeal (Lord Evershed, M.R., Parker and Sellers, L.J.J.), applying *In re Palmer* (1890, 62 L. T. Rep. 778; 45 Ch. D. 291), held that the client was entitled to an itemised bill, because the solicitor's mistaken statement that he was entitled to charge a lump sum had been one of the factors which had led to the making of the agreement. But the court indicated that, as a matter of general principle, it was not right to say that a client who had made an agreement for paying a lump sum for non-contentious business had an unqualified right to ask for a bill of costs. His right to require a bill was limited to cases where he could show on the facts of the particular case to the satisfaction of the court that there was something into which, as a matter of general principle or private right or both, the court ought to look.

In *Hughes v. Hughes* ([1958] 2 All E. R. 366) Wrangham, J., held that a solicitor's lien on being discharged from a suit otherwise than for misconduct, which is normally absolute, was only a qualified lien in a divorce case, having regard to the fact that these cases are not merely suits inter partes, and could not be disposed of by agreement like civil actions. A statutory duty was imposed on the court to inquire into matters and to refuse to grant decrees unless satisfied of certain facts, irrespective of the wishes of the parties, and there was provision for the intervention in such proceedings in certain cir-

cumstances of the Queen's Proctor, representing the public, and indeed of any member of the public. The assertion of an absolute right to refuse to deliver up material papers must be calculated to embarrass that full investigation which the public interest required. His lordship consequently negatived a solicitor's claim to an absolute lien and upheld a registrar's order giving effect to a qualified lien involving delivery up of the papers subject to the right to have them returned at the end of the proceedings and to such undertakings as might be required to make the lien effective against the former client.

This decision was reversed by the Court of Appeal ([1958] 3 All E.R. 179), which observed that, notwithstanding the public interest, divorce proceedings *inter partes* were still litigation and there was no compelling reason why the rights of solicitors in such cases should differ from their rights in other cases. An unqualified lien should be preserved in the public interest in order that litigation might be properly conducted with due regard to the interest not only of litigants but also of the officers of the Court who served those interests. It would be odd, it was said, if a litigant were in effect able to get solicitors' work done for nothing by the simple expedient of changing his solicitor as often as he chose, leaving a trail of unpaid costs in his wake and demanding papers without payment, when he had no just cause to complain of the solicitor's conduct.

The appellant in *In re a Solicitor's Clerk* ([1957] 3 All E.R. 617), an unadmitted solicitor's clerk, was the subject of a direction by the disciplinary committee of the Law Society that no solicitor should employ him without the written permission of the society. Section 16(1) of the Solicitors Act, 1941, provides for the making of such an order where a clerk has been convicted of larceny in respect of any money or property belonging to, or held or controlled by, his employing solicitor. By an amendment effected under section 11(1) of the Solicitors (Amendment) Act, 1956, section 16(1) of the 1941 Act includes convictions of larceny irrespective of ownership. A Divisional Court (Lord Goddard, C.J., Barry and Havers, JJ.) dismissed an appeal against such an order, notwithstanding that the appellant's conviction—of larceny of property not that of the employing solicitor—was prior to the amendment. The conclusion did not involve a retrospective construction of the Act of 1956. The Act was not retrospective; it simply enabled a disqualification to be imposed for the future which in no way affected anything done by the appellant in the past. The disciplinary committee had, therefore, jurisdiction to make the order.—*L.T.*

TORTFEASORS: CONTRIBUTION

In *Harvey v. R. G. O'Dell, Limited (Galway Third Party)* ([1958] 1 All E.R. 657) McNair, J., held that the first defendants were entitled to be indemnified by the third party under section 6(1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, against their liability under the judgment in the action. This judgment was in favour of the plaintiff, whom his lordship held entitled to damages at the hands of the defendants, his employers, in respect of personal injuries sustained as the result of a road accident when he was a passenger in a sidecar driven by a fellow employee, both being at the time on a journey on the employers' business. The accident was due in part to the negligence of the driver, who was killed and whose widow as administratrix of his estate was the third party. Section 6(1) of the above cited Act provides: "Where damage is suffered by any person as the result of a tort... (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage." His lordship held that the claim was well founded. Had the cause of action been in tort, the claim would have been barred by section 1(3)(b) of the Law Reform (Miscellaneous Provisions) Act, 1934, since proceedings had not been taken within six months after represen-

tation had been taken out. The right here in question, of contribution between tortfeasors, was a right *sui generis* conferred by statute and the cause of action for contribution did not arise until the judgment in the case. The words in the 1935 Act "who would if sued have been liable" had no temporal connotation referring to the time at which the hypothetical actions must be assumed to have been brought. Construed literally all that the phrase required was that the hypothetical action had been instituted at some time before the claim for contribution arose.—*L.T.*

SENSITIVE MINK

IN the well-known case of *Hollywood Silver Fox Farm, Ltd. v. Emmett* [1936] 2 K.B. 469 the plaintiffs carried on the business of breeding silver foxes. The defendant, an adjoining landowner, maliciously caused his son to discharge guns on his own land, but as near as possible to the plaintiffs' breeding pens, with a view to injuring the plaintiffs by interfering with the breeding of their foxes. The plaintiffs brought an action to recover damages for nuisance by noise and for an injunction. The action was successful although the firing took place on the defendant's own land over which he was entitled to shoot. This decision was distinguished by the Court of Appeal for Alberta in *Rattray v. Daniels* (1959), 27 W.W.R. 385. In that case the defendant took a bulldozer on to his land during the whelping season of mink in the plaintiff's mink farm situated on adjoining land and as a result some of the mink destroyed their young. The plaintiff claimed damages for nuisance created by the defendant and for negligence in the operation of the bulldozer. The learned trial Judge dismissed the action and the plaintiff's appeal against that decision did not succeed. Their Lordships took the view that there was no negligence in the bulldozer's operation as the defendant had muffled its noise as far as possible. With regard to nuisance, the defendant had negatived malice by showing that he could only obtain the use of the bulldozer during the whelping season, that he needed the bulldozer to level his land for business purposes, and that he had given the plaintiff one year's notice of his intention to use it at the time in question. It was decided that the defendant should not be denied such reasonable use of his land because of the delicate and sensitive nature of the business being carried on by his neighbour, the plaintiff, on his own property. The Court might well have adopted the words of Lopes, L.J., in *Robinson v. Kilvert* (1889), 41 Ch.D. 88, where his Lordship said: "A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade."—*S.J.*

ADMISSION OF CONFESSIONS

As Lord Sumner found in *Ibrahim v. R.* [1914] A.C. 599, "it has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." In *Ibrahim v. R.*, *supra*, ten or fifteen minutes after a soldier had been murdered an officer said to another soldier, the prisoner, who was then in custody: "Why have you done such a senseless act?" and the soldier replied: "Without doubt I killed him." It was held that this confession was a voluntary statement as it was not made either from fear of prejudice or hope of advantage. A rather similar point arose in *R. v. Smith* (1959), *The Times*, 26th March. A regimental sergeant-major heard that there had been some stabbing. Without delay he called a

late night parade but, after each man had been questioned individually, nobody admitted being concerned in the incident. The sergeant-major then made it clear that he would keep the company on parade until someone admitted the stabbing, and when he heard this, the appellant stepped forward and said: "I did the stabbing." The Courts-Martial Appeal Court had no doubt that this statement was inadmissible as it was not made voluntarily. The sergeant-major's words were, quite clearly, a threat or, possibly, an inducement. However, at about 7.30 on the next morning a sergeant from the special investigation branch arrived to make inquiries. He saw the appellant who, after he was given the usual caution, again confessed to the stabbing. The appellant then signed a written caution and made a further statement in confirmation of his confession. The Court came to the conclusion that the oral and written statements made to the sergeant of the special investigation branch were clearly admissible as, in the words of Lord Parker, C.J., "the effect of any original inducement or threat under which the first statement was made had been dissipated."—*S.J.*

"AS SOON AS POSSIBLE"

WHERE an act is to be performed "as soon as possible" it is now established that something more than execution within a reasonable time is required.

The decision of the Court of Appeal in *Hydraulic Engineering Co., Ltd. v. McHaffie, Goslett & Co.* (1878), 4 Q.B.D. 670, is important in this connection. The defendants contracted with the plaintiffs in July for the manufacture of a part of a machine "as soon as possible," well knowing that the article was wanted by the plaintiffs by the end of August. In fact, it was not delivered until the latter part of September, because the defendants were without a foreman competent to prepare certain patterns which were essential to the manufacture of the article in question. The Court found that the defendants were in breach of their contract, and Bramwell, L.J., declared that "'as soon as possible' means to do it within a reasonable time, with an undertaking to do it in the shortest practical time."

The defendants contended that the decision of the Court of Common Pleas in *Attwood v. Emery* (1856), 1 C.B. (N.S.) 110, gave the phrase a wider construction, but his Lordship thought that that decision did not go further than to say that if a tailor accepts an order to make a coat "as soon as possible," he need not put down a half-made vest in order to begin the coat as every customer knows at the time of giving an order that the manufacturer or tradesman may have other orders on hand. If *Attwood v. Emery, supra*, did go further than he believed, he (Bramwell, L.J.) could not agree with it, but Brett, L.J., did not think that the earlier case decided anything which could not be fully adopted and reconciled with the decision which they were then making.

The definition advanced by Bramwell, L.J., in the *Hydraulic Engineering* case was approved by Dysart, J., in the Canadian case of *Kings Old Country, Ltd. v. Liquid Carbonic Canadian Corporation, Ltd.* [1942] 2 W.W.R. 603. It appeared that there was a contract for the sale and delivery of an automatic bottling machine which provided that the machine was to be shipped by the manufacturers "as soon as possible." The Court decided that the effect of the undertaking to deliver the machine "as soon as possible" was that it was to be delivered within a reasonable time, the understanding being that it was to be done within the shortest possible time.

The meaning of the expression "as soon as possible" was also considered in *Verelst's Administratrix v. Motor Union Insurance Co., Ltd.* [1925] 2 K.B. 137, where a policy of insurance stipulated that notice of an accident should be given to the insurance company "as soon as possible" after the occurrence of the accident. The insured was killed in a motor accident in India in January, 1923. Although her personal representative knew of the death with-

in a month the existence of the policy was not discovered until January, 1924, and notice was given to the company as soon as possible after the policy came to light. The Court decided that the arbitrator was entitled to find that notice had been given to the company "as soon as possible" as all the circumstances should be taken into account, including the available means of knowledge of the insured's personal representative of the existence of the policy and the identity of the insurance company. In the course of his judgment, Roche, J., accepted the suggestion that the phrase "as soon as possible" meant "as soon as possible in the circumstances which prevail and apply to" the personal representative.—S.J.

LARCENY: THING OF "VALUE"

A VERY interesting point on the law of larceny arose in a recent case at the London Sessions. As is well-known, "a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof" [s. 1(1) of the Larceny Act, 1916]. A thing "capable of being stolen" must be, *inter alia*, a thing "which has value" [s. 1(3)]. It appears that a market porter had been charged with stealing some carrots from his employers but a witness for the prosecution said that the carrots were valueless. In view of this statement counsel for the defence successfully submitted that the prisoner should be discharged as he was not alleged to have taken something "which has value." Strange to say, there seems to be little recent authority as to what "has value" for the purposes of s. 1 of the 1916 Act. However, in *R. v. Morris* (1840), 9 C. & P. 349, Parke, B., said that there is no doubt that the article alleged to have been stolen must be of some value "but it is quite new to me, that it must be of the value of some coined money." He thought that a value of "a hundredth part of a farthing" was sufficient. The Court took a similar view in *R. v. Perry* (1845), 1 C. & K. 725. A person was indicted for stealing a void and worthless cheque and it was found "at all events, there was a stealing of a piece of paper, which was sufficient to sustain a count for larceny." In a later case, it was shown that three pigs which had been bitten by a mad dog were shot and buried on the owner's land three feet below the surface of the soil. There was no intention of digging them up again or of making use of them in any way. The prisoners were convicted of larceny of the pigs and the Court of Criminal Appeal agreed that there was "nothing in" their objection that the buried pigs were of no value to the prosecutor (*R. v. Edwards* [1877], 13 Cox 384).—S.J.

CONTEMPT OF COURT

COMPLAINTS that the powers of the Courts to convict for contempt are excessive and bear harshly upon the subject have been made from time to time during the last seventy-five years, but remedial legislation, which was introduced on some five separate occasions between 1883 and 1908, failed to reach the Statute Book. Within the last two years, possibly as a result of the decisions in *R. v. Odhams Press, Ltd.* ([1956] 3 All E.R. 494), *R. v. Griffiths and Others* ([1957] 2 All E.R. 379) and *Alliance Perpetual Building Society v. Belrum Investments, Ltd.* ([1957] 1 All E.R. 635), the subject attracted fresh publicity, and led to a cautiously phrased resolution by the annual general meeting of the Bar in July, 1958, that there should be a right of appeal from any decision holding a person guilty of contempt of Court. Another point of criticism is levelled against the uncertainty of the law. A Committee appointed by the Council of Justice, under the Chairmanship of Lord Shaw-

cross, P.C., Q.C., have considered the problem, and have set down their conclusions in a detailed report which was published on April, 3. The Committee reach the conclusion that "the substantive law of criminal contempt is chaotic and a serious handicap to free discussion"; the great and urgent need, in their view, is a right of appeal to the Court of Appeal against any conviction or sentence by the High Court for contempt of Court. The Committee accept the principle that the Court should retain a residuary power in all cases to prevent interference with the course of justice by punishment for contempt, but no prosecution for criminal contempt outside the Court should be initiated except by or with the consent of the Attorney-General. Other procedural proposals are that any application for attachment or committal for civil contempt should be heard in public, that every person charged with contempt should be entitled to give oral evidence in his defence, and that the power of the Court of Appeal, the High Court and quarter sessions to punish summarily for contempt committed in face of the Court should be limited in a way similar to that of county Courts. The Committee recommend further that it should be a defence to any charge of contempt on the ground of matter being published which is alleged to prejudice any judicial proceeding that the alleged contemnor neither knew nor had any reason to suspect that such proceeding had begun. Likewise it is proposed that a publication of anything relating to proceedings in chambers should not of itself constitute contempt unless it is in breach of an order of the Court prohibiting publication in a proceeding relating to an infant, person of unsound mind, or secret process, or in interlocutory proceedings where publication might prejudice a fair trial.—*L.T.*

PASSING-OFF AND VOICES

THE tort of passing-off is that of representing goods as those of another person. An essential element of it is that confusion is likely to be caused in the minds of purchasers. Hitherto the tort has been applied in relation to the sale of goods, but recently it was put forward as a ground for claiming an interlocutory injunction to restrain the use of a voice in television advertising. Sketches were broadcast on commercial television advertising food products. In these a human figure in cartoon form, not resembling any living person, was employed and the voice of a commentator was broadcast. The attention of Mr. Alastair Sim, the actor, was drawn to these sketches, as people who knew him well had formed the opinion that the voice was his voice and had approached him. The voice was in fact that of another actor, who had impersonated his voice in stage performances, but denied having used that voice in these sketches. No undertaking to discontinue the broadcasts being given in answer to the request of Mr. Sim's solicitors, a writ was issued on his behalf claiming damages for libel and passing-off and an injunction. On motion for an interlocutory injunction it was argued that a professional actor's reputation is a right of property capable of invasion, just as is the property in a particular kind of goods, and that the commentator's voice was being passed-off for the plaintiff's. To confuse the public as to the performances of a well-known actor was to injure his goodwill. Both McNair, J., and the Court of Appeal found it unnecessary to solve this legal problem for the case was not one in which an interlocutory injunction would be granted for libel, where the jurisdiction to grant such relief was exercised with the greatest caution, and it would not be appropriate to grant on the basis of passing-off what should be withheld on the basis of libel (*Sim v. H. J. Heinz & Co., Ltd. and Another* ([1959] 1 All E.R. 547). Thus, the point of law remains as yet undecided, though it would, no doubt, be a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without his consent.—*L.T.*

LONELY EMPLOYMENT

THE hazards of employment are many and sometimes curious. One would not expect a hazard of employment to be that one should be attacked with a spanner when in bed. Yet it happened, and a claimant has established his claim to industrial injury benefit on the ground that the attack arose out of his employment [R(I) 30/58]. He was a lighthouse-keeper, and he and another man, twenty-three years of age, were the keepers of South Lundy lighthouse. Each man had a tour of duty of eight weeks. They had been on duty a little over a fortnight when, the claimant having gone to bed about 8:20 p.m., his colleague entered his room and attacked him with a spanner as he lay in bed. The claimant escaped. The local insurance officer, in deciding against the claim, had founded himself on the *Cowman's* case [R(I) 76/54], where a fellow cowman had shot at his friend on the job in the early morning and had then committed suicide himself. In that instance the cowman, though shot at his work, did not succeed in his claim to benefit, for there was nothing in the job of cowman which created a risk that a cowman should be attacked by his friend—as distinct, presumably, from being attacked by a bull. The mental instability of the lighthouse-keeper's mate, however, was aggravated by the isolation incidental to his employment, and the lighthouse-keeper's danger was related to the employment because it imposed on him propinquity to his assailant. Thus, the injury arose out of the employment. Similarly, it would seem, the danger to a postman from a householder's dog would be related to his employment, for the postman's duty to approach the house with the post would bring him into propinquity with the dog. Behind the curtain of national insurance the phrase "arising out of and in the course of the employment", which is a test of entitlement to industrial injury benefit, still brings before the Commissioner many curious happenings.—*L.J.*

THE NEGLIGENCE OF FELLOW-SERVANTS

It is now just over ten years since the Law Reform (Personal Injuries) Act 1948 was passed. This Act abolished the defence of common employment and made an employer liable for the torts of fellow-servants against one another in the same manner as he is liable for their torts towards the public.

It is a convenient moment to look at some of the cases which have been decided since the Act.

There were people who said that, when common employment was abolished, nothing more should be heard of the employer's personal duty to provide safe plant and a safe method of work: these were artificial fictions which had grown up to mitigate the hardship of common employment, and in future it would only be necessary to allege that some individual had acted negligently. Indeed, this view was reiterated recently by Prof. A. L. Goodhart of Oxford in (1958) 74 L.Q.R. 397 and by Prof. C. J. Hamson of Cambridge in a broadcast talk (*The Listener*, 1958, pp. 613-5). But it is, quite frankly, an untenable view to anyone in contact with everyday litigation. Many accidents are due to impersonal causes, such as machinery or harmful substances, or falls from a height, rather than to any negligent act of a fellow-servant: the necessity for positive safety measures against such dangers springs from the employer's personal duty, and liability does not depend on any act of negligence. In the last ten years the House of Lords has taken the personal duty to provide for safety farther than ever before, e.g., in *Morris v. West Hartlepool Steam Navigation Co., Ltd.* ([1956] 1 All. E.R. 385: fencing hold of ship at sea). The vicarious liability for fellow-servants is "wholly distinct" from the personal liability (*Staveley Iron & Chemical Co., Ltd. v. Jones* [1956] 1 All. E.R. 408, *per* Lord Morton). Therefore it is not correct, and never has been, to say that the abolition of common employment superseded the old law. Nevertheless it added a new province of liability, and has important applica-

tions, especially where a fellow-servant is negligent in driving vehicles or handling heavy loads.

FELLOW-SERVANT'S DUTY OF CARE

It is not generally realised that the Act extended vicarious liability to situations in which it had never applied before. A master's liability for his servants grew up for the protection of the outside public: it wears a different aspect when applied to things happening inside the organisation. It is necessary to inquire what duty of care fellow-servants owe to one another.

In the old Scottish case of *Dixon v. Ranken* ([1852] 14 D. 420), where the Court of Session rejected for a time the "recent" English cases on common employment, Lord Hope, Lord-Justice Clerk, said: "For their careful and cautious attention to duty, for their neglect of precautions by which danger to life may be caused, he (the employer) is just as much responsible as for such misconduct on his own part, if he were actually present and working."

Although this decision was overruled by the House of Lords in 1858, the effect of the abolition of common employment is to reinstate it as good law (*Matuszyk v. National Coal Board* [1953] S.C. 8, *per* Lord President Cooper). It has also been said in England that men working together owe a duty to one another "to take reasonable care in the actual work...and in the method of work employed" (*Williams v. Port of Liverpool Stevedoring Co., Ltd.* [1956] 2 All. E.R. 69).

This duty of care may be broken even by mere agreement to disobey orders, as in *Stapley v. Gypsum Mines, Ltd.* ([1953] 2 All. E.R. 478, disregard of instructions to make roof safe) or in the *Williams* case (adoption of unsafe method of unloading ship's hold which resulted in unstable piles of bags). More commonly there is an isolated act of negligence, as in *Lindsay v. Connell & Co.* ([1951] S.C. 281, hitting a mate with a hammer) or *Broom v. Morgan* ([1953] 1 All. E.R. 849, leaving trap-door open).

In the *Staveley* case (*supra*) the argument was advanced that there must be a certain amount of give-and-take when a number of men are working together for hours on end, and that occasional slips should therefore be excused. But the House of Lords rejected this argument and held that the proper standard of care is that appropriate to a reasonable man in the fellow-servant's position, e.g., "an ordinary, prudent crane-driver." Thus, crane-driver is negligent if he does not carry out the standard drill of giving a test lift to a load to see that it is balanced. This standard of care implies that he must exercise the degree of skill which is necessary for his work.

THE COURSE OF THE EMPLOYMENT

The decisions which have been given on the scope of the employment reflect much the same difficulties which have arisen in the past where members of the public have been injured. For example, some prohibitions may remove a certain class of duties entirely from the scope of the employment: an ordinary miner has stepped right outside his duties if he acts as a shotfirer, because unqualified persons are forbidden by statute to undertake those duties (*Alford v. National Coal Board* [1952] 1 All. E.R. 754). But where the duties of a garage hand involved moving cars within a garage, though he had been forbidden to drive, it was held that driving a car for the purpose of moving it was within the scope of his employment, though a prohibited method was used (*London County Council v. Cattermole (Garages), Ltd.* [1953] 2 All. E.R. 582). The recent Scottish case of *Mulholland v. William Reid & Leys, Ltd.* ([1958] S.L.T. 285) was rather similar. An apprentice in a firm of agricultural implement makers was unable to drive and was not authorized to do so: but it was part of his duties to move the agricultural implements about, and he got into a vehicle which was obstructing the passage of an implement to move it out of the way. The vehicle backed violently into a fellow-servant, who was fatally injured. The employers were held liable.

There are also some interesting cases on the use of lights near inflammable substances. Thus, a storekeeper who exposes a naked light while in charge of a store where petrol is kept is acting negligently in his capacity as storekeeper: *Dunk v. Hawkes, Sanders, Ltd.* (*The Times*, October 27, 1953). But in another recent Scottish case, where miners left their work and retired to a quiet part of the waste to smoke, the Court of Session (Inner House) held that they were acting outside the scope of their employment and, in consequence, the employers were not liable (*Kirby v. National Coal Board* [1958] S.L.T. (Notes), 47).—L.J.

REASONS ON FACT AND LAW

THE weight of high judicial authority has been thrown into the scale to condemn with characteristic felicity of language the citing and, by implication if not expressly, the reporting of negligence cases for fact. It is not precisely fact, however, at which the shafts are aimed, but at the mistake of taking the reasons for conclusions on fact, that is, conclusions which a jury would have decided without giving reasons if the trial had not been by a Judge alone, as propositions of law. This was the error that the House of Lords corrected in *Qualcast (Wolverhampton), Ltd. v. Haynes* ([1959] 2 All E.R. 38), reversing the decision of the county Court Judge and of the Court of Appeal on fact, namely, on the question whether employers had fulfilled their duty to take reasonable care for the employee's safety. The employee in that case was an experienced moulder, who had not worn protective spats that were available for him nearby, and had sustained injury as a result of spilling molten metal from a ladle. "If the reasons given by a Judge for arriving at the conclusions previously reached by a jury are treated as 'law' and citable", said Lord Somervell of Harrow, "the precedent system will die from a surfeit of authorities." "Let not the same thing happen to the common law," said Lord Denning after recalling how vast was the multitude of workmen's compensation cases, "lest we be crushed under the weight of our own reports." We shun the surfeit. We bow to the appeal. Yet the question of the reportability of cases is often a vexed one into which many considerations enter, and we turn for a moment to that question, lest these shafts be taken to be aimed at reports and reporters rather than their readers. Both should abide their question. For if the reports should be selective, yet the use of them and the appreciation of what they decide and for what they are authority rest with the reader.—L.J.

REVIEWS.

The Identification of Thumb Impression and the Cross-examination of Finger Print Experts. By N. K. MEHTA. 1959. DELHI: Bar Shahbulla, Nai Sarak. Demi 8vo. Pages iv+102. Price Rs. 12.

IN this book the learned author has explained in simple language how to carry on the examination and cross-examination in finger print cases. In India the majority of the people being illiterate they append their thumb impressions in token of their signatures. To laymen thumb impressions appear to be similar, but there exists many differences in these impressions. This book is written with the object of explaining the fundamental principles of the identification of finger prints. Nature has not made any two objects identical. Finger impressions of any two individuals are not alike. On this principle the positive identification of thumb impression is based. This mode of detection has become an exact science. This book is written with the object of assisting Courts and lawyers to arrive at a definite conclusion about the correct-

ness or otherwise of the expert's opinion. The book is bound to be of great use to Courts, members of the legal profession, and police officers.

Workmen's Compensation Act and Other Social Insurance Legislations. By JNANENDRA NATH BAKSI, M.A., B.L., Advocate, Calcutta High Court, and JITENDRA KUMAR MITRA, M.A., B.L., Advocate, Calcutta High Court. CALCUTTA: S. C. Sarkar & Sons (Private) Ltd., 1-C, College Square. 1959. Second Edition. Demi 8vo. Pages xlii+418. Price Rs. 15.

THIS book is intended to give in detail the Acts, Rules, Notifications and Judicial decisions relating to Social Insurance. The corresponding provisions of the English Acts and English decisions have been referred to. Since the publication of the first edition many changes have been made in the Acts and Rules relating to Social Insurance legislation. All these changes have been clearly and carefully incorporated in this edition. The case law, both English and Indian, has been brought up-to-date. We have no doubt that the book will prove useful to lawyers and laymen who have to deal with technical labour matters.

The Specific Relief Act. By K. N. BHANUMIK, B.L. CALCUTTA: Eastern Law House (Private) Ltd., 59, Ganesh Chunder Avenue. 1959. Roy 8vo. Pages xxi+241. Price Rs. 10.

THE learned author has clearly set forth the principles underlying the different provisions of the Specific Relief Act. He has lucidly explained the meaning of various sections in order to make the book of great practical utility. The sections have been clearly explained in the light of decisions of English and Indian Courts. Extensive quotations have been given from various judicial pronouncements wherever necessary. This handy work is bound to assist the legal profession in solving intricate points of law arising out of the different provisions of the Act. Courts and practitioners will find the book very serviceable in expounding the provisions of the Act.

A Commentary on the Hindu Code. By P. C. GHOSH, M.A., B.L. CALCUTTA: S. C. Sarkar & Sons (Private) Ltd., 1-C, College Square. 1959. Demi 8vo. Pages xiv+237. Price Rs. 10.

THIS book is written with the object of presenting to the reader the codified Hindu law. The four principal Acts affecting the Hindus have been fully discussed and carefully annotated to explain their provisions. A special Introduction containing the main provisions of each of the Acts in a nutshell has been given. The differences between the old law and the new law have been clearly pointed out. The provisions of the Acts have been explained in the light of the case law on the subject. Charts illustrating the order of succession and sapind relationship have been given. The book on the whole gives interesting exposition of the amended Hindu law.

Co-ownership and Partition. By SHAMBHUDAS MITRA, M.A., LL.B., Advocate. CALCUTTA: Eastern Law House (Private) Ltd., 54, Ganesh Chunder Avenue. 1959. Roy 8vo. Pages xxiii+272. Price Rs. 10.

THE law as to co-ownership is a Judge made law. The learned author has made a survey of the existing state of law. In every form of co-ownership partition is the ultimate result. Sometimes it is done peacefully, sometimes the matters go to Court. In this book the learned author has carefully indicated the procedure as to partition among co-owners, both amicable as also through Court. He has divided the subject into eleven Chapters, and carefully expounded the law on the subject. The book is bound to be of great utility to the Bench and the Bar.

The Indian Stamp Act. By JAHNABI CHARAN BHANUJ, B.L. CALCUTTA: S. C. Sarkar & Sons (Private) Ltd., 1-C, College Square. 1959. Second Edition. Demi 8vo. Pages xxx+388. Price Rs. 12.50.

THIS is a commentary on the Indian Stamp Act, 1899, as modified upto 1958 by the Central and Provincial Legislatures. The main Act as amended in Bharat, Pakistan and Burma, has been commented upon, indicating local changes. A Schedule has been given showing all the changes in Indian States, Pakistan, and Burma. The commentary clearly discusses various principles and all important decisions have been referred to. The book is sure to be used for reference by all those interested in its subject-matter.

Income-tax Cash Credits & Secret Profits. By M. K. SHAKDWIPI. NASIK CITY: 203, M. Gandhi Road. 1959. Demi 8vo. Pages 3+28. Price Rs. 2.

THE Indian Income-tax Act is a complicated measure lacking in lucidity. The author of this brochure has done a signal service in explaining some of the complicated provisions of the Act. He has clearly explained the system of making cash credits, has presented a comprehensive view of the subject and given the exact picture of the law on every point. He has referred to several decided cases. This brochure is an interesting exposition of some of the complicated provisions of the Act.

H. C. Mitra's Indian Limitation Act. By B. C. MITRA, B.A., LL.B., BARRISTER-AT-LAW, Advocate, Supreme Court of India. CALCUTTA: Eastern Law House (Private) Ltd., 54, Ganesh Chunder Avenue. Fourteenth edition. 1959. Roy 8vo. Pages xciii+991. Price Rs. 18.

WE cordially welcome a new edition of this well-known work. The text of the Indian Limitation Act contains all the latest amendments made by the Legislature and the case law is scrupulously brought up-to-date. Several portions of the work have been rewritten and fresh matter has been lucidly incorporated. The comment is divided into cognate groups with appropriate headings. This edition is bound to be highly useful to the profession at large.

Shorter Constitution of India. By DURGA DAS BASU. CALCUTTA: S. C. Sarkar & Sons (Private) Ltd., 1-C, College Square. 1959. Second edition. Demi 8vo. Pages lvi+680. Price Rs. 28.

THE first edition of this book was exhausted in a very short time. The various Articles of the Constitution have been lucidly discussed and the case-law has been carefully considered and brought up-to-date. This work is intended as a comprehensive guide to the Indian Constitution and it fulfils its purpose admirably well.

The "Yearly Digest" of Indian and Select English Cases. By N. RAMA-RATNAM, M.A., B.L. MADRAS: The Madras Law Journal Office, Mylapore. 1958. Crown 4to. Columns 2595.

THIS annual publication has become deservedly popular with the profession. The learned author deserves great credit for bringing out this stupendous work even under abnormal condition. The utility of this Digest to Courts and practitioners cannot be gainsaid.

The
Bombay Law Reporter.
JOURNAL.

October, 1959.

HON. MR. JUSTICE J. C. SHAH.

We offer our sincere congratulations to Mr. Justice Shah on his elevation to the Bench of the Supreme Court of India. He was born on January 19, 1906, and received his early education at the Proprietary High School and the R. C. High School, Ahmedabad, and passed the Matriculation Examination in 1922. In 1926 he secured honours in mathematics in the B. A. Examination from the Elphinstone College, Bombay. Thereafter he took to law and passed in the LL.B. Examination in 1928. In January 1933 he achieved success in the Advocates Examination and started his practice in Ahmedabad. Within a short period he came to Bombay and commenced to practise on the Appellate Side of the Bombay High Court. In the trial of the dastardly murder of Mahatma Gandhi he appeared as Assistant Special Prosecutor before the Sessions Judge at Delhi.

In a very short time he built up a very lucrative practice on the Appellate Side of the High Court and made his mark as a consummate lawyer. In 1949 he was appointed a Puisne Judge of the Bombay High Court. His Work as Chairman of the Kerala and Madras Food Poisoning Inquiry in July 1958 was much appreciated.

As a Judge he was extremely conscientious in the strict performance of his judicial duties. He united strong commonsense and industry with sound knowledge of law and proved a very capable Judge. Patient, courteous and impartial, he gained the respect of the legal profession and the confidence of the litigating public. His judgments are noteworthy for full statement of facts, and elaborate discussion of arguments and relevant legal principles. His disposal of cases was quick. If Judges would make their decisions just, they should behold neither plaintiff, defendant, nor pleader, but only the cause itself. Justice discards party, friendship, kindred, and is therefore always represented as blind. The administration of justice is the firmest pillar of Government.

By Mr. Justice Shah's elevation to the Supreme Court, the Bombay High Court loses a strong, sound, painstaking and expeditious Judge, but the Supreme Court gains a shining pillar of strength. Our sincere felicitations to his Lordship, as he is bound to achieve great success in the new sphere of his career.

The members of the Bar and Solicitors gathered together in the Central Court, on October 8, 1959, to bid farewell to the Hon'ble Mr. Justice J. C. Shah.

Sir Jamshedji Kanga said:

May it please your Lordship,

The members of the Original Side of the Bar, on whose behalf I am speaking in the absence of the Advocate General, have received with very great pleasure your Lordship's well-merited appointment to the Bench of the Supreme Court, and offer their sincere congratulations to your Lordship.

As a senior member of the Bar, I have had the opportunity of observing your Lordship's career at the Bar from the day it commenced. Your Lordship's knowledge of law and able advocacy were highly appreciated, and your Lordship became a leading practitioner. Your Lordship's practice was mainly on the Appellate Side, which has a purely Indian Bar ever since the High Court began functioning. The Appellate Side Bar has been praised by several English Chief Justices, and I have heard senior English Barristers, who went on the Appellate Side almost every Wednesday, say that the Appellate Side Indian Bar was a competent Bar. Your Lordship's elevation to the Bench was anticipated, and luckily it came at such a time as would give your Lordship many years on the Bench. Your Lordship has completed nearly ten years on the Bench of the Bombay High Court. During that period, your Lordship has maintained all the best traditions of the Court, and has given entire satisfaction to the legal practitioners and the public. Your Lordship heard all those who appeared before your Lordship with patience and courtesy. When I joined the Bar, Sir Lawrence Jenkins, once a Judge of the Calcutta High Court, was the Chief Justice of the Bombay High Court. In those days the Calcutta Bench and the Calcutta Original Side and Appellate Side Bars were considered the best in India. Even the remuneration of the Chief Justice of Calcutta was greater than that of the Chief Justice of Bombay and Madras. But the times have materially altered. Bombay gave its first Chief Justice, its first Attorney General and its first Solicitor General to the Supreme Court. The Bombay Bench and the Bombay Original Side and Appellate Side Bars at the present time occupy a very high place in India. That result is undoubtedly due to the contributions made by Judges and lawyers like your Lordship. We are fully confident that your Lordship will have a very successful career on the Bench of the Supreme Court. The general expectation is, and our wishes and prayers are, that your Lordship will end your Lordship's judicial career as the Chief Justice of the Supreme Court.

On behalf of the Original Side of the Bar, I wish your Lordship a very successful career on the Supreme Court Bench, long life, health and happiness.

Mr. Y. V. Chandrachud, the Government Pleader, said:

My Lord,

Last time we met in the Central Court was to do homage to Chief Justice Chagla, who relinquished his office in September 1958. The feel

ings of those who have assembled here to-day are no less poignant than the feelings which were expressed on that occasion. Those were feelings of gratitude and of affection.

Your elevation to the Bench in 1949 was preceded by a career which, for its success, had few precedents at the Bar. For a period of ten years and more, there was no celebrated cause in appeal in which you were not briefed to appear for one side or the other. At the Bar you not only acquired a large practice, but what is perhaps of equal importance, you also acquired an admiring circle of friends. An almost crushing load of ever-mounting work deprived you of all leisure, and it was not often that you could seek relaxation in the lighter atmosphere of the Bar-room. You, however, stole time to pay fleeting visits to the Bar-room, when you would relax with a shy abandon which is so peculiarly your own. For then you would don the Parsi cap of Mr. Pochaji Jamshedji and you would let loose a stream of stories glowing with a sly humour. The younger set—and I was one of them—would try to eavesdrop, but the subtleties of the seniors were beyond our comprehension.

In 1948 came the crowning achievement of your career, for the Government of India appointed you with Mr. C. K. Daphtary as a Prosecuting Counsel in the Mahatma Gandhi Murder Trial. The trial was of great national importance and it evoked a world-wide interest. The preparation of that monumental case involved a heavy strain on you, even though you were accustomed to a life of hard work and rigorous self-discipline.

Soon after the conclusion of the Gandhi trial, you were persuaded to accept a seat on the Bench of this High Court. You responded to the persuasion, though at a great personal sacrifice, for it meant giving up a large and lucrative practice. Your appointment as a Judge must have come as a relief to you from the gruelling work at the Bar, though subsequent events show that you gave up a career of hard work to embark upon a career of even more hard work. As Lord Macmillan has said in his autobiography, advocacy is an enthralling vocation, though an exhausting one, and one is apt to grow weary of putting all one's energies into other people's disputes. You accepted the sanctuary of the Bench partly for the reason that, though enthralled, you were exhausted, and partly for the reason that, as a Judge, you could continue to serve the Law in a serener atmosphere where you could turn to more useful account the garnered stores of your experience.

It is not without trepidation that I approach the task of assessing your work as a Judge of this Court. The 1st of March 1949 saw the birth of a judicial career marked by independence of thought and an almost infinite capacity for taking pains. The dissenting judgment in *Jesingbhai's* case, which was delivered in April 1950 by you as a member of the Full Bench consisting of Chief Justice Chagla, Mr. Justice Bavdekar and yourself, will ever stand as a tribute to your independence of thought and approach. Those of us who had the good fortune to be present in the First Court that day will not easily forget how, in a rather surcharged atmosphere, you proceeded to voice your dissent—not without regret, not without respect, but with a calm confidence. That judgment and the other judgments which are treasured in the Law Reports emphasize the directness

7

of your approach and your faculty for plain unadorned language. Your judgments are characterised, not by purple passages, but by clear and simple statements of fact and law.

Your knowledge of the several branches of law is so well-distributed that it is difficult to say where you excel. Whether you sat on the Appellate Side or on the Original Side, whether you were hearing civil appeals or criminal appeals, your qualifications as a Judge shone in proportion as the occasion called forth their display. But, as the poet Wordsworth says:

"Even amongst the fairest objects,
Some are fairer than the rest."

And may I, with apologies to the poet, say:

"Even amongst the strongest subjects,
Some are stronger than the rest."

If I am asked to pin-point your excellence, I would say that you excelled in the law of land acquisition.

It is notable my Lord, that in the discharge of your judicial functions, you were never led by any conscious desire to excite the admiration of the Bar. Chief Justice Mathew Hale has said that there are two golden rules of conduct which he followed as a Judge: one, not to be solicitous of what men will say or think so long as you keep yourself exactly according to the rule of Justice, and two, to be short and sparing at meals so that you may be the fitter for business. We knew as a matter of personal experience that your Lordship adhered strictly to the first rule, and there is enough circumstantial evidence to lead to the conclusion that your Lordship followed the second rule also.

I am afraid, my Lord, I will be untrue to the Bar, which I have the good fortune to represent to-day, if I omitted to mention that for some time it was felt that the Bar could not keep pace with your quickness. Sometimes you lost patience if you lost time; sometimes excursions into matters of small moment were cut short too promptly, and sometimes your unrivalled power of searching comment was utilised so as to indicate that any further argument may be ineffective. I am happy, my Lord, to be able to say to-day that it was a matter of no small satisfaction to the Bar that, in recent years, your Lordship made a determined effort to remove any cause for complaint or criticism on these counts. Imperfections mark every human character, and the test of a good Judge, as that of a good man, is not how perfect he is, but how he strives to be less and less imperfect.

My Lord, as the time for parting draws nearer and nearer, happy memories crowd into our minds, and to-day we have nothing but happy memories of our association with your Lordship. You will soon occupy a seat on the Bench of the highest Court of the land. You have never relaxed. As the Chairman of the Commission of Enquiry into the Food Poisoning cases in Madras and Kerala, you even ordained that Sundays should be treated as mere Mondays. You have carved a place for yourself by a thrifty application of time. We are all happy, that you will now have longer week-ends, no working Saturdays, and longer holidays which you richly deserve, and a part at least of which, we hope, you will spend

without the companionship of law books and *labais*. Life is larger than Law. On behalf of the Bar, I wish your Lordship great good luck and every distinction in your new assignment.

My Lord, it is difficult to measure contemporaneously the influence of individuals on the growth and shaping of institutions. That is the privilege of history. But it requires no strong imagination to anticipate that in your case the verdict of history can only be that you gave speed, strength and vitality to this Court by a singular devotion and rectitude. While parting, the Bar could give you no better farewell than to say that your work in this Court will ever inspire us to devote our talents towards enhancing the prestige of this Court by hard and conscientious work.

Mr. N. H. Sethna, President, Incorporated Law Society, said:

My Lord,

On behalf of the Solicitors' profession, it gives me great pleasure to associate myself with the expressions and sentiments which fell from the lips of Sir Jamshedji Kanga and Mr. Chandrachud. My Lord, I do not think I can usefully add anything to what they have said in such happy terms, but there is one incident in your Lordship's life which perhaps the previous speakers did not know, and that is that your Lordship was at one time meant for the Indian Civil Service, but for reasons other than that of intellect or industry, your Lordship was asked not to present yourself at the selection. My Lord, what was then lost to the Civil Service was gained by this Court, and by reason of your industry and intelligence you surmounted all difficulties, till at last we found you presiding over this Court as one of the best Judges that we can have.

My Lord, I would be failing in my duty if I did not, on behalf of the members of my profession, express great appreciation for your Lordship's kindness and courtesy when your Lordship was taking chambers on the Original Side of the High Court. Your Lordship's valuable guidance very often, when we were in error, led us to believe that after all Judges are also human beings who can correct us and not merely blame us. At the same time, when we saw your Lordship taking witness action on the Original Side of the High Court, it came to several of us as a matter of surprise with what ease you handled such witness action—an ease, my Lord, which some of the best counsel from the Original Side could not have achieved at any time.

My Lord, it is a matter of considerable regret to us that you have to part from us, but it is a happy thought that your Lordship will in the new environments be able to do great service to our country and add greater lustre to the highest Court of our country, and perhaps also make a name as one of the Chief Justices of that Court.

On behalf of my profession, I wish your Lordship God-speed and good health; and perhaps at some time, when your Lordship has occasion to revert for a few days to this city, we may have the pleasure of seeing you again in good health.

The Hon'ble Mr. Justice J. C. Shah replied:

Sir Jamshedji Kanga, Mr. Government Pleader, President of the Incorporated Law Society, and members of the Bar,

I feel deeply moved by the cordial welcome which you have accorded to me this evening and the sentiments expressed by you. I am not vain enough to think that I have deserved the tribute you paid to me.

My memory goes back more than twenty-six years when I came to Bombay after a short practice at a mofussil Bar, when I was friendless and felt lonely. When I saw this Court building built in gray stone, I felt that my lot was cast in surroundings which did not appear to be congenial. I saw a large number of members of the Bar flitting about with hardly a kind word to say. But that was soon changed. I acquired a large circle of friends, both on the Original Side and on the Appellate Side, and it was my good fortune that I happened to come to this Court, more by accident than by design, to practise.

Gentlemen, years have rolled by and I am sitting here for the last time in this Court bidding you good-bye, and I am carrying with me the cherished memories of times which have gone by, of the affectionate and courteous regard and co-operation which I have always received when I was with you at the Bar and also when I sat on the Bench. The termination of this association, which has been to me instructive and pleasant, is particularly painful to me, and I find it difficult to express adequately the depth of my feeling. It is for more than ten years that I have sat on this Bench. I entered upon the performance of my duties with great diffidence, but it has been my good fortune during these years to have had the assistance of what is reputed to be the ablest Bar in this country. Throughout my career as a Judge, I have invariably found an honest presentation of the cases and arguments, coupled with unfailing courtesy, which made my work both light and interesting. You have referred to the merit of my work on the Bench: I can unreservedly say, not out of any modesty but out of genuine conviction, that the merit thereof reflects the industry and presentation by members of the Bar of cases which came up for hearing before me. Our work—the work both of the Bar as well as of the Bench—in the Courts is done in the fierce light of publicity. It is work done in the light of cold reason in the search for truth, and it is to the credit of the Bar that the dust of political arena and of other-strife has not entered the precincts of this Court. When I entered upon the performance of my duties as a Judge, I fervently prayed to the Almighty that he may give me the strength to hold the scales of justice even and to uphold the highest traditions of the Bombay Bench and the High Court. I have, I believe, made a sincere effort in that direction: I do not know how far I have succeeded in achieving that ideal.

Gentlemen, all parting is sad. To me it is particularly sad when I am required to leave the field of my activity where the formative years of my life as well as the most important period of my professional life have been lived in such pleasant associations. During the last ten years that I have sat on the Bench, there have been revolutionary changes in this motherland of ours. We have won Independence and have

started upon a programme of unprecedented development, the pace of which we, being in the midst of the stream, are unable to gauge. Even though our work as lawyers and as Judges is performed in the cloistered arena of the Courts, we cannot be immune to these developments. It will be for the future historian to record whether as lawyers and Judges we have contributed to the acceleration of the progress of our State. That the profession of law and the administration of justice have a vital role in the administration of the State is undisputed. When we have set out upon a vast experiment of enabling every individual citizen in this land to attain his fullest individuality, to make him free from want and hunger, to provide him with the normal amenities of civilised life, let us not lay ourselves open to the charge that in the matter of administration of justice the progress was hindered by judicial delay.

Gentlemen, in regard to my work as a Judge, if in the discharge of my duties I have at any time appeared to go quicker than I was expected to do, it has been because I have always believed that justice delayed is justice substantially denied. I have, I feel, attempted to act in that belief. If, during the course of my career as a Judge, unwittingly any harsh word has escaped me, as it may have escaped, I crave your indulgence on this day of parting.

I thank you, gentlemen, for the co-operation you have given to me.

SECTION 28 OF THE BOMBAY RENT ACT

and

*Babulal Bhuramal v. Nandram Shivram.**

CERTAIN observations of the Supreme Court in *Babulal Bhuramal v. Nandram Shivram*¹ have raised a very interesting controversy as to whether the civil Courts would cease to have jurisdiction over a particular suit by reason of a plea of tenancy and consequent protection under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, being taken up by the defendant in the written statement. The relevant passages of the said judgment are at pp. 957-8 and are as follows:—

"...Do the provisions of s. 28 cover a case where in a suit one party alleges that he is the landlord and denies that the other is his tenant or vice versa and the relief asked for in the suit is in the nature of a claim which arises out of the Act or any of its provisions? The answer must be in the affirmative on a reasonable interpretation of s. 28."

"...On a proper interpretation of the provisions of s. 28 the suit contemplated in that section is not only a suit between a landlord and a tenant in which that relationship is admitted but also a suit in which it is claimed that the relationship of a landlord and tenant within the meaning of the Act subsists between the parties. The Courts which have jurisdiction to entertain and try such a suit are the Courts specified in s. 28 and no other."

Two interpretations are placed on the above passages of the Supreme Court judgment. One school of thought interprets these passages as merely emphasizing the frame of that particular suit while reaffirming the judgment of the High Court that the civil Courts would not have jurisdiction to entertain a suit in respect of a title arising out of any of the provisions of the Rent Act as such a claim or question can only be gone into by the special Court set up under s. 28 of the Rent Act. In other words, under s. 29-A of the Rent Act, the right of a civil Court to go into questions of title is restricted to cases

* By Ramesh M. Berekh, Advocate.

1 (1958) 60 Bom. L. R. 954, S.C.

of titles *de hors* the Rent Act and does not extend to titles which arise out of the provisions of the Rent Act e.g. the question whether a person is a lawful sub-tenant or assignee in respect of certain premises and entitled to protection as such under ss. 14 or 15 of the Rent Act is a question which only the special Court set up under s. 28 can go into as it involves taking cognizance of s. 14 or 15 of the Rent Act. A civil Court, as rightly held in *Harswarup Khannamal v. Nandram*,² would not have jurisdiction to go into the above question as the title claimed therein arises out of the provisions of Rent Act. However, if the title which is claimed arises *de hors* the Rent Act e.g. *ex contractu* or out of ownership, then the special Court not having been invested with jurisdiction to decide question of title otherwise than by reason of the provisions of the Rent Act, the ordinary Courts of the land would continue to have jurisdiction to decide questions of title, and it is because of this that the Legislature made it clear that suits on title and in respect of title could be filed in Courts competent to decide these questions, notwithstanding what is contained in s. 28 or 29 of the Rent Act. According to this view, when the plaintiff files an ejectment suit on the basis of any other relationship but that of landlord and tenant, say, licensor and licensee or owner and trespasser, and if the defendant pleads that he is a tenant of the plaintiff and entitled to protection under the Rent Act, the Court must determine the respective contentions of the parties and decide whether the relationship between the parties is that of licensor and licensee or owner and trespasser as the plaintiff claims or that of landlord and tenant as the defendant claims. If the Court decides the issue in favour of the defendant, the civil Court would not have jurisdiction to proceed further with the suit as it would then be a question between a landlord and a tenant for reliefs under s. 28 and only the special Court set up under s. 28 would have jurisdiction to deal with the same. On the other hand, if the Court decides the issue in favour of the plaintiff, it would continue to have the jurisdiction to try the suit and would be able to try the suit on the merits to its logical conclusion.

The other School of thought interprets the above Supreme Court judgment as laying down a new principle, viz. that even though a plaintiff may bring a suit in ejectment against the defendant on the basis of any other relationship, say, licensor and licensee or owner and trespasser, if the defendant contends that he is a tenant of the plaintiff and entitled to protection under the Rent Act, the civil Court, by reason of the above quoted passages of the Supreme Court judgment, would be ousted of its jurisdiction and cannot even decide whether the relationship which subsists between the parties is that of licensor and licensee or owner and trespasser as claimed by the plaintiff or that of landlord and tenant as claimed by the defendant. According to this view, the determination of this very question is left to the special Court set up under s. 28. In other words, though a civil Court would have jurisdiction to entertain a suit when instituted, it being based on a title *de hors* the Act and otherwise within its competence, it would cease to have jurisdiction to decide that suit, nay, even the question to decide whether it has jurisdiction to try the suit or not, as soon as a defendant takes up the plea of tenancy and protection under the Rent Act. It is argued that the words

"On a proper interpretation of the provisions of s. 28, the suit contemplated in that section is not only a suit between a landlord and a tenant in which that relationship is admitted but also a suit in which it is claimed that the relationship of a landlord and a tenant within the meaning of the Act subsists between the parties."

are wide enough to cover cases both where such a claim is made either in the plaint or in the written statement, and the only Court which can deal with such claims is the special Courts set up under s. 28 of the Rent Act. It is interesting to note that this interpretation of the Supreme Court judgment has appealed to the City Civil Court, Bombay, and that Court has, subscribing to the above interpretation, declined to go into the question of determining its

jurisdiction in such cases, and returned the plaints for presentation to proper Court viz. the Small Causes Court, Bombay.

It is submitted with great respect that the above interpretation of the Supreme Court judgment does not appear to be correct. It is submitted that the above observations of the Supreme Court must be read in the context of the facts of that case, and, when so read, it will be clear that the Supreme Court has not laid down such a broad principle. In that case, plaintiff No. 1 was a tenant of the premises in question under defendant No. 1. Plaintiffs Nos. 2 and 3 were persons to whom the premises were sub-let by plaintiff No. 1. Defendant No. 1 as the landlord gave notice to quit to plaintiff No. 1 on December 6, 1947. Thereafter he filed suit No. 483/4400 of 1948 in the Court of Small Causes, Bombay, on April 29, 1948, whereby he sought to evict plaintiff No. 1. To this suit, defendant No. 1 also made plaintiffs Nos. 2 and 3 parties to the suit alleging that they were trespassers and had no right to be on the premises. The Small Causes Court held that plaintiffs Nos. 2 and 3 were not lawful sub-tenants, and the sub-letting to them by plaintiff No. 1 being contrary to law, the latter had deprived himself of the protection of the Act. An appeal against the decree was unsuccessful and revision application made to the High Court was summarily dismissed. Thereafter, the plaintiffs filed the present suit in the City Civil Court praying, *inter alia*, for a declaration that plaintiff No. 1 was a tenant of the defendants and was entitled to protection under the Rent Act, and that plaintiffs Nos. 2 and 3 were lawful sub-tenants of plaintiff No. 1 and were entitled to the possession, use and occupation of the premises as sub-tenants thereof. The City Civil Court held that it had jurisdiction to try the suit but dismissed the same on the ground that there had been no lawful subletting of the premises to plaintiffs Nos. 2 and 3 as the provisions of s. 10 of the Rent Act, 1944, had not been complied with. Against that decision, the plaintiffs appealed to the High Court, which appeal was dismissed on the ground that the City Civil Court had no jurisdiction to entertain the suit, as the suit involved a question of title arising out of the provisions of the Rent Act and was triable exclusively by the Court of Small Causes, Bombay. Plaintiffs Nos. 2 and 3 preferred an appeal to the Supreme Court from the judgment of the High Court.

It is material to note that, in this case, there was no dispute that plaintiff No. 1 was not the contractual tenant of the defendant-landlord. The material question was whether plaintiff No. 1 continued to enjoy the possession as a statutory tenant against whom no order in ejectment could be passed, notwithstanding the termination of his contractual tenancy by the landlord, if he was ready and willing to pay the rent and observe and perform the terms of tenancy. Now, the question whether he was ready and willing to pay the rent and observe and perform the terms of tenancy and therefore entitled to protection under the Rent Act could only be gone into by the special Court set up under s. 28 as it would be a question arising out of s. 12 of the Rent Act. Again, plaintiffs Nos. 2 and 3 prayed for a declaration that they were lawful sub-tenants of plaintiff No. 1 and were entitled to protection as such under the Rent Act. This would clearly mean that in order to support their case plaintiffs Nos. 2 and 3 would have to rely on the provisions of s. 14 of the Rent Act, and, as rightly held in *Harswarup v. Nandram* any claim or question arising out of the provisions of the Rent Act could only be gone into by the special Court set up under s. 28 of the Rent Act. None of the plaintiffs in the case before the Supreme Court was claiming a title *de hors* the Act and, therefore, the City Civil Court would have no jurisdiction to entertain a claim of title which arose out of the provisions of the Rent Act. It was in emphasizing the frame of the suit as filed that the above observations of the Supreme Court were made and they must be read as such.

On the other hand, if the claim or question of title arises *de hors* the Rent Act, the civil Courts of the land would continue to have jurisdiction to decide the same under s. 29A of the Rent Act, even though the same may have been

determined incidentally under s. 28 or s. 29 of the Rent Act. This has been made clear by the Supreme Court at p. 959 of the same judgment.

"...It is possible to conceive of cases where in a suit under s. 28 a question of title to premises which does not arise out of the Act or any of its provisions may be determined incidentally. Any party to the suit aggrieved by such a determination would be free to sue in a competent Court to establish his title to such premises by virtue of the provisions of s. 29A [of the Rent Act]. On the other hand, in a suit where a question of title entirely arises out of the Act or any of its provisions, the jurisdiction to try such a suit was exclusively vested in the Courts specified in s. 28 of the Act and no other. That is to say, a title which could not be established outside the Act but which arose under the provisions of the Act by virtue of a claim made thereunder must be determined by a Court specified in s. 28 and a title *de hors* the Act may be determined in any other Court of competent jurisdiction... By enacting s. 29A the Legislature clearly intended that no finality should be attached to the decision of a Court trying a suit under s. 28 on a question of title *de hors* the Act."

Thus, if the plaintiff files an ejectment suit against his licensee or a trespasser, the City Civil Court would have jurisdiction to try the same, e.g. in *Govindram Salamatrai v. Dharampal*³ the plaintiff had filed the suit against the defendants alleging that they were his licensees of a certain property, that the license had been properly and legally terminated and that he was entitled to an order of eviction against the defendants. The defendants contended that they were the tenants of the plaintiff and therefore were protected under the Rent Act, and also contended that the High Court had no jurisdiction to entertain the suit. Dealing with the question of jurisdiction, it was held that the proper forum for the determination of the question whether the relationship between the plaintiff and the defendant is as between landlord and tenant or as between licensor and licensee or as between owner and trespasser is the High Court which initially has got the jurisdiction to entertain the suit for ejectment which has been properly framed on the basis of relationship as between licensor and licensee or owner and trespasser.

But it is argued that the above judgment is impliedly overruled by the above observations of the Supreme Court. It is respectfully submitted that the above observations of their Lordships were made more to indicate the frame of the plaintiff's suit than to determine the question of jurisdiction of the civil Court. A division bench of the Bombay High Court has recently considered in *Jaswantlal v. "Western Comp., India"*⁴ the above Supreme Court judgment. The facts in that case were that the plaintiff had filed a suit in ejectment against the defendants contending that the defendants were trespassers or at best licensees whose license had been validly revoked. The defendants contended that they were the plaintiff's sub-tenants and were entitled to protection under the Act. The defendants relied on the above two passages of the Supreme Court judgment and contended that the City Civil Court had no jurisdiction to entertain the suit. Dealing with this contention of the defendants it was held that the above observations emphasized more on the frame of the suit and did not deal with the question of jurisdiction. It was held that in order to decide whether a suit comes within the purview of s. 28 what must be considered is what the suit as framed in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of a claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by s. 28. The ratio of the above judgment has been reaffirmed in another recent decision reported in *Abdul Kayum v. Ebrahim*.⁵ It was held in that case that a suit by a plaintiff under s. 47 of the Presidency Small Cause Courts Act, for a declaration that the defendant was not at the time of applying for the order under ss. 41 and 43 entitled to the possession of such property, and the application by the defendant for such an order constituted an act of trespass, was main-

3 (1951) 53 Bom. L. R. 386.
4 (1959) 61 Bom. L. R. 1087.

5 (1959) 61 Bom. L. R. 1228.

tainable in the City Civil Court as the suit was essentially under ss. 46 and 47 of the Presidency Small Cause Courts Act and the mere fact that the plaintiff had stated in addition that he was entitled to protection under the Rent Act would not change the nature of the suit.

It is, therefore, respectfully submitted that the true interpretation of the Supreme Court judgment is that the Supreme Court has not laid down any such broad proposition as to oust the jurisdiction of the civil Court to entertain any suit without determining the issue of its jurisdiction as soon as the defendant pleads tenancy and protection under the Rent Act. In any event, it is submitted that the observations of the Supreme Court are *obiter* and should not be deemed to override an earlier judgment of the Supreme Court in *Bhatia Co-operative Society Ltd. v. Patel*⁶. There the plaintiff had filed a suit in ejectment against the defendant who was his tenant on the footing that the Rent Act did not apply to the premises as the same were exempt under s. 4 of the Rent Act. The defendant contended that the Rent Act applied and the premises were not exempt from the provisions of the Rent Act and that, therefore, the City Civil Court had no jurisdiction to entertain and try the suit. Dealing with the question of jurisdiction, their Lordships have observed (p. 206) :

"...The crucial point, therefore, in order to determine the question of the jurisdiction of the City Civil Court to entertain the suit, is to ascertain whether, in view of s. 4 of the Act, the Act applies to the premises at all. If it does, the City Civil Court has no jurisdiction; but if it does not, then it has such jurisdiction. The question at once arises who is to decide this point in controversy. It is well settled that a civil Court has inherent power to decide the question of its own jurisdiction, although, as a result of its enquiry, it may turn out that it has no jurisdiction over the suit. Accordingly we think, in agreement with the High Court, that this preliminary objection is not well founded in principle or on authority..."

Similarly if a plaintiff files a suit against his licensee or a trespasser and the licensee or the trespasser contends that he is the tenant of the plaintiff and entitled to protection under the Rent Act, the question which would arise is whether the relationship between the parties is that of landlord and tenant or that of licensor and licensee or owner and trespasser. If the relationship is that of landlord and tenant, the City Civil Court would not have jurisdiction. If the relationship is that of licensor and licensee or owner and trespasser, the City Civil Court would have jurisdiction to try the same. The question arises as to who is to decide the point in controversy and the Supreme Court has answered it by saying that every civil Court has inherent jurisdiction to determine the question of its own jurisdiction although as a result of the enquiry it may turn out that the Court has no jurisdiction to try the suit.

Now, if the Supreme Court in deciding *Babulal Bhuramal v. Nandram* wanted to lay down a different principle from the one it laid down in *Bhatia Co-operative Housing Society Ltd. v. Patel* it would have said so. But it having not done so, it is legitimate to infer that it did not want to make a departure from the law laid down in *Bhatia Co-operative Society's* case where the facts were different. Secondly, even if it is possible to read the Supreme Court judgment in *Babulal Bhuramal v. Nandram* as laying down a very broad principle, it is submitted, that the same ought not to be extended to cases where the facts are exactly the converse of the case before the Supreme Court.

Now, the scope of the binding nature of the observations of the highest Court has been laid down by the High Court in *Comr. I.T. v. Bai Shirinbai*⁷. In that case the question arose whether the assessee's assessable profits on the sale of shares was the difference between the sale price and the cost price paid by the assessee or the difference between the sale price and the market price on April 1, 1945, on which date the assessee had started her business,

the assessee having purchased the shares prior to April 1, 1945. The assessee contended that she was liable to be taxed on the difference between the sale price and the market price on April 1, 1945. The department, relying on an earlier judgment of the Supreme Court, contended that the profits should be assessed on the basis of difference between the sale price and the actual cost price. Now, the earlier Supreme Court judgment dealt with a case where the assessee had, during the accounting year, withdrawn some silver bars and shares from the business and settled them on certain trusts in which he was the managing trustee, and in his books he credited the business with the cost price of the silver bars and shares so withdrawn. The department and the High Court assessed him to tax on the basis of the difference between the cost price of the silver bars and shares and their market value on the date of their withdrawal from business. The Supreme Court set aside the assessment holding that there was only a fictional sale and that the assessee could not be taxed on a fictional sale. Basing its argument on this judgment, the department contended in the later case that just as a person cannot be assessed on profits deemed to arise on a fictional sale, so also in assessing the profits of the assessee in the later case, the basis to be adopted should be the difference between the actual purchase price paid by the assessee and the sale price and not the difference between the sale price and the market price on the date of conversion viz. April 1, 1945. The above argument of the department was not accepted by the High Court. Chagla C.J., who delivered the judgment, stated (p. 716):

"It has been very strongly urged by the Advocate General that it is our duty, whatever our own views may be, to give effect to the decision of the Supreme Court. With very great respect, a decision of the highest Court is a decision which is true with regard to the facts on which that decision is based. Logical corollary may follow from that decision and a Court may be asked to accept the logical corollary and to extend the principle of that decision, but the binding nature of the decision depends upon what is the ratio which applies not only to the facts in that particular case but would be applicable to other facts as well. It is perfectly true that no two decisions can have identical facts and it is not in that sense that one decision is to be distinguished from another. But once the ratio is discovered, then the case is not an authority for a proposition that may seem to follow logically from it, as was stated by Lord Halsbury in *Quinn v. Leatham*." We need hardly say that if we were satisfied that the ratio of the Supreme Court judgment applied to the facts of this case, whatever our view might have been, we would have unhesitatingly applied it and come to a decision in conformity with the decision of the Supreme Court. But when we are asked to extend the principle of that decision, with very great respect, we hesitate to do so, because we feel that if all the aspects of the matter had been present before the Supreme Court, they would not have agreed to extend that principle to cases where an asset was realised by a business man and where the question arose as to what were his business profits and how those business profits should be allocated."

Likewise, it is submitted that the ratio, if any such be, of the Supreme Court judgment in *Babulal Bhuramal v. Nandram* ought not to be applied to a case where the plaintiff brings a suit in ejectment on the basis that the defendant is his licensee or a trespasser, as the facts would be converse of the case in *Babulal Bhuramal's* case, and that if all the aspects of the matter had been present before the Supreme Court, they would not have agreed to extend the principle to a case of the above nature.

It may be observed in passing that the City Civil Court seems to have been influenced in holding that it has no jurisdiction to even determine the question of its own jurisdiction on the basis of certain provisions of certain statutes where the Courts' jurisdiction has to be decided not by an ordinary Court of the land but by a special tribunal set up under that particular piece of legislation, not because of what the plaintiff says in his plaint but because

of the plea that the defendant sets up in his written statement, e.g. the Bombay Tenancy and Agricultural Lands Act or the Displaced Persons' Debts Adjustments Act etc. That may be so, because there is an express provision to that effect in those statutes. But under the Rent Act there is no similar provision and therefore provisions in those statutes cannot be a helpful guide in determining the forum for the disputes under the Rent Act. The same point was urged before the High Court in *Bhatia Co-operative's* case before Weston J. He held (p. 203):

"It is first contended by Sir Jamshedji Kanga that the City-Civil Court had no jurisdiction to entertain the suit, for the Court to which the jurisdiction to entertain such suit is given by the Act No. LVII of 1947 is the Court of Small Causes at Bombay. But unless express provision exists to the contrary, and such provision would be most extraordinary, any Court has jurisdiction to decide whether or not it has jurisdiction in a particular matter, and we cannot accept that it is necessarily for the Small Causes Court to decide in the first instance whether the suit should or should not proceed in that Court or in the City Civil Court."

Lastly, it is submitted, that if the Supreme Court judgment is interpreted as it is sought to be done, it would result in a conundrum. Let us assume that the effect of the Supreme Court judgment is that the ordinary civil Court is deprived of its jurisdiction even to determine the question of its own jurisdiction as soon as the defendant sets up a plea of tenancy and protection under the Rent Act, and that the determination of the question whether the defendant is a tenant and entitled to protection under the Rent Act is to be made by the special Court set up under s. 28 of the Rent Act. Now, if the special Court holds that the defendant's plea of tenancy and consequent protection under the Rent Act is correct, well and good. But if the special Court decides against the defendant, then it would not have jurisdiction to deal with the claim or question of title arising *de hors* the Rent Act. The special Court would return the plaint for presentation to proper Court viz. the ordinary civil Court. Very likely the defendant will again, though falsely, take up the plea of tenancy and consequent protection under the Rent Act. The civil Court would still have no jurisdiction to decide the dispute between the parties since the defendant, though falsely, claims that he is a tenant. It may be argued that the question having been decided by the special Court is barred by *res judicata* between the parties and, therefore, the civil Court would have jurisdiction to deal with such a case. But a Court in order to decide that a claim or question being agitated between the parties is barred by *res judicata* must have jurisdiction to try the subsequent suit. Now, if the above interpretation were to be put upon the judgment of the Supreme Court, the City Civil Court would not have jurisdiction to try the suit or to decide that the defendant's contention is barred by *res judicata* even after the determination of the issue by the special Court because its jurisdiction will be ousted as soon as the defendant, even though falsely, claims that he is a tenant, and entitled to protection of the Act. The Supreme Court observations are wide enough to cover all cases of claim of tenancy even where a dispute regarding the relationship between the parties has been considered by the special Court and rejected by the special Court. Thus a plaintiff would be left without any remedy. He cannot succeed in the special Court because it has no jurisdiction to assist him in the event of the relationship being otherwise than as landlord and tenant, and the civil Court will equally have no jurisdiction because of the Supreme Court judgment. Surely the Supreme Court had not intended to create such an absurd situation.

It is, therefore, respectfully submitted that the correct interpretation of the Supreme Court judgment is that the above observations only emphasize the frame of the suit. It is further submitted that the correct manner to decide the question whether s. 28 of the Rent Act applies in a given suit and consequently triable exclusively by the Small Causes Court is, as held in *Jaswantilal v. "Western Comp. India"* to find out what the suit as framed in substance is

and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of a claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by s. 28 of the Rent Act.

GLEANNINGS.

LISTER V. ROMFORD ICE CO., LTD.

If an employee, while acting in the course of his employment, is negligent and a third person suffers damage in consequence, the employee may find himself liable for that damage not only on a direct claim made against him by the third person, but also on a claim made by his employer or his employer's insurers to recover damages which either have had to pay to the third person. Authority for this proposition is to be found in *Lister v. Romford Ice & Cold Storage Co., Ltd.* ([1957] 1 All E.R. 125); a majority decision of the House of Lords. Under the law as it stands, therefore, whenever an employee is negligent in the course of his employment and as a result his employer becomes liable to pay damages to a third person, the employee is exposed to the risk that his employer will require him to pay the damages out of his own pocket, and it makes no difference that the employer may have covered his own liability by insurance. It is this possibility which led to the appointment, in March 1957, of an inter-departmental Committee to consider the implication of the *Lister* case, some aspects of which were discussed in the Journal in an article in 1956 (106 L.J. 4), shortly after the decision of the Court of Appeal in this case ([1955] 3 All E.R. 460) had been reported. The Report of the Committee has now been published: they think that the decision in the *Lister* case has not exposed a practical problem and that there is not any need for legislation at present.

The decision in the *Lister* case (*supra*) did not enunciate any new principle of law; it rather affirmed that an employee who is under a duty of care remains personally responsible for the consequences of his failure to exercise such care. Practical considerations have led third parties who had been injured by employees acting in the course of their employment to make their claims, not against the employee, but against the employer who will have funds to pay, and in the vast majority of cases employers have met such claims without troubling to recoup themselves by seeking to make their employees indemnify them; similarly, insurers have been reluctant to exercise their rights of subrogation against employees, save in exceptional circumstances. Cases to the contrary, which have been most infrequent, include *Ryan v. Fildes* ([1938] 3 All E.R. 517), *Jones v. Manchester Corpn.* ([1952] 2 All E.R. 125), *Semtex, Ltd. v. Gladstone* ([1954] 2 All E.R. 206) and *Harvey v. R. G. O'Dell, Ltd.* ([1958] 1 All E.R. 657). There is, as the Committee stress, little indication that employers, or insurers of employers, have been taking advantage of their right to obtain recoupment; moreover certain voluntary action has been taken both by employers and insurers which has further reduced the likelihood of employees being asked to contribute to damages paid to fellow employees as a result of their negligence. In these circumstances the Committee do not recommend that an attempt should be made to meet the problem by legislation, and this recommendation has been accepted by the Government (598 *Hansard* H.o.C. 33). The Committee add, however, that if in future it should appear that employers or insurers were exploiting their rights unreasonably, the problem would have to be reviewed afresh.—L.J.

BANK: NEGLIGENT ADVICE

A BANKER may, as such, give advice on investments to a customer who consults him or, indeed, to anyone who comes to him for advice and whom he chooses to advise. If he undertakes to advise, he must exercise reasonable care and skill in giving the advice, and if he does so negligently he will incur liability. Exactly the same considerations, as Lord Finlay, L.C., pointed out in his speech in *Banbury v. Bank of Montreal* ([1918] A.C., at p. 655) apply to the case of the manager of a branch of a bank with regard to the business which is immediately under his care as manager. In *Woods v. Martins Bank, Ltd.* ([1958] 3 All E.R. 166) the manager of a branch of the defendant bank agreed to act as the plaintiff's financial adviser, and in that capacity advised the plaintiff to make investments in preference shares of a private company, also a customer of that branch of the defendant bank, and to guarantee the overdraft of another small private company. The advice was honestly given, but there was no reasonable ground for advising the plaintiff in his own interest to make the investments or to guarantee the overdraft. In each case the sums advanced by the plaintiff were lost. His action for damages for negligence against the bank and the manager of the branch was successful, Salmon, J., holding that on the facts it was within the scope of the defendant's bank business to advise on financial matters, and the advice which had been given to the plaintiff was given without the ordinary care and skill that a bank manager should possess. The company whose preference shares the plaintiff bought had an overdraft with the manager's branch of the bank and the learned Judge made it clear that in his view the branch manager "ought never to have advised the plaintiff at all—certainly not without making a full disclosure to the plaintiff of the conflicting interests between the plaintiff and the defendant bank and the plaintiff and the defendant bank's other customers concerned". The *Banbury* case was distinguished on the ground that there the bank manager had admittedly no general authority to advise, but Lord Finlay's words on the proper course to be taken where there are conflicting interests are very much in point: "If the banker's familiarity with the subject arises from the fact that he has himself a pecuniary interest in it, he would be bound in advising the customer to make full disclosure to him of this circumstance".—L.J.

REVIEWS.

Elements of Indian Company Law. By SOHRAB R. DAVAR, Barrister-at-Law. Sixth Edition by KHORSHED D. P. MADON, Advocate, and RUSTOM S. DAVAR, Barrister-at-Law. BOMBAY: The Progressive Corporation (Private) Ltd., Jehangir Wadia Building, 51, Mahatma Gandhi Road. 1959. Demi 8vo. Pages LII+655. Price Rs. 13.50.

WE welcome a new edition of this book which is very popular with students, lawyers and businessmen. Since the publication of the last edition the new Companies Act, 1956, was promulgated. Many changes have been effected in the company law by this Act and a new edition of this book became absolutely necessary. The whole work has undergone a thorough and complete revision in the light of new amendments. All these changes have been carefully pointed out and important recent cases have been referred to. The changes made by the new enactment have been clearly explained and every effort has been made to make this edition useful in every way to students, practitioners and those who have to do anything with the company law. For the guidance of students selected examination questions have been given at the end of the book. A separate chapter at the end of the book deals with capital issue control. The Appendices include the Schedules to the Companies Act and Companies (Central Government's) General Rules and Forms. We may

unhesitatingly say that this edition will be found very serviceable to the Company Secretary, company promoter, managing agent, the director and professional men who have to deal with Company Law.

Modi's Text Book of Medical Jurisprudence and Toxicology. Edited by N. J. MODI, M.B., M.B.O.P. (LOND.). BOMBAY: N. M. Tripathi (Private) Ltd., Princess Street. Thirteenth Edition. 1959. Roy. 8vo. Pages 808. Price Rs. 25.

In this edition the learned author has carefully and thoroughly revised every section of the book. He has incorporated new cases of medico-legal importance. Several new sections dealing with fresh matter have been added. The section on inter-sex has been entirely rewritten and the section on toxicology has been brought up-to-date. In revising this edition various text books have been consulted and the whole matter has been carefully scrutinised from the medico-legal standpoint. Medical practitioners and lawyers will find this edition extremely useful.

The Sale of Goods Act and the Indian Partnership Act. By SIR DINSHAH FARDUNJI MULLA. Edited by KAIKOBAD SORABJI SHAVAKSHA, B.A. (OXON), Barrister-at-Law. BOMBAY: N. M. Tripathi (Private) Ltd., Princess Street. Fifth Edition. 1959. Roy. 8vo. Pages xii+188. Price Rs. 7.50.

We welcome a new edition of this work. The provisions of the two Acts have been fully and carefully explained in a lucid style and the case law has been brought up-to-date. Students of law will find this edition extremely useful for studying the provisions of these two Acts.

Recognition in the Law of Nations. By SATYAVRATAN RAMDAS PATEL, LL.M., Advocate, High Court, Bombay. BOMBAY: N. M. Tripathi (Private) Ltd., Princes Street. 1959. Demi 8vo. Pages ix+122. Price Rs. 15.

THIS book contains a brief exposition of the law of nations. It critically examines the theoretical aspects of the whole question. Certain imperfections of International law are clearly pointed out. International law does not bind the states of the world in a common legal system. It is applied by states according to their own discretion. International law should be freed from various substantive and procedural defects. The whole subject is divided into twenty-three chapters and the discussion is very illuminating.

The Finance Acts of 1958 & 1959 and the Indian Income-tax Act, the Wealth-tax Act, and the Expenditure-tax Act. By A. N. AIYAR, B.A., B.L., Advocate, Supreme Court, and T. A. RAMACHANDRAN, B.A., B.L., Advocate, High Court, Madras. MADRAS: Company Law Institute of India (Private) Ltd., 21, Thyagaraya Road. 1959. Roy. 8vo. Pages c+viii+133+lv. Price Rs. 14.00.

THIS is a very thoughtful commentary on the various Acts incorporated in this work. The intricate provisions of several sections of the various Acts have been carefully explained in simple language. The annotations are analytical and critical and they throw fresh light on many provisions of these complicated Acts. Persons who have to tackle the provisions of these Acts will find the book very serviceable.

The
Bombay Law Reporter.

JOURNAL.

November 15, 1959.

SECTION 102C OF THE BOMBAY LOCAL BOARDS ACT AND THE
ANOMALOUS POSITION OF TAXATION APPEALS.*

Section 113 of the Bombay Local Boards Act of 1923 provides for an appeal to a Judicial Magistrate against the quantum of tax levied by a Local Board. The opening two sentences and sub-cl. (1) of s. 113 are as follows:

"Appeals against any notice of demand issued under sub-section (3) of section 104 may be made to any Judicial Magistrate or Bench of such Magistrates by whom under the directions of the Sessions Judge such class of cases is to be tried. But no such appeal shall be heard and determined unless—

(a) the appeal is brought within fifteen days next after service of the notice of demand complained of;"

The plain and literal meaning of the above clearly is that an appeal is competent against the Notice of Demand and that the same must have been issued under s. 104(3) of the Bombay Local Boards Act. There has been occasion for the interpretation of this section and it has been held in *District Local Board, (W.K.) v. Kutuballi*¹ that under this provision of s. 113 appeal is competent only upon issue of the Demand Notice. The jurisdiction in the Judicial Magistrate to entertain and hear the appeal is vested only upon the issue of the Demand Notice, and, however disputable the quantum of tax may be, no statutory remedy of this appeal is available to the tax payer without issue of this Demand Notice. Just as the said s. 113 mentions that appeal against any notice of demand can be filed to a Judicial Magistrate, it also in unequivocal terms states that such notice will be Notice of Demand issued under s. 104(3) of the Bombay Local Boards Act, and the words such appeal in the second sentence of s. 113 refer to an appeal against the Notice of Demand issued under s. 104(3) of the Act. Though in the case of the *District Local Board, (W.K.) v. Kutuballi*, specific point about the second proposition viz. that the Demand Notice must be under s. 104(3) of the Act was not before their Lordships, still there is clear expression therein that the Demand Notice must be the Demand Notice issued under s. 104(3) of the Bombay Local Boards Act. It is observed in the said case (p. 1237):—

"The opening words of the section, namely, 'Appeals against any notice of demand issued under sub-section (3) of section 104 may be made' would show that before a Judicial Magistrate or a Bench of Judicial Magistrates can exercise jurisdiction under the section, there ought to be in existence a notice of demand issued by the Local Board under sub-s. (3) of s. 104 of the Act. Then again, the words 'No such appeal shall be heard and determined' would also show that the jurisdiction to proceed with the hearing of the appeal made under s. 113 of the Act does not vest in the Judicial Magistrate unless a notice of demand has in the first instance been issued against the person concerned by the Local Board. The words 'such appeal' in the expression 'No such appeal shall be heard and determined' are important. They refer to an appeal against a notice of demand issued under sub-s. (3) of s. 104."

In theory it cannot be disputed that an appeal is intended against the levy of tax. However the remedy of appeal has to be specifically provided for in the enactment by specific provisions and the provisions investing and divest-

*By Kusumkant D. Bhate.

1. (1953) 60 Bom. L. R. 1235.

ing jurisdiction are subjected to the rule of strict interpretation. It also further appears from the scheme of the various Acts concerning the Local Bodies that only one appeal is provided whether it be at the stage of the levy of tax or at the collection stage. Taxation by Local Authorities has two important phases. First is the levy and the other is the recovery or the collection procedure. In fact the corner stone of taxation is the Assessment List. The recovery or collection phase under the Local Boards Act is provided under Chapter VIII. Issue of Bill is provided at s. 104(1) and Notice of Demand is provided under s. 104(3) and the appeals are provided at s. 113, and this is at the stage of collection. Under provisions of the Village Panchayats Act in the repealed Act of 1933, Assessment List was provided at s. 89 and the Bill under s. 91(1), notice demanding the amount which is named as Writ of Demand was provided under s. 91(2) but the appeal remedy therein was provided at the stage of levy of the tax under s. 89(3). The same scheme is adhered to in the new Act III of 1959, wherein appeal against levy is provided at s. 124(5) and issue of the Bill and Writ of Demand are provided at ss. 129 (1) and 129(2) respectively. Under the Municipal Boroughs Act taxation appeals are provided at s. 110. The old s. 110 of the Municipal Boroughs Act as it stood prior to the amendment by Act XXXVI of 1949 was similar to the Local Boards Act and remedy of appeal was provided against Notice of Demand issued under s. 194(3) of that Act. By the amending Act XXXVI of 1949 after the words "appeal against" the words "any notice of demand issued under section 104(3)" were deleted and also similar words in s. 110(2)(a) were deleted and at that place words "any claim included in the bill presented under section 104(1)" were added and suitable further amendment to s. 110(2)(a) was also made. By this amendment appeals became competent upon issue of the bill under s. 104(1) of that Act and within fifteen days after the presentation of the bill. This amendment was made to avoid inequitable position that the tax payer had to wait till the issue of the Demand Notice and had to pay along with the bill amount, the charges of the Demand Notice though he would be willing to pay the bill amount on presentation of bill but that he could not pay the same because if he paid the same the Demand Notice would not be issued and appeal itself would not be competent. However, by the added words in s. 110 of the Municipal Boroughs Act, it is probably sought to be made clear that an appeal is provided not against the Demand Notice but against the bill. The newly added words also do indicate that appeal contemplated is against the levy of the tax itself, because appeal is provided not against the bill but against the claim included in the bill. However, the appeal limitation is provided as fifteen days from the presentation of the bill and it also can be said that it is the bill upon presentation of which appeal under s. 110 becomes competent and that it is presentation of bill that gives jurisdiction to the Judicial Magistrate to hear the appeal. In any case, so far as the Local Boards Act is concerned there is no such provision made as is found in the Municipal Boroughs Act and under Local Boards Act the appeal is against the Notice of Demand.

Now, reverting over to the main theme, provisions of s. 102C may be looked into. It may be noted that the District Local Board is authorized to levy tax on profession, trades and callings and so also are the Village Panchayats and the residents of the Village Panchayats are subject to the taxation jurisdiction both of the Local Board and also the Village Panchayat, and to avoid such taxation by both the Local Board and the Village Panchayat on the same tax payer it has been provided by Act XLIII of 1955 that a Village Panchayat shall not levy a tax on the profession, trades or callings on the residents of the Village Panchayat so long as such tax is levied upon them by the Local Board, but that such percentage not exceeding 50 per cent. of the collection of such tax (as the State Government may determine) shall be paid to the Village Panchayat and that the Village Panchayat should effect the tax collection work of the Local Board. The important s. 102C inserted in the Local Boards Act by s. 6 of Act XLIII of 1955 further provides that notwith-

standing the provisions of the Local Boards Act the Village Panchayat should undertake the work of collection under provisions of the Village Panchayats Act and as if such tax is imposed by itself and consequently collection work could not be done by the Local Board under the provisions of the Local Boards Act. This important provision of s. 102C is as follows:

"Where in exercise of the powers given by this Act a district local board imposes a tax on professions, trades, callings and employments, then notwithstanding in this Act or any other law for the time being in force, in any area within the limits of a village panchayat constituted under the Bombay Village Panchayats Act, 1933,—

(a) such tax shall be collected by the village panchayat concerned from those persons who are liable to pay the tax under the rules made by a district local board and who reside or carry on any trade or exercise any profession or follow a calling within such area, in accordance with the provisions of sections 91 and 92 of the Bombay Village Panchayats Act, 1933, as if it was a tax imposed by it under the provisions of the said Act and shall be paid to the district local board at such time and in such manner as the district local board may specify;

(b) such percentage not exceeding 50 per cent. of the gross collection of such tax in any financial year as the State Government may by general or special order determine shall not form part of the local fund of the district local board but shall be assigned to the village panchayat in such manner as the district local board may determine." (Italics are mine)

Thus, under s. 102C of the Bombay Local Boards Act, collection of the tax on the professions, trades and callings levied by the Local Board upon residents of the area of Village Panchayat is to be effected notwithstanding the Local Boards Act provisions and by the Village Panchayat and that is to be done under the provisions of the Village Panchayats Act only. Therefore, in such cases relevant provisions for issue of Bill, Demand Notice of s. 104 of the Local Boards Act cannot be invoked and the provisions of the Village Panchayats Act regarding issue of Bill, Writ of Demand and distress Warrant has to be availed of. Thus for the purpose of collection of such tax, bill will be issued under provisions of the Village Panchayats Act and if the amount is not paid then writ of demand will be issued. In any event in such cases neither bill nor Notice of Demand will be issued at any time, under respective provisions of ss. 104(1) and 104(3) of the Bombay Local Boards Act. Now the question is that if Notice of Demand under Local Boards Act and under provisions of s. 104(3) of Local Boards Act is not issued and cannot be issued whether an appeal will be competent under s. 113 of the Local Boards Act?

Before concluding that an anomaly exists it must be considered as to what is the intention of the Legislature in providing collection of such tax by the Village Panchayat and whether in such cases an appeal is intended under provisions of the Village Panchayats Act. Section 9 of the amending Act XLIII of 1955 itself provides by insertion of s 31(2) (bb) that the collected proceeds of tax on professions, trades and callings assigned under s 102C of the Local Boards Act will form part of the Village Panchayat fund. The amount is so assigned as if in lieu of the restraints imposed upon it. So Village Panchayat has more interest in the collection work which is done not merely as an agent. The assignment of such high percentage (of about 50 per cent.) of the collection could not be allotted to the Village Panchayat merely as an agent doing collection work. It is stated at s. 102C that such tax shall be collected by the Village Panchayat as if it was a tax imposed by it under the provisions of the Village Panchayats Act. If the idea was that the Village Panchayat was merely a tax collecting agency it would have been merely stated that tax collection provisions of the Village Panchayats Act will apply and that the tax shall be deemed to be a tax of the Village Panchayat for that purpose. But the wordings are that it is to be treated as a tax imposed by the Village Panchayat itself and these are perhaps very meaningful words and it might appear that the Legislature intended that appeal in such cases would be under the provisions of the Village Panchayats Act. Also when the collection work would

be done by the Village Panchayat it would retain amount upto 50 per cent. of the tax amount and it would be strange to ask the Local Board to refund the amount part of which in fact would not have been received by it. (In such cases at least it appears that an appeal against only the Local Board will not be sufficient.) However, first difficulty for such consideration is that the Village Panchayats Act does not provide for any appeal against or after the issue of the Bill or the Writ of Demand. Under the scheme of the Village Panchayats Act appeal remedy is not available after the stage of Bill and Demand Notice. Now if remedy of appeal for such cases is to be read as provided at the stage of levy of assessment list then the difficulty is that there is no such specific provision made in the Village Panchayats Act when s. 102C has been inserted. It would also mean that though under Local Boards Act appeal remedy is provided upon payment of the claim dues with demand notice charges such appeal, contrary to the intention of the Local Boards Act would be available without such payment. *Ex facie* the Village Panchayat does merely the collection work and comes into picture only after the assessment list is prepared and finalised by the Local Board. Also it will not be possible to invoke appeal provisions of the Village Panchayats Act at the assessment stage, as then the Local Board would not be desisted of its function and of its jurisdiction. It appears clear that the Legislature never intended that appeal provisions under the Village Panchayats Act should be available in such cases, because appeals under the Village Panchayats Act are provided against the levy of the tax which is initially imposed by the Village Panchayat itself. This is also clear from the nature of forum provided for such appeals. It also sounds queer to have different remedies of appeal under different provisions of law and to different forum for the levy of the tax of the same Local Board. To non-residents of Village Panchayat there will be available a remedy of appeal under s. 113 of the Local Boards Act and for them the authority will be a Judicial Magistrate. If appeal is available under the Village Panchayats Act at the levy of assessment stage then the forum will be under the old Act the Standing Committee of the Local Board and under the new Act of 1959 to the Panchayat Mandal. Further it would mean availability of appeal remedy two times viz. at the stage of the Assessment List as specifically provided therein and at the stage of the Writ of Demand impliedly, for the purposes of such cases as would come under the provisions of s. 102C of the Local Boards Act. Thus it is not possible to reconcile the position and say that the Legislature had in its mind that appeals in such cases where collection work is done by the Village Panchayats should be under provisions of the Village Panchayats Act.

As stated at the outset an appeal under provisions of s. 113 of the Local Boards Act will be competent upon issue of Demand Notice under s. 104(3) of the Local Boards Act because appeal is provided only against the Notice of Demand issued under provisions of s. 104(3) of the Local Boards Act. Firstly "Writ of Demand" so issued under provisions of the Village Panchayats Act will be a different terminology than "Notice of Demand". Further this writ of demand will be issued under provisions of the Village Panchayats Act and not under s. 104(3) of the Bombay Local Boards Act. Though in theory appeal is against the levy of the tax still in reality there must be some clear and substantive provisions under which the tax payer gets the right to file the appeal and by which jurisdiction to entertain the appeal can be invoked by the authority appointed for that purpose. At present such provision is only under s. 113 of the Local Boards Act and it is difficult to see how writ of demand issued under provisions of the Village Panchayats Act can give such rights which accrue only upon the issue of the Notice of Demand under s. 104(3) of the Bombay Local Boards Act. However, apart from other difficulties, it appears evident that on plain reading of s. 113 of the Local Boards Act, in absence of Notice of Demand under s. 104(3) of the Bombay Local Boards Act, a tax payer will not be able to avail himself of the remedy of appeal provided under s. 113 of the Act. In effect the remedy of appeal is in the statute book but the tax

payer cannot avail of it because Notice of Demand would not be issued by the Local Board. That the tax payer should be deprived of his valuable remedy of appeal under such circumstances is really a very hard consequence. It is submitted that this anomalous position need to be corrected by a suitable amendment.

GLEANNINGS.

RIGHTS OF AN AUTHOR

REPORTED cases on the rights and liabilities of authors, editors and publishers between themselves are not many, and the recent decision in *Joseph v. National Magazine Co., Ltd.* ([1958] 3 All E.R. 52) provides an occasion for considering a field of law which seldom comes before the Courts.

In that case the question was of the right of an author to have his article published in the form in which he wrote it or to recover for breach of contract. Equally the case raised the question of the right of the editor to have a contributor's article altered or re-written and then to publish it under the name of the contributor or anonymously. Needless to say the rights of the editor will always depend on any special contract, and in *Joseph's* case the decision rested on the nature of the contract. But as the contract was one come to by word of mouth with no very specific terms, the case is of general interest.

The plaintiff was an antique dealer who specialised in jade. He was not a writer in any professional way. The defendant company was the publisher of a magazine *The Connoisseur*, which occupied a prominent position in its own line. It appeared that the contract arose out of a visit by a representative of the defendant company to the plaintiff's premises for the purpose of selling him advertising space. The plaintiff had recently acquired two jade plaques and suggested that instead of their being advertised in the advertisement columns they should appear in the editorial columns with an article on them by the plaintiff. This would have been less costly to the plaintiff and would have given him the enhancement of his reputation accorded to contributors to such a magazine.

There was controversy as to the terms of the contract and the date when it was made; the Judge found that the contract was to publish an article of a page in length (about 1,000 words) to be written by the plaintiff and that in fact the plaintiff's first article was withdrawn by the plaintiff and his second attempt accepted. A third attempt was subsequently produced, apparently the same as the second one except for a number of minor corrections. When the editor received the second attempt he was not satisfied with its style; so he sent it to a professional journalist, who had some knowledge of jade, for the purpose of re-writing it for *The Connoisseur*. This was done, and the re-written version was sent to the plaintiff for correction, but after the third version had been received.

The receipt of the re-written second attempt was a shock to the plaintiff who immediately wrote rejecting it on various grounds including, according to the plaintiff, errors of fact and also alterations which had taken away the plaintiff's theme by a change in title and the like. He also pointed out that his third attempt had been ignored but His Lordship found that the editor was not bound to consider the third attempt having, at the time of its receipt, already commenced to deal with the second attempt.

The plaintiff issued a writ for specific performance and damages, and the case came to be heard by Harman, J.

The questions for decision were fairly free from authority, but on general principles one would say straight away that a contract to write an article or a book would not be enforced by the remedy of specific performance because the

Court cannot effectively see that an author will fulfil his part of the bargain in a way which the other party must necessarily accept and, as specific performance must usually be reciprocal, i.e., it must be possible for either party to require it of the other, that difficulty would be fatal. But there is a circumstance where that rule will not apply, and there is a decision of Danckwerts, J. (not reported in the law reports, but mentioned in (1951) 62 The Author 2, at p. 38, *vis.*, *Barrow v. Chappell & Co., Ltd.*), to the effect that where the contract relates to a work already in existence, specific performance may be ordered. In such a case the difficulty mentioned above does not arise. In the case in question the contract was to publish a piece of music already composed and previously performed.

In *Joseph's* case there was never an agreement as to what detail should be published. The second attempt was not accepted by the editor since he had it re-written; the re-written version was not accepted by the plaintiff and the third version was not considered by the editor.

It is important to notice however that Harman, J., did not find that there was no contract. There was a contract to publish an article of about 1,000 words and Harman, J., decided—and this is really the crux of the case—that the plaintiff was entitled to have the article published in his own words under his own name. His Lordship accepted that the editor would have the right to shorten any article found to be too long and make corrections of mistakes or possibly grammatical changes; but the plaintiff was not bound to submit to having his name published as the author of a different article expressing other opinions in a different style.

The defendants argued that, if there was a breach of contract, damages should only be nominal because the plaintiff, it was contended, was merely seeking publicity and this he could have had if he had agreed to the publication of the re-write under his name. The learned Judge rejected this contention because he took the view that the plaintiff's object was to enhance his reputation as an expert on jade, and this he was entitled to do within reasonable limits in his own way. His Lordship considered that the plaintiff was justified in rejecting the re-write as being inferior in style and as one which would not be an assistance to the plaintiff's reputation but the reverse. The plaintiff's claim for damages therefore succeeded.

It would not be practicable to dismiss this case as simply one where the editor had not been careful enough in selecting his contributor having regard to the style which the editor desired, or not being careful enough not to be committed to publish an article before seeing it. There must be many editors who simply would not find it practicable always to close these gaps. It is believed that generally editors put responsibility for contributions on the author and in cases of conflict of view they may accompany an article with a disclaimer by the editor for concurrence in the view expressed. Readers may, no doubt, be inclined to put some responsibility on an editor for selection of an article but this can sometimes be dealt with by a statement that the editor has asked the writer for an article and his contribution follows. No doubt the defendant in *Joseph's* case had reasons for not adopting those expedients, but it is understandable that a contributor may object to his work being re-written by another and then being published anonymously or under the contributor's name. One would also think that readers prefer to believe that what purports to be written by a named individual is in fact written by him, even though in some cases this is not so. A recent example of "ghost" writing is reported in *Housden v. Marshall* ([1958] 3 All E.R. 639)—a tax case.—*L.J.*

STATUTORY OFFENCE: *MENS REA*

It is a fundamental principle of the common law that to constitute a criminal offence, the guilty act must be accompanied by guilty intention. The prin-

ciple derives from an age when statute law bulked less largely in the criminal law than it does at present, but even in regard to statutory provisions it is well established that, in the absence of a clear indication to the contrary, the intention of a statute is presumed to be that some kind of *mens rea* is necessary in order to constitute the offence which it enacts (*cf. Brend v. Wood* [1946] 62 T.L.R. 462, 463). Yet that presumption is not universal, and only if on the proper construction of an enactment according to its terms and objects *mens rea* is not expressly or by necessary implication excluded, will it be regarded as essential. The most recent instance where the presumption was negatived is *R. v. St. Margaret's Trust* ([1958] 2 All E.R. 289), a case in which a finance company found itself—unwittingly—in breach of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956, which makes it an offence for any person to dispose of certain goods under a hire-purchase or credit sale agreement unless a specified percentage of the cash price is paid before signing the agreement. In this case dealers in motor cars accepted less than the required deposit for the sale of a motor car on hire-purchase terms. They inserted a falsely inflated cash price in the agreement and thereby induced the finance company to advance a larger sum than they would have done if the true cash price had been disclosed. Since the requirement of the Order of 1956 that fifty per cent. of the cash price must be paid before signing the agreement was thus not satisfied, the finance company, by entering into the transaction had, though acting innocently, in fact contravened art. 1 of the Order. Their appeal against conviction was dismissed by the Court of Criminal Appeal on the ground that the terms of art. 1 of the Order considered together with the object of the Order made the prohibited act an offence although the act was innocently done: "The importance of not doing what is prohibited is such", Donovan, J., observed in delivering the judgment of the Court, "that the method of business must be rearranged so as to give the necessary knowledge."—*L.J.*

MOVING WITH THE TIMES

We agree with Lord Denning that lawyers should play an active part in law reform. Our readers will have noticed that in these pages we publish occasional articles on the need to change the law and we have heard comments to the effect that the business of solicitors is to deal with the law as it is and not to reason why, and that we should leave law reform to politicians and other social reformers. While laymen frequently see more of the ill effects of an existing law than the lawyers, we believe that the only effective law reformers can be the lawyers themselves. Only we have the necessary experience and knowledge to be able to judge not only whether the present state of the law is unjust, but also whether any change would bring with it more benefits than the ills which it is designed to remedy. Although Parliament contains a majority of non-lawyers, the legal strength in Parliament is such as to ensure that law reform is carefully and patiently studied before it is brought into effect. In recent years, in particular, lawyers have taken the initiative in promoting several measures of law reform. We believe that it is right, as Lord Denning said in his recent Romanes Lecture, that legal principles should be like the propositions of scientist, which fall to be modified when shown not to fit all instances or even discarded when shown to be in error. In our view, it is not enough to rely on the Courts and we applaud the way in which the present Lord Chancellor and his predecessors have encouraged and kept alive the constant review of the existing law which is the function of the Law Reform Committee. To this movement the Council of The Law Society have made a substantial contribution and the appendices to successive annual reports of the Council have been a most valuable source of reform.—*S.J.*

MIDDLE CLASS MORALITY?

WHEREAS others besides admirers of Bernard Shaw will be aware that there are differences in outlook between what are inexactly described as the middle classes and those who are even more inexactly described as the working classes, we believe that Lady Wootton's statement that "what motoring offences are to one class, theft is to another; that is all there is to it", is based on entirely false premises. First, driving motor vehicles is not the monopoly of any one class. The millionaire and the moujik take much the same view about the speed limit, i.e., one is unlucky if one is caught. Secondly, we are not aware that theft is condoned among any class. We agree it is difficult to understand why a man who is convicted of, say, some offence involving dishonesty or some minor homo-sexual offence should be regarded as unfit to hold public office whereas men who have been convicted of dangerous driving, or even of driving while under the influence of drink, have apparently been able to continue in or even to embark upon public office. *The Times* was probably right when it commented that those who commit motoring offences do so for the most part without criminal intent, and Lady Wootton's own description of such offences as selfish is probably fairly near the truth. While most people would regard dangerous driving and driving while under the influence of drink as morally reprehensible, the vast majority of motoring offences are committed in moments of mental aberration. It might be sound to invent a new category of administrative offences, since it may be morally unsound to put exceeding the speed limit and even careless driving in the same category as crimes in the strict sense of the word.—S.J.

ROOTS: LIABILITY IN NUISANCE

IN a recent action in the High Court (*Mayer v. Deptford Corporation*), Jones, J., dismissed a claim for damages in respect of damage to a house owned by the plaintiff which, it was alleged, was a result of subsidence caused by the roots of a tree in the street growing underneath the plaintiff's garden and taking moisture from under her house. The action was unsuccessful as the evidence did not satisfy his Lordship that it was the growth of the tree which had caused the settlement, not because no action will lie in any circumstances in respect of damage caused by roots growing under the plaintiff's land. Indeed, in *Lemmon v. Webb* [1893] 3 Ch. 1, it was said that in this connection projecting branches and roots should be treated in the same way and that, if the roots of a tree grew into a neighbour's soil and damaged his property, the owner of the land on which the tree was growing would be liable in nuisance. This view was confirmed by the Court of Appeal in *Davey v. Harrow Corporation* [1957] 2 W.L.R. 941, where Lord Goddard, C.J., found that "it must be taken to be established law that, if trees encroach, whether by branches or roots, and cause damage, an action for nuisance will lie," whether the trees were planted or self-sown. However, an action for damages is not the only remedy available to a person whose property suffers as a result of the intrusion of the roots of trees growing on adjoining land. In *McCombe v. Read* [1955] 1 W.L.R. 635, an injunction was granted to restrain the defendants from allowing the roots of any tree on their property so to encroach on the plaintiff's land as to cause a nuisance.—S.J.

AERIAL CROP DUSTING

IN the United States, aerial crop dusting has become an effective and relatively inexpensive method of killing weeds, even among growing crops but experience has shown that this process may result in loss to the owners of adjoining land. For example, in *McKennon v. Jones* [1951], 244 S.W. 2d. 138, the defendant intended to dust his cotton crops but in fact he also dusted the plaintiff's bees and their hives with the poisonous particles. Who should bear the loss: the plaintiff or the defendant? This question was considered in a note

in the Minnesota Law Review, vol. 43, No. 3. The writer found that the courts of the United States have reached fairly similar results in aerial crop dusting cases but that the theories of recovery adopted by the courts have been far from uniform. Most courts appear to imply that the plaintiff can recover only after proving that the spraying operation was conducted negligently, but only one court, the Texas Civil Appeals Court, has gone so far as to say that the person who suffers damage is without a remedy unless there is evidence of negligence. On the other hand, the Supreme Court of Louisiana has decided that "negligence or fault, in these circumstances, is not a requisite to liability" and other courts have found strict liability under the rule in *Rylands v. Fletcher* on the ground of "non-natural" user of the defendant's land. Although he appreciates that it would discourage crop dusting in areas where the risk of damage to others is high, the writer of the note believes that strict liability is the most reasonable approach. He suggests that all the States should enact that those who apply the dust should be made absolutely liable for all crop dusting damage and that they should be adequately insured. It would be interesting to see how an English court would approach this problem.—S.J.

CRIMINAL INVESTIGATION

It is well known that fewer criminals would be convicted if it were not for the statements that they make, with or without caution, to the police. It would be a miscarriage of justice if an admission or a confession made to the police could not be given in evidence to prove the guilt of the accused. It would equally be a miscarriage of justice to admit admissions and confessions obtained by threats or inducements. Although we pride ourselves on observing the principle that in this country no man is bound to convict himself out of his own mouth, not so much because of any false sympathy for the guilty but because of fears that the innocent may be wrongfully trapped, it sometimes happens that the police are able to secure from the accused himself the evidence they need for a conviction long before they are required by the Judges' Rules to administer a caution. Indeed, it often happens that the necessity for a caution only arises at the point when the inquiries of the police are no longer in danger of being hampered by giving it. There is some public disquiet on the subject. Several Members of the House of Commons have put their names to a motion asking that no alleged confession of anyone charged with a criminal offence shall be admissible in evidence in any court unless made in the presence of a magistrate. *Justice*—the British section of the International Commission of Jurists—have appointed a committee under the chairmanship of Mr. F. H. Lawton, Q.C., to consider the law and practice of the examination of persons charged with criminal offences with reference to the examination by police and committing magistrates, the taking and admissibility of confessions, and the desirability of making the defendant give early notice of the main lines of his defence. In the last particular the aims of *Justice* go beyond the House of Commons' motion. As a corollary of the principle that no man should be bound to convict himself out of his own mouth, in this country we accept the principle that no man is bound to say anything in answer to a charge or to give evidence on his own behalf, either at the preliminary examination or at his trial. Nevertheless, there are judicial *dicta* indicating that it may be proper for a Judge in his summing-up to comment on the fact that an alibi was not disclosed before the trial, thus giving the prosecution no opportunity of testing it. We have some sympathy with the idea that the defence should be bound to give prior notice of certain lines of defence, particularly an alibi, although we would resist anything in the nature of formal pleadings. What is wrong is that there should be no clear law on the subject. So long as the caution exists in its present form, the complete silence of the prisoner should not be adversely commented on in any way.—S.J.

PRIVILEGE FOR PARSONS!

STATEMENTS are said to be absolutely privileged when no action will lie in respect of them no matter how false and defamatory or even malicious they may be. Such privilege exists, *inter alia*, in the case of statements made in the course of and with reference to judicial proceedings by a Judge, member of a jury, party, witness or advocate and in respect of statements made in Parliament by a member of either House. The recent case of *Harris v. Collins* (1959), *The Times*, 17th April, an action for slander by three members of the League of Empire Loyalists against the Rev. Canon John Collins in respect of implications made in the course of a sermon preached in St. Paul's Cathedral, prompted Mr. Cecil Binney to write to *The Times* (21st April) to suggest that the law of defamation should be amended as "absolute privilege ought to apply to a sermon preached in an Anglican church, or at least to one preached in a cathedral." We do not agree. As it stands, the law provides that no action may be brought for the publication of a defamatory statement if the defendant pleads and proves that it is true as "the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to, possess" (*per* Littledale, J., in *M'Pherson v. Daniels* (1829), 10 B. & C. 263). In view of this, it cannot be said that the law imposes unreasonable restraint upon pulpit utterances, even upon those of such a courageous and forthright preacher as Canon Collins. It has been said that "a strong and faithful pulpit is no mean safeguard of a nation's life." This is true, but the meaning of "faithful" must include "true to fact", and the maker of a statement which satisfies this requirement is already adequately protected by the law.—S.J.

A CASE OF WRONGFUL DISMISSAL

THE Court of Appeal in *Laws v. London Chronicle (Indicator Newspapers), Limited* recently upheld the decision of Judge Sir Edgar Dale awarding the plaintiff £45 damages for wrongful dismissal. The Master of the Rolls, in the course of a judgment with which the other members of the court agreed, said that the law to be applied was stated in *Halsbury's Laws of England* (3rd edn., Vol. 25, p. 486) where it was said that a single instance of insolence in the case of a servant in the position of a newspaper critic would hardly justify dismissal. The passage to which his Lordship referred appears in a note (citing *Edwards v. Levy*, 1860, 2 F. & F. 94) qualifying a statement in the text setting out several reasons for which a servant may be dismissed summarily—among them if he "is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant." The Master of the Rolls went on to say that, since a contract of service was but an example of contracts in general, the general law of contract was applicable. If summary dismissal was claimed to be justifiable, the question must be whether the conduct complained of was such as to show that the servant disregarded the essential conditions of the contract of service. It was, no doubt, generally true that wilful disobedience of an order would justify summary dismissal, since such disobedience showed a deliberate disregard of a condition essential to the contract of service and, unless the servant obeyed the proper orders of the master, the relation was struck at fundamentally. But the statement of the law in *Halsbury* also said: "There is no fixed rule of law defining the degree of misconduct which will justify dismissal."—L.T.

REPORTABILITY: LAW AND FACT

Few people, probably, would quarrel with the statement that under a system of precedent the basic legal reason for reporting a case is that it establishes, extends or modifies, a principle of law. In our generation new law is made,

however, by statute, and the interpretation of statutes accounts for many reported cases. The statement with which we began is the classic rule. It is too narrow today. The truth is nearer to this—that there exists, and has existed for generations, a demand for reports of cases, and that in our main series of reports a balance is found between two extremes, namely, that of reporting every case (which would satisfy the demand and has had distinguished advocates, but might surfeit other readers) and that of keeping to the classic rule that we have stated, which in the last century has never satisfied practitioners and might indeed, if strictly applied, cause the precedent system to die of inanition rather than surfeit. The demand is based on what helps practitioners with their work. It is here that the question of reporting cases for fact becomes acute. The practitioner has to try to apply old principles amid new developments of science, in changed conditions and under varying conceptions of social duty. He is in need of guidance. The approach of Judges to problems arising at the present day explains to practitioners the application of old principles in new conditions; it may be a valued guide, even though new law is not created. The reporting of cases illustrating this application of established principles is essential to the existence of a sufficient degree of certainty to enable clients to be advised, and litigation to be brought, settled or fought on the real issues. That is the main purpose that reports serve, not solely that the decisions reported make or modify legal principles. It is the proper and useful function of reports to satisfy the need for guidance, avoiding excess so far as is possible.—*L.J.*

SUMMARY DISMISSAL

In *Spain v. Arnott* (1817), 2 Stark. 256, Lord Ellenborough found that in the case of a yearly servant, "after a refusal on the part of the servant to perform his work, the master is not bound to keep him on as a burthensome and useless servant to the end of the year." In his judgment in *Turner v. Mason* (1845), 14 M. & W. 112, Parke, B., took the words of Lord Ellenborough to mean that "the wilful disobedience of any lawful order of the master is a good cause of discharge" of the contract of service. However, in *Laws v. London Chronicle (Indicator Newspapers), Ltd.* (1959), *The Times*, 23rd April, the Court of Appeal took the view that it was going too far to say that every act of disobedience to a lawful order entitled the employer to dismiss the servant without notice. The Master of the Rolls was of the opinion that summary dismissal was justified only where the conduct of the servant was such as to show that he had disregarded the essential conditions of the contract of service but, for this reason, his Lordship conceded that summary dismissal was normally justified where the servant had wilfully disobeyed an order. In *Laws'* case, an action for damages for wrongful dismissal, it was held that the conduct of the plaintiff did not amount to such a wilful disobedience of an order as justified the defendant employer saying to her: "I treat the contract as ended and summarily dismiss you."—*S.J.*

FORGING A WILL

It is our impression that there are few prosecutions under s. 2(1)(a) of the Forgery Act, 1913, for forging "any will, codicil or other testamentary document either of a dead or of a living person," but recently at Norwich the son of a deceased was sent for trial charged with that offence in respect of a will which he maintained had been executed by his father. It seems that it is no defence for the accused to show that the will alleged to have been forged has been admitted to probate. Authority for this may be found in *R. v. Buttery* (1818), Russ. & Ry. 342, where nine Judges were unanimous in upholding the overruling of a contention that as probate of the will which the prisoners were alleged to have forged had been granted and remained unrevoked, it was

conclusive evidence of the validity of the will. A point of practical importance in relation to a will which is alleged to have been forged was resolved by *R. v. Jones* (1846), 1 Den. 166. In that case the accused put a forged will into his solicitor's hands ostensibly for the purpose of seeking professional advice, but in reality in the hope that the solicitor would act upon it. It was held that the will had not been given to the solicitor in professional confidence and that the rule as to privileged communications between solicitor and client did not apply. It is also an offence under s. 2(1)(a) of the 1913 Act to forge "any probate or letters of administration, whether with or without the will annexed."—*S.J.*

DEVELOPMENT OF CASE LAW

We may carry the matter one stage further. Sometimes it is the demand which seems to prevail over logic in law reporting. There is an outstanding recent example in the case of *Wintle v. Nye* ([1959] 1 All E.R. 552). We venture to repeat the view that we expressed previously in these columns that the decision was not truly reportable as it was a decision of fact—a view which the existence of some observations, in the leading opinion in the House of Lords, on the scope of admissible evidence in a probate case where fraud was not alleged gives us no occasion to alter. The case was ultimately reported because of the demand for it—it is memorable, but it carries the law no step beyond where it was before. *Qualcast (Wolverhampton), Ltd. v. Haynes* ([1959] 2 All E.R. 38), which gives rise to these paragraphs, was itself a case on the relationship of master and servant and the duty of care, and observations in one of the speeches might seem to lead to the view that there was little to be added by future cases on that branch of the law. Yet it was only in this year that two cases were before the House of Lords, *Davis v. New Merton Board Mills* ([1959] 1 All E.R. 346) and *Smith v. Austin Lifts, Ltd.* ([1959] 1 All E.R. 81); both of which were on the discharge of the duty of a master to his servant and both of which, it is suggested, were unquestionably important cases for report. The tide of the law is never still. Its advances are gradual, perhaps almost imperceptible, and yet when one looks back after many years the waters have swept forward. Reports show the ebb and flow of changing trends, but not every report can be expected to show a substantial change in legal principle.—*L.J.*

WRONGFUL DISMISSAL

WILFUL disobedience to the lawful and reasonable order of the master justifies summary dismissal. There is a number of authorities establishing this general proposition, most of them of venerable antiquity: among them is *Turner v. Mason* [(1845) 14 M. & W. 112] on which reliance was placed by the employers in the latest case on the subject, *Laws v. London Chronicle (Indicator Newspapers, Ltd.)* ([1959] 2 All E. R. 285). The servant's isolated act of disobedience in that case consisted in leaving a conference room when she was requested by the chairman and managing director of the company, her employers, to remain. In her action for damages for wrongful dismissal, she was awarded £ 45 by the county court Judge, and the employers' appeal to the Court of Appeal was dismissed. Commenting on *Turner v. Mason*, the Master of the Rolls said it would be going too far to assert that any of the Judges there laid it down as a proposition of law that every act of disobedience to a lawful order entitled the employer to dismiss the servant. Thus, in *Edwards v. Levy* [(1860) 2 F. & F., at p. 95] Hill, J., pointed out that a single instance of insolence in the case of a servant in such a position as that of a newspaper critic would hardly justify dismissal. The proper conclusion to be drawn, so the

Court of Appeal stated, was that since a contract of service was but an example of contracts in general, the general law of contract was applicable; and consequently, where summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of was such as to show that the servant disregarded the essential conditions of the contract of service. We may thus go back to the general statement, quoted in the opening sentence of this paragraph, which is taken from Halsbury's Laws (3rd edn.), vol. 25, p. 485, but it is also said there, as Lord Evershed, M. R., pointed out, that "there is no fixed rule of law defining the degree of misconduct which will justify dismissal".—*L.J.*

MUSHROOMS

THOUGH most of us know what we like it seems doubtful whether many of us realise what we eat. Of late, consumable goods have had more than their fair share of publicity. There was the case of Spanish champagne, then a report about the sugar or glucose content of soft drinks followed by a news item of cheese labelled "Cheshire" but nevertheless accurately marked "Imported" (from Holland). Now it seems that the West Sussex County Council has had doubts about the ingredients used in mushroom soup. A prosecution was brought against a company under the Food and Drugs Act, 1955, on the ground that a packet described as "Knorr Mushroom Soup" had a label stating that dehydrated mushroom was amongst the ingredients it contained. The prosecution was brought on the ground that the alleged dehydrated mushroom was dehydrated spores of fungus called *boletus edulis*. There was no suggestion that it was not of good edible quality and palatable with its flavour closely resembling that of a mushroom. A Latin dictionary produced in Court defined *boletus* as meaning the best kind of mushroom. Evidence was given that dried cultivated mushrooms were not satisfactory for the making of soup. The summonses were dismissed and the prosecuted company was allowed 100 guineas costs. It would be revealing to know under what name the prosecution considered the product concerned should be marketed. "Boletus soup" would mean nothing to the public; and if dried cultivated mushroom soup were sold it seems likely that complaints would be received that mushroom soup—as understood by the public—had not been supplied. A storm in a soup-plate!—*S.J.*

SHOPPERS AND SHOPKEEPERS

WHEN, in *Timothy v. Simpson*, (1834), 6 C. & P. 499, counsel suggested to Parke, B., that if a man advertised goods at a certain price, he (counsel) had a right to go into his shop and demand the article at the price marked, his lordship replied: "No, if you do, he has a right to turn you out". Some lawyers were reluctant to accept this as a correct statement of law, but the matter was finally settled and the view of Parke, B., upheld by the decision of the Court of Appeal in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Squithern), Ltd.*, [1953] 1 Q.B. 401. In that case, Somervell, L.J., said that "in the case of an ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed". We were interested to read that the opposite is true in Poland. According to a report in *The Times*, 26th May, of a recent case heard by the district Court of Katowice, a woman brought a successful action for damages against the State trade network for refusing to sell her a dress displayed in the window of one of its shops. The woman, who, as a result of the case, is said to have made herself the "heroine of shoppers" all over Poland, fancied the dress but was told that she could not have it as there were

none in stock. Her action succeeded as in Polish law the display of an article constitutes an offer to sell: in this country it is merely an invitation to do business and it is for the customer to offer to buy the goods. It is surprising to find that the State trader in Poland is in a weaker position in this respect than the private shopkeeper in England.—S.J.

TREASURE TROVE

IN his work on Prerogative, Chitty said that treasure trove is where any gold or silver "is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown" and he added that it must not have been "casually lost," or "purposely parted with" in such a way as to make it evident that the owner intended to abandon the property altogether. This definition has been adopted by the Courts on more than one occasion (e.g., by Farwell, J., in *A.-G. v. Trustees of the British Museum* [1893] 2 Ch. 598) and it seems to make clear the reason for a recent decision by the jury at the Southwark coroner's Court. After some articles from a church cellar and tower, including an old harmonium, had been burnt in the church yard, 135 gold sovereigns and 25 half sovereigns were found on the ash heap. The church council sold some of the coins, which must have been hidden in the harmonium, because the vicar thought that as they were found above ground the coins would not be classed as treasure trove. The jury took a different view, presumably because the coins were concealed in a "private place", other than in a house or in the earth. Perhaps it should be mentioned that the jury also found that the discovery of the coins had not been intentionally concealed, a common-law misdemeanour, and that the coroner, Mr. R. Ian Milne, expressed the hope that the vicar would be allowed to retain the amount which he had received in respect of the coins which were sold.—S.J.

LAWYERS AND LAWN TENNIS

THE name of lawn tennis probably originated in the fertile imagination of Arthur Balfour, who was a pioneer of the game. When coined, it was certainly an improvement on the paratitle of sphairistike. But it is a misnomer: lawn has never been the only surface on which the game was played, while the word tennis invites confusion with the very different parent-game of royal and ancient lineage. In deference to Wimbledon as the cradle of the game, one is tempted to suggest that lawn tennis could be more simply and suitably described by the one word "wimbling."

The game was invented in England in the late 1860s. In 1878, barely eight years after the first lawn tennis club had been formed at Leamington and only a year after the championships had started at Wimbledon, Middle Temple Lawn Tennis Club was founded. Soon Inner followed suit—the archives of its lawn tennis club date back to 1881—and by 1885 Edward Marshall Hall, for one, was "often to be seen—to the great distress of his clerk—in spotless white flannels, playing tennis in Inner Temple Gardens with Bouverie and others," after which, according to his biographer, "he would sit in chambers, quenching his thirst with large quantities of lemon squash made by himself." In turn, Gray's Inn Lawn Tennis Club was founded in 1902. Alone among the Inns of Court Lincoln's seems to have been ever impregnable to such distractions.

The couple of grass courts which lay in the gardens of both Inner and Middle Temple until 1939 have not yet been restored, and their respective clubs, ranking among the oldest lawn tennis clubs in the world, have regrettably lapsed into quiescence, at any rate for the present. Abolished also is the grass court which, with trees literally on its side-line, survived in Gray's Inn until 1955

But the firmly established tradition of the attachment of the bench and bar to lawn tennis has not died. It has been protected, co-ordinated and stimulated by an "umbrella" organisation, open at a modest subscription to all members of the English bench and bar, bar students and ladies closely related to any such member.

After months of thoughtful preparation, the value of which was enhanced by the astute guidance of the late Monty Temple, the Bar Lawn Tennis Society was formally inaugurated in Middle Temple on 20th April, 1950. Slade, J., presided, as indeed he has at all the society's meetings throughout the past decade, besides having added lustre and stamina to its team in many a match. Several subsequent general meetings were held somewhat incongruously in one of the Divorce Courts, at the hour when badminton is played in the Bear Garden, while the committee has customarily met over a cup of tea in Master Lawrence's chambers. At the inauguration, Lord Tucker, who is now president of the society, was among those who helped to draft its rules, which, through the earlier co-operation of Judge Aarvold, were largely based on those of the Bar Golfing Society. His Majesty King George VI and Her Majesty the Queen have successively been graciously pleased to grant the society their patronage. Its first president was the then Lord Chancellor, Lord Jowitt, who was active on its behalf until the very eve of his death. Many other prominent members of the bench and bar gave their support from the start; and a warm invitation to join the society is permanently open to those who have not yet done so. Two of its strongest players who, like others too numerous to name, have done much for the society, are Neill Cox and John Cope, "those two hyaenas" as they were dubbed by an astonished American opponent.

The society enables judges, counsel and bar students to participate in the game as a corporate unit. It plays twice a year against the International Lawn Tennis Club of Great Britain for the Slade Cup, at the respective homes of Lady Grosfield and Lord Iliffe, two generous patrons of the game. It annually, and usually at Hurlingham, competes against the solicitors, who surprisingly enough still have no lawn tennis society of their own. It also plays each year in and around London against a score or so of such clubs as are good enough to extend it their hospitality.

Further, the society plays in London and elsewhere against foreign lawyers. Thus, in the words of the late Lord Jowitt, "it is believed to be making a useful, though humble, contribution to international understanding." Without any extraneous financial assistance, it has managed to play as far afield as Baden-Baden, Bastad, Brussels, Deauville, Dublin, Düsseldorf, Florence, Paris and Rome. Several of these international engagements, such as that against the French lawyers for the Chrestell Cup and against the Swedish lawyers for the Parkfelt Cup, are repeated at appropriate intervals. Efforts to arrange such a match in Moscow have not yet met with success. But on 25th August, 1960, the society is due to play a return match against the American Bar for the Breed Cup at the Piping Rock Club on Long Island. Moreover the example of the society has inspired lawyers of other lands to form similar organisations and has given impetus to the salutary growth of international sporting contests between those of a common or similar profession.

Domestically, the society provides for its members annual tournaments which include a singles competition for a coveted challenge cup, presented by a founder member, the late Frank Riseley. He it was who at Wimbledon in 1906 shared the distinction with S. H. Smith of winning a final which is widely claimed to have eclipsed in enchantment any other doubles match ever played on the Centre Court. In addition, the society holds an annual gathering for all its members at the hospitable Hurlingham Club. The occasion is more than a social event, and is enjoyed by non-playing, no less than by playing, members. For the society, mindful of its peculiar heritage, uses its own "club day" to foster the collegiate spirit of each of the four Inns of Court by means

of a contest for an inter-Inns challenge trophy. The cup was donated by Sir Gerald Hargreaves, who a few years ago would hasten from a day on the bench to play a round of singles for the Riseley Cup against an opponent of a third his age and then in his studio design colours for the society—narrow scarlet and heliotrope, representing the High and county court benches, on a broad black background, signifying the bar.

For the amateur who likes to knock a ball about at week-ends, lawn tennis, with the advent of the cannon-ball service and smash-volley, has developed into perhaps too much of an exhibitionist exercise for the young athlete in the prime of condition, too much of a spectacle of speed and strength. From that point of view, it may be that the game should never have abandoned an early rule of Germain's lawn tennis that the ball had to be kept within the court on both its first and second bounce. Nevertheless, as an indication of the soundness of its current rules, lawn tennis continues to grow in popularity; and, as part of a tradition which is almost coeval with that of the game itself, the Bar Lawn Tennis Society has grown fast since its 27 founders met in Middle Temple some ten years ago. Its members now number 241; and, besides its other activities, the society has already played no less than 250 matches in England and in more than half a dozen lands beyond the seas.—*L.T.*

REVIEWS.

The Bombay Village Panchayats Act, 1958. By D. H. CHAUDHARI, B.Sc., LL.B., Pleader. POONA: N. R. Bhalerao, Law Book-sellers, 492, Shanwar, Near Shanwar Post Office. Demi 8vo. Pages x+268+viii. Price: Rs. 4.

THIS is a very useful commentary on the Bombay Village Panchayats Act, 1958. When the State of Bombay was reorganised it became necessary to enact a new legislation governing village panchayats in order to have a kind of uniformity in their formation. The powers and duties of these panchayats were consequently much enlarged. As the Village Panchayats Act is applicable to villages, sufficient care has been taken to see that the villagers easily understand its provisions. The learned author has carefully explained the various provisions relating to matters affecting the entire life of a village. The provisions of the Act have been carefully explained in simple language. All those who are in any way connected with the development of the village panchayats will find this book very valuable.

The Bombay Court Fees Act, 1959. By D. H. CHAUDHARI, B.Sc., LL.B., Pleader. POONA: N. R. Bhalerao, Law Book-sellers, 492, Shanwar, Near Shanwar Post Office. Demi 8vo. Pages viii+269+xii. Price: Rs. 8.

A COURT-FEE is a kind of judicial tax levied for the purpose of meeting the expenses of the judiciary. The Bombay Court-fees Act, 1959, repeals the Court-fees Act, 1870, in its application to the State of Bombay. The new Act has come into force from August 1, 1959. In explaining the provisions of this Act, the learned author has relied upon the case-law dealing with similar provisions of the Court-fees Act, 1870. Wherever the provisions differ he has carefully explained the idea underlying the new provisions. As the new Act has recently come into force lawyers will surely find this commentary very helpful.

The Bombay Law Reporter. JOURNAL.

December 15, 1959.

SAPINDASHIP AND RELIGIOUS EFFICACY.*

THE word Sapinda has been the subject of many a hard fought fight: whether the word Pinda in the compound word Sapinda should be taken to mean body or oblations has been the subject of warm discussion among the Hindu lawyers.

The *locus classicus* has been the comment of Vijnaneshwar in Mitakshara, Ch. 1, 52. Here is a brief outline of it.

"...She is called his Sapinda who has particles of the body in common with him. Non-Sapinda means not his Sapinda... Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father because of particles of his father's body having entered his. In like manner stands the grandson... Likewise (the grandson stands in sapinda relationship) to his maternal grandmother, and the rest through his mother... So also the wife and husband because they together beget one body."

As authorities for his view Vijnaneshwar quotes three texts. Aiteraya Brahman (आत्माहि जज्ञे आत्मन) "The man himself is born from himself"; Taittiriya Brahman (प्रजामनु प्रजायत) "Thou art born again in the off-spring" and Garbhopanishad (एतत्पादकौशिकं शरीरं) "The human body is made of six koshas"—three being derived from the father and three from the mother. It is mostly from this source that Vijnaneshwar derives material to amplify his statement. This type of Sapindaship he terms (अवयव अवयवसपिण्ड्यम्)—Sapindaship from blood particles.

In Vedic literature the word Pinda occurs a few times. It is found in Rig-veda (1,162.19) and the Taittiriya Samhita (iv. 6.9.3.) where it seems to mean "a part of the body of the sacrificial animal thrown into fire as an offering". In Taittiriya Samhita II. 3,8,2, and in Satapath Brahman II 4,2,24 the word means 'ball of rice' offered to the manes.

It is evident that both the meanings are familiar to the Vedic Rishis. The Dharmasutras also, specially Gautam, Vasishtha and Vishnu, show that the Sutrakars did contemplate some relationship between offering pinda and taking inheritance.

Vijnaneshwar has very intelligently explained how the meaning of Sapinda is restricted to certain degrees. He says "...Therefore, the word Sapinda though it applies everywhere (to a wide circle) by the expressive power of its component parts (literal meaning) is restricted to a certain definite sphere like the words 'Nirmanthya' and 'Pankaja'." The word Pankaja denotes 'springing from mud' but is restricted by usage to the lotus. So the seven persons related through male and five through a female are Sapindas.

The centre of the discussion is the text of Manu. (अनंतरः सपिण्डायस्तस्य तस्य घनं भवेत्). It has been variously explained. The chief difficulty lies in the interpretation of the expression

सपिण्डायाः and तस्य तस्य

The best explanation seems to be that of Kulluka who reads it as सपिण्डमध्यात् among the Sapindas. Dayatatava has a similar interpretation to offer.

*By Brij Kishore Sharma, LL.M., Assistant Professor of Law, Lucknow University, Lucknow.

Some writers take तस्य तस्य to refer to inheritor alone while there is another group of authors who regard the first तस्य as referring to the deceased and the latter to the inheritor.

The Dayabhag School, which has Jimutvahana as its foremost exponent, differs from Mitakshara in the meaning that ought to be attached to the word Sapinda. In this system it is taken to denote "the ball of rice" the "exequial cake" that is offered to the manes at the time of the performance of Parvana Shrad-dha. Sapinda means a person related with another through oblations of food. It is taken that Sapinda has different meaning in the context of Asaucha (impurity after death or birth etc.).

For his support from antiquity Jimutvahana relies on Manu and Baudhayana. Manu, IX, 186, says

"To three should libations of water be offered, to three is the cake offered the fourth is the offerer of these, there can be no fifth."

The text of Baudhayana runs thus:—

"The great-grand-father, the grand-father, the father, oneself, the uterine brothers, the son by a wife of the same caste, the grandson and the great-grand-son,—these undivided coparceners, they call Sapindas, the divided coparceners, they call Sakulyas, where there are no offsprings the property goes to the aforesaid."

It may be pointed out here that Colebrooke translated the above passage erroneously. We shall refer to it elsewhere. But that error was a consequence of attaching the meaning of Pinda to Daya as was done by Dayabhag without the least warrant. It seems that Jimutvahana himself was not sure of his theory for he mentions in Ch. XI, 6, para. 38 that though the learned may not agree on his principle (Upakaratva) yet they must abide by the order that he gives on the basis of Manu. The emphasis is more on the order than on the principle.

The result of the interpretation of Dayabhag is to erase the distinction between a Gotraja and a Bandhu. While it is the dictum of Yajnavalkya that Bandhus can succeed only on failure of Gotrajas which indicates that the two classes are to be distinguished from each other. Another anomaly that arises is that Jimutvahana states that sister's son belongs to the same Kula, though not to the same Gotra. This is opposed to the established practice and usual meaning attached to the word.

Kulluka while commenting on another Sloka of Manu, Ch. V 60, states that Sapinda relationship can subsist only among persons belonging to the same Gotra. That is why the maternal grandfather, though being a recipient of the cake is not regarded as a Sapinda.

In this context it is of interest to consider the summary of the law relating to connection between the inheriting of property and offering the Shraddha—the heirs beginning with the son and ending with the daughter's son, are entitled to inherit property and also to offer Shraddha, in the absence of these, though the father and others are to inherit the property the Shraddha is to be performed by the brother and the rest, even though the parents are there; the Shraddha is to be performed by the uterine brother, and only in his absence by the half-brother;—in the absence of these, by the father; then the maternal uncle and the teacher. In the absence of all these, the Shraddha is to be performed by the daughter-in-law; then the father-in-law. After all these the mother, then the grandsons of the brother.

An oft-quoted text in this respect is that of Vishnu (यश्चाप्यहुरः स पिण्डदायी). But the correct meaning of the text is that given by Pt. Ganganath Jha: "He who inherits the property is liable for offering the cake".

Apararka also quotes a Smriti text to the effect that when a man inherits a person's property, he should perform the Shraddha for him and also offer the cake to three ancestors.

• The Virmitrodaya which largely subscribes to the tenets of the Mitakshara

school also refers to the principle of religious efficacy in determining the preferential heir though not to establish the right to succeed.

The Judicial Committee of the Privy Council has, relying on Virmitrodaya, held accordingly. We shall consider a few important judgments on the point. It is submitted that to accord the Virmitrodaya the privilege of acceptance as universally acclaimed and unexceptionably followed commentary was an error which the Privy Council committed. The Virmitrodaya was composed in Orchha, a kingdom of little importance in Bundelkhand, and though it contained double the number of slokas of Mahabharata yet it was never taken to represent the consensus of opinion of the Hindu lawyers. With respect, it was not apposite for the Judicial Committee to make its principles binding on every Hindu who may happen to follow Mitakshara.

In the case of *Buddha Singh v. Lattu Singh*,¹ their Lordships of the Privy Council laid down (p. 227):

"...It is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from sapinda-relationship, or community of blood, in judging the nearness of blood-relationship or propinquity among the gotrajas, the test to be applied to discover the preferential heir is the capacity to offer oblations."

In *Vedachela Mudaliar v. Subramania Mudaliar*², the Judicial Committee again held that the religious efficacy may be taken as a guide to prefer one of the two Bandhus as heirs. In *Jatindra Nath Roy v. Nagendra Nath Roy*³, the Privy Council again reiterated emphatically that as between Bandhus of the same class, the spiritual benefit conferred upon the propositus by offerings is a measure of propinquity to him. In a Madras case *Muttusami v. Muttukumarasami*⁴, the High Court held referring to Virmitrodaya that

"...This passage indicates that as between bandhus of the same class, a rule of preference may be found in the quantity of spiritual benefit which they confer."

In the case of *Lallubhai Babubhai v. Mankuvarbhai*⁵, the High Court observed that the burden rests upon the plaintiffs to show that Vijnaneshwar and Nilkantha regarded Sapinda relationship as resting upon a different basis for the purposes of inheritance from that in the Achara Kanda and in the Sanakar Mayukha. The counsels failed to prove it.

Vijnaneshwar after defining Sapinda insisted that the same meaning should be drawn wherever the word was used. In *Sham Singh v. Kishun*⁶, Justice Mukherjee said that we must take it as settled beyond possibility of controversy that the version of Colebrooke is inaccurate and that the term Sapinda is used by Vijnaneshwar not to indicate connection by funeral oblations, but of corporal particles.

Dayabhag regarding the definition of Daya (दाय) (Ch. I. 51) says:—

"Therefore, the word heritage is used to signify wealth, in which property, dependent on relation to the former owner, arises on the demise of that owner.

(उतश्च पूर्वस्वामीसंबन्धाधीनं तत्स्वाम्योपरमे
यत्र द्रव्ये स्वत्वम् तत्रम् निश्चयो दायशब्दः)

In Mitakshara दाय has been explained thus: Ch. I. sec. 1,2.

"Here the term heritage signifies that wealth which becomes the property of another, solely by reason of relation to the owner."

The employment of the word solely excludes any other cause. Sangraha-kara states that what has come to one through the father and through the mother is expressed by the term Daya. (पितृद्वारागतं द्रव्यं मातृद्वारागतम् च यत्).

According to Nighantu दाय is that property which belonged to the father and comes to be partitioned.

1 (1915) 42 I.A. 208, s.c. 17 Bom. L. R. 1022.

2 (1921) 48 I.A. 349, s.c. 24 Bom. L.R. 649.

3 (1930) 58 I.A. 372 s.c. 33 Bom. L.R. 1411.

4 (1892) 16 Mad. 23, 80.

5 (1876) 2 Bom. 383, 427.

6 (1907) 6 C.L.J. 190, 201.

Vijnaneshwar has further attempted to elucidate whether property is temporal. He contradicts Gautama (Ch. 1, sec. 1, 8 and 9) and proves his proposition that property is secular by logical deduction. Property is worldly for it effects transactions selective to worldly purposes "Whatever does effect temporal ends is temporal as rice and other similar substances. Such too is property. Therefore it is temporal". It is evident from the above definition that the concept of property has hardly any connection with religious duties that are performed after the death of the owner. Even the Dayabhag has abstained from defining it as 'dependent on spiritual benefit' instead of 'dependent on relation'.

Mitakshara has further refuted the relationship by taking the instance of the widow's right to inherit (Chap. II, Sec. 1, 15):

"Besides it may be here asked; is the appointment to raise up issue a reason for the widow's succession to the property? Or is the issue, borne by her, the cause of succession? If the appointment alone be the reason, it follows that she has a right to the estate, without having borne a son; and the right of a son subsequently produced does not ensue."

Moreover, in order to firmly root the argument that the nature of property is strictly temporal there is another argument of Vijnaneshwar, Ch. II. sec. 22 and 23:

"Besides, if wealth be designed for sacrificial uses the argument would be reversed by which it is shown that the careful preservation of gold (inculcated by the passages of Veda) "Let gold be preserved" is intended not for religious ends but for human purposes."

The reasoning here alluded to occurs in the Mimamsa Ch. III, sec. 4, 12, and the reasoning is incompatible with the notion, that wealth is intended solely for sacrificial uses.

It is a rule of interpretation of Hindu scriptures that if two reasons are given in the same clause, for any particular proposition, the reason last given is said to be by way of Sadhak or additional support and may be rejected. For example Vijnaneshwar in Ch. II, sec. I, 22-25 arguing against the statement that the wealth of a regenerate man is designed for religious uses, states one proposition, adds another and further supports his contention twice. Thus in all he submits four points. According to principles of exegesis the weight attached to the last is the minimum. Similarly Jimutvahana in explaining the heritable right of the widow, the daughter etc., and laying down the order of succession quotes express texts and then supports them on the additional ground of the doctrines of spiritual benefit. This additional ground must suffer rejection in view of the principles of exegesis which have been admitted by Jimutvahana himself.

Shrikrishna, an eminent scholar and commentator of Dayabhag, has himself disregarded the additional ground. He does not even mention it and only states the heirs as they are given in the express texts. Ch. XI, Sec. VI. 36.

In Ch. XI, Sec. 1, 32, Jimutvahana quotes Manu (मनु) Ch. 9/137.

पुत्रेण लोकाञ्जयति पौत्रेणानंतमस्ते ।

अथ पुत्रस्य पौत्रेण ब्रह्मस्याप्नोति विष्टपम् ॥

"By a son, a man reaches heaven, by a grandson remains there for a very long period and by the great-grand-son he obtains the abode of the sun."

After this he comments that though the rights of sons etc., are clearly obtained they also can be inferred by way of reasoning because the wealth which devolves upon the sons etc., benefits the deceased, since the male descendants produce great spiritual benefit to their ancestor. He supports his contention on the ground that Manu names them as heirs after a statement of the spiritual benefits conferred by them and relating it by "therefore".

But a perusal of Manu Ch. IX, 185, and Ch. IX, 165 will make it evident that the right to inherit is not at all taken by Manu to be an incident of the

capacity to offer oblation to manes, or dependent upon the competency to perform Parvana Shraddha.

The error in the decision of cases arose from the overlooking of the above mentioned principles of interpretation.

The genesis of the error can be traced to the case of *Govindlal Shaha v. Anand Lal Ghose*.⁷ That Mr. Justice Hobhouse obviously fell into an error is quite apparent. He reiterates that (p. 27):

"two proposition seem to me to follow first that every one is competent who is not by this chapter (Ch. V Dayabhag) declared incompetent and secondly that everyone who can present funeral obsequies is competent to inherit"

and then on page 28 he states as derived from the above chapter that the principle on which the Dayabhag law of inheritance proceeds is that the right to inherit is the reward of the spiritual benefit conferred on the deceased owner of the property. In the Full Bench decision Mr. Justice Mitter also committed the same mistake of disregarding a vital rule of interpretation. He moreover erred in another place when he stated that the real object that the Dayabhag had in view was to establish a general principle of its own. There is no warrant at all for this proposition. What Jimutvahana attempted was a commentary on Yajnavalkya, and even if it be granted that he intended to lay down his own principle, there is entirely no basis for giving his principle a weight greater than the Smriti of Yajnavalkya.

The question now arises is that why at all should the doctrine be relied on by Jimutvahana. The explanation is to be found in the character of the writings of those times as mostly polemical because discussion was the chief way of imparting education and in the second place in the recognition that the principle was a point of current controversy at that time though the scales seem to be slightly in the favour of the view of Vijnaneshwar.

The second proposition is founded on the ground that Vijnaneshwar who wrote about three centuries ahead of Dayabhag found it expedient to refute the principles and deny it any place. In Ch. 1, 52, he writes:

"If Sapinda relationship be alleged to be founded upon the connection arising from the presentation of exequial cakes, then no such relationship is possible with relatives connected through the mother in the mother's line, nor with the sons of brothers and others."

The above passage shows that some of the Pandits did entertain the idea that Sapindaship has a link with the competency to offer the Parvana Pinda.

Even before Jimutvahana, Aparaka had overcome the objection put forth by Vijnaneshwar. He states:

"Among these the uterine brother is a nearer Sapinda to the deceased, than any other propinquous kinsman, because he presents the water and the cake to the same ancestors to whom the deceased was bound to present them. The nephew is a little more remote than the uterine brother, because the former gives a cake to the father which has no connection whatever with the deceased. The son of a nephew is more remote than the nephew himself, because the son presents two Pindas which have no connection with the deceased."

But what is worth being noted is that he does not say anything about the Bandhus succession on the principle of spiritual benefit.

In a great many cases whether the emphasis is on the express texts or on the theory of "Upkaratva" the result is identical. Hence we find Jimutvahana and his disciples relying on the principle by way of Sadhak.

Srikrishna, who is the author of a learned commentary on Dayabhag, observes while commenting in Ch. XI, Sec. VI in para. 33 that if the capacity to benefit the soul of the deceased person had been the foundation of heritable right, then the person who gives pinda to the deceased at Gaya or the person who immerses his ashes in the holy waters of the Ganga ought to inherit before all others. As an opinion of a learned Pandit, it is very important to note this.

It is worth noting at this juncture that the most important rites and solemnities after the demise of a person for his benefit are the sixteen Shraddhas the last of which is the Sapindikarana because it is after "Sapindikarana" that the dead leaves the Pret Yoni. The next in importance are the anniversary and the Nandi Mukh Shraddhas. Parvana Shraddha is not a necessity but at the most a spiritual luxury. It is because of this reason that few even among the learned have the knowledge of this Shraddha and there is hardly any Hindu who performs it.

If the succession is judged according to the performance of the sixteen Shraddhas then the order of succession shall be wholly different from what Jimutvahana has delineated.

Another objection raised against the principle is housed in the Dayabhag itself. In Ch. IV, Sec. III, para. 37 it is stated that the son-in-law of a female succeeds to her Stridhan, because the son-in-law by giving Pinda may benefit the soul of his mother-in-law and father-in-law. Now if the son-in-law is capable of benefitting the soul of his father-in-law, then on the spiritual principles he must be able to claim as heir to the father-in-law as well as to the mother-in-law. But while Jimutvahana gives him the pride of a place in the list of heirs to females he is denied any right as heir to males.

Manu has expressly cut the ground on which afterwards Jimutvahana tried to build the theory, in

गोत्ररिक्त्वे अनयितुर्नहरेदन्निम सुतः ।

गोत्ररिक्त्वातुगः पिण्डो व्यपैति ददतः स्वया ॥

"The adopted son shall not take the Gotra or property of his progenitors the cake follows the Gotra and the property; for him who gives away his son, the funeral offerings cease."

It has been clearly indicated that Pinda follows property and not the opposite. Another text on the same point is from Smriti

"When a man inherits a person's property, he should perform the Shraddha for him and also offer the cake to three ancestors." (G. N. Jha, Vol II, 509).

Another reason assignable to the new interpretation of Jimutvahana is that the enumeration of heirs by Vijñaneshwar was not universally acceptable. It is well known that there is some conflict in the Smritis of Manu and Yajñavalkya. Yajñavalkya states that after brother's son the Gotrajas and the Bandhus take the heritage. But he has nowhere defined as to who are the Gotrajas and the Bandhus, and at no place explained what is the order of succession amongst them. Vijñaneshwar later on defined Gotrajas as agnates and Bandhus as cognate Sapindas. He thus enabled Samanodakas to inherit before the Bandhus in the face of a text of Manu that Samanodakas can inherit only in default of Sapindas.

Jimutvahana on the other hand laid down a line of succession in accordance with Manu after defining Gotrajas and Bandhus and placing Samanodakas in the last. One must admit that this is more symmetrical. The novel definition of Sapindas made it easier to resolve the competing claims than it was in the case of the incomplete enunciation of rules by Mitakshara. It can be speculated that Jimutvahana who wanted to systematise and simplify the law in regard to succession relied on the theory of spiritual benefit to make it palatable to the Pandits of his day. He also relied on Baudhayana and Manu which are cited in Ch. XI, Sec. 1, paras. 37, 40.

A loophole in Jimutvahana's new twist is admission of maternal relations. He gives them entrance on the reasoning that during a man's life-time he is bound to offer Pindas to his maternal ancestors and after his death, this wealth may, therefore, be taken by maternal relations who give pindas to the same ancestors and thus perform acts productive of religious merits to him. But this is quite unacceptable. It is not proper to suggest that a person by giving a pinda to a deceased ancestor brings any benefit upon the souls of third persons who used to give pindas to the same ancestor in their life-time. It is

beyond dispute that maternal relations cannot confer any benefit on the soul of the deceased person. The above reasoning also assures that even after death the deceased exercises control and ownership on the property, and that even after death there exists the sacred obligation to offer oblations to manes. Moreover, the Parvana Shraddha of the maternal ancestors can take place only along with the performance of the Shraddhas of the paternal ancestors. When a person dies and is relieved of the obligation to perform the Shraddhas of the paternal ancestor it is difficult to imagine that there still subsists a duty to perform the rituals for the benefit of the soul of maternal ancestors. The Sastras impose duties on the living and not on the dead.

Another point which demands elucidation is the proper importance that is to be attached to a primary or a secondary Pinda. The father's daughter's son takes before grandfather. The reasoning would be that he offers three secondary Pindas while grandfather gives only two primary Pindas. But it is veiled in mystery as how to ascertain the relative importance of these Pindas. The above case when compared with that of the brother's grandson and father's sister's son becomes more inexplicable because in the latter case the brother's grandson who offers only one primary Pinda in which the deceased participated supersedes the father's sister's son, the offerer of three secondary Pindas. The only satisfactory explanation to these anomalies is that neither the heritable right nor the order of succession depends on that principle.

It may also be pointed out that there is absolutely no authority for the proposition that offerings to the nearer ancestors are more effective than offerings to a remoter ancestor.

A glance at the list of persons competent to perform Shraddha and their order will make it clear that the order varies from the order of succession in the Dayabhag school.

Further among several brothers it is only the eldest brother who performs the Shraddha, but all the brothers have an equal right of succession. The wives of ancestors are also recipients of Pindas etc., but it is nowhere held that the offerer should succeed to their Stridhan. It cannot be maintained that it is only the male who derive religious benefit and not the female.

According to the rules regarding performance of Shraddhas if a person's father and grandfather are alive then he must offer Pindas to whom his grandfather offers. This rule extends the link of spiritual benefit to the third, fourth and fifth ancestors. In case the father only is alive then the bond extends to four ancestors. But the order of heirs has no such corresponding flexibility.

Summing up after the preceding survey it is submitted that the real basis of the Dayabhag rule seems to be that the genesis of the theory was to support the custom prevalent in the country by which certain cognates claimed inheritance. Udyot and Medhatithi had already subscribed to the theory. The rules relating to inheritance are closely allied with the offering of funeral oblations but it is wholly unwarranted to assume that spiritual bargain is the real basis of succession according to Hindu law. This error was enlarged by the British Courts and a substantial part of it was due to the limitations of their province of study to translations by Colebrooke.

The modern legislation regarding the personal laws of the Hindus has brought fundamental changes in numerous basic conceptions of the Hindus. The Hindu Succession Act has, however, refrained from using the expression Sapinda which was not always clear in its connotation and uniform in its import. The Hindu Marriage Act, 1955, however, has adopted the age-old terminology. It must be conceded that the use is hapless and is bound to create confusion. But as we are not concerned here with the computation of degrees etc., we may properly abstain from dwelling upon the subject. But it is of interest to note that the new definition as given in s. 3(f)(4) has struck off all relations between religious efficacy and Sapindaship. The relationship is to be based only on computation as provided in s. 3(f)(4) and the Explanation.

GLEANINGS.

A POPULAR DELUSION

IN the course of his judgment in the memorable case of the lady and the unwholesome snails, His Honour Judge Bladgen referred to "the popular delusion that is floating about that when anybody suffers a calamity of any sort somebody else has got to pay." The learned county court judge recalled the fact that "the general rule is that the tree lies where it falls." We thought of these observations when we read the newspaper reports of a recent case before Streatfeild J., at Bristol Assizes. The plaintiff alleged that after an operation for the removal of the little finger of his right hand he was too tightly bandaged and that, in consequence, he developed gas gangrene and two more fingers had to be amputated. His lordship admitted that the plaintiff had suffered a misfortune of the first magnitude but he was satisfied that no individual had been negligent. In view of this, he gave judgment in favour of the defendants, the board of governors of the hospital in which the operation was performed, and added: "Surgeons, doctors and nurses are not insurers. They are not guarantors of absolute safety. They are not liable in law merely because a thing goes wrong. They are not workers of miracles." It is easy for the layman to forget that the law merely requires that such professional people should exercise professionally that skill, perception and knowledge which belongs to the ordinary practitioner, not that of the topmost specialists in the land.—S.J.

SERVANT'S INJURY AS BREACH OF CONTRACT

NORMALLY the question whether injuries suffered by a servant in the course of his employment are to be regarded as a breach of a contractual duty to take reasonable care for his safety or as a tort is of little more than academic interest. If there is anything to choose between them tort may be said to have the advantage that there is no need to prove any particular term of the contract of service, and a good background of cases to assist in clarifying the nature of the duty. There is an argument on the question whether the damages that can be claimed in tort are greater than those which can be claimed in contract; this arises from a comparison of the wording of the rules laid down in *Hadley v. Baxendale* (1854), 9 Exch. 341 for claims in contract, and *Re Polemis* [1921] 3 K.B. 560 for claims in tort. The writer takes the view that it can be shown that the area of causes encompassed by the rule in tort is larger than that in contract. But it is rare that the question arises at all, and, as far as is known, it has not arisen in cases such as we are now considering.

Indeed where the distinction has been discussed it seems to have been treated as of no value. Only recently in *Davie v. New Merton Board Mills, Ltd.* [1959] 2 W.L.R. 331; Viscount Simonds said (at p. 336): "The same act or omission by an employer may support an action in tort or for breach of an implied term of the contract of employment, but it can only lead to confusion if, when the action is in tort, the court embarks on the controversial subject of implied contractual terms." If the difference was thought to be of importance the contrast between the two bases for an action would not "lead to confusion" but would, on the contrary, be important to study in order to compare the position under the one type of claim with the position under the other.

There are cases, however, where the distinction has practical significance, one of which was the recent decision of *Matthews v. Kuwait Bechtel Corporation* [1959] 2 W.L.R. 702. First, there is the case of a foreign employer where leave may be required for service of proceedings out of the jurisdiction—that was the case here—and, secondly, there is the county court jurisdiction on the matter of costs.

In *Matthews'* case the plaintiff entered into a contract with the defendants, a Panamanian company, to serve them as a foreman millwright in Kuwait. The contract was signed in England by the plaintiff and by the defendants' agents, and was expressed to be governed by the law of England. It was a long, printed document but contained no clause imposing any duty on the defendants to take care for the safety of the plaintiff. Shortly after arriving in Kuwait the plaintiff met with an accident by falling into a trench whilst working on a pump, and suffered injury. It appears that he stepped back to avoid a load swinging from a crane.

The plaintiff alleged that there was to be implied in this contract a term by virtue of which the employers agreed "to take all reasonable care by themselves, their servants or agents to provide and maintain safe premises, plant and equipment at any place or places" at which the plaintiff was to work and "to institute, operate and maintain a safe system of work and not to expose (the plaintiff) to any unnecessary risk of injury..."

Leave to serve the proceedings out of the jurisdiction was obtained but the defendants applied to have the writ set aside on the ground that any claim of this nature must be brought in tort and that there is no jurisdiction to grant leave for claims in tort not arising in England.

It was conceded by the defendants that a duty of the type claimed as an implied term did arise between the parties but not under the contract. There was a provision which formed part of cl. 12 of the contract to the effect that the agreement "embodies the whole arrangements between the parties with reference to the employment agreement hereby constituted, and all previous correspondence and negotiations, whether oral or written, shall be excluded." Sellers, L.J., said, in regard to that provision, "I think none of those terms is anything like adequate to exclude, or, indeed, was ever intended to exclude, any term which would normally be implied into the contract if in fact there are such terms."

His lordship turned to *Lister v. Romford Ice and Cold Storage Co., Ltd.* [1957] A.C. 555 and read extracts from several of the speeches showing that the House proceeded in that case on the basis that there were obligations on the master and on the servant to act with reasonable care in regard to their contractual duties. Viscount Simonds said that it made no substantive difference whether the claim were framed in contract or tort. Lord Radcliffe regarded the inquiry into the distinction as raising an artificial question.

The Court of Appeal came to the conclusion that the authorities postulated a principle that the duty of care for the safety of a servant which is imposed on a master may be treated as implied in the contract of service, or arises under the law of tort, and that the servant may at his option frame the action under either head.

The position in regard to costs in the county court, where the same problem arises, was not, of course, relevant to this action; but it was pointed out that the question does not usually arise because costs in tort are greater than those in contract and claims for injuries are usually framed in tort.

References to a rule contrary to that laid down by this decision were made. In *Salmond on Torts*, 12th ed., p. 130, and in *Munkman on Employer's Liability*, p. 60, it is contended that claims such as this lie only in tort. So, too, in *Riley v. Baxendale* (1861), 6 H. & N. 445, such a view was expressed. The court considered that the rule suggested by the latter decision could not stand in the light of what has been said in the House of Lords on this matter, and consequently refused to follow it. It was consigned "to the limbo of lost causes."

We must not overlook the rule that one can within very wide limits make any arrangement one likes by contract. Consequently, if cl. 12 of the contract in this case had been suitably worded would it not have excluded the implied contractual term for safety of the servant? If the clause had expressly excluded all implied terms, would this have been sufficient? One does.

commonly come across clauses similar to this one but more wide in their scope. Could one argue that it is contrary to public policy to exclude the contractual term for safety so as to preclude a servant who is employed by a foreign firm from bringing an action in his native country—the place to which he will normally return if injured? This really raises another question: If claims for injury can be dealt with by the English courts when framed in contract why cannot they be dealt with when framed in tort? Exactly the same facts are in issue and the same principle to all intents and purposes. Consequently it would be reasonable to call for an extension of the provisions of Ord. 11 so as to allow service out of the jurisdiction for claims in tort where they could be framed in contract except that the contract expressly excludes the claim.—*S.J.*

A NICE CUP OF TEA

THE Germans have their beer gardens; the French have their cafés; but only the English have tea rooms as a national institution and tea as a national drink. For them it is rest in labour, balm of hurt minds, great nature's second course, centre of social intercourse. If it comes to the point there are few things an Englishman would rather have than a nice cup of tea. Tea has given its name to one of the great sustaining meals of the English day and, except in the most sophisticated circles, it haunts all the others. It is just over three centuries ago that it first decisively bedewed the English social scene, for it was in 1658 that the Sultan's Head near the Royal Exchange advertised "that excellent and by all physicians approved China drink called by the Chineans toha and by other nations tay alias tee." It was also called cha or chaw and was already known in an esoteric way to English travellers in the East, since in 1615 an agent of the East India Company named Wickham, resident in Japan, wrote to a colleague in Macao asking for "a pot of the best sort of chaw."

The origins of tea emerge faintly from the mists of remote antiquity. Perhaps they go back to the legendary Chinese Emperor Chinnung more than 4,000 years ago. Certainly it was known in the sixth century and was already a taxable commodity in the eighth century. By the ninth century its cultivation had spread from China to Japan. While the tax collector exploited it, a contemporary lyric poet sang its virtues: "Tea tempers the spirits, harmonises the mind, dispels lassitude and relieves fatigue, awakens thought and prevents drowsiness, lightens and refreshes the body." The most fervent English tea drinker could say no more.

The tea trade with Europe seems to have been started by the Dutch in the early 17th century. In the middle of that century a little tea was still a gift fit for a king and in 1664 the East India Company presented two pounds of it to Charles II. Pepys, ever full of curiosity, made its acquaintance on 25th September, 1660. "I did send for a cup of tee (a China drink) of which I never had drunk before." By 28th June, 1667, Mistress Pepys had discovered its virtues: "By coach home, and there find my wife making of tea: a drink which Mr. Pelling, the pothecary, tells her is good for her cold and defluxions." Henceforth the great seas of beer, which had hitherto rolled unchecked about the stomachs of the English, were met and challenged by a tide of ever-increasing strength, and, in the long run, the floods of tea proved powerful enough to sweep aside even the insidious cross-current of gin, so destructive in the 18th century.

In the second half of that century tea ceased to be an indulgence for the better-off and became a commonplace at the labourer's table, not only the usual beverage in the morning and evening but generally drunk in large quantities at his midday dinner. By this time it was inevitably attracting the attention of the law. The authorities became concerned about tea in two respects, first • the evasion of duty by smuggling on a tremendous scale, connived at by all

classes, and secondly the adulteration or, as it was charmingly called, the "sophistication" of tea. The smuggler was as much part of the rural community as the grocer or the carrier. On 29th March, 1777, Parson Woodforde noted in his diary: "Andrews the smuggler brought me this night a bagg of Hyson tea six pound weight...I gave him some Geneva and paid him for the tea at 10s. 6d. per pound." Acts of Parliament were passed imposing penalties for smuggling tea, coffee and spiritous liquors and seeking to encourage both the smugglers and the dealers to whom they sold to inform against each other. A particularly drastic Act was passed in 1779. Nevertheless, in 1784 it was reckoned that less than half of the 13 million pounds of tea consumed in the United Kingdom actually paid duty.

Fraudulent dealers in tea practised two principal cheats, reselling used tea leaves and mixing in other ingredients. A pamphlet of 1780, entitled "Advice to the Unwary," cited the case of the widow Burket of Beccles in Suffolk, formerly a tea dealer, at whose house a chest was found after her death, full of dried tea leaves which she had begged from the King's Head Tavern, evidently for resale. The pamphlet demanded the utmost newspaper publicity for cases of adulteration to warn people "not only to detect and punish such delinquents but to preserve themselves, as no one can tell what pernicious effects (though secret and slow) the continual drinking of a hot infusion of different leaves manufactured with terra japonica, logwood, copperas and various ingredients may have upon the strongest constitution." It quoted a letter dated 1778 from two of the most respectable grocers in Norwich relating an experiment with a mixture of sloe leaves and used tea leaves dried again: "Four of the most capital tea dealers in this city then present were unanimously of opinion that it might easily have passed them for real tea."

By sect. 5 of an Act of 1724 (11 Geo. 1 c. 30) a penalty of £100 was imposed on any dealer in tea who adulterated it or mixed it with terra japonica, or with any drug or with any leaves other than leaves of tea, or with other ingredients. By sect. 11 of another Act of 1731 (4 Geo. 2 c. 14): "Whereas several ill-disposed persons do frequently dye, fabricate or manufacture very great quantities of sloe leaves, liquorish leaves, and the leaves of tea that have been used or the leaves of other trees, shrubs or plants in imitation of tea, and do likewise mix, colour, stain and dye such leaves and likewise tea with terra japonica, sugar, molasses, clay, logwood, and with other ingredients, and do sell and vend the same as a true and real tea to the prejudice of the health of His Majesty's subjects the diminution of the revenue, and the ruin of the fair trader," it was made an offence so to adulterate tea, to offer adulterated tea for sale or to have possession of it, subject to a penalty of £10 per every pound. The Adulteration of Tea Act, 1777 (17 Geo. 3 c. 29), regulated the whole subject, imposing a penalty of £5 for every pound of adulterated tea manufactured or sold. In the event of non-payment the offender was to be imprisoned for not less than six months or more than twelve months.

A curious case came before the Lord Mayor of London on 11th October, 1833, when application was made to burn 11,000 lbs. of a preparation called "British leaf," an imitation of tea, seized by the Excise. It contained elm leaves, sloe leaves, apple leaves, poplar leaves, willow leaves and rose leaves, and a wing of a maple seed had been found in a sample. It was not represented as genuine tea. The discussion of its wholesomeness resolved itself into a battle of experts. Mr. Gilbert T. Burnett, Professor of Botany at King's College, said that he had no objection to a cup of the infusion now and then, but he objected to the ordinary use of it. He said he spoke as a medical man as well as a botanist. He did not think it wholesome; it was astringent. He said it bore a strong resemblance to tea. He added that these leaves contained some of the most active poison in the vegetable world, prussic acid. On the other side, Mr. John F. Daniel, Professor of Chemistry at King's College, said that he had not the least objection to drink the infusion. There was not the slightest particle of prussic acid in it and there was nothing deleterious in the sample. He should say that.

green tea was more astringent. After retiring to his private room the Lord Mayor said that he and his advisers were unanimously of opinion that the British leaf should be condemned. The whole quantity was accordingly burned.

Tea is still protected by the law, although the 18th century Acts were repealed in 1958. The chief wall against adulterated imports is now sect. 229 of the Customs and Excise Act, 1952, which deals with imported tea found to be mixed with any other substance "exhausted" (that is "deprived of its proper quality, strength or virtue by steeping, infusion, decoction or other means"). How zealous may be the application of this Act was demonstrated by a letter in *The Observer* last year. Until quite recently, said the writer, jasmine scented tea, which has a most delightful flavour, was being sold in England at 20s. a pound. "Then quite suddenly we learned that no more would be imported because the Board of Trade had decided that mixing flowers with tea was adulteration. A few months later the merchant from whom I buy tea told me that two friends of his had recently returned from a visit to China bringing with them six tins of jasmine-scented tea. The customs officer wished to throw the tea into the sea, but, yielding to the violent protests of the travellers, he allowed them to take the tins of tea ashore after they had been labelled 'Unfit for Human Consumption.' " No doubt some official at the Board of Trade feels that jasmine-scented tea is too "sophisticated" for the era of the Common Briton.—*L.T.*

NOVATION AND PROPER LAW OF CONTRACT

THE decision of the Court of Appeal in *Re United Railways of the Havana and Regla Warehouses, Ltd.* ([1959] 1 All E.R. 214) is a valuable contribution to the law of the discharge of a contract in the field of private international law, particularly in these days when foreign government by legislation or administrative act interfere with the contracts of private parties. The case also gives help in the question whether a *renvoi* has any place in the law of contract; and also whether an act, to be actionable in tort in this country, must be an act not justifiable according to the law of the foreign country concerned.

The facts of the case were complex and arose out of a claim by an American trustee to prove in the liquidation in London of an English company operating a railway in Cuba. In 1921 the company raised \$6 million in the United States for the purchase of rolling stock by means of a modification of what is known as the Philadelphia Plan. The company issued fifteen-year 7½ per cent. Trust Certificates carrying interest and repayable at a premium to be administered by a trustee company incorporated in the State of Pennsylvania. At the same time the company caused to be incorporated in the State of Delaware a subsidiary corporation and assigned to it the rolling stock; the subsidiary in turn leased to the parent company the rolling stock at a rental to be paid to the trustee company in Philadelphia. The railway company as lessee covenanted not to assign its right or interest in the rolling stock. The lease included a provision that the parties intended to enter into it and execute it in accordance with the laws of Cuba and register it under those laws and to record it as might be required by United States law. The trustee company was to re-assign the rolling stock to the subsidiary company when all payments had been made. The rental from the lease provided funds for the service and payment of the debt through the trustee company. By 1953 the railway was very much in arrears under its obligation to the trustee company and in that year became the subject of state acquisition under the laws of Cuba. This acquisition took the form of a sale by the railway company of its undertaking and assets. In 1954 the railway company went into voluntary liquidation in England. The successor to the trustee company lodged a proof for instalments unpaid under the lease which was rejected by the liquidators. In an appeal against rejection, which first came before Wynn-Parry, J., the primary ques-

tion raised was whether the railway company's obligations to the trustee company under the lease still subsisted or whether they were discharged by the act of acquisition by the Cuban government. The learned Judge held that the railway's obligations to the trustee still subsisted, and his decision was upheld by the Court of Appeal. They clearly still subsisted if the proper law was that of Philadelphia; if the *lex situs* of the debt, namely Cuban law, applied, or if Cuban law were the proper law of the contract, it might be otherwise. Counsel for the liquidator contended that by Cuban law the sale of the railway to the Cuban State had the effect of transferring liability to the latter. In other words, there was a compulsory novation which forced the trustee to accept henceforward the Cuban State as its debtor. In the Court of Appeal, Jenkins and Romer, L.JJ., concluded that the law of Philadelphia was the proper law; Willmer, L.J., that it was the law of Cuba. However, all three learned Lords Justices agreed that it was immaterial which was the proper law since they accepted the evidence of a Cuban lawyer that the acquisition by the Cuban State amounted to no more than an agreement between the company and the Cuban State to the effect that as between those two parties the State should discharge the liabilities under the lease and agreement and indemnify the company in respect thereof, leaving wholly unaffected the rights of the creditors concerned against the company. Therefore, it was not necessary for the Court to pass upon the liquidators' contention that there had been a compulsory statutory novation. Nevertheless, though *obiter*, the Court's views as to which law applied in the case of a compulsory novation of a debt through governmental action carry weight.

In the *Havana Railways* case the only two systems of law that could apply were those of Pennsylvania or of Cuba. The former would apply if it were the proper law of the contract or if the law of Cuba, operating the principle of *renvoi* applied, Pennsylvania law. Cuban law would apply either if it were the proper law or if the *lex situs* of the debt (which was situate in Cuba and which arose out of the contract) applied. The question raised was whether English law would look to the proper law of the contract or to the *lex situs* of the debt at the time of such an acquisition by a foreign state as occurred in the case of the Havana Railways. The matter is bare of authority and it is first necessary to analyse the juridical nature of a novation. Counsel for the liquidators contended that a novation was a single act, and whether it bound the creditor depended on the *lex situs* of the debt, namely, Cuban law. The trustee company's contention, which was preferred by the Court of Appeal, was that a novation involved two distinct and successive acts, the discharge of the debt owed by the first debtor followed by the entry into a fresh contract between the creditor and a new debtor whereby the latter takes over the obligations of the original debtor. First in time comes the discharge of the original debtor. It was essential for the liquidators of the Havana Railways, in order to succeed, to establish that what might be termed the discharge component of the novation was governed by Cuban law as the *lex situs*. On this, Jenkins, L.J., confirmed Wynn-Parry, J.'s, approval of the view of Dr. Cheshire that "discharge affects the substance of the obligation". Jenkins, L.J., also approved the view of Wynn-Parry, J., that "one of the most important aspects of any contract is the manner in which it is to be charged, and one would suppose that the parties would intend the law which they had chosen as the proper law to govern that important matter—discharge". In *Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* ([1890] 25 Q.B.D. 390) the plaintiff in England contracted to sell copper to a French company according to the rules of the London Metal Exchange. This, in the view of Lord Esher, M.R., rendered it impossible to deny that the contract was English. The defendants failed to accept the copper. Later they were pronounced by a French Court to be in judicial liquidation, and such a judgment, they contended, discharged them from liability on the contract. Their contention was decisively rejected by Lord Esher. To hold otherwise would have been to bind the plaintiffs by

a law with which they had nothing to do. In the words of Wynn-Parry, J., this was "a strong case and it has...never been questioned"—even though in 1890 the phrase "proper law of the contract" was not in use.

The proper law of the lease and agreement in the *Havana Railways* case was, in the view of Jenkins and Romer, L.J.J., that of Philadelphia. Willmer, L.J., held that it was that of Cuba but agreed that his dissent in that respect was immaterial since all three Lords Justices concluded that the agreement between the Cuban Government and the railway company left the rights of any creditors unaffected. The most satisfactory formulation where—as here—the parties have not selected the proper law is that the latter is the one "with which the transaction has its closest and most real connection". The Delaware subsidiary and the trustee corporation were both American corporations. The Philadelphia Plan was a peculiarly American financial device, and the trusts created were, at their inception, unrecognised by Cuban law. All this was decisive in favour of Pennsylvanian law as the proper law notwithstanding that resort might be had to the Cuban Courts to assert rights over the rolling stock, the security for the loan situate in Cuba, or that the lease and agreement were executed and registered in accordance with Cuban law.

To sum up: where a debt is situate in a country other than that of the proper law, the rights of the creditor will not be prejudiced by any action taken by the foreign debtor's government to relieve the debtor of his obligations. The Court of Appeal also held that *renvoi* had no place in the law of contract. —L.J.

"LE CRIME PASSIONNEL"

THE mind at once leaps to drama, to an extravagant picture of a tragic person in the dock, dwarfed by guards with curling moustaches; to a story of passion and pathos, of betrayed lovers or wronged wives, of human frailty and of very dramatic death. While there, one finger aloft and his gown billowing out behind him, stands the Great Advocate, dominating the court, cowing the prosecutor and hypnotising the jury into returning a verdict contrary to all canons of any known law! But quite apart from the fact that there is no really appropriate English translation, the whole conception of *le crime passionnel* smacks of exotic continental jurisprudence alien to the subtle and methodical balances and processes of English law. Thus, to the distinguished figures ruminating before the fire of the Garrick Club or sipping coffee in Chancery Lane, the thought that any such development was creeping into English law, like banjo housing development encroaching on to a green belt, that a human being who kills because he is so transported by anguish or love or other emotion should be somehow less culpable in law, must be alarming and abhorrent. But what, in fact, is the present trend abroad and at home? On the Continent, where the romantic conception of *le crime passionnel* was shared at the end of the nineteenth century by the first scientific theories relating to the subject, it appears that the modern trend is to circumscribe the admission of extenuating circumstances in favour of the "passionate" offender rather than to broaden the ground of exemption or attenuation. As M. Marc Ancel, a judge of the Supreme Court of France, has written, the number of *crimes passionnels* has substantially declined, and the number of acquittals or too lenient sentences has considerably decreased since 1945. M. Ancel attributed this to the admission of women to sit on the jury and women have shown themselves inclined to be more severe than men; the decline of the romance of passion; and the fact that Parisian juries have had before their eyes since 1940 infinitely greater disasters. Yet in England certain changes in the law of murder have recently been made, widening the scope and range of defence and enlarging the province of the jury in judging the extent of passion and its effect on loss of self-control.

For in the past, be the story ever so tragic and lovers ever so star-crossed or so betrayed, the power of the jury, when deciding upon the culpability of a man charged with murder who tried to excuse the killing by claiming that he was provoked, was severely limited. Except for the reasonably unlikely chance of one spouse catching another precisely *in flagrante delicto*, the jury were directed that where a person was killed by a deadly weapon mere words or gestures were not enough to reduce the offence from murder to manslaughter. Although it might be thought that words and gestures could in many circumstances provoke a man to rages of passion and loss of self-control, nevertheless the judge had to withdraw the question of provocation from the jury where words alone were relied upon as constituting provocation, save in circumstances of a most extreme and exceptional nature. Moreover, the fact that the person provoked was highly excitable or particularly irascible or suffered from some physical or mental peculiarity could not, and cannot still, be pleaded as an especial excuse for lack of self-control. For in deciding whether the provocation was such as to make a man through passion lose his self-control and whether in fact he did so lose his self-control in consequence of such passion caused by such provocation, the test of the provocation and its effect is that of what can be reasonably expected in such circumstances of the reasonable man—that controversial character who must travel on an omnibus, who takes the magazines at home and pushes the lawn mower in his shirt sleeves, the normal dredger owner, who is always male and never female, who possesses the “agility of an acrobat and the foresight of an Hebrew prophet”, and whose qualities and tastes, or lack of them, have played such a dominating part in determining how an Englishman should react and what he may or may not do with impunity. But not even that “ideal *vir constans*” was expected to retain his self-control when catching his wife in the act of adultery, and the chink in the rule was this admission that there did exist in human affairs a certain circumstance which could understandably drive men beyond their normal self-control and so render their reaction less culpable. But this remained an exception, and as Lord Simon made clear in *Holmes v. Director of Public Prosecutions* [1946] A.C. 588, the mere confession of adultery was not sufficient. Taunting or gloating or brandishing the fact in words which might often prove more provocative even than a sudden, if unlikely, discovery, was not provocation sufficient to reduce the crime. To paraphrase Lord Simon’s well-known illustration, the only possible defence of Othello would have been to publish the circumstances of his crime for the urgent attention of the Home Secretary after the trial.

Until 1957, the classic direction given to juries in cases in which the sympathy of everyone was with the accused, where, in fact, the crime arose from passion or from pathos, was that given by Devlin, J., in *R. v. Duffy* [1949] 1 All E.R. 982. For he then defined provocation as “an act or series of acts done by the dead man to the accused which would cause in any reasonable person and actually caused in the accused a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind.” But in 1957 the Homicide Act, was universally hated and scorned even more than Dr. Johnson hated and scorned cant or the Whigs, altered the law. It provided, in s. 3, that on a charge of murder where there is evidence on which the jury can find that the accused was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury. So the standard of the reasonable man, not the excitable, the irascible, the peculiar nor the particular, remains; but the jury are now permitted to consider things done, things said, or both together. In this sense the issue of provocation is very much at large. What, then of the English crime of passion or provocation?

Recently a husband was acquitted of the murder of his wife's lover and sentenced to a term of imprisonment for manslaughter. His defence was one of provocation and involved recounting the general circumstances of his life and the conduct and words of the man he killed. Because of the 1957 Act, the jury were permitted to consider everything done and everything said, and if they accepted the evidence as to what was said and done, to decide the effect which that would have had, in their opinion, upon a reasonable man. Although the husband had purchased a revolver and sought out the appointment with the lover, the jury, after listening to the whole story of the relationship of the parties concerned in the tragedy, and of what the husband had said and done and what was said and done to him, acquitted him of murder, and the prosecution, upon whom rests the burden to prove the absence of provocation, decided not to challenge the defence of provocation. In another recent case a mistress, learning that her lover was not to marry her, stabbed him to death. Again, after hearing the defence, the jury acquitted the woman of murder and convicted her of manslaughter. Of course, each particular case involves its own particular circumstances, but since 1957 this widening of the province of the jury in cases of this kind, so that they are now permitted and entitled to take into account broader and wider considerations, has surely prised open this branch of the criminal law so as to provide these ordinary, everyday, judges of the fact with greater opportunity of deciding for themselves the degree of blame which should rest upon the killer of another human being. In 1955 Mr. Melford Stevenson, Q.C. (now Mr. Justice Stevenson), for the defence of Ruth Ellis, was unable to address the jury after Mr. Justice Havers had ruled that there was not sufficient material even on a view of the evidence most favourable to the accused to support the verdict of manslaughter on the ground of provocation. That might not have been the case today, for although Ruth Ellis may have had "time to cool" from the time when she placed the revolver in her handbag, travelling thereafter several miles to Tanza Road, and the time when she eventually shot David Blakely, it could be (although I express no opinion as to the probability) that the jury might have found that the "things done" by David Blakely previously and at Tanza Road by going to and coming from the public-house, by seeing her and by turning away from her, combined with things previously said, did amount to provocation, and that in such circumstances Ruth Ellis was not guilty of murder but guilty of manslaughter. If s. 3 of the 1957 Act had then been law, might not Ruth Ellis have put in evidence before the jury, for them to believe or disbelieve, things said and things done which could have reduced the degree of culpability? For it is surely now open to anyone accused of murder to lay before a jury a wretched and possibly tragic recital of circumstances which preceded the killing. So a balance has shifted from the judge of the law to the judges of the fact, and with that shift of balance a greater opportunity is presented to the advocate. Madam Fahmy, with her husband crouching before her ready to spring like an animal, was acquitted of murder when her defence was self-defence. If she was tried today would the alternative be other than manslaughter? When Marshall Hall defended her, would he have not been more confident if, for his second barrel, he could have relied upon s. 3 of the Homicide Act, 1957?

Thus it appears that this modern English legislation has given greater power to the jury at a time when juries, apart from the war years, have never played so little part in civil law. They can be flattered, as they are properly flattered, by both judges and counsel, but they will surely take this new opportunity and use it sensibly, humanely and justly. So, for all that, *le crime passionnel* still remains inexorably alien, a colourful and romantic conception. While the arts of the Great Advocate associated with crimes of passion must yet be left in the capable hands of Mr. Charles Laughton and Mr. Michael Dennis.—S.J.

THE BOMBAY LAW REPORTER

REPORTS

EDITORS :

DHIRAJLAL KESHAVLAL THAKORE, B.A.,
BARRISTER-AT-LAW,

AND

MANHAR RATANLAL VAKIL, B.A., LL.B.,
BARRISTER-AT-LAW.

Vol. LXI—1959.

BOMBAY:
THE BOMBAY LAW REPORTER OFFICE
KRISHNA MAHAL, 68 MARINE DRIVE.

• • [All Rights Reserved]

JUDGES OF THE HIGH COURT.

Chief Justice :

THE HON'BLE MR. H. K. CHAINANI.

Puisne Judges :

THE HON'BLE MR. J. C. SHAH (*Appointed Judge, Supreme Court of India, on October 12, 1959*).

"	"	"	J. R. MUDHOLKAR.
"	"	"	S. T. DESAI.
"	"	"	Y. S. TAMBE.
"	"	"	B. N. GOKHALE.
"	"	"	S. P. KOTVAL.
"	"	"	K. G. DATAR.
"	"	"	K. T. DESAI.
"	"	"	J. M. SHELAT.
"	"	"	N. A. MODY.
"	"	"	N. M. MIABHOY.
"	"	"	G. B. BADKAS.
"	"	"	V. M. TARKUNDE.
"	"	"	D. V. PATEL.
"	"	"	V. S. DESAI.
"	"	"	K. K. DESAI.
"	"	"	V. A. NAIK (<i>Appointed, February 13, 1959</i>).
"	"	"	V. B. RAJU (<i>Appointed, June 12, 1959</i>).
"	"	"	S. G. PATWARDHAN (<i>Appointed, October 5, 1959</i>).
"	"	"	S. M. SHAH (<i>Appointed, December 12, 1959</i>).

TABLE OF CASES REPORTED.

CIVIL

	PAGE
Abdul Karim v. Haji Mahomed, 61 Bom. L.R.	625
—Kayum v. Ebrahim, 61 Bom. L.R.	1223
—Raheman v. Mishrimal, 61 Bom. L.R.	761
Additional Special Land Acq. Officer v. Shantaram, 61 Bom. L.R.	95
Ahmedabad People's Co-op Bank v. Pradip, 61 Bom. L.R.	612
Ambi Pundalik v. Pundalik, 61 Bom. L.R.	1167
Amirchand Narayan v. Divisional Officer, Bombay, 61 Bom. L.R. (O.C.J.)	1145
Anandrao v. Eknath, 61 Bom. L.R.	1123
Anusuyabal v. J. M. Mehta, 61 Bom. L.R.	1417
Appa Shiling v. Vithal Baba, 61 Bom. L.R.	1671
Aseudomal v. Mansingh, 61 Bom. L.R.	497
B.E.S.T. Workers' Union v. State, 61 Bom. L.R. (O.C.J.)	937
Bai Jamna v. Bai Dhanl, 61 Bom. L.R.	419
—Jibiben v. Bombay Revenue Tribunal, 61 Bom. L.R.	1475
—Nani v. Gita Bai, 61 Bom. L.R. (S.C.)	523
—Rukhi v. Vrajlal Jechand, 61 Bom. L.R.	408
Belgonda Appanna v. Bhhimgonda, 61 Bom. L.R.	184
Behram v. Chaturbhuj, 61 Bom. L.R.	698
Bari Rajeshwar v. Tukaram, 61 Bom. L.R.	1041
Bawal Khan v. B. C. Shah, 61 Bom. L.R. (O.C.J.)	938
Bhagwandas Motiram v. Bombay Rev. Tribunal, 61 Bom. L.R.	1406
Bhagwant Vinayak v. Radhakisan, 61 Bom. L.R.	348
Bharat Manilal v. State of Bombay, 61 Bom. L.R. (O.C.J.)	81
Bhikhu Sakharan v. B. K. Potdar, 61 Bom. L.R.	960
Bhikusa v. Sanganner Bidi Kamgar Union, 61 Bom. L.R.	764
Bhojrajji v. Saurashtra State, 61 Bom. L.R. (F.B.)	20
Bhor Industries Ltd. v. Commr. I.T., 61 Bom. L.R.	578
Bidi & Tobacco Merchants' Assoc. v. State, 61 Bom. L.R.	890
Bombay Municipal Corporation v. Ramchandra, 61 Bom. L.R. (O.C.J.)	1129
Brindlal v. Gokal & Hoffman, 61 Bom. L.R. (O.C.J.)	996
Champaklal Rangildas v. Swastik Bharat Kala Kendra, 61 Bom. L.R.	1850
Chandrabhaga v. Bhikachand, 61 Bom. L.R.	864
Chhagan Manji v. Aher Jiva, 61 Bom. L.R.	50
Commr. of Income-tax v. Amarchand, 61 Bom. L.R.	399
—v. Amritlal Bhogilal, 61 Bom. L.R. (S.C.)	541
—v. Chugandas & Co., 61 Bom. L.R.	847
—v. Digvijaysinhji Tin Factory, 61 Bom. L.R.	566
—v. Evans Medical Supplies, 61 Bom. L.R.	400
—v. Gaekwar F. & R. Co., 61 Bom. L.R.	380
—v. Mulraj Karsondas, 61 Bom. L.R.	1543
—v. National Elec. Industries, 61 Bom. L.R.	1380
—v. Phirozshaw P. Mistry, 61 Bom. L.R.	1842
—v. Purushottamdas, 61 Bom. L.R.	1521
—v. Ranchhoddas, 61 Bom. L.R. (S.C.)	1458
—v. Saraspur Mills Ltd., 61 Bom. L.R.	1838
D. A. Kelshikar v. State of Bombay, 61 Bom. L.R. (O.C.J.)	1625
Darbar Shri Meramwala Bhayawala v. Valbal, 61 Bom. L.R.	959
Dattatraya Nagesh v. Ganesh, 61 Bom. L.R.	599
—Shripati v. Shankar, 61 Bom. L.R.	792
Desaihbhai v. S. M. Dudhanl, 61 Bom. L.R.	1826
DeSouza (M.F.) v. Children's Educational Society, 61 Bom. L.R.	750
Dhananjaya v. Bombay Revenue Tribunal, 61 Bom. L.R.	1156
Dharma Vijaya Agency v. Commr. Inc. Tax, 61 Bom. L.R.	1421
Digvijaysinhji (K.S.) v. Nanji, 61 Bom. L.R.	44
Divecha (P.H.) v. Commr. I. T., 61 Bom. L.R.	1584
Dr. K. A. Dhairyawan v. J. R. Thakur, 61 Bom. L.R. (S.C.)	548
East India Trading Co. v. Badal & Co., 61 Bom. L.R. (O.C.J.)	333
Engineering Staff Union v. State, 61 Bom. L.R. (O.C.J.)	298
—v. State of Bombay, 61 Bom. L.R. (O.C.J.)	1847
Executors of Sir Cowasji Jehangir v. Commr. I.T., 61 Bom. L.R.	373
F. E. Dinshaw Ltd. v. Commr. I.T., 61 Bom. L.R.	393
Francesco Cordi v. Gorakhram, 61 Bom. L.R. (O.C.J.)	1195

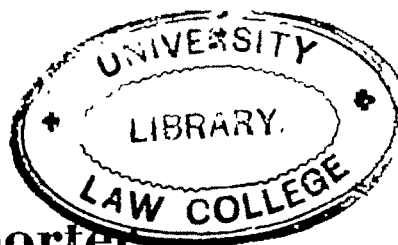
	PAGE
Gajanan v. Collector, Buldana, 61 Bom. L.R.	1402
—Dhundiraj v. Shridhar, 61 Bom. L.R.	170
Gangadhar Rakhmajl v. Manjula, 61 Bom. L.R.	442
Gangaram Baliram v. Dharamchand, 61 Bom. L.R.	1698
—Ichharam v. Bhikasing, 61 Bom. L.R.	666
Glaxo Laboratories v. Venkateswaran, 61 Bom. L.R.	1
Godrej & Co. v. Commr., Inc.-Tax, 61 Bom. L.R.	1602
Gopikisan Agarwal v. Sales Tax Officer, 61 Bom. L.R.	1517
Gulabchand Nanhoolal v. Fulchand, 61 Bom. L.R.	484
Gulabrao Anandrao v. Ramji, 61 Bom. L.R.	1651
—Fakirao v. Baburao, 61 Bom. L.R.	753
Haji Sheikh v. S. Natesa, 61 Bom. L.R.	1127
Hasanbhai v. Adambhai, 61 Bom. L.R.	415
Hasmukhlal Parekh v. Commr., Inc.-Tax, 61 Bom. L.R.	1839
Her Highness Maharani Mandalesa Kumari v. Ram Narain (P) Ltd., 61 Bom. L.R.	651
Humayun Abdullah v. M.G. Abrol, 61 Bom. L.R.	1633
India United Mills v. Reg. Prov. Fund Commr., 61 Bom. L.R.	1835
Jadavji Naraldas v. Commr., Inc.-tax, 61 Bom. L.R.	592
Jaiswal Medical Stores v. Asst. Drugs Controller, 61 Bom. L.R.	1531
Jakati (S.M.) v. S.M. Borkar, 61 Bom. L.R.	638
Jamna (Bai) v. Bai Dhani, 61 Bom. L.R.	419
Janku Zibai v. Shamrao, 61 Bom. L.R.	1410
Jasin Tomu v. Harischandra, 61 Bom. L.R.	1112
Jaswantlal Jagjiwandas v. Western Company, 61 Bom. L.R.	1087
Jayashree v. Rajkamal Kalamandir, 61 Bom. L.R.	1245
Jayasingapore Mills v. Collector of Kolhapur, 61 Bom. L.R.	1823
Jayavantsinhji v. State of Bombay, 61 Bom. L.R.	945
Jethalal Lakhamai v. Jankibai, 61 Bom. L.R.	427
Jivanlal v. Pramodchandra, 61 Bom. L.R.	110
—Manilal v. Chhitalal, 61 Bom. L.R.	1284
Jiviben v. Bombay Revenue Tribunal, 61 Bom. L.R.	1475
Jiwanji Ramalljee v. Union of India, 61 Bom. L.R.	632
John Servage v. Nagpur Corpn., 61 Bom. L.R.	1299
K. A. Dhalryawan v. J. R. Thaker, 61 Bom. L.R.	548
K. S. Digvijaysinhji v. Nanji, 61 Bom. L.R.	44
Kelkar (D.A.) v. State of Bombay, 61 Bom. L.R.	1625
Keshav Govind v. Extra Asst. Judge, 61 Bom. L.R.	1151
Keshavji v. Asst. Judge Junagadh, 61 Bom. L.R.	124
Khatikabel v. Controller of Estate Duty, 61 Bom. L.R.	719
Kodan Ranglal v. Bombay Rev. Tribunal, 61 Bom. L.R.	86
Krishnaprasad v. Colaba Land & Mills, 61 Bom. L.R.	636
Kuberdas v. State of Bombay, 61 Bom. L.R.	1276
Laxman Dhulshet v. Ganpat, 61 Bom. L.R.	1591
M. F. DeSouza v. Children's Educational Society, 61 Bom. L.R.	750
Madanlal Mulchand v. Shaikh Mahfub	1637
Madhavrao Narayanrao v. Ram Krishna, 61 Bom. L.R.	531
Madhosingh Danatsingh v. State of Bombay, 61 Bom. L.R.	1537
Madhya Pradesh Industries v. Commr., Inc.-Tax, 61 Bom. L.R.	1333
Maharana Mill Kamdar Union v. Vyas, 61 Bom. L.R.	678
—Mills v. Inc.-Tax Officer, 61 Bom. L.R.	1395
Mahavirprasad Badridas v. M. S. Yagnik, 61 Bom. L.R.	1433
Mahesh Anantral v. Commr., Inc.-Tax, 61 Bom. L.R.	886
Manahem Yeshooa v. Union of India, 61 Bom. L.R.	1888
Mandalesa Kumari v. Ramnarain Pvt. Ltd., 61 Bom. L.R.	651
Manilal v. Union of India, 61 Bom. L.R.	976
—Dahyabhai v. Commr. Inc.-Tax, 61 Bom. L.R.	1359
—Dhanji v. Commr., Inc.-Tax, 61 Bom. L.R.	187
Manji Khimji v. Union of India, 61 Bom. L.R.	182
Manordas Kalidas v. V. V. Tatke, 61 Bom. L.R.	1560
Maroti Sadashiv v. Godabal, 61 Bom. L.R.	143
Marzban Rustomji v. Khushalbhai, 61 Bom. L.R.	294
Mauladin Ayub v. Commr., Inc.-Tax, 61 Bom. L.R.	354
Masagaon Dock Ltd. v. Commr., Inc.-Tax, 61 Bom. L.R.	554
Meena Lachman v. Lachman Uttamchand, 61 Bom. L.R.	1549
Meramwala Bhayalal v. Valbai, 61 Bom. L.R.	989
Mohanlal Chandulal v. Janu Darraj, 61 Bom. L.R.	633
Mrs. Sushila Mahendra v. Mahendra Manilal, 61 Bom. L.R.	431
Municipal Corporation v. Akbar Sarela, 61 Bom. L.R.	1097
N. M. Naik v. Colaba Land Mills, 61 Bom. L.R.	456
Nagpur K. K. Samaj v. Nagpur Corporation, 61 Bom. L.R.	468
Naik (N.M.) v. Colaba Land Mills, 61 Bom. L.R.	456
Namdeo Bhika v. Ramnath, 61 Bom. L.R.	351

	PAGE
Nani Bai v. Gita Bai, 61 Bom. L.R.	523
Narendas Mathuradas v. Commr., Inc.-Tax, 61 Bom. L.R.	361
Narayan Laxman v. State of Bombay, 61 Bom. L.R.	1284
—Yeshwant v. Rajaram, 61 Bom. L.R.	1274
Narayanlal Bansilal v. M.P. Mistry, 61 Bom. L.R.	220
National Union of Commercial Employees v. Meher, 61 Bom. L.R.	642
New Jehangir Vakil Mills v. Commr. Inc.Tax., 61 Bom. L.R.	1464
—v. Vyas, 61 Bom. L.R.	187
New Mahalaxmi Mills v. Commr., Inc.-Tax, 61 Bom. L.R.	1869
—Shorrock Spinning & Mfg. Co. v. Raval, 61 Bom. L.R.	618
Nilgiri Ceylon Tea Co. v. State, 61 Bom. L.R.	1888
Nivrutti Laxman v. Shivdayal, 61 Bom. L.R.	957
Nurjehan v. Sultan Ahmed, 61 Bom. L.R.	1570
Onkarnal Meghraj v. Commr. I.T., 61 Bom. L.R.	1878
Oriental M. P. Works v. Bhaskar, 61 Bom. L.R.	1045
P. H. Divecha v. Commr. Inc. Tax, 61 Bom. L.R.	1584
Parbhani Transport Ltd. v. Bedekar, 61 Bom. L.R.	1572
Parihar (Y.S.) v. Chintaman Madhavs, 61 Bom. L.R.	403
Parmar & Co. v. V. R. Gupta, 61 Bom. L.R.	482
Petlad Municipality v. Petlad Mills, 61 Bom. L.R.	795
Phirooah Sarosh v. State of Bombay, 61 Bom. L.R.	1559
Popatlal Bhikamchand v. Commr., Inc.-tax, 61 Bom. L.R.	1382
Pukhraj v. D. R. Kohli, 61 Bom. L.R.	1280
R. R. Bidi Factory v. First Civil Judge, Nagpur	39
Rai Sahab Seth Gopikisan Agarwal v. Sales Tax Officer, 61 Bom. L.R.	1517
Rakhama Sitaram v. Laxman, 61 Bom. L.R.	1170
Ram Krishna Dalmia v. Tendolkar J., 61 Bom. L.R.	192
Rambhau Sakharan v. Tatke, 61 Bom. L.R.	148
Ramchandra v. Municipal Committee, Kator, 61 Bom. L.R.	1288
—Yeshwant v. Digambar, 61 Bom. L.R.	1665
Ramdayal v. K. R. Patil, 61 Bom. L.R.	1210
Ramkrishna v. State Ind. Court, 61 Bom. L.R.	1312
Rammayya Venkat v. State of Bombay, 61 Bom. L.R.	654
Ransing v. Municipal Corporation, Poona, 61 Bom. L.R.	904
Rashtriya Mill Mazdoor Sangh v. State Ind. Court, 61 Bom. L.R.	1279
Ratilal Virchand v. State, 61 Bom. L.R.	990
Rekchand Mills v. Commr., Sales Tax, 61 Bom. L.R.	90
Rukhi v. Vrajlal Jechand, 61 Bom. L.R.	408
S. M. Jakati v. S.M. Borkar, 61 Bom. L.R.	688
Sadasheo Jagannath v. Hemaji, 61 Bom. L.R.	1141
Saraswati Printing Works v. Commr. Sales Tax, 61 Bom. L.R.	607
Sardarsing v. Rakaran, 61 Bom. L.R.	984
Sarupchand v. Union of India, 61 Bom. L.R.	1444
Satyanarayan v. Vithoba, 61 Bom. L.R.	159
Sawatram Ramprasad Mills v. Kundannal, 61 Bom. L.R.	1511
Sham Kekshru v. N.P. Shah, 61 Bom. L.R.	289
Shankarrao v. 2nd Addl. Dist. Judge, Nagpur, 61 Bom. L.R.	218
Shantabai Baburao v. Ramchandra, 61 Bom. L.R.	627
Shardaprasad Onkarprasad v. Divl. Supdt., C. Rly., 61 Bom. L.R.	1596
Sheikh Rahiman v. Raje Nilkanthrao, 61 Bom. L.R.	1203
Shloosingh v. Bombay Revenue Tribunal, 61 Bom. L.R.	210
Shrinu Vishnu v. Vishnu Kirpalani, 61 Bom. L.R.	100
Shrinibai v. State of Bombay, 61 Bom. L.R.	1191
Shrimati Ambli Pundalik v. Pundalik, 61 Bom. L.R.	1187
—Vatsalabai v. Togya Megha, 61 Bom. L.R.	1351
Sonaju Krishnaje v. Nathu, 61 Bom. L.R.	156
Special Land Acquisition Officer v. Katrak, 61 Bom. L.R.	1259
—v. Lakhamal, 61 Bom. L.R.	1083
Sri Ram Ram Narain v. State, 61 Bom. L.R.	811
State of Bombay v. Davalbhai, 61 Bom. L.R.	1247
—v. Estate Investment Co, 61 Bom. L.R.	660
—v. Kulsumbai, 61 Bom. L.R.	263
—v. M. C. Menon, 61 Bom. L.R.	75
—v. Mathuradas, 61 Bom. L.R.	1102
—v. Morarji, 61 Bom. L.R.	318
—v. Shastri Yagna Purashadasji, 61 Bom. L.R.	700
Sudhir Laxman v. S.A. Dange, 61 Bom. L.R.	500
Sugandhabai Shivram v. Sundrabai, 61 Bom. L.R.	560
Sultan Bros. v. Commr., Inc.-Tax, 61 Bom. L.R.	1514
Sumatiben v. Jaswant Bhogilal, 61 Bom. L.R.	1565
Surendra Shankar v. Laxman, 61 Bom. L.R.	757
Sushila Mahendra v. Mahendra Manilal, 61 Bom. L.R.	431
Tara Singh v. Union of India, 61 Bom. L.R.	1185

	PAGE
Tarabai v. Bombay Rev. Tribunal, 61 Bom. L.R.	41
"The Club" v. Municipality, Mahabaleswar, 61 Bom. L.R.	52
Trustees, Charity Fund v. Commr., Inc.-tax, 61 Bom. L.R.	(S.C.) 1452
Tulsibai v. State of Bombay, 61 Bom. L.R.	(O.C.J.) 1844
Uthasibai Jethmal v. Bhagchand, 61 Bom. L.R.	108
Uran Islampur Municipality v. Shankarrao, 61 Bom. L.R.	284
V. M. Dorlikar v. Chief Executive Officer, 61 Bom. L.R.	1100
Vakratunda Chintaman v. Special Land Acq. Officer, 61 Bom. L.R.	1501
Vallabhdas v. Municipal Committee, Akola, 61 Bom. L.R.	784
Vatsalabai v. Togya Megha, 61 Bom. L.R.	1351
Venkatachalam v. Bombay Dyeing & Manuf. Co., 61 Bom. L.R.	(S.C.) 536
Vishvanath Krishna v. Mahadeo, 61 Bom. L.R.	180
Vishwanath Rupchand v. Bom. Rev. Tribunal, 61 Bom. L.R.	1285
W. W. Joshi v. State of Bombay, 61 Bom. L.R.	820
Waman Ganesh v. Ganu, 61 Bom. L.R.	1267
Shrinivas v. Ratilal, 61 Bom. L.R.	(S.C.) 1011
Western India Industries v. C.B. Poona, 61 Bom. L.R.	(S.C.) 950
— v. Municipal Corpn. Poona, 61 Bom. L.R.	(S.C.) 954
Y. S. Parthar v. Chintaman Madhava, 61 Bom. L.R.	403
Yadavrao v. Bombay Rev. Tribunal, 61 Bom. L.R.	(F.B.) 213
Yagnapurushdasji v. Mukdas, 61 Bom. L.R.	1016
Yamunabai v. Ram Maharaj, 61 Bom. L.R.	1810

CRIMINAL

Abdul Rahim v. State of Bombay, 61 Bom. L.R.	(S.C.) 1547
Abu Ismail Merchant v. State, 61 Bom. L.R.	345
Alijan Munshi v. State, 61 Bom. L.R.	1620
Andheri Eto. Bus Service v. Bombay State, 61 Bom. L.R.	(S.C.) 1408
Bastav Victory Rodrigues v. State, 61 Bom. L.R.	(F.B.) 670
Bhogilal Chunilal v. State of Bombay, 61 Bom. L.R.	(S.C.) 746
Budhmal Founmal v. The State, 61 Bom. L.R.	444
C. M. Trivedi v. Bhatnagar, 61 Bom. L.R.	450
Deoman Shamji v. The State, 61 Bom. L.R.	30
Geoffrey Manners & Co. v. State, 61 Bom. L.R.	(S.C.) 603
Francis D'Souza v. Edward, 61 Bom. L.R.	1180
Jahram Chandrabhan v. State, 61 Bom. L.R.	35
Kanakmal Lalchand v. State, 61 Bom. L.R.	1500
Krishna Nayar v. State, 61 Bom. L.R.	684
Loku Basappa v. The State, 61 Bom. L.R.	1271
Mobarik Ali v. State of Bombay, 61 Bom. L.R.	(S.C.) 58
Narayan Ganpati v. The State, 61 Bom. L.R.	447
Radhakrishnan Rammath v. State, 61 Bom. L.R.	711
Ramdas Kikabai v. State, 61 Bom. L.R.	1178
Ramji Lakhamai v. Harshadrai, 61 Bom. L.R.	1648
Ratanchand v. The State, 61 Bom. L.R.	1161
Sadashiv v. P. V. Bhakerao, 61 Bom. L.R.	(F.B.) 1176
Shankar Balaji v. State of Bombay, 61 Bom. L.R.	1076
Shankarlal v. Mohammad, 61 Bom. L.R.	1642
State v. Babulal Fakirchand, 61 Bom. L.R.	1478
— v. Chinubhai Haridas, 61 Bom. L.R.	1309
— v. Chunilal Vallabhji, 61 Bom. L.R.	807
— v. Dahyalal Dalpatram, 61 Bom. L.R.	885
— v. Daroga, 61 Bom. L.R.	118
— v. Dhanraj Mills Ltd., 61 Bom. L.R.	1291
— v. Ibrahim Nabiji, 61 Bom. L.R.	808
— v. Kamalakar Prabhakar, 61 Bom. L.R.	1674
— v. L.C. Patel, 61 Bom. L.R.	1021
— v. M. M. Pinto, 61 Bom. L.R.	1617
— v. Mahomedkhan, 61 Bom. L.R.	164
— v. Memon Mohmad, 61 Bom. L.R.	715
— v. Murlidhar, 61 Bom. L.R.	1656
— v. Pundlik Bhikaji, 61 Bom. L.R.	887
— v. Shankar Bhaurao, 61 Bom. L.R.	591
State of Bombay v. Gaya Deepchand, 61 Bom. L.R.	1509
— v. Mohammadkhan, 61 Bom. L.R.	1644
Umer Saheb v. State, 61 Bom. L.R.	1001
Vishnoo Ramchandra v. State, 61 Bom. L.R.	498
Vithal Krishnaji v. State, 61 Bom. L.R.	1062
Vyara Municipality v. Fulchand, 61 Bom. L.R.	973



The Bombay Law Reporter

REPORTS

APPEAL FROM ORIGINAL CIVIL.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.
GLAXO LABORATORIES (INDIA) PRIVATE LTD.

v.

A. V. VENKATESWARAN.*

Sea Customs Act (VIII of 1878), Secs. 87, 29, 29B, 30, 39, 182, 188, 191—Constitution of India, Art. 226—Assessment order under s. 87 whether administrative order or quasi-judicial order—Difference between administrative and quasi-judicial orders—Assessing authority to give reasons for making particular assessment order or for issuing short notice levy—Whether Court can consider affidavit disclosing such reasons in absence of reasons in order of assessment itself—Court's power to entertain writs when alternative remedy available to petitioner—Whether customs authority in determining real value of goods bound by price shown on invoice—Evidentiary value of invoice—Indian Income-tax Act (XI of 1922), Secs. 23(3), 37.

An assessment order made under s. 87 of the Sea Customs Act, 1878, is an administrative order and not a quasi-judicial order.

The difference between an administrative and a quasi-judicial order does not lie merely in this that in the case of a quasi-judicial order a writ of certiorari can be issued. The more fundamental difference between the two orders is that in the case of a quasi-judicial order the Court must require and demand from the authority exercising his functions that he will conform to the judicial process.

Province of Bombay v. Khushaldas Advani,¹ *Rex v. Electricity Commissioners: London Electricity Joint Committee Co. (1920), Ex Parte*,² *R. v. Manchester Legal Aid Committee*,³ *Secretary of State v. Mask & Co.*,⁴ *Assistant Collector v. Sooraj-mall*,⁵ *Express Newspapers Ltd. v. Union of India*,⁶ *Nagendra Nath v. Commr. of Hills Division*,⁷ *Nakkuda Ali v. M. F. Desai*,⁸ *F. N. Roy v. Collector of Customs, Calcutta*,⁹ *Leo Roy Frey v. Superintendent, Dt. Jail*,¹⁰ *B. N. Banerjee, Collector of Customs, Bombay v. Ramchand Sobhraj Wadwan*¹¹ and *Bombay Business House v. S. Venkatesan*,¹² referred to.

In making an assessment or in issuing a short levy notice under the Sea Customs Act, 1878, the assessing authority must give reasons for his decision i.e. as to how and why the assessing authority came to a particular conclusion or made the assessment in a particular manner.

*E. R. H. Readymoney Ltd. v. State of Bombay*¹³ and *Nagendra Nath v. Commr. of Hills Division*, referred to.

Where, however, such reasons are not given, but the reasons are disclosed in

*Decided, August 26, 1958. O.C.J. Appeal No. 7 of 1958: Miscellaneous Application No. 137 of 1957.

1 (1950) 53 Bom. L. R. 1, S.C.

2 [1924] 1 K. B. 171.

3 [1952] 2 Q. B. 413.

4 (1940) 42 Bom. L. R. 767, p.c.

5 (1952) 56 O. W. N. 452.

6 [1953] A. I. R. S.C. 578, 612.

7 [1958] A. I. R. S.C. 398, 406.

8 [1951] A. C. 66.

9 [1957] S. C. J. 724.

10 [1958] S. C. J. 301, 303.

11 (1958) O. C. J. Appeal No. 53 of 1955, decided by Chagla C.J. and S. T. Desai J., on August 19, 1955 (Unrep.).

12 (1958) 60 Bom. L. R. 1058.

13 (1957) 59 Bom. L. R. 786.

affidavits at the trial, then the Court could look into those reasons and consider those reasons as if they were the reasons embodied in the order itself.

The reason why the Courts refuse to entertain writs when an alternative remedy is available is that the Legislature has set up tribunals for decision in appeals and that the remedy which the Court could give, the petitioner could obtain from these tribunals. But whether the petitioner should be disentitled to maintain the petition or not is a matter of discretion with the Court, and if the Court is satisfied that the petitioner will not get justice from the appellate tribunal or that he would have no confidence in the decision of the tribunal or that the appeal would be nothing more than an appeal from Caesar to Caesar, then the Court is not bound to accede to the submission of the State that it should not hear the petitioner and the petitioner should be referred to the appellate tribunal set up under the Act.

In determining the real value of goods for the purposes of the Sea Customs Act, 1878, the Customs authorities are not bound by the price shown on the invoice by the importer. The invoice is an important piece of evidence to determine what the real value is. But that piece of evidence may be discarded if the authorities take the view that it is not a genuine document or if they take the view that over and above the price which is being paid some other consideration has passed under the document.

Section 30(b) of the Sea Customs Act, 1878, does not in any way import into its construction any consideration as to the character of the importer. What is emphasised is the cost of the goods, whoever the importer may be.

In order to test the genuineness of the invoice the customs authorities may requisition to their aid any other facts, but only for that purpose. They may consider if they like the cost in Europe, cost of production, or any other factor. But all those considerations must ultimately be directed to the determination and ascertainment of the only fact which has got to be determined and ascertained under s. 30(b) of the Sea Customs Act, 1878, which is the cost of the goods of like kind and quality at the place of importation.

The facts appear in the judgment.

H. M. Seervai, Advocate General, with *R. J. Joshi* and *N. A. Palkhivala*, for the appellants.

Sir Nusserwanji Engineer, with *V. J. Taraporevala*, for the respondents.

CHAGLA C.J. Although the ultimate question that we have to decide in this appeal lies in a very narrow compass, it raises certain questions of considerable public importance. The appellants before us are a company registered in India and they deal in anti-biotics, pharmaceuticals and foods, and for the purpose of their business they have been importing into India since about February 1951 large quantities from Glaxo Laboratories Ltd., U.K., of vitamin B.12 in bulk of the value of several lakhs of rupees every year. The appellant company admittedly is a subsidiary company of the English company. From February 1951 to May 1955, the appellants entered in their bill of entry for the purpose of customs duty the invoice value of the goods. Between June 1955 to May 1956, they showed the real value of the goods as the wholesale price of the goods in the United Kingdom, and after May 1956 they reverted to their original practice of showing the invoice value. In this appeal we are concerned in all with ten consignments. The first six consignments arrived in India in April 1956 and September 1956 and the value of these consignments was shown in the bill of entry as £72-3-9 per gram. This was the invoice price. The Customs authority did not accept the invoice value and assessed these six consignments on the basis of the price of £87-10-0 per gram and levied assessment on that basis. Thereupon the appellants made applications for refund claiming the difference between £87-10-0 per gram and £72-3-9 per gram. The Customs authority on its part issued what has been described as short levy notices. These notices were in respect of liability to pay a larger amount and it was stated in these short levy notices that pending finalisation of the investigation an amount was mentioned as an anti-

cipated less charge. After the six consignments had arrived, the price of vitamin B.12 was reduced from £72-3-9 to £65-2-3. The seventh consignment arrived in November 1956, the eighth in December 1956 and the ninth in February 1957, and the appellants prepared their bill of entry with regard to these three consignments on the basis of the invoice price. In respect of these three consignments short levy notices were issued by the Customs authority on the basis that the appellants were liable to pay 12½ per cent. in addition to the invoice price. The goods were passed on the basis of the amount entered in the bill of entry by the appellants, but the assessment was not accepted by the Customs authority, and therefore the short levy notices were issued. With regard to the first six consignments prior to the date of the petition which the appellants filed, the short levy notices were withdrawn and as a matter of fact a certain amount was refunded by the Customs authority because it was found that even on the basis that they had adopted the amount at which the goods had been assessed was not the proper amount. With regard to the short levy notices in respect of consignments 7, 8 and 9, they were followed up by a demand notice which called upon the appellants to pay the amount in respect of which the short levy notices were issued. The tenth consignment with which we are concerned is the consignment of March 10, 1957, and, without going into unnecessary details, as far as this consignment was concerned the final order of assessment was made by the Collector himself on April 15, 1957, and the assessment of this consignment was also made on the basis that the appellants were liable to pay 12½ per cent. more than the invoice value. The invoice value, which was accepted for the purpose, as we shall presently point out, was the invoice of Messrs. Voltas Ltd. This petition was filed challenging the order of assessment with regard to the six consignments and for a direction that the refund application made by the appellants should be disposed of by the Customs authority. With regard to the seventh, eighth and ninth consignments, the challenge was made against the short levy notices which were served upon the appellants and, as pointed out, in respect of which a notice of demand had been sent by the Customs authority. With regard to the tenth consignment, the challenge was against the order of assessment passed, as pointed out, by the Collector.

The narrow issue that arises in this case for our determination, and which is a matter of controversy between the appellants and the Customs authorities, is this. What the Customs authorities have done and what they seek to justify is that they have taken into consideration identical goods vitamin B.12 manufactured by Glaxo Ltd. of United Kingdom and imported by Voltas Ltd. and added to the invoice price shown in the invoice of Voltas Ltd. 12½ per cent. discount, and the question that we have to decide is whether, looking to the language of the statute and the liability of the appellants to pay customs duty, this assessment is in accordance with law.

The first and the most important question that has been debated at the Bar is whether the order made by the Customs authorities is an administrative order or a quasi-judicial order. The consequences of holding the order to be quasi-judicial are important and serious, because the consequence is not merely this that in this particular case we would be in a position to issue a writ of *certiorari* against the Customs authorities and to correct any error of law apparent on the face of the record. If the consequences stopped at that, even then we would have to seriously consider the arguments advanced by the Advocate General and Sir Nusservanji Engineer. But the consequences are much more far-reaching, because if we were to hold that when the Assistant Collector or the Appraising Officer assessed goods imported into India to customs duty he is performing a quasi-judicial function, then it must follow as a necessary and inevitable consequence that in assessing the goods of every importer he must observe the rules of natural justice. In other words, his assessment must be in accordance with what is known as the judicial process. Administrative and executive processes are very different from judicial processes. A Court or a body which is acting judicially has to conform to certain

judicial standards. There are certain rules which are known as rules of natural justice which have got to be conformed with. A decision cannot be given behind the back of the party affected. The Court or the authority or the tribunal cannot take into consideration evidence without giving the party affected an opportunity to explain that evidence. Therefore, the difference between an administrative and a quasi-judicial order does not lie merely in this that in the case of a quasi-judicial order a writ of *certiorari* can be issued. The more fundamental difference between the two orders is that in the case of a quasi-judicial order the Court must require and demand from the authority exercising his functions that he will conform to the judicial process.

In deciding whether this order made by the Customs authorities is a quasi-judicial order or not, a large number of authorities were cited by the Advocate General. As far as India is concerned, the test that has got to be applied is the test which was laid down by the Supreme Court in *Province of Bombay v. Khushaldas Advani*¹, and it has not been suggested and it cannot be suggested that the Supreme Court in any subsequent decision has revised or reviewed that case. But what is urged by the Advocate General is that the law has developed since *Advani's* case was decided and there is nothing in subsequent decisions which is contrary to what was laid down in *Advani's* case, but the subsequent decisions clarify and to a certain extent simplify what was stated by the learned Judges of the Supreme Court in that case. Now, *Advani's* case, with respect, did not lay down anything new. It laid down a test which has become a *locus classicus* in any decision dealing with quasi-judicial or administrative orders, and the test is the famous test laid down by Lord Justice Atkin in *Rex v. Electricity Commissioners: London Electricity Joint Committee Co.* (1920), *Ex parte*², and the test is—if repetition may be forgiven—

“Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.” (p. 205)

Therefore, this definition lays down three tests. You must have a body of persons who must have legal authority to determine questions, the second test is that the questions which they have to determine affect the rights of subjects, and the third test is that a duty must be imposed upon this body of persons to act judicially. There can be no doubt in this case that the first two tests are satisfied. The Customs officer who makes the assessment has to determine certain questions. There is also no doubt that these questions affect the rights of subjects and affect them very seriously because on the determination of the Customs officer depends the liability of the assessee to pay certain customs duty. But the difficulty is caused, as it was caused in *Advani's* case, with regard to the third test. Is there a duty cast upon the Customs officer to act judicially? Therefore, however serious the question may be which the officer has to decide, however much it may affect the rights of subjects, if the Court cannot find a duty imposed upon the officer to act judicially, the act will not be a quasi-judicial act but an administrative act. This third test was emphasised in the majority judgment and especially in the judgment of Chief Justice Kanja. At p. 6 the learned Chief Justice says:

“...It seems to me that the true position is that when the law under which the authority is making a decision itself requires a judicial approach, the decision will be quasi-judicial.”

Therefore, we must look at the statute which sets up a tribunal or which provides for certain decisions by officers, to see whether that statute requires the tribunal or the officer to act judicially. It is perfectly true that no statute will provide that the tribunal or the officer shall act judicially. If there was such an express provision, no difficulty whatsoever would arise in construing provisions of a statute. But the difficulty arises because the statute in express

1 (1950) 53 Bom. L.R. 1, S.C.

2 [1924] 1 K. B. 171.

terms does not impose the duty of acting judicially. One has got to look at the various provisions of the statute in order to come to the conclusion whether considering those provisions it was incumbent upon the authority or the tribunal to act judicially.

Now, as we shall presently point out, in no subsequent case in India or in England this third test laid down by Lord Justice Atkin has ever been departed from. The Advocate General's contention is this that what the recent English decisions have laid down is that in order to apply the third test a simple method has been devised and that simple method is to find out whether the particular authority or tribunal has to ascertain facts according to law, and if that tribunal or authority has to ascertain facts according to law and in ascertaining those facts that authority cannot be influenced by any considerations of policy or expediency, then you must infer and must come to the conclusion that that tribunal or authority has to act judicially. If that were the true test, undoubtedly the task of the Courts would be considerably simplified. Take this very case. It is perfectly true that the Customs authorities have to ascertain facts according to law. The Customs authorities have to determine what the nature of the goods is and what is the duty which the importer has to pay according to the provisions of the Sea Customs Act. It is equally clear that in ascertaining those facts the Customs authorities have not got to be influenced by any questions of policy or expediency. They must do their duty honestly and impartially. Therefore, if the test suggested by the Advocate General were sound, then without considering the other provisions of the statute we must come to the conclusion that the Customs authorities in passing orders of assessment must act judicially and that an order of assessment is a quasi-judicial order. But unfortunately such simple tests are always denied to Courts of law. When we look at the English decisions on which the Advocate General has relied, it will be found that the learned Judges there had emphasised the fact that each case must be considered on its own merits, that in each case the act or the statute must be looked at, and taking the circumstances of each case and the provisions of the statute the Court must come to the conclusion whether a particular order is an administrative order or a quasi-judicial order. If all that had to be done was to apply the test as suggested by the Advocate General, then it would be unnecessary for the Courts in England to have emphasised the necessity of considering each case on its own merits. In *Advani's* case it was pointed out that in applying this test it made no difference whether a decision of an officer was a subjective decision or an objective decision. The Advocate General sought to distinguish *Advani's* case on the ground that under the Requisition Act it was the subjective determination of the officer for the purposes of requisitioning which largely influenced the Supreme Court in coming to the conclusion that the requisitioning order was an administrative order, and it is pointed out that in the Sea Customs Act the decision is not a subjective determination but it is an objective determination. The Customs officer has objectively to find facts. He has not to import any subjective influence or attitude or outlook into his determination, and it is said that the principle laid down in *Advani's* case cannot possibly apply to the Sea Customs Act. It seems to us a rather difficult proposition to accept that whenever an officer is acting objectively and whenever he is required to act impartially and not to be influenced by policy or expediency, his order must in every case and of necessity be a quasi-judicial order. As one of the Judges in England has said, even an administrative officer not acting judicially may act reasonably, and we may say that even an administrative officer not acting judicially must act honestly and impartially. But to suggest that whenever there is a duty to act impartially and honestly, to be loyal to facts and not to persons, it converts the decision of an officer into a quasi-judicial order, is a proposition which on the authorities we find it difficult to accept.

The decision which has been most strongly relied upon is the decision in •

*R. v. Manchester Legal Aid Committee.*¹ That was rather an unusual case and such a case could only have arisen in England. The question was with regard to legal aid and a debtor applied for legal aid and a certificate for legal aid was given to him. The debtor then became insolvent and the trustee in bankruptcy then applied for the legal aid certificate which had been given to the debtor. The legal aid certificate was given to the trustee to continue the bankrupt's claim against the defendant which happened to be a company. Thereupon the company applied for an order of *certiorari* on the ground that the committee, under the Legal Aid and Advice Act of 1949 which had issued the certificate, had no power to grant a certificate to a trustee in bankruptcy, and the question that was raised and discussed at great length was whether the order passed by this committee was an administrative order or a quasi-judicial order, because a writ of *certiorari* could not have been issued unless it was held that the order passed by the committee was a quasi-judicial order. At pages 415 and 416 the provisions of the Legal Aid and Advice Act are set out, and in his able argument Sir Hartley Shawcross points out that it would be shocking if a committee consisting entirely of lawyers had not to make its decisions judicially. Therefore, here we have a law by which lawyers had to decide whether a particular person was entitled to legal aid or not, and it was this decision which was being considered by the English Court as to whether it was a quasi-judicial decision or an administrative decision, and it is in this context and with this background that one must look at the observations made in the judgment. At page 428, in the judgment of Mr. Justice Parker, what is emphasised, and with respect we agree, is that it is not necessary that there should be a formal *lis* before it could be said that the decision of the authority is a quasi-judicial decision. It is sufficient if there are proposals and opposition and evidence has to be taken by the authority. But at the end of page 428 Mr. Justice Parker says:

"The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively. Where the decision is that of a Court, then, unless, as in the case, for instance, of justices granting excise licenses, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if, in order to arrive at the decision, the body concerned had to consider proposals and objections and consider evidence, then there is the duty to act judicially in the course of that inquiry."

Therefore, far from laying down a simple and invariable test, Mr. Justice Parker is at pains to emphasise not only that it will be impossible but it would be inadvisable to attempt to define exhaustively the circumstances in which it could be said that it was the duty of an authority or a tribunal to act judicially. Then comes the passage at page 431 which has been most strongly relied upon by the Advocate General, and which is the whole basis of his argument, and this is what the learned Judge says:

"The present case, as it seems to us, is an a fortiori case. Though the local committees may be said to be administrative bodies in the sense that they are responsible for administering the Act, they are quite unconcerned with questions of policy. They cannot refuse legal aid because the fund is becoming depleted or because they think that certain forms of action should be discouraged. They have to decide the matter solely on the facts of the particular case, solely on the evidence before them and apart from any extraneous considerations. In other words, they must act judicially, not judiciously."

It is perfectly true that in the context of this case, considering the provisions of the Act, Mr. Justice Parker did attach great importance to the fact that the committee had to decide the matters on facts and evidence without permitting extraneous considerations to affect their decision. But to say that in this passage the English Court has laid down an unfailing and unvarying

test, is to read this passage out of its context. This passage must be read with the caution which the learned Judge has administered earlier to which reference has been made.

A decision of the Privy Council was also strongly relied upon and that is the case of *Secretary of State v. Mask & Co.*¹ There is a passage in the judgment of the Privy Council which, divorced from its context, may lead to the conclusion that where tribunals are set up which may be considered as statutory tribunals, it is the duty of these tribunals to act judicially. What the Privy Council there said was that even if jurisdiction is so excluded (dealing with the Sea Customs Act which excluded the jurisdiction of the civil Courts) the civil Courts had jurisdiction to examine into cases where the provisions of the Act had not been complied with, or the statutory tribunal had not acted in conformity with the fundamental principles of judicial procedure; and the Advocate General says that if we find that the Customs officer has not acted in conformity with the fundamental principles of judicial procedure, we have a right to interfere, and he says that fundamental principles of judicial procedure is merely a paraphrase of rules of natural justice and therefore the Privy Council held that there was a duty cast upon the authority set up under the Sea Customs Act to act judicially. It should be borne in mind that what was challenged before the Privy Council was not the original order of the Customs authorities but the order in appeal. An appeal had been preferred, a revision had also been preferred, and after exhausting all the legal remedies the matter had come before the Privy Council. It is perfectly clear, as has been pointed out in *R. v. Manchester Legal Aid Committee* that there may be stages laid down by a statute which would provide that at a particular stage the officer or the tribunal acts in his executive capacity or in his administrative capacity and at a different stage he has got to act judicially or quasi-judicially, and as we will point out when we examine the provisions of the Sea Customs Act, under that Act also it is quite possible to take the view that although the Customs officer when he passes the order of assessment is acting administratively, when the matter goes in appeal to the higher authority, at that stage, the authority set up under the Act, has got to act quasi-judicially. Therefore, we do not read this judgment of the Privy Council, and indeed we cannot, as laying down an all embracing principle that wherever statutory tribunals are set up it is their duty to act in conformity with fundamental principles of judicial procedure. The Privy Council could not have overlooked the test laid down by Lord Justice Atkin and could not have decided that whether there was a duty cast upon the tribunal to act judicially or not, the mere fact that a statutory tribunal was set up was sufficient for a Court to take the view that it was the duty of that tribunal to act in conformity with the fundamental principles of judicial procedure.

Reliance was also placed by the Advocate General on a decision of the Calcutta High Court in *Assistant Collector v. Soorajmull*². That is a judgment of Chief Justice Harries and Mr. Justice Banerjee, and a passage in the judgment of the learned Chief Justice which is relied upon for another purpose and in another context is that appeals and revisions provided under the Sea Customs Act are in the nature of appeals from Caesar to Caesar and might not be regarded with any great confidence by persons in the position of the respondents in the case. But on the point that we are at present considering, reliance was placed on the judgment of Mr. Justice Banerjee and Mr. Justice Banerjee, with respect, with admirable research has set out all the relevant decisions on the point, he has also told us what the qualifications of a Judge should be, quoting Dr. Robson, but after all this he comes to the conclusion that he has simply applied the law laid down in *Advani's* case. So we go back, after learned discussion, to *Advani's* case and the test we have to apply is the test laid down in *Advani's* case. It may be noted that that particular case on the facts turned not on an order of assessment but it was a case where the

1 (1940) 42 Bom. L. R. 767, p.c.

2 (1952) 56 C.W.N. 452

Customs authorities levied additional duty and imposed fine, and the question was whether that particular order of the Customs authorities was a quasi-judicial order, and, as we shall point out, it is now beyond controversy that such an order is a quasi-judicial order.

It has been pointed out to us by the Advocate General that the decision in *B. v. Manchester Legal Aid Committee*¹ has been favourably considered by this Court in *Pandyan Ins. Co. v. K. J. Khambata*,² and has received the approval of the Supreme Court in two cases—*Express Newspaper Ltd. v. Union of India*³ and *Nagendra Nath v. Commr. of Hills Division*⁴, and it is said that whatever *Advani's* case might have decided, the Supreme Court as recently as this year has given its imprimatur to the decision of the English Court in *B. v. Manchester Legal Aid Committee*. But we do not read the decision in *B. v. Manchester Legal Aid Committee* to lay down any law different from the law laid down in *Advani's* case. It is perhaps, with respect, a fuller and a more elaborate exposition of the law, and therefore when the Supreme Court cites this decision with approval it does not mean that the Supreme Court in 1958 took a different view of the law from the view taken by the Supreme Court in *Advani's* case.

Reference was also made to a decision in *Nakkuda Ali v. M. F. Des. Jayaratne*.⁵ That is the decision of the Privy Council and there the Privy Council was dealing with the Controller of Textiles in Ceylon and the Privy Council held that the Controller in acting under a certain regulation was not acting judicially and that regulation dealt with the cancellation of licenses. Lord Radcliffe delivering the judgment of the Committee has reviewed all the authorities. At p. 75 the learned Law Lord rightly emphasises that the status of the person or body who passed the order has nothing to do with the question as to whether he has to act judicially or not. This is what he says (p. 75):

"...In truth, the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted." And at p. 77 he poses the question:

"But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially?"

And at the same page he emphasises the duty to act judicially by saying:

"...If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari."

And at p. 78 he cites with approval the judgment of Lord Hewart C.J. in *Rez v. Legislative Committee of the Church Assembly*⁶:

"...In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."

Having cited this passage the learned Law Lord went on to examine the provisions of the Ceylon Act with which the Committee was dealing and this is what he says (p. 415):

"It is that characteristic that the Controller lacks in acting under reg. 62. In truth, when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it. But, that apart, no procedure is laid down by the regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private,

1 [1952] 2 Q. B. 413.

2 [1954] 57 Bom. L. R. 186.

3 [1958] A. I. R. S. O. 578, 612.

4 [1958] A. I. R. S. O. 398, 406.

5 [1951] A. O. 66.

6 [1928] 1 K. B. 411, 415.

before the Controller acts. The licence-holder has no right to appeal to the Controller or from the Controller. In brief, the power conferred on the Controller by reg. 62 stands by itself on the bare words of the regulation and, if the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules."

The Advocate General is quite right that the provisions of the Sea Customs Act are different from the provisions which Lord Radcliffe was considering. As we shall point out, the question here is not the subjective question of whether licence should be withdrawn from a particular person or not. There is a right of appeal provided under the Sea Customs Act. But the Sea Customs Act approximates to regulation 62 which the learned Law Lord was considering to this extent that no regulation is laid down for securing that the assessee should have notice or that there should be an inquiry public or private before the Customs authorities can act. But it would be unsafe and even erroneous to apply a decision, however weighty, on a construction of a particular statute to the construction of an entirely different statute, and the Advocate General is right that although the Privy Council might have held that the Controller of Textiles in Ceylon is not acting judicially, the Customs authorities under the Sea Customs Act may have to act judicially and to observe the judicial process. But for that purpose we must look to the provisions of the Sea Customs Act itself.

We now, therefore, turn to consider what the Sea Customs Act lays down. The charging section is s. 20:

"Except as hereinafter provided, customs-duties shall be levied at such rates as may be prescribed by or under any law for the time being in force,...."

Then we have s. 22 which confers upon the Central Government the power to fix tariff values on any goods exported or imported by sea on which customs duties are by law imposed. This is a very important power because not only has Government a right by law to fix the duty which an importer has to pay, but under this section the Central Government has been given the power and the authority to fix the value artificially of the goods which are imported. In other words, the Central Government could say that the value of vitamin B.12 shall be so many pounds per gram for the purpose of customs duty. Of course, we agree with the Advocate General that this power under s. 22 has to be exercised taking into consideration the international obligations into which India has entered and which India always respects. But apart from international obligations there is nothing to prevent the Central Government from fixing artificially any tariff value in respect of any goods which are imported. This is rather important to bear in mind when we come to consider the merits of the matter. Then we have s. 29 which provides:

"On the importation into, or exportation from, any custom-port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill of entry or shipping bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill."

It is this obligation which was cast upon the appellants which they had to discharge by showing in their bill of entry the real value of vitamin B.12 which they imported into India. The real value which they had to show was not the real value determined by any objective standard. The Legislature itself has supplied a definition for the expression "real value" because in s. 30 it is provided: "For the purposes of this Act the real value shall be deemed to be..." In using this expression the Legislature is introducing a legal fiction. Whatever real value in fact may be, for the purpose of this Act the real value shall be what the Legislature has defined it to be, and that definition is:

"(a) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation •

or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof: or

(b) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid."

We shall have much more to say with regard to this section when we come to deal with the question in controversy between the parties as to what duty the appellants are liable to pay. Turning back to s. 29, the second paragraph of that section provides:

"In case of doubt, the Customs-collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity or description which it is in his power to furnish. And thereupon such person shall produce such document and furnish such information:"

Considerable emphasis was placed by the Advocate General on this part of s. 29 and what was urged is that this is an indication of the judicial process which the Customs Collector has to follow because if he has any doubt as to the real value, power has been conferred upon him to requisition the necessary materials not only from the owner of the goods but also from any other person, and therefore it is suggested that the Legislature did not desire that the Customs Collector should decide matters *ex parte* but that he should call for the necessary materials and evidence, decide on those materials and evidence, and therefore decide judicially and in accordance with the well-known rules of natural justice. It is pointed out that this paragraph also casts a duty upon the person to produce the document and to furnish the information when he is called upon to do. In our opinion, this only deals with cases where the Customs Collector feels doubt. Normally Customs Collectors are so constituted that they do not feel doubt and if they do not there is no obligation cast upon them by this section to call for the documents or information which this section empowers them to do. Besides, it would not be proper in this context to read the expression "may" as "shall" or "must". It is a discretionary power conferred upon the Customs Collector, and the power is undoubtedly very wide, because under this power not only the owner or the importer but also any other person is bound to produce materials, information and documents which the Customs Collector requires.

Attention was also drawn to the new section which has been incorporated in the Sea Customs Act by the Sea Customs (Amendment) Act (XXI of 1955) and that is s. 29B and that section now empowers the Customs authorities to make a provisional assessment of duty. An interesting argument was advanced before us that the short levy notices were not according to law because they were in fact provisional assessments of duty and not short levy notices contemplated by s. 39 to which we shall refer. But fortunately, as we shall point out when we come to the end of this judgment, it is not necessary to decide this question in appeal. Turning to s. 39, it gives power to the Customs authorities, when customs duties or charges have not been levied or have been short-levied through inadvertence, error, collusion or misconception on the part of the officers of Customs, or through misstatement as to real value, quantity or description on the part of the owner, or when any such duty or charge, after having been levied, has been, owing to any such causes erroneously refunded, to call upon the person concerned to pay the duty or charge or deficiency or to repay the amount paid to him in excess, on a notice of demand being issued to him within three months from the relevant date as defined in sub-s. (2), and the relevant date is the date of the assessment. Then we come to s. 86 which obliges the importer to enter in the bill of entry the goods which have been imported. Then comes s. 87 which is the material section for the purpose of assessment. That section says:—

"On the delivery of such bill the duty (if any) leviable on such goods shall be ascer-

sed, and the owner of such goods may then proceed to clear the same for home-consumption, or warehouse them, subject to the provisions hereinafter contained."

A striking feature of this section, as compared with other taxing statutes to which we shall presently turn, is the almost extreme simplicity in which the power to assess has been conferred upon the relevant authority. The Legislature has given no direction whatever in this section as to how the assessment should be made, whether any notice should be given to the assessee, whether any inquiry should be held, and except the barest of language used, the section contains no indication that the assessing authority has to proceed to assess according to judicial process or that while assessing it is the duty of the assessing authority to act judicially. It is very pertinent in this connection to turn to s. 182 which deals with penalties, and to note the language used by the Legislature in this section in contrast to the language used in the assessing s. 87. Section 182 provides:

"In every case, except the cases mentioned in section 167, Nos. 28, 72, and 74 to 76, both inclusive, in which, under this Act, anything is liable to confiscation or to increased rates of duty; or any person is liable to penalty, such confiscation, increased rate of duty or penalty may be adjusted—"

and then follows the jurisdiction conferred upon various authorities. Therefore, the Legislature expressly required the authorities, who were empowered to impose penalties, to adjudge whether a person was liable to the penalty or not, and implicit in the expression "adjudged" is the duty to act judicially; the duty to act as a Judge and not as an administrative or executive officer. It is by reason of this that although some doubt was expressed by the Supreme Court earlier, the Supreme Court has now finally held that under s. 182 the decision of the officer is a quasi-judicial order. See *P. N. Roy v. Collector of Customs, Calcutta*¹, affirmed in *Leo Roy Frey v. Superintendent, Dt. Jail*.² Section 188 deals with appeals and gives the right to any person who is aggrieved by any decision or order passed by a Customs officer to appeal to any officer of Customs not inferior in rank to a Customs Collector and empowered in that behalf by name or in virtue of his office, or to the Chief Customs authority; and as far back as *Secretary of State v. Mask & Co.*, the Privy Council held that an appeal lay not only from an order passed under s. 182 but it lay against any order passed under the Sea Customs Act including an order of assessment. Section 191 deals with the revisional power of the Central Government.

Now, having considered the scheme of the Sea Customs Act, in our opinion it is difficult to take the view that the statute imposes any obligation upon the assessing authority to act judicially. Although that duty may be imposed in a case of an adjudication under s. 182 and also a decision of an appeal under s. 188, it does not necessarily follow that at the initial stage of assessment when an assessment is made under s. 87 the assessment order is a quasi-judicial order. In this connection it would not be out of place to compare the parallel provisions of the Income-tax Act. Mr. Seervai is right that in a sense the Sea Customs Act is in *pari materia* with the Income-tax Act. Both are taxing statutes. The Court in both cases must be anxious to construe provisions of the law in favour of the subject and try and see that the subject is not denied any right which the Court can possibly ensure to him. Turning to the Income-tax Act, it is now settled law that an assessment made by the Income-tax Officer under s. 23(3) is a quasi-judicial proceeding, and when we look at the language of that section we find that the statute has provided:

"On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment."

When one compares the language of this sub-section with the language of s. 87

of the Sea Customs Act, the contrast is not only apparent but striking. Sub-section (3) of s. 23 makes it obligatory upon the Income-tax Officer to hear the evidence as may be produced by the assessee. Sub-section (2) makes it obligatory upon the Income-tax Officer to issue a notice; and the whole language of sub-s. (3) clearly indicates that the Legislature intended that the Income-tax Officer should follow the judicial process in arriving at his conclusion. No such indication is given in s. 87 of the Sea Customs Act. The next section in the Income-tax Act to which attention might be drawn is s. 37. That section deals with the power of the Income-tax authorities and it provides:

"The Income-tax Officer, Appellate Assistant Commissioner, Commissioner and Appellate Tribunal shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters,..."

and power is given for discovery and inspection enforcing the attendance of any person, of compelling the production of books of account, issuing commissions, and there is also power conferred upon the various Income-tax authorities to examine persons on oath. The Advocate General said that we find corresponding powers in the second paragraph of s. 29 of the Sea Customs Act. In our opinion, the ambit of the powers of the Income-tax authorities under s. 37 is much wider than the ambit of their powers under the second paragraph of s. 29, and the wide ambit conferred upon the Income-tax authorities under s. 37 is a further indication that the Legislature intended the Income-tax authorities to act as a Court in the sense of adopting and observing the substantial principles of judicial procedure which a Court follows and observes.

Before we pass from this subject, a passing reference may be made to two judgments which were referred to at the Bar. One is the judgment in what has come to be known as "the fountain pen case" in *B. N. Banerjee, Collector of Customs, Bombay v. Ramchand Sobhraj*¹, and from the judgment it appears that the appellate Court took the view that the order of assessment passed by the Customs authorities was an administrative order. But we agree with the Advocate General that that observation was not based upon any argument advanced before the Court as to whether the order was administrative or quasi-judicial. In that case the Court assumed that the order was an administrative order, and that decision, as rightly observed by the Advocate General, is no authority for the proposition that this Court has held that an assessment order is an administrative order. The other case is the *Ball-bearing case* in *Bombay Business House v. S. Venkatesan*.² In that case my brother Mr. Justice S. T. Desai dismissed the application for a writ against the Customs authorities. All that we emphasised in that judgment was that whether it was a writ of *certiorari* or a writ of *mandamus* the questions of fact could not be gone into by this Court and this Court could not constitute itself into a Court of appeal.

If then the order of assessment is an administrative order and not a quasi-judicial order, the other head of the argument which was submitted to us by the Advocate General, that there is an error apparent on the face of the record, does not survive. We may point out that we listened to a very interesting argument and in this respect also our attention was drawn to the progress that the law has made in England and how the Courts have extended the jurisdiction in cases where the Courts in the earlier days would not have thought of issuing a writ of *certiorari*, in respect of a matter where no question of jurisdiction arose but the question was confined to an error of law committed by a judicial or quasi-judicial authority acting within jurisdiction.

The order made by the assessing authorities is also challenged on the ground that the order, although it is appealable, gives no reasons for the decision. Except in the case of the 10th consignment where the Collector ultimately made his order on April 15, 1957, it is not disputed that in making the assessment or in issuing the short levy notices no reasons were vouchsafed to the appellants

¹ (1955) O. C. J. Appeal No. 53 of 1955, August 19, 1955 (Unrep.), decided by Chagla C. J. and S. T. Desai J., on ² (1958) 60 Bom. L. R. 1058.

as to how and why the assessing authorities came to a particular conclusion or assessed the appellants in a particular manner. It is again well settled law (see *C. R. H. Readymoney Ltd. v. State of Bombay*¹, a judgment of this Court, and also a judgment of the Supreme Court in *Nagendra Nath v. Commr. of Hills Division*²) that when a law confers a right of appeal, the Legislature intends that that right should be an effective right and that right can only be an effective right if the officer or authority from whose order an appeal lies gives reasons for his decision. It is only then that the appellate Court can properly discharge its function. It is only then that the appellate Court could consider whether the decision of the lower authority was correct or not. Now, as already pointed out, under s. 188 a right of appeal is conferred upon the assessee against the assessment order made by the assessing authorities. But notwithstanding this right of appeal, the assessing authorities have not thought fit, except in the case of the 10th consignment as pointed out, to give reasons for their decision. It would have been open to us to take the view that the matter should go back to the assessing authorities with a direction that they should give reasons for the decision and then those reasons could have been tested by this Court if the requisite writ could have lain. But we have agreed to the procedure suggested by the Advocate General, a procedure indeed which has been followed in English Courts, that even where reasons are not given, if the reasons are disclosed in affidavits at the trial, then the Court would look into those reasons and consider those reasons as if they were the reasons embodied in the order itself. Here we have a long and argumentative affidavit from the Collector which gives reasons for the decision and therefore instead of sending the matter back with a direction to the assessing authorities to give reasons for their decision, we have agreed to consider the reasons given by the Collector in the affidavit as if they were the reasons embodied in the order.

One other matter which may be considered and disposed of before we come to the merits is the question as to whether we should entertain this writ in view of the fact that the assessee had a right of appeal under s. 188, and Sir Nusservanji has strongly argued that we have always taken the view that if effective alternative and adequate remedy is open to the petitioner, the Court will not grant him relief under its extraordinary jurisdiction under art. 226 of the Constitution. The position here is rather unusual. In the nine consignments the order of assessment was made by the Customs Collector and under s. 188 the appeal lay to the Collector. But when the Collector passed an order of assessment with regard to the 10th consignment, he clearly indicated what his view on the merits of the petitioner's case was and we agree with the Advocate General that the Collector clearly pre-judged the decision of the appeal. It is quite true that we cannot judge administrative officers discharging judicial functions with the same strictness that we would judge a Judge sitting in Court. A Judge has to maintain certain standards of detachment and objectivity, apart from being impartial. But an administrative officer has to do a considerable amount of administrative work, decide questions of policy, give directions, give instructions, which would be intolerable if they were done by a Judge sitting in Court. But making all possible concession for an administrative officer and the Collector of Customs, we cannot possibly countenance the position urged by Sir Nusservanji that although he may clearly express his opinion, although he may emphatically indicate what his views are, the assessee must still be compelled solemnly to go before him in appeal to hear in appeal the decision which he has practically already given. The reason why the Courts refuse to entertain writs when an alternative remedy is available is that the Legislature has set up tribunals for decision in appeals and that the remedy which the Court could give the petitioner could obtain from these tribunals. But whether the petitioner should be disentitled to maintain the petition or not is a matter of discretion with the Court, and if the Court is satisfied that the petitioner will not get justice from the appellate tribunal or that he would have no confidence in the decision of the tribunal or that the appeal would be nothing more than—

1 (1957) 59 Bom. L. R. 786.

2 [1958] A. L. R. S. C. 398.

to use the language of Sir Trevor Harries—an appeal from Caesar to Caesar, then the Court is not bound to accede to the submission of the State that it should not hear the petitioner and the petitioner should be referred to the appellate tribunal set up under the Act. With regard to the 10th consignment, it is true that in that case the appeal lay to the Central Board of Revenue. But even there the Advocate General has pointed out that Government have issued specific instructions with regard to this particular case. When discussions were going on between the petitioners and the Collector, a particular interview is recorded by the petitioners in their letter of August 3, 1956, and the correctness of the facts set out in that letter has not been denied by the Customs authorities, and this is what the letter states:

“The Collector stated that there was no point in arguing the matter further—the Customs House had received orders from the Government of India in this sense and they were bound to follow such orders.”

This was in connection with the assessing of the petitioners' goods. Well, if the Customs authorities had to carry out the orders of Government, then very little would be left either of judicial process or the doing of justice in the sense that justice not only should be done but should seem to be done. While not in any way deviating from the principle we have laid down in writ cases, in our opinion in this particular case under the special circumstances of the case we will not refuse to entertain the petition on the ground that the appellants have had recourse to the appellate tribunal set up under the Sea Customs Act.

Coming to the merits of the matter, if the order of assessment is an administrative order, there can be no doubt that by a writ of *mandamus* we could compel the assessing authorities to act according to law. But before such a writ could be issued, it must be clear on the language of the statute itself that the action of the authorities was in contravention of the law. The petitioners must satisfy us that there was a clear duty incumbent upon the assessing authorities to act in accordance with certain specific provisions of the law and that they had failed to discharge that duty and have acted in contravention of the law. What is urged by the petitioners in this case is that in assessing the goods of the petitioners, the assessing authorities have taken into consideration matters which are extraneous matters which the law does not permit them to take into consideration. What is pointed out is that under s. 30(b) in order to determine the real value what the assessing authorities have to do is to ascertain the cost at which goods of the like kind and quality could be delivered in Bombay, and in so ascertaining the cost the Customs authorities can only take into consideration matters which are relevant and germane to that question and not matters which are entirely foreign to the consideration of that question. In this case it is clear that the case does not fall under s. 30(a) and the goods of the appellants are to be ascertained on the basis of s. 30(b). Looking at the language of that sub-section it is clear that what the assessing authorities have to do is to find out goods which are of the like kind and quality which are imported into Bombay and determine the cost at which they could be delivered in Bombay. In most cases there would be no difficulty in finding goods of like kind and quality, but we may have a case where goods are *sui generis* and you have only one importer importing those goods, and then the question may arise how are you going to find the cost of the goods of like kind and quality when no other goods are available in the market or no other goods have been imported in the country?

Now, this problem came up before the Privy Council and the Privy Council resolved this problem in *Ford Motor Company of India Limited v. Secretary of State*,¹ by holding that cl. (a) of s. 30 can be applied distributively to each of the Ford motor cars contained in a particular consignment. There the question was of assessing the Ford motor cars to duty and a Ford motor car cannot be compared with a motor car of any other make, and the Privy Council

said, "take any one motor car, find out what the cost would be to deliver it at the place of import, and that would be the real value for the purpose of s.30(a)". Therefore, the decision of the Privy Council was that the goods under assessment themselves may under cl. (a) be considered as members of their own class even though at the time and place of importation there are no other members. The decision of the Privy Council was under cl. (a) of s. 30, but the language for the purpose of this discussion was the same as the language used in cl. (b), viz., goods of the like kind and quality, and what fell for construction before the Privy Council was the expression which we are construing. In this particular case this difficulty does not arise because, as we shall presently point out, although the case of the Customs authorities is that vitamin B.12 manufactured by Glaxo Ltd. in the United Kingdom and imported into India are goods which are *sui generis*, admittedly, there is another importer besides the appellants and that is Voltas Ltd. and the whole basis of the assessment made by the Customs authorities is the cost at which these goods were delivered to Voltas Ltd. We have a clear indication of the case of the Collector of Customs in the letter of April 15, 1957, to which reference has been made, and this is what the Collector says:

"It has been found that goods of like kind and quality are being imported by another importer, M/s. Voltas Ltd., Bombay, under a sole distributors' agreement entered into by them with the same suppliers. It has also been found necessary to enhance the invoice values charged by the suppliers to M/s. Voltas in the proportion of 87.5 to 100 in order to arrive at the assessable value under section 30(b) Sea Customs Act."

The whole of the controversy between the parties which we said at the outset is in a very narrow compass, is this. The appellants have no grievance, and they can have no grievance, to the Collector assessing the goods imported by the appellants on the basis of the goods imported by Voltas Ltd. because they are identical goods. The grievance of the appellants is that there is no justification on the part of the Collector and no warrant in law to add 12½ per cent. to the invoice value of the goods imported by Voltas Ltd.

We must now try and point out how this 12½ per cent. came to be added. It appears that there was an agreement between Voltas Ltd. and Glaxo Laboratories Ltd. of U. K. dated March 12, 1955, and the relevant provision of that agreement was:

"On all sales to you of the 1 gm. pack of bulk Glaxo Vitamin B.12 we undertake to allow you a discount of 12½% when the c.i.f. price is £ 87 10s. per gm., provided that in the event of any alteration in the said c.i.f. price or when in Glaxo's opinion changes in Indian commercial circumstances justify Glaxo doing so we shall have the right to reduce the discount to 10%."

Therefore, on the goods imported by Voltas Ltd. under this agreement, although the price was £ 87-10-0 they were allowed a discount of 12½ per cent. Therefore, the price as far as Voltas Ltd. was concerned was £ 87-10-0 less 12½ per cent. The Customs authorities then took the view, and rightly, that they were not concerned with this 12½ per cent. discount and that the price must be fixed on the basis of £ 87-10-0 and not on the basis of £ 87-10-0 less 12½ per cent. discount. Then there came a modification of this agreement on August 1, 1956, and by that modification Glaxo Laboratories Ltd., England, agreed to supply to Voltas Ltd. bulk Glaxo vitamin B. 12 at net f.o.b. prices without any trade discounts allowable whatsoever. Therefore, by this modification Voltas Ltd. did not get any discount or commission and they paid the price fixed by Glaxo Ltd. without getting any concession. Shortly put, the whole of the contention of the Customs authorities is that they are entitled to add back or to load the invoice price of Voltas Ltd. by 12½ per cent., and therefore in the consignments with which we are concerned in this appeal what the authorities have done is that they have looked at the invoice of Voltas Ltd. and added to the price shown 12½ per cent., and the question that falls for our determination is whether this is in accordance with law.

Now, we entirely agree with Sir Nusservanji that in determining the real value the Customs authorities are not bound by the price shown on the invoice

by the importer. It would be an impossible position as far as the revenue of this country is concerned, if the Customs authorities had to accept whatever invoice was produced for their inspection and to determine the real value on the basis of that invoice. In fact, s. 30(b) does not refer to the invoice at all. The invoice is an important piece of evidence to determine what the real value is. But that piece of evidence may be discarded if the authorities take the view that it is not a genuine document or if they take the view that over and above the price which is being paid some other consideration has passed under the document. Take this very case. Although the invoice of Voltas Ltd. may show "X" pounds as the price of one gram of vitamin B.12 if the Customs authorities were satisfied that Voltas Ltd. were receiving 12½ per cent. discount and that discount was being paid to them and that that discount was not shown in the invoice but they had reason to believe that such a discount was credited to Voltas Ltd. in some way or other, then undoubtedly they would be entitled to say that the invoice price shown is not the proper price for the purpose of determining the real value. But if the Customs authorities come to the conclusion that the price shown in the invoice of Voltas Ltd. is the real price, that there is no other consideration which flows from Glaxo Ltd. to Voltas Ltd., then it is not open to the Customs authorities to take into consideration other extraneous factors which the law does not permit them to do. We are told by the Advocate General that apart from Voltas Ltd. and the appellants, there are other importers in Bombay who are importing vitamin B.12. It would be open to the Customs authorities to compare the cost at which these various importers have imported this particular commodity. We are told that it was suggested to the Customs authorities to take up this line and find out what the actual cost is, but they rejected it on the ground, as already pointed out, that the goods imported by the appellants were *sui generis* and they had instructions from Government to treat these goods as *sui generis*. Therefore, if the authorities have taken up that attitude, then they must determine according to law what the goods cost to Voltas Ltd. and that cost cannot be increased by any factor or any circumstance which does not fall within the purview of s. 30(b).

Now, we must say that the attitude taken up by the Collector in his affidavit seems to be a little inexplicable. As already pointed out, in the letter of April 15, 1957, the case of the Collector was clearly and explicitly set out that he had found that there were goods imported by another importer Voltas Ltd. and it had been found necessary to enhance the invoice value by 12½ per cent. This letter does not state why it was found necessary to enhance this value, but the reason now appears in the affidavit filed by the Collector. In para. 10 of that affidavit the Collector dealing with para. 22 of the petition says:

"I am not aware of and do not admit that between April and September 1956 and November 1956 to March 1957, Messrs. Voltas Ltd. did not in fact receive any discount in respect of the price of £72-3-8 per gm. F.O.B. Further, the Distributors' Agreement dated 18th March 1955 and the modification letter dated 1st August 1956 will also not be deemed to be admitted. I maintain that an agent is entitled to a commission on goods imported and if the invoices do not indicate the commission, it is proper to interpret that the value shown in the invoices is the net value after the deduction of the commission. The 'real value' of the goods in question was equal to the invoice value plus the undisclosed amount of the commission."

Now, here, we have in this affidavit a series of statements unwarranted by law, unwarranted by facts, and which disclose a complete confusion of thought. In the first part of this paragraph the Collector does not say that Voltas Ltd. received any commission in respect of the invoices after the modification of their agreement with Glaxo Ltd. after August 1, 1956. He merely takes up the technical attitude that he is not aware of and does not admit. Then he takes up rather this curious attitude that he does not admit the agreement and the modification with Voltas Ltd., although the very assessment of the petitioners was on the basis of the agreement between Glaxo Ltd. and Voltas Ltd. Then he propounds a statement of law which is erroneous that an agent is entitled to commission on goods imported. Surely, this is not a principle of law but

a matter of agreement. There is no obligation on an agent to receive commission. An agent may or may not take commission and it is purely a question of fact and not a matter of law. Then he goes on to make this rather startling statement:

"...if the invoices do not indicate the commission, it is proper to interpret that the value shown in the invoices is the net value after the deduction of the commission."

We do not know what canon of construction has been adopted in order to consider these invoices. Then he ends up by saying:

"The real value of the goods in question was equal to the invoice value plus the undisclosed amount of the commission."

After having said that he was not aware and did not admit that Voltas Ltd. received any commission, here he seems to suggest that there was an undisclosed amount of commission which Voltas Ltd. had received.

Now, there does not seem to be any warrant on the record for the suggestion that Voltas Ltd. had received any commission which had not been disclosed. We would not have proceeded further in the matter if the Collector had told us that on the evidence or on the information he had come to the conclusion that Voltas Ltd. had received commission from Glaxo Ltd. which had not been disclosed and that he had added this commission to the invoice value of the goods consigned to Voltas Ltd. But as pointed out, he does not take up this attitude in the earlier part of para. 10 of his affidavit. It is more a case of suspicion and surmise. It is a case of willing to wound but afraid to strike. We do not think that this is a fair attitude for the Collector to take. We are all the more surprised because in all cases we have been dealing with under the Sea Customs Act in this Court, as we told Sir Nusserwanji and the Advocate General, we have always found the Customs authorities taking up a very responsible attitude and always trying to discharge their duty, which is always an unpleasant duty, to the best of their ability and always with due regard to the rights of the assessee under the law. Then we come to para. 12 and this is what the Collector says:

"As regards the case of Messrs. Voltas Ltd. cited by the petitioners, I say that Messrs. Voltas Ltd. were appointed Agents-Distributors of the English company and were allowed for their services, a commission of 12½ per cent. I say that the petitioners are not the Agents-Distributors of the said goods. In the circumstances, I say that in order to ascertain the 'real value' of the said goods, the relevant matter for consideration would be as to what is the gross value shown in the invoices of importers other than the Agents-Distributors, without abatement of the 12½ per cent discount given to Messrs. Voltas Ltd., as the Agents-Distributors."

Now, this is an extraordinary *volte face* on the part of the Collector, because having based his assessment on the invoices of Voltas Ltd. he here tells us that Voltas Ltd. were Agents-Distributors of the English company and that in order to ascertain the real value of the good what has got to be found is the gross value shown by the importers other than the Agents-Distributors, and again he adds the insinuation "without abatement of the 12½ per cent discount given to Messrs. Voltas Ltd. as the Agents-Distributors." Well, as we pointed out, it was perfectly open to the Collector to have taken into consideration vitamin B.12 imported by different importers. But he came to the conclusion advisedly under instructions from Government that vitamin B.12 imported by other importers were not goods of the like kind and quality as the goods manufactured by Glaxo Ltd. and imported into India. Having come to that conclusion he based his assessment on the invoice of Voltas Ltd. and in this paragraph he turns round and says:

"Messrs. Voltas Ltd. are after all Agents-Distributors and we cannot find the real value by looking at their invoice but we must consider the invoices of other importers."

We agree with the Advocate General that s. 30(b) does not in any way import into its construction any consideration as to the character of the importer. What is emphasised is the cost of the goods, whoever the importer may be. It may be said that goods may be subsidized or they may be dumped on the

Indian market. But for that purpose the Customs authorities have not been given the right to take that factor into consideration under s. 30(b). The remedy for that evil is action by Government under s. 22. As already pointed out, subject to international obligations it is open to Government, if they find that goods are being brought to Bombay at a cost less than its actual cost, to fix the tariff value of these goods, and the Advocate General has drawn our attention to some notifications issued by Government where in fact they have done so. Therefore, where at one stage the Collector of Customs wanted to find out what the goods cost in England and at what price they were exported to Europe, these factors are not relevant for the purpose of deciding that the goods are being dumped or subsidized in the Indian market. The Customs authorities may take that into consideration in order to determine whether the invoice price shown by the importer is the real cost at which goods of like kind and quality could be delivered, or, let us put it this way, in order to guide the Customs authorities in assessing the goods of the appellants and other goods in future. The invoice is *prima facie* evidence. It is not conclusive evidence. If the Customs authorities accept the invoice, there is an end of the matter. If they do not, then in order to test the genuineness of the invoice they may requisition to their aid any other facts, but only for that purpose. They may consider if they like the cost in Europe, cost of production, or any other factor. But all those considerations must ultimately be directed to the determination and ascertainment of the only fact which has got to be determined and ascertained under s. 30(b), which is the cost of the goods of like kind and quality which could be delivered in Bombay. In this connection, in para. 7 of his affidavit the Collector has also drawn attention to the relation subsisting between the English company and the appellants, and he has pointed out that the Indian company is a subsidiary company and that under an agreement between them a certain amount has to be remitted out of the profits to the English company. It is also pointed out that the Indian company has purchased the Glaxo trade marks at a certain price and these are being written off from time to time in the balance-sheet of the Indian company. These are all very important considerations for assessing the Indian company to income-tax, but they do not seem to have much relevance to the question which the Customs authorities had to decide as to what the goods cost in Bombay. If the suggestion is that the English company sent goods to the Indian company at a cheaper value or cheaper price because of the fact that these relations subsisted between the English company and the Indian company then, as already pointed out, unless this relationship has some bearing on the question of the determination of the real value it cannot be taken into consideration for the purpose of assessing the goods of the petitioners. Sir Nusserwanji says that there may be a special contract arrived at under special circumstances between the Glaxo Company in England and Voltas Ltd. and that the assessing authorities were entitled to take those circumstances into consideration. Now, both the agreement and the modification are before the Court and were before the assessing authorities and the assessment has been based simply on the ground that because Voltas Ltd. charged 12½ per cent. commission at one time, therefore the authorities will assume that they continued to charge that commission and because in law agents are entitled to charge commission. That is, we think, a correct summary of the attitude taken up by the assessing authorities as appears on the record.

In this connection it may be pointed out that Voltas Ltd. on April 10, 1957, wrote to the Assistant Collector of Customs stating:

"It has been necessary for the supplier to reduce the price to us and, in order to allow us to make our own selling prices to meet competition in India, it was agreed that the basis of our invoice prices would be a nett figure, decided upon, from time to time, after reviews of the competitive position vis-a-vis world prices. It was a result of a review of such factors which took place in Bombay with one of the Directors of Glaxo Laboratories, U.K. who was on a visit to India, that clause 7 of the Agreement dated 18th March, 1955 was amended from its original form to its present form."

The grievance of Sir Nusserwanji is that no further evidence and documents

were produced by Voltas Ltd. in support of their contention that there was a modification of the original agreement. But the Advocate General rightly complains that whatever the attitude of Voltas Ltd. might have been, it was after all their goods which were being assessed to duty and at no time have they asked to request the English company to produce any documents if there were any in connection with this modification, and the Advocate General has made the offer that he is quite prepared to get an affidavit made by a responsible officer of the English company that after the modification no discount whatever was paid to Voltas Ltd. and the modification represents a genuine transaction. The learned Judge on this point allowed certain evidence. The appellants were compelled to call a Director of Voltas Ltd. because the agreement and modification were not admitted by the Collector, and Sir Nusserwanji wanted to take us through the cross-examination of that witness to show us that on the face of it it seemed curious that a modification of this sort should have been brought about without any correspondence, without any resolution being passed by the Board of Directors of Voltas Ltd., or by Glaxo Ltd. in England. We have not permitted him to do so because, in our opinion, on this writ application we must decide the question on the record and not by evidence led in Court. The question that we have to decide is: What was the position at the date of the petition? Were the assessing authorities justified in adding 12½ per cent. to the invoices of Voltas Ltd. for the reasons stated by them on record? In our opinion, it is patent that the reasons given by the authorities are not reasons which can be supported in law.

A question was also argued with regard to the validity of the short levy notices to which references has been made. The learned Judge has taken the view that those notices are valid and the Advocate General wanted to satisfy us that they did not fall within the purview of s. 39. We must not be considered to have upheld the view of the learned Judge because, in our opinion, it is unnecessary to decide the question in view of the order we are proposing to pass.

Sir Nusserwanji on behalf of the Customs authorities agrees that the Customs authorities will dispose of the refund applications in respect of the first six consignments in the light of this judgment. In other words, the Customs authorities will consider whether they were justified in assessing the appellants on the invoice of Voltas Ltd. plus 12½ per cent. If they come to the conclusion in the light of our directions and observations that they were so justified, then the refund applications will be dismissed. If, on the other hand, they come to the conclusion that the assessment must be on the basis of the invoice, then the appellants would be entitled to succeed with regard to the whole claim made by them. If, on the other hand, they come to the conclusion that the assessment should be reduced partially, then the appellants would succeed partially with regard to the refund applications. We wish to make it clear that this has nothing to do with the refund already paid by the Customs authorities in respect of the first six consignments under the circumstances to which we have already adverted earlier in the judgment.

With regard to the 7th, 8th and 9th consignments, a demand has been made with regard to the short levy notices issued in respect of these three consignments. Sir Nusserwanji agrees on behalf of the Customs authorities that with regard to these notices also the Customs authorities will decide in the light of our judgment what is the proper assessment to be made on the appellants. If they come to the conclusion that the assessment should be maintained, then the short levy notices will stand. If, on the other hand, they come to the conclusion that the 12½ per cent. addition is not justified, they will withdraw the short levy notices. If, on the other hand, they come to the conclusion that the amount of the assessment should be reduced, the short levy notices will be suitably amended.

With regard to the 10th consignment, as we have not gone beyond the stage of assessment made by the Collector, Sir Nusserwanji agrees on behalf of the Customs authorities that that assessment order will be set aside and the Customs

authorities will reconsider the matter in the light of our judgment and make the assessment order in accordance with the directions given by us in this judgment.

Sir Nusserwanji agrees that for the purpose of appeal under s. 188 and revision under s. 191, the orders made by the Customs authorities on these 10 consignments in the light of this judgment will be considered to be original orders of assessment and the petitioners will have a right of appeal within the period of limitation fixed under the relevant sections on the basis that the order of assessment was made when the decisions were given by the Customs authorities on these consignments.

With regard to the 10th consignment, we have already directed that the Collector will review in the light of this judgment the order of assessment made by him on April 15, 1957. If on this review it is found that the appellants are entitled to any refund, he will make the order of refund, because under an interlocutory order passed by this Court the goods covered by the 10th consignment were passed on to the appellants paying the full amount of assessment under protest and without prejudice to their rights.

The result is that the decision of the learned Judge dismissing the petition with costs will be set aside and the directions mentioned in the judgment will be given on this petition to the respondents.

On the question of costs, the Advocate General submits that in view of the fact that the Collector of Customs has agreed through his counsel to give effect to the directions contained in this judgment and the appellants have also agreed to abide by the decision of the Collector subject to the right of appeal and revision or any other remedy in law, the proper order would be that there should be no order as to costs throughout. We accept that submission and direct that there will be no order as to costs throughout.

Liberty to the appellants' attorneys to withdraw the sum of Rs. 500 deposited in Court.

Appeal allowed.

Solicitors for the appellants: *Crawford Bayley & Co.*
Solicitor for the respondents: *N. B. Vakil.*

FULL BENCH.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

KUMAR SHRI BHOJRAJJI KARANSINHEJI v. SAURASHTRA STATE.*

Saurashtra Adjudication of (Special Courts) Suits Ordinance, 1949 (No. LXXII of 1949), Sec. 4—Saurashtra Suits against Government (Abatement and Adjudication) Act (IV of 1951), Sec. 3(1)—Constitution of India, Art. 363—Suits contemplated by s. 4(1)(i) of Ordinance, nature of—Contractual obligation undertaken by Ruler of State previous to its merger with State of Saurashtra—Whether suit to enforce such contract falls within s. 4(1) of Ordinance—Abatement of such suit by virtue of s. 3(1) of Act IV of 1951—Suit whether barred under art. 363 of Constitution—Liability of merging State taken over by successor State under covenant—Whether covenant can be looked upon as waiver by succeeding State of its right to ignore private rights of citizens of merging State.

Section 4(1) of the Saurashtra Adjudication of (Special Courts) Suits Ordinance, 1949, contemplates suits which sound in tort and not suits in contract.

Where the Ruler of a State, previous to its integration with the State of Saurashtra, had entered into a contract with the plaintiff and the plaintiff filed a suit against the State of Saurashtra to enforce the contractual obligation undertaken by the Ruler,

*Decided, August 27, 1958. First Appeal Wadalla, Civil Judge, Senior Division, Surendranagar, in Civil Case No. 37 of 1950. No. 12 of 1958, from the decision of M. B.

on the question whether the suit fell within the ambit of s. 4(1) of the Saurashtra Adjudication of (Special Courts) Suits Ordinance, 1949:—

Held, that the expression "anything done or omitted" in s. 4(1)(i) of the Ordinance means anything done or omitted unilaterally,

that what was done by the Ruler was to enter into a contract with the plaintiff which was a bilateral act and the enforcement was not of any right or remedy in respect of anything done or omitted to be done, but the suit was for the enforcement of the contract entered into between the plaintiff and the Ruler, and hence the suit did not fall within s. 4. of the Ordinance, and

that, therefore, the suit did not abate by reason of the provisions of s. 3(1) of the Saurashtra Suits against Government (Abatement and Adjudication) Act, 1951.

When a citizen seeks to enforce his contractual right or his rights under the ordinary law of the land, merely because he is asserting those rights against the State, the State cannot rely on the provisions of art. 363 of the Constitution of India for contending that because the liability was taken over by the State from the merging State under a covenant, the right of the citizen cannot be adjudicated in a civil Court as provided by art. 363 of the Constitution. The covenant itself may be looked upon as a waiver by the Covenanting State of its right to ignore private rights of the citizen of the State of which it is the successor.

Bholanath J. Thaker v. State of Saurashtra,¹ followed.

West Rand Central Gold Mining Company v. Rex,² referred to.

Onn Bhojrajji (plaintiff), who was the second son of the ex-Ruler of the State of Sayla, was a cadet of the Sayla State and as such, according to the law and custom governing the rights of the cadets of the State, he was entitled to Giras by way of maintenance and residential quarters suitable to his status or sufficient amount of cash to enable him to build such quarters. On July 21, 1945, by an order the Thakore Saheb of Sayla, the father of the plaintiff, in his capacity as the Ruler of the State, directed that a sum of Rs. 80,000 should be paid to the plaintiff for building a Darbargadh in the plaintiff's Giras village Dhedhuki. The order provided that the amount of Rs. 80,000 should be paid to the plaintiff within five years. Pursuant to this order the plaintiff was paid Rs. 6,000 in the year 1946 and Rs. 6,000 in the year 1947. The sum of Rs. 18,000 remained unpaid and in the meantime the Sayla State integrated with the United States of Saurashtra. The plaintiff applied to the Chief Secretary of the United States of Saurashtra for payment of Rs. 18,000, but he was informed that the amount would not be paid to him and liability to pay it was denied. On February 2, 1950, the plaintiff filed the present suit against the United States of Saurashtra in the Court of the Civil Judge at Surendranagar claiming the balance of Rs. 18,000. The trial Court dismissed the suit on the ground that the suit had abated under the Saurashtra Suits against Government (Abatement and Adjudication) Act, 1951. The plaintiff appealed to the High Court of Saurashtra. The appeal came up before M. C. Shah and J. A. Baxi JJ. who referred it to a full bench. Baxi J. delivered the following referring judgment on July 1, 1954:—

Baxi J. This appeal arises out of a decree of the Civil Judge, Senior Division, Surendranagar, dismissing the suit filed by the appellant, who is the son of the Ruler of the Sayla State, against the respondent State. In this suit he claimed Rs. 18,000 on the strength of an order dated July 21, 1945, passed by the Thakore Saheb of Sayla. By this order the Thakore Saheb directed the payment to the appellant of Rs. 80,000 for constructing a Darbargadh in the village Dhedhuki in yearly instalments and further directed that the amount should be paid to him in full within five years. The appellant has been paid Rs. 12,000 in two instalments by the Sayla State. Before any further payment could be made that State was integrated with the Saurashtra State. The appellant, thereupon, claimed from the Saurashtra State the payment of the balance of Rs. 18,000, but his claim was rejected by it. The appellant, therefore, filed the suit against the State. The suit was resisted by the State on

¹ [1954] A. I. R. S.C. 480.

² [1905] 2 K. B. 391.

various grounds, and objection against the jurisdiction of the Court to entertain the suit was also taken in the written statement. During the pendency of the suit, Act IV of 1951, known as "The Saurashtra Suits against Government (Abatement and Adjudication) Act, 1951," was passed and it was contended on behalf of the State that the suit had abated under the provisions of s. 3(1) of that Act. The learned Civil Judge held that the Court had jurisdiction to entertain the suit and found in favour of the appellant on all other points raised on behalf of the State. But he held that the suit had abated under Act IV of 1951 mentioned above and dismissed the suit. The appellant has preferred this appeal against the learned Civil Judge's decree.

The appellant had contended that the liability of the former Sayla State to pay the balance of Rs. 18,000 under its order was transferred to the Saurashtra State under art. 6(1)(c) of the Covenant. The contention on behalf of the State was that this question was not justiciable by virtue of art. 363 of the Constitution and consequently the Court had no jurisdiction to try the suit. The learned Civil Judge relying upon a Full Bench decision of this Court in *State v. Bholanath*¹ rejected this contention and held that the article had no application to the present suit and he had jurisdiction to try the same. In *Bholanath's* case the claim against the State was for compensation for premature retirement of a servant from civil service. Bholanath was a member of the permanent civil service of the former Wadhwan State. After signing the Covenant, the Ruler of that State passed a law which fixed the superannuation age for the State's civil servants at 60. After the Ruler made over the administration of the Wadhwan State to the Saurashtra State in pursuance of the terms of the Covenant, Bholanath was retired from service by the Saurashtra State on the ground that he had passed the age of superannuation which was taken at 55. Bholanath filed the above suit relying on cl. 16 of the Covenant, under which the Saurashtra State had undertaken to absorb. He also relied on the law passed by the Wadhwan State. The suit was contested on behalf of the States *inter alia* on two grounds; firstly that after the Ruler of the Wadhwan State had entered into the Covenant, it was not competent for him to enact any law, which could bind the Saurashtra State, and secondly that, as the dispute arose out of the Covenant, the jurisdiction of the Court was barred by art. 363 of the Constitution. The Full Bench held that the Ruler had lost legislative competence after he signed the Covenant and could not enact the law, under which Bholanath claimed to be retained in service till 60. As regards the application of art. 363, it held that the article applied to disputes arising out of the Covenant between the Covenanting Rulers on the one hand and the State or the Union Government on the other, but not to suits where one of the parties to the dispute was a private party. The case went in appeal to the Supreme Court in *Bholanath v. State of Saurashtra* (Civil Appeal No. 170 of 1954). The Supreme Court reversed the Full Bench decision as it did not accept the view that the Ruler had lost legislative competence after signing the Covenant and before making over the administration in pursuance thereof. The law under which Bholanath claimed was, in their Lordships' view, good law, and continued to be good law under the terms of the Covenant after the merger and Bholanath's rights under that law could be enforced by means of a suit. In that view of the matter, their Lordships held that art. 363 could not be invoked by the State. There was, therefore, no authoritative pronouncement of the Supreme Court on this question and the view expressed by the Full Bench is at the present moment the last word on the point.

The learned Advocate General, however, contended that the view of the Full Bench about the scope and the applicability of this article was not correct. He argued that if the parties to the Covenant could not agitate in a Court of law disputes arising out of the Covenant, it was illogical to hold that persons, who were not parties thereto, could do so, even though they might be regarded in some way as beneficiaries under the Covenant. According to him, the lan-

¹ [1952]-A. I. R. Saurashtra 49, F.B. . . .

guage of art. 363 was very clear and barred the adjudication of the dispute by a Court irrespective of the parties to it.

The learned Advocate General's contention is not without force. But as the question has been discussed by the Full Bench at some length, we would have hesitated to make another reference to the Full Bench on the same point. However, we are referring this appeal to the Full Bench on other points and the correctness of its view in *Bholanath's* appeal about the scope of art. 363 will no doubt be reconsidered by it.

Before proceeding to the other points raised in this appeal, it will be convenient to notice the provisions of Ordinance 72 of 1949 and Act IV of 1951. The Saurashtra Adjudication of (Special Courts) Suits Ordinance, 1949, (Ordinance No. 72 of 1949) was enacted to provide for the adjudication of suits triable by special Courts in the Western India and Gujarat States region and the Covenanted States, Talukdars and Estates. Clause (i) of s. 3 of the Ordinance provides that subject to the provisions of s. 4, all suits or proceedings of any description, whether civil or political, which were, before the date of the coming into force of the Ordinance, triable by Special Courts constituted or established by or under the authority of the Government of India or the Crown Representative or the Rulers of the Covenanted States or the Talukdars etc. shall be tried and disposed of by civil Courts. Clause (ii) provides for transfer by the Government of the above suits and proceedings to civil Courts. Section 4 of the Ordinance is a saving clause and exempts from the application of s. 3 suits against the Government of the nature described in cls. (i) and (ii) of that section. Clause (i) refers to suits for the enforcement of any right or remedy in respect of anything done by or under the authority of any Ruler of a Covenanted State or any Talukdar etc. before April 15, 1948, while cl. (ii) refers to suits in respect of any dispute between the Government and any landholder arising out of a provision of any treaty, engagement or other instrument, which was executed or entered into by a Ruler of the Covenanted State, Talukdar etc. before the integration of his State, Estate or Taluka into the State of Saurashtra. Act IV of 1951 was next passed and cl. (i) of s. 3 of the Act provides for the abatement of the suits described in cl. (i) of s. 4 of the Ordinance and cl. (2) provides that the suits of the nature described in cl. (ii) of s. 4 of the Ordinance shall be tried by a Special Officer.

The net result of these two pieces of legislation is that the civil Court's jurisdiction was extended to all suits and special proceedings, which were formerly triable by Special Courts and over which the jurisdiction of the civil Courts was barred. But suits against the Government of the nature described in cls. (i) and (ii) of s. 4 of the Ordinance were exempted from the jurisdiction of the civil Courts. No alternative forum was, however, provided by the Ordinance for the trial of the suits so exempted from the civil Court's jurisdiction, though the former Special Courts had ceased to function. Act No. IV of 1951 was, therefore, passed, which put an end to suits of the nature described in cl. (i) of s. 4 of the Ordinance by providing for their outright abatement and set up a special forum in respect of other class of suits by providing that they should be tried by a Special Officer.

Reverting to the discussion of the present appeal, the learned Civil Judge relying upon a decision of this Court in *State of Saurashtra v. Haji Ismail*¹ held that the Ordinance applied to suits which were instituted before the date of the Ordinance and were pending on that date, and as the present suit was filed after the Ordinance it did not apply to it and the jurisdiction was not barred by the provisions of s. 4(i) of the Ordinance.

Mr. M. O. Shah supported this finding. The learned Advocate General argued that s. 4 applied to all suits triable by Special Courts whether they were pending on the date of Ordinance or instituted subsequently. He pointed out that cl. (i) of s. 3 of the Ordinance gave jurisdiction to civil Courts in respect of all suits triable by Special Courts irrespective of whether they were pend-

¹ [1953] A. I. R. Ben. 180.

ing on the date of the Ordinance or not and cl. (1) of s. 3 would apply to a suit instituted after the date of the Ordinance and the civil Court would have jurisdiction to try them. Provisions for pending suits were made by cl. (ii) of s. 3. But s. 4 exempted all suits against Government mentioned in s. 3 and not merely suits mentioned in cl. (ii) of s. 3 and, therefore, the view of the Bench in Civil Appeal No. 16 of 1952 was erroneous and should be reconsidered. We are inclined to the view that s. 4 of the Ordinance refers to suits of the nature described both in cls. (i) and (ii) of s. 3 of the Act and applies to suits pending on the date of the Ordinance as well as to suits filed subsequently, and the question requires to be considered by the Full Bench.

Mr. M. O. Shah also argued that cl. (i) of s. 4 of the Ordinance was not applicable to this suit and consequently whether the suit was pending or not on the date of the Ordinance, the civil Court's jurisdiction was not barred. He submitted that cl. (i) of s. 4 of the Ordinance referred to suits in respect of anything done by or under the authority of a Ruler before April 15, 1948, i.e., suits arising out of indefensible acts of malfeasance or nonfeasance of the Rulers and referred to para. 3 of the Statement of the Objects and Reasons appended to the Bill No. XIII/1950 published at p. 463 of the Saurashtra Government Gazette, Part I-A, 1950, which Bill was subsequently enacted into Act IV of 1951. As the present suit was for enforcement of liability in respect of a legitimate grant by the Ruler of the former Sayla State, Mr. Shah argued, it was not covered by cl. (1) of s. 4 of the Ordinance and consequently the Court's jurisdiction was not barred. The learned Advocate General, while not conceding the point, admitted that the provisions of cl. (i) of s. 4 of the Ordinance were susceptible of the construction, which Mr. Shah was placing upon it, and if the High Court accepted that construction, the jurisdiction of civil Courts would not be barred by the provisions of cl. (i) of s. 4 of the Ordinance. We are inclined in favour of the construction that Mr. Shah places on the scope of cl. (i) of s. 4 of the Ordinance. That clause is intended to bar the jurisdiction of civil Courts over suits in respect of autocratic acts of malfeasance or non-feasance of the Ruler, leaving such suits to be dealt with by subsequent legislation, but the Legislature could not have intended to exempt from the jurisdiction of civil Courts, suits in respect of legitimate liability incurred by a Covenanting State before integration. Such a construction would be repellent to the fundamental principle of devolution of liability under art. 6 of the Covenant. Therefore, cl. (i) of s. 4 of the Ordinance could not apply to suits against Governments which though triable by Special Courts, did not arise out of acts of malfeasance or nonfeasance by the Rulers and consequently the Court's jurisdiction cannot be barred. The present suit does not arise out of any such act of malfeasance or nonfeasance by the Ruler and consequently s. 4 of the Ordinance does not apply to it and the jurisdiction of the Court is not barred.

The learned Civil Judge held that the suit had abated by virtue of cl. (i) of s. 3 of Act IV of 1951. If, however, the present suit is held to be outside the scope of s. 4 of the Ordinance, Act IV of 1951 cannot apply to it and the suit cannot abate. The decision on this question will, therefore, depend upon whether the present suit is governed by cl. (i) of s. 4 of the Ordinance and will have to be determined by the Full Bench.

In the result, we direct that the appeal be referred to the Full Bench.

The appeal was heard by a Full Bench composed of Chagla C.J. and S. T. Desai and K. T. Desai JJ.

N. A. Palkhivala and *P. L. Chudgar*, with *N. C. Maniar*, for the appellant.
Y. V. Chandrachud, Government Pleader, for the respondent.

CHAGLA C.J. When Mr. Justice M. C. Shah and Mr. Justice Baxi of the Saurashtra High Court heard First Appeal No. 12 of 1952, certain important questions of law arose before them and they thought it necessary to refer those questions to a Full Bench. This matter has now come before us.

In order to understand the question that we have to decide, a few facts must be stated. The plaintiff is the second son of the ex-Ruler of Sayla and on July 21, 1945, the Thakore Saheb of Sayla, the then Ruler, agreed to give to the plaintiff a sum of Rs. 30,000 in lieu of residence and this came to be given under the following circumstances. The Thakore Saheb was the *karta* of an impartible estate and both under the custom and the rule of Hindu law the impartible estate would go to his eldest son, but the younger sons have a right of maintenance and residence. Certain provision was made with regard to the maintenance of the plaintiff, but with regard to the residence, that claim was commuted for the amount of Rs. 30,000. Pursuant to this arrangement two sums of Rs. 6,000 each were paid in 1946 and 1947. It may be stated that the order of the Thakore Saheb provided that the sum of Rs. 30,000 was to be paid by five instalments. On March 15, 1948, the United States of Kathiawar came into existence, the State of Sayla having merged in these United States on March 7, 1948. The United States of Kathiawar ultimately gave place to the State of Saurashtra and under the States Reorganization Act of 1956 the State of Saurashtra became a part of the Bombay State, and the plaintiff filed the suit against the State of Saurashtra on February 2, 1950, claiming the balance of Rs. 18,000. The trial Court, which gave its judgment on November 20, 1951, held in favour of the plaintiff on all points, but came to the conclusion, by reason of certain provisions of law to which we will presently make reference, that the suit had abated and dismissed the suit. An appeal was carried to the High Court of Saurashtra and a Division Bench of that High Court, as just pointed out, made this reference to the Full Bench on July 1, 1954.

The first question is whether the suit filed by the plaintiff has abated. In order to understand this contention and also the second contention which arises out of certain provisions of the Constitution, let us try and clearly understand what the nature of the suit was which the plaintiff had filed. He was enforcing against a State a contractual obligation undertaken by the Ruler of Sayla. It was an agreement arrived at between the Thakore Saheb of Sayla and the plaintiff that in lieu of the plaintiff's right to residence, which it has been found by the trial Court existed under both Hindu law and custom prevalent in the State, he should be given Rs. 30,000 by the Ruler of Sayla. Therefore, the Thakore Saheb of Sayla had undertaken a contractual obligation in consideration of the plaintiff giving up his right of residence to pay this sum of Rs. 30,000. Whatever form the plaint might have taken, in substance this was the suit that the plaintiff filed. He contended that he had been paid Rs. 12,000 and the balance of Rs. 18,000 remained to be paid under this contract.

The first piece of legislation we have got to look at is Saurashtra Ordinance No. 72 of 1949 and s. 3 of that Ordinance provides:

"(1) Notwithstanding anything contained in any law or instrument for the time being in force, but subject to the provisions of section 4, all suits or proceedings of any description, whether civil or political, which were, before the date of the coming into force of this Ordinance triable by Special Courts constituted or established by, or under the authority of, the Government of India, as then constituted, or the Crown Representative, or the Rulers of the Covenanted States, or the Talukdars or Estate-holders of Agreeing Talukas or Estates shall be tried and disposed of by civil Courts."

This Ordinance, as the marginal note to s. 3 and the preamble makes it clear, relates to certain suits which were triable by Special Courts and these Special Courts are Courts set up in the Western India and Gujarat States region. There is no clear evidence on the record which goes to show that the suit of the plaintiff, with which we are dealing, was a suit which would have been cognizable by a Special Court if the merger of States had not taken place. But for the purpose of this argument we will assume that the Ordinance applies and that the suit which the plaintiff filed, if the State of Sayla had not joined the Saurashtra State, would have been tried by the Special Court mentioned in the Ordinance. Therefore, what s. 3(1) provides is that all these

suits shall be tried and disposed of by civil Courts. In other words, the Special Courts are done away with and the jurisdiction of civil Courts is restored. But there is an exception to this provision and that exception is contained in s. 4, and we are concerned with cl. (1):

"Nothing contained in section 3 shall apply to any suit against the Government in respect of—

(i) the enforcement of any right or remedy in respect of anything done or omitted to be done by or under the authority of any Ruler of any Covenanting State or any Talukdar or Estate-holder of any Agreeing Taluka or Estate before April 15, 1948."

This Ordinance was followed by Act IV of 1951 and sub-s. (1) of s. 3 provides:

"(1) All suits of the nature described in clause (i) of section 4 of the Saurashtra Adjudication of (Special Courts) Suits Ordinance, 1949 (No. LXXII of 1949) (hereinafter referred to as the said Ordinance), pending in any Court or before any authority on the date of the coming into force of this Act shall abate."

The narrow question that arises for our decision on this head of argument is whether this particular suit falls within the ambit of s. 4(1) of the Ordinance. If it does, then the suit abates by reason of the provision in Act IV of 1951 and the trial Court was right in holding that the suit had abated. Now, what is the nature of the suits contemplated by s. 4(1)? It is a suit against the Government in respect of the enforcement of any right or remedy in respect of anything done or omitted to be done by or under the authority of any Ruler of any Covenanting State. It is clear on a plain construction of this provision that the suits contemplated by this sub-section are suits where the plaintiff makes a grievance of anything done or omitted to be done by or under the authority of any Ruler and in respect of that grievance he seeks to enforce some right or remedy. Therefore, the complaint must be that the Ruler has done something which is wrong or erroneous or has omitted to do which he was bound to do. Now, this suit, far from making any such complaint or ventilating any such grievance, stands by the decision taken by the Ruler and wishes that decision to be enforced. The complaint of the plaintiff is not that the Ruler has done anything wrong or has omitted to do anything which he should have done. On the contrary, his complaint is that the successor State has failed to honour and observe the terms of the contract entered into by the Ruler and the grievance is against the successor State and not against the Ruler of the Covenanting State.

The Government Pleader says that the plaintiff is seeking a right or remedy in respect of an order passed by the Ruler and we must hold that a suit of that nature would fall within the expression "any right or remedy in respect of anything done by the Ruler," and the Government Pleader urges that the Ruler has done something, which is passing the order, that the right of the plaintiff flows from that order, and therefore he is enforcing that right. In our opinion, that suggested construction is entirely untenable. The expression "anything done or omitted" clearly means anything done or omitted unilaterally. There is no act or omission on the part of the Ruler which is unilateral in respect of which any right or remedy is sought. What is done by the Ruler is to enter into a contract with the plaintiff. So the act is a bilateral one which has resulted in a contract, and the enforcement is not of any right or remedy in respect of anything done or omitted to be done, but the suit is for the enforcement of a contract entered into between the plaintiff and the Ruler. Therefore, it is clear that really what was contemplated by s. 4(1) were suits which sound in tort and not suits in contract, and the present suit, as already pointed out, is a suit in contract and not a suit which sounds in tort. Therefore, as far as the first question is concerned, we are of the opinion that the suit does not abate by reason of the provisions of Ordinance 72 of 1949 and Act IV of 1951.

The next question is the proper interpretation of art. 363 of the Constitution. That article, as the marginal note correctly indicates, constitutes a bar against civil Courts with regard to disputes arising out of treaties, agreements and covenants entered into before the commencement of the Constitution by

the Ruler of an Indian State with the Government of the Dominion of India or any of its predecessor Governments, and what is urged on behalf of the State is that what the plaintiff is seeking to enforce is a liability undertaken by the State under the Covenant, and in order that the plaintiff should succeed not only the Covenant will have to be construed but the question that the Court will have to consider is a question with regard to a dispute arising out of this Covenant.

* Now, certain legislative history is necessary to be considered in order to appreciate this point. The first Constitutional document is the Covenant entered into between the various merging States to constitute the United States of Kathiawar and that Covenant was signed on April 15, 1948, and art. VI(1)(c) of that Covenant provides:

"all the assets and liabilities of the Covenanting State shall be the assets and liabilities of the United States of Kathiawar."

We have then Ordinance I of 1948 which Ordinance gave the name of Saurashtra to the United States of Kathiawar which set out art. VI of the Covenant and provided by cl. 3(1):

"When in pursuance of paragraph 1 of Article VI of the Covenant, the administration of any Covenanting State has been taken over by the Raj Pramukh, the fact shall be notified in the Saurashtra Government Gazette and thereupon the provisions of clauses (a), (b) and (c) of paragraph 1 of Article VI shall immediately come into force."

This Ordinance was published in the Gazette on March 1, 1948, and the Sayla State was taken over on March 7, 1948. Therefore, on that date, as far as the Sayla State is concerned, cl. (c) of art. VI(1) with which we are concerned came into force, viz., that all the assets and liabilities of the Covenanting State, which in this case is Sayla, became the assets and liabilities of the State of Saurashtra. A proclamation was also issued on April 1, 1948, which was published in the Saurashtra Government Gazette on April 5, 1948, and this proclamation also mentions that all the assets and liabilities of the said States and Talukas have become the assets and liabilities of the State of Saurashtra. On January 26, 1950, India became a Republic and the Constitution came into force and art. 295(2) provided:

"Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1)."

And Saurashtra was shown as one of the States in Part B of the First Schedule. Therefore, Saurashtra became the successor State to the corresponding Indian State both with regard to assets and liabilities, and the corresponding Indian State to Saurashtra mentioned in Part B was the State of Saurashtra which was brought into existence in 1948 by the Proclamation and Ordinance I of 1948. Then we have the reorganization of the States as recently as 1956 and s. 91 of the States Reorganization Act provided:

"The benefit or burden of any assets or liabilities of an existing State not dealt with in the foregoing provisions of this Part shall—

(a) if there be only one successor State, pass to that State."

So we have a clear chain carrying forward the assets and liabilities of the original State in Kathiawar to the present reconstituted State of Bombay. We start with the liability of the State of Sayla incurred under this document which conferred upon the plaintiff certain contractual rights. That liability was taken over by the covenant by the United State of Kathiawar, it was re-emphasised by the Ordinance referred to, further emphasised by the Proclamation, and provision was made with regard to it by the Constitution, and ultimately we have the States Reorganization Act which saves the rights and liabilities of the original existing State.

In view of this history, can it be said that the question that has got to be considered in this suit is a question which relates to any dispute arising out

of any provision of a treaty, agreement, covenant, engagement or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party? We will consider this question from two aspects. The first aspect is this. If the matter had stood merely at the covenant entered into between the different States to set up the United State of Kathiawar, what is urged by the Government Pleader is that the liability undertaken by the new State was a liability under the covenant, the plaintiff was not a party to that covenant, and it is well-settled that the rights arising out of the covenant must be adjudicated as between the high contracting parties to the Covenant, and a stranger to the Covenant has no right to claim any benefit conferred under the Covenant. So what is urged is that although the United State of Kathiawar may have undertaken the liabilities of the Sayla State, inasmuch as the plaintiff was not a party to the Covenant, he cannot claim the benefit of that Covenant. Now, in the first place, it is not quite true to say that the plaintiff is seeking to enforce a right which arises under the Covenant. His right, in the first instance, arises under the Hindu law or Hindu custom, and secondly it arises out of the contract which commutes his right of residence under Hindu law for a fixed sum of Rs. 30,000. Therefore, what he is seeking to enforce is his rights under private law, and it is a difficult proposition to accept that when a citizen seeks to enforce his contractual right or his rights under the ordinary law of the land, merely because he is asserting those rights against the State, the State can rely on the provisions of art. 363 for contending that because the liability was taken over under the original covenant the right of the plaintiff cannot be adjudicated in a civil Court as provided by art. 363.

But the matter is no longer now a matter of controversy because the Supreme Court has taken the view in *Bholanath J. Thaker v. State of Saurashtra*,¹ that the Covenant itself may be looked upon as a waiver by the Covenanting State of its rights to ignore private rights of the citizen of the State of which it is the successor. It is true that under international law when there is a cession or a succession or a conquest, the State which benefits by the cession or succession or conquest is not bound to recognize the rights of the citizens of the State which it has absorbed. The recognition must be either by law or by proclamation. But as the Court of Appeal pointed out in *West Rand Central Gold Mining Company v. Rex*,² that the law as laid down by the Privy Council was that the new sovereign State may choose to waive its rights and recognise titles and rights as they existed at the date of cession, and it is in the light of this observation of the Privy Council that Mr. Justice Bhagwati in the case just referred to has stated (p. 682):

"There was in fact no such legislation and therefore his rights remained and the Municipal Courts would be entitled to examine the contract and apply the Dhara No. 29 of St. 2004 and enforce whatever rights the appellant had under that Dhara and his contract of service.... The Covenant could be looked at to see whether the new sovereign had waived his rights to ignore rights given under the laws of the former sovereign. The terms of the Covenant showed that the existing laws were to continue and whatever the rights of the appellant were under the existing laws were available for enforcement to the appellant and there was no bar to the Municipal Courts entertaining a suit to enforce such rights.

In this view of the matter Art. 363 of the Constitution could not be invoked by the respondent. There was no dispute arising out of the Covenant and what the appellant was doing was merely to enforce his rights under the existing laws which continued in force until they were repealed by appropriate legislation. This ground therefore could not avail the respondent."

As a matter of fact, in our case the position is much stronger. The observations of Mr. Justice Bhagwati, with respect, would apply even if the matter rested at the covenant and nothing more had happened. But here we have an Ordinance passed by the new State which is the law of that State and under

¹ [1954] A. I. R. S.O. 680.

² [1905] 2. K. B. 391. •

that law the liabilities of the merged State are taken over. Therefore, what the plaintiff is seeking to enforce is not any right under the covenant. He is seeking to enforce a right conferred upon him by the law of the Saurashtra State constituted by the Ordinance just referred to. Therefore, it is difficult to understand how in any view of the case art. 363 comes into question. The Saurashtra State went far beyond the stage of the covenant. It gave its imprimatur to the covenant and recognised the rights of the subjects of the merged States and assumed the liabilities in respect of those States by passing an Ordinance which incorporated in it relevant provisions of the covenant.

The Government Pleader wanted to argue that even assuming the suit was maintainable and had not abated and even assuming that the Court had jurisdiction and the jurisdiction had not been ousted by art. 363, even so this was not a liability which the State had taken over under the provisions of the Covenant and the Ordinance. We have prevented the Government Pleader from going into that matter because it is clear on the record that that contention was never raised either in the trial Court or in the Court of appeal of the Saurashtra High Court. All that the State contended was that the suit was not maintainable by reason of the fact that it had abated and also by reason of the fact that the jurisdiction of the civil Court had been ousted by art. 363 of the Constitution. If the State failed in these two contentions it was not its further contention that notwithstanding the fact that the suit was maintainable it was not liable to discharge this liability on any construction of the Ordinance or on any principle of international law.

It is unnecessary to consider another question that was referred to us by the Division Bench of the Saurashtra High Court as to whether s. 4 of the Ordinance applies to suits pending on the date of the Ordinance as well as to suits filed subsequently. As we have held that the suit does not fall at all within s. 4, this question does not arise.

We must send this matter back to the Division Bench to dispose of the appeal on merits in the light of this judgment. But we would like to say this, and we have said this to the Government Pleader, that the plaintiff has been seeking to establish his right since 1950, we are now in 1958, and as far as one can gather from the judgment of the trial Court and even of the High Court, there is very little on merits to justify the State in resisting the claim of the plaintiffs. This is not one of those cases where an order in favour of a son of a Prince was passed on the eve of the merger. The order was passed as far back as 1945, it is based on a right under Hindu law which was honoured by the State itself by paying two instalments of Rs. 6,000 each, and we do feel that this is a case where the State will sympathetically consider the claim of the plaintiff and not insist upon having this appeal argued on merits before the Division Bench.

Order accordingly.

CRIMINAL REVISION.

Before Mr. Justice Datar and Mr. Justice Tarkunde.

DEOMAN SHAMJI PATIL v. THE STATE.*

Bombay Prohibition Act (XXV of 1949)—Criminal Procedure Code (Act V of 1898), Secs. 157, 4(1)—Indian Penal Code (Act XLV of 1860), Secs. 353, 352, 97, 99, 52—Whether police officers empowered by law to forcibly take person suspected or accused of offence under Prohibition Act for medical examination—Person forcibly taken for such examination, whether can exercise right of private defence—Whether such person in so exercising his right can be convicted under s. 353 or 352 of I.P. Code—Section 157 of Cr. P. Code whether grants on investigating officers general over-riding power to act in curtailment of rights and liberties of subject for purposes of investigation—Applicability of exception in first para. of s. 99, I.P. Code—Police officers acting outside scope of their powers whether can be said to have acted in "good faith."

In the case of a person suspected or accused of an offence under the Bombay Prohibition Act, 1949, the police officers are not empowered by law to take that person, against his will, to a doctor for medical examination. If force is sought to be used by the police officers in taking such a person to a doctor, he can lawfully exercise the right of private defence against them under s. 97 of the Indian Penal Code, and if he does so exercise the right, he cannot be convicted either under s. 353 or 352 of the Indian Penal Code.

Section 157 of the Criminal Procedure Code, 1898, lays down some of the duties, and none of the rights, of an officer in charge of a police station. That section has no relevance whatever to the consideration of the extent to which a police officer can act in curtailment of the rights of the subject as regards his person or his property.

Bhondar v. Emperor,¹ agreed with.

The exception contained in the first paragraph of s. 99 of the Indian Penal Code, 1860, applies where a public servant acts irregularly in the exercise of his powers, and not where he acts outside the scope of his powers.

State v. Yamanappa Limbaji,² explained.

THE facts appear in the judgment.

S. G. Patwardhan, for the petitioner.

Y. V. Chandrachud, Government Pleader, for the State.

TARKUNDE J. Two interesting questions of law arise in this case. One is whether police officers are empowered by law, in the case of a person suspected or accused of an offence under the Bombay Prohibition Act, to take that person, against his will, to a doctor for medical examination. The second question arises if the first is answered in the negative, and that question is whether such a person can lawfully exercise the right of private defence against the force sought to be used in taking him to a doctor.

This being a criminal revision application, the facts are no longer in dispute. The petitioner, who will be referred to hereafter as the accused, is a resident of Satana in the Nasik district. On the date of the offence, information was received at the police station at Satana that the accused was behaving in a disorderly manner in a public street under the influence of drink. Thereupon some police constables went to the spot and brought the accused to the police station. They tried to make a panchanama about the physical condition of the accused, but could not get any panchas. Then Head Constable Wagh, who appears to have been in charge of the police station, asked five or six constables

*Decided, September 11, 1958. Criminal Revision Application No. 685 of 1958, from the orders of conviction and sentence passed by L.M. Paranjape, Sessions Judge, Nasik, in Criminal Appeal No. 60 of 1958, reducing the

sentences passed by A. M. Mulla, Judicial Magistrate, First Class, Satana, in Criminal Case No. 1153 of 1957.

1 [1931] A. L. R. Cal. 601.

2 (1955) 58 Bom. L. R. 551.

to take the accused to the local dispensary for his examination by the medical officer. On the way, the accused refused to go any further, and resisted the attempts of the constables to drag him to the dispensary. While so resisting, he gave a blow to constable Thakaji and another to constable Madhav, and made good his escape. He ran inside a house and chained the door from within. Some days later, he surrendered to the police. Two cases were then launched against him. One was for an offence under s. 85 of the Bombay Prohibition Act. He was acquitted in that case. The other was for an offence under s. 353, Indian Penal Code, of assault and use of criminal force to deter public servants from discharging their duty. He was convicted of the offence and the conviction was upheld in appeal. He has come in revision from the order of conviction and sentence.

On behalf of the accused, Mr. S. G. Patwardhan has advanced a plea which was not taken in the Courts below, but which is consistent with the facts proved by the prosecution. Mr. Patwardhan says that the action of the constables in dragging or attempting to drag the accused towards the dispensary was itself illegal, that the constables were obviously not doing their "duty" while acting illegally, and that the conduct of the accused cannot, therefore, constitute an offence as defined in s. 353, Indian Penal Code. Two reasons are urged by Mr. Patwardhan in support of the plea that the action of the constables was illegal. He says, in the first place, that there is no legislative sanction which enables police officers in the course of investigation to require an unwilling person to submit to medical examination, so that the employment of force or show of force by the constables against the accused amounted to use of criminal force or to assault, and was an offence under s. 352, Indian Penal Code. He says, secondly, that even if such legislative sanction were shown to exist, the conduct of the constables violated cl. (3) of art. 20 of the Constitution which provides that "no person accused of any offence shall be compelled to be a witness against himself", and which was interpreted by the Supreme Court in *M. P. Sharma v. Satish Chandra, District Magistrate, Delhi*,¹ to mean, in broad terms, that no person against whom an accusation has been made shall be required to furnish, by any positive volitional act, any material which can be used as evidence against him.

Dealing with the first part of Mr. Patwardhan's argument, we have been unable to find any statutory provision which renders lawful the coercion exercised or threatened by the constables in order that the accused may be medically examined. The powers which may be exercised by police officers in the course of investigation have been specified in several sections of the Criminal Procedure Code, and supplemental provisions in that behalf are found in Chap. VI of the Bombay Police Act, 1951, and, in so far as the investigation relates to offences under the Bombay Prohibition Act, in Chap. IX of that Act. Although no power has specifically been conferred on investigating officers to compel a person to submit to medical examination, the learned Government Pleader argues that the power has been impliedly conferred by s. 157 of the Criminal Procedure Code. That section provides that, in certain circumstances, an officer in charge of a police station shall proceed, or shall depute one of his subordinate officers to proceed, to the spot "to investigate the facts and circumstances of the case, and, if necessary, to take measures for discovery and arrest of the offender." Section 4(1) of the Code provides that the word "investigation", where it occurs in the Code, "includes all the proceedings under this Code for the collection of evidence conducted by a police officer..." The learned Government Pleader says that when, in the case of a person suspected of an offence under the Bombay Prohibition Act, a police officer proceeds to secure expert medical opinion about the physical condition of that person, he conducts a "proceeding for the collection of evidence", that the proceeding therefore amounts to "investigation", and that it is the duty of the police officer concerned to carry out this investigation under s. 157 of the Code. The learned Government Pleader further argues that the Code does

not purport to lay down all the various modes in which investigation may have to be carried out in different cases, so that the expression "proceedings under the Code" occurring in the above definition of "investigation" is not confined to specific proceedings authorised by the Code, but extends to all the proceedings which the officer, who is authorised to investigate a case, finds it necessary to adopt for the purpose of investigation. The argument in substance is that s. 157 of the Code authorises an investigating officer to collect evidence in any manner that he may find expedient, and that this authority over-rides the rights and liberties of the subject to the extent necessary for the purpose of investigation.

The short answer to this rather specious argument is that s. 157 of the Code lays down some of the duties, and none of the rights, of an officer in charge of a police station. That section has no relevance whatever to the consideration of the extent to which a police officer can act in curtailment of the rights of the subject as regards his person or his property. Since a part of the investigation in every case can obviously be carried out by doing what an ordinary individual can do, the Legislature did not find it necessary to lay down, in a positive form, all the things that may be done by an investigating officer in collecting evidence. But to the extent to which the Legislature found that curtailment of the rights and liberties of the subject was necessary for a proper investigation into offences, to that extent the Legislature has made positive and specific provisions. Such provisions are found in the Criminal Procedure Code as well as in other Acts. For instance, ss. 51 to 53 of the Code relate to search of arrested persons, ss. 96 to 99 and s. 165 to search of places, ss. 160 to 162 to interrogation of witnesses, etc. If investigating officers had a general over-riding power to do whatever is found necessary for investigation, all these provisions would be redundant. The learned Government Pleader suggests that these provisions have been made, not by way of granting to investigating officers some limited powers of interference with the rights and liberties of the subject, but by way of imposing limitations on the over-riding power of investigating officers to interfere with such rights and liberties. This argument is untenable, firstly because the said sections positively confer certain limited powers and do not purport to limit some general power otherwise existing, and, secondly because in the absence of positive legislative enactment a general power to interfere with individual rights and liberties cannot be simply assumed. Law on the contrary assumes—and this was so even before the commencement of the Constitution—the existence of individual rights and liberties, and steps in for regulating those rights and liberties in the interest of social living.

That the Code of Criminal Procedure has not granted to investigating officers an over-riding power such as is claimed by the learned Government Pleader is further illustrated by the Identification of Prisoners Act passed by the Central Legislature in 1920. The preamble of the Act shows that its object was "to authorise the taking of measurements and photographs of convicts and others". Among other things, the Act requires any person arrested in connection with certain types of offences to allow his measurements to be taken in the prescribed manner on the direction of a police officer. The Act also authorises Magistrates to direct measurements and photographs to be taken of any person if that is found expedient "for the purposes of any investigation or proceeding under the Code of Criminal Procedure". Section 6 of the Act makes it lawful to overcome any resistance to the taking of measurements and photographs under the Act, and also makes the resistance itself an offence under s. 186 of the Indian Penal Code. The Act was passed several years after the Code of Criminal Procedure, and it shows that the Code did not grant to investigating officers a general over-riding power to act in curtailment of the rights and liberties of the subject for the purpose of investigation.

A question was raised before us whether the accused in this case was formally arrested before he was sought to be taken for medical examination. We did not find it necessary to decide this question because, even if he was taken in

custody, the police constables had no legal authority to require him to submit to medical examination. It is obvious that the arrest and detention of a person under the provisions of the Criminal Procedure Code do not deprive the person of such of his rights and liberties as are unconnected with his confinement.

A view similar to the one which we are adopting in this case was taken by a Division Bench of the Calcutta High Court in *Bhondar v. Emperor*.¹ It was held in that case that it was not permissible under the Criminal Procedure Code to take hold of a prisoner forcibly and to examine his body medically without his consent for the purpose of qualifying some medical witness to give evidence in the case against him, and that any such examination without the consent of the accused amounted to an assault. It was further held in that case that the medical evidence so obtained is not admissible, but we are not required to express any opinion as regards that conclusion.

We find that the English law on this question is also the same. This can be seen from the following passage in Halsbury's Laws of England, 3rd edn., Vol. X, at p. 742:—

"Without the consent of a prisoner, a judge or magistrate has no power to order an examination of his person, and if in pursuance of such an order an examination is made, the person who made the order and the person who makes the examination are guilty of an assault; but if the prisoner consents, even under a misapprehension as to the power to make such an order, the consent is an answer to the charge of assault."

It is thus clear that the police constables in this case were not doing their duty in taking the accused against his will towards the dispensary and that the accused cannot be convicted under s. 358 of the Indian Penal Code.

In view of this conclusion, we do not find it necessary to decide whether, as contended by Mr. Patwardhan, the act of the police constables amounted to the exercise of testimonial compulsion and violated cl. (3) of art. 20 of the Constitution. That question may fall for determination if the Legislature makes a provision requiring a person to submit to medical examination so that the evidence thus obtained may be used against him.

It is next argued by the learned Government Pleader that, even if the accused is not guilty of the aggravated offence under s. 358 of the Indian Penal Code, his action in giving two blows to the police constables amounts to an assault punishable under s. 352 of the Indian Penal Code. Now, as held above, it was the police constables who initially assaulted the accused by attempting to drag him forcibly to the dispensary, and *prima facie* the accused had the right of private defence against that action under s. 97 of the Indian Penal Code. It does not appear to us, nor was it urged before us by the learned Government Pleader, that the accused inflicted more harm than was necessary for the purpose of preventing the constables from taking him to a doctor. The learned Government Pleader, however, says that the accused was not entitled to act in the exercise of the right of private defence because of para. 1 of s. 99, Indian Penal Code, which runs as follows:—

"There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

Now, the expression "good faith" as used in the Indian Penal Code has a technical meaning, for s. 52 of the Indian Penal Code says that

"nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention."

It is obviously the duty of all police officers to acquaint themselves with at least the general scope of their powers. Since the action of the police constables in this case was altogether outside the scope of their powers, it cannot be said that they acted with "due care and attention" and therefore in "good faith". Generally speaking, the exception contained in the first para. of s. 99 of the Indian Penal Code applies where a public servant acts irregularly in the exer-

1 [1931] A. I. R. Cal. 601.

cise of his powers, and not where he acts outside the scope of his powers.

The learned Government Pleader, however, points out that the police constables were merely carrying out the order given by the head constable in taking the accused to the medical dispensary, and he argues that they were protected by the first para. of s. 99 irrespective of whether the order of the head constable was wholly illegal. In support of this argument the learned Government Pleader relies on a recent decision of a Division Bench of this Court in *State v. Yamanappa Limbaji*.¹ Now, in the first place, it cannot be held that the police constables were carrying out the order of the head constable in dragging the accused to the dispensary against his will. The evidence shows that the head constable had merely asked the police constables to take the accused to the dispensary, and that the accused offered resistance on the way to the dispensary in the absence of the head constable. Since the occasion to exercise force against the accused arose in the absence of the head constable, it is not correct to say that the head constable had directed the constables to exercise force against the accused. Secondly, even if the order of the head constable amounted to a direction to take the accused to the dispensary by force if necessary, we do not think that the mere fact that the constables were carrying out an order of their superior officer, however illegal that order might have been, had the effect of depriving the accused of the right of private defence.

The decision in *State v. Yamanappa Limbaji* does not, in our opinion, support that view. In that case, the accused was a dismissed police constable, and he failed, even after dismissal, to vacate the quarters which had been provided to him during his term of service. The District Superintendent of Police gave a notice to the accused to vacate the premises, and on his failure to do so, directed a Sub-Inspector of Police to dispossess him. The accused offered resistance to the Sub-Inspector and assaulted him, and was then prosecuted for an offence under s. 332 of the Indian Penal Code. The Court held, relying on para. 1 of s. 99 of the Indian Penal Code, that the accused was not entitled to act in the exercise of the right of private defence. The notice issued by the District Superintendent of Police to the accused calling upon him to vacate the premises was under s. 31(1) of the Bombay Police Act, and the subsequent direction of the District Superintendent of Police requiring the Sub-Inspector to secure vacant possession of the premises fell under s. 31(2) of that Act. Both the sub-sections of s. 31 require that the officer taking action thereunder should have been authorised to do so by the State Government. Now, the District Superintendent of Police had an authority from the State Government, but the Court found that that authority enabled the District Superintendent of Police to take action under s. 31(1) only, and not under s. 31(2) as well. It was under these circumstances that the Court held that, although the direction of the District Superintendent of Police was not in accordance with law, the Sub-Inspector of Police was protected by para. 1 of s. 99 of the Indian Penal Code against the exercise of the right of private defence by the accused. The judgment of the Division Bench was delivered by Vyas J., and in the course of the judgment the learned Judge observed (p. 559):

"...The District Superintendent of Police's order dated July 29, 1954, was not such as would *prima facie* appear to be a defective or bad order. It would have been a different matter if on the face of the order itself it had appeared defective or incorrect. If *ex facie* the order had been such that the Sub-Inspector should or could have known that he was asked to do something which was contrary to law, it might have raised a different question..."

In another part of his judgment, with reference to the position of a public servant carrying out an order of his superior officer, the learned Judge said (p. 561):

"...He is not expected to test and satisfy himself as to the technical propriety of the order which he is called upon to enforce. For instance, in this case he could not

be expected to apprehend a fine distinction between an authorisation contemplated by s. 31, sub-s. (1), cl. (b), and an authorisation under s. 31, sub-s. (2). He could not be blamed if he did not see a distinction between the scope and extent of sub-s. (1) and sub-s. (2) of s. 31...."

It is clear that the learned Judges who decided that case did not lay down any general proposition to the effect that the right of private defence cannot be exercised against public servants who carry out the orders of their superiors, however manifestly illegal the orders may be. It was because the order which the Sub-Inspector of Police was carrying out in that case was apparently lawful, but was found to be unlawful on account of a technical defect, that the learned Judges held that the accused was deprived of the right of private defence by para. 1 of s. 99 of the Indian Penal Code. In the present case, the order of the head constable, if it is construed as an order authorising the police constables to use force against the accused, was wholly beyond the powers of the head constable, and the accused had the right of defending himself against the force sought to be illegally exercised against his person in pursuance of that order.

The result is that the accused is not guilty either under s. 353 or under s. 352 of the Indian Penal Code. Accordingly we make the rule absolute, set aside the order of conviction and sentence, and acquit the accused. The fine, if paid, should be refunded. The bail bond is cancelled.

Conviction and sentence set aside.

CRIMINAL APPELLATE.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Kotval.

JAIRAM CHANDRABHAN MAHAR v. THE STATE.*

Indian Penal Code (Act XLV of 1860); Sec. 300, Exception 1—Accused tried for murder of his wife stating that he had seen her coming out of her paramour's house on the night previous to offence—Accused further stating that on his questioning her about it the following morning, the deceased threatening to go and live with her paramour, using foul language and kicking accused—Accused thereupon striking her with knife and causing her death—Whether case of accused fell under Exception 1 to s. 300—Burden of proof of exception whether discharged on bare word of accused person.

The accused, who was tried for an offence under s. 302 of the Indian Penal Code for the murder of his wife, in his defence stated that he had seen his wife coming out of the house of her paramour on the night previous to the offence, that when he saw her the following morning working in a field and questioned her about it, she talked to him impertinently, threatened to go and live with her paramour and used foul language, that when he caught her hand she kicked him and that, thereupon, he lost his self-control, took out a small pen-knife and dealt five or seven blows with it on his wife's person. On the question whether Exception 1 to s. 300 of the Code was available to the accused:—

Held, that the incident which the accused alleged had occurred in the field in the morning was not sufficient in law to constitute grave and sudden provocation within the meaning of that expression used in Exception 1 to s. 300 of the Indian Penal Code.

It is extremely hazardous to apply Exception 1 to s. 300 of the Indian Penal Code to a case like the above merely on the ground that offences against marital rights are made punishable in India. What has to be considered in a case of this kind is whether provocation which was offered was of a kind which would cause a reason-

*Decided, June 30, 1958. Criminal Appeal No. 65 of 1958, against the order of conviction passed by G. G. Bhograj, Additional Sessions

Judge, Buldana, in Sessions Trial No. 42 of 1957.

able man belonging to the same social stratum as the accused person to lose his power of self-control.

Holmes v. Director Public Prosecution' and Murugien, In re,' referred to.

The bare word of an accused person is not sufficient to discharge the burden of proof of an exception. There must be some corroboration, direct or indirect, of the statement of the accused person.

THE facts appear in the judgment.

B. B. Ranade, for the appellant.

W. B. Pendharkar, Special Government Pleader, for the respondent.

MUDHOLKAR J. The appellant was tried for the offence of murder of his wife committed at Takali, district Buldana, on or about August 20, 1957. The learned Additional Sessions Judge who tried the appellant convicted him under s. 302 of the Indian Penal Code but instead of awarding the maximum sentence awarded the lesser penalty under the law.

It was not in dispute before the learned Additional Sessions Judge nor is it in dispute before us that the appellant and his deceased wife Tulsabai used to quarrel quite often. The appellant is a resident of Telhara. Two or three days prior to the Akshaya Tritiya of the year 1957, the appellant along with Tulsabai and their children went to Takali where his mother-in-law Muktabai lived. He stayed there for two or three days and returned alone to Telhara. Tulsabai continued to stay on in Takali till her death on August 20, 1957. It may be mentioned that the appellant visited Takali a few days before Nag Panchami and again visited Takali two weeks before the Pola of that year. His object in visiting Takali was to induce his wife to return with him to Telhara.

The incident out of which this appeal arises occurred during the third visit of the appellant to Takali. On the morning of August 20, 1957, the appellant went to a field at Takali where Tulsabai was carrying on weeding operations along with her mother Muktabai (P.W. 4), her aunt Janabai (P.W. 7), her sisters-in-law Renuka (P.W. 8) and Bhikabai (P.W. 9) and a number of other women and men including Pandurang (P.W. 11) and Wasudeo (P.W. 10). When the appellant saw Tulsabai he talked with her. In the course of that talk he struck Tulsabai five or seven times with a knife causing serious injuries to her person as a result of which she expired on that very day.

The appellant's defence is that Tulsabai was a woman of loose character as she was carrying an intrigue at that time with one Pundya, who though a resident of a different village, had gone to Takali after Tulsabai went to stay there; that on the night of August 19, he saw Tulsabai entering the house of one Purnya, a relation of Pundya, who was staying at Takali at that time, that he also saw Tulsabai coming out of that house at about 1 a.m. and thereafter returned home; that next morning he went to the field where Tulsabai was working and asked her whether she had gone to Purnya's house on the previous night; that Tulsabai thereupon said "Yes, I will go; it is my sweet will. If you feel it so much, then I will begin residing with Pundya" (sic). The appellant added that though he tried to persuade Tulsabai to improve her ways she declined to do anything. On the contrary she said: "If you are so much ashamed, then get away from here. Why have you come here?" and also used foul language. This enraged the appellant and that he thereafter caught her hand. Tulsabai retaliated by kicking him, whereupon, he lost his self-control, took out a small pen-knife which was with him and dealt five or seven blows with it on Tulsabai's person.

As already stated the appellant does not dispute the essential facts that Tulsabai met her death as a result of several knife injuries received by her and that these injuries were caused by the appellant alone. The question which remains to be decided, therefore, is what offence was committed by the appellant.

If the defence of the appellant is accepted then the case would fall under the first *Exception* to s. 300 of the Indian Penal Code and the offence would amount to culpable homicide not amounting to murder punishable under s. 304 of the Code. The first *Exception* to s. 300 of the Indian Penal Code reads thus:

"Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."

The question is whether the facts alleged by the appellant can be deemed sufficient to bring the case under the aforesaid *Exception*, assuming for the moment that the facts were as stated by the appellant. Had the appellant attacked the deceased in the way he did at 1 a.m. on the morning between August 19-20, while she was coming out or after she had come out of Purnya's house, the first *Exception* may have been available to him. But can it be said that that *Exception* was available to him later on the morning of August 20, and that too after the appellant had slept over the provocation alleged to have been given to him by Tulsabai by misconducting herself. It must be remembered that even according to the appellant he was quite calm and collected when he talked with Tulsabai while she was working in the field that morning along with other womenfolk. According to him, Tulsabai talked to him impertinently and also threatened to go and even live in the house of Pundya whom he regarded as her paramour.

Shri Ranade who appears for the appellant points out that apart from talking in this manner the deceased kicked the appellant and that, therefore, this circumstance entitled the appellant to the benefit of the First *Exception* to s. 300. It must be remembered that what the deceased did in the night was something far more serious than what, according to the appellant, she said and did in the field that morning. If the appellant was sufficiently strong willed not to lose his self-control even though he saw his wife coming in the early hours of the morning out of the house of her paramour, it is difficult to accept the statement that the appellant lost that power by reason of something less grave which happened in the field later in the morning. Apart from that, it seems to us that what occurred in the field in the morning cannot ordinarily be regarded as grave and sudden provocation to justify the killing of a person. We may cite the following observations from the decision in *Holmes v. Director of Public Prosecutions*¹ (p. 127):

"The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill, or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognised, viz., the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule:... But it has been rightly laid down that the exception cannot be extended,..."

"... a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter."

This passage has been cited by Basheer Ahmed Sayeed J. in his judgment in *Murugion, In re*.² In the course of his judgment the learned Judge has observed (at p. 15):

"But it should be noted that these decisions apply to the society in England and countries of western culture and civilization. It is well known that in western societies, marital laws and violations thereof are looked upon with such (sic) greater latitude and the award of damage in Civil Courts would constitute sufficient redress. Adultery is not made punishable as it is in our country where a more serious view is taken of offences against marital rights."

In our opinion, it would be extremely hazardous to apply the first *Excep-*

tion to s. 300 to a case of the kind we have here merely on the ground that offences against marital rights are made punishable by the law in India. What has to be considered in a case of this kind is whether provocation which was offered was of a kind which would cause a reasonable man belonging to the same social stratum as the accused person to lose his power of self-control. Bearing in mind the fact that adultery though frowned upon in our country is not uncommon in the village community and bearing also in mind the fact that even before the law made a provision for obtaining a divorce, a customary form of divorce has prevailed in the village communities, it would not be right to hold that the reaction of an Indian spouse from such a community would be different from that of one in the Western countries. We are, therefore, of the view that the incident which the appellant alleged occurred in the field on the morning of August 20, was not sufficient in law to constitute grave and sudden provocation within the meaning of that expression used in the first *Exception* to s. 300.

Apart from that, we have only the word of the appellant to the effect that conversation of the kind stated by him took place between him and Tulsabai and that in the course of the incident she kicked him after filthily abusing him. Now, if there was any truth in this he would have made a statement about it before the committing Magistrate. On the other hand, when he was asked by the committing Magistrate: "When the females doing the weeding had gone two or three fields ahead did you deal three blows on her head with a dagger?" His answer was: "I did not strike her. I tried to catch hold of her hand and she fell down on the sickle in her hand." Then he was asked: "After you beat her, did she shout and did her mother Muktabai come there running?" His answer was: "Yes, she came running." To the question, "When Muktabai intervened did you push her aside and deal three blows with the dagger on her stomach?" his answer was, "I do not state anything here. I will tell everything in Sessions Court."

Now, we would have expected the appellant to make a clean breast of the whole thing before the committing Magistrate if in point of fact whatever he did was done under grave and sudden provocation. Again, in that case, he would have never thought it necessary to invent a false defence to the effect that the injuries were caused by the sickle which Tulsabai herself was holding in her hand. We may further mention the fact that not one of the several eye-witnesses examined in the case has been questioned about the conversation which is said to have taken place and particularly about the kicks which Tulsabai is said to have administered to the appellant. It is, therefore, clear that the defence which was set up before the Sessions Court was only an after-thought. Now, the law requires that where an accused person pleads an exception he has to prove it. In the instant case, there is no proof. There is only the word of the appellant. According to Shri Ranade the word of the appellant should be accepted as was done in the Madras case (*cit sup*). We cannot accept the principle that in every case the bare word of an accused person is sufficient to discharge the burden of proof of an exception. There must be some corroboration, direct or indirect, of the statement of the accused person. Apart from that, in the instant case, as we have already shown, the statements made by the appellant in his examination are patently untrue and cannot be accepted. Upon this view, we negative the contention of Shri Ranade that the offence is anything less than murder. We, therefore, affirm the appellant's conviction under s. 302 of the Indian Penal Code.

He has already been awarded the lesser sentence and, therefore, there is nothing more that can be done.

The appeal is dismissed.

Appeal dismissed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Kotval.

MANAGER, RAMKRISHNA RAMNATH BIDI FACTORY,
 . ANDHALGAON v. FIRST CIVIL JUDGE, 1ST CLASS, NAGPUR.*

Payment of Wages Act (IV of 1936), Sec. 18—Civil Procedure Code (Act V of 1908), O. XI—Whether Authority under Act has jurisdiction to order party to make discovery of documents in his possession—Section 18 whether controlled by s. 15(3).

The Authority under the Payment of Wages Act, 1936, has under s. 18 of the Act jurisdiction to order a party before it to make discovery of the document in his possession.

The words "all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of...compelling the production of documents" in s. 18 of the Payment of Wages Act, 1936, refer to the provisions of O. XI of the Civil Procedure Code, 1908, which deals with discovery, inspection and production of documents.

Section 15(3) of the Payment of Wages Act, 1936, does not control the powers granted to the Authority under s. 18 of the Act.

THE facts appear in the judgment.

M. N. Phadke, for the petitioner.

D. B. Bhagade, for opponents Nos. 2 and 3.

KOTVAL J. This matter arises out of proceedings taken under the Payment of Wages Act before opponent No. 1 who is the Authority appointed under the Payment of Wages Act.

Opponent No. 2 Hiranman, who was a *bidi* worker in the factory of the petitioner, made an application along with his counsel (opponent No. 3) for payment of delayed wages and also for compensation under the provisions of ss. 15(2) and (3) of the Act. The petitioner raised several defences including the defence that the application was barred under the provisions of the Act. During the pendency of the proceedings an application on behalf of opponent No. 2 Hiranman was moved on October 5, 1957, praying that the petitioner should be directed to make discovery of certain documents for the relevant period for which the wages were claimed. In that application Hiranman stated that the petitioner maintained a register of workers and a payment register in which the wages disbursed to the workers were mentioned. Therefore, those registers were relevant for deciding the quantum of the delayed wages due to Hiranman. The petitioner opposed this application and alleged that it was not made in accordance with any provision of law, that the provisions of the Code of Civil Procedure did not apply to the proceedings under the Payment of Wages Act, and that the Authority had therefore no jurisdiction to pass any order upon Hiranman's application. The Authority rejected the petitioner's contentions and allowed the application for discovery of documents by its order dated November 8, 1957. This is the order impugned in the present petition.

Mr. M. N. Phadke, appearing on behalf of the petitioner, has reiterated the contention that the Authority under the Payment of Wages Act had no jurisdiction to pass an order for discovery of the particular documents required before it. The relevant provision is contained in s. 18 of the Payment of Wages Act, 1936. The section runs as follows:—

"Every Authority appointed under sub-section (1) of section 15 shall have all the powers of a civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents,..."

*Decided, July 9, 1958. Special Civil Application No. 379 of 1957.

Apart from any other power under s. 18, the authority has

"all the powers of a civil Court under the Code of Civil Procedure...for the purpose of...compelling the production of documents."

In our opinion, by these words the Legislature intended to refer to the provisions of O. XI of the Code of Civil Procedure which deal with discovery, inspection and production of documents. In its first eleven rules O. XI deals with the delivery of interrogatories, a subject with which we are not here concerned. Then it makes provision for the discovery of documents in rr. 12 and 13. After discovery is provided for, it deals with the subject of production of documents in r. 14. Then provision is made for the inspection of the documents produced in rr. 15, 17 and 18 of the Order.

Reading the Order as a whole it seems to us clear that the provisions made in the Order for discovery and inspection are only provisions made in order to aid the production of documents before the Court, particularly the provisions regarding "discovery". These provisions would therefore squarely fall within the ambit of the words used in s. 18 of the Payment of Wages Act, viz.

"all the powers of a civil Court under the Code of Civil Procedure, 1908, for the purpose of...compelling the production of documents."

Inspection is only a step-in-aid of the final production of the documents. Upon this view, therefore, the Authority under the Payment of Wages Act had the jurisdiction to order the petitioner to make discovery of the documents in his possession.

Mr. Phadke then raises another contention. He referred to the provisions of s. 15(3) of the Payment of Wages Act and he urged that such an order could only be passed after the Authority "entertained" the application. Subsection (3) of s. 15 merely confers jurisdiction on the Authority to hear the application under the Act and grant certain reliefs, and it can have no reference to the procedural power which is prescribed under s. 18. In our opinion s. 15(3) of the Act cannot control the powers granted to the Authority under s. 18.

In any event, it is clear upon the allegations made by the petitioner himself in the present petition that the Authority had "entertained" the application before it. We hold that the order passed, calling upon the petitioner to make discovery of documents in his possession, was a valid order passed with jurisdiction by the Authority.

Upon this view the petition fails and is dismissed with costs.

Petition dismissed.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Kotval.

TARABAI MADHAORAO DESHMUKH v. THE BOMBAY REVENUE
TRIBUNAL, NAGPUR.*

Berar Regulation of Agricultural Leases Act (XXIV of 1951), Secs. 8, 9, 19(2)—Lease terminated by landlord under s. 9(1) on ground that land required for personal cultivation—Possession delivered by lessee—Application by lessee under s. 9(6) stating that land leased out by landlord to another person—Maintainability of such application—Whether operation of s. 8 excluded when lease terminated on ground that landlord requiring land for personal cultivation.

The operation of s. 8 of the Berar Regulation of Agricultural Leases Act, 1951, is altogether excluded in the one case contemplated by s. 9(1) of the Act, viz. where the lease was terminable on the ground that the landholder required the land for cultivating the land personally.

The words in s. 8(1)(g) of the Act "as provided in s. 9" only qualify the word "notice" occurring in that clause of s. 8(1). Therefore s. 8(1)(g) merely refers to the notice and its various requirements mentioned in s. 9(1) and to nothing further. It has no reference to the remaining sub-sections of s. 9.

Under ss. 8(1)(g) and 9 of the Berar Regulation of Agricultural Leases Act, 1951, so far as termination of any lease of land held by a protected lessee is concerned the landholder has two options: (a) to terminate by notice on the ground that he requires the land for cultivating it personally, [s. 9(1)], and (b) to terminate by notice in other cases, [s. 8(1)(g)]. In the former case, he need not have recourse to any authority or obtain orders of a Revenue Officer, but the right is given in such a case to the tenant to challenge the notice on the two grounds mentioned in s. 9(3) and in that event the Revenue Officer has to adjudicate in accordance with sub-ss. (3) to (9) of s. 9. The notice in this case must fulfil the requirements of s. 9(1). In the latter case, the notice also must fulfil all the requirements of s. 9(1) excepting obviously the requirement as to the landholder requiring the land for cultivating it personally. In this case the landholder must obtain the orders of the Revenue Officer to terminate the lease.

Uttamrao v. Sahurao,¹ disapproved.

THE facts appear in the judgment.

B. K. Thakur, for the petitioner.

B. N. Deshpande, for the respondents.

KOTVAL J. The order in this Special Civil Application shall also govern the disposal of Special Civil Application No. 60 of 1958. The facts as also the points arising in both these Special Civil Applications are common and a common argument was addressed by consent of counsel concerned. It will be sufficient to state the facts in Special Civil Application No. 59 of 1958.

Respondent No. 4 Ganesh was a protected lessee of the petitioner. On December 23, 1952, the landholder gave him notice terminating his lease under the provisions of s. 9(1) of the Berar Regulation of Agricultural Leases Act on the ground that the former required the land for cultivating it personally. In pursuance of this notice, respondent No. 4 consented to the delivery of possession and possession was delivered to the landholder on April 1, 1953. A few months later, on August 23, 1954, the former protected lessee Ganesh put in an application under s. 9(6) of the Act against the petitioner and three other persons who were impleaded because there was some dispute as to who was the landholder. By that application, respondent No. 4 prayed that field No. 111 of which he was the former protected lessee should be placed in his possession because the landholder had instead of cultivating the field at home as stated in his notice under s. 9(1) leased it out to another person Kashirao,

*Decided, July 10, 1958. Special Civil Application No. 60 of 1958.
Application No. 59 of 1958 (with Special Civil Application No. 60 of 1958) 1 [1958] N. L. J. 182

respondent No. 7. The application was heard by the Sub-Divisional Officer, Achalpur, who dismissed it, and in appeal the Additional Deputy Commissioner maintained the dismissal of the application. In second appeal a Division Bench of the Bombay Revenue Tribunal set aside the decisions of the Sub-Divisional Officer and the Additional Deputy Commissioner and allowed the application. The short question which arises for decision upon this petition may now be stated.

Section 8(1)(g) of the Act runs as follows:

"Notwithstanding any agreement, usage, decree or order of a court of law, the lease of any land held by a protected lessee shall not be terminated except under orders of a Revenue Officer made on any of the following grounds, namely—...

(g) he has been served with a notice by the landholder as provided in section 9."

Section 9(1) runs as follows:

"Notwithstanding anything contained in section 8 the landholder may terminate the lease of a protected lessee by giving him notice in writing delivered not less than three months before the commencement of the next agricultural year stating therein the reasons for such termination and the description of the area in respect of which it is proposed to terminate the lease, if the landholder requires the land for cultivating the land personally."

The other provisions of s. 9 give the protected lessee a right to question the notice served under s. 9(1) if it is not bona fide and also give the lessee an option to give up some other land than the land regarding which notice has been given. With these provisions we are not immediately concerned. But s. 9(6) provides as follows:

"If on re-entering upon any land after termination of the lease of a protected lessee in accordance with this section, a landholder fails at any time during such period as may be prescribed to utilise the land for the purpose for which the lease was terminated, the dispossessed lessee may apply to the Revenue Officer to put him in possession of the land from the commencement of the agricultural year next following; and the Revenue Officer shall, after hearing the landholder and making such enquiry as he deems fit, put the lessee in possession of the land if he is satisfied of the failure and also award him such sum by way of compensation as the Revenue Officer may consider sufficient."

The application which was preferred was expressly made under s. 9(6) of the Act. The view which prevailed with the Sub-Divisional Officer as also the Additional Deputy Commissioner was that the landholder had taken possession in contravention of the provisions of the Berar Regulation of Agricultural Leases Act and, therefore, since the protected lessee had been dispossessed he could make an application under s. 19(2). This was one of the questions raised by Mr. R. K. Thakur appearing on behalf of the petitioner. The other question raised by Mr. Thakur was that in the present case the landholder had not terminated the lease under the provisions of s. 9(1) and therefore s. 9(6) would be inapplicable. He urged that the termination was with the consent of the protected lessee and not under the orders of a revenue officer as required by s. 8(1)(g) read with s. 9(1) and therefore an application under s. 9(6) would not lie. He has derived support for his contention from a decision of the Bombay Revenue Tribunal in *Uttamrao v. Sahurao*.¹ The view which the Bombay Revenue Tribunal has taken in the present case is however directly contrary to the view taken in that case.

An examination of the provisions of ss. 8(1)(g) and 9(1) independently of each other no doubt reveals an apparent conflict between the two provisions. Section 8(1)(g) enjoins that a lease of a protected lessee shall not be terminated except under orders of a Revenue Officer, while s. 9(1) lays down no such condition but, on the other hand, permits termination of a lease by giving the protected lessee a notice in writing delivered under certain conditions. Mr. Thakur urged that since s. 9 is referred to in s. 8(1)(g) the provisions of s. 8(1)(g) would govern s. 9(1) and therefore in the present case since the

lease was not terminated under orders of a Revenue Officer but only by private treaty the provisions of s. 9(6) would not be attracted. That was also the construction placed on these provisions of law by the Bombay Revenue Tribunal in *Uttamrao v. Sahurao*.

It is no doubt true that s. 8(1)(g) lays down as one of the conditions for the termination of a lease, that a notice shall have been served by the landholder as provided in s. 9; but s. 9 makes no reference to the obtaining of orders of a Revenue Officer for the termination of a lease as such except in the case provided in s. 9(3) where the tenant has to initiate certain proceedings.

In this apparent conflict it seems to us that the decisive provision is contained in the opening clause of s. 9(1). The provisions of s. 9(1) are preceded by the *non-obstante* clause "Notwithstanding anything contained in section 8" and having regard to the normal purpose of such a clause we must give it due effect. It seems to us that it was clearly the intention of the Legislature to exclude the operation of s. 8 altogether in the one case contemplated by s. 9(1), viz. where the lease was terminable on the ground that the landholder required the land for cultivating the land personally. The reason for such an exclusion is not far to seek because that particular ground of termination of the lease is specifically and in great detail dealt with exclusively in s. 9. Therefore, so far as that particular ground of terminating a lease of a protected lessee is concerned, the Legislature obviously intended that the provisions of s. 9 should operate untrammelled by the provisions of s. 8. This does not mean as was held in *Uttamrao's* case that upon this interpretation the lessee would be left to the mercy of the landholder. The lessee has a valuable protection still conferred on him. The protection is that he can apply under s. 9(3) that the notice is not bona fide or that he should be permitted to give up some other land in lieu of the land mentioned in the notice.

It was then argued that if this be the interpretation of s. 9(1) then s. 8(1)(g) would be deprived of all meaning because s. 8(1)(g) states, as one of the grounds for terminating a lease under orders of a Revenue Officer, that the lessee "has been served with a notice by the landholder as provided in section 9." The argument is that the words "as provided in section 9" show that the whole of s. 9 would apply and therefore s. 9 is subject to s. 8.

We cannot accept this contention. The words in s. 8(1)(g) "as provided in section 9" only qualify the word "notice" occurring in that clause of s. 8(1). Therefore s. 8(1)(g) merely refers to the notice and its various requirements mentioned in s. 9(1) and to nothing further. It has no reference to the remaining sub-s. of s. 9.

We are unable to accept the interpretation of the *non-obstante* clause in s. 9 as given in *Uttamrao v. Sahurao*.

The cumulative effect of the provisions of s. 8(1)(g) and s. 9 indicates that so far as termination of any lease of land held by a protected lessee is concerned the landholder has two options: (a) to terminate by notice on the ground that he requires the land for cultivating it personally [s. 9(1)] and (b) to terminate by notice in other cases, [s. 8(1)(g)]. In the former case, he need not have recourse to any authority or obtain orders of a Revenue Officer, but the right is given in such a case to the tenant to challenge the notice on the two grounds mentioned in s. 9(3) and in that event the Revenue Officer comes into the picture and he has to adjudicate in accordance with sub-ss. 8 to 9 of s. 9. The notice in this case must fulfil the requirements of s. 9(1) i.e. (i) it must be in writing, (ii) must be delivered not less than three months before the commencement of the next agricultural year, (iii) state therein the reasons for termination, (iv) the description of the area, in respect of which it is proposed to terminate the lease, and (v) the fact that the landholder requires the land for cultivating the land personally.

In the latter case, the notice also must fulfil all the above requirements excepting obviously the 5th requirement mentioned above. That, in our opinion, is the only meaning of s. 8(1)(g). In that case it is the landholder who must obtain the orders of the Revenue Officer.

The reasons for thus distinguishing between the two categories of termination by notice are not far to seek. Under general law, in the absence of a contract to the contrary a landlord can always terminate a lease by notice. The rule is recognised by the Act, but is qualified. Where the landlord needs the land for his own cultivation, the Act does not go so far as to say that his needs shall be subordinated to the needs of the tenant. In such a case the landlord may take back the land by his own volition by giving a notice subject only to the safeguards in favour of the lessee in s. 9(3). But where the landlord desires to eject the lessee when he does not need the land for himself but on other grounds (and it is to be noted that cls. (a) to (j) all contemplate some case or the other where the tenant is at default or blameworthy) then the procedure is more stringent and the landlord cannot evict without an order from a Revenue Officer.

The Berar Regulation of Agricultural Leases Act was only passed to provide for long term leases of agricultural land, to ensure fixity of tenure in the interest of efficient agriculture in Berar. It gave lessees certain additional rights, protected them against rack-renting and indiscriminate ejectment but certainly contained nothing to abrogate the law relating to landlord and tenant as it stood prior to its enactment. We cannot conceive that it was the intention of the Legislature to make it impossible for a landholder to terminate voluntarily a tenant's lease under any circumstances. That is also inconsistent with the object of the legislation.

We hold, therefore, that in the present case the application made by Ganesh, the protected lessee under s. 9(6) was correctly made under that provision of law even though the lease was not terminated by the orders of a Revenue Officer.

Another contention urged on behalf of the petitioner by Mr. Thakur related to limitation. That question no longer remains for decision in the view we have taken.

In the result, therefore, we affirm the decision of the Bombay Revenue Tribunal in both the cases and dismiss both the Special Civil Applications with costs.

Applications dismissed.

[RAJKOT BENCH]

Before Mr. Justice Shah and Mr. Justice Shelat.

K. S. DIGVIJAYSINHJI HAMIRSINHJI v. NANJI SAVDAS.*

Saurashtra Land Reforms Act (XXV of 1951), Secs. 2(15), 12, 18, 19, 20, 23(1), 39—Lands granted as 'giras' by former Ruler of State to petitioner continued by United State of Saurashtra on condition that petitioner not to evict tenants on lands—Government of Saurashtra by notification under Act declaring petitioner 'girasdar' and incorporating in notification condition that petitioner not to evict tenants—Application by petitioner for allotment of "gharkhed land" under s. 19 of Act—Whether petitioner's application could be granted—Whether there is conflict between s. 12 and s. 18—Whether Government can impose restrictions upon rights of girasdar.

The former Ruler of a State in Saurashtra granted certain agricultural lands as 'giras' to the petitioner who was a junior member of the ruling family. After the administration of the State was taken over by the United State of Saurashtra, an agreement was arrived at between the Ruler and the Government of India under which the lands were regarded as lawfully granted to the petitioner but subject to the restriction that the grantee was not to evict the tenants on the lands. After the coming into force of the Saurashtra Land Reforms Act, 1951, the Government of Saurashtra by a notification dated July 20, 1954, declared the petitioner a girasdar subject to the provisions of s. 18 of the Act, and conditions imposed by the Govern-

*Decided, August 12, 1958: Special Civil Application No. 55 of 1957.

ment of India that he could not evict tenants were incorporated in the notification. In the meanwhile on March 21, 1952, the petitioner applied for an order of allotment of "gharkhad land" under s. 19 of the Act read with r. 4. On the question whether the petitioner's application could be granted:—

Held, that as the condition incorporated in the agreement arrived at between the Ruler and the Government of India was accepted by the petitioner, who had knowledge of it, it ensured for the benefit of the tenants for whose benefit it was imposed, that as the notification which declared the petitioner a girasdar, expressly preserved the rights of the tenants and imposed a disability upon the petitioner preventing him from evicting the tenants in the lands of which he was declared a girasdar, that declaration also ensured for the benefit of the tenants under s. 18 of the Saurashtra Land Reforms Act, 1951, and

that, therefore, the petitioner's application could not be granted.

The rights which a tenant has and which are not limited or abridged under s. 18 of the Saurashtra Land Reforms Act, 1951, are to be regarded as enforceable so long as the tenancy is subsisting. Therefore, where there is statutory determination of tenancy under s. 12 of the Act as a result of an order of allotment of land to the girasdar passed by the Mamlatdar, the girasdar becomes an occupant of the land under s. 39 of the Act and the rights of the tenant holding that land are extinguished.

There is nothing in the Saurashtra Land Reforms Act, 1951, which requires the Government when declaring a landlord a girasdar, not to impose any conditions upon him, or not to declare the rights of the tenants in the land of which the landlord is declared a girasdar.

THE facts appear in the judgment.

A. B. Baxi, for the applicant.

C. N. Shah, for opponents Nos. 1 and 7.

B. D. Shukla, for opponents Nos. 2 to 6, 17, 18.

B. R. Sompura, Special Government Pleader, for opponents Nos. 26, 27.

SHAH J. This Special Application raises a question as to the interpretation of certain provisions of the Saurashtra Land Reforms Act, No. XXV of 1951. The lands in dispute were within the jurisdiction of the former Virpur State. One Hamirsinhji Thakore of Virpur died in 1937, leaving him surviving his son Dilipsinhji who succeeded to the Virpur Gadi according to the custom of primogeniture. Dilipsinhji died in the year 1945 and he was succeeded to the *gadi* by his son Narendrasinhji. On June 1, 1947, Narendrasinhji granted certain agricultural lands as "giras" to the petitioner Digvijaysinhji who was the grantor's paternal uncle. These lands were situate in the villages of Matiya and Gunda. On February 11, 1948, an exchange was effected between Narendrasinhji and the petitioner whereby the lands in Matiya and Gunda were returned to Narendrasinhji and the petitioner was granted certain lands at Kharedi which are the subject-matter of this petition. On February 17, 1948, entries were posted in the "Hak Patrak" of the Virpur State which evidenced the grant of the lands to the petitioner. On March 8, 1948, the administration of the Virpur State was handed over to the United State of Saurashtra. In February 1949, Mr. V. P. Menon, Secretary to the Ministry of States, Dominion of India, held a conference at Jamnagar to discuss the questions relating to private properties of the Rulers and certain formulæ were evolved for granting recognition to the claims of the erstwhile Rulers to their private properties. Thereafter an agreement was arrived at between Narendrasinhji and the Government of India, under which the lands at Kharedi were regarded as lawfully granted to the petitioner but subject to the restriction that the grantee was not to evict the tenants on the lands. The arrangement between the Government of India and Narendrasinhji was set out in a letter dated November 2, 1949, which states *inter alia*:—

"According to the Jamnagar Conference decision as this grant was an exchange, it was acceptable after verification regarding reasonableness of the exchange. It having been decided on enquiry that the exchange was reasonable, the grant is accepted sub-

ject however to the liability of the grantees (a) to pay 12½% as assessment, (b) to see that no cultivator shall be evicted from the land."

The letter also requested that intimation be given to the petitioner about the assessment charged under the agrarian law and that he should be put in possession of the land subject to the liability specified in the letter.

The Saurashtra Land Resumption Ordinance No. 84 of 1949, making provision for resumption of certain lands was issued by the Raj Pramukh in 1949. It is undisputed, however, that the lands in dispute in this application are not included in the schedule to that Ordinance. The State of Saurashtra then passed the Saurashtra Land Reforms Act, 1951, which was enacted for

"improvement of land revenue administration and for ultimately putting an end to the Girasdar system"
and

"to regulate the relationship between the Girasdars and their tenants and to enable the tenants to become occupants of the land held by them and to provide for the payment of compensation to the Girasdars for the extinguishment of their rights."

The expression 'Girasdar' was, by s. 2(15) of that Act, defined as meaning any talukdar, bhagdar, bhayat, cadet or mulgirasia and included any person whom the Government may, by notification in the Official Gazette, declare to be a Girasdar for the purposes of this Act. The petitioner, though a junior member of the Virpur family, was not a girasdar as a cadet bhayat or mulgirasia. On January 29, 1954, the Government of Saurashtra declared the petitioner for the purposes of the Act, a "girasdar" but subject to the provisions of s. 18 of the Act. By a notification dated July 20, 1954, the earlier notification of January 29, 1954, was clarified and it was recited that the petitioner was declared a girasdar subject to the provisions of s. 18 of the Act, i.e., conditions imposed by the Government of India that he cannot evict tenants, should be incorporated in the notification. In the meanwhile, the petitioner had applied on March 26, 1952, for an order of allotment of "gharkhed land" under s. 19 of the Land Reforms Act read with r. 12. The application was resisted by the tenants, who contended that in the lands in dispute, they held "Chav" rights. They also contended that the petitioner was not a "girasdar" and that in any event he could not evict the tenants. The Mamlatdar negatived the contention of the tenants that they held Chav rights in the village Kharedi. He observed that the notification issued by the Government on July 20, 1954, only disabled the girasdar from evicting any tenant, but when the petitioner was declared a girasdar by the Government "for the purposes of the Land Reforms Act," he was entitled to all the privileges of a girasdar under the provisions of that Act; and that the condition attached to the declaration of status of the girasdar being of a date anterior to the enactment of the Act, only operated to disable the girasdar from evicting the tenants but did not disentitle him to the advantages conferred upon him by the Act. The Mamlatdar then proceeded to award to the petitioner land out of the holdings of four tenants. Those tenants were Kanbi Sava Uka, Kanbi Lala Premji, Kanbi Ruda Bhawan and Kanbi Naran Kala. Against the order passed by the Mamlatdar, an appeal was preferred to the Deputy Collector, Eastern Division, Halar. The Deputy Collector agreed with the view of the Mamlatdar that the tenants were not holding "Chav" rights. He further held that there was a difference between eviction and allotment, and inasmuch as the petitioner was not seeking to evict the tenants by exercising the right as a landlord but was seeking to avail himself of the statutory right created in his favour by virtue of the order of allotment, the restriction imposed by the notification dated January 29, 1954, and amended by notification dated July 20, 1951, was ineffective. The tenants then applied in revision to the Revenue Tribunal against the order passed by the Deputy Collector. The Tribunal disagreed with the view of the Mamlatdar and the Deputy Collector on the effect and interpretation of the notification dated January 29, 1954, as amended, and observed that as the petitioner had knowledge of the restriction imposed under the agreement incorporated in the letter dated November 2, 1949, the

agreement was binding upon him, and the lands were allotted to him subject to the conditions which were on his behalf assented to by the Ruler of Virpur. They further observed that the rights in the land granted to the petitioner by his declaration as a girasdar were restricted by conditions which were imposed under the letter dated November 2, 1949, which incorporated the agreement between the Government of India and the Ruler of Virpur and also by the conditions which were imposed under the notification dated January 29, 1954, as amended, and the petitioner was accordingly incompetent to evict the tenants who were entitled to take advantage by virtue of s. 18 of the Land Reforms Act, of the conditions imposed upon the petitioner. They, therefore, held that the petitioner was not entitled to any "gharkhed" land from the tenants whose lands were included in the letter dated November 2, 1949. The Tribunal then proceeded to consider whether the tenants had "Chav" rights; and they agreed with the view of the Mamlatdar and the Deputy Collector on that question. On the view taken by them that the rights of the petitioner were restricted by the grant made to him and by the notification declaring him a girasdar he was not entitled to evict the tenants on allotment in his favour of lands referred to in the letter dated November 2, 1949, the application of the petitioner was dismissed. The petitioner has applied to this Court challenging the correctness of that order under art. 227 of the Constitution.

It is urged by Mr. Baxi on behalf of the petitioner that a girasdar under the Land Reforms Act has a statutory right to get an order of allotment of land for personal cultivation, and the restriction, if any, imposed upon his rights as a landlord vanish when the order of allotment is made in his favour by the Mamlatdar, and that the statutory rights of the girasdar cannot by executive orders of the Government be restricted or limited in the absence of an express provision in the statute authorising the Government in that behalf. In other words, it is urged, that the rights of the tenants in the lands before the enactment of the Land Reforms Act must be regarded as subject to the rights conferred by statute upon the girasdar, and once the Mamlatdar, in exercise of his powers under Chap. IV of the Land Reforms Act, allots any land for personal cultivation to a girasdar, the rights of the tenants in the land are extinguished.

In order to appreciate the contention it may be necessary to refer to certain provisions of the Land Reforms Act of 1951. We have already referred to the definition of the word 'Girasdar' in s. 2(15) of the Act. By s. 3, it is provided that the Act is to override all other laws except as otherwise provided by the Act. By s. 6, the persons who are lawfully cultivating the land belonging to a girasdar are, for the purposes of the Act, to be deemed tenants. By s. 12, provision is made for termination of tenancies. Termination may take place on account of default on the part of a tenant or some act done by him which is destructive or permanently injurious to the land comprised in his holding, or by reason of his sub-letting or using the land for purposes other than agricultural. It is also implicit in s. 12 that tenancy may be determined in accordance with the provisions of Chap. IV which deals with allotment of lands. Section 18, on which reliance has been placed by the Tribunal provides that:

"Nothing contained in this Act shall be construed to limit or abridge the rights or privileges of any tenant under any usage or law for the time being in force or arising out of any contract, grant, decree or order of a Court or otherwise howsoever."

Chapter IV deals with allotment of land to a girasdar for personal cultivation. By s. 19 it is provided that any girasdar may, at any time within four months from the date of the commencement of the Saurashtra Land Reforms Act, apply to the Mamlatdar for allotment to him of land for personal cultivation. Section 20 contemplates that an enquiry shall be made by the Mamlatdar on the application of the Girasdar, and authorises that officer to make an order of allotment of land for personal cultivation. Under sub-s. (1), the Mamlatdar is required to issue notice to the tenant or tenants concerned and to give them an opportunity of being heard and to make enquiry in the manner prescribed. By

sub-s. (2) it is provided that the Mamlatdar, having due regard to provisions of the Chapter, may pass an order allotting to a girasdar such land as may be specified in the order. By sub-s. (3) it is provided that the Mamlatdar shall issue occupancy certificate to a girasdar in respect to his gharkhed and the land, if any, allotted to him. Then a disability is imposed by sub-s. (4) upon the girasdar. He is prohibited from obtaining possession of any land held by a tenant otherwise than in accordance with an order under sub-s. (3). Section 21 provides, insofar as it is material, that a girasdar of class A or class B shall be allotted land for personal cultivation so that added to the area of his gharkhed estate and of khalsa land, if any, in his possession, the total area does not exceed the prescribed area. The remaining provisions of that Chapter are not material in this application. The scheme of Chap. IV is that a girasdar has a statutory right to obtain land for personal cultivation to the maximum extent permissible under s. 21 and for that purpose he may make an application to the Mamlatdar and obtain an order from that officer allotting to him from his tenant land for personal cultivation. Chapter V deals with acquisition of occupancy rights by a tenant and by s. 28, cl. (1), a tenant is authorised to acquire occupancy rights in his holding on payment of such amount as may be equal to six times the assessment payable in respect of agricultural lands included in his holding, by making an application in the prescribed form to the Mamlatdar. Section 29 contemplates the holding of an enquiry by the Mamlatdar and s. 30 provides for the issue of an occupancy certificate to the tenant. Section 31 sets out the consequences of the issue of an occupancy certificate to a tenant. By cl. (a), a tenant in respect of the holding for which a certificate has been issued, becomes an occupant directly from the State and has all the rights and is subject to all the obligations of an occupant under the Act and under the Code in respect of the holding. Section 32 provides that occupancy certificate issued under s. 30 shall be effective from the date specified therein. There is, however, a proviso to cl. (b) which states that where any agricultural land or any portion thereof is allotted to a girasdar under the provisions contained in Chap. IV, either before or after the date on which an occupancy certificate issued to a tenant in respect of such land or a portion thereof has become effective under this section, the occupancy certificate issued to a tenant in respect of such land or portion thereof shall be deemed to have, and to have always had, no effect whatsoever and certain consequences shall then ensue. Section 50, provides for execution of orders for awarding possession or restoration of possession. The order of the Mamlatdar has to be enforced as if it is a decision of the Mamlatdar under Ordinance No. 52 of 1948. In our judgment the combined effect of the provisions of the Act is that tenants who are in possession of land to which the Act applies are entitled subject to certain exceptions on payment of the amount prescribed by s. 28, to be declared occupants. A girasdar is entitled under the Act to claim certain minimum area as gharkhed land, i.e., land for his personal cultivation: and to the extent to which rights are conferred upon the girasdar by the Act, the protection which is conferred upon the tenants and rights conferred upon them, are restricted.

A girasdar, either when so declared or by virtue of his status as defined in s. 2, cl. (15), may make an application for obtaining an order for allotment of land for personal cultivation. When an order of allotment is made, the rights which the tenants hold in the land, will be extinguished. That is made abundantly clear by the proviso to cl. (b) of s. 32. Section 18, however, provides that the rights of occupancy of the tenants which are acquired under any usage or law for the time being in force or arising out of any contract, grant, decree or order of a Court or otherwise howsoever, are not to be limited or abridged by anything contained in the Act. *Prima facie*, there may arise a conflict between s. 18 and the effect of the order which the Mamlatdar might pass under s. 20 and the consequences which may ensue by reason of the provisions contained in s. 39. But that conflict, in our judgment, is resolved on the view that the rights which a tenant has and which are not to be limited or abridged, are to be regarded as enforceable so long as the tenancy is subsisting. That view is

supported by the provision contained in s. 12. The Legislature has in s. 12 set out the circumstances in which a tenancy may be determined and the procedure for determination of tenancy. Section 12 contemplates determination of tenancies at the instance of the landlords and also by statutory operation. Section 18 cannot be isolated from the other provisions of the Act. It is then reasonable to hold, reading ss. 12 and 18 together, that so long as the tenancy subsists, the rights of tenants are not to be limited or abridged notwithstanding anything contained in the Act. Mr. Baxi is, therefore, right in contending that ordinarily there is a statutory determination of tenancy by virtue of allotment of land to a girasdar. It is clear that from the order of allotment flows the consequence that the girasdar becomes entitled to obtain possession of the land allotted consistently with the order of the Mamlatdar and the girasdar becomes, by virtue of the provisions of s. 39, an occupant of the land, and the rights of the tenants holding that land are extinguished.

But, in our view, in the present case, the rights of the tenants which have been declared under the letter dated November 2, 1949, and further confirmed by the order declaring the petitioner a girasdar on January 29, 1954, as amended by order dated July 20, 1954, must prevail. The petitioner claims to be a grantee from the Ruler of Virpur. During the course of the negotiations for surrender of the former Virpur State, the lands at Kharedi were given to the petitioner by the Ruler in exchange for the lands at Matiya and Gunda. Ultimately an arrangement was arrived at between the Government of India and the Ruler of Virpur whereby the exchange was upheld but subject to the restriction that the grantee was not to evict the tenants. The Revenue Tribunal has found that the petitioner had knowledge of this condition; and if knowing this condition he agreed to accept and continued to accept the benefit which was reserved to him under the Merger Agreement, it is not, in our judgment, open to the petitioner to contend that he is not bound by the condition which was imposed. The condition incorporated in the letter dated November 2, 1949, having been accepted by the petitioner it must enure for the benefit of the tenants for whose benefit it appears to have been imposed. Mr. Baxi urged that even if the authority or right conferred upon the petitioner under the agreement dated November 2, 1949, was restricted, once the Land Reforms Act of 1951 was passed, the rights and obligations of the parties have to be adjudged in the light of the Act and not in the light of the agreement incorporated in the letter. But by the very notification declaring the petitioner a girasdar, the rights of the tenants have been expressly preserved and a disability is imposed upon the petitioner which prevents him from evicting the tenants in the land of which he was declared a girasdar. That declaration also enures for the benefit of the tenants under s. 18 of the Act.

We are unable to accept the argument of Mr. Baxi that it is not open to the Government to impose any restrictions upon the rights of a girasdar. In our judgment, there is nothing in the Act which requires the Government when declaring a landlord a girasdar, not to impose any conditions upon him, or not to declare the extent of the rights of the tenants in the land of which the landlord is declared a girasdar. If by the very terms of the declaration the petitioner was incompetent to terminate the tenancy of tenants of the land of which he is declared a girasdar, we are of the view that he cannot achieve that object by obtaining an order for personal cultivation of the land of tenants who are by tenure, grant or contract protected from eviction. We are, therefore, of the opinion that the Tribunal was right in holding that the land of the tenants who were protected from eviction could not be allotted to the petitioner for personal cultivation. In that view of the case, this application fails and the rule is discharged with costs.

Rule discharged.

[RAJKOT BENCH]

Before Mr. Justice Shah and Mr. Justice Shelat.

KANBI CHHAGAN MANJI v. AHER JIVA MALA.*

Saurashtra Barkhali Abolition Act (XXVI of 1951), Secs. 8(1) & (2)(a),† 10—Tenant deprived of entire or part of land in his possession under s. 8(1)—Whether tenant can pre-empt purchaser of land from barkhalidar—Right of tenant to pre-empt whether conditioned by his being in occupation of land adjacent to land sought to be pre-empted.

A tenant who is deprived of possession of land under s. 8(1) of the Saurashtra Barkhali Abolition Act, 1951, whether it is the entire area of the land in his occupation or a part of the land, may pre-empt a purchaser of the land from the barkhalidar, if the purchase or the lease is within ten years from the date on which the order allotting the land under s. 8(1) of the Act is passed.

THE facts appear in the judgment.

V. G. Hathi and R. C. Trivedi, for the petitioner.

J. R. Nanavaty and S. K. Dodia, for the opponents.

SHAH J. One Sindhi Piru Adam was a barkhalidar of a piece of land ad-measuring 8 acres and 6 gunthas bearing survey Nos. 104 and 480 of Agatarai. The barkhalidar applied to the Mamlatdar under s. 8 of the Saurashtra Barkhali Abolition Act XXVI of 1951, for allotment of land for personal cultivation, and an order was passed allotting to him the entire area of the land, survey Nos. 104 and 480, and the barkhalidar was put in possession thereof. The barkhalidar then sold the land to Aher Jiva Mala and Aher Mulji Gokal. The petitioner, who was a tenant on the land before he was dispossessed in consequence of the allotment, then applied to pre-empt the land sold to opponents Nos. 1 and 2. He claimed to exercise the right conferred upon him by s. 8(2)(a) of the Barkhali Abolition Act. The Mamlatdar granted the application of the petitioner. In appeal to the Deputy Collector, the order passed by the Mamlatdar was confirmed. Against that order, a revision application was filed before the Revenue Tribunal. The three Members who constituted the Revenue Tribunal differed in their ultimate conclusion. Two of the Members were of the view that in order that the right to pre-empt a sale or lease of land by the Barkhalidar can be exercised under s. 8(2)(a), the tenant must establish that he is in possession of a part of the land which was originally occupied by him as a tenant. If with the tenant no land out of his original holding has remained, the right to pre-empt cannot be exercised. The third Member of the Bench was of the view that the object of the Act was to settle *bona fide* girasdars as well as *bona fide* tenants on the land, and if the interpretation of the word 'pre-emption' in the Act was given as suggested by the majority of the Bench, that "would fundamentally defeat the purpose of the Act and would have grave and serious implications." He was, therefore, of the view that the order passed by the Mamlatdar and the Deputy Collector should be confirmed. The Revenue Tribunal, in accordance

*Decided, August 12, 1953. Special Civil Application No. 19 of 1958.

†The relevant section runs thus:

8 Allotment of land for personal cultivation.—

(1) A Barkhalidar in whose estate the agricultural land is equal to two economic holdings or less and who is not a Chakariat, Dharmada Institution, or Jivaldar for life, shall be allotted land for personal cultivation in the following manner:—

(a) each of his tenants shall first be given half an economic holding, including any Khalea land in possession of such tenant;

(b) if there remains any Barkhali Land, the Barkhalidar shall be given land to make half an economic holding, including Gharkhed

and Khalea Land in his possession, if any;

(c) if there still remains any Barkhali Land, it shall be divided half and half between the Barkhalidar and the tenant.

Provided that the maximum land so allotted shall not exceed one economic holding.

(2) (a) The Barkhalidar in respect of land allotted to him for personal cultivation under sub-section (1), and the tenant in respect of land allowed to remain in his possession under the said sub-section, shall have a mutual right of pre-emption for ten years for lease or sale at a price to be determined by the Mamlatdar under the rules made under this Act.

with the decision of the majority of the Members, set aside the order passed by the Deputy Collector and dismissed the application filed by the petitioner for pre-emption. The petitioner has applied to this Court under art. 227 of the Constitution.

Now the Saurashtra Barkhali Abolition Act of 1951 was passed, as the preamble of the Act states, to "provide for certain measures for the abolition of Barkhali tenure" and "for improvement of the land revenue administration and for agrarian reforms." The object of the Act is to abolish barkhali tenure and to confer upon the tenants the rights of occupancy. By s. 10, right is conferred upon every tenant, after commencement of the Act, to apply to the Mamlatdar for acquiring occupancy rights in respect of his holding. But the Legislature, with a view to make equitable distribution of land between barkholidars and their tenants, has enacted that certain barkholidars possessing small holdings may be allotted land from their tenants for personal cultivation. That provision is to be found in s. 8, sub-s. (1) whereof provides that a barkholidar in whose estate the agricultural land is equal to two economic holdings or less and who is not a Chakariat, Dharmada institution, or Jivaidar for life, shall be allotted land for personal cultivation in the following manner:— (a) each of his tenants shall first be given half an economic holding, including any khalsa land in possession of such tenant; (b) if there remains any barkhali land, the barkholidar shall be given land to make up half an economic holding, including gharkhed and khalsa land in his possession, if any; (c) if there still remains any barkhali land, it shall be divided half and half between the barkholidar and the tenant. Evidently, this sub-section applies only in a case where the holding of a barkholidar is two economic holdings or less. By sub-s. (2), cl. (a), a right exercisable within ten years (of allotment or the issue of occupancy certificate) to pre-empt a sale or lease is conferred. We must confess that the phraseology which the Legislature has chosen to use is somewhat ungrammatical and inappropriate and appears more to conceal its import than to express it. Sub-section (2), cl. (a), provides that the barkholidar *in respect of* land allotted to him for personal cultivation under sub-s. (1), and the tenant *in respect of* land allowed to remain in his possession under the said sub-section, *shall have a mutual right of* pre-emption for ten years for lease or sale at a price to be determined by the Mamlatdar under the rules made in that behalf by the Act. We find it difficult to ascertain the precise implication of the expressions "in respect of" and "shall have a mutual right of". It was urged by Mr. Nanavaty, who appears on behalf of the transferees from the barkholidar, that the Legislature intended to confer upon the barkholidar, who has possession of land allotted to him for personal cultivation and the tenant who is allowed to remain in possession of the land under sub-s. (1), a right to pre-empt a sale or lease of land which is part of or is contiguous to the land allotted to the Barkholidar or allowed to remain in the possession of the tenant. In other words, it is urged, that if out of a unit of land a part is allotted under s. 8 to the barkholidar and the balance remains with the tenant, on sale or lease of the holding the transferee from the barkholidar or the tenant may be pre-empted for the benefit of the remaining land of the tenant or the barkholidar. However for so construing, sub-s. (1) may have to be entirely re-written, and several clauses added thereto. Again there is nothing in the provision either express or implied which supports the view that the right of pre-emption can be exercised only by a contiguous owner. Evidently, the sub-section confers the right of pre-emption both upon a barkholidar and a tenant. The section may be divided into its two component parts: (1) the barkholidar, in respect of the land allotted to him for personal cultivation under sub-s. (1), shall have a right of pre-emption for lease or sale, and (2) the tenant, in respect of the land allowed to remain in his possession under the said sub-section, shall have a right of pre-emption for lease or sale. If the barkholidar is given a right of pre-emption for the benefit of the land allotted to him for personal cultivation, the first question which springs to mind is "in respect of what land is the right of pre-emption to be exercised"; and the

Legislature does not appear to have furnished an answer or even a clue to that question. Similarly, on the interpretation by Mr. Nanavaty, if the tenant allowed to remain in possession of the land under sub-s. (1) is given the right of pre-emption for the benefit of land remaining in his occupation, we are completely left in the dark as to the land on which such right of pre-emption is to be exercised. The expression "in respect of" is obscure in its import; and we are unable to appreciate the implication of the expression "shall have mutual right of pre-emption...for lease or sale" in the context in which it occurs. It appears, however, having regard to the scheme of the Act, that the Legislature intended that there should be equitable distribution of land on the abolition of barkhali tenure and that the barkhalidars' tenants be made occupants of the lands in their possession subject to the right of certain small-scale barkhalidars to claim land for personal cultivation. The Legislature also intended that if within ten years, the barkhalidar who has obtained possession of land from the tenant for personal cultivation or the tenant who has been allowed to remain in possession of the land under sub-s. (1), transfers the same by lease or sale the other party interested in the land shall have a right to pre-empt such lease or sale, and the exercise of the right of pre-emption is not conditioned by the pre-emptor being in occupation of the land adjacent to the land sought to be pre-empted. In our judgment there is nothing in sub-s. (2) which supports the view that the right which a tenant has for pre-empting a sale or lease by a barkhalidar is restricted to those cases in which the tenant is allowed to remain in possession of land adjacent to the land to be pre-empted. We, therefore, hold that a tenant who is deprived of possession of land under sub-s. (1) whether it is the entire area of the land in his occupation or a part of the land, may pre-empt a purchaser of the land from the barkhalidar, if the purchase or the lease is within ten years from the date on which the order allotting the land under sub-s. (1) is passed. On that view of the case, the order passed by the Revenue Tribunal will be set aside and the order passed by the Deputy Collector restored with costs in this Court.

Application allowed.

Before Mr. Justice K. T. Desai and Mr. Justice Miahboy.

"THE CLUB", MAHABALESHWAR v. THE MUNICIPALITY OF MAHABALESHWAR.*

Bombay District Municipal Act (Bom. III of 1901), Sec. 59(1)(xi)—Mahabaleshwar Municipality, Rules & By-laws, r. 1—Municipality under rule providing for levy of tax on hotels, boarding houses, eating houses, restaurants, tea or coffee houses and other places where food, meals, drinks etc. provided on payment of money—Municipality seeking to recover such tax from private members' club—Whether such club a hotel within meaning of rule—Expression "other places" whether means places where public or section thereof has access—Club whether liable under rule to pay tax.

Under a rule framed by a municipality under s. 59(1)(xi) of the Bombay District Municipal Act, 1901, the municipality provided for the levy of "a tax in respect of all hotels, boarding houses, eating houses, restaurants, tea or coffee-houses and other places where food, meals, refreshments, tea, coffee or other non-intoxicating drinks are provided on payment of money." The municipality under this rule claimed to levy the tax on an unincorporated private members' club, the property and funds of which belonged to the members for the time being jointly in equal shares, contending that the club was an hotel or that it was covered by the expression "other places etc." appearing in the aforesaid rule:—

Held, that the two elements to constitute an hotel viz. access thereto by the public or a section thereof and supply of articles constituting meals and drinks for a price being absent in the present case, the club was not an hotel within the meaning of the rule framed by the municipality:

*Decided, August 30/ September 2, 1958. Special Civil Application No. 1420 of 1958.

Railway Assessment Authority v. Great Western Railway Co.¹ and Graff v. Evans,² referred to;

that the expression "other places" which follow upon the words "all hotels, boarding houses, eating houses, restaurants, tea or coffee houses" must be interpreted as words describing a place falling within the same genus viz. a place where the public or a section thereof has access, and, therefore, the club falls outside the ambit of the rule, and

that, therefore, the club was not liable to pay any tax under the rule.

THE facts appear in the judgment.

Y. V. Chandrachud, Government Pleader, for the petitioner.

M. A. Rane, with C. B. Dalvi, for the respondents.

K. T. DESAI J. The petitioner is a private Club at Mahabaleshwar. The premises of the Club are situate within the municipal limits of the Mahabaleshwar Municipality. Under the provisions of s. 59 of the Bombay District Municipal Act, 1901, the Mahabaleshwar Municipality has a right, subject to the sanction of the Commissioner, of levying taxes. Clause (xi) of sub-s. (1) of s. 59 provides that the municipality may levy

"any other tax (not being a toll on motor vehicles and trailers, save as provided by section 14 of the Bombay Motor Vehicles Tax Act, 1935):"

In exercise of the powers conferred by the Bombay District Municipal Act, the Municipality has framed rules levying certain taxes. Rule 1 so framed runs as follows:—

"The municipality shall levy a tax in respect of all hotels, boarding houses, eating houses, restaurants, tea or coffee houses and other places where food, meals, refreshments, tea, coffee or other non-intoxicating drinks are provided on payment of money."

The municipality of Mahabaleshwar, respondent No. 1 before us, contended that "The Club" at Mahabaleshwar was an hotel or that, in any event, it was a place where food, meals, refreshments, tea, coffee or other non-intoxicating drinks were provided on payment of money within the meaning of the aforesaid rule, and claimed to levy the tax on "The Club". "The Club" paid such tax for several years. For the years 1956-57 and 1957-58 "The Club" refused to pay such tax, contending that "The Club" was neither an hotel nor a place where food, meals, refreshments, tea, coffee or other non-intoxicating drinks were provided on payment of money as required under the aforesaid r. 1. The municipality has sought to recover the said tax by coercive process available to the municipality under the Bombay District Municipal Act. "The Club" has thereupon filed the petition, which is now before us, for the issue of a writ of *mandamus* or a writ in the nature of *mandamus* or other appropriate writ, direction or order under art. 226 of the Constitution of India restraining the municipality of Mahabaleshwar and its President and the successor in office of the President, their servants and agents from levying and/or collecting and/or recovering from the petitioners any tax called or like the "hotel tax". The petitioner has also prayed that the respondents be directed to refund to the petitioner the tax for the year 1955-56 which, it was alleged, had been wrongly recovered by the respondents from the petitioner. The latter prayer, however, has not been pressed by the learned Government Pleader who appears for the petitioner.

The main question before us is the question relating to the true construction of rule No. 1 quoted above. That rule provides, *inter alia*, for a levy of tax in respect of all hotels. The expression "hotel" has been defined in the rules and by-laws framed by the municipality. The definition, as it existed at the relevant time, was as follows:

"Hotel means and includes a Boarding House and any place or eating house where strangers, travellers or other persons are provided with meals and drinks for a price." It is urged by the learned advocate for the respondents that "The Club" is an

hotel within the meaning of this definition, as travellers or other persons are provided with meals and drinks for a price at the premises of "The Club." He says that every person who goes to Mahabaleshwar for a change is a traveller and that as such traveller he is provided with meals and drinks at "The Club" for a price and that "The Club" is an hotel. The expression "traveller" is applicable to a person whilst he is travelling from one place to another. The moment he reaches his destination, he ceases to be a traveller. People from various places go to Mahabaleshwar for a change and they stay at Mahabaleshwar for a shorter or a longer period. Once they reach Mahabaleshwar and stay at Mahabaleshwar, it is difficult to apply the expression "traveller" to them. The expression "traveller" as used in the definition in connection with an hotel cannot possibly apply to such persons.

It is then urged that the expression "other persons" would equally cover them. Now, the words "other persons" are preceded by the words "strangers, travellers". If the expression "other persons" was intended to cover any and every person other than a stranger or a traveller, there would have been nothing simpler for those framing the rules than to say that an hotel would mean and include any place where any person is provided with meals and drinks for a price. If the expression "other persons" had such a wide meaning, the use of the words "strangers, travellers" preceding them would have been superfluous. In the context in which the expression "other persons" has been used, it cannot include members of a private Club or the guests of such members who are entitled to be served with food or drink under the rules provided for by the Club. That expression is intended to refer to the public or any section thereof which has access to the places referred to in the rule.

In connection with this question, it may not be out of place to refer to a decision of the House of Lords in *Railway Assessment Authority v. Great Western Railway Co.*¹ The question that arose for consideration in that case was whether a railway canteen constituted a "railway hereditament" within the meaning of s. 1, sub-s. (3) of the Railways (Valuation for Rating) Act, 1930. That section provided as under:—

"For the purposes of this Act...Railway hereditament means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company; Provided that no premises occupied as a dwelling house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of a railway hereditament."

Dealing with the argument that the railway canteen constituted an hotel, Lord Thankerton in his speech observes at p. 238 as follows:—

"...An hotel, in my opinion, connotes a building in which an hotel business is carried on, to which the public are entitled to resort for accommodation and refreshment, and to which the edict 'nautes caupones' would apply."

This decision shows that access to the public is an essential requirement in order to constitute a place an hotel.

The other requirement which has to be satisfied before a place can fall under the definition of the word "hotel" is that meals and drinks are provided for a price thereat. When a Club supplies meals and drinks to a member, the question arises whether that is a supply made for a price. The transactions that take place when a Club supplies food or drink to its members came up for consideration before an English Court in the case of *Graff v. Evans*². In that case the Court had to consider the question whether a members' private club did not "sell by retail" intoxicating liquors within the meaning of s. 3 of the Licensing Act, 1872, when it supplied to its members such liquors for consumption on and off the premises of the club at fixed prices, the same being 33 per cent. above the cost price. Field J. at p. 378 of that case observes as follows:—

"...I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were

1 [1948] A. C. 234.

2 (1882) 8 Q. B. D. 373.

their agents with respect to the general property in the goods, although they had other agents with respect to special properties in some of the goods... It appears to me immaterial whether the sum a member pays for the liquor is equal to or more or less than the cost price. The transaction does not become the more or the less a sale on that account. It cannot be the true view that if the member pays a sum exactly equal to the cost price there is no sale within the section, but that if he pays more than the cost price there is... A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff (the Manager of the club) with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property in the goods to Foster, which was not a sale within the meaning of the section."

The Club at Mahabaleshwar is an unincorporated members' club. In dealing with such clubs, it has been stated in Halsbury's Laws of England, Third edn., Vol. No. V, p. 254, para. 590 as follows:—

"The rights and duties of the members of such a club as between themselves, and the internal arrangements for carrying it on, depend upon the rules. Subject to any rule to the contrary, the property and funds of the club belong to the members for the time being jointly in equal shares; and if provisions are supplied to a member, at a given price, this does not constitute a sale; it is in effect a release by the other members of their interest in the goods supplied."

The principles enunciated above in Halsbury's Laws of England are equally applicable in India.

So far as the rules of the petitioner Club are concerned, they do not contain any provision to the contrary, and the property and funds of "The Club" would belong to the members for the time being jointly in equal shares. A member has an interest in the meals and drinks supplied to him by the club and has an interest in the monies which he pays to the club for the supply of such meals and drinks. It is clear from what is stated above that so far as "The Club" at Mahabaleshwar is concerned, it cannot be said that meals and drinks are supplied by the Club to its members for a price within the meaning of the definition of the expression "hotel" as given in the rules and by-laws framed by the Mahabaleshwar Municipality.

The two elements necessary to constitute an hotel viz. (i) access thereto by the public or a section thereof and (ii) supply of articles constituting meals and drinks for a price are absent in the present case. The municipality itself has not treated this Club as an hotel for the purposes of s. 48(1)(b) (iia) of the Bombay District Municipal Act, 1901. The definition of the expression "hotel" referred to above is made applicable in connection with the by-laws framed under s. 48 of the Bombay District Municipal Act, 1901. Under s. 48 it is provided as follows:—

"48. (1) Every municipality may from time to time with the previous sanction in the case of City Municipalities, of the State Government or in other cases of the Commissioner, make, alter or recind by-laws, but not so as to render them inconsistent with this Act,...

(b) prescribing the conditions on or subject to which, and the circumstances, in which, and the areas or localities in respect of which, licences may be granted, refused, suspended or withdrawn for the use of any place not belonging to the municipality;...

(iia) as a hotel, eating house, tea or coffee shop, restaurant, dining saloon, refreshment room or for a like purpose."

In the exercise of the powers conferred under the said section, the municipality has with the sanction of the Commissioner framed by-laws. By-law No. 1 lays down that no premises within the municipal limits shall be used as an hotel or restaurant without a licence from the President. No such licence has ever

been required from "The Club", even though the definition of the expression "hotel" within the meaning of the said by-law is the same as the one applicable in the case of rule No. 1 referred to by me earlier. In our view, "The Club" is not an hotel within the meaning of r. 1.

It is next urged that even if "The Club" is not an hotel, it would be covered by the expression "and other places where food, meals, refreshments, tea, coffee or other non-intoxicating drinks are provided on payment of money," appearing in r. 1. It is urged that the expression "other places" was intended to cover each and every place where food, meals, refreshments, tea, coffee or other non-intoxicating drinks were provided on payment of money. On behalf of the petitioner the learned Government Pleader contended that the expression "other places" appearing in that rule should be construed *ejusdem generis* having regard to the words "hotels, boarding houses, eating houses, restaurants, tea or coffee houses" which precede it. Reliance was placed on Maxwell on the Interpretation of Statutes, 10th edn., p. 337. It is there stated as under:—

"But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. In other words, it is to be read as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended, as, for instance, a proviso specifically excepting certain classes clearly not within the suggested genus."

The words which precede viz. "all hotels, boarding houses, eating houses, restaurants, tea or coffee houses" belong to one genus viz. a place where the public or a section thereof has access. When the expression "other places" follows upon these words, these words must be interpreted as words describing a place falling within the same genus viz. a place where the public or a section thereof has access. If the words are so interpreted, "The Club" clearly falls outside the ambit of the rule. The rules framed by the municipality throw some light on what was intended. Rule 2 which immediately follows r. 1 provides as follows:—

"The tax shall be assessed at rates given in rule 3 on the annual rental actually paid or where no rent is paid on the annual rental value of the place used as a hotel." This rule indicates that all the places referred to in r. 1 are regarded as covered by the expression "hotel". It cannot be disputed that an hotel is a place where the public or a section thereof has access. The rule relating to assessment, which is r. No. 8, provides as under:—

"Assessment shall be made according to the following scale:

- | | | |
|---|----|-------|
| (a) For an annual rental actual or estimated of Rs. 50 to 100 | .. | Rs. 7 |
| (b) For every additional Rs. 100 of the rental | .. | Rs. 8 |

Provided that if after applying clause (b) above, the remainder of the rental value is below Rs. 50 it shall be neglected and if it is Rs. 50 or above, it shall be taken as Rs. 100 and tax levied."

These rules show that the intention of the Mahabaleshwar Municipality in framing these rules was to tax hotels, and tax them at a rate of assessment dependent upon the annual rental of the place. The municipality has itself referred to this tax as 'Hotel tax' in the municipal bill, which is annexed as exh. No. 1 to the affidavit of S. S. Dighe, Secretary of "The Club". That bill shows the name of the tax as "Hotel Tax" and the amount sought to be recovered under that head is Rs. 639 being the amount claimed in respect whereof the petitioner has come before us. Even in the letter of demand, dated April 11, 1958, addressed by the President of the Mahabaleshwar Municipality which is annexed as exh. No. 2 to the said affidavit, the tax is referred to as "Hotel Tax". Much value cannot be attached to the use of the expression "Hotel Tax" by the municipality, if the tax was in reality a tax not merely on hotels but on other places like the Club at Mahabaleshwar. The intendment of the rule appears to be that only places where the public or a section thereof has access were sought to be taxed, and recognition to that idea has been given by the municipality itself by dubbing the tax as "Hotel Tax"

in the printed bills and in the letter of demand. In para. 9 of the petition; it has been stated as follows:—

"A mere cursory reading of the rules and by-laws of the petitioner club will show that the public generally have no right of access to the club. The club is conducted not with a view or desire to do business but merely with the object of satisfying the social needs of its members. In fact, the petitioner club does not do or carry on any business. The petitioner submits that as the entry to the club is not open to the public generally and as the club does not carry on business, it is not a 'Hotel' and is therefore not liable to pay the 'hotel tax'."

The statement that the public do not have any right of access to the Club has not been controverted in the affidavit in reply. The only thing stated in para. 4 of the affidavit in reply is as follows:—

"...the petitioner provides its members and their guests food, meals, refreshments, tea, coffee and other non-intoxicating drinks for a price. The petitioner therefore is covered by the rules and bye-laws and is liable to pay the tax."

Strong reliance has been placed by the learned advocate for the respondents on some of the by-laws of the petitioner Club. By-law 38 provides as follows:—

"38. All meals shall be served in the dining or breakfast room only, provided that a member may have chota hazri and tea served in his room likewise a member who is ill may also have his meals served in his room."

By-laws 40, 41 and 42 are as follows:—

"40. The messing charges inclusive of chota hazri, breakfast, lunch, tea and dinner shall be as fixed by the Committee season by season and notified in separate 'Scale of charges'...

41. The charge for single meals shall be:

						Rs.	a.	p.
Chhota hazri	..	..	..	..	..	0	12	0
Breakfast	..	..	..	..	..	2	8	0
Lunch	..	..	..	..	..	4	0	0
Afternoon tea	..	..	..	..	..	1	0	0
Dinner	..	..	..	..	..	5	0	0

Special dinner, from Rs. 6-8-0 upwards according to the menu ordered.

42. A member entertaining a guest to a meal will pay in addition to above rates, a table fee of four annas per head for reserving a private table. An extra charge of Re. 1-0-0 per head will also be made unless 12 hours notice in writing is given to the Secretary."

By-law 45, which deals with guests, runs as follows:—

"45. A member may entertain guests at breakfast, lunch or dinner, and he shall give notice in writing of his intention to do so at least twelve hours before the entertainment..."

These by-laws, it is urged, show that refreshments, tea, coffee and meals can be had on payment of money and that as these could be had on payment of money, the place where these things are obtainable is one covered by rule No. 1. Reliance was also placed on by-laws Nos. 61 and 62. By-law No. 61 runs as follows:—

"61. A member is permitted to purchase stores, wines, spirits or tobacco to be consumed on or off the premises, provided that the Committee may at any time, without assigning any reason, stop the supply to any member or to all members."

By-law No. 62 runs as follows:—

"62. The Honorary Secretary is authorised on behalf of the Club, to undertake outside contracts for catering at At Homes, weddings, parties or other entertainments, at charges to be fixed from time to time by the Committee..."

It is urged that by-laws No. 61 and 62 show that the Club carries on the business of sale of stores and that it carries on the business of catering. We have been informed by the learned Government Pleader on behalf of "The Club" that in fact during the course of its existence, the Club has never undertaken any catering contract for any person other than a member. The rules, no

doubt, provide that the members would be supplied with food and drink at the charges therein set out. The question still remains whether such a supply on payment of charges is a supply "on payment of money" within the meaning of r. No. 1. It is not necessary for the purpose of the present petition to determine that point in view of the fact that we hold that the supply that is being made is only to the members of the club and to their guests and not to the public or any section thereof. Even when any supply is made to the guests, a member has to pay for it, and a guest is not permitted under the rules to make any payment in connection therewith.

Rule No. 1 is a rule which imposes a tax. It is well-established that statutes which impose pecuniary burdens are subject to the rule of strict construction. In Maxwell on the Interpretation of Statutes, 10th edn., it is stated at p. 288 as follows:—

"It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

On a fair reading of the rule, it is clear that it was not intended to apply to a place where the public or a section thereof has no access.

As the element of access to the public or any section thereof is absent in the case of the petitioner, the petitioner is not liable to pay any tax under r. No. 1 of the rules under which the municipality claims to levy and recover the tax from the petitioner.

In view of our judgment, the petitioner is entitled to the issue of a writ of *mandamus* requiring the respondents and the successor in office of respondent No. 2, their servants and agents to forbear from levying and/or collecting and/or recovering from the petitioner any tax under rule No. 1 of the rules framed by respondent No. 1 municipality under s. 59 of the Bombay District Municipal Act, 1901, and we order accordingly. Respondents to pay to the petitioner the costs of the petition.

Application allowed.

SUPREME COURT.

Present: Mr. Justice B. Jagannadhas, Mr. Justice Syed Jafer Imam and Mr. Justice P. Govinda Menon.

MOBARIK ALI AHMED v. THE STATE OF BOMBAY.*

Indian Penal Code (Act XLV of 1860), Secs. 2, 3, 4, 34, 420—Criminal Procedure Code (Act V of 1898), Secs. 179, 5(1)—Indian Evidence Act (I of 1872), Secs. 16 III. (b), 88—Foreigner committing offences within India though corporeally present outside India at time of offence—Whether Indian Penal Code applies to such person—Exercise of criminal jurisdiction whether dependent on locality of offence or nationality of offender—Authorship of document whether can be proved by contents of the document—Whether permissible to construe Indian Penal Code in accordance with notions of criminal jurisdiction prevalent when Code enacted—How far legitimate to construe Code with reference to modern needs.

Under s. 2 of the Indian Penal Code, 1860, the Code applies to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside India at the time of the commission of the offence.

The meaning of the phrase "every person" in s. 2 of the Indian Penal Code is that it comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed. The section must be understood as

*Decided, September 6, 1957. Criminal Appeal No. 209 of 1956.

comprehending every person without exception barring such as may be specially exempt from criminal proceedings or punishment thereunder by virtue of the Constitution (see art. 361(2) of the Constitution of India) or any statutory provisions or some well-recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

Exercise of criminal jurisdiction depends on the locality of the offence and not on the nationality of the alleged offender except in a few specified cases such as ambassadors, Princes etc.

The fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are juridically attributable to him notwithstanding that he is corporeally present outside India at the time, is not to give any extra-territorial operation to the law; for it is in respect of an offence whose locality is in India, that the liability is fastened on the person and the punishment is awarded by the law, if his presence in India for trial can be secured.

It is implicit in s. 3 of the Indian Penal Code that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time.

Macleod v. Attorney-General for New South Wales,¹ *S. S. Lotus*,² *The Queen v. Keyn*,³ *Croft v. Dunphy*⁴ and *Governor-General v. Raleigh Investment*,⁵ referred to.

The authorship of a document may be proved by internal evidence afforded by the contents of the document. This mode of proof may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the Court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender, limited though it may be, as also his knowledge of the subject-matter of the chain of correspondence, to speak of its authorship. In an appropriate case the Court may also be in a position to judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship.

Illustration (b) to s. 16 of the Indian Evidence Act, 1872, only means that each one of the facts mentioned therein (the fact that a letter was posted in due course and the fact that it was not returned through the Dead Letter Office) is relevant. It cannot be read as indicating that without a combination of these facts no presumption of the receipt of the letter by the addressee can arise.

Although under s. 88 of the Indian Evidence Act, 1872, no presumption can be drawn as to the person who delivered the message for transmission, the contents of the message received, in the context of the chain of correspondence may furnish proof of authorship of the message at the dispatching end.

Where the charge against the accused is under s. 420 read with s. 34 of the Indian Penal Code, 1860, but the actual findings support a conviction of the accused under s. 420 of the Code, the conviction of the accused under s. 420 would be valid unless prejudice is shown to have occurred.

*Willie (William) Slaney v. The State of Madhya Pradesh*⁶ and *Shreekanth Ramayya Muntipalli v. The State of Bombay*,⁷ referred to.

It is not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible, unless there is anything in the Code or in any particular section to indicate the contrary.

THE facts are stated in the judgment.

A. P. Gandhi and *J. B. Dadachanji*, for the appellant.

H. J. Umrigar and *R. H. Dhebar*, for the respondent.

¹ [1891] A. C. 455.

² Publications, Permanent Court of International Justice, Series A, No. 10, 23.

³ (1876) 2 R. D. 63.

⁴ [1923] A. C. 156.

⁵ [1944] A. I. R. F. C. 51, 60, 61.

⁶ [1955] 2 S. C. R. 1140.

⁷ [1955] 1 S. C. R. 1177, 1188, s.o. 57 Bom. L. R. 632.

JAGANNADHADAS J. This is an appeal by special leave. The appellant before us was convicted by the learned Presidency Magistrate, Third Court, Esplanade, Bombay, for the offence of cheating under s. 420 read with s. 34 of the Indian Penal Code on three counts of cheating viz., the first relating to a sum of Rs. 81,000, the second relating to a sum of Rs. 2,30,000, and the third relating to a sum of Rs. 2,36,900. He was sentenced by the learned Magistrate to two years rigorous imprisonment and a fine of Rs. 1,000 on the first count, to twenty-two months rigorous imprisonment and a fine of Rs. 1,000, on the second count, and two months rigorous imprisonment on the third count. It was directed that the substantive sentences only on the second and third counts are to run concurrently.

The prosecution was initiated on a private complaint filed by one Luis Antonio Correa on June 30, 1952, against four persons of whom the appellant was designated therein as the first accused and one Santram as the fourth accused and two other persons, A. A. Rowji and S. A. Rowji, as second and third accused respectively. Bailable warrants were issued against all the four by the learned Magistrate, but it appears that warrants could not be executed against accused Nos. 2, 3 and 4. They were reported as absconding. The trial was accordingly separated as against them and proceeded only as against (accused No. 1) the appellant herein. The convictions and sentences have been confirmed on appeal by the High Court at Bombay.

The complainant is a business man from Goa and was the Director of a firm in Goa which was trading in the name of Colonial Limitada doing business in import and export. At the relevant time there was severe scarcity of rice in Goa. The complainant was accordingly anxious to import rice urgently into Goa. He got into touch with a friend of his by name Rosario Carvalho in Bombay who was doing business as a Commission Agent. Carvalho in his turn got into touch with one Jasawalla who was also doing business of Commission Agent at Bombay in the name of Universal Supply Corporation. This Jasawalla was previously in correspondence with the appellant about business in rice. The appellant was at the time in Karachi and was doing business in the name of Atlas Industrial and Trading Corporation and also in the name of Ifthiar Ahmed & Co. The telegraphic address of the complainant was Colodringco and that of the appellant was Ifthy. As a result of exchange of telegrams, letters and telephone messages between Jasawalla and the appellant on one side, and Jasawalla and the complainant on the other, followed up by direct contacts between the appellant and the complainant through telephone, telegrams and letters, a contract was brought about for purchase, by the complainant from the appellant, of 1,200 tons of rice at the rate of £ 51 per ton, to be shipped from Karachi to Goa. The contract appears originally to have been for payment of the price in sterling at Karachi. But it is the prosecution case (which has been accepted by both the Courts below) that a subsequent arrangement was arrived at between the parties by which the payment was to be made in Bombay in Indian currency, in view of the difficulties experienced in opening a letter of credit in a Bank at Karachi through the Portuguese Bank at Goa. It is also the prosecution case, which has been accepted, that the understanding was that 25 per cent of the price was to be paid as advance by the complainant to Jasawalla as the agent of the appellant for this purpose and that on receiving intimation thereof the appellant was to ship the rice and that the balance of the purchase money was to be paid on presentation of the shipping documents. It appears that at a later stage the quantity of rice to be supplied was raised to 2,000 tons and advance to be paid to 50 per cent. of the total stipulated price. It is also the prosecution case that the appellant represented at various stages by telephone talks, telegrams and letters, to Jasawalla as well as to the complainant directly that he had adequate stock of rice and that he had reserved shipping space in certain steamers which were about to leave for Goa and that he was in a position to ship the rice on being satisfied that the requisite advance was paid. It is in evidence that on receiving such assurances, the complainant paid moneys as shown below to

Jasawalla and obtained receipts from him, purporting to be the agent of the appellant.

- | | | |
|-----------------------|-------|--------------|
| 1. On July 23, 1951 | .. .. | Rs. 81,000 |
| 2. On August 28, 1951 | .. .. | Rs. 2,30,000 |
| 3. On August 29, 1951 | .. .. | Rs. 2,36,900 |

All these amounts are held to have been received by the appellant in due course. It is admitted, however, that no rice was in fact shipped to the complainant and the amounts have not been returned back to the complainant. The defence of the appellant is to the effect that the amounts were not in fact paid to any person who was his agent and not in fact received by him at all and that he was unable to supply the rice as the complainant did not comply with the terms of the contract by opening a letter of credit at Karachi or paying him in Pakistani currency. This defence has not been accepted and the appellant has been found guilty as charged by the Courts below. He was, therefore, convicted and sentenced as above stated.

It is necessary to set out somewhat in detail the essential facts held to have been proved by the Courts below to appreciate the legal contentions that have been urged before us. As previously stated, the complainant got into touch with his friend Carvalho of Bombay to help him in getting rice for consumption in Goa and Carvalho in turn contacted Jasawalla for the purpose. Before that time, Jasawalla, in the course of his usual business, had received a letter, exh. O, dated June 5, 1951, from the appellant offering that he would be prepared to do business in rice if a letter of credit is opened or cash payment is made in Karachi. Carvalho came to know of this from Jasawalla and informed the complainant. Jasawalla also wrote a letter to the complainant. The complainant sent a telegram showing his willingness to open credit, if 1,200 tons of rice could be shipped to Goa. Jasawalla wrote a letter, exh. P, dated June 6, 1951, to the appellant quoting the telegram of the complainant and asking for an offer. The appellant by his letter dated June 10 to Jasawalla, offered to supply as much rice as he wanted and demanded 25 per cent. cash payment as advance. After some tripartite correspondence, the appellant by his letter dated June 26, agreed to accept money in Bombay, at the price of £ 51 per ton of rice. Jasawalla by telegram dated July 5, 1951, informed the appellant that the Goa party accepted the 25 per cent. arrangement. The appellant by a letter dated July 7, accepted the offer but wanted 50 per cent. deposit and gave time till the 10th, suggesting that since the rice was scarce the deal must be finished at once. Jasawalla intimated this to the complainant and asked him to start at once with money and informed him that if there was delay the party at the other end would claim damages. The appellant did not get any information for the next few days. He accordingly sent one Santram (accused No. 4 in the complaint) to Bombay as his agent for discussing the matter in question and authorising him to fix the deal on the spot. Santram appears to have fixed the bargain for shipping 1,200 tons of rice on the complainant paying an advance sum of Rs. 1,50,000 at Bombay as 25 per cent. deposit towards the price of the said 1,200 tons of rice. On receipt of this information the appellant wrote a letter dated July 12, to Jasawalla wherein he confirmed the arrangement arrived at by Santram. Jasawalla was thereupon taken by Santram to accused Nos. 2 and 3. They were introduced to him as the agents of the appellant who were to receive the moneys in this transaction on appellant's behalf. At the same time the appellant was also writing letters to Jasawalla which seem to indicate that he was trying to shift his position by asking for 50 per cent. as advance deposit. For a few days thereafter the complainant did not turn up at Bombay with the funds and the appellant by his telegram dated July 16, asked Jasawalla why there was no further information about the transaction. By a telegram dated July 17, he informed Jasawalla that s.s. Olinda was sailing in a few days and that it would be too late to ship the rice and that the matter should be hurried up. On July 18, the complainant sent a telegram to Jasawalla informing him that he was coming with funds and that if the rice was not shipped it may be shipped by s.s. Olinda which was about

to start on July 21. The appellant also sent a telegram to Jasawalla on July 18, asking why the deal was not coming on and that he had already reserved space by the steamer of the 21st. On July 19 again Jasawalla received a telegram from the appellant informing him definitely that space was reserved in the steamer. The complainant also sent a telegram to Jasawalla on the same day informing him that he was coming and that at least 500 tons must be shipped at once. The complainant arrived at Bombay on July 20. The indent, exh. A, was prepared in triplicate and signed by the complainant on the same day. The complainant brought cheques and drafts to the tune of Rs. 81,000. It would appear that at this stage the complainant was asking that he should be allowed (for the time being) to deposit only Rs. 50,000 as deposit for a shipment of 500 tons. But appellant insisted that Rs. 1,50,000 should be paid as advance for 1,200 tons. On or about July 21, the appellant sent a letter to Jasawalla with a pro-forma receipt for Rs. 1,50,000 signed by him to be made use of by Jasawalla in whatever manner he thought proper in connection with the transaction then under way. The said receipt was shown to the complainant who was shown also the other correspondence that was received from the appellant. Jasawalla by his letter dated July 22, to the appellant confirmed the shipment of the deal of 1,200 tons of rice and intimated that some portion of the money was immediately ready and some portion would be brought in a day or two, totalling over Rs. 80,000 and that the balance would be paid after hearing about shipment of 1,200 tons. This was agreed to by the appellant. On July 23, Jasawalla telephoned to the appellant that he was going to pay the money to accused No. 2 as directed by the appellant. In the afternoon of that very day the parties went to the office of accused No. 2 and there was again a further conversation on the phone with the appellant who, on the phone, conveyed the assurance that payment to accused No. 2 would be as good as payment to himself. The complainant and Carvalho were hearing both the morning and afternoon talks between the appellant and Jasawalla, on a second line. Thereupon the complainant paid the sum of Rs. 81,000 to Jasawalla who passed a receipt (exh. B) therefor on behalf of the appellant and the said amount was passed on to accused No. 2. The fact of this payment was intimated to the appellant by telephone as well as by a telegram. A letter was also written on July 24 to the appellant referring to the telephone calls and telegram and informing him that the amount was paid. He was also asked therein to ship the rice at once promising that the balance will be paid in a week. On July 23 itself the appellant sent a telegram saying that he had received the messages and was trying to book 1,000 tons. According to the prosecution case the appellant having received the sum of Rs. 81,000 as above, changed his front from July 24, 1951. The facts held to have been proved in respect of this change of front may now be stated.

On July 24, 1951, the appellant sent to Jasawalla a telegram mentioning difficulties created by the Exchange Controller in shipping the goods. When Jasawalla conveyed his protest and insisted upon the shipping of the goods at once, the appellant sent a telegram on July 25, informing him that the difficulties were of a minor character and that the space for shipping was already booked. Jasawalla by his telegram of the same date asked for confirmation of loading of 1,200 tons by s.s. Olinda and requested him that if the full quantity could not be loaded, a portion thereof might be sent immediately. The appellant by his letter dated July 26, acknowledged Jasawalla's letter dated 23rd (informing him about the payment of Rs. 81,000) and intimated that the rice would be shipped by the next steamer s.s. Umãria sailing for Malaya and that the said steamer can touch Goa if the quantity of rice to be shipped is raised to 2,000 tons. By a letter dated July 26, Jasawalla protested against the new condition. The complainant sent a letter dated July 27, to Jasawalla asking whether the rice was shipped by s.s. Olinda or not. On July 27, the appellant sent a telegram to Jasawalla asking for bank-guarantee (for payment of balance). It does not appear that any question of bank-

guarantee was raised in the correspondence between the parties, after Sant-ram (accused No. 4) fixed up the deal on the footing of payment of advance of Rs. 1,50,000, in cash at Bombay by way of 25 per cent. deposit. On receiving this letter raising the question of bank-guarantee, Jasawalla wrote back on the 27th to the appellant about the change of front and charging him with cheating and not fulfilling his part of the contract after receiving the money. By a letter dated July 30 and also a telegram of the same date the appellant replied to Jasawalla wherein he promised to send the rice by s.s. Umaria and also threatened to break off negotiations if the parties had no confidence in him. Jasawalla thereupon asked the appellant by telegram to fix the sailing date of s.s. Umaria and inform him. The appellant wrote back on August 1, admitting receipt of letters from Jasawalla and attempting to pacify him. Jasawalla replied thanking him and asked for a clear date of the sailing of s.s. Umaria. By that time Jasawalla had made enquiries with Mackinons & Mackenzie (shipping agents) and was informed that no shipping space had been reserved by the appellant and found the statement of the appellant in this behalf to be false. Jasawalla sent copies of this correspondence between him and the appellant to the complainant. That correspondence indicated the appellant's position to be that the rice would be shipped by s.s. Umaria only if the load could be increased to 2,000 tons and that the appellant stated that he got the sailing of s.s. Umaria delayed by two days for the purpose. The complainant thereupon informed Jasawalla that he was prepared to accept the new deal for 2,000 tons. Jasawalla by his telegram dated August 2, to the appellant confirmed this new arrangement and by another telegram dated August 3, asked the appellant to hurry up with the shipment. Thereafter the appellant raised a fresh matter. On August 6, the appellant sent a direct telegram to the complainant and asked him to request the Portuguese Pro-Consul at Karachi to obtain exchange-guarantee. Between August 7 and 12, several letters and telegrams passed between the complainant and Jasawalla, on the one hand and the appellant on the other. As a result of efforts made in this interval, it appears that the Pro-Consul, Mr. Alphonso was prepared to give the exchange-guarantee of the State Bank of Pakistan for payment in sterling of the price of rice. The appellant then by his letter dated August 13, informed Jasawalla that the State Bank was not insisting on exchange-guarantee but that it would be sufficient if a certificate was issued by the Portuguese authority that the rice was required for replenishing the ration shops in Goa. A similar letter was also written by the appellant on August 14, to the complainant. Thereupon the complainant and Jasawalla approached the concerned authority at Goa, viz., one Mr. Campos, the Trade Agent to the Portuguese Government. Mr. Campos thereupon sent telegrams on August 16, to the State Bank of Pakistan, to the Pro-Consul, Mr. Alphonso, and to the appellant certifying that rice was required for replenishing the ration shops in Goa.

After this there was a further change of tactics by the appellant. By a telegram dated August 20, 1951, the appellant informed the complainant that the papers before the Government were ready and that he had done his best but that payment must be made. In reply the complainant sent a telegram to the appellant on the same date stating that he did not understand the contents of his telegram and promised to send the balance on loading. The complainant also informed Jasawalla about these telegrams exchanged between him and the appellant. This was followed up by some further correspondence between the parties on August 22. The appellant sent telegrams both to the complainant and to Jasawalla demanding 90 per cent. deposit as advance and threatened to break off if it was not complied with. Thereupon Jasawalla sent a telegram on the 22nd to the complainant to come to Bombay. He informed the appellant the same day that the complainant was coming down to Bombay to arrange for 50 per cent. deposit and asked the appellant to start loading. On the 24th he wrote also a letter to the appellant to the effect that the complainant would pay 50 per cent. advance minus the amount already paid and informed him

that the complainant would fly to Karachi to supervise the loading. The appellant thereupon sent a telegram dated the 25th informing Jasawalla that everything was ready but hinted about the opening of a letter of credit. Again on August 27, the appellant sent a telegram to Jasawalla that stocks could not be released unless the arrangement was fulfilled i.e., 90 per cent. amount was paid. The complainant came to Bombay with drafts and cheques to the tune of about Rs. 4,75,000, and contacted Jasawalla. He contacted also the appellant on phone. He paid a sum of Rs. 2,30,000 on August 28, 1951, to Jasawalla who passed a receipt, exh. F., therefor, on behalf of the appellant. On August 29, the complainant paid another sum of Rs. 2,36,900 to Jasawalla who passed a receipt, exh. G., therefor, on behalf of the appellant. It is the case of the prosecution that both these were also passed on to accused No. 2 and through him to the appellant and that the appellant acknowledged receipt of these amounts in his correspondence and that case has been also accepted. On the 29th itself the appellant sent a telegram to Jasawalla as follows:

"Part consignment received, rest tomorrow, Pentakota for the 1st certain goods required alongside."

On receiving this telegram Jasawalla informed him by a telegram dated August 31, that he was shocked that no space was reserved, though everything had been done on his side. The appellant sent a reply by telegram dated September 1, 1951, protesting against the language used by Jasawalla in the telegram and informed him that space was reserved but the company could not wait as the goods could not be shipped. On September 5, the appellant informed Jasawalla by a letter that space was reserved by s.s. Pentakota and that everything was ready for shipment. Meanwhile the complainant feeling very nervous and anxious about the fulfilment of the transaction proceeded in person to Karachi on September 4. According to the complainant he stayed at Karachi for about two weeks. He was shown some godowns containing rice bags suggesting that they belonged to the appellant and were ready for shipment. But he was not afforded any opportunity for verifying that the stock was intended for shipment in respect of his transaction. The complainant went to Karachi on a Visa for three months. But after a stay of less than two weeks he was served with a quit-order from the Pakistan Government on September 18, and was bundled out of Karachi. It is the complainant's impression that this was manoeuvred by the appellant. On his return back, correspondence was again resumed between the appellant and the complainant. By a letter dated September 21, the appellant promised to ship the goods by s.s. Ismalia which would not be sailing in September but would leave on October 3. On September 23, the appellant sent another letter stating that s.s. Ismalia was arriving on October 3 and not on September 26. On October 3, the appellant wrote another letter to the complainant informing him that s.s. Ismalia was not available. The complainant thereafter sent a telegram to the appellant dated September 29, calling upon him to ship the goods by s.s. Shahjehan if s.s. Ismalia was not available. The complainant by a further letter dated October 1, called upon the appellant to ship the rice at once. By a telegram dated October 2, the appellant informed the complainant that s.s. Shahjehan was arriving the next day and that he would wire the position. By his telegram dated the 3rd, he informed the complainant that the loading had commenced. On October 6, the complaint received another telegram from the appellant that he would not ship per s.s. Shahjehan until demands in his letter dated September 29, are complied with. It is the complainant's case that no such letter was ever received by him. Jasawalla also informed the appellant that no letter dated September 29, was received. By telegram dated October 8, 1951, Jasawalla called upon the appellant to refund the money and cancel the contract. On October 12, the appellant sent a telegram which conveyed a suggestion that he would ship rice by s.s. Shahjehan arriving on October 19, instead of October 9. There were some further telegrams exchanged. Finally the complainant sent a telegram on October 26, calling upon the appellant to ship rice immediately or refund the money.

This was followed by further exchange of correspondence which ultimately resulted in a letter by the appellant to the complainant dated November 17, denying all the allegations made against him.

The above facts were held to have been proved by the Courts below on the basis of a good deal of correspondence between the parties consisting of telegrams and letters and supported by the oral evidence mainly of three persons, viz., (1) the complainant, (2) Jasawalla, and (3) an ex-employee of the appellant at Karachi by name Sequeria. All this evidence has been accepted by the Courts below after full consideration of the various comments and criticisms against acceptability of the same.

In a case of this kind a question may well arise at the outset whether the evidence discloses only a breach of civil liability or a criminal offence. That, of course, would depend upon whether the complainant in parting with his money to the tune of about Rs. 5½ lakhs acted on the representations of the appellant and in belief of the truth thereof and whether those representations, when made were in fact false to the knowledge of the appellant and whether the appellant had a dishonest intention from the outset. Both the Courts below have found these facts specifically against the appellant in categorical terms. These being questions of fact are no longer open to challenge in this Court before us in an appeal on special leave.

Learned counsel for the appellant accordingly raised before us the following contentions:

1. The appellant is a Pakistani national, who, during the entire period of the commission of the offence never stepped into India and was only at Karachi. Hence he committed no offence punishable under the Indian Penal Code and cannot be tried by an Indian Court.

2. The appellant was brought over from England, where he happened to be, by virtue of extradition proceedings in connection with another offence, the trial for which was then pending in the Sessions Court at Bombay and accordingly he could not be validly tried and convicted for a different offence like the present.

3. The various telegrams and letters relied upon by the prosecution were held to have been proved on legally inadmissible material.

4. The charge being under s. 420 read with s. 34 of the Indian Penal Code for alleged conjoint acts of the appellant along with the persons designated as accused Nos. 2, 3 and 4, in the complaint and the said three accused not being before the Court and the appellant not having been in Bombay at the time, the conviction is unsustainable.

We have heard elaborate arguments on all these matters but have felt satisfied that there is no substance in contentions 2, 3 and 4 above. Accordingly we did not call upon the counsel for the State to reply to the same. It is, therefore, unnecessary to deal with them at any length. They will be disposed of in the first instance.

To understand contention 3, it is convenient to take the letters and telegrams separately. The letters which have been relied on for the prosecution fall under the following categories.

1. Letters *from the appellant* either to Jasawalla or to the complainant.

2. Letter *to the appellant* from Jasawalla or the complainant.

Most of the letters from the appellant relied upon bear what purport to be his signatures. A few of them are admitted by the appellant. There are also a few letters without signatures. Both the complainant and Jasawalla speak to the signatures on the other letters. The objection of the learned counsel for the appellant is that neither of them has actually seen the appellant write any of the letters nor are they shown to have such intimate acquaintance with his correspondence as to enable them to speak to the genuineness of these signatures. Learned trial Judge as well as the learned Judges of the High Court have found that there were sufficient number of admitted or proved letters which might well enable Jasawalla and the complainant to identify the signatures of the appellant in the disputed letters. They also laid stress substan-

tially on the contents of the various letters, in the context of the other letters and telegrams to which they purport to be replies and which form the chain of correspondence, as indicating the genuineness of the disputed letters. Learned counsel objected to this approach on a question of proof. We are, however, unable to see any objection. The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature, by one of the modes provided in ss. 45 and 47 of the Indian Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the Court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender limited though it may be, as also his knowledge of the subject-matter of the chain of correspondence, to speak to its authorship. In an appropriate case the Court may also be in a position to judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship. We are unable, therefore, to say that the approach adopted by the Courts below in arriving at the conclusion that the letters are genuine is open to any serious legal objection. The question, if any, can only be as to the adequacy of the material on which the conclusion as to the genuineness of the letters is arrived at. That, however, is a matter which we cannot permit to be canvassed before us.

A few of the letters said to have been received from the appellant, as stated above, do not bear his signatures. These were held to have been proved by the circumstantial evidence as pointed out and we see no objection thereto.

The next objection is as regards the letters said to have been sent by Jasawalla and the complainant to the appellant. Jasawalla and the complainant have produced copies of the originals. It has been contended that these copies are inadmissible. But such a contention is obviously untenable. The appellant cannot be expected to produce them, if true, since he disputes them. There is also the evidence of his ex-employee, Sequeria that the originals were received, but taken away by his son. The main contention in respect of these letters is that there is no proof that they were received by the appellant at Karachi. It is contended that evidence given by either Jasawalla or the complainant that the originals were written and posted is not relevant to show that the same have been received. It is urged that the proof of mere posting of a letter is not presumptive evidence of the receipt thereof by the addressee unless there is also proof that the original has not been returned from the Dead Letter Office. Illustration (b) to s. 16 of the Indian Evidence Act, 1872, is relied on for the purpose and it is urged that a combination of the two facts is required to raise such a presumption. We are quite clear that the illustration only means that each one of these facts is relevant. It cannot be read as indicating that without a combination of these facts no presumption can arise. Indeed that section with the illustrations thereto, has nothing to do with presumptions but only with relevance. Some cases relating to this have been cited before us. We have considered the same but it is unnecessary to deal with them.

Next taking the question relating to telegrams the main objection is as to the proof of the genuineness of the various telegrams said to have been received from the appellant. In this case since we are largely concerned with the nature and contents of the representations said to have been made by the accused to the complainant or to Jasawalla, it is obvious that what are relevant or important are the telegraphic messages delivered to the complainant or Jasawalla provided the authorship of the original is made out. These messages have been proved by producing the messages actually handed over to either of these persons or the

transit copies of the originals recorded at the receiving end. The real objection, however, appears to be that there is no proof as to the appellant having been the author of these messages. It is true that under s. 88 of the Evidence Act there is a presumption only that the message received by the addressee corresponds with the message delivered for transmission at the office of origin. There is no presumption as to the person who delivered such a message for transmission. But here again proof of authorship of the message need not be direct and may be circumstantial as has been explained above in the case of letters. The contents of the messages received, in the context of the chain of correspondence may well furnish proof of the authorship of the messages at the dispatching end. A number of other minor objections have been also raised before us connected with the proof of these telegrams. They have all been fully dealt with by one of the learned Judges of the High Court. Most of these objections are unsubstantial, and it is enough to say that we are in general agreement with the conclusions of the High Court in this matter.

As regards both the letters and the telegrams considerable argument was attempted before us as to the mode in which they were let in for proof in the course of the examination of the witnesses. But in the absence of any clear indication on the record that any objection in that behalf was seriously taken, we could not permit any challenge in this behalf.

We may add that as regards the main objection both in respect of letters as well as telegrams, viz., the use of the contents of the disputed documents, for proof thereof there is this that could be said, viz., in view of the fact that quite a large number of the documents are not admitted and only a few have been held to be admitted or indubitably proved it may have been a question open before the Court of appeal whether the internal evidence with reference to such a large mass of correspondence substantial portion of which is disputed was adequate to arrive at a satisfactory conclusion as to the genuineness of these documents. That question is not open before us. But, even if we were inclined to go into this, it was well nigh impossible, having regard to the fact that most of the documents relied upon by the trial Court as well as the appellate Court have not been printed in the record before us. However, there is no reason to think that the learned Judges who have considered the matter very elaborately have not come to a satisfactory conclusion. They have acted not merely on the internal evidence of the documents but also on the oral evidence of three main witnesses viz. the complainant, Jasawalla and Sequeria, each set of evidence having been considered as affirmative of the other and in the aggregate as proving the authorship of the disputed documents.

The fourth contention raised by the appellant's counsel relates to the validity of the conviction under s. 420/34 of the Indian Penal Code. Learned counsel argued that persons designated as accused Nos. 2, 3 and 4 in the complaint, were all in Bombay and the appellant in Karachi and that therefore no conjoint offence could be committed by them within the meaning of s. 34 of the Indian Penal Code. He relies upon the dictum in *Shreekanthiah Ramayya Munipalli v. The State of Bombay*¹ to the effect that it is essential that the accused should join in the "actual doing" of the act and not merely in planning its perpetration. We do not think that that case, or the dictum therein relied on, has any bearing on the facts of the present case. It is also necessary to observe that what in fact has been found in this case is the commission of the offence by the appellant himself. Though the trial Magistrate and one of the learned Judges of the High Court referred to the conviction as a conviction under s. 420/34 of the Indian Penal Code, the actual findings support a conviction of the appellant under s. 420 itself. Such a conviction would be valid though the charge is under s. 420 read with s. 34 of the Indian Penal Code, (See *Willie (William) Slaney v. The State of Madhya Pradesh*²), unless prejudice is shown to have occurred.

Thus there is no substance in contentions 3 and 4.

1 [1955] 1 S. O. R. 1177, 1188. a.c. 57 2 [1955] 2 S. O. R. 1140.
Bom. L.R., 632.

Contention No. 2 arises under the following circumstances. It appears that the appellant was previously undergoing trial in the Court of the Sessions Judge at Bombay for the offences of forgery and fraud and was on bail in connection with that trial. While thus on bail he fled away first to Pakistan and from there to England. The Indian authorities made an application to the Metropolitan Magistrate, Bow Street, under the Fugitive Offenders Act, for his being arrested and surrendered. That application was granted by the Magistrate. Thereupon the appellant moved the Queens Bench Division of the High Court in England for a writ of *habeas corpus* challenging the validity of his arrest and surrender to the Indian authorities. Judgment of Lord Goddard, C.J., dealing with this matter is reported as *Re. Government of India and Mubarak Ali Ahmed*¹. The application was dismissed and the order for surrender made under the Fugitive Offenders Act was upheld. It appears that when he was brought back to Bombay and was in jail custody with reference to the resumed sessions trial, the complainant got to know about it and filed his complaint on June 30, 1952. The Presidency Magistrate took it on his file and issued warrant against the accused and had him brought up before his Court in due course for trial (presumably after the sessions trial was completed). The objection raised before us is that the appellant having been surrendered by the order of the Metropolitan Magistrate only for the sessions trial which was pending against him in Bombay, he could not be tried for any other offence said to have been committed by him in India. Learned counsel relies on s. 3(2) of the English Extradition Act, 1870 (33 & 34 Vic. c. 32) which shows that it is contemplated thereby that a fugitive criminal who has been surrendered under the Extradition Act in respect of a particular offence should not be tried for any other offence until he has been restored or has been given an opportunity of returning. This section, however, has no bearing in the present case, since, as already stated, the appellant was surrendered under the Fugitive Offenders Act which contains no analogous provision. Section 8 of the Fugitive Offenders Act only provides for an optional repatriation of the surrendered person at his request if he is acquitted of the offence for which he is surrendered. Learned counsel argues that the principle underlying s. 3(2) of the English Extradition Act is a general one and that it should be applied by analogy also to a surrender under the Fugitive Offenders Act. We are unable to accede to that contention. It may also be mentioned that even if his arrest in India for the purpose of a trial in respect of a fresh offence is considered *not* to be justified, this by itself cannot vitiate the conviction following upon his trial. This is now well-settled by a series of cases. (See *Parbhu v. King-Emperor*²; *Lumbhardar Zutshi v. The King*³; and *H. N. Bishnud v. The State of Delhi*⁴.) This contention must accordingly be overruled.

We are left, therefore, with the first contention raised by the learned counsel for the appellant which is the only substantial question that has been raised before us requiring careful consideration.

The first contention is raised on the assumption that the appellant is a Pakistani national. At the outset, it may be stated that it is doubtful whether in fact the appellant at the time of the offence, could be considered a Pakistani national. The complainant asserted in his complaint, that he came to know the appellant to be an Indian citizen and described him as hailing from Hyderabad (Deccan) and as having absconded to Pakistan and from there to England. In a long written statement filed after the prosecution closed its case, the appellant himself gave details of his previous history from the year 1928. He stated that he became a Graduate with Honours from the Punjab University in 1928; that he joined the Indian Finance Service and served in various capacities and at various places, that he ultimately resigned from the Government service in 1943 and joined an industrial concern at Hyderabad (Deccan), that he did a lot of business there and that he entered into a large business contract with the Government of Hyderabad, which was revived by the Mili-

1 [1952] 1 All E. R. 1060, 1061.

2 [1944] 46 Bom. L. R. 838, p.c.

3 [1949] 52 Bom. L. R. 430, p.c.

4 [1955] 1 S. C. R. 1150, 1163.

tary Government after the Police Action. He winds up the narration of his previous history with the following significant statement.

"The contract was satisfactorily fulfilled prior to my migration to Pakistan in July, 1950."

This is a categorical statement of the appellant himself which shows that he continued to be in India till July, 1950. If so, it appears *prima facie* that by virtue of art. 5 of the Constitution read with art. 7 thereof, he was a citizen of India on the date of the Constitution and continued to be so at the date of the offence in July-August, 1951, unless he shows that under art. 9 of the Constitution, he voluntarily acquired the citizenship of a foreign State. *Prima facie* mere migration to Pakistan is not enough to show that he had lost Indian citizenship. This question has not been considered or dealt with in the Courts below, probably because it was not properly raised at the early stages. Being a fundamental objection to jurisdiction this should have been raised at the trial by the appellant (accused), at any rate, soon after the charge was framed. We might well have declined, therefore, to permit the question of jurisdiction in this specific form to be argued before us. But the learned Judges of the High Court have entertained it and dealt with it on the stated assumption that the appellant is a Pakistani national. To over-rule the objection at this stage without finally deciding whether the appellant continues to be an Indian citizen (after remanding for additional finding, if need be), would not be fair or satisfactory. In the circumstances we have felt it desirable to allow arguments to proceed on the same assumption which the High Court has made. We, therefore, proceed to deal with it.

The learned Judges of the High Court decided against the objection of the appellant as to the jurisdiction of the Court to try him for the alleged offence relying on s. 179 of the Code of Criminal Procedure which provides as follows:

"When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

In view of the above provision, the learned Judges say as follows:

"Even upon the footing that the representations were made, or the deception was practised by the appellant, while he was in Pakistan, the consequence of the deception, namely, the delivery of the property, took place in Bombay."

They held that the appellant could, therefore, be tried in Bombay in respect of the delivery of the money in Bombay. The argument of the learned counsel for the appellant is that s. 179 of the Code of Criminal Procedure proceeds on the assumption that the person to be tried is substantively liable for an offence under the Indian Penal Code and that s. 179 prescribes the place of trial but does not create the liability. He urges that since the appellant is a Pakistani national who was not physically present at Bombay at any stage of the commission of the offence, the Indian Penal Code has no application to him. He is therefore not liable for an offence under the Penal Code and hence is not triable under s. 179 of the Code of Criminal Procedure. It appears from s. 5(1) of the Code of Criminal Procedure that the provisions of the said Code relating to the place of trial assume the existence of substantive liability under the Indian Penal Code or under any other law. Section 5(1) says that:

"All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained."

Now the point raised by the learned counsel is that to hold a person in the position of appellant substantively liable for the offence charged against him in the circumstances of this case, would be to give extra-territorial operation to the provisions of the Indian Penal Code. He contends that such extra-territorial operation can only be by reason of specific legislation in this behalf and does not arise from any general provisions of the Indian Penal Code.

To deal with this contention, it is necessary to appreciate clearly the basic

facts found in this case. The offence of cheating under s. 420 of the Indian Penal Code as defined in s. 415 of the Code has two essential ingredients, viz., (1) deceit i.e., dishonest or fraudulent misrepresentation to a person, and (2) the inducing of that person thereby to deliver property. In the present case the volume of evidence set out above and the facts found to be true show that the appellant though at Karachi was making representations to the complainant through letters, telegrams and telephone talks, sometimes directly to the complainant and sometimes through Jasawalla, that he had ready stock of rice, that he had reserved shipping space and that on receipt of money he would be in a position to ship the rice forthwith. These representations were made to the complainant at Bombay, notwithstanding that the appellant was making the representations from Karachi. The position is quite clear where the representations were made through the trunk phone. The statement of the appellant at the Karachi-end of the telephone becomes a representation to the complainant only when it reaches cognition of the complainant at the Bombay-end. This indeed has not been disputed. It makes no difference in principle if the representations have in some stages been conveyed by telegrams or by letters to the complainant directly or to some one of the appellant's agents, including Jasawalla in that category. There is also no question that it is as a result of these representations that the appellant parted with his money to the tune of about Rs. 5½ lakhs on three different dates. It has been found that the representations were made without being supported by the requisite facts and that this was so to the knowledge of the appellant and that the representations were so made with an initial dishonest intention. On these facts it is clear that all the ingredients necessary for finding the offence of cheating under s. 420 read with s. 415 have occurred at Bombay. In that sense the entire offence was committed at Bombay and not merely the consequence viz., delivery of money which was one of the ingredients of the offence. Learned counsel for the appellant has not seriously contested this position. But he urges that even so the appellant, who was not corporeally present in India at the relevant time, does not fall within the purview of the Indian Penal Code. Now there can be no doubt that *prima facie* the Indian Penal Code is intended to deal with all unlawful acts and omissions defined to be offences and committed within India and to provide for the punishment thereof of the person or persons found guilty therefor. This is implicit in the preamble and s. 2 of the Indian Penal Code. What is, therefore, to be seen is whether there is any reason to think that a foreigner not corporeally present at the time of the commission of the offence does not fall within the range of persons punishable therefor under the Code. It appears to us that the answer must be in the negative unless there is any recognised legal principle on which such exclusion can be founded or the language of the Code compels such a construction. It is strenuously urged that to consider a foreigner guilty under the Penal Code for an offence committed in India though attributable to him and to punish him therefor in a case where he is not corporeally present in India for the commission of the offence, would be to give extra-territorial operation to the Indian Penal Code and that an interpretation which brings such extra-territorial operation must be avoided. The case of the Privy Council in *Macleod v. Attorney-General for New South Wales*¹ is relied upon. But this argument is based on a misconception. The fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are juridically attributable to him notwithstanding that he is corporeally present outside India at the time, is not to give any extra-territorial operation to the law; for it is in respect of an offence whose locality is in India, that the liability is fastened on the person and the punishment is awarded by the law, if his presence in India for the trial can be secured. That this is part of the ordinary jurisdiction of a municipal Court is well recognised in the common law of England as appears from Halsbury's Laws of England (Third edn.), Vol. X, p. 318. Paragraph 580 therein shows that the exercise of criminal jurisdiction at common law is limited

to crimes committed within the territorial limits of England and para. 581 states the jurisdiction in respect of acts outside English territory as follows:

"For the purposes of criminal jurisdiction, an act may be regarded as done within English territory, although the person who did the act may be outside the territory; for instance, a person who, being abroad procures an innocent agent or uses the post office to commit a crime in England is deemed to commit an act in England. If a person, being outside England, initiates an offence, part of the essential elements of which take effect in England, he is amenable to English jurisdiction. It appears that even though the person who has initiated such an offence is a foreigner, he can be tried if he subsequently comes to England."

Thus the exercise of criminal jurisdiction in such cases under the common law is exercise of municipal jurisdiction and much more so in a case like the present, where all the ingredients of the offence occur within the municipal territory.

It would be desirable at this stage to notice certain well-recognised concepts of International Law bearing on such a situation. Wheaton in his book on *Elements of International Law* (Fourth Edn.) at p. 183, dealing with criminal jurisdiction states as follows:—

"By the Common Law of England, which has been adopted, in this respect, in the United States, criminal offences are considered as altogether local, and are justiciable only by the courts of that country where the offence is committed."

At p. 182 thereof it is stated as follows:—

"The judicial power of every independent State, extends (with the qualifications mentioned earlier) to the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory."

In Hackworth's *Digest of International Law* (1941 edn.), Vol. II, at p. 188 there is reference to opinions of certain eminent American Judges. It is enough to quote the following dictum of Holmes J. noticed therein:

"Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."

In Hyde's *International Law* (Second Edn.), Vol. I, at p. 798, the following quotation from the judgment of the Permanent Court of International Justice dated September 7, 1927, in the case relating to *S. S. Lotus*¹ is very instructive:—

"It is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there."

This quotation is also noticed in *Openheim's International Law* (Eighth edn.), Vol. I, at page 332 in the foot-note. In noticing the provisions of International Law in this context we are conscious that what we have to deal with in the present case is a question merely of municipal law and not of any International Law. But as is seen above, the principles recognised in International Law in this behalf are virtually based on the recognition of those principles in the municipal law of various countries and is really part of the general jurisprudence relating to criminal responsibility under municipal law. No doubt some of the above dicta have reference to offences actually committed outside the State by foreigners and treated as offences committed within the State by specific legislation. But the principle emerging therefrom is clear that once it is treated as committed within the State, the fact that he is a foreigner corporeally present outside at the time of such commission is no objection to the exercise of municipal jurisdiction under the municipal law. This emphasises the principle that exercise of criminal jurisdiction depends on the locality of

1 Publications, Permanent Court of International Justice, Series A. No. 10, 23.

the offence and not on the nationality of the alleged offender (except in a few specified cases such as ambassadors, Princes, etc.).

Learned counsel for the appellant has relied on various passages in the judgment of Cockburn C.J. in the well-known case *The Queen v. Keyn (Franconia's case)*¹. Fourteen learned Judges participated in that case and the case appears to have been argued twice. Eight of them including Cockburn C.J. formed the majority. Undoubtedly there are various passages in the judgment of Cockburn C.J. which *prima facie* seem capable of being urged in favour of the appellant's contention. In particular the following passage at p. 235 may be noticed:

"The question is not whether the death of the deceased, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant, at the time the act was done, was himself within British jurisdiction."

The learned Chief Justice, however, recognised at p. 237 that there were certain American decisions to the contrary. Now the main debate in that case was whether the sea upto three mile limit from the shore is part of British territory or whether in respect of such three mile limit only limited and defined extra-territorial British jurisdiction extended which did not include the particular criminal jurisdiction under consideration. In respect of this question, as a result of the judgment, the Parliament had to enact the Territorial Waters Jurisdiction Act, 1878 (41 and 42 Vict. c. 73) which in substance overruled the view of the majority and of the learned Chief Justice on this point. The main principle of criminal jurisdiction, however, relevant for our purpose was enunciated in the minority judgment of Amphlett, J. A., at p. 118, that "it is the locality of the offence that determines the jurisdiction" implying by contrast that it is not the nationality of the offender.

The question, however, that still remains for consideration is whether there is anything in the language of the sections of the Indian Penal Code relating to the general scheme of the Code which compels the construction that the various sections of the Indian Penal Code are not intended to apply to a foreigner who has committed an offence in India while not being corporeally present therein at the time. For this purpose we are not concerned with such of the sections of the Penal Code, if any, which indicate the actual presence of the culprit as a necessary ingredient of the offence. Of course, for such offences a foreigner *ex hypothesi* not present at the time in India cannot be guilty. The only general sections of the Indian Penal Code which indicate its scheme in this behalf are ss. 2, 3, and 4 and as they stand at present, they are as follows:—

"2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

3. Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

4. The provisions of this Code apply also to any offence committed by—

(1) any citizen of India in any place without and beyond India;

(2) any person on any ship or aircraft registered in India wherever it may be.

Explanation.—In this section the word 'offence' includes every act committed outside India which, if committed in India, would be punishable under this Code."

Sections 3 and 4 deal with offences committed beyond the territorial limits of India and s. 2 obviously and by contrast refers to offences committed within India. It appears clear that it is s. 2 that has to be looked to to determine the liability and punishment of persons who have committed offences within India. The section asserts categorically that every person shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code and of which he shall be guilty within India. This recog-

nises the general principle of criminal jurisdiction over persons with reference to the locality of the offence committed by them, being within India. The use of the phrase "every person" in s. 2 as contrasted with the use of the phrase "any person" in s. 3 as well as s. 4(2) of the Code is indicative of the idea that to the extent that the guilt for an offence committed within India can be attributed to a person, every such person without exception is liable for punishment under the Code. Learned counsel for the appellant suggests that the phrase "within India" towards the end of s. 2 must be read with the phrase "every person" at the commencement thereof. But this is far-fetched and untenable. The plain meaning of the phrase "every person" is that it comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed. This section must be understood as comprehending every person without exception barring such as may be specially exempt from criminal proceedings or punishment thereunder by virtue of the Constitution (see art. 361(2) of the Constitution) or any statutory provisions or some well-recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

Learned counsel drew our attention to a number of sections in the Indian Penal Code, viz., ss. 108A, 177, 203, 212, 216, 216A and 236. The argument based on reference to these sections is that wherever the Legislature in framing the Penal Code wanted to legislate about anything that has reference to something done outside India it has specifically said so and that therefore it may be expected that if it was intended that the Penal Code would refer to a person actually present outside India at the time of the commission of the offence, it would have specifically said so. We are unable to accept this argument. These sections have reference to particular difficulties which arose with reference to what may be called, a related offence being committed in India in the context of the principal offence itself having been committed outside India—that is, for instance, abetment, giving false information and harbouring within India in respect of offences outside India. Questions arose in such cases as to whether any criminal liability would arise with reference to the related offence, the principal offence itself not being punishable in India and these sections were intended to rectify the lacunae. On the other hand, a reference to s. 3 of the Code clearly indicates that it is implicit therein that a foreigner who commits an offence within India is guilty and can be punished as such without any limitations as to his corporeal presence in India at the time. For if it were not so, the legal fiction implicit in the phrase "as if such act had been committed within India" in s. 3 would not have been limited to the supposition that such act had been committed within India, but would have extended also to a fiction as to his physical presence at the time in India.

In the argument before us, there has been some debate as to what exactly is the implication of the clause "of which he shall be guilty within India" in s. 2 of the Code. It is unnecessary to come to any definite conclusion in respect thereto. But it is clear that it does not support the contention of the appellant's counsel. We have, therefore, no doubt that on a plain reading of s. 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside.

It has next been urged before us that the exercise of jurisdiction over a foreigner by municipal Courts depends on the theory of temporary allegiance to the State by reason of his entry into the State, which carries with it the protection of its laws and therefore his submission thereto. Dicta from some of the decided cases have been cited before us. It is unnecessary to deal with any of those cases. On an examination of those cases it will be found that allegiance, temporary or otherwise, has not been laid down anywhere as a limiting principle in respect of criminal jurisdiction, which is primarily concerned with questions of security of the State and of the citizens of the State.

A number of early cases of the High Courts in India have been brought to our notice as bearing on the question now under consideration. (See *Reg. v.*

*Elmstone, Whitwell*¹; *Reg. v. Pirtai*²; *Mussummat Kishen Kour v. The Crown*³; and *Gokaldas v. Emperor*⁴). As against them may be noticed the case in *Emperor v. Chhotalal Babar*⁵. It is unnecessary to consider them at any length. Undoubtedly some of them seem to support the view pressed before us on behalf of the appellant that criminal jurisdiction cannot extend to foreigners outside the State. These, however, are decisions rendered at a time when the competence of the Indian Legislature was considered somewhat limited, under the influence of the decisions like those in *Macleod's* case in spite of the decision in *Queen v. Burah*⁶. However that may be, these concepts are no longer tenable after India became a Dominion by the Indian Independence Act of 1947 and after it became an independent free sovereign republic under the present Constitution. It is enough to refer to the case of *Croft v. Dunphy*⁷ and to the decision of Spens C. J. in *Governor-General v. Raleigh Investment*⁸. In the latter case Spens C. J. indicates that there has been considerable change in the concept of the doctrine of extra-territorial legislation, subsequent to *Macleod's* case and the criticism of *Macleod's* case in certain Canadian decisions and of the Privy Council itself has been adverted to.

Learned counsel invited our attention to a passage from the report of the Indian Law Commissioners quoted at p. 274 of Ratanlal's Law of Crimes (Eighteenth Edn.). It is enough to say that though this quotation may be valuable as a matter of history, it cannot be a legitimate guide for the construction of the section. That construction must be based on the meaning of the words used, to be gathered according to the ordinary rules of interpretation and in consonance with the generally accepted principles of exercise of criminal jurisdiction. It is not necessary, and indeed not permissible, to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. The notions relating to this matter have very considerably changed between then and now during nearly a century that has elapsed. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible, unless there is anything in the Code or in any particular section to indicate the contrary.

After giving our careful consideration to the questions raised before us, we are clearly of the opinion that even on the assumption that the appellant has ceased to be an Indian citizen and was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under the Indian Penal Code notwithstanding his not being corporeally present in India at the time.

We have been asked to consider the question of sentence. As has been stated at the outset the substantive sentences of imprisonment are two years under the first count and twenty-two months under the second. The sentences were concurrent on the second and third counts. As a result, the total imprisonment which has been awarded against the appellant would be a period of three years and ten months. We are not prepared to say that the discretion of the trial Court in awarding that sentence has been wrongly exercised.

The appeal is accordingly dismissed.

Appeal dismissed.

1 (1870) VII Bom. H.C.R. 89 (Cr. Ca.).
2 (1873) X Bom. H.C.R. 356.
3 (1878) XIII P. R. 49 (Criminal Judgments).
4 (1933) 35 Cr. L. J. 585.

5 (1912) I.L.R. 36 Bom. 524, s.c. 14 Bom. L. R. 387.
6 (1878) 3 A. C. 889.
7 [1933] A. C. 156.
8 [1944] A. L. R. F.C. 51, 60, 61.

APPEAL FROM ORIGINAL CIVIL.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.

THE STATE OF BOMBAY v. M. C. MENON.*

Bombay Land Requisition Act (Bom. XXXIII of 1948), Sec. 6—Constitution of India, Arts. 226, 227—Whether Court can go behind declaration of vacancy made under s. (4)(a) on question of fact or law—Such a declaration when can be challenged—Assignment by tenant of premises whether creates vacancy within Act although assignee in occupation of premises.

A declaration of vacancy made under s. 6(4)(a) of the Bombay Land Requisition Act, 1948, cannot be challenged either on the facts on which the declaration is based or on the ground that in law such a declaration cannot be made.

A declaration that there is a vacancy can be challenged under art. 226 or under art. 227 of the Constitution of India only on the ground that the declaration was mala fide or that there was some extraneous factor which led the Government or the officer concerned to make that declaration.

Mohsin Ali Mahomed Ali v. State of Bombay and *Lila Vati Bai v. The State of Bombay*,² referred to.

On an assignment by a tenant of the premises in his occupation to a third party there is a vacancy within the meaning of the Explanation to s. 6 of the Bombay Land Requisition Act, 1948, although the assignee may be in occupation of the premises. Under the Act the State has the right to requisition the premises, if they are vacant as understood by the Act, even though the premises be in possession of a statutory tenant and even though his possession may be protected against the landlord.

ONE A. D. Nayar, who was a monthly tenant of a flat in a building situated at Matunga in Bombay since 1942, in January 1949 started a commercial institution in a portion of his premises. On September 22, 1955, A. D. Nayar assigned this business of the commercial institution to one M. C. Menon (petitioner) and the deed of assignment mentioned Rs. 601 as consideration paid by the petitioner for the furniture and goodwill of the business. Under this deed A. D. Nayar purported to assign and transfer to the petitioner the benefits of the tenancy of the premises which was conveyed without consideration as incidental to the sale of the goodwill and furniture. On April 22, 1957, the Accommodation Officer, Bombay, passed the following order:—

"Whereas, on inquiry it is found that the premises specified below had become vacant in the month of September 1955.

Now, therefore, in exercise of the powers conferred by clause (a) of sub-section (4) of section 6 of the Bombay Land Requisition Act, 1948 (Bom. XXXIII of 1948), the Government of Bombay is pleased to declare that the said premises had become vacant after 4th December 1947 and to requisition the said premises for a public purpose, namely, for housing a Bombay State Government servant."

The petitioner applied to the High Court under art. 226 of the Constitution of India for an appropriate writ to quash the order of requisition. The petition was heard by Coyajee, Acting C.J. who allowed it, delivering the following judgment on September 27, 1957:—

COYAJEE Acting C.J. This petition raises a short point of law: The petitioner challenges an order of requisition, and that order of requisition is dated April 22, 1957. By that order flat No. 8, first floor, Annapurna Mandir, has been acquired on the ground that that flat had become vacant in the month of September 1955. It is important to note that the ground is that it had become vacant in the month of September 1955.

The facts in connection with this petition are that this flat was acquired as

*Decided, February 25, 1958. O. C. J. Appeal No. 60 of 1957: Miscellaneous No. 165 of 1957. 1 (1950) 53 Bom. L. R. 94. 2 (1957) 59 Bom. L. R. 934, S.C.

a tenant by a party named A. D. Nayar and A. D. Nayar was here from 1942. From 1949 onwards Nayar started a regular commercial institute under the name and style of Vishnu Commercial Institute. Evidently he had started a commercial class in a residential flat with the result that he applied for licence to the Bombay Municipality which licence was granted to him. It appears that the petitioner acquired this Vishnu Commercial Institute as a going concern under an assignment with all right, title and interest thereto, assets thereof including the goodwill and the tenancy rights. This assignment took place on the September 22, 1955, and this assignment is annexed to the petition. It appears that the landlord declined to transfer the tenancy and a suit was filed by the landlord for ejection of the petitioner. In the meanwhile intimation of suppressed vacancy was conveyed to the Controller of Accommodation and a show cause notice dated April 25, 1956, was issued against the petitioner. A copy of the notice is exh. D to the petition. After hearing the petitioner the Accommodation Officer passed the order requisitioning the premises and against that order this petition is presented.

Now it is not challenged that there is a proper legal assignment which has been regularly made and registered and the question and the pure question of law is whether, if the petitioner was in fact in law or was deemed in law to be the tenant under this assignment of 1955, there could be a declaration at all of vacancy in September 1955 as alleged as the basis of the ground on which this order is made. Because, the very foundation of jurisdiction of the Accommodation Officer is that there is a vacancy. But, if at the date of the order the petitioner though not living there was in fact a tenant, then the very foundation or the condition precedent to the exercise of this jurisdiction by the Accommodation Officer disappears.

Mr. Kantawalla referred me to s. 25 of the Rent Act which says that a landlord shall not use or permit to be used for a non-residential purpose any premises which on the date of the coming into operation of this Act were used for residential purposes and sub-s. (2) is a penal clause for punishment for non-compliance with such a section. Mr. Kantawalla also drew my attention to s. 6, 'Explanation thereto' of the Requisition Act and relied upon a Notification dated April 5, 1954, which says that notwithstanding anything contained in these rules any premises in the city of Bombay used for a non-residential purpose on February 18, 1954, shall with effect from the April 5, 1954, be exempt from the provisions of s. 6. It is contended on behalf of the respondent that in the circumstances, facts and dates of this case the petitioner can claim no exemption under this Notification and that assignments are covered in terms by Explanation to s. 6 of the Act.

Mr. Rajgopal in his argument put it very shortly and very neatly in the following manner. He says that first of all the question is whether this is an assignable business. That proposition is not challenged. Secondly, if it is an assignable business, is it properly assigned? That assignment has not been challenged in the affidavit in reply. If the deed of assignment cannot be impeached, according to Mr. Rajgopal, then one must look at s. 15 of the Rent Act, which says notwithstanding anything contained in any law it shall not be lawful, after coming into operation of this Act, for any tenant to sublet the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. The learned counsel pointed out that by a Notification under the proviso a transfer or assignment incidental to the sale of a business as a going concern together with the stock-in-trade and goodwill thereof is exempted provided the transfer or assignment is of the entire interest of the transferor or the assignor in such premises together with the business, stock-in-trade and goodwill thereof, with the result that under this Notification dated September 21, 1948, the prohibition in s. 15 does not apply. In these circumstances, the question remains that the petitioner clearly under the Rent Act and the common law is entitled to these premises and Mr. Rajgopal rightly points out that the Notification dated April 5, 1954, does not and cannot come in his way even if it were read in the manner the respondent

wants that Notification to be read, because the petitioner is under the definition of tenant deemed in law to be a tenant at the date when the order was made. A tenant is defined under the Rent Act under s. 5(11) as any person by whom or on whose account rent is payable for any premises and includes any person to whom interest in premises has been transferred under proviso to s. 15. Therefore, if interest under the proviso to s. 15 has been adequately conveyed to the petitioner, the petitioner became a tenant in law, and if he became a tenant and he is deemed to be a tenant, he certainly was in possession of these premises during the period preceding the order, and there could be no question of any vacancy.

The Notification relied upon by counsel on behalf of the petitioner, as shown by him, was published some months after the Requisition Act was passed and with an eye to s. 6 of the Requisition Act and the proviso to s. 15 of the Rent Act. In these circumstances, it is clear that the petitioner need not fall back upon any express exemption under any Notification under the Requisition Act, because his rights remain unaffected as they devolved on him under the proviso to s. 15 of the Rent Act.

It is clear, therefore, on the record that in fact there could be in fact no vacancy as declared on this order and therefore there was no jurisdiction in the Accommodation Officer to pass this order. This petition will, therefore, be allowed. The order of requisition will be quashed and the petitioner will get the costs of the petition.

THE State of Bombay appealed.

H. M. Seervai, Advocate General, with *B. M. Kantawalla*, for the appellant.
V. Rajagopal, with *M. H. Thakkar*, for the respondent.

CHAGLA C.J. This is an appeal from a judgment of Mr. Justice Coyajee by which he held that the Accommodation Officer had no jurisdiction to pass the requisition order which was impugned by the petitioner. It is sufficient to state a very few facts in order to decide the two contentions that arise in this appeal.

One Nair was a monthly tenant of the premises, which is a flat on the first floor of a building at Hormusji Adenwalla Road, Matunga, and it appears that in January 1949 this Nair started a commercial institution in one of the rooms of this flat. On September 22, 1955, Nair assigned this business to the petitioner, and the deed of assignment mentions Rs. 601 as consideration paid by Menon, Rs. 400 being the price of furniture and Rs. 201 being the price for the goodwill of the business. The order of requisition was passed on April 22, 1957, and it recites that on an enquiry, it was found that the premises had become vacant in the month of September 1955 and the order of requisition is passed in exercise of the powers conferred by cl. (a) of sub-s. (4) of s. 6 of the Bombay Land Requisition Act, and there is a declaration that the premises had become vacant—after December 4, 1947. Mr. Justice Coyajee took the view that in view of the assignment in favour of the petitioner, there was in law no vacancy and, therefore, the State Government had no jurisdiction to pass this order. The learned Judge also took the view that on a true construction of the provisions of the Requisition Act, the legal effect of the assignment was that there was no vacancy, and these two conclusions arrived at by the learned Judge have been challenged before us by the Advocate General. Section 6(4)(a) makes the declaration of vacancy conclusive evidence that the premises were or had so become vacant. The question that arises *in limine* is whether it is competent to this Court to go behind that declaration. If it is not so competent, no further question can arise.

Now, Mr. Rajagopal has argued on behalf of the respondent that, although it may not be open to the Court to go behind the declaration in order to ascertain the facts found by the officer who held the enquiry, it is open to the Court to consider whether, in law, there is a vacancy, and if, in law, there is no vacancy, the Court can and, indeed, should hold that the order has been

made without jurisdiction. The matter is put this way: The jurisdiction to make an order under s. 6 depends upon a vacancy. If, in law, there is no vacancy, then there is no jurisdiction to make an order. Now, this very point was considered by this Court in *Mohsinali Mahomedali v. The State of Bombay*¹. In that case Mr. Justice Tendolkar had taken the view that the declaration under s. 6 was conclusive as to facts but not as to its legal consequences. The decision of Mr. Justice Tendolkar come up before me and Mr. Justice Gajendragadkar, and we found unable to accept the interpretation put by the learned Judge upon the expression "conclusive evidence" and what we held, was as found at p. 97:

"...Therefore, in our opinion, on a declaration being made by Government that there is a vacancy, that declaration is conclusive both as to the facts and also as to the legal requirements which the law makes necessary."

Therefore, not only it is not competent to the petitioner to challenge the facts on which the declaration is based, but it is also not open to the petitioner to challenge the order on the ground that it does not comply with the requirements of vacancy laid down in the Requisition Act. We also pointed out that both the requirements as to law and the facts were questions which the Legislature had left for decision to the Government and the Court could not go behind the conclusion arrived at by the Government. This decision was given fairly a long time ago, but its correctness has been affirmed by the Supreme Court in a recent decision in *Lila Vati Bai v. The State of Bombay*², and at p. 940 the Supreme Court has cited this judgment, presumably with approval, and has itself laid down the law in the following language:

"...But the special powers aforesaid of this Court or of the High Court cannot extend to reopening a finding by the State Government under s. 5 of the Act that the tenant has not actually resided in the premises for a continuous period of six months immediately preceding the date of the order or under s. 6 that the premises had become vacant at about the time indicated in the order impugned."

Now, Mr. Rajagopal himself relies on the judgment of the Supreme Court, and his contention is that where the Supreme Court speaks of reopening, it only refers to facts and not to law. What is further pointed out by Mr. Rajagopal is that earlier in this passage, the Supreme Court has stated (p. 940):

"But that does not mean that the jurisdiction of the High Court under art. 226 or of this Court under art. 32 or on appeal has been impaired. In a proper case the High Court or this Court in the exercise of its special jurisdiction under the Constitution has the power to determine how far the provisions of the statute have or have not been complied with."

and according to Mr. Rajagopal, if the law laid down what a vacancy is and if the Government declared a vacancy contrary to the provisions of the law, it was not carrying out the statutory requirements and this Court can interfere under art. 226. This, in our opinion, is a total misreading of the judgment of the Supreme Court. It has now become elementary to say that however conclusive the Legislature may make a particular decision or a particular finding, it is always subject to the over-riding powers of the High Court under art. 226 or under art. 227 of the Constitution and, therefore, Mr. Rajagopal is right to this extent that even a declaration that there is a vacancy can be challenged under art. 226 or under art. 227. But the challenge cannot be directed to reopening that declaration or going behind that declaration. The challenge can only be that the declaration was made *mala fide* or that there was some extraneous factor which led the Government or the officer concerned to make that declaration. The Supreme Court, with respect, was not saying that under art. 226 it is open to the High Court to go behind the declaration on a question of fact or on a question of law. If, again with respect, the Supreme Court has said so, it would be reversing our decision in *Mohsinali Mahomedali v. The State of Bombay*. Far from the Supreme Court doing so, as we have pointed out, it has referred to this judgment presumably with approval. Therefore, this is

not a case where the petitioner is making a proper challenge against the declaration under art. 226. What the petitioner is doing is asking the Court to sit in judgment on the declaration made by the Government and to decide that in law such a declaration could not be made. That, this Court cannot do, and, therefore, with respect, we do not agree with the learned Judge when he holds that the officer had no jurisdiction to declare a vacancy by reason of the assignment. The learned Judge should have assumed by reason of the conclusiveness of the declaration that all the legal requirements of a vacancy had been complied with.

Now, we turn to the second contention, although it does not strictly arise but as the matter has been considered by the learned Judge and as the matter is of some importance and as the Advocate General states that the State wants guidance on this question, we have been persuaded to go into that matter also: Assuming it was open to the Court to consider the legal requirement of a vacancy, would the facts here established constitute a vacancy in law? Now, for this purpose we will assume that the assignment of September 22, 1955, is a valid and legal assignment. If it is legal and valid, does the fact that the petitioner is an assignee under a valid assignment bring about a situation in law by which there is no vacancy which would attract the powers of Government to make a requisition order? It is difficult to understand how, with very great respect to the learned Judge, it is possible to take the view on a plain reading of the relevant provisions of the section that an assignment does not create a vacancy. The Explanation to s. 6 provides:

"For the purposes of this section,—

Premises which are in the occupation of the landlord, the tenant or the sub-tenant, as the case may be, shall be deemed to be or become vacant when such landlord ceases to be in occupation or when such tenant or sub-tenant ceases to be in occupation upon termination of his tenancy, eviction, assignment, or transfer in any other manner of his interest in the premises or otherwise, notwithstanding any instrument or occupation by any other person prior to the date when such landlord, tenant or sub-tenant so ceases to be in occupation."

Therefore, according to the plain and clear meaning of this Explanation, when the tenant Mr. Nair executed the deed of assignment on September 22, 1955, and assigned the premises to the petitioner, there was a vacancy within the meaning of this Explanation. Whether in fact there was a vacancy or not is irrelevant, because the Explanation introduces a legal fiction and for the purposes of the Requisition Act, on an assignment by a tenant there is a vacancy although the assignee may be in occupation of the premises.

Now, this clear position in law, so it seems to us, is met by Mr. Rajagopal by pointing out that under the Rent Act, a tenant is defined in s. 5(11) as also any person whose interest in premises has been transferred under the proviso to s. 15, and s. 15 permits an assignment being made under certain circumstances, and for the purposes of this argument, we will assume that the assignment that is made is an assignment which is permitted under s. 15, and we will also assume that for the purposes of the Rent Act, the petitioner has become a tenant. Now, says Mr. Rajagopal that if the petitioner is a tenant under the Rent Act, his possession is protected and he cannot be evicted by the requisition order. He draws attention to the fact that although a landlord is defined in the Requisition Act, a tenant is not defined; and, therefore, we must turn to the Rent Act for the definition of a tenant. But that is entirely an unacceptable canon of construction. When an Act defines a landlord and does not define a tenant, it clearly means that we must look upon "tenant" as a co-relative term and define a tenant corresponding to the definition of the landlord. In the Land Requisition Act, the landlord is defined as any person who is, for the time being, receiving, or entitled to receive, rent in respect of any premises, and therefore, the tenant must be defined as a person who, for the time being, pays or is liable to pay rent. If that be the true definition, then that definition can only apply to Nair who, as a tenant, assigned the premises to the petitioner. But apart from the definition, Mr. Raja-

gopal has raised a larger question that if a tenant is protected by the Rent Act, his premises cannot be requisitioned under the Land Requisition Act. In our opinion, that is an entirely untenable proposition. The Rent Act and the Land Requisition Act are not laws *in pari materia*. The object of putting the Rent Act on the statute book was to protect the possession of the tenant, but the protection was to be against the landlord. The Legislature, notwithstanding the termination of the contractual tenancy, wanted to protect the tenant from being evicted by the landlord, which power he had under the ordinary law. But even though the person may be looked upon as a tenant under the Rent Act and even though his possession may be protected under the Rent Act, it does not, therefore, follow that his possession is protected against the State. Under the Land Requisition Act, we are not dealing with rights of the landlords, but we are dealing with the rights of the State, and the State has the right to requisition premises, if they are vacant as understood by that Act, even though the premises may be in possession of a statutory tenant and even though his possession may be protected against the landlord. The fallacy underlying this argument is to equate the protection under the Rent Act with the right to requisition under the Land Requisition Act. We will assume, for the sake of this argument that the petitioner was a tenant as defined by the Rent Act, that the assignment was valid and that being in occupation the petitioner was deemed to be a tenant under the provisions of the Rent Act and the landlord could not evict him except on the grounds mentioned in the Rent Act. But when we turn to the Requisition Act, there is nothing in the Act which prevents the State from requisitioning premises of a statutory tenant. If the statutory tenant does not occupy the premises and the premises become vacant, those premises become liable to be requisitioned. If the tenant does not occupy the premises, the landlord cannot eject him, because he is protected, but the State can step in and say that in view of the housing problem in the State if you do not occupy the premises, well, we will make better use of those premises. That is the whole basis of the Land Requisition Act. That is the policy underlying that Act. Therefore, in our opinion, even assuming every fact in favour of Mr. Rajagopal and assuming that we can go behind the declaration, it is clear, on the facts of this case, that the legal requirements of a vacancy are satisfied and in law the State Government was entitled to requisition these premises.

The result is that the appeal is allowed and the petition must be dismissed with costs.

Liberty to the appellant to withdraw the sum of Rs. 500 deposited in Court.

Appeal allowed.

Solicitors for the appellant: *Little & Co.*

Solicitors for the respondent: *Manohar & Co.*

ORIGINAL CIVIL.

Before Mr. Justice K. T. Desai.

BHARAT MANILAL DALAL v. THE STATE OF BOMBAY.*

Bombay Land Requisition Act (Bom. XXXIII of 1948), Sec. 5—Declaration made under

- s. 5(2) whether conclusive evidence as regards person entitled to reside in premises to be requisitioned—Whether declaration precludes real tenant or landlord from showing that he is the real tenant or landlord and not person mentioned therein.

The declaration made under s. 5(2) of the Bombay Land Requisition Act, 1948, is not conclusive evidence as regards the person entitled to reside in the premises which are sought to be requisitioned.

Under s. 5 of the Bombay Land Requisition Act, 1948, the declaration is made conclusive as regards the actual non-residence of the person referred to in the order for a continuous period of six months immediately preceding the date of the order. The declaration does not preclude the real owner, landlord or tenant from showing that he is the real owner, landlord or tenant and not the person mentioned in the declaration.

Dwarkanadas Gordhandas v. The State of Bombay,¹ agreed with.

Jamnadas Ramchand v. The State of Bombay,² *State of B'bay v. M. C. Menon*,³ *Mohstnali Mahomedali v. State of Bombay*⁴ and *Dashrath Lazman Jaya v. D. B. Pathak, Accommodation Officer, Govt. of Bombay*,⁵ referred to.

THE facts appear in the judgment.

S. T. Tijoriwala, with *Miss N. P. Uplekar*, for the petitioner.

B. L. Dalal, with *K. K. Desai*, for the respondent.

K. T. DESAI J. The petitioner claims to be a tenant of a room in a building known as New Blocks situate at 175, Walkeshwar Road, Bombay. Prior to the year 1942 one Chandravadan C. Mehta was the tenant of the said premises. The petitioner alleges that he used to reside with the said Chandravadan C. Mehta in the said premises from the year 1941, that the said Mehta left the premises permanently in or about the middle of 1942, that the petitioner thereafter remained in possession of the said premises and was regularly paying rent in respect of the said premises to the landlord, that rent receipts in respect of the said premises were issued in the name of the said Mehta upto the end of the year 1955, that thereafter they were issued in the name of the petitioner and that he was the tenant lawfully entitled to occupy the said premises. In or about the end of March 1956 the petitioner came across a notice issued by the Inspector of Requisitioning calling upon the occupants of the said premises to present themselves before the Inspector with rent receipts, ration cards, electric bills, postal evidence etc. and to furnish such information as may be in their possession relating to the said premises. It is the case of the petitioner that he thereupon saw the Accommodation Officer and satisfied the Officer that he was the tenant of the said room. On March 29, 1957, a notice was issued by the Accommodation Officer to the said Chandravadan C. Mehta as the tenant and to the petitioner and one Mahendra Manubhai Javeri as occupants. In that notice it was stated that the Government had made inquiries and were considering the question of requisitioning the said premises. The said Mehta, the petitioner and the said Javeri were required to see the Accommodation Officer on the date and at the time therein specified with their legal adviser, if any, with a written statement to show cause, if any, why the said premises should not be requisitioned. They were further required on that day

*Decided April 14, 1958. O. C. J. Miscellaneous Petition No. 434 of 1957.

¹ (1953) Miscellaneous Petition No. 230 of 1953, decided by S. T. Desai J., on October 14, 1953 (Unrep.).

² (1953) O. C. J. Appeal No. 71 of 1953, decided by Chagla C. J. and J. C. Shah J.,

L.R.—6.

on December 3, 1953 (Unrep.).

³ (1958) 61 Bom. L. R. 75.

⁴ (1950) 53 Bom. L. R. 94.

⁵ (1957) O. C. J. Appeal No. 42 of 1957, decided by Tendolkar and S. T. Desai JJ., on September 16, 1957 (Unrep.).

to produce all available evidence such as food ration cards, the true copies of extracts from the A.R.D.'s registers, rent bills, gas and electricity bills, postal cards or envelopes received at the said address and any other relevant evidence. On April 22, 1957, the petitioner saw the Accommodation Officer and pointed out what according to him were the correct facts and produced documentary evidence in support of his case. On December 18, 1957, an order was passed requisitioning the said premises. That order is in terms following:—

"Whereas on inquiry it is found that Shri Chandravadan C. Mehta was the person lawfully entitled to reside in the part of the building specified below:

Room No. 1 on the 1st floor of the building known as New Blocks situated at 175, Walkeshwar Road, Bombay.

And whereas on inquiry it is found that the said Shri Chandravadan C. Mehta has not actually resided in the said part of the building for a continuous period of six months immediately preceding the date of this order;

And whereas in the opinion of the Government of Bombay it is necessary to requisition the said part of the building for a public purpose, namely for housing a Bombay State Government Servant.

Now, therefore, in exercise of the powers conferred by section 5 of the Bombay Land Requisition Act, 1948 (Bom. XXXIII of 1948) the Government of Bombay hereby declares that the said Shri Chandravadan C. Mehta has not actually resided in the said part of the building specified below for a continuous period of six months immediately preceding the date of this Order, and requisitions the said part of the building for a public purpose, namely, for housing a Bombay State Government servant."

The petitioner challenges the validity of this order on various grounds and has prayed for the issue of a writ of *mandamus* or a writ in the nature of *mandamus* or an appropriate writ, order or orders or direction under art. 226 of the Constitution of India ordering the State of Bombay and/or its officers to withdraw, cancel or set aside the said order of requisition dated December 18, 1957, and to forbear from enforcing and/or causing to be enforced or taking or causing to be taken any steps or proceedings in the enforcement of the said order and/or from allowing any person to occupy the said premises.

The principal contention advanced before me on behalf of the petitioner is that the said Chandravadan C. Mehta was not at the relevant time lawfully entitled to reside in the said premises. It is urged that in fact he ceased to reside in the said premises since 1942. It is further urged that in any event when the landlord in January 1956 issued rent bills in favour of the petitioner, the vestige of any title in the said Chandravadan C. Mehta to occupy the premises ceased to exist. It is urged that the declaration which proceeds upon the footing that Chandravadan C. Mehta was the person lawfully entitled to reside in the said premises is a bad declaration and that as the declaration is bad, the order of requisition is equally bad and cannot be sustained.

It was strongly urged before me on behalf of the respondent that the declaration that has been made is conclusive evidence both as regards the person entitled lawfully to reside in the premises and as regards the fact of his non-residence during the period of six months immediately preceding the date of the order. Section 5(2) of the Bombay Land Requisition Act, which has been relied upon, runs as follows:—

"5. (2) Where any building or part thereof is to be requisitioned under sub-section (1), the State Government shall make such enquiry as it deems fit and make a declaration in the order of requisition that the owner, the landlord or the tenant, as the case may be, has not actually resided therein for a continuous period of six months immediately preceding the date of the order and such declaration shall be conclusive evidence that the owner, landlord or tenant has not so resided."

The question whether the declaration made is conclusive evidence as regards the person entitled to reside in the premises came up for decision before Mr. Justice S. T. Desai in *Dwarkanadas Gordhandas v. The State of Bombay*¹.

¹ (1953) O. C. J. Miscellaneous Petition October 14, 1953 (Unrep.).
No. 230 of 1953, decided by S. T. Desai J. on

In that case, to use the language of the learned Judge, the argument was that the declaration was conclusive evidence not merely of the fact of absence of occupation but also of the fact as to who was the tenant. Dealing with that argument, the learned Judge has expressed himself in emphatic terms as follows:—

"...The proposition seemed to me to be a startling and menacing one and I expressed the view that the language of the section did not confer any such power on the Requisitioning authority and the only merit of the contention lay in the boldness of the claim. The question of title could not be decided by the Authorities."

The learned Judge has, thereafter, referred to a judgment of the Appeal Court in which the view taken was that the order would be bad if it was established that the sub-tenant, not referred to in the order, had all along been in possession and occupation of the premises and was in possession at the date of the requisition order.

I was also referred to a decision of a Division Bench of this Court consisting of the Chief Justice and Mr. Justice Shah in *Jamnadas Ramchand v. The State of Bombay*.¹ In that case the order of requisition dated March 20, 1953, recited that on inquiry it was found that Mrs. R. Craven, the tenant, was the person lawfully entitled to reside in the part of the building therein mentioned. The order of requisition was passed on the footing that Mrs. R. Craven had not resided in the said part of the building for a continuous period of six months immediately preceding the date of the order. Jamnadas Ramchand, the petitioner in that case, contended that he had been accepted as a tenant by the landlord after Mrs. Craven had left the premises at the end of July 1950 and that he was the person lawfully entitled to occupy the said premises. The learned Chief Justice in the course of his judgment observes as follows:—

"Before the petitioner can succeed he must establish that he was lawfully in possession of the premises, and the first contention that we have to consider is whether the petitioner has succeeded in establishing his case that he was accepted as a tenant by the landlord after Mrs. Craven left the premises at the end of July 1950."

On the facts of that case the appeal Court came to the conclusion that the appellant had failed to prove that the landlord had accepted him as a tenant and that a new tenancy came into existence on the departure of Mrs. Craven from India. That decision clearly shows that the appeal Court did not regard the declaration as being conclusive on the question of the person entitled to occupy the premises as a tenant.

Reliance has been placed on behalf of the respondent upon a decision of the Chief Justice and Mr. Justice S. T. Desai in *State of B'bay v. M. C. Menon*.² That was a case dealing with an order of requisition passed under the provisions of sub-s. (4) of s. 6 of the Act. In that case the premises were used for the purpose of business and the previous tenant had on September 22, 1955, assigned that business to the petitioner for a consideration and had put the petitioner in possession of the premises. The order of requisition was passed on April 22, 1957, and it recited that the premises had become vacant in the month of September 1955. In that case the learned Chief Justice, who delivered the judgment of the Court, referred to his own remarks in the case of *Mohsinali Mahomedali v. State of Bombay*,³ where at p. 97 he had observed that on a declaration being made by Government that there was a vacancy, that declaration was conclusive both as to the facts and also as to the legal requirements which the law made necessary. He further observed that not only it was not competent to the petitioner to challenge the facts on which the declaration was based, but it was also not open to the petitioner to challenge the order on the ground that it did not comply with the requirements of vacancy laid down in the Requisition Act. He took the view that under art. 226 it was not open to the Court to go behind the declaration on a question

1 (1953) O. C. J. Appeal No. 71 of 1953, decided by Chief C. J. and J. C. Shah J., on December 8, 1953 (Unrep.).

2 (1958) 61 Bom. L. R.

3 (1950) 53 Bom. L. R. 94.

of fact or on a question of law. That is not a decision in respect of the provisions contained in s. 5 of the Act. There is a limitation upon the exercise of the powers conferred by s. 5 of the Act. Under the proviso to s. 5(1) it has been expressly stated that no building or part thereof wherein the owner, the landlord or the tenant, as the case may be, has actually resided for a continuous period of six months immediately preceding the date of the order shall be requisitioned under that section. Government is not constituted the sole Judge to determine the person who was the real owner, landlord or tenant of the premises which are sought to be requisitioned. The Government is not enabled by an erroneous decision to deprive the real owner, landlord or tenant of his rights. The making of the inquiry and the making of the declaration referred to in s. 5(2) is constituted a condition of the passing of a valid order of requisition under s. 5(1). Under s. 5 the declaration is made conclusive as regards the actual non-residence of the person referred to in the order for a continuous period of six months immediately preceding the date of the order. The declaration does not preclude the real owner, landlord or tenant from showing that he is the real owner, landlord or tenant and not the person mentioned in the declaration.

Another decision referred to on behalf of the respondent was an unreported judgment of a Division Bench of this Court consisting of Mr. Justice Tendolkar and Mr. Justice S. T. Desai in *Dashrath Lazman Jaya v. D. B. Patil*, *Accommodation Officer, Govt. of Bombay*¹. In that case Mr. Justice Tendolkar, who delivered the judgment of the Court, observes as under:—

"...no-doubt, the State Government has to decide for itself who was the person entitled to reside in the premises, whether he was the owner, the landlord or the tenant; but we find nothing in the words of this sub-section which requires the Government to declare whether the owner, the landlord or the tenant was entitled to reside. Having determined that question for themselves, they have to determine whether the person entitled to reside resided therein for a continuous period of six months prior to the making of the order and making the relevant declaration.... Therefore, in law, in our opinion, there is no obligation on the State Government to declare in the declaration that the person who, according to them, has not resided in the premises occupied the character of an owner or a landlord or a tenant, so long as they have in fact determined for themselves who was entitled to occupy the premises."

This decision does not deal with the question which has been raised before me. In my view, the decision of Mr. Justice S. T. Desai in *Dwarkanadas Gordhandas v. The State of Bombay* is still good law and I am in respectful agreement with that decision.

It is then urged on behalf of the respondent that there is a disputed question of fact which arises on the present petition and that the remedy by way of a petition for the issue of a writ is not the proper remedy. It is urged that the petitioner's claim that he is the real tenant of the premises is not admitted. It is further urged that according to the declaration made by the respondent, Chandravadan C. Mehta was the person who was the tenant of the said premises. I find that in the affidavit in reply to the petition, dated February 21, 1958, it has been stated in express terms by the Accommodation Officer in para. 7 as follows:—

"I say that the landlords issued rent receipts in the name of the petitioner from January 1956 and that the rent receipts were issued in the name of the said Mr. Mehta till the end of 1955. I submit that the landlords recognised the said Mehta as tenant and passed receipts in his name till the end of 1955. The landlords were not entitled to accept the petitioner as tenant in and from January 1956 as they purported to do. The landlords ought to have given intimation of vacancy which they failed to do. I deny that the petitioner was and is the lawful tenant of the premises."

In para. 6 of that affidavit it is stated as follows:—

"From the information available to Government, it appeared that Shri Chandra-

¹ (1957) O. C. J. Appeal No. 42 of 1957, September 16, 1957 (Unrep.), decided by Tendolkar and S. T. Desai JJ. on

vadan C. Mehta the tenant of the premises in question ceased to occupy the premises in or about 1953 and passed on the said premises unauthorisedly and in contravention of the provisions of law, to the petitioner in or about January 1956."

Having regard to the statement made in that affidavit that the landlords issued rent receipts in the name of the petitioner from January 1956, it is clear that so far as the landlords were concerned, they recognised, as from January 1956, the petitioner as their tenant. The only contention that is sought to be raised on behalf of the respondent is a contention based on law viz. that as no intimation of vacancy had been given by the landlords, they were not entitled to accept the petitioner as their tenant from January 1956, as they had purported to do, and that there was no lawful tenancy of the premises created in favour of the petitioner. This point is, however, covered by a decision of our appeal Court in *Mahomed Husain v. Trivedi*¹. It is a decision of a Division Bench of this Court consisting of the Chief Justice and Mr. Justice Bhagwati. In that case the learned Chief Justice in delivering the judgment of the Court observes at p. 660 as follows:—

"...The question is whether any rights are created as between a landlord and a tenant in a case where the landlord fails to give intimation or fails to get permission from Government as required by s. 6. It is clear that if the landlord contravenes the provisions of s. 6, he renders himself liable to penal consequences. But does that mean that no right is created as between landlord and tenant? Looking to the scheme of s. 6 it is clear that s. 6 is not intended in any way to modify the ordinary law of landlord and tenant. The Land Requisition Act requires the landlord to give intimation to the Government of a vacancy because Government can deal with such vacancies by allocating it to persons who are in need of property, and if the landlord does not conform to the scheme, he is penalised for his action. But there is no reason why we should assume from that that if a landlord has created a tenancy in favour of a tenant contrary to the provisions of s. 6, no right is created in the tenant himself. Section 6 does not render a tenancy created void. It only penalises the action of the landlord in that he created the tenancy without the permission of Government."

In view of the aforesaid judgment, once the fact of the landlords having given the tenancy to the petitioner in January 1956 is accepted, the tenancy must be held to be a lawful tenancy and the contention urged on behalf of the respondent must fail. On the admissions made in the affidavit in reply itself, it must be held that there was a tenancy created in the month of January 1956 in favour of the petitioner. On such tenancy being created, the petitioner as such tenant was lawfully entitled to reside in the said premises and not Chandravadan C. Mehta. In this view of the matter, the declaration that has been made is bad.

In the case of *Maneklal v. Collector of Ahmedabad*², the learned Chief Justice in delivering the judgment of a Division Bench of this Court has, in connection with the provisions of s. 5(2) of the Act, observed at p. 993 as follows:—

"...An inquiry is made obligatory in every case where a building or part thereof is to be requisitioned... Whatever the nature of the building, if the Government wishes to requisition a building, it must hold the inquiry mentioned in sub-s. (2) of s. 5." In dealing with the argument urged in that case that even though an inquiry is obligatory under the aforesaid provision a declaration is not obligatory, the learned Chief Justice observes as follows (p. 993):—

"...It is clear that reading sub-s. (2) as a whole the position is that both an inquiry and the making of a declaration are obligatory."

In this case, the declaration as regards the person lawfully entitled to reside in the premises being bad, the condition precedent to the requisitioning of the premises has not been fulfilled and the order must be held to be bad and is liable to be set aside.

The petitioner has in the petition also challenged the order on the ground that no inquiry was in fact held or that in any event if there was an inquiry

1 (1951) 54 Bom. L. R. 659.

2 (1953) 55 Bom. L. R. 992.

held, it was but a pretence of an inquiry. This ground was not pressed before me and it is not necessary for me to deal with the same.

It is further urged that the order was passed *mala fide*. There is no substance in this contention and it has not been seriously pressed before me. There is no substance in any of the other contentions urged on behalf of the petitioner.

In the result, the petitioner is entitled to succeed and I direct the issue of a writ of *mandamus* in terms of prayer (a) of the petition. The respondent to pay to the petitioner the costs of the petition, the costs being fixed at Rs. 325, inclusive of the costs of the notice.

Petition allowed.

Solicitors for the petitioner: *Nanavati Tijoriwala & Co.*

Solicitors for the respondents: *Little & Co.*

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Kotwal.

KODAN RANGLAL POWER v. BOMBAY REVENUE TRIBUNAL.*

Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (I of 1951), Secs. 40, 41†—Madhya Pradesh Land Revenue Code (II of 1955), Secs. 241, 147, 240(2), 239††, 104—C.P. Land Revenue Act (II of 1917), Sec. 46—Application for conferral of Malik Makbuzi under s. 41 of Act I of 1951 based on accrual of right of occupancy tenant under s. 40 of Act—Appeal against order made on application pending when Act II of 1955 came into force which repealed s. 40 of Act—Whether appeal lapsed because of repeal of s. 40.

*Decided, July 10, 1958. Special Civil Application No. 67 of 1958 (with Special Civil Applications Nos. 92, 93 and 109 of 1958).

† "S. 40. Any land not included in home-farm but brought under cultivation by the proprietor after the agricultural year 1948-49 shall continue in the possession of such proprietor and shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed.

S. 41. Except in such areas as the State Government may, by notification, exclude from the operation of this section, every absolute occupancy tenant who, at any time before the date of vesting or within six months therefrom, or such further period as the State Government may from time to time notify pays to the State Government an amount equal to three times the annual rent for the time being payable by him for his holding and every occupancy tenant who likewise pays to the State Government an amount equal to four times such rent, shall on and from the date of vesting or the date of such payment, whichever is later, be declared in the prescribed manner to be a Malik Makbuzi of the land comprised in his holding."

†† S. 241 "All applications for conferral of Malik Makbuzi rights, filed under sections 41, 56 and 69 of Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, pending on the date of the coming into force of this Code shall, notwithstanding the repeal of the said Act, be heard and decided in accordance with the provisions contained therein as if the said Act had not been repealed.

147. Every person who at the coming into force of this Code belongs to any of the

following classes shall be called a Bhumidari and shall have all the rights and be subject to all the liabilities conferred or imposed upon a Bhumidari by or under this Code, namely:—

(a) every person in respect of land held by him as an occupancy tenant in the Central Provinces;

(b) every person in respect of land held by him as a raiyat or raiyat sarkar in the Central Provinces;

(c) every person in respect of land held by him as a raiyat or tenant in the merged territories;

(d) every person in respect of land held by him as a lessee of the State Government under sub-section (3) of section 68 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, not falling under clause (f) of section 146.

240. (2) Any reference in any enactment other than the Central Provinces Land Alienation Act, 1916, to—

(a) an occupancy tenant,

(b) a raiyat;

(c) a tenant; and

(d) a permanent tenant

shall be deemed to be a reference to a Bhumidari.

239. All rules, assessments, appointments and transfers made, notification and proclamations issued, authorities and powers conferred, farms and leases granted, records of rights and other records framed or confirmed, rights acquired, liabilities incurred, times and places appointed, and other things done under any of the enactments hereby repealed shall, so far as may be, be deemed to have been respectively made, issued, conferred, granted, framed, revised, confirmed, acquired, incurred, appointed and done under this Code."

The applicant made an application under s. 40 of the Madhya Pradesh Abolition of Proprietary Rights Act, 1950, for conferral of *malik makbuz* right in respect of certain land, contending that under s. 40 of the Act read with r. 1 framed thereunder he had become an occupancy tenant of the land and, therefore, he was entitled under s. 41 of the Act to be declared a *malik makbuz* of the land upon payment by him of the requisite rent. On July 12, 1955, the applicant filed an appeal against the order made on his application to the M.P. Board of Revenue under s. 40 of the Act. Pending the appeal the M.P. Land Revenue Code, 1954, came into force on October 1, 1955, and it repealed, among other provisions, s. 40 of the Madhya Pradesh Abolition of Proprietary Rights Act, 1950. On the question whether the appeal lapsed because of the repeal of s. 40 of the Act, upon which the applicant's right was founded:—

Held, that the foundation of the application under s. 41 of the Act was the right conferred by s. 40 of the Act which right had already accrued to the applicant and was not taken away by any of the provisions of the Code,

that as the proceedings before the Tribunal arose out of the application made by the applicant under s. 41 of the Act, the application was saved by s. 241 of the Code,

that the order made under s. 41 of the Act was made appealable under s. 84 of the Act and that section was not repealed by the Code, and

that, therefore, the appeal did not lapse.

A right acquired under s. 40 of the Madhya Pradesh Abolition of Proprietary Rights Act, 1950, is saved by s. 239 of the M.P. Land Revenue Code, 1954, read with ss. 147 and 240 of the Code.

THE facts appear in the judgment.

Y. V. *Jakatdar*, for the petitioner.

N. L. *Abhyankar*, for respondents Nos. 2 and 3.

MUDHOLKAR J. This is a petition under arts. 226 and 227 of the Constitution for the issue of a writ of *certiorari* quashing the order of the Bombay Revenue Tribunal dated November 7, 1957, and for issue of such other writ, order or direction as may be approved. This petition was heard along with Special Civil Applications Nos. 92/58, 93/58 and 109/58.

In all these petitions the point taken is that the Bombay Revenue Tribunal was in error in dismissing the appeals before it upon the basis of the decision in *Surendraraj v. State of Bombay*.¹ That is a decision of a Full Bench of the Bombay Revenue Tribunal itself. Since the facts out of which these petitions arise are somewhat different it will be desirable to make separate mention of the facts out of which each petition arises.

We shall first deal with petition No. 67 of 1958. Here, the petitioner had made an application to the Additional Deputy Commissioner, Gondia, under s. 40 of the Madhya Pradesh Abolition of Proprietary Rights Act, 1950, for the conferral of *malik makbuz* right in respect of certain land. In that application the petitioner contended that though the land to which the application related was not included in the home-farm in 1948-49, it was brought under cultivation by him as the proprietor after the agricultural year 1948-49, that it was in his possession and that he had, therefore, become, under s. 40 of the Act read with r. 1 framed under that Act, an occupancy tenant of this land. He was consequently entitled under s. 41 of the Act to be declared a *malik makbuz* of the land upon payment by him of three times the annual rent. It may be mentioned that the annual rent had not been fixed with respect to this land and one of the prayers of the petitioner was that this also should be fixed. His application was allowed partially by the Additional Deputy Commissioner. Against that part of the application which was not allowed by the Additional Deputy Commissioner, the petitioner preferred an appeal before the M.P. Board of Revenue on July 12, 1955, under s. 40 of the Abolition of Proprietary Rights Act, 1950. The M.P. Land Revenue Code came into force on October 1, 1955. It repealed, among other provisions, s. 40 of the Abolition of Proprietary Rights Act. The Bombay Revenue Tribunal, following its

1 [1958] N. L. J. 282, F.B.

decision in *Surendraraj's* case, held that the appeal had lapsed because s. 40, upon which the petitioner's right was founded, was repealed by the M.P. Land Revenue Code.

In *Surendraraj's* case a Full Bench of the Bombay Revenue Tribunal held that s. 40 of the Abolition of Proprietary Rights Act is not saved by s. 241 of the M.P. Land Revenue Code and that, therefore, though the M.P. Land Revenue Code came into force during the pendency of the appeal, the appeal had lapsed and could not be proceeded with. One of the principles of construction upon which the Bombay Revenue Tribunal proceeded was quoted with approval by the learned Judges of the Nagpur High Court in *Chhote Khan v. Mohammad Obedullakhan*.¹ That principle is that a repeal will generally divest all inchoate rights which have arisen under the repealed statute and destroy all accrued causes of action based thereon and that as a result, such a repeal, without the saving clause, will destroy any proceedings, whether not yet begun, or whether pending at the time of the enactment of the repealing Act, and not already prosecuted to a final judgment, so as to create a vested right.

It seems to us that the view of the Full Bench of the Bombay Revenue Tribunal to the effect that because of the repeal of s. 40 of the Abolition of Proprietary Rights Act the appeal had lapsed is not correct. It must be borne in mind that the application of the petitioner in this petition is not under s. 40 of the Act but is under s. 41 of that Act. Applications under s. 41 of the Act, which were pending on the date on which the M.P. Land Revenue Code came into force, have been specifically saved by the provisions of s. 241 of the Code. It is true that the foundation of the application under s. 41 was the right conferred by s. 40 of the Act. This was a right which had already accrued to the petitioner and this right has not been taken away by any of the provisions of the M.P. Land Revenue Code.

Upon the allegation made by the petitioner he had acquired the right of an occupancy tenant before the M.P. Land Revenue Code came into force. Section 40 did not require any application from a person who asserted his right under that section before acquiring that right. Nor does s. 40 contemplate any order to be made by a Revenue Authority conferring upon that person the right of an occupancy tenant. In that respect s. 40 is different from s. 41 which requires intervention of a Revenue Officer and requires the passing of an order. It also requires payment of some money before the right specified in that section could be acquired by a person. That acquisition of a right under s. 40 by the person who fulfils the conditions laid down therein was automatic. A person who had acquired such a right, would, under s. 147 of the M.P. Land Revenue Code read with s. 240(2) thereof, become a *Bhumidhari* under the M.P. Land Revenue Code. The rights acquired under the enactments repealed by the M.P. Code are saved by s. 239 of that Code. In these circumstances it is clear that the repeal of s. 40 of the Abolition of Proprietary Rights Act does not in any way affect a proceeding of the kind that was taken before the Bombay Revenue Tribunal.

As we have already stated, the proceeding before the Bombay Revenue Tribunal arose out of the application made by the petitioner under s. 41 of the Act. Such an application is saved by s. 241 even though s. 40 itself has been repealed by the M.P. Land Revenue Code. An order of a Deputy Commissioner or Additional Deputy Commissioner in respect of a matter under s. 41 of the Act is made appealable by s. 84 of the Abolition of Proprietary Rights Act. That section has not been repealed by the M.P. Land Revenue Code. In these circumstances, disagreeing with the Bombay Revenue Tribunal we hold that the appeal does not lapse and also point out that this is not a case to which the principles laid down in *Chhotekhan's* case at all apply.

We shall now deal with Special Civil Applications Nos. 92 and 93 of 1958. In these cases the petitioners, Shree Laxminarayan Deosthan, had made two applications before the Additional Deputy Commissioner, Chanda, sitting at

Wardha, but the reliefs which were asked for in these two applications were different. In one of the applications the relief asked for was the correction of the entries in the annual papers. In the other application, the prayer was for allotting four fields for grazing purposes in occupancy rights. The prayer for the correction of the entries was rejected. As regards the other application, an order was passed to the effect that four of the fields specified by the petitioners shall be reserved for grazing purposes in occupancy rights. It was further ordered that these fields should be assessed and a *patta* should be given to the petitioners. A common order was passed with regard to both these cases. Shri Mandlekar says it is because of this that he preferred two appeals before the Bombay Revenue Tribunal. Both these appeals were dismissed by the Tribunal on the ground that s. 40 of the Abolition of Proprietary Rights Act having been repealed these appeals had lapsed.

It is not clear to us why Shri Mandlekar should have preferred an appeal against that part of the order of the Additional Deputy Commissioner which had really granted him the relief which he had sought, i.e. reservation of some land for grazing purposes. However, we need not go into that matter. Upon the view we have taken it is clear that the repeal of s. 40 of the Abolition of Proprietary Rights Act does not in any way affect the petitioners' right to have the entry in the record-of-rights corrected. The right to have an entry corrected is recognised by s. 46 of the C.P. Land Revenue Act, 1917. Section 104 of the M.P. Land Revenue Code which corresponds to that section also recognises this right. That being so, we cannot uphold the dismissal of the appeals upon the ground given by the Bombay Revenue Tribunal. It may be that the appeals may fail on some other ground; but that is not a matter which is argued before us and therefore we need not deal with it.

Finally, we will deal with Special Civil Application No. 109 of 1958. Here, the petitioner had made an application for the correction of the record-of-rights on February 26, 1952. This application was dismissed by the Additional Deputy Commissioner, Nagpur, sitting at Umrer, on August 24, 1955. An appeal preferred by the petitioner before the Bombay Revenue Tribunal was dismissed by it on the ground that it had lapsed because of the repeal of s. 40 of the Abolition of Proprietary Rights Act. It is no doubt true that in his application to the Additional Deputy Commissioner the petitioner had founded his claim for the correction of the entry under s. 40 of the Act. But as we have already stated, the repeal of s. 40 does not affect the petitioners' right to have his application for the correction of entries considered because such right, if any, which he has acquired under s. 40 is saved by s. 239 of the M.P. Land Revenue Code read with ss. 147 and 240 thereof.

Upon this view, we allow all the petitions and remit the appeals to the Bombay Revenue Tribunal for being heard and disposed of on merits. Costs so far incurred, including those of this Court, will abide the event.

Petitions allowed.

[NAGPUR BENCH]

Before Mr. Justice Gokhale and Mr. Justice Badkas.

**M/S. R. S. REKHCHAND MOHTA SPG. & WVG. MILLS (PRIVATE) LTD.
v. THE COMMISSIONER OF SALES TAX.***

Central Provinces and Berar Sales Tax Act (XXI of 1947), Secs. 22B, 22, 22A, 11A.—Assessment order passed by Regional Assistant Commissioner passed prior to coming into force of s. 22B—Whether Sales Tax Commissioner can exercise his revisional powers under s. 22B in respect of such order—Construction of statute—When can statute be presumed not to be retrospective in operation—Whether presumption against retrospective construction applicable to enactments which affect only procedure and practice of Courts or tribunals.

The revisional powers under s. 22B of the Central Provinces and Berar Sales Tax Act, 1947, can be exercised by the Commissioner of Sales Tax even in respect of orders of subordinate authorities passed prior to December 1, 1953 (when s. 22B came into force), provided the revisional order is passed by him before the expiry of two years from the date of the order sought to be revised.

Bisessar House v. State of Bombay,¹ referred to.

Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation. But the presumption against retrospective construction has no application to enactments which affect only the procedure and practice of Courts or tribunals.

THE facts appear in the judgment.

M. N. Phadke, for the applicant.

N. L. Abhyankar, Special Government Pleader, for the opponent.

GOKHALE J. The assessee in both these civil references had submitted his returns under the Central Provinces and Berar Sales Tax Act, 1947 (XXI of 1947), for two years covering the period between October 22, 1949, to November 9, 1950, and November 10, 1950, to October 30, 1951, and he was assessed by the Regional Assistant Commissioner of Sales Tax, Amravati, by his orders dated August 18, 1953, in respect of both the periods. The amounts of assessment were paid by the assessee in pursuance of those orders. Thereafter, notices were issued by the Commissioner of Sales Tax, Nagpur, under s. 22B of the C. P. and Berar Sales Tax Act, calling upon the assessee to show cause why the assessment orders passed by the Regional Assistant Commissioner, Amravati, should not be set aside. In reply to the said notices, the applicant filed written objections, contending *inter alia* that s. 22B, which came into force on December 1, 1953, by virtue of Act No. XX of 1953, could not apply in respect of the assessment orders passed on August 18, 1953, and the Commissioner had no power to revise those orders by virtue of the powers conferred upon him under s. 22B. It may be mentioned that under the original orders, the Regional Assistant Commissioner of Sales Tax, Amravati, had granted exemption to the assessee in respect of certain sales of cloth, on the ground that these sales were pure exports and they were exempted under the provisions of art. 286(1)(b) of the Constitution. The Commissioner rejected the assessee's contention regarding his revisional powers under s. 22B of the Sales Tax Act, and on the merits he took a different view from that taken by the Regional Assistant Commissioner of Sales Tax regarding the exemption to be given to the sales of cloth and held that the sales in question were taxable. He, therefore, set aside the assessment orders and remanded the two cases to the Regional Assistant Commissioner with a direction to proceed with the assessment of the assessee in the light of his revisional orders. These revisional orders in the

*Decided, August 4, 1953. Civil Reference 1 (1953) 60 Bom. L. R. 1395, F.B. Nos. 35 and 36 of 1957.

two cases were passed by the Commissioner on April 26, 1954, that is to say, before the expiry of two years from the date of the original orders which were passed on August 18, 1953. Against this decision of the Commissioner, the assessee filed appeals before the Board of Revenue which was then the appellate authority, and the Board of Revenue of Madhya Pradesh relying upon its Division Bench ruling in Appeal No. 4/XXXXIII-7 of 1955, dated May 14, 1956, dismissed the appeals of the assessee. In respect of this decision of the Board of Revenue, the assessee filed applications under s. 23(1) of the Sales Tax Act, requesting that the question as to whether the revisional powers under s. 22B of the Sales Tax Act could be made applicable to orders passed by the Regional Taxing Authority on August 18, 1953, should be referred for decision to the High Court. These applications came before the Sales Tax Tribunal which has now replaced the Board of Revenue and by its order dated July 24, 1957, the Tribunal has referred to us the following two questions:

1. Whether s. 22B applies to cases in which the order sought to be revised was passed before the said section came into operation?

2. Whether the Commissioner of Sales Tax was justified in law in re-opening the assessment made in these cases and making an order of remand?

Now, Mr. Phadke, the learned advocate appearing on behalf of the assessee, has contended, in the first instance, that under question No. 2 referred to us, the Sales Tax Tribunal intended that the High Court should also go into the question of the merits of the assessment order of the Sales Tax Commissioner. We are not prepared to accept this argument. It is clear from the record that the only question that was argued before the Board of Revenue on behalf of the assessee was whether the Sales Tax Commissioner could invoke the revisional powers conferred on him by s. 22B of the Sales Tax Act with a view to revising the orders that were passed before the said section came into force on December 1, 1953. The merits of the order of assessment do not appear to have been challenged before the Board of Revenue, and, in our opinion, under the second question which has been framed by it, the Sales Tax Tribunal has not referred the merits of the assessment order to this Court.

The only question, therefore, which falls to be considered in these references is whether the Sales Tax Commissioner could exercise his revisional powers under s. 22B of the Sales Tax Act, so as to affect orders which were passed prior to the coming into force of this section on December 1, 1953; and it is contended by Mr. Phadke on behalf of the assessee that s. 22B, which, along with other sections, was inserted by the M. P. Act No. XX of 1953 in substitution of the original s. 22, could not have any retrospective operation so as to affect the orders passed in these cases on August 18, 1953. Now, in order to examine this contention, it would be necessary to look into the provisions of the original s. 22 of the Sales Tax Act and the new sections which replaced it by virtue of the amending Act No. XX of 1953. Section 22, as it originally stood, was a composite section dealing with appeals against original orders of the taxing authorities, as well as the revisional powers of the Commissioner, as also of the Tribunal. Under sub-s. (4) of s. 22, every order passed in appeal was, subject to the provisions of sub-s. (5) and s. 23, to be final. Under sub-s. (5) of s. 22, which dealt with the revisional powers, it was provided:

"Subject to rules made under this Act and for reasons to be recorded in writing, the Commissioner upon application or of his own motion may revise any order passed under this Act or the rules thereunder by a person appointed under section 3 to assist him, and subject as aforesaid, the Tribunal may, in like manner, revise any order passed by the Commissioner:

Provided that before rejecting any application for the revision of any such order the Commissioner or the Tribunal, as the case may be, shall consider it and shall record reasons for such rejection."

It is obvious from this sub-section that the Commissioner had the power to revise any order passed by an authority appointed under s. 3 to assist him, either upon an application made by the assessee or by an action *suo motu* on

his part. This power was to be exercised in accordance with the rules framed under the Act; and Mr. Phadke in this connection drew our attention to r. 57 of the C. P. and Berar Sales Tax Rules, 1947, which provided that an application for revision of an order shall be made within 30 days of the passing of the order. The proviso to this rule stated that no application for revision of any order of assessment passed in an appeal shall be entertained by any authority unless it was satisfied that the petition for revision raised a substantial question of law, and that the tax with penalty, if any, in respect of which the application was made, had been paid along with the application. It will, therefore, be observed from this rule that an application for revision, if it was preferred by the assessee, had to be made within 30 days of the passing of the order he sought to challenge. But there does not seem to have been any period of limitation if the Commissioner wanted to revise an original or appellate order acting on his own motion. By virtue of the Amending Act of 1953, the original s. 22 was substituted by ss. 22, 22A, 22B and 22C. New s. 22A(1) refers to the power of the Commissioner on his own motion to call for the record of any proceedings under the Act, in which an order has been passed by any subordinate authority, and after making such enquiry or causing such enquiry to be made and subject to the provisions of the Act, to pass such order thereon as he thought fit, provided the order so passed was not an order prejudicial to the dealer and the order under revision was not made more than one year previously. Under sub-s. (2) of s. 22A, the Commissioner could be moved also by a dealer for revision, provided the application was made within one year from the date of the order sought to be revised. It would, therefore, appear from s. 22A(2) that instead of the period of 30 days provided under r. 57, the assessee was given the right to apply in revision to the Commissioner against an original or appellate order within one year from the date of the order. Then comes s. 22B with which we are concerned in these references and it runs as follows:

"(1) The Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by any person appointed under section 3 to assist him is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the dealer an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

(2) No order shall be made under sub-section (1) after the expiry of two years from the date of the order sought to be revised.

(3) Any dealer objecting to an order passed by the Commissioner under sub-section (1) may appeal to the Tribunal within sixty days of the date on which the order is communicated to him."

Section 22C deals with the power of the Commissioner or the appellate authority to impose penalty, but we are not concerned in this case with that section.

Now, the whole of Mr. Phadke's contention in these references is that the powers given to the Commissioner under s. 22B are powers to revise orders of any authority subordinate to him and these powers can be exercised by him *suo motu* without an application by the assessee; and according to Mr. Phadke, these revisional powers could not be exercised by the Commissioner in respect of orders passed prior to December 1, 1953, on which date this section came into force, because, according to Mr. Phadke, the new section gave a wider power of revision to the Commissioner than the old s. 22(5) which ceased to have force on November 30, 1953. The argument of Mr. Phadke appears to be that under r. 57, as it originally stood, a revisional application against an order of assessment passed in appeal could only be entertained if the Commissioner was satisfied that the petition for revision raised a substantial question of law. Mr. Phadke concedes that this r. 57 would only apply to applications for revision made to the Commissioner but would not apply to action taken by the Commissioner *suo motu*. But he contends that the same limitation of a requirement of a substantial question of law will have to be imported when the Commissioner exercised his powers to revise the orders of his subordinates when

he took action *suo motu*; and according to Mr. Phadke, under the present s. 22B the Commissioner is empowered to revise an order of any authority subordinate to him even if it is merely erroneous in so far as it is prejudicial to the interests of the Revenue, and it is Mr. Phadke's contention that under the new section, the powers of revision conferred on the Commissioner are wider, and, therefore, that section cannot be given any retrospective operation. We are not prepared to accept this argument. Rule 57 dealt with applications for revision and it provided a period of 30 days within which the application for revision could be filed. As I have already pointed out, under the new s. 22A(2) that period has been actually enlarged to a period of one year from the date of the order, so that the right of the assessee to file revisional applications has been placed on a footing more beneficial to the assessee, inasmuch as under the new s. 22A he now gets a period of one year within which to make an application for revision. Rule 57, as it originally stood, did not deal with the case of revision by the Commissioner acting *suo motu*, and the requirement in the proviso as to a question of law was confined to cases of revision of an order of assessment passed in appeal. We are not, therefore, prepared to accept Mr. Phadke's contention that the Commissioner's power of revision *suo motu* under old s. 22(5) could only be exercised if the order of the subordinate authority was erroneous on a question of law. In our opinion, therefore, the present s. 22B does not impose any greater disability on the assessee when the Commissioner seeks to exercise his power *suo motu* on the ground that any order passed by the subordinate authority was erroneous in so far as it was prejudicial to the interests of the revenue. On the other hand, whereas under the old s. 22(5) there was no period of limitation provided, within which the Commissioner could revise the orders of the subordinate authorities, under s. 22B, sub-s. (2), the Commissioner can exercise his powers of revision, provided he does so before the expiry of two years from the date of the order sought to be revised. Therefore, in a sense, greater protection is afforded to the tax-paying dealer, in that no order passed by a subordinate authority would be subject to revision at the hands of the Commissioner acting *suo motu* after the expiry of two years from the date of the order.

The second contention of Mr. Phadke is that in the present case, the orders of assessment which were passed on August 18, 1953, were in respect of the assessment period for the years 1949-50 and 1950-51. The Commissioner's order of revision is undoubtedly passed within a period of two years of the original order of assessment as provided under sub-s. (2) of s. 22B. But Mr. Phadke contends that, in effect, the Commissioner seeks to re-open the assessment on the ground of a wrong deduction allowed by the Regional Assistant Commissioner, and that, according to Mr. Phadke, would come within the ambit of s. 11A, and since admittedly three years had elapsed on April 26, 1954, from the first period of assessment, namely, October 22, 1949, to November 9, 1950, at least the order of revision with reference to that period would be bad. In this connection Mr. Phadke relies on a recent decision in *Bisesar House v. State of Bombay*.¹ In our judgment, this argument is clearly misconceived. Section 11A deals with the power of the Commissioner and of persons to whom these powers are delegated under s. 16, to re-open an assessment where the authority is satisfied that any turnover of a dealer during any period has been under-assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made therefrom; and the power of the Commissioner under s. 11A is subject to the period of limitation of 3 calendar years from the expiry of the assessment period. It is true that s. 11A was given retrospective effect by M. P. Act No. XX of 1953 from June 1, 1947, and that was possibly the reason why the Legislature provided for a period of three calendar years from the expiry of the assessment period, so that the assessee may not be subjected to harassment after a considerable lapse of time. Section 11A deals with the power of the original assessing authority and has no

relation to the revisional powers of the Commissioner provided under old s. 22(5) and under the present s. 22B. We are not, therefore, prepared to accept Mr. Phadke's contention that because s. 22B(2) does not correlate the period of limitation to the period of assessment, a greater disability is imposed on the assessee. What is contemplated under s. 11A is an action by the original assessing authority when it finds in consequence of any information which has come into its possession that there has been a case of under-assessment or escapement of assessment. The Full Bench of this Court on which Mr. Phadke relies decided to read ss. 11 and 11A together and held that notice issued under sub-s. (2) of s. 11 would be bad if it was issued three calendar years after the expiry of the period of assessment. But it has to be remembered that the notice contemplated under sub-s. (2) of s. 11 is a notice issued by the taxing authority before the original order of assessment is passed, and would, as the Full Bench points out, in the substantial sense be an initiation of fresh proceedings by the Commissioner. On the other hand, s. 22B(2) has itself provided for a period of limitation and that period is two years from the date of the order sought to be revised. There is, therefore, no scope for importing a further period of limitation from s. 11A as urged by Mr. Phadke. As I have already pointed out, under the original s. 22(5) which was in force till November 30, 1953, it was not necessary for the Commissioner to pass his order in revision within two years of the date of the order sought to be revised. The second contention of Mr. Phadke, therefore, that s. 22B could not affect orders passed prior to December 1, 1953, because it is not correlated, in any manner, to the period of assessment and, therefore, could not be given retrospective operation, is unsound and cannot be accepted.

Mr. Phadke has not disputed and cannot dispute the fact that the orders of assessment prior to November 30, 1953, were not final but subject to the provisions of ss. 22 and 23. Even prior to November 30, 1953, the present orders could have been revised, and under s. 22(5) the orders could have been revised even after the expiry of the period of two years from August 18, 1953. Section 22B which came into force on December 1, 1953, actually places a further restriction on the revisional powers of the Commissioner, in that he has now to revise an order, if he takes action *suo motu* under that section within a period of two years from the date of the order sought to be revised. The principles on which the Court decides whether a statute is to be given retrospective operation or not are well settled. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation: see Maxwell on Interpretation of Statutes, 10th edn., p. 215. But the presumption against retrospective construction has no application to enactments which affect only the procedure and practice of Courts or tribunals, *Ibid* p. 225. As I have already stated, Mr. Phadke's argument that the present s. 22B casts a greater disability on the assessee cannot be accepted. In our judgment, the new section merely regulates the exercise by the Sales Tax Commissioner of his powers of revision and does not whittle down, in any manner, the rights of the assessee, or impose any greater disability on him. It seems to us, in the circumstances, that s. 22B, which came into force on December 1, 1953, involves really nothing more than an alteration of procedure designed to regulate the exercise of revisional powers by the Commissioner. In our opinion, therefore, under s. 22B, the Commissioner would be entitled to revise orders passed prior to December 1, 1953, when that section came into force. At the same time, under sub-s. (2) of s. 22B, the revisional order itself cannot be passed after the expiry of two years from the date of the order sought to be revised.

As the questions framed by the Sales Tax Tribunal appear to us to be unnecessarily wider in scope we propose to answer those questions as follows:—

(1) The revisional powers under s. 22B can be exercised by the Commissioner even in respect of orders of subordinate authorities passed prior to December 1, 1953, pro-

vided the revisional order is passed by him before the expiry of two years from the date of the order sought to be revised: and

(2) The order of remand was justified in view of our answer to the first question. The applicant-assessee will pay the costs of the State in both the references.

Answers accordingly.

Before Mr. Justice Shah and Mr. Justice Datar.

ADDITIONAL SPECIAL LAND ACQUISITION OFFICER, POONA

v.

SHANTARAM SHAMRAO GHOLE.*

Land Acquisition Act (I of 1894)—Compensation—Market value of land assessed on basis of hypothetical scheme for residential buildings by laying out plots—Valuation how to be arrived at—Whether price received on sale of one plot by claimant without benefit of normal amenities given to purchaser in respect of such plot decisive of value of land—Whether permissible to award claimant value of separate plot in which is reflected value of amenity of well laid-out road—Such claimant whether could also be separately paid value of land reserved for road.

In proceedings under the Land Acquisition Act, 1894, in assessing the market value of land on the basis of a hypothetical scheme for residential buildings by laying out the land in plots, it is not what the claimant may have expected to receive by sale of the area of one or two plots out of the land which is to be decisive of the value of the land, but what the valuer may regard as the value of the plots aggregated after deducting the expenses of providing such amenities as water connections, well laid-out roads, drainage facility and electrical connections, which the purchasers may normally expect to obtain in the sector in which the land is situate.

In the valuation of land on the basis of a hypothetical building scheme it would be unfair to award to the claimant the value of the separate plots, in which is fully reflected the value of the additional amenity of having well laid-out roads and also separately to pay to the claimant the value of the land reserved for the road.

The Trustees for the Improvement of the City of Bombay v. Karanddas¹ and Secy. of State v. Dulak Bala Debti² referred to.

THE facts appear in the judgment.

F.A. No. 371 of 1956.

Y. V. Chandrachud, Government Pleader, and *M. A. Rane*, Assistant Government Pleader, for the appellant.

K. V. Joshi, with *G. S. Gupte* (Jr.), for the respondent.

F.A. No. 480 of 1957.

K. V. Joshi, with *G. S. Gupte* (Jr.), for the appellant.

Y. V. Chandrachud, Government Pleader, and *M. A. Rane*, Assistant Government Pleader, for the respondent.

SHAH J. By a notification dated February 25, 1952, under s. 4 of the Land Acquisition Act, the Government of Bombay notified part of City Survey No. 869-A admeasuring 26010 sq. ft. of Nana Peth, Poona, as likely to be needed for a public purpose viz. vegetable market and a cart stand. The Land Acquisition Officer awarded to the claimant Rs. 61,470. In his view the land could be developed by laying it out into 14 building plots in two rows divided by a road. He awarded Re. 1 for the road-land admeasuring 289'×25' and for the balance he awarded compensation at the rate of Rs. 4-8-0 per square foot. In addition, the Land Acquisition Officer awarded to the claimant the 15 per cent.

*Decided, August 6, 1958. First Appeal No. 371 of 1956 (with Cross First Appeal No. 480 of 1957), from the decision of A. A. Badshah, Civil Judge, Senior Division, Poona,

in Land Reference No. 2 of 1954.

1 (1908) I. L. R. 33 Bom. 28, s.c. 10 Bom. L. R. 688.

2 [1938] A. I. R. Cal. 75.

solatium. The claimant, feeling dissatisfied with the award, applied for a reference under s. 18 of the Land Acquisition Act. The learned Civil Judge, Senior Division at Poona, who heard the reference, confirmed the valuation of the building land made by the Land Acquisition Officer, but he awarded to the claimant compensation at the rate of 14 annas per sq. ft. for the area of 289'×25' reserved under the scheme for the road. The Land Acquisition Officer, it appears, had made certain deductions in respect of the development of the land, such as deductions for expenses for constructing roads, and for providing electricity, water connections, drainage, and those deductions aggregated to Rs. 7,443. The learned Judge disallowed those deductions and awarded to the claimant Rs. 15,829-14-0 in addition to the amount awarded by the Land Acquisition Officer. The Land Acquisition Officer contends in this appeal that the additional amount awarded by the learned trial Judge should be disallowed to the claimant. The claimant claims an additional amount of Rs. 21,879-4-0 being the aggregate value of 895 sq. ft., and the value of the land reserved for road at the rate of Rs. 3-2-0 per sq. ft. He has also claimed 15 per cent. solatium on the additional amount.

C. Survey No. 369A, Nana Peth, is of inam tenure. Out of that land a portion in the northern half, 90 ft. in width having a frontage on a public road to its west and 289 ft. in length admeasuring in the aggregate 26010 sq. ft., was proposed to be acquired for the construction of the Poona City vegetable market and cart stand. It appears that out of this land two pieces 1305 sq. ft. in the north-east corner and 75 sq. ft. in the south-east could not be acquired under this notification as they belonged not to the claimant but to two other strangers, Parvatibai, wife of Bhikoba More, and Mahamad Alli Rehman Baksh. In the southern half of city Survey No. 369A, Nana Peth, stood two chawls. These chawls were mortgaged in the year 1947 and an amount of Rs. 1,543 was due as unpaid municipal taxes in respect of the chawls standing on this land. The land under acquisition abuts on the Math Road. On the north is the property of another person and to the south is a chawl belonging to the claimant.

The Land Acquisition Officer was of the view that the land had a building potentiality, it being within the built up sector of the Nana Peth locality. The learned trial Judge agreed with that view, and it is not disputed before us that the land under acquisition has to be assessed as building land, even though at the date of the notification it was lying open and unused.

In the year 1947 it appears that the claimant desired to convert this land into a building site, and he laid out the land into fourteen building plots. Plots 1 to 7 were on the northern side, and the remaining plots 8 to 14 were on the southern side. These two rows of plots were divided by a road 25 ft. in width. Out of the plots so laid out, plot No. 7 was sold by the claimant by a deed dated December 15, 1949, to one Parwatibai at the rate of Rs. 3-1-0 per sq. ft. The price charged for this land included not only the price of plot No. 7 but also of half the width of the road on which plot No. 7 abutted. The area of plot No. 7 was 930 sq. ft., but the claimant obtained the price from Parwatibai for an additional area of 375 sq. ft. on the footing that he was selling half the width of the road to Parwatibai under the sale-deed. In the sale-deed there was a covenant under which the purchaser was not to put up any structure in an area to the south of the demarcated plot admeasuring 12'-6"×30' and that she was to put up the structure only on 31'×30' with the permission of the municipality. It appears that an area adjacent to plot No. 14, which was an open piece of land also belonging to the claimant was sold at the rate of Rs. 3 per sq. ft. by sale-deed dated August 20, 1951.

There is no evidence of any sale about the date of acquisition of comparable land of this dimension in this sector and it is difficult to arrive at the valuation of the land at an overall rate. The claimant was again not receiving any income out of the land, and the valuation of the land cannot be made by capitalising the net income received by the claimant. The land being building

land and undeveloped, valuation by capitalising the income even if some income was received may be unfair to the claimant. Nor is there any expert evidence about the market value of this land. In the circumstances, the only method of valuation which may usefully be adopted is the method of a hypothetical building scheme, which is often adopted in valuing lands in built up localities; and both the Land Acquisition Officer and the learned Civil Judge have adopted this method of valuation.

The Land Acquisition Officer valued plots Nos. 1 and 8 which abut on the Math Road at Rs. 5 per sq. ft. He valued the two easternmost plots at Rs. 3; and he valued plots Nos. 2, 3, 9 and 10 at Rs. 3-8-0 per sq. ft., and plots Nos. 4, 5, 6, 11, 12, 13 and 14 at Rs. 3 per sq. ft. The Land Acquisition Officer computed the aggregate price of plots Nos. 1 and 8 at Rs. 17,875, of plots Nos. 2, 3, 9 and 10 at Rs. 18,270, and of plots Nos. 4, 5, 6, 11, 12, 13 and 14 at Rs. 25,830. Adding thereto the value of Re. 1, which he regarded as the nominal value of the land reserved for the road, he awarded to the claimant Rs. 61,976. The Land Acquisition Officer then deferred the value of the land for two years at the rate of 5 per cent. on the view that all the plots may be disposed of in four years. He accordingly held that Rs. 56,212 was the value of the land at the date of the publication of the notification.

The learned trial Judge approved of the method of valuation adopted by the Land Acquisition Officer as fully developing all the potentialities of the land. He valued plots 1 and 8 at Rs. 5, and plots 2, 3, 9 and 10 at Rs. 3-8-0, and the remaining plots at Rs. 3. Neither side has in these appeals sought to challenge the valuation of the plots. The learned trial Judge was of the view that the Land Acquisition Officer was in error in assessing the market value of the open land reserved for the road at Re. 1 only. In his view compensation for the land reserved for the road should have been taken at 25 per cent. of the market value of the land forming the plots, even though that land was to be kept open as reserved for the road. In the view of the learned Judge, the Land Acquisition Officer was also in error in deducting the amount of Rs. 7,443 as estimated expenses for providing water mains, a drainage line and construction of roads. He expressed the view that the claimant had been able to sell plot No. 7 without any amenities such as were contemplated by the Land Acquisition Officer, and there was no condition in the sale-deed imposing an obligation upon the claimant to provide facility for drainage and water connection. He further observed that the claimant had realised price at the rate of Rs. 3-1-0 per sq. ft. for plot No. 7 without any condition of providing those amenities, and the claimant had also sold a plot to the north of plots Nos. 13 and 14 at the rate of Rs. 3 per sq. ft. in the year 1951 and even in that sale-deed there was no condition about providing the amenities. He then observed:

"It is hence apparent that the prices realised for these plots were without any condition for providing any such amenities to the purchasers of the plots. The same prices he would have realised for his remaining plots without any condition for providing the amenities stated above and hence the valuation of the plots made by the Land Acquisition Officer did not depend upon the condition that the above stated amenities would be provided for by the claimant, for the purchasers. I think, if the claimant had to provide the above stated amenities to the purchasers of the plots, the values of the plots would have gone further more than the values put down by the Land Acquisition Officer and the value actually realised by the claimant for the sales of the plot No. 7 the C.T.S. No. 369 and plot No. 15."

He, therefore, disallowed the deduction of Rs. 7,443 made by the Land Acquisition Officer and awarded compensation for the road land at one-fourth the value of the building land.

The learned Government Pleader, who appears on behalf of the Land Acquisition Officer, contends that the trial Judge misconceived the contention advanced on behalf of the Land Acquisition Officer. He urges that the Court was called upon to decide the valuation of the land on the basis of exploitation

for the most lucrative user, which in this case was undoubtedly by laying it out as building plots. Having regard to the locality and the sector in which they are situate, in assessing the market value of the plots demarcated out of the land, the valuer must take into account the amenities which the persons who may be expected to purchase the plots may look for, and such amenities, according to the learned Government Pleader, in an urban area in the vicinity of a large town, are laid-out roads, electric connections, water mains and drainage connections. In our view this contention must be upheld. In assessing the market value on the basis of a hypothetical scheme for residential buildings by laying out the land in plots it is not what the claimant may have expected to receive by sale of one or two plots out of the land which is to be decisive of the value of the land, but what the valuer may regard as the value of the plots aggregated after taking into consideration the expenses of providing the amenities which the purchasers may normally expect to obtain in the sector in which the land is situate. The land under acquisition is a large piece of land, and there is no evidence that there was a purchaser for this large piece of land. No evidence has been led by the claimant to show that any prospective purchaser had even made offers to him for purchasing the entire area. The land was therefore being valued as laid-out into building plots; and if prospective purchasers investing large sums of money for purchasing separate plots were to be found, such purchasers would, in our judgment, expect to have the minimum amenities of town life such as water connections, well laid-out roads, drainage facility and electric connections. The value of the land assessed by the learned Judge in respect of the plots having a frontage on the main road comes to Rs. 45 per sq. yard, and even in respect of the rear plots it comes to Rs. 27 per sq. yard. The circumstance that one purchaser was willing to take a plot without insisting upon the provision for water supply, drainage facility and electrical connection will not justify the Court in assuming that all the plots may be sold at the rates at which one of the plots was sold. The learned trial Judge was, in our judgment, in error in assuming that because one purchaser was found, who was willing to purchase plot No. 7 without the benefit of the amenities, which may be normally expected, that the claimant "was not bound to provide such amenities" and the land may be valued without making any deductions for expenses for providing the amenities. The question is not whether the claimant was bound to provide for the amenities according to the scheme developed by him, but it is whether it is reasonably possible to develop a piece of land as a building site and to dispose of the plots at the rates fixed by the claimant without providing for the normal amenities of town life. In our view, it would be difficult, if not impossible, to develop the scheme in its entirety, unless the amenities to which we have made reference are provided by the owner of the land.

In the valuation of land on the basis of a hypothetical building scheme, the valuer has to ascertain the maximum value of each plot laid out in the most lucrative manner in the light of its potentialities, and in doing so, expenses which may have to be incurred for developing the land in the most profitable manner have evidently to be taken into account. A land cannot be parcelled into building plots for residential purpose unless proper and adequate roads are demarcated and prepared; and it is only by the reservation of land for the roads that the building plots acquire a substantially higher rate than the overall rate of the land regarded as a single unit. In other words, the loss which the owner of land suffers by reservation of parts thereof for roads is reflected in the higher price for the formed plots. If the claimant was unwilling to provide such amenities, as he claims he was unwilling to, we think that it would have been impossible for him to get any substantial number of offers for purchasing the lands. It is in evidence that even though the claimant had laid out the plots in 1949, within two years not more than 2 plots were sold. Purchasers who purchase this land at rates varying between Rs. 27 and Rs. 45 per sq. yard would, it appears not be forth-

coming and a large number of plots may remain undisposed of, if the amenities of having well-laid-out roads of reasonable width and provision for electrical, drainage and water connections were not made. Evidently the land reserved for roads cannot be disposed of and it will have apart from the plots no market value. We are, therefore, of the view that the learned Judge in the Court below was in error in allowing to the claimant additional value for the land reserved for the roads at the rate of 25 per cent. of the market value of the hypothetical plots laid out in the land.

In support of his contention that even when valuation of land is to be made as the basis of a hypothetical building scheme, the road width has to be assigned some substantial market value, Mr. Joshi relied upon *The Trustees for the Improvement of the City of Bombay v. Karsondas*¹, and *Secy. of State v. Dulai Bala Debi*². In our judgment these cases do not support the contention advanced by Mr. Joshi. In *Karsondas Naikhu's* case, an appeal was filed against the decision of a Special Tribunal under the City of Bombay Improvement Trust Act. In that case, the Tribunal appointed under s. 48(3) of Bombay Act IV of 1898 adopted an overall rate in respect of the entire area of land at Rs. 15-11-0 per sq. yard, and that overall area included the area which was to be set apart for the roads. It was in that context that Mr. Justice Batchelor, who delivered the judgment of the Court, observed (p. 31):

"...when once you have adopted the general principle of a sale of the land split up into parcels suitable for building, it appears not only unnecessary but inappropriate to make a special deduction on account of the small area marked off for the roadway."

That was a case in which the value of the land as a single unit was taken and deduction for expenses for providing roads was sought to be made. The Court in that case did not assign value to individual plots but took the overall rate of Rs. 15-11-0 per sq. yard. If in the overall value the reduction in the value of the land to be reserved for road width was reflected, it is, with respect, right to hold that it would be "unnecessary and inappropriate to make a special deduction on account of the area marked off" for the road. But that is not the case in the present proceedings. Here we proceed to assess the value of the land by valuing the plots separately, and in the value of the plot so assessed is reflected the value of the amenity, namely, that adjacent thereto is a laid-out road of width of 25 feet.

The Calcutta High Court judgment in *Dulai Bala's* case has, in our judgment, no bearing on this particular question. In that case a building abutting on a common passage and with an interest in the passage was acquired under the Land Acquisition Act and subsequently there was another proceeding for acquisition of the land which was used for passage for that building. In valuing the building the existence of the passage which gave access to the building was taken into consideration and increased value was allowed having regard to the existence of the passage as a means of access. The Court found that the entire proprietary interest of the owners of the land in the common passage including all the interest in the subsoil was not acquired. The Court was, therefore, of the view that because the adjacent building had received a higher value on account of the passage, the land covered by the passage did not lose its value to the owners. We are unable to appreciate how that case can have any application to this case. Admittedly the building with appurtenant right of passage and the land of the passage were sought to be acquired in two separate acquisition proceedings; and the Court held that the claimant was entitled to receive the separate values of the two components and the fact that in valuing the building the value of the right of passage was taken into account did not justify the view that all the rights in the land of the passage were acquired in the earlier proceeding. We are in the present case concerned to determine the value of the land laid-out in the most lucrative manner for the benefit of the claimant. In laying out the land in that man-

¹ (1908) I. L. R. 33 Bom. 28, s.c. 10 Bom. L. R. 688.

² [1938] A. L. R. Cal. 75.

ner it would be unfair to award to the claimant the value of the separate plots, in which is fully reflected the value of the additional amenity of having laid-out roads, and also separately to pay to the claimant the value of the land reserved for the road. In effect, it will amount to paying compensation twice over for the same land.

On the view taken by us, the claimant's claim for additional compensation for the area of the road cannot be sustained.

[The rest of the judgment is not material to the report.]

Appeal allowed.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.
SHIRIN VISHNU KIRPALANI v. VISHNU alias MANEK HIRANAND KIRPALANI.*

Decree—Antedating of,—Power of High Court in its appellate jurisdiction to antedate decree passed by it—Petition for judicial separation filed under Hindu Marriage Act, 1955, dismissed by trial Court—High Court on appeal passing decree for judicial separation—When open to High Court to antedate its decree so that it could bear the date of the decree of the trial Court—Civil Procedure Code (Act V of 1908), O. XLI, rr. 35, 33—Bombay High Court Appellate Side Rules, r. 161.

A petition filed before the City Civil Court for judicial separation under the Hindu Marriage Act, 1955, was dismissed, and the High Court, on appeal, set aside the order of the trial Court and passed a decree for judicial separation. On the question whether it was open to the High Court to antedate the decree passed by it and direct that it should bear the same date as the decree passed by the trial Court:—

Held, that the specific period of two years laid down in s. 13(1)(viii) of the Act is the period commencing after a decree is passed by a competent Court,

that in the present case it could not be said that any decree for judicial separation was passed by the trial Court which would start the period laid down in s. 13(1)(viii),

that the period in this case under the section only commenced after the decree was pronounced by the High Court, and

that, therefore, even assuming that the High Court had the power to so antedate the decree, the High Court could not, in the instant case, exercise it, in view of the law.

The power of the High Court in its appellate jurisdiction is not fettered by the mandatory provisions of O. XLI, r. 35, of the Civil Procedure Code, 1908.

The Appellate Side Judges of the High Court can direct the Registrar to draw up the decree and either antedate it or post-date it.

Borthwick v. Elderslie Steamship Company (No. 2),¹ referred to.

ONE Vishnu H. Kirpalani on November 14, 1956, filed a petition in the Bombay City Civil Court for restitution of conjugal rights against his wife Shirin. On December 3, 1956, Shirin filed a petition against her husband Vishnu for judicial separation on the ground of cruelty. Both the petitions were heard together and the Judge of the City Civil Court on August 27, 1957, dismissed the wife's petition on the ground that she had not succeeded in establishing the case of cruelty and also dismissed the husband's petition as he was of opinion that the conduct of the husband was such as justified the wife in not going back to live with him. Both Vishnu and Shirin appealed to the High Court. The appeal came on for hearing before Chagla C.J. and S. T. Desai J., who, on August 11, 1958, passed a decree for judicial separation in favour of the wife, holding that on the evidence the wife had established her case of legal cruelty and that the case came within the ambit of s. 10(2)(b) of the Hindu Marriage Act, 1955. Accordingly, their Lordships confirmed the order passed by the trial Judge in the husband's petition.

*Decided, August 11/12, 1958. First Appeal M. J. Petition No. 2495 of 1956 (with 2825 of No. 740 of 1957, from the orders of M. A. 1956.)
Sakhardande, Judge, City Civil Court, in 1 [1956] 2 K. B. 516.

It was then urged by counsel appearing on both the sides that the decree passed by their Lordships in appeal should be antedated so that the decree should bear the same date as the decree passed by the trial Court.

H. M. Seervai, Advocate General, *K. J. Khandalavala*, *N. A. Palkhivala* and *N. S. Phatarphekar*, with *Crawford Bayley & Co.*, for the appellant (wife).

* *M. P. Laud*, with *Kanga & Co.*, for the respondent (husband).

CHAGLA C.J. A very interesting point has been argued before us as to the date which this decree which we have passed in appeal shall bear. Both the Advocate General and Mr. Laud request us to antedate the decree and to direct that this decree shall bear the same date as the decree passed by the trial Court. What is urged is that under O. XLI, r. 33, of the Code, the powers of the appellate Court are very wide and the appellate Court has the power to pass any decree and make any order which ought to have been passed or made, and it is pointed out that what we are doing by this appeal is to decide that the trial Court should have passed a decree for judicial separation in favour of the wife. If that is our view, there is no reason why we should not date the decree as the decree originally passed by the City Civil Court.

First turning to the question of the power of the High Court to antedate the decree, the first provision which might be looked at is O. XX, r. 7. That rule deals with judgment in the trial Court and the provision is that the decree shall bear the date the day on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree. Now, this rule does not apply to High Courts in the exercise of their ordinary or extraordinary civil jurisdiction, and as a matter of fact we on the Original Side have framed a rule, r. 287, which provides that by special leave of the Judge a decree may be antedated or post-dated. Therefore, the Judges on the Original Side undoubtedly possess the power and the jurisdiction to antedate or post-date a decree. Turning to the provision of decrees in appeal, the relevant provision in the Code is O. XLI, r. 35. Sub-rule (1) of that rule provides:

"The decree of the Appellate Court shall bear date the day on which the judgment was pronounced."

This rule does not apply to the High Court on its appellate jurisdiction. That is clear from the provisions of O. XLIX, r. 3, which exempts this rule from application to the High Court in the exercise of its appellate jurisdiction. Therefore, as the Code stands, it seems to be clear that the High Court exercising its appellate jurisdiction is not bound by the mandatory provision of O. XLI, r. 35. Although the High Court has framed a rule on the Original Side to which reference has just been made, there is no such rule framed on the Appellate Side. But in the absence of any such rule, it seems that the power of the High Court in its appellate jurisdiction is not fettered by the mandatory provisions of O. XLI, r. 35. The Advocate General drew our attention to a rule which we have framed on the Appellate Side which has some bearing on the question, and that is r. 161 and that rule provides that the decree shall bear the date on which the judgment of the High Court was pronounced. This rule is in a Chapter which bears the heading "Rules for the guidance of the Registrar's office", and it seems that inasmuch as these are not rules framed by the High Court under any of the provisions of the Civil Procedure Code, it would be open to the Judges sitting on the Appellate Side to direct in a particular case that the direction given to the Registrar under r. 161 should not be carried out. In other words, the Appellate Side Judges here could direct the Registrar to draw up the decree and either antedate it or post-date it.

In this connection, it will be perhaps interesting and also instructive to look at what the position in England is. O. XLI, r. 3 deals with entry of judgment and that rule provides:

"Where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or Judge shall otherwise order, and the judgment shall take effect from that date: provided that by special leave of the Court or a Judge a judgment may be ante-dated or post-dated."

Therefore, the Rules of the Supreme Court expressly confer upon the Judge the power to ante-date or post-date the judgment, and that power we have taken to ourselves on the Original Side by r. 287. Then we come to the powers of the appellate Court in England. There is no express provision with regard to the power of the appellate Court, but there is high authority for the proposition that the appellate Court has also the power to ante-date and presumably post-date its judgment. The Annual Practice 1957 at page 1263 cites the judgment of Lord Justice Romer in *Borthwick v. Elderslie Steamship Company* (No. 2),¹ which states (p. 521):

"...the judgment [of the Court of Appeal] must be treated as of the date on which it was given in the Court of Appeal, subject to the right of that Court to antedate its judgment. That right should...be exercised with caution."

Now, it is a matter for consideration whether we should not have a rule on the Appellate Side similar to r. 287 on the Original Side. It is perfectly true that such a power should be exercised sparingly and with caution, but there is no reason why, if a Judge on the Original Side is armed with that power, the Judges sitting in appeal in the High Court should not have similar power. But assuming we have the power, the question is whether that power can be exercised in this particular case, and for that purpose we must first turn to the Act which we are interpreting and administering and that is the Hindu Marriage Act, 1955. Section 13 deals with the grounds of divorce and two material provisions may be looked at. One is cl. (viii) and the other is cl. (ix). Clause (viii) says: "the other party has not resumed cohabitation for a space of two years or upwards, after the passing of a decree for judicial separation against that party;" and cl. (ix) says: "has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree." Therefore, before the right can accrue to a party seeking divorce in these two cases, there must be in one case a failure to resume cohabitation for a space of two years after the passing of the decree for judicial separation, and in the second case there must be a failure to comply with the decree for restitution of conjugal rights for a similar period. Now, can it possibly be said, if we ante-date the decree to the date the City Civil Court passed its decree, that there was a failure on the part of one or the other party to resume cohabitation after the passing of the decree and equally so in the case of a decree for restitution of conjugal rights that there was a failure to comply with that decree for a period of two years after it was passed? The scheme underlying these two clauses of s. 13(1) seems to us to be clear. The Legislature was anxious that marriages should not be easily or lightly dissolved, and that even after decrees for restitution of conjugal rights and judicial separation were passed, *locus penitentia* should be given to the married couple to try and come to a settlement. If that was the policy underlying the two clauses, it is clear that the specific period of two years laid down by the Legislature is the period commencing after a decree is passed by a competent Court. It cannot possibly be said that any decree for judicial separation was passed by the City Civil Court which would start the period laid down by the Legislature. That period in this case under s. 13(1)(viii) can only commence after the decree has been pronounced by this Court. Under the circumstances, assuming we have the power, we do not think this is a case where we should exercise it or even we could exercise it in view of the law.

The result, therefore, is that the decree which we have passed yesterday will bear yesterday's date as provided by r. 161 of the Appellate Side Rules.

Order accordingly.

¹ [1905] 2 K. B. 519.

Before Mr. Justice Gokhale and Mr. Justice Patel.

ULHASIBAI JETHMAL BAGMAR v. BHAGCHAND ALIAS
BHAGWANDAS NEMICHAND MARWADI.*

Indian Partnership Act (IX of 1932), Secs. 14, 16, 50—Indian Trusts Act (II of 1882), Sec. 88, III. (d)—Partnership consisting of two partners dissolved by notice given by partner B to partner P—Notice stating that out of entire amount of profit of partnership lying with P, half to be given to B within four days and that B wishing to break off relations with P—P subsequently purchasing property out of amount of profit belonging to partnership—Whether such property partnership asset and B entitled to a share in it—Benami transaction—Burden of proof—Whether onus of proof on party alleging that transaction is benami—Burden of proof in such case how discharged.

A partnership consisting of two partners B and P was dissolved by a notice given by B to P on September 28, 1945, which stated that till the date of the notice a net profit of Rs. 20,000 was made by the partnership business and that the amount of profit was with P, that out of this amount P should pay half of it to B within four days of the receipt of the notice and that henceforth B wished to break off all relations with P. On April 9, 1947, P purchased certain property for Rs. 10,500. On the question whether the property became a partnership asset so as to give B a share therein on the assumption that P had paid the purchase price of the property out of the amount of profit in his hands belonging to the partnership:—

Held, that as the partnership in the case was dissolved in 1945 and as B had broken off all relations with P and claimed an eight anna share in the profits which he alleged were in the hands of P, the purchase of the property could not be regarded as a transaction of the partnership, in the circumstances of the case, so as to give B a share therein on the ground that he was a partner.

Even during the subsistence of a partnership, if property is purchased out of partnership assets, it does not necessarily become partnership property, and where property is purchased not for the purpose of business or for the benefit of the firm the question as to the ownership of the property must depend upon the facts and circumstances of the particular case.

*Sudarsanam Maistri v. Narastmhulu Maistri and Adarji Mancherji Dalal, In re*¹ distinguished.

Bank of England Case,² *Trimble v. Goldberg*,³ *Debi Parshad v. Jai Ram Dass*⁴ and *Ramlinga Reddy v. Ramlingam Setty*,⁵ referred to.

The burden of proof that a transaction is a benami transaction is on the party who alleges that the transaction is benami and the burden must be strictly discharged. In order to succeed the party so alleging must put the Court in possession of legal and satisfactory evidence and it will not suffice to point to matters of suspicion or even to plausible conjecture.

De Silva v. De Silva,⁶ *Ramabai v. Ramchandra*⁷ and *Sreesamchunder Dev v. Gopaul Chunder Chuckerbutty*,⁸ referred to.

THE plaintiff's (Ulhasibai's) case was that she had purchased two houses, City Survey No. 90 and House No. 66 in Peth Ganj at Poona from one Premchand Maganlal under a sale-deed dated April 9, 1947, for a consideration of Rs. 10,500, this consideration being made up of Rs. 5,000 in respect of a prior mortgage on the two houses taken in the name of Sundrabai, the daughter of the plaintiff, and Rs. 5,500 paid in cash. According to the plaintiff, the prior mortgage, dated July 6, 1946, was taken in the name of Sundrabai because there was a dispute pending in the Civil Court at Sasvad between the plaintiff's husband's *bhaubands* and the plaintiff. After the plaintiff's purchase of the

*Decided, August 20/21, 1958. First Appeal No. 5 of 1955 (with First Appeals Nos. 356 and 357 of 1956), from the order passed by R. M. Kulkarni, Joint Civil Judge, Senior Division, Poona, in Special Civil Suit No. 49 of 1950.

¹ (1902) 1 L. L. R. 25 Mad. 149.

² (1930) 1 L. L. R. 55 Bom. 795, s.c. 33 Bom. L. R. 576.

³ (1861) 3 De G. F. & J. 645.

⁴ [1906] A. C. 494.

⁵ [1952] A. I. R. Puj. 284.

⁶ [1938] A. I. R. Mad. 929.

⁷ (1903) 5 Bom. L. R. 784.

⁸ (1905) 7 Bom. L. R. 293.

⁹ (1866) 11 M. L. A. 28.

two houses on April 9, 1947, she obtained a release deed from Sundrabai on September 18, 1948, in respect of the mortgage which was executed by Premchand in her favour, and it was stated in that release deed that the original amount of the mortgage, Rs. 5,000, belonged to the plaintiff. According to the plaintiff, therefore, she became the owner of these two houses. One Bhagchand (defendant) was in possession of some portion of house No. 90 as a tenant of Premchand under a rent-note dated April 12, 1946, but the remaining portion was in the possession of Premchand and it contained his goods. According to the plaintiff, the defendant purchased these goods from Premchand and these goods were, therefore, removed from the premises and thereafter the plaintiff put her lock to that portion and took actual possession of the said portion. It is the plaintiff's case that on or about June 12, 1947, the defendant removed the plaintiff's lock on that portion and took forcible possession thereof as a trespasser. It was also the plaintiff's case that after the purchase the defendant had agreed to pay rent to the plaintiff for the portion occupied by him as a tenant, but when defendant was asked to pay the rent he denied the ownership of plaintiff regarding the house. The plaintiff filed the present suit (Special Suit No. 49 of 1950) on February 23, 1950, against the defendant as a trespasser for recovering possession of house No. 90 at Peth Ganj, Poona, from the defendant and meane profits. The defendant was the son of one Nemichand, who had two sons—Punamchand and the defendant. Punamchand was married to plaintiff's daughter Sundrabai some time in 1935. Nemichand's family originally came from Chikalthan, Taluka Karmala, District Sholapur, and first Punamchand and thereafter the defendant came to Poona and started business. The principal defence of the defendant to the plaintiff's suit was that the plaintiff was not the owner of the suit house at all, but that the transaction of sale in her favour, dated April 9, 1947, was brought about with the funds of the ownership of defendant and his brother Punamchand, who is the plaintiff's son-in-law, and even the moneys advanced to the vendor Premchand on the mortgage did not belong to plaintiff nor to Sundrabai. According to defendant, the transaction of mortgage of July 6, 1946, and that of sale of April 9, 1947, were made *benami* in the name of the plaintiff's daughter Sundrabai and the plaintiff respectively. According to the defendant, it was settled between him and his brother Punamchand that the latter should first take both the houses in mortgage for Rs. 5,000 on July 6, 1946, and thereafter Punamchand purchased both the houses on April 9, 1947, and both the transactions were made with the funds of the ownership of defendant and his brother, for the benefit of the defendant and his brother Punamchand, and neither the plaintiff nor her daughter Sundrabai had any connection with the amounts of considerations of both the transactions. According to the defendant, after this purchase, it was subsequently settled between the plaintiff and his brother that the defendant alone should take the suit house No. 90 and that the defendant's brother Punamchand alone should take house No. 66, and in pursuance of this agreement the defendant was making *vakiyat* of the suit property as exclusive owner. It is the defendant's allegation that his brother subsequently changed his mind with the intention of appropriating both the houses to himself and put forward the plaintiff to file the present false and vexatious suit. The defendant denied any knowledge about the release deed passed by Sundrabai on September 18, 1948. The defendant denied the plaintiff's contention as to possession of the property and stated that the plaintiff's allegations, that Premchand had asked the defendant to attorn to the plaintiff and that the defendant had agreed to pay rent to the plaintiff, were fraudulent and false. He also stated that plaintiff's financial position was from the beginning very bad and her allegation that she purchased the houses for Rs. 10,500 which were of her ownership, was not true. One of the contentions of the defendant was that he himself had filed Suit No. 1099 of 1948 on May 31, 1948, against his brother and the present plaintiff and others, in which he had asked for accounts from Punamchand of several businesses and also sought a declaration that City Survey No. 90 of Poona belonged exclusively to him and that the defendants

had no right or interest therein; and it was his contention that the present suit could not proceed and should be stayed till the final disposal of Suit No. 1099 of 1948. That suit was decreed in favour of the defendant.

On September 27, 1948, Punamchand filed Regular Civil Suit No. 2163 of 1948 against the defendant to obtain dissolution and accounts of the grocery business run in partnership between him and defendant in house No. 90 at Peth Ganj, Poona, and that suit was dismissed principally on the ground that the suit was not in time, as the firm had been dissolved on August 25, 1945, and the suit was filed on September 27, 1948.

All these three suits were heard together by consent of parties as companion suits.

The trial Court came to the conclusion that the plaintiff failed to prove her title to the suit property and held that the defendant had proved that the suit property was purchased *benami* in the name of the plaintiff by the defendant and his brother Punamchand with their funds. It also held that the defendant had not proved that he had become the exclusive owner of house No. 90. The finding of the learned trial Judge in the suit for accounts filed by the defendant was that the defendant had failed to prove that as a result of the compromise Punamchand had agreed with him to purchase a house for their joint use from the joint family assets in his hands. He, however, held that Punamchand had purchased the houses covered by the mortgage-deed and the sale-deed *benami* with funds belonging to both the brothers but not with joint family assets or purporting to act for plaintiff's benefit. He also held that the defendant failed to prove the oral agreement by which house No. 90 at Peth Ganj was exclusively allotted to his share and he held that the defendant was entitled to get a declaration that he had a partner's interest in the two house properties.

First Appeal No. 5 of 1955 was filed by the plaintiff and First Appeals Nos. 356 and 357 were filed by Punamchand. The appeals were heard together.

B. B. Kotwal, for the appellant in all three appeals.

B. A. Jahagirdar, with *Y. V. Chandrachud* and *M. I. Patel*, for respondent in F. A. No. 5 of 1955 and F. A. No. 356 of 1956.

B. A. Jahagirdar, with *Y. V. Chandrachud* and *M. I. Patel*, for respondent No. 1 in F. A. No. 357 of 1956.

GOKHALE J. [His Lordship, after stating the facts of the case and dealing with points not material to this report, proceeded.] The question is whether on this oral and documentary evidence on the record the finding of the trial Court that the purchase of the two houses was *benami* in the name of the plaintiff can be said to be correct. Undoubtedly, the onus of proof that the transaction in suit was a *benami* transaction was on the defendant Bhagchand. It was his case that the mortgage deed was taken *benami* in the name of Sundrabai and the sale deed was also taken *benami* in the name of the plaintiff with a view to preventing any trouble from the Income-tax Department and that this was done in pursuance of an agreement between the two brothers. The case of such an agreement has been held to be not established and the motive which has been put forth in support of the *benami* transaction also does not seem to be borne out. On the other hand, plaintiff's case that the mortgage was taken *benami* in the name of Sundrabai seems to be justified in view of the fact that her son was a lunatic and there was a suit brought against her by her husband's *bhaubands* for partition and possession of house property and lands in her possession at the time the mortgage transaction was entered into. The documentary evidence also shows that the two houses came to be entered in her name and it is from her custody that the relevant documents of title have been produced in this suit. But the important question is whether defendant proves that the source of money for the mortgage as well as the sale-deed proceeded from the two brothers or whether plaintiff paid the moneys in respect of both the mortgage as well as the sale transaction. It is an accepted rule of guidance in reference to

benami transactions to see from what source the purchase money has proceeded; and it must be shown that the person from whom the money has gone to effect the purchase furnished it as a purchaser. The *benami* character of a transaction must however be legally established. See *De Silva v. De Silva*.¹ In *Ramabai v. Ramchandra*² it was held by this Court that the burden of proof is on the party who seeks to give to a purchase a different meaning and complexion from that which it bears on its face and the burden must be strictly discharged; in other words, in order to succeed the party alleging that the transaction is *benami*, must put the Court in possession of legal and satisfactory evidence and it will not suffice to point to matters of suspicion or even to plausible conjecture. See also *Sreemanchunder Dev v. Gopaul Chunder Chuckerbutty*.³ On the evidence we have come to the conclusion that the financial resources of the plaintiff have not been established to be poor as was alleged by the defendant. The story of the plaintiff as regards the suit mortgage and the sale transactions is supported by oral as well as documentary evidence. The relevant account books of the businesses carried on by the brothers have not been produced and we do not accept defendant's story, stated for the first time in his evidence, that the account books were taken away by Punamchand from house No. 90 in August 1945. It is true that it has been shown from the certified copies of the savings and current accounts in the Bank of Poona standing in the name of Punamchand that Rs. 5,000 were withdrawn by Punamchand about 4 days before the date of the mortgage and an amount of Rs. 3,400 was also withdrawn by Punamchand from his current account about a few days prior to the sale-deed. At the most, these two withdrawals might raise suspicion, but for the reasons which I have already stated, we are not prepared to hold that these withdrawals would support defendant's version that the mortgage and the sale transactions were effected *benami* to avoid trouble from the income-tax authorities. The result is that we must differ from the view taken by the trial Court and hold that defendant has failed to prove that the suit property was purchased *benami* in the name of the plaintiff by defendant and his brother Punamchand with funds belonging to both.

Mr. Kotwal, learned advocate appearing on behalf of the appellant Ulhasibai, has also raised an alternative contention. He says that assuming it is held that the moneys in respect of the suit mortgage and sale transactions did not belong to Ulhasibai but were supplied by Punamchand, he contends that even then the house in suit will not become a partnership asset as to give defendant a share therein. This is undoubtedly a new point raised by Mr. Kotwal in this appeal, but as it is a pure point of law we have allowed both Mr. Kotwal and Mr. Jahagirdar to argue that point. As I have already stated, defendant Bhagchand resisted the present suit by his written statement on the ground that the mortgage as well as the purchase of the house property was made with the aid of funds belonging to Punamchand and himself. There is no reference in the written statement to any partnership assets at all. In exh. 69, the notice which Bhagchand gave to Punamchand on September 26, 1945, it was stated that from the beginning of the business to the date of the notice a net profit of Rs. 20,000 was made from the businesses after deducting all expenses and that all the amount of profit was with Punamchand. The notice further informed Punamchand that out of the amount of Rs. 20,000, which was with Punamchand, he should pay half of it, i.e., Rs. 10,000, to Bhagchand within four days from the receipt of the notice and it was further stated that henceforth Bhagchand wished to break off all relations with Punamchand. This notice, therefore, in effect dissolved the partnership between the two brothers, and even on this version of defendant, Punamchand had a large amount of profits in his hands in which he had only an eight-anna share and the argument of Mr. Kotwal is that in these circumstances even assuming that Punamchand had paid, out of the profits in his hands belonging to the partnership, the consideration for the mortgage and thereafter for the sale, it could not be held that defen-

¹ (1903) 5 Bom. L. R. 784.
² (1905) 7 Bom. L. R. 293.

³ (1886) 11 M. I. A. 29.

dant had any share in the house. Mr. Jahagirdar, however, relied on s. 14 of the Partnership Act in support of his contention that in such a case the house would be the property of the partnership. Section 14 of the Partnership Act reads as follows:

"Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm."

The first paragraph of this section shows what would be the property of a firm. All property and rights and interest in property which have been brought by the partners into the stock of the firm or which have been acquired or purchased by or for the firm subsequently, will be *prima facie* regarded as the property of the firm. The second limb of the section provides for a rule of presumption and under that rule, property and rights and interests in property acquired with money belonging to the firm will be deemed to have been acquired for the firm unless a contrary intention appears. In our opinion, this section would not be applicable to the facts of the present case. There is no dispute that the partnership between the two brothers was dissolved in 1945 and the suit transactions were effected after the dissolution. It is nobody's case that the two houses were purchased for the purpose of any business or even for the benefit of the firm. The case of the defendant is that the property was purchased for the benefit of the two brothers and they became joint owners. Even during the subsistence of a partnership, if property is purchased out of partnership assets, it does not necessarily become partnership property and where property is purchased not for the purpose of business or for the benefit of the firm the question as to the ownership of the property must depend upon the facts and circumstances of the particular case. In this connection the following observations of Lord Justice Turner in what is known as the *Bank of England Case*¹ are relevant (pp. 658-659):—

"...It cannot I think be laid down as an universal rule, that when lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate of the partners. There are different purposes for which the lands may have been bought. They may have been bought for the purpose of being used and employed in the trade, as the *Saracen's Head* estate appears in this case to have been, or they may have been bought, not for the purpose of being used or employed in the trade, but for the purpose of a mere speculation on account of the partnership, for I know nothing which can prevent partners from speculating in land, if they think proper to do so, as freely as they may speculate in mere articles of commerce, though foreign to their trade. Again, they may have been bought without reference to the purposes of the trade or the benefit of the partnership, with the intention of withdrawing from the trade the amount employed in the purchase, and converting that amount into separate property of the partners, or they may have been bought on account of one or more of the partners, he or they becoming debtors to the partnership for the amount laid out in the purchase. The form of the conveyance in these cases does not settle the question, for in whatever form the conveyance may be, there may be a trust of the land which may follow the money, liable however, as other trusts of the like nature are, to be rebutted by evidence. Where land purchased is not merely paid for out of the partnership assets, but is bought for the purpose of being used and employed in the partnership trade, it is scarcely possible to conceive a case in which there could be sufficient evidence to rebut the trust, and accordingly in those cases we find the decisions almost, if not entirely, uniform, that the purchased land forms part of the joint estate of the partnership; but where the land is not purchased for those purposes, the question becomes more open, and we have to consider whether the circumstances attending the purchase show that it was made on account of the partnership individually, or of any one or more of them in whose name the land may have been bought."

1 (1861) 3 De G. F. & J. 645.

In *Trimble v. Goldberg*,¹ two partners of a partnership of three which was formed to purchase and resale certain properties of a gentleman called Hallard, consisting of 5,500 shares in a company called Sigma Syndicate and of stands or plots of land, purchased other stands belonging to the Syndicate and made profits, and the question arose whether these other stands purchased by the two partners were partnership property in which their third partner was entitled to benefit, and the Privy Council held that as the purchase was not within the scope of the partnership and as the subject of the purchase was not a part of the business of the partnership, or an undertaking in rivalry with the partnership, or indeed connected with it in any proper sense, the property could not be regarded as partnership property. Mr. Jahagirdar, on the other hand, in support of his argument that the suit property must be considered to be partnership property, relied on a decision of the Madras High Court in *Sudarsanam Maistri v. Narasimhulu Maistri*.² There the Court was concerned with property acquired from the funds of a business which had been carried on jointly by the partners and continued by one of the partners until the institution of the suit, and it was held that as the lands and houses were bought in the name of the partner and paid for by the firm or from the profits of the partnership business, they were *prima facie* partnership property in the absence of an allegation and proof that from time to time, portions of the assets of the partnership were, by agreement of the partners, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners. This case, in our opinion, can be distinguished on its own facts. There, the property had been acquired out of funds of the business which had continued till the institution of the suit for account and partition of the property and in the absence of any contrary intention was held to have been bought on account of the firm. In the present case, admittedly a dissolution had taken place between the two brothers since 1945. Mr. Jahagirdar also relied on *Adarji Mancherji Dalal, In re*³ in which it was held that no partner has any beneficial interest on his own account in any particular estate or property of the partnership within the meaning of s. 250 of the Indian Succession Act, 1925, until the partnership is wound up and its accounts taken; and Mr. Jahagirdar's contention is that in respect of the dissolution of the present partnership the moneys in the hands of Punamchand continued to be partnership assets in which he had no beneficial interest of his own. Now, this case again can be distinguished because the partnership properties in the case consisted of certain insurance policies, the premia in respect of which were admittedly paid for from the assets of the partnership and not from the individual account of the partners and were described and treated by the partners as partnership property. As I have already stated, in the present case, in the defendant's notice dated September 26, 1945, given to Punamchand, the defendant had claimed a definite share of 8 annas in the profits which he claimed were in the hands of Punamchand and stated further that he had broken off all relations with Punamchand. It cannot, therefore, be said that Punamchand had no beneficial interest in the properties of the partnership. As no accounts have been produced, it is difficult to say that Punamchand paid more than the amount of the profits which would have fallen to his share at the time of dissolution even if it was he who paid the consideration amount in respect of the mortgage and the sale transactions.

Then Mr. Jahagirdar relied on a passage from Lindley on Partnership at page 391 wherein it is stated:

"Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound, in all transactions affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people and in which the firm is in honour and conscience entitled to participate."

¹ [1906] A. C. 494.

² (1902) I. L. R. 25 Mad. 149.

³ (1920) I. L. R. 55 Bom. 795, a.c. 33 Bom. L. R. 576. •

This principle, as has been pointed out by the learned author, was established by numerous decisions before the English Partnership Act, 1890, and the result of these decisions was incorporated in ss. 29 and 30 of the said Act. Sections 16 and 50 of the Indian Partnership Act would correspond to ss. 29 and 30 of the English Partnership Act. Section 16 provides:

"Subject to contract between the partners—

(a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm;

(b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business."

It is difficult to appreciate how s. 16 would assist Mr. Jahagirdar. Mr. Jahagirdar himself does not rely on s. 16, but on s. 50 of the Partnership Act, which would correspond to s. 29(2) of the English Partnership Act. Section 50 reads thus:—

"Subject to contract between the partners, the provisions of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up."

We are not concerned with the proviso to this section. This section applies to personal profits made by a surviving partner or by the representative of a deceased partner out of transactions of partnership undertaken after the dissolution of the firm on account of the death of a partner. In our opinion, the principle of this section cannot apply to the facts of the present case. The partnership in the present case was dissolved in 1945 and defendant had broken off all relations with Punamchand and claimed an eight-anna share in the profits which he alleged were in the hands of his brother Punamchand. The purchase of the houses can in no sense be regarded as a transaction of the partnership in these circumstances.

Mr. Jahagirdar further relied on s. 88 of the Indian Trusts Act. That section deals with the subject of an advantage gained by a fiduciary and it provides:

"Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

Mr. Jahagirdar's client has not made any allegations whatever to bring the present case within the ambit of this section. It is not the allegation of the defendant that Punamchand purchased the property by availing himself of his status as a partner. On the other hand, his case was that it was agreed between the brothers that the properties were to be purchased from out of joint funds for the benefit of both the brothers. Mr. Jahagirdar also relied on ill. (d) to s. 88 which states:

"A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership."

In our opinion, this Illustration cannot go beyond the scope of the section itself; and before a partner can lay claim to any purchase made by another partner the conditions laid down in the section will have to be alleged and proved.

Mr. Jahagirdar has then relied on a decision of the East Punjab High Court in *Debi Parshad v. Jai Ram Dass*,¹ where it was held that if one partner obtains in his name, either during the partnership or before its assets have been sold, a renewal of a lease of the partnership property, he will not be allowed to treat the renewed lease as his own and as one in which his co-partners have

no interest. In that case, the lease itself was the subject-matter of the suit and its renewal was obtained by one partner in his own name. Under these circumstances, the Court naturally held that that partner could not be allowed to treat the renewed lease as his own to the exclusion of the other partner. On the other hand, Mr. Kotwal has relied on a decision of the Madras High Court in *Ramalinga Reddy v. Ramalingam Setty*¹ in which it was held that

"In the case of partners, the Indian Legislature has nowhere indicated an intention to enact an absolute rule of law or an irrebuttable presumption that renewal of lease obtained by one of them enures for benefit of the other. Except in cases otherwise specially provided for by statute, a constructive trust can be held to arise only if the conditions of s. 88 or s. 90, Trusts Act, are satisfied. In other words it must be shown that one of the partners has 'availed himself of his character' to gain an advantage or that the partner has gained an advantage by entering into a transaction in which 'his own interests are or may be adverse' to those of the other partners."

In our opinion, this case supports the contention of Mr. Kotwal. As I have already stated, it is not alleged by the defendant that this purchase was made by Punamechand by availing himself of his character as a partner and gaining any pecuniary advantage to himself. The accounts of the partnership have not been produced and, in our judgment, the documentary evidence would indicate that the account books were not taken by Punamechand, as alleged by defendant, but must have been with the defendant himself. It is significant that defendant has produced exh. 195, a post-card which Punamechand wrote to Nemichand, his father, and exh. 196 which one Subhagchand Ranka addressed to Punamechand. The grievance of Punamechand that defendant himself was in possession of some of the relevant documents seems, therefore, to be not without force.

Even assuming, therefore, that Punamechand utilised a part of the profits of the partnership in his hands for the purchase of the properties, it cannot be held that defendant thereby gets any interest in the two houses on the ground that he was a partner.

[The rest of the judgment is not material to this report.]

APPEAL FROM ORIGINAL CIVIL.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.

JIVANLAL CHIMANLAL MEHTA v. PRAMODCHANDRA
CHIMANLAL MODY.*

Presidency-Towns Insolvency Act (III of 1909), Sec. 9(e)—Civil Procedure Code (Act V of 1908), O. XXI, r. 92—Provincial Insolvency Act (V of 1920), Sec. 6(e)—Act of insolvency when committed under s. 9(e) of Act III of 1909—Whether act of insolvency committed only on sale being confirmed under O. XXI, r. 92, of Code.

For the commission of an act of insolvency under s. 9(e) of the Presidency-Towns Insolvency Act, 1909, it is enough if the property is sold by public auction and knocked down to the highest bidder and it is not necessary that the sale should have been confirmed under O. XXI, r. 92, of the Civil Procedure Code, 1908.

Venkatakrishnayya v. Malakondayya,³ agreed with.

Kanat Lal v. Tinkari De,⁴ *Firm Phul Chand v. Aggarwal*,⁵ and *Ex parte Villars*: In re Rogers,⁶ referred to.

ONE Jivanlal Chimanal Mehta (debtor) was a partner in the firm of Messrs. C. Jivanlal and Co., the other partners being Harjivan Keshavji Shah, Hasmukhlal Jivanlal Mehta and Chimanal Trikamlal Mody. On December 22, 1955, a decree was passed by the Bombay City Civil Court at Bombay against the firm of C. Jivanlal and Co., in favour of Balubhai Vadilal and Co., for the sum of Rs. 11,444. On November 28, 1956, Balubhai Vadilal and Co., applied

1 [1938] A. I. R. Mad. 929.

*Decided, August 26, 1958. O. C. J. Appeal

No. 27 of 1958: Insolvency No. 129 of 1957.

2 [1942] A. I. R. Mad. 306.

3 [1933] A. I. R. Cal. 564.

4 [1938] A. I. R. Lah. 814.

5 (1874) 9 Ch. App. 432.

for and obtained a warrant of attachment, attaching the right, title and interest of the debtor in the immoveable property belonging to him, known as "Hill View", situate at 9, Juhu Lane, Ghodbunder Road, Andheri, Greater Bombay, in execution of the decree. The attachment in enforcement of the warrant of attachment was levied by the Sheriff of Bombay on November 29, 1956. On March 13, 1957, the judgment-creditors applied for and obtained a warrant for the sale by public auction of the right, title and interest of the debtor in the property. On October 11, 1957, the Sheriff of Bombay duly issued and advertised a proclamation for sale by public auction of the right, title and interest of the debtor in the immoveable property. On November 18, 1957, the Sheriff of Bombay put up for sale by public auction the right, title and interest of the debtor in the immoveable property in enforcement of the warrant for sale and it was sold to the highest bidder. The Sheriff of Bombay issued a certificate to the effect that pursuant to the warrant for sale dated March 13, 1957, she did on November 18, 1957, sell by public auction all the right, title and interest of the debtor, a partner in C. Jivanlal and Co., in the lands and premises mentioned in the said warrant for the price or sum of Rs. 10,000 subject to the rights and charges and claims mentioned in the proclamation of sale.

One Pramodchandra Chimanlal Mody (petitioning creditor) filed the present petition on November 27, 1957, for adjudication of the debtor as an insolvent, claiming that he was a creditor of the debtor in the sum of Rs. 3,251.75 nP. and urging that the aforesaid sale of the debtor's property constituted an act of insolvency under s. 9(e) of the Presidency-Towns Insolvency Act, 1909.

The petition was heard by K. T. Desai J. who passed an order of adjudication against the debtor on February 20, 1958, observing, in the course of his judgment, as follows:—

K. T. DESAI J. The next and the most important contention that has been urged by the learned counsel for the debtor is that there has been no act of insolvency within the meaning of s. 9(e) of the Presidency-towns Insolvency Act. Section 9(e) of the Presidency-towns Insolvency Act is as follows:—

"9. A debtor commits an act of insolvency in each of the following cases, namely...

(e) If any of his property has been sold or attached for a period of not less than twenty one days in execution of the decree of any Court for the payment of money."

What is contended on behalf of the debtor is that though the property has been sold by the Sheriff of Bombay, the sale has hitherto not been confirmed. It is urged that a sale becomes complete only on confirmation and that it is only a completed sale which is a sale within the meaning of s. 9(e). It is urged that as there is no such completed sale, no act of bankruptcy has been committed by the debtor.

Mr. Desai strongly relies upon the decision in the case of *Ex parte Villars: In re Rogers*.¹ In that case an execution was levied by seizure and sale of a trader's goods for a debt exceeding £ 50. The goods were sold partly on July 4, 1873, and partly on July 7, 1873, and monies were received in respect of these goods. Bills of sale were executed by the Sheriff in respect of these goods. The sale proceeds were handed over by the Sheriff to the attaching creditor. Thereafter the debtor, whose goods had been sold, was adjudged a bankrupt. In dealing with the matter, Sir W. N. James L.J. observes at p. 445 as under:—

"...And I think that the Court can so construe those words as not to render the act of the sheriff or the title of a purchaser, which is derived from a sale made by him, invalid, by calling in aid the language of the 11th section, which enacts that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at the time of the act of bankruptcy, or the first of the acts of bankruptcy, 'being completed', and treating the completed sale as the act of bankruptcy, at the time of which the bankruptcy is to be deemed to commence. If the act of bankruptcy is the act of the bankrupt himself, then the title of the trustee relates back to the moment of the commencement

of the act done by him; but if, as in the present case, it is not a voluntary act of the bankrupt, but a proceeding *in invitum*, it relates back only to the moment after the completion of the transaction which constitutes the act of bankruptcy."

Placing a strong reliance upon this passage Mr. Desai urges that the act of insolvency is committed when the sale is "completed" and he says that in the present case the sale will be complete only when the same is confirmed by the Court and not till then. In the case of *Ex parte Villars* the Court held that as the execution creditor had no notice of the petition for adjudication within 14 days after the date of the sale, he was entitled to the proceeds of the sale notwithstanding the supervening bankruptcy under the provisions of the Bankruptcy Act of 1869. The question for determination before the Court in that case was whether the sale proceeds vested in the Official Receiver in bankruptcy or whether the execution creditor was entitled to retain the proceeds of sale. In that case the point of time at which the act of bankruptcy was committed was not in issue. In that case the sales effected by the Sheriff and the bills of sale executed by him in connection with these sales have not been shown to be on different dates and no question arose as to when the sales should be deemed to have been effected within the meaning of the Bankruptcy Act.

There are a few decisions of the Courts in India relating to the interpretation of provisions similar to the provisions contained in s. 9(e) of the Presidency-towns Insolvency Act. These cases have arisen under s. 6(e) of the Provincial Insolvency Act. Section 6(e) of the Provincial Insolvency Act is as follows:—

"6. A debtor commits an act of insolvency in each of the following cases, namely:

(e) if any of his property has been sold in execution of the decree of any Court for the payment of money;"

The language of s. 6(e) of the Provincial Insolvency Act is identical with the language used in s. 9(e) of the Presidency-towns Insolvency Act, except that in s. 9(e) there is an additional ground which constitutes an act of insolvency viz. attachment for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money.

In the case of *Venkatakrishnayya v. Malakondayya*,¹ which was decided by Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri, as he then was, the petitioner was adjudged an insolvent on a creditor's application under the Provincial Insolvency Act and the order of adjudication was confirmed in appeal. A civil revision petition was filed challenging the correctness of the appellate order. It was urged that there was no act of insolvency when a sale in execution had been held and that sale had not been confirmed or having been confirmed had been set aside as a result of a deposit under r. 89 of O. XXI of the Civil Procedure Code. Dealing with this argument the Court observed as under (p. 306):—

"There appears to be no decided case covering this actual point. Two cases have been quoted, A.I.R. 1938 Lah. 819 and A.I.R. 1933 Cal. 564, in which it was held that the date of the sale for the purpose of limitation to an application under S. 9, Provincial Insolvency Act, is not the date of the confirmation, but the date of the actual sale. We have also been referred to (1785-1800) 100 E.R. 33 in which it was held that a clear and unequivocal act of bankruptcy such as suspension of payment cannot be explained away by the subsequent circumstance that the creditor was paid. It seems to us that none of these cases really touch the point which we have to decide. Under S. 6(e), Provincial Insolvency Act, a debtor commits an act of bankruptcy if any of his property has been sold in execution of the decree of any Court for payment of money. Under O. 21, Civil P.C., we find both in R. 89 and in R. 90 the words 'where any immovable property has been sold in execution of a decree' used to indicate a sale which has been held and awaits confirmation and one which is liable to be set aside either as a result of a deposit or as a result of an objection to the procedure. That is to say, the words 'property has been sold in execution of a decree', when used in O. 21, Civil P.C., refer not to an indefeasible

1 [1942] A. I. R. Mad. 306.

sale, but to a sale which has been actually held but which may be set aside as a result of subsequent proceedings. It seems to us that there is no apparent necessity for giving greater weight to the words in S. 6, Provincial Insolvency Act, than they carry in the relevant rules of O. 21 to which cl. (e) of S. 6, Provincial Insolvency Act, naturally has reference. The enumeration of the various acts of insolvency in S. 6 seems to contemplate those acts which in the public eye shake the credit of a debtor and are likely to cause a scramble amongst the creditors for his assets. The man may actually be solvent, but may still commit an act of insolvency by suffering something to be done which shakes his apparent credit, as when he disappears from his normal dwelling house or hides himself from his creditors or under the corresponding provision of the Presidency Towns Insolvency Act, suffers some attachment of his property in execution of a decree to subsist for 21 days. All these are outward and visible signs that a man's credit has been shaken and they are circumstances which are likely to cause a panic amongst his creditors. Consequently they justify any creditor in asking the Court to step in and see that there is a fair distribution of the debtor's assets."

In the course of the judgment, it has further been observed as follows (p. 307) :—

"...But as we read S. 6(e) when there has in fact been a sale in execution a subsequent deposit whereby the sale is set aside or a subsequent objection founded on some material irregularity resulting in the setting aside of the sale, will not alter the fact that the property was sold in execution of the decree."

I am in respectful agreement with the reasoning given in that case. It is not necessary to repeat what has been stated by the division bench of that Court. It is enough for me to say that I adopt the reasoning given in that case.

When one turns to s. 65 of the Code of Civil Procedure, which deals with sales in execution of a decree it has been provided as under :—

"Where an immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute."

The phraseology used in this section clearly indicates that in the Code the time when a property is considered to be sold is different from the time when the sale becomes absolute. What I have to consider is whether the words "property has been sold in execution of a decree" appearing in s. 9(e) of the Presidency-towns Insolvency Act have been used in the same sense in which the words "property is sold in execution of a decree" have been used in the Code of Civil Procedure. Section 9 of the Presidency-towns Insolvency Act refers to sales taking place in execution of a decree. Such sales are to take place in accordance with the provisions of the Code and the words appearing in s. 9 of the Presidency-towns Insolvency Act must be read and construed in the same sense in which similar words are used in the Code of Civil Procedure. The language in the Code is clear and leaves no room for doubt that under the Code a property is deemed to be sold when it is knocked down to a purchaser by the Sheriff when he effects a sale in execution of a decree. In the case of *Kanai Lal v. Tinkari De*,¹ which was decided by a division bench of the Calcutta High Court consisting of Mitter and M. C. Ghose JJ., it has been observed as follows (p. 566) :—

"...A sale is complete as soon as property is knocked down and purchased by somebody; confirmation comes later. There is no authority for the contention that when S. 6, Cl. (e), says that the act of insolvency occurs when the property is sold, we must read into the language of the statute as if the words were 'when the sale was confirmed'. The legislature knew the distinction between 'sale' and 'confirmation of a sale' and it has used language which will go to show that the act of insolvency is committed as soon as the property is sold..."

A decision to a similar effect has been given by Mr. Justice Tek Chand in the case of *Lal Chand v. Bogha Ram*.² The learned Judge in that case has quoted with approval the observation in the case of *Kanai Lal v. Tinkari De*, that an act of insolvency under s. 6(e) occurs when the property is knocked down to

¹ [1933] A. I. R. Cal. 564.
L.B.—8.

² [1938] A. I. R. Lah. 819.

the purchaser at the auction sale and not when the sale is confirmed. In the case of *Hoshnak Ram v. Punjab National Bank*,¹ a division bench of the Lahore High Court has held that when the officer of the Court or such other person as the Court may appoint to conduct a sale as provided in O. XXI, r. 65, knocks down the property to the highest bidder, such person must be deemed to have been declared to be the purchaser of such property. The sale is complete when the property is knocked down to the highest bidder and it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for a higher amount. In my view, the sale in this case took place when the property was knocked down to the purchaser and on the property being knocked down to the purchaser, the property must be considered to have been sold within the meaning of s. 9(e) of the Presidency-towns Insolvency Act and an act of insolvency then took place. The debtor, in my view, has committed an act of insolvency within the meaning of s. 9(e) of the Presidency-towns Insolvency Act and the petitioning creditor is entitled to have him adjudicated an insolvent.

The debtor appealed.

H. S. Desai, for the appellant.

Mrs. Sohini Mehta, for the respondent.

CHAGLA C.J. This appeal raises two questions, one which is very simple to decide and the other of some importance. The appellant was adjudicated insolvent on a petition presented on November 28, 1957, by the respondent basing the petition on a debt of Rs. 8,251-75 nP. and urging as the ground of insolvency that the property of the appellant had been sold in execution of a decree; and the first question that was considered by the learned Judge below was whether there was a subsisting debt on which the petition could be founded and the question that arose for consideration was whether a certain document constituted an acknowledgment within the meaning of the Limitation Act or an acknowledgment within the meaning of art. 1 of Sch. 1 of the Stamp Act. On the decision of this question depended whether there was a subsisting debt or not. Now, the document is a statement of account and it sets out the balance due to one Pramodchandra Chimanlal Mody, the respondent, from the firm of C. Jivanlal & Co. in which the appellant was a partner. There was an account of the respondent in the books of the firm and the statement corresponds to the balance that appeared to the credit of the respondent in the books of the firm. What is urged by the appellant is that inasmuch as this document was not stamped, it is inadmissible in evidence, and if the document is ruled out, the debt due by the firm of C. Jivanlal & Co. in which the appellant was a partner is barred by limitation. Now, the question as to whether the document falls within art. 1 of Sch. 1 of the Stamp Act depends, as the article itself says, on the decision whether the document was given in order to supply evidence of a debt, and numerous authorities, which, it is not necessary to review, have clearly laid down that that must be the paramount intention of the person giving the document and the question that the Court has to ask looking at the document and looking at the surrounding circumstances is whether the document is given in order to supply a statement of account or whether the document is given in order to supply evidence of a debt. The learned Judge has held on consideration of all the facts that this particular document does not fall within art. 1 of Sch. 1. No authority can help to construe this particular document. Each decision must turn on the facts of its own case; and we have here a very important circumstance and that circumstance is that accounts of the firm of C. Jivanlal & Co., as admitted by the appellant himself, were made up every year after Divali and the appellant says:

"in due course the account of moneys brought in by the said Chimanlal Tricumlal

Mody, a partner of the firm in the name of his son Pramodchandra Chimanlal Mody was made up after Asho. Vadya 30th, Sanvat year 2011 i.e. 14th of November 1953, and Khata acknowledgment was sent to him showing the amount due."

So, the case of the appellant himself is that accounts of the firm were made up from time to time, that one of the partners, who is the father of the respondent, brought in money in the name of his son, the respondent, and the account of moneys brought in by the father of the respondent was made up at the end of every year and a statement supplied to the respondent. Under these circumstances, it is difficult to take the view that the document, which we are considering, constitutes an acknowledgment within the meaning of the Stamp Act and we agree with the learned Judge that this is an acknowledgment within the meaning of the Limitation Act, that Limitation is saved by this document and the petition was well founded to the extent that it relied on this document.

The second question is whether the debtor committed an act of insolvency and the act of insolvency relied upon is the one set out in s. 9(e) of the Presidency-towns Insolvency Act:

"If any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money."

In this case, we are concerned with the first part of this sub-section "if any of his (debtor's) property has been sold" and the relevant facts with regard to this aspect of the case are that one Balubhai Vadilal & Co. obtained a decree against the appellant for Rs. 11,444 in the City Civil Court Suit No. 2676 of 1955. In execution of that decree, the immovable property of the appellant situated at Ghod Bunder Road, Andheri, was attached on November 29, 1956; the warrant of sale was issued on March 13, 1957, and the proclamation of sale was issued on October 11, 1957, and the property was sold by public auction on November 18, 1957, and knocked down to the highest bidder. The insolvency petition, as already pointed out, was presented on November 28, 1957. Now, the contention of Mr. Desai is that an act of insolvency has not been committed because the property has not been sold. His submission is that for the purpose of this sub-section, the property can only be said to have been sold if the sale has been confirmed, as provided under the Civil Procedure Code, O. XXI, r. 92. There is a similar provision both in the High Court Rules and the City Civil Court Rules about confirmation of a sale. Now, what is said is that till the sale is confirmed under O. XXI, r. 92, the sale is an inchoate sale. It is open to the person, whose property has been sold, to apply to set aside the sale of the property under rr. 89 and 90, and till his applications are disposed of, the sale does not become absolute. In this case, all that had happened was that the Sheriff had knocked down the property to the highest bidder, but the sale never became absolute, it was never confirmed and the property did not vest in the purchaser. Therefore, what was urged was that there was no act of insolvency. It was contended that, under s. 9(e) of the Insolvency Act, it is only when the sale becomes absolute that an act of insolvency is committed.

Now, before turning to the authorities, looking at the language used by the Legislature what the Legislature has stated is: "if any of his property has been sold". Now, the sale of a property and the sale being confirmed or becoming absolute are two different concepts which are well recognised under the Indian law. The Civil Procedure Code, O. XXI, r. 89, uses language identical with s. 9(e) of the Insolvency Act. Rule 89 says:

"Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein...may apply to have the sale set aside..."

Therefore, the Legislature clearly recognises that there is a sale of a property which is antecedent to its confirmation or its becoming absolute under r. 92. The same is the language used in r. 90 where an application can be made to set aside a sale on the ground of irregularity or fraud. Here also, the language

used is: "where any property has been sold in execution of a decree" and the concept of the sale becoming absolute arises when you come to O. XXI, r. 92. Therefore, as we have just said, these are two entirely separate legal concepts—the sale of an immovable property and the sale becoming absolute. Now, if the Legislature intended that the act of insolvency should only occur when the sale became absolute, there was no reason why the Legislature should not have used appropriate language to convey that intention. The Legislature has advisedly used the expression that the property has been sold and not when the sale has become absolute or has been confirmed. The reason behind this language is that, for the purpose of insolvency, the Legislature is concerned more with the position of the debtor rather than the rights of the purchaser under the sale. Mr. Desai says that till the sale becomes absolute, the property does not vest in the purchaser. That idea is to be found in s. 65 of the Civil Procedure Code:

"Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute." So that although under s. 65 the vesting can only take place, if the sale has become absolute, the time of vesting is not when the sale became absolute but from the time when the property is sold. But, we are not concerned with the rights of the purchaser or with the vesting of the property in the purchaser. What we are concerned with and what the Insolvency Act is concerned with is either the acts of the debtor or his financial condition. It is true, as pointed out by Mr. Desai, that an act of insolvency may be a voluntary act of the debtor or in some cases it may be the result of the acts of others and this is one of those cases where it is not the act of the debtor which constitutes the act of insolvency. It is his creditor who brings his property to sale which results in the act of insolvency. But even so, the very fact that the debtor has permitted his property to be sold may be looked upon by the Legislature as a sufficient ground for taking the view that he has committed an act of insolvency. Normally, a solvent person does not permit his property to be sold at a public auction and to be knocked down to the highest bidder. It is only when the person is in a very embarrassing financial circumstance that he allows his property to be sold at a public auction, and therefore it is not surprising, and on the contrary it is natural, that the Legislature should have considered the selling of the property in the sense of its being knocked down to the highest bidder as an act of insolvency and not the sale becoming confirmed or becoming absolute under O. XXI, r. 92, of the Civil Procedure Code. Order XXI, r. 92, is more concerned with the rights of the purchaser. Section 9(e) of the Insolvency Act is more concerned, if not with the act of the debtor, with his condition and position, and when we realise that, the distinction between a sale and a confirmation of a sale becomes clear.

Now, as far as the Indian authorities are concerned, they have all taken the same view of the language used by the Legislature. The only way Mr. Desai has been able to distinguish is that all these decisions are under the Provincial Insolvency Act and not under the Presidency-towns Insolvency Act. Sub-section (e) of s. 6 says:

"A debtor commits an act of insolvency in each of the following cases, namely:—

If any of his property has been sold in execution of the decree of any Court for the payment of money."

It is true that under the Provincial Insolvency Act, the property remaining under attachment is not an act of insolvency. We find it, however, difficult to appreciate the argument that, when our Indian High Courts have construed identical language used in s. 6(e) in a statute which is *in pari materia* with the statute with which we are concerned, we should attach no importance to these judgments but turn to the English cases dealing with English law. The position might have been different if the expression had been construed in the context of some other law. But if the context of the law is identical law, it is

difficult to understand why a different interpretation should be put upon the language used in the Presidency-towns Insolvency Act, unless there is something in the Act to justify a different construction in case of this expression.

Now, the three decisions to which reference may be made are: *Kanai Lal v. Tinkari De*,¹ *Firm Phul Chand v. Aggarwal*² and *Venkatakrishnayya v. Malakondayya*³. We must refer particularly to the judgment of the Madras High Court. This is a decision of Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri and the learned Judges at p. 307 say:

"Having these considerations in mind it is but natural that the Legislature should lay down as one of the criteria for judging whether a man's ostensible credit has been shaken, the fact of a sale in Court of his assets in execution of a decree. The question whether the sale is eventually set aside for some irregularity or whether the debtor eventually finds it to his interest to deposit the amount of the particular decree is not material. It is the very fact that his circumstances are sufficiently embarrassed to make him to submit to a sale of his property, which justifies the creditor in asking the Insolvency Court, to take charge of his estate."

With respect, we entirely agree with this view with regard to this particular provision of law in the Insolvency Act.

Mr. Desai referred to a passage in Sir Dinshaw Mulla's Insolvency Act, where the learned author says:

"The law as to commencement of insolvency under the Presidency Towns Insolvency Act is the same as the English law", and earlier on in this passage:

"If the act of insolvency is the act of the insolvent himself, e.g., a transfer of property to defeat or delay creditors, the title of the Official Assignee or Receiver relates back to the moment of the commencement of the act of insolvency, but if it is not a voluntary act, but a proceeding in invitum, e.g., a sale of property under an execution, the title relates back to the completion of the transaction which constitutes the act of insolvency", and what is urged is that we must look at the English law in order to decide when the sale was completed and it is only on the completion of the sale that the act of insolvency is committed. Now, we do not read the learned author, with respect, to say that we must prefer decisions of the English Courts to those given by our own High Courts on a construction of identical provision of law. All that this passage means is that the law under the Presidency-towns Insolvency Act is the same as the English law and yet the law may be the same under the Provincial Insolvency law where that law is applicable.

Strong reliance was placed on a decision of the English Court reported in *Ex parte Villars: In re Rogers*.⁴ There, the facts were that the appellant recovered judgment against the bankrupt and issued the writ and the Sheriff seized the goods of the debtor under the judgment and the goods seized were assigned to the appellant, the execution-creditor. The appellant paid the Sheriff the purchase money and the Sheriff after deducting the rent and other charges paid back the amount to the appellant in satisfaction of the debt for which the attachment was levied. All this was done 14 days before the petition in bankruptcy was presented, and the question that the Court had to consider was "Could the execution-creditor retain the amount of the sale proceeds which he was entitled to recover or the goods?" It is in connection with this question that certain observations were made by Lord Chancellor Cairns and Lord Justice James on which reliance has been placed. At p. 444, the learned Lord Chancellor Cairns says:

"...I cannot find in the 15th and 17th sections any words which would vest in the trustee either the property itself, the complete sale of which to a third party is made the commencement of the bankruptcy, or the proceeds of the sale, which never belonged to the bankrupt."

Lord Justice James at p. 445 also uses similar language when he speaks of

1 [1933] A. I. E. C. 564.

2 [1933] A. I. R. Lah. 814.

3 [1942] A. I. R. Mad. 308.

4 (1874) 9 Ch. App. 432.

treating the completed sale as the act of bankruptcy and what is strenuously urged by Mr. Desai is that under the English law, it is the completed sale that constitutes an act of insolvency. But the question still remains what is the completed sale under the English law. As far as we can gather from the facts of this case, the completed sale was the sale by the Sheriff. As soon as the Sheriff had sold the goods seized under a writ, it became a completed sale. If that was the position under the English law, it is difficult to understand why the sale is not a completed sale under the Indian law when the property is knocked down to the highest bidder. Mr. Desai says that under Indian law, you require a confirmation of the sale. It is only then that the sale becomes absolute. But a completed sale in the meaning of the English law is different from the sale becoming absolute within the meaning of the Indian law. As far as we can see, there is no provision similar to O. XXI, r. 92, in the English law, and, therefore, the English law looked upon the sale by the Sheriff as a completed sale. So that even assuming that we are governed by the English law, it is clear that as soon as the property is seized under a writ—or to use our own language “the property which is under attachment is sold to the highest bidder”, the sale becomes a completed sale. It may be that under the English law, the further concept of having the sale confirmed is not required. Under the Indian law, it is required. But that does not mean that when you are construing the Indian law, you must import into the section not merely the earlier concept of the property being sold to the highest bidder but also the subsequent concept of the sale being confirmed under O. XXI, r. 92. In our opinion, the learned Judge was right in the view that he took that an act of insolvency was committed when the property was sold by the Sheriff on November 18, 1957, by public auction and knocked down to the highest bidder.

The result is that the appeal fails and is dismissed with costs.

Liberty to the respondent's attorneys to withdraw the sum of Rs. 500 deposited in Court.

Appeal dismissed.

Solicitors for the appellant: *Nanavati & Co.*

Solicitors for the respondent: *Dikshit Maneklal & Co.*

CRIMINAL REFERENCE.

Before Mr. Justice Miahoy.

STATE v. J. D. DAROGA.*

Criminal Procedure Code (Act V of 1898), Secs. 173(4), 244, 207A(3), 251A(1)—Accused, before commencement of trial, not supplied with copies of police statements of prosecution witnesses—Whether prosecution debarred from examining such witnesses where copies of such statements not supplied to accused before trial—Discretion of Magistrate to disallow additional evidence when can be exercised.

Where the accused before the commencement of his trial is not supplied with copies of the police statements of prosecution witnesses as required under s. 173(4) of the Criminal Procedure Code, 1898, the prosecution is not thereby debarred from examining these witnesses.

If the prosecution intends to lead evidence copies of which have not been supplied to the defence, the Magistrate might put the prosecution on terms and insist that the additional evidence should not be allowed to go on record unless and until copies of the police statements of witnesses are supplied in advance to the defence.

Gurubachan Singh v. The State of Punjab,¹ referred to.

Where, however, the Magistrate feels that prejudice is likely to be caused to the defence by reason of the fact that the witnesses, who have already been examined,

*Decided, October 25, 1957. Criminal Reference No. 138 of 1957, made by Akbar S. Barela, Sessions Judge, Thana, in Criminal Revision Application No. 13 of 1957, arising

from the orders passed by V. R. Chavan, Judicial Magistrate, First Class, Shahpur, in Criminal Case No. 671 of 1956.

¹ [1957] S. O. J. 539.

could not thereafter be examined with a view to falsify the additional evidence, which was about to be tendered, the Magistrate in his discretion might disallow the prosecution to tender the additional evidence.

THE prosecution case was that the police having received information on March-10, 1956, that one J. D. Daroga, who was the Hydraulic Engineer of the Bombay Municipal Corporation, and four others (accused) were drinking liquor in contravention of the provisions of the Bombay Prohibition Act, 1949, outside one of the bungalows at Tansa lake, raided the premises at about 8 p.m. and surprised the accused when the drinking party was actually on. A police photographer was with the raiding party and he took photographs of the party and impressions of the chance finger prints on bottles and tumblers were also taken. Seven charge-sheets were sent up against the accused and the trying Magistrate, on an application made by the prosecution, consolidated all the cases and ordered these to be tried as one case on the ground that the cases arose out of a single incident. The consolidated case was tried as a summons case. The plea of all the five accused was recorded on September 4, 1956, under s. 242 of the Criminal Procedure Code, 1898, and the accused pleaded not guilty to the charges and claimed to be tried. The case was adjourned to September 26, 1956, and on that date an application was made by the prosecution for permission to examine six additional witnesses in addition to those mentioned in the charge-sheets and whose evidence was recorded on September 4, 1956. Police statements of these six witnesses were supplied to the accused that very day and the points on which they were to be examined were stated in the application. No orders were passed on the application by the Magistrate on that date and the case was adjourned. The case was taken up for hearing on subsequent dates and three out of the aforesaid six new additional witnesses were examined. On January 15, 1957, the prosecution made an application for permission to examine one more witness J. B. Shah. The accused objected to any permission being given for examination of the three new additional witnesses and J. B. Shah. The trying Magistrate passed an order refusing permission to the prosecution to examine these four witnesses on the grounds (1) that the prosecution ought to have supplied to the defence, not later than September 4, 1956, the copies of police statements of these witnesses because the trial commenced on that date and it having failed to do so, it was not entitled in law to examine these witnesses and (2) that the evidence of these witnesses was not relevant.

The prosecution went in revision to the Sessions Judge at Thana. The Sessions Judge disagreed with the finding of the trying Magistrate that under s. 173(4) of the Criminal Procedure Code, 1898, the prosecution was debarred from tendering the aforesaid additional evidence and he also disagreed with the finding of the Magistrate that the evidence which the aforesaid four witnesses proposed to give was irrelevant. Accordingly the Sessions Judge made the present reference to the High Court, observing as follows:—

“...non-furnishing of statements of witnesses under s. 173(4) before the commencement of the trial does not invite either expressly or by implication any bar against the examination of witnesses, whose statements have not been so furnished. On the other hand any such bar would be contrary to the other provisions of the Code, namely, ss. 244, 251(A), 252, 207(A), 288 and 540.

One more circumstance supports this view. With the filing of a charge-sheet under s. 173(1) of the Code, the powers of the police for investigation in respect of that case do not come to an end. Even after filing the charge-sheet, if the police come across fresh facts, they are entitled to make another investigation. Therein they may examine further witnesses. It would be physically impossible to furnish the statements of the witnesses so examined before the commencement of inquiry or trial as required by s. 173(4). Does it follow that therefore the prosecution has no right to examine those witnesses? The conclusion would be so obviously wrong that s. 173(4) has got to be given an interpretation which is more reasonable and which is consistent with the other provisions of the Code.

It was argued that any interpretation of s. 173(4) other than the one pressed on behalf of the accused in this case would render it nugatory. I am unable to agree. In so far as s. 173(4) imposes an obligation on the officer in charge of the police station to furnish the accused with copies of certain documents and statements, the failure to observe that obligation according to the spirit of the law may entail the consequence that the Court may presume that the accused has been prejudiced in his defence and it would be for the prosecution to satisfy the Court that the accused has not been prejudiced. The question of prejudice is no doubt a question of fact and has to be determined on a consideration of all the facts and circumstances, but in case of non-compliance with the provisions of s. 173(4) the accused may have the advantage of a presumption in his favour which the prosecution may have to remove. In *Tikamchand v. State* (1957 Cr. L.J. 188) the accused, who were being prosecuted for an offence under the Gambling Act, were not furnished before the commencement of the trial with copies of certain documents which were alleged to be instruments of gaming. When these were sought to be proved at the trial, the counsel of the accused objected on the ground that the provisions of s. 173(4) being mandatory, the production of the documents should not be allowed now. That objection was overruled by the trial Court and also by the Sessions Court and, therefore, the accused approached the High Court in revision. The Madhya Bharat High Court held that the non-furnishing of copies was bound to cause prejudice to the accused in his defence, quashed the proceedings and sent the case back for retrial which was to recommence after furnishing copies of the documents to the accused. Therefore, the Court did not hold that the documents cannot be produced in evidence but held that copies should be given and then the trial should commence afresh as on the facts of that case prejudice had been caused to the accused. It was argued before that the whole object of the amendment made to s. 173 in 1955 when the new sub-s. (4) was introduced would be frustrated if the above view were taken. Now the counsel for the accused concedes that the object of the amendments introduced by Act XXVI of 1955 was to expedite trial of criminal cases and at the same time secure fairness of trial. That being the object the test in all cases of violation of procedure where no penalty is provided for is whether prejudice has been caused. If there has been no prejudice, the trial is not vitiated in spite of irregularities. This is the principle on which s. 537, Criminal Procedure Code is based. I am, therefore, unable to agree that s. 173(4) would be nugatory and its object would be frustrated if the evidence relating documents and witnesses of which copies have not been furnished in accordance with s. 173(4) is allowed to be adduced. It is not necessary to refer to the history of legislation, but if we consider the historical background of the development of the mode of trial in England from which we have borrowed the mode, we find that obstacles in the shape of delays in procedure were placed in the way of swift progress from arrest to sentence in order to provide safeguards for the accused against the oppressive exercise of the power of the king. These are, therefore, matters of procedure and the sole test is whether the accused has had a fair trial or whether he has been prejudiced in his defence. It is on that point only that the compliance or non-compliance of the provisions of s. 173(4) is relevant."

The reference was heard.

Y. V. Chandrachud, Assistant Government Pleader, for the State of Bombay.
E. B. Ghaswalla, with *Y. S. Murudkar*, for the opponents.

MIABHOY J. [His Lordship after stating the facts of the case proceeded:] The first point which arises for consideration is whether the submission of the learned counsel for the accused that the copies of the police statements of the additional witnesses not having been supplied on or before September 4, 1956, the prosecution is debarred from tendering the aforesaid evidence as a matter of law is correct. Sub-section (4) of s. 173 of the Criminal Procedure Code has been recently substituted for the original sub-s. (4) by Act XXVI of 1955. That sub-section is as follows:

"(4) After forwarding a report under this section, the officer in charge of the police station shall, before the commencement of the inquiry or trial, furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under sub-sec-

tion (1) and of the first information report recorded under section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under section 164 and the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

Reading this sub-section, it is quite clear that it imposes an obligation on the officer in charge of a police station to supply free of cost to the defence copies of the police statements of persons whom the prosecution proposes to examine as witnesses. It is also quite clear from sub-s. (4) that this obligation has got to be discharged by the officer in charge of the police station "before the commencement of the inquiry or trial". Therefore, on the facts, there is no doubt whatsoever that the officer in charge of the police station concerned in the present case has committed a breach of the duty cast upon him by sub-s. (4) of s. 173. This is not disputed by the prosecution. But whilst this is so, the question which has got to be considered and answered in the present reference is one an answer to which is not to be found in the present sub-s. (4). The question which has got to be considered is as to what is the effect of a breach of the duty cast upon the police officer under sub-s. (4) of s. 173. The contention of the defence is that the consequence of the breach of this duty is that the prosecution is debarred for ever from examining any person, a copy of whose police statement has not been supplied to the defence. The question for consideration is whether this contention is correct. The learned counsel for the accused frankly admitted that the aforesaid sub-s. (4) or any other part of s. 173 did not state in terms that such is the effect of the breach of duty on the part of the officer in charge of a police station. But the contention was that having regard to the mandatory provisions contained in sub-s. (4) aforesaid, the Legislature intended that such should be the effect. The contention was that if effect was not given to the aforesaid contention of the defence, then the provisions contained in sub-s. (4) would be rendered nugatory and would become a dead-letter. In my opinion, before reaching a conclusion on the aforesaid subject, it is necessary to bear in mind the position of s. 173 in the scheme of the Code. The aforesaid s. 173 finds a place in Part V of the Code of Criminal Procedure and the heading of that Chapter is: "Information to the police and their powers to investigate." Section 173 is to be found in Chap. XIV. All the sections under this Chapter deal with the powers and the duties of the police officer. Having regard to these two important facts, it is quite clear to my mind that the Legislature, when it enacted s. 173, was not dealing with the powers and the duties of the Court in relation to a trial or any inquiry, but it dealt only with the powers and the duties of the police officers during the stage of investigation. Therefore, ordinarily, it would not be proper to look to this particular part of the Code and the aforesaid Chapter for an answer to the question as to what are the powers and the duties which the Court possesses where a prayer is made for the examination of additional witnesses. The learned counsel for the defence contended that the object of amending sub-s. (4) of s. 173 was to put the defence in possession of all the facts on which the prosecution wanted to rely and thereby prevent additional evidence being led against the defence. It was contended that the main object of the aforesaid sub-section was that the prosecution must, before the commencement of an inquiry or trial, make up its mind as to what evidence it wanted to lead against the defence, and having once made up that mind, it was not open to the prosecution to change it and to lead any additional evidence. It is difficult to generalise as to what was the object of the Legislature in introducing the amendment, that it has done, in sub-s. (4) of s. 173. The Supreme Court has made some remarks on this subject in *Gurubachan Singh v. The State of Punjab*.¹ The relevant remarks are to be found at page 544. The remarks are:

"...The object of this provision is to put the accused on notice of what he has to meet at the time of the inquiry or trial."

It appears that before the aforesaid amendment, the defence had no access to the police statements recorded in the course of investigation. Under the old law, the defence had to wait for having access to the police statements till the witness was examined and the stage of cross-examination was reached. This entailed delay as very often the cross-examining counsel were either not ready to cross-examine as they either wanted the police statement of the witness concerned, or wanted some time for studying the police statement, and in the interval the Court had to wait till the cross-examining counsel had perused the police statement. Therefore, one of the objects of the Legislature, in undertaking amendment to s. 173, also appears to be to prevent an inquiry or trial from being protracted, as it would naturally be, if the defence were not placed in possession of all the materials on which the prosecution intended to rely at the time of the inquiry or trial. Having regard to these two objects, it is impossible, therefore, to say that the Legislature could have intended such a far-reaching effect as to prevent the prosecution from tendering additional evidence altogether provided the evidence was found to be either relevant or in the interest of justice. In my opinion, having regard to the position of s. 173 in the scheme of the Code of Criminal Procedure, the proper sections which are to be looked to decide the aforesaid matter is not s. 173 alone, but also the sections which deal with the powers of the Court relating to inquiries and trials. In the present case, I propose to deal first with those sections which deal with the powers of the Court in relation to summons cases. In my opinion, if one reads the sections which deal with the powers of the Court during the course of a trial in a summons case, then there are clear indications that the Legislature did not intend to debar the prosecution from tendering additional evidence altogether. Section 241, Criminal Procedure Code, says that the Procedure laid down in the subsequent sections shall be observed by the Magistrates in the trial of summons cases. Then s. 244 is in the following terms:—

"244. (1) If the Magistrate does not convict the accused under the preceding section or if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence...

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing...

(3) ..."

Therefore, so far as sub-s. (1) of s. 244 is concerned, it clearly provides that after the plea has been recorded, the Magistrate shall take all such evidence as may be produced in support of the prosecution. In this particular section, there is nothing which enjoins that the prosecution shall necessarily be confined only to the examination of those witnesses copies of whose statements have been given by the officer in charge of the police station. On the contrary, the words are wide enough to include the examination of even those witnesses copies of whose statements have not been recorded. In this connection, it is important to bear in mind that an investigation does not necessarily end when a charge-sheet is sent to a Magistrate. It is open to the investigating officer to collect evidence in support of a charge even after the charge-sheet has been sent to the Magistrate. Sometimes important and additional evidence may be brought to light even after the charge-sheet has been sent to the Magistrate. Having regard to this important fact, in my opinion, it would be doing violence to the language of sub-s. (1) if it were interpreted to mean that the prosecution was necessarily circumscribed by what the police officer had omitted to do under sub-s. (4) of s. 173, Criminal Procedure Code. It is true that if the prosecution intends to lead evidence copies of which have not been supplied to the defence, having regard to the intention underlying sub-s. (4) of s. 173, the learned Magistrate might put the prosecution on terms and insist that the additional evidence should not be allowed to go on record unless and until copies of the police statements of the witnesses were supplied in advance so

that the defence may know all the full facts of the case, and may be ready to cross-examine the additional witnesses. It may be that, in some cases, where the learned Magistrate might feel that prejudice is likely to be caused to the defence by reason of the fact that the witnesses, who have already been examined, could not thereafter be examined with a view to falsify the additional evidence, which was about to be tendered, the learned Magistrate in his discretion might disallow the prosecution to tender the additional evidence. But it is one thing to say that the prosecution is totally debarred from leading additional evidence and it is entirely another thing to say that the learned Magistrate has a discretion in the matter as to whether additional evidence should or should not be allowed. If we examine some other sections of the Criminal Procedure Code, we find that the same result follows. Sub-section (4) of s. 173 deals not only with the cases of trial but also with cases of inquiry. Section 207A has been introduced by the Legislature by the same amendment by which it amended sub-s. (4) aforesaid. Sub-section (3) of s. 207A is important in connection with the point which requires to be decided. That sub-s. (3) is in the following terms:

"(3) At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished."

In this connection, it is important to notice that whereas sub-s. (4) of s. 173 speaks of a duty which is to be performed before the commencement of an inquiry or trial, sub-s. (3) of s. 207A speaks of the duty which is to be performed by the Court "at the commencement of the inquiry." Therefore, it is quite clear from sub-s. (3) of s. 207A that even if the officer in charge of the police station has not supplied the necessary copies to the defence before the commencement of the inquiry, the learned Magistrate has got the power of ordering the prosecution to supply the necessary copies to the defence "at the commencement of the inquiry." If the submission which the learned counsel for the defence makes were correct, then no such power could have been conferred upon the Magistrate under s. 207A(3). If the submission of the defence counsel were, correct, then the moment the police officer failed in his duty of supplying the necessary copies before the commencement of the inquiry, then, no evidence whatsoever could be led by the prosecution. In that case, no power would be given to the Magistrate to make an order calling upon the prosecution to supply the necessary copies to the defence. Exactly the same provisions are to be found in respect of trials of warrant cases. Section 251A of the Criminal Procedure Code has been recently introduced at the same time when sub-s. (4) of s. 173 was substituted. Section 251A(1) is in the following terms:

"(1) When, in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished."

In addition to this we have also to bear in mind the provisions of s. 540. That section confers power upon the Court to summon a material witness or to examine a person present in Court at any stage of an inquiry, trial or other proceeding. Therefore, examining the argument of the learned defence counsel in the light of the provisions contained in ss. 244, 207A and 251A, it is quite clear that, if sub-s. (4) of s. 173 were to be interpreted in the manner suggested by the defence counsel, then, that interpretation would be in conflict with the aforesaid ss. 244, 207A and 251A of the Criminal Procedure Code. It is well known that a section in a statute is to be so interpreted as to harmonise with the rest of the statute. Under the aforesaid circumstances, in my opinion, the view taken by the learned Magistrate that the breach of the obligation imposed upon a police officer under sub-s. (4) of s. 173 entails the

consequence that the prosecution is debarred from tendering any additional evidence, is wrong and the view taken by the learned Sessions Judge is correct and that view must be upheld. In my opinion, the proper way in which the learned Magistrate should have dealt with the question was from the point of view of the prejudice which the breach of the aforesaid obligation had caused or was likely to cause to the defence. I do not propose to say anything on this aspect of the case, because, in my opinion, that aspect will have to be dealt with by the learned Magistrate hereafter. The learned counsel for the defence urged that, having regard to the fact that some of the witnesses have already been examined and cross-examined and that their evidence is over, the defence would be prejudiced inasmuch as the defence had lost the right of eliciting from the witnesses already examined materials which would have been useful in appreciating the additional evidence which is sought to be tendered by the prosecution. In my opinion, this is a proper stand-point from which the application of the prosecution requires to be considered. The learned Sessions Judge has discussed this question, but having regard to the fact that this point has not been dealt with by the learned Magistrate, I do not propose to express any opinion on the same. In my opinion, the learned Magistrate will have to consider this aspect of the case and pass such suitable orders as he may deem fit in the circumstances of the case.

[The rest of the judgment is not material to the report.]

Rule made absolute.

APPELLATE CIVIL.

[RAJKOT BENCH]

Before Mr. Justice Vyas and Mr. Justice Tarkunde.

KESHAVLAL MOTIHAND SHAH v. THE ASSISTANT JUDGE, JUNAGADH.*

Saurashtra Agricultural Debtors' Relief Act (XXIII of 1952), Secs. 5, 2(3), 41(2), 44, 54—Saurashtra District and Subordinate Civil Courts Ordinance, 1948 (XI of 1948), Secs. 17, 19—Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1939), Secs. 4, 7, 8, 15—Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947), Sec. 48—Whether Board constituted under s. 5 of Saurashtra Act XXIII of 1952 a Court—Assistant Judge under Saurashtra Ordinance empowered and invested with powers to entertain appeals from decrees or orders of "subordinate Courts" transferred to him by District Judge—Appeal filed in District Court against award made by Board constituted under Saurashtra Act transferred to Assistant Judge by District Judge—Whether Assistant Judge had jurisdiction to hear such appeal—Tribunal, under statute creating it, a Court for limited purpose—Whether such tribunal a Court.

A Board constituted under s. 5 of the Saurashtra Agricultural Debtors' Relief Act, 1952, is a Court.

People's Own Prov. & Gen. Ins. Co. v. Guracharya,¹ distinguished.

Shah Kevalshi Jethidas v. Zala Dikubha Mulstahji,² dissented from.

*Spring Mills, Ltd. v. Ambekar*³ and *Gobinda Chandra v. Rashmoni Dassya*,⁴ referred to.

Where under Notifications issued by the Government of Saurashtra under ss. 17 and 19 of the Saurashtra District and Subordinate Civil Courts Ordinance, 1948, an Assistant Judge was empowered to try appeals from decrees and orders of "subordinate Courts" as would lie to the District Judge and as may be referred to him by the District Judge concerned and the Assistant Judge was invested with powers to entertain such appeals from the decrees and orders of "subordinate Courts" as would lie to the District Judge:

*Decided, December 4, 1957. Special Civil Application No. 37 of 1957.

¹ (1945) 47 Bom. L. R. 852, s.c. [1946] A. I. R. Bom. 200.

² 9 Saurashtra Law Reporter 198.

³ (1947) 51 Bom. L. R. 148, s.c. [1949]

A. I. R. Bom. 188.*

⁴ [1943] A. I. R. Cal. 470.

Held, that the Assistant Judge, to whom an appeal filed against an award made by a Board constituted under s. 5 of the Saurashtra Agricultural Debtors' Relief Act, 1952, was transferred by the District Judge concerned, had jurisdiction to hear the appeal, as the Board was a Court within the meaning of the expression "subordinate Courts" which occurred in the Notifications.

If a statute creating a tribunal says that the tribunal shall be a Court for the limited purpose of certain sections of certain enactments, then the tribunal is not a Court in the sense in which the word "Court" is used in the context of hierarchy of Courts established in the Union of India.

THE facts appear in the judgment.

V. G. Hathi, for the applicant.

B. K. Mehta and *K. C. Patel*, for opponents Nos. 6 and 7.

VYAS J. This is a petition under art. 226 or under art. 227 of the Constitution of India, and it is filed by Shah Keshavlal Motichand. The relief which the petitioner has prayed for in this petition is that the judgment of the Assistant Judge in Civil Appeal No. 237 of 1956, which was pronounced on January 19, 1957, be quashed. A further relief which is sought by the petitioner is that the order passed by the Board reducing his (petitioner's) dues to Rs. 1,954-8-4 for secured debts and to Rs. 1,158-9-0 for unsecured debts, be also quashed. A direction is sought from this Court to the Board that the Board should accept the debt which was admitted by the debtors and should proceed to pass the award on the basis of admitted debts.

This application raises an interesting point of law, and the point is whether the Board constituted under s. 5 of the Saurashtra Agricultural Debtors' Relief Act, No. XXIII of 1952, is a Court within the meaning of the expression 'Subordinate Courts' which occurs in the two Notifications, bearing Nos. LD/J/18-5(1)-i and LD/J/18-5(1)-ii, both dated May 23, 1956, one of which was issued under s. 17 and the other under s. 19 of the Saurashtra District and Subordinate Civil Courts Ordinance, 1948 (XI of 1948). The point arises in this way.

Opponents Nos. 6 and 7 applied for the adjustment of their debts under the Saurashtra Agricultural Debtors' Relief Act on February 14, 1955. In their application, opponents Nos. 6 and 7 mentioned only two persons as their creditors, and those persons are the present opponents Nos. 3 and 4. On September 27, 1955, opponents Nos. 6 and 7 disclosed further that the petitioner and opponent No. 5 were also their creditors, and they requested that these two persons also be joined as parties to the application. The Board thereupon issued notices to the petitioner and opponent No. 5 also. Thereupon, the petitioner filed his statement before the Court under s. 13(b) of the Act, and in that statement, he showed his dues at Rs. 7,504-12-0. Opponent No. 5 did not file any statement, and, therefore, his debt was declared to be extinguished. On January 21, 1956, it was found that the total debts due by the opponents exceeded Rs. 10,000. The Board at Manavadar, therefore, having no jurisdiction to enquire into the matter, transferred the case to the Board at Junagadh. It is the petitioner's contention in this application that the transfer by the Manavadar Board to the Junagadh Board was not the one which was contemplated under s. 12(2) of the Act, and, therefore, the transfer by the Manavadar Board to the Junagadh Board was one without jurisdiction. At this stage, it may be noted that this objection was not taken by the petitioner when the Junagadh Board started to hear the matter upon its transfer to that Board by the Board at Manavadar. The Junagadh Board proceeded with the enquiry, and in that enquiry opponent No. 6 admitted all the dues of the petitioner. Therefore, the Board thought it unnecessary to examine the petitioner for an explanation in regard to any of the items shown by him as due to him from opponents Nos. 6 and 7. The Board at Junagadh, by an order passed by it on September 28, 1956, which order was passed without calling upon the petitioner to explain the items, disallowed certain items. It is the contention of the peti-

tioner that the Board did not correctly appreciate the accounts which were submitted before it and wrongly believed that the petitioner had abandoned his claim for the amount of Rs. 5,500 which, says the petitioner, he had not in fact abandoned. Upon this contention, the petitioner submits in the present application that the whole approach which was adopted by the Board in this case was an approach which was not lawful and not warranted by the facts.

Upon the award being given by the Junagadh Board, the petitioner filed an appeal, No. 237 of 1955, from the award. That appeal was filed in the Court of the District Judge, Sorath. The appeal was transferred to the Court of the Assistant Judge of Junagadh for disposal. The petitioner objected to the jurisdiction of the Assistant Judge at Junagadh to hear the appeal, but the objection was over-ruled. The learned Assistant Judge dismissed the appeal of the petitioner and confirmed the award which was made by the Board. It is these orders, both of the Board and of the Assistant Judge, which are challenged and sought to be quashed by the petitioner by filing this application.

Now the point which Mr. Hathi for the petitioner has raised is that the Assistant Judge, Junagadh, had no jurisdiction to hear and decide the appeal from a decision of the Board constituted under the Saurashtra Agricultural Debtors' Relief Act, and, therefore, the impugned judgment of the Assistant Judge is a judgment without jurisdiction. Under s. 41(2) of the Saurashtra Agricultural Debtors' Relief Act, an appeal from a decision of the Board lies to the District Court within whose local territorial jurisdiction the Board is situated. But under s. 17 of the Saurashtra Ordinance No. XI of 1948, the Government of Saurashtra may, by a notification in the Official Gazette, empower any Assistant Judge to try such appeals from the decrees and orders of the subordinate Courts as would lie to the District Judge and as may be referred by him to the Assistant Judge. Under s. 19 of the said Ordinance, the Government of Saurashtra may, by notification in the Official Gazette, invest an Assistant Judge with all or any of the powers of a District Judge within a particular part of a district, and may, by like notification from time to time, determine and alter the limits of such part. Now the two notifications bearing Nos LD/J/18-5(1)-i and LD/J/18-5(1)-ii, both dated May 23, 1956, were issued by the Government of Saurashtra, one under s. 17 and the other under s. 19 of the Saurashtra Ordinance No. XI of 1948. Under the notification issued under s. 17, the Assistant Judges at Morvi, Gondal, Porbandar and Bhavnagar were empowered to try such appeals from the decrees and orders of the subordinate Courts as would lie to the District Judge, and as may be referred to them by the District Judge concerned. Under the notification issued under s. 19, the Assistant Judges at Morvi, Gondal and Porbandar were invested with powers to entertain such appeals from the decrees and orders of Subordinate Courts as would lie to the District Judge. It is in these circumstances, in order to decide whether the Assistant Judge of Junagadh at Porbunder who heard the appeal from the decision of the Board had jurisdiction to hear it, that it has become necessary to decide whether the Board is a Court within the meaning of the expression "Subordinate Courts" which occurs in these notifications.

Section 2, sub-s. (3) of the Saurashtra Agricultural Debtors' Relief Act says: "'Board' means the Board constituted under section 5 of the Act." Sections 5(1) of the Act provides:

"(1) The Government shall constitute one or more Boards for the whole State or for specified local areas.

(2) Every such Board shall consist of—

(a) A Civil Judge, Senior Division, to whom applications may be made under sub-section (1) of section 4 in cases in which the total debts do not exceed ten thousand rupees;

(b) a Civil Judge, Junior Division, to whom applications may be made under sub-section (1) of section 4 in cases in which the total debts do not exceed ten thousand rupees;"

Now, a Civil Judge is a judicial officer, who, in the normal discharge of his duties as a judicial officer, exercises wide civil jurisdiction and acquires a

bulk of judicial experience. Upon such a judicial officer the Legislature has conferred special jurisdiction in the matter of adjustment of debts. From the manner in which the Legislature has constituted the Boards, it is evident that the intention of the Legislature was that the judicial experience acquired by a judicial officer in the exercise of civil jurisdiction should be brought to bear upon and be exercised in matters which fall within the scope of the Act. The special jurisdiction which the Legislature has conferred upon a judicial officer constituting a Board is that he should entertain applications for adjustment of debts, issue notices upon the debtors and creditors, frame and decide preliminary issues, take accounts, examine the parties, decide whether the transfer is in the nature of a mortgage, determine the value of property, declare fraudulent alienations void, determine paying capacity, scale down debts, etc. In the discharge of these duties and the performance of these functions, it is inevitable that the judicial experience acquired by him as a result of having exercised civil jurisdiction would be a deciding factor, and that it should be so was the intention of the Legislature when it provided by enacting s. 5 of the Act that the Board should be constituted of a Civil Judge. Our view is that the intention of the Legislature in creating the Boards under the Saurashtra Agricultural Debtors' Relief Act was that a civil Court which normally exercises civil jurisdiction would be called a Board when it decides applications under the Act. A mere change of name is immaterial. We must look to the scheme of the Act and the scheme, which I shall presently examine in details, shows that the Board constituted under the Act is a Court.

While performing the above functions, a Civil Judge does not act as *persona designata*. There are only two ways in which he could possibly act. He could act either as *persona designata* or as a Court. There is no reason for us to hold that when a Civil Judge who is a judicial officer discharges the duties imposed upon him under the Saurashtra Agricultural Debtors' Relief Act—the duties of deciding matters which are of judicial or quasi-judicial nature—and adjudicates upon the rights of the debtors and creditors, he acts in his personal or independent capacity and not as a Court. It is clear in our view that since the word used in the statute (the Saurashtra Agricultural Debtors' Relief Act) giving special jurisdiction in matters which are judicial or quasi-judicial is 'Board' and not 'Court', the scheme of the entire Act must be looked into in order to find out whether the matters are to be decided by the Civil Judge as a Court or in his personal capacity (See *Kiran Chandra v. Kalidas*¹). As we shall presently point out upon the examination of the scheme of the Saurashtra Agricultural Debtors' Relief Act, it is clear that the Civil Judge acting under the said Act does not act as a *persona designata*, but as a Court. In the body of the said Act, there is a scheme which clearly shows that the Legislature intended that the Civil Judge constituting a Board should act as a Court and not as *persona designata*. Section 54 provides:

"No application or proceeding in regard to the insolvency of a debtor shall be dealt with by any other Court."

The word 'other' in the expression 'any other Court' is significant. It has been used with a purpose, and the purpose is to show the intention of the Legislature that the Civil Judge, in the discharge of his duties under the Act, acts as a Court and not as a *persona designata*. This conclusion is, in our opinion, inescapable.

In the Bombay Agricultural Debtors Relief Act, 1939, there was s. 8 which provided:

"All proceedings under this Act before the Board shall be deemed to be judicial proceedings for the purposes of sections 193 and 228 of the Indian Penal Code."

When the Legislature said that the proceedings before the Board should be deemed to be judicial proceedings, though for a limited purpose only, i.e. for the purpose of ss. 193 and 228 of the Indian Penal Code, it clearly intended that they were not judicial proceedings properly so called. Even for the pur-

pose of ss. 193 and 228 of the Indian Penal Code, they were only to be deemed to be judicial proceedings. In the Saurashtra Agricultural Debtors' Relief Act, there are no provisions analogous to the provisions of s. 8 of the Bombay Agricultural Debtors' Relief Act, 1939, and this would point to the intention of the Legislature to consider the proceedings held before a Board as judicial proceedings.

Then in the Bombay Agricultural Debtors Relief Act of 1939 there was s. 15 which said:

"A Board shall in all proceedings under this Act be subject to the control of the District Court within the local limits of whose jurisdiction it is ... established."

Now if the Board under the said Act were a Court, it would not have been necessary to provide that it would be subject to the control of the District Court, for all Courts in a District are subject to the control of a District Court. In the Saurashtra Act, there is no section analogous to the provisions of s. 15 of the Bombay Agricultural Debtors Relief Act of 1939. This would also, in our opinion, show that the Legislature intended that the Board constituted under the Saurashtra Agricultural Debtors' Relief Act should be a Court. If the Legislature had intended that the Board was not to be a Court, it would have also made a provision in the Act as to under whose authority and control the Board would be.

In the view we are taking, viz. that the Board constituted under the Saurashtra Agricultural Debtors' Relief Act is a Court, we are fortified by the fact that the authority before whom the applications for adjustment of debts are made and who adjudicates upon the debts under the Bombay Agricultural Debtors Relief Act of 1947 is, by the Legislature, called a Court. Because the Legislature has called him a Court, we do not find in that statute provisions analogous to the provisions of s. 7 of the Bombay Agricultural Debtors Relief Act of 1939, viz. the provisions regarding vesting of certain powers of civil Courts in that authority, but, on the contrary, we find s. 46 regarding the application of the provisions of the Code of Civil Procedure to the proceedings held by him. These characteristics, viz. the absence in the Saurashtra Agricultural Debtors Relief Act of the provisions analogous to those of s. 7 of the Bombay Agricultural Debtors Relief Act of 1939 and the presence in the Saurashtra Agricultural Debtors' Relief Act of the provisions (see s. 44) analogous to those of s. 46 of the Bombay Agricultural Debtors Relief Act of 1947 would, in our opinion, be sufficient indication that the Board constituted under the Saurashtra Agricultural Debtors' Relief Act is a Court.

In the case of *People's Own Prov. & Gen. Ins. Co. v. Guracharya*,¹ it was held that the Debt Adjustment Board set up under the Bombay Agricultural Debtors Relief Act, 1939, was not a Court subordinate to the High Court in order to attract the application of s. 115 of the Code of Civil Procedure. It was held accordingly that no revisional application lay to the High Court from the orders of the Debt Adjustment Board. Now the *People's Own Prov. & Gen. Ins. Co. v. Guracharya* was a case under the Bombay Agricultural Debtors Relief Act, 1939, and the question that fell to be considered in that case was whether the Board established under the Act was a Court, and it was held that it was not a Court. It is to be noted, and this would substantially distinguish that case from the present case, that under the Bombay Agricultural Debtors Relief Act of 1939, the word "Court" was defined, and the Legislature had provided that for the purpose of that Act, the word "Court", in ss. 17, 61 and 63 of the Act, and where it occurred for the first time in sub-s. (1) of s. 62 of that Act, meant a District Court to which an appeal lay against the award of a Board under s. 9. The Legislature provided further that in ss. 13, 14, 66, 67A, 75 and 83 and in s. 62 where the word 'Court' occurred for the second time in sub-s. (1), 'Court' meant a District Court, a Court of the Assistant Judge or a Court of a First Class Subordinate Judge, as the case might be, hearing an appeal against an award of a Board under s. 9. The

¹ (1945) 47 Bom. L. R. 852, s.c. [1946] A. L. R. Bom. 300.

Legislature then said that in the remaining provisions of the Act wherever the expression 'Court' occurred, it meant a civil Court of competent jurisdiction. Now, as the Board constituted under the Bombay Agricultural Debtors Relief Act of 1939 did not answer the definition of 'Court' as given in the Act, it was held, and with great respect rightly, that the Board was not a Court.

Now, in the present case the Saurashtra Agricultural Debtors' Relief Act does not define 'Court' and we have to gather the intention of the Legislature from the scheme of the Act. As I have stated above, the essence of the scheme of the Saurashtra Agricultural Debtors' Relief Act is that in the decision of the questions falling within the scope of the Act, the judicial experience of a Civil Judge who has exercised civil jurisdiction must play a vital and decisive role. We find it difficult to believe that when the Legislature conferred special jurisdiction upon a judicial officer under the Saurashtra Agricultural Debtors' Relief Act, it intended to enact that the status which such judicial officer possessed while exercising normal civil jurisdiction should be withdrawn from him and he should cease to be a Court. While exercising special jurisdiction, which is in the nature of the jurisdiction of a Court, the Civil Judge who is acting as a Board may not be deciding civil suits properly so called, but because he adjudicates only upon debts and decides the rights as between debtors and creditors only, there is no reason why we should hold that he is acting as a *persona designata* and not as a Court.

There is another reason also why the decision in the *People's Own Prov. & Gen. Ins. Co. v. Guracharya's* case would not help Mr. Hathi's client. It was, as I said, a decision under the Bombay Agricultural Debtors Relief Act of 1939. Now in the Bombay Agricultural Debtors Relief Act of 1939, there was s. 7 which said:

"(1) Subject to the provisions of this Act and any rules, the Board shall have the same powers as are vested in civil Courts under the Code of Civil Procedure, 1908, when trying a suit and in particular in respect of the following matters:

- (a) joining any necessary or proper parties;
- (b) summoning and enforcing the attendance of any person and examining him on oath;
- (c) compelling the production of documents;
- (d) issuing commissions for the examination of witnesses; and
- (e) proof of facts by affidavits."

The learned Chief Justice took the view that if the Board had been intended by the Legislature to be a Court, it would not have been necessary to provide that it shall have the same powers as are vested in civil Courts under the Code of Civil Procedure in respect of certain matters. The provision contained in s. 7, sub-s. (1), of the Bombay Agricultural Debtors Relief Act of 1939 regarding the vesting in the Board of certain powers of civil Courts under the Code of Civil Procedure, 1908, for certain purposes only would show that the Legislature did not intend the Board created under the said Act to be a Court. As I have said, in the Saurashtra Agricultural Debtors' Relief Act, there is no section which speaks of vesting in the Board of the powers of a civil Court under the Code of Civil Procedure for certain specified purposes only, and this, in our opinion, would show that the Legislature intended the Board to be a Court, and, therefore, did not consider it necessary to enact that it should be vested with certain powers which are exercised by the civil Courts under the Code of Civil Procedure. If the Legislature, while enacting the Saurashtra Agricultural Debtors' Relief Act, had intended that the Board should not be a Court, then, it would have made provisions analogous to the provisions of s. 7 of the Bombay Agricultural Debtors Relief Act of 1939; but it did not do so. Thus, the intention of the Legislature in enacting the Saurashtra Agricultural Debtors Relief Act, in which there is no section analogous to s. 7 of the Bombay Agricultural Debtors Relief Act of 1939, would show that the Board established under the former Act is a Court.

Before I proceed further, I must revert to the provisions of s. 4 of the Bombay Agricultural Debtors Relief Act of 1939. Section 4 consists of several sub-
L.R.—O.

sections and sub-s. (3) provides:

"(4) The Board shall consist of—

(a) one person who holds or has held office under the Crown in India, or who has been practising as a legal practitioner for such period as may be prescribed, or

(b) a body or association of persons, or

(c) persons not less than three and not more than five in number."

It would be interesting to compare the abovementioned constitution of the Board created under the Bombay Agricultural Debtors Relief Act of 1939 with the constitution of the Board created under s. 5 of the Saurashtra Agricultural Debtors Relief Act. Under s. 5 of the latter Act, a Board has to consist of a Civil Judge, Senior Division, or a Civil Judge, Junior Division, and as I have stated above, a Civil Judge has judicial experience, and he normally exercises civil jurisdiction. In our view, the fundamental difference in the manner of the constitution of the Board under the two Acts would itself show why the Board constituted under the Bombay Agricultural Debtors Relief Act of 1939 was not considered to be a Court. In our view, for the reasons stated above, namely the fundamental difference between the constitution of the Board under the two Acts and an examination of the scheme of the Saurashtra Agricultural Debtors' Relief Act, we must come to the conclusion that the Board established under the Saurashtra Agricultural Debtors' Relief Act is a Court.

In the case of *Spring Mills, Ltd. v. Ambekar*¹ it was held that the mere fact that a statute provided an appeal to a Court from a particular body did not necessarily make that body a Court. It was observed that the Authority under the Payment of Wages Act was not a Court within the meaning of s. 115 and the High Court had no revisional jurisdiction over the orders of that Authority. This case can hardly help Mr. Hathi's client. We are not deciding that the Board established under the Saurashtra Act is a Court simply because a provision is made in the body of the Act for an appeal to the District Court from the decision of the Board. We have come to the conclusion that the Board is a Court upon a detailed examination of the provisions of the entire Act. We have come to the conclusion that the Board is a Court because the Civil Judge who constitutes the Board decides the matters falling within the scope of the Act not as a *persona designata*, but as a Court. Besides, it may be noted that *Spring Mills Ltd. v. Ambekar* was a case under the Payment of Wages Act and in the Payment of Wages Act there is a section, being s. 18. The provisions of s. 18 are:

"Every authority appointed under sub-section (1) of section 15 shall have all the powers of a civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents."

It is in the light of the provisions of s. 18 that the Court interpreted the intention of the Legislature and held that the Authority under the Payment of Wages Act was not a Court within the meaning of s. 115 of the Code of Civil Procedure. Section 18 clearly provided that for certain limited or specified purposes only the Authority had the powers of a civil Court under the Code of Civil Procedure. The clear implication of this provision was that excepting for the purposes specified in the body of s. 18, the Authority was not to be construed as a Court. In the Saurashtra Agricultural Debtors' Relief Act, there is no section analogous to s. 18 of the Payment of Wages Act. This also would show that the scheme of the Saurashtra Agricultural Debtors' Relief Act is that the Board constituted under the Act is a Court.

I have, in passing, already made reference to s. 44 of the Saurashtra Agricultural Debtors' Relief Act. Section 44 lays down:

"Save as otherwise expressly provided in this Act, the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings under this Chapter."

Here also we have got the inherent evidence of the intention of the Legislature in enacting the said Act. In the Bombay Agricultural Debtors Relief Act of

1 (1947) 51 Bom. L. R. 148, s.c. [1949] A. I. R. Bom. 188.

1939, there are no provisions analogous to the provisions of s. 44 of the Saurashtra Agricultural Debtors Relief Act, whereas in the Bombay Agricultural Debtors Relief Act of 1947, we do find in s. 46 thereof provisions analogous to those of s. 44 of the Saurashtra Agricultural Debtors' Relief Act. In our view, the fact that the Legislature enacted that the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings under Chapter II of the Saurashtra Agricultural Debtors' Relief Act would also be a good indication to show that the intention of the Legislature was that the Board constituted under the said Act should be a Court.

It is true that Lord Halsbury says in Vol. VIII at page 526 (Hailsham's edition):—

"There are tribunals with many of the trapping of a Court which nevertheless are not Courts in the sense of exercising judicial power. A tribunal is not necessarily a Court in the strict sense of exercising judicial power because it gives a final decision; hears witnesses on oath; two or more contending parties appear before it...it gives decisions which affect the rights of the subjects; there is an appeal to a Court."

But this passage cannot help Mr. Hathi's client. There is no doubt that tribunals which may possess some of the attributes of Courts are not necessarily Courts. As the passage itself shows, the essence of the tribunal being a Court lies in its exercising judicial power. As observed at an earlier stage (page 525) by the same learned author:

"The distinction appears to be not so much whether the particular tribunal is a Court of justice but whether it is a Court in law."

Therefore, we have to see not what the tribunal does, but what it is in law. For this purpose we have to go to the enactment which constitutes the tribunal and find out whether the enactment constitutes it into a mere tribunal other than a Court or into a Court in the strict sense of the word. On a careful analysis of the enactment in question, we have come to the conclusion that the Board constituted under the Saurashtra Agricultural Debtors' Relief Act is a Court.

Our attention is also invited to a decision of the Calcutta High Court in the case of *Gobinda Chandra v. Rashmoni Dassya*.¹ It was a case under the Bengal Agricultural Debtors' Relief Act. We have not got before us the Bengal Act, and we are, therefore, unable to examine the scheme of that Act. In the body of the judgment the learned Judges, with great respect, did not examine the scheme of the Act, and, therefore, we are unable to appreciate the reasons upon which they held that the Board was not a Court. We are unable to agree with Mr. Hathi that the Calcutta case would assist his clients.

I must next refer to a decision of the Saurashtra High Court in *Shah Kevashi Jethidas v. Zala Dilubha Mulsinkji*.² In this case, it was held by a Division Bench of the Saurashtra High Court, consisting of the learned Chief Justice and Mr. Justice Baxi, that the Board exercising jurisdiction under the Saurashtra Agricultural Debtors' Relief Act was not a Court. It was observed that a revision application to the High Court against the order of the Board was not accordingly competent. Upon a perusal of the judgment of the learned Judges in this case, it would appear that they referred to the Bombay case of the *People's Own Prov. & Gen. Ins. Co. v. Guracharya* and the Calcutta case which I have just mentioned. It appears from the judgment of the learned Judges that the distinction emerging from a comparative examination of the provisions of the Bombay Agricultural Debtors Relief Acts of 1939 and 1947, in relation to the provisions of the Saurashtra Agricultural Debtors' Relief Act was not brought to the notice of the learned Judges. Accordingly, with great respect, we do not feel called upon to follow that decision.

The result, therefore, is that upon an examination of the scheme of the Saurashtra Agricultural Debtors' Relief Act, we hold that the Legislature, in constituting the Boards under s. 5 of the Act, intended that the Board should be a Court. If a statute creating a tribunal says that the tribunal shall be a Court for the limited purpose of certain sections of certain enactments, then

1 [1943] A. I. R., Cal. 470,

2 9 Saurashtra Law Reporter 193.

the tribunal is not a Court in the sense in which the word "Court" is used in the context of hierarchy of Courts established in the Union of India. But, in the body of the Saurashtra Agricultural Debtors' Relief Act, we do not find any such provision made in relation to the Board created under s. 5 of the Act. We must, therefore, hold for the reasons stated in the course of this judgment that a Board constituted under s. 5 of the Saurashtra Agricultural Debtors' Relief Act is a Court.

The next point which Mr. Hathi has endeavoured to make before us is that no opportunity was given by the Junagadh Board to the petitioner of being heard in the matter of his dues from his debtors-opponents Nos. 6 and 7. It is no doubt true that upon the admission of debts by opponents Nos. 6 and 7, the Junagadh Board did not consider it necessary to put the petitioner in the box and seek any explanation from him in respect of the various items which, according to the petitioner, were due to him from opponents Nos. 6 and 7. It is to be remembered, however, that the learned Assistant Judge, on appeal, went exhaustively into the question of debts which were due by opponents Nos. 6 and 7 to the various creditors, including the petitioner, and there is no doubt that when the appeal was heard by the learned Assistant Judge, the petitioner's learned advocate was present, and argued the case on behalf of his client. We, therefore, do not see much substance in the grievance which Mr. Hathi makes before us that his client was not heard by the Junagadh Board. Then again, if we peruse the appellate judgment of the learned Assistant Judge, it would appear that the learned Judge carefully went into the various books of account maintained by the petitioner. The petitioner maintained four books of account, and in these books of account there were various items of interest and various other items. The learned Judge paid careful attention to the question of these items and their relations *inter se*. He considered exhs. 18, 19, 20 and 21 which were the different books of account maintained by the petitioner. In our view, therefore, upon the finding of fact regarding the quantum of the debts due to the petitioner from opponents Nos. 6 and 7, the learned Judge has arrived at a correct conclusion. The learned Judge saw no reason to interfere with the view taken by the Junagadh Board in that connection. Therefore, on merits also, we see no substance in the contention pressed before us by Mr. Hathi.

In the result, the application fails and is rejected with costs.

Application rejected.

[RAJKOT BENCH]

Before Mr. Justice Vyas and Mr. Justice Patel.

MANJI KHIMJI PATEL v. THE UNION OF INDIA.*

Central Provinces and Berar Sales Tax Act (XXI of 1947), Sec. 2(g)—Building materials purchased by contractor to carry out building contract—Whether such materials sold by contractor to owner of building within s. 2(g) of Act—Such materials whether liable to sales tax.

Building materials in a building contract which are purchased by a building contractor from third parties and which are used by him in the construction of a building and the property in which, under the contract, was not to pass to the owner when the goods were purchased by the contractor cannot be said to be sold by him to the owner of the building within the meaning of s. 2(g) of the Central Provinces and Berar Sales Tax Act, 1947, and are not, therefore, liable to any sales tax under the Act.

Bhuramal v. Rajasthan State¹ and Pandit Banarsi Das v. State of Madhya Pradesh,² differed from.

*Decided, January 15, 1958. Special Civil Application No. 257 of 1956 (with Special Civil Applications Nos. 258 and 262 of 1956).

1 [1957] A. I. R. Rajasthan 104.

2 (1955) Sales Tax Cases, Vol. VI, p. 93.

*D. Sarkar & Bros. v. Commercial Tax Officer*¹ and *Dunkerley & Co. v. State of Madras*,² agreed with.

P. & C. Oslar (India) Ltd. v. M. B. State,³ referred to.

THE facts appear in the judgment.

K. M. Chhaya, for the applicant.

B. R. Sompura, Special Government Pleader, for the opponents.

VYAS J. These three Special Applications raise a common question and we propose to decide the question by a common judgment. The point which arises in these applications is whether the building materials in a building contract which are purchased by a building contractor from third parties and which are used by him in the construction of a building could be said to be sold by him to the owner of the building within the meaning of cl. (g) of s. 2 of the Central Provinces and Berar Sales Tax Act, 1947.

The petitioners entered into a contract for the construction of buildings. They supplied the entire material required for the construction of the buildings. It is contended on their behalf that the supply of the building materials by them, after purchasing the said materials from third parties, was not a sale of goods and, therefore, the State Legislature had no jurisdiction to declare such transactions as sale of goods or make them taxable as sale of goods. It is contended for the petitioners that the provisions of the Act—the Central Provinces and Berar Sales Tax Act, 1947—which are sought to be utilised by the State for the purpose of levying a tax upon the building materials, in so far as they are construed to interpret the supply of goods in the execution of a building contract as sale of goods liable to sales tax, are *ultra vires* and void. It is also the contention of the applicants that r. 4 of the rules framed under the Act, which has been framed for calculating the price of goods in a contract which includes price of goods as well as work and labour, is arbitrary and that the State Legislature has no power to delegate the function of laying down the principles of calculating price of goods in a building contract to the State Government.

In the Government of India Act, 1935, 7th Sch., List 2, there was an item, being Item No. 48, under which the Provincial Legislature was empowered to legislate in respect of taxes on the sale of goods. In the Constitution of India there is a corresponding provision and that provision is contained in Item No. 54, List II, Sch. VII. Under this item, the State Legislature has power to legislate on taxes on sale or purchase of goods other than newspapers. It is contended for the petitioners that the words "sale of goods" are not defined in the Government of India Act nor in the Constitution, but that, at the time when the Government of India Act came into operation or at the time when the Constitution came into force, the words "sale of goods" had a definitive meaning in law and were governed by the Indian Sale of Goods Act, which was based on the English Sale of Goods Act. In other words, the contention of the petitioners would seem to be that when the Constitution was drafted and came into force, it was clearly understood what in law amounted to sale of goods, and it is argued that the intention of the framers of the Constitution in conferring power on the State Legislature to legislate on the subject of imposing taxes on the sale of goods was not to confer anything more than a power to impose taxes on what was then understood in law as sale of goods. Thus the question which arises for our decision in these applications is whether, under a contract of building, the supply of building materials by the contractor for the construction of a building could be considered as sale of goods.

In our view, the contracts of the nature undertaken by these applicants are not contracts for the sale of goods. This is patently clear on the face of the contracts themselves. That being so, the Legislature of a State has no power to levy sales tax by treating these transactions as involving sale of goods so

1 [1957] A. I. R. Cal. 223.

2 [1954] A. I. R. Mad. 1130.

3 [1957] A. I. R. Madhya Bharat 139.

as to bring them within the purview of the Central Provinces and Berar Sales Tax Act, 1947. We must accept the submission of the applicants' learned advocate that the Legislature has no power to include within the definition of "sale" a transaction which is not a "sale" and so extend its power to tax transactions which are wholly outside their legislative field. In our view, until the building materials are affixed to the building, the property therein would remain with the building contractor, notwithstanding the fact that the materials might have been approved by the employer or his agent. Of course, if there is an agreement to the contrary, viz., an agreement to treat the property in building materials as having been transferred from the contractor to the owner as soon as the contractor purchases those materials from a third party for using them in the construction of a building, the case would assume a different aspect. But, with that aspect of the matter we are not called upon to deal in these applications. It is, therefore, clear to us that unless there is a contract intending specifically to pass the property in the materials as and when they are brought to the site, the property would pass only when the materials are affixed to the building. As Mr. Justice Sinha observed in the case of *D. Sarkar & Bros. v. Commercial Tax Officer*¹ (p. 292):

"...The contract is treated as an entire contract to build, and the price is to be paid on a lump-sum basis or the amount ascertained according to the schedule of rates after measuring the quantity."

It may be noted that in deciding the above-mentioned Calcutta case, Mr. Justice Sinha followed a decision of the Madras High Court in the case of *Dunkley & Co. v. State of Madras*.² It was held by the learned Judges of the Madras High Court that in construing the provisions of the Act, the Court should seek to ascertain the meaning and intention of the Parliament from the language of the statute itself. The learned Judges held that the expression "sale of goods" signified a contract whereby the property in the goods was actually transferred from the seller to the buyer. With respect, their Lordships put a plain and natural construction upon the words "sale of goods". Their Lordships pointed out that the legislative power of a Provincial Legislature to levy a tax on sale of goods was confined only to the transaction of the sale and they pointed out that building contracts, which expression included contracts for the construction of dams, road work, bridges etc., were always considered in law as entire and indivisible contracts in the sense that the complete fulfilment of the promise by one party was a condition precedent to the right of the other party to call for the fulfilment of any part of the promise by the other. In our view, there is no element of sale of the materials in a building contract, and the contract is an indivisible contract. It is impossible to accept the contention that as and when a building contractor goes on purchasing building materials, he goes on selling those materials to the owner of the building even before the building is completed. It is impossible to take the view that after the building materials are purchased by the contractor and sold by him to the owner, they are affixed to the building. It is clear to our minds that unless the work for the completion of which the contractor took the contract was completed, the contractor would not be entitled to the price fixed under the contract. We have looked into the contracts, which are the subject-matter of these applications. We are unable to discover anything in the terms of the contracts which would imply a contract for the sale of materials for a stipulated price. There is no doubt that the property in the materials passed to the owner of the land, not by virtue of delivery of the materials as goods under an agreement of sale which stipulated a price for the materials, but because the materials were affixed to the building in pursuance of the contract. When the property in the entire building would pass to the owner, then and then only, and not before then, the property in the materials which are fixed to the building would also pass to the owner. A building comprises several materials, and, that being so, we cannot conceive

1 [1957] A. I. R. Cal. 283.

2 [1954] A. I. R. Mad. 1130.

of two different points of time, one when the property in the materials would pass from the contractor to the owner and the next when the property in the building as distinct from the materials would pass to the owner. We have thought over the question, and have examined the contentions advanced before us by the learned advocates on behalf of both sides, but we find it impossible to accept the contention of the learned Special Government Pleader that the property in the building materials went on passing from the contractor to the owner as and when the contractor went on purchasing those materials from third parties. In the view which we are taking, we are fortified by the decisions above referred to of the Madras High Court and the Calcutta High Court.

On behalf of the State the learned Special Government Pleader invited our attention to a decision of the Rajasthan High Court in the case of *Bhuramal v. Rajasthan State*.¹ The learned Judges in this case pointed out in para. 11 of their judgment:

"Though, therefore, the contractor is handing over a completed building or dam or bridge according to the terms of the contract, what he is really selling is the materials which are included in the building etc., in addition to the labour charges which he has incurred, and charges for his own work and skill."

Upon a careful consideration of the implication of these observations it would appear that even these observations would show that the building materials were not looked upon by the learned Judges as having been sold by the contractor to the owner as and when the contractor went on purchasing them from third parties. The learned Judges took the view that when a building was completed and when the contractor was handing over the completed building to the owner, he was selling the materials, which were used in construction of the building, to the owner. Now, so far as the view taken by the Rajasthan High Court is concerned, viz., that when the completed building was handed over by the contractor to the owner, he was selling the materials to the owner, we are, with respect, unable to follow that view. As we have stated above, a building contract is one and indivisible contract, in which there is no transfer of goods or selling of materials as and when the materials are purchased by the contractor. In our view, nothing passes from a contractor to the owner until the entire building is completed. We may look at the case from this aspect. If upon the completion of a building, the owner does not approve of the building with the result that the contractor is compelled to pull down the building and build another one to the satisfaction of the owner, what happens? Would the owner be liable to pay the price of the building materials used in that building to the contractor? The answer would be in the negative. This would show, apart from anything else, that the property in the building materials does not pass to the owner from the contractor unless and until the building is completed and approved of by the owner to whom the delivery of the building is handed over. Take another instance. If for some reason the owner repudiates the contract after the building materials are purchased by the contractor, what is the position? If the property in the goods has already passed from the contractor to the owner, would the contractor be entitled to call upon the owner to pay him the price for the goods used by him upto that point of time upon the contention that the owner rescinded the contract? Here again, the answer would be in the negative. Thus, it would be clear, upon an examination of the various aspects of the contract, that a building contract, being one and indivisible contract and the question of handing over of the building materials not arising until the whole building is completed, the property in the building materials would not pass to the owner as and when they are purchased by the contractor.

The learned Special Government Pleader has next invited our attention to a decision of the Nagpur High Court in the case of *Pandit Banarsi Das v. State of Madhya Pradesh*.² In this case, a Division Bench of the Nagpur High Court observed that if a building contract was not to be split up into its com-

¹ [1957] A. I. R. Rajasthan 104. ² (1955) Sales Tax Cases, Vol. VI, p. 93.

ponent parts, that is to say, material and labour, in legislative practice relating to the ordinary regulation of sale of goods, there was no warrant for holding that it could not be so split up even for purposes of taxation. The learned Judges said that building materials were goods and there was payment for materials although it was not made separately, but as part of a larger amount. Again, with respect, we find ourselves compelled to differ from the view taken by the learned Judges of the Nagpur High Court. Upon a plain construction of the expression "sale of goods" and upon a consideration of the fact that there is nothing contained in the contracts which are the subject-matters of these applications to suggest that the property in the goods was to pass as and when the goods were being purchased by the contractor, we must hold that the contract was one and indivisible and that the property in the building materials was not to pass from the contractor to the owner until the building was completed, and once the building was completed what passed from the contractor to the owner was proprietary right in the immovable property. What passed from the contractor to the owner was not the property in the building materials as distinct from immovable property, i.e., the building itself.

The learned Special Government Pleader has then invited our attention to a decision of the Madhya Bharat High Court in the case of *F. & C. Osler (India) Ltd. v. M. B. State*.¹ In this case, the learned Judges held that even assuming that in some of the contracts there was affixing of what at one time were chattels, the element of sale of chattel might be less predominant than the element of bringing into existence an immovable property and that for that reason they might not be said to involve a sale. We are unable to see how these observations could help the State. On the contrary they help the applicants. It would all depend upon what was the predominant element in a contract. If the predominant element was to bring into existence an immovable property, then the transaction would not involve a sale of the building materials. There is no doubt that in these applications what we are concerned with are transactions in which the predominant element was not the sale of the building materials, but the bringing into existence of an immovable property. That being so, even the Madhya Bharat case would not assist the learned Special Government Pleader.

Accordingly, for the reasons stated above, we are of the view that the building materials which were purchased by the applicants-contractors from third parties, and which were used by them in constructing the buildings for which they had taken the contracts, would not fall within the ambit of the expression "sale of goods" in cl. (g) of s. 2 of the Central Provinces and Berar Sales Tax Act, 1947. Therefore, they would not be liable to sales tax. In the light of this conclusion there does not survive any necessity to consider whether r. 4 of the rules framed under the Act is *ultra vires* or *intra vires*. The provisions of this rule would not be attracted in view of our finding that the supply of building materials by a contractor to the owner would not amount to a sale within the meaning of cl. (g) of s. 2 of the Act. All these applications are accordingly allowed, and it is declared that the building materials supplied by the applicants to the State in the course of the execution of the building contracts would not amount to a sale of the said materials within the meaning of cl. (g) of s. 2 of the Act and, therefore, they would not be liable to any sales tax. The opponent in all these cases will bear its own costs and pay the costs of the applicants.

Applications allowed.

[RAJKOT BENCH]

Before Mr. Justice Vyas and Mr. Justice Patel.

THE NEW JEHANGIR VAKIL MILLS LTD., BHAVNAGAR v. N. L. VYAS, INDUSTRIAL TRIBUNAL, RAJKOT.*

Industrial Disputes Act (XIV of 1947), Secs. 33, 33A, 36, 19(3)(d)—Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), Secs. 22, 12—Meaning of expression "concerned in such dispute" in s. 33—Workers in ring frame department of mill dismissed pending dispute before Industrial Tribunal relating to seniority between workers in bleaching department of same mill—Mill not obtaining permission of Tribunal before dismissing workmen—Application by dismissed workers under s. 33A to Tribunal whether maintainable—Whether such workmen "concerned" in disputes pending before Tribunal.

The expression "concerned in such dispute" in s. 33 of the Industrial Disputes Act, 1947, means really concerned or directly, personally or primarily concerned in such dispute, and not merely interested in such dispute.

Certain workers of a mill belonging to the ring frame department of the mill, who were working as doffers, were dismissed by the mill for misconduct. The workers made an application under s. 33A of the Industrial Disputes Act, 1947, to the Industrial Tribunal contending that at the date of their dismissal certain disputes between the mill and its workmen were pending before the Tribunal, that it was obligatory upon the mill to take permission of the Tribunal before dismissing them and that as the mill did not obtain such prior permission, the mill violated the provisions of s. 33 of the Act. The disputes pending before the Tribunal when these workers were dismissed related to determination of seniority between certain workers of the bleaching department of the mill and the change over which was to be effected upon the basis of the seniority. On the question of the maintainability of the application under s. 33A of the Act:—

Held, that the applicant workers were not the workmen concerned in the disputes which were pending before the Tribunal at the date upon which they were dismissed and that, therefore, the provisions of s. 33 of the Act were not attracted and the Tribunal had no jurisdiction to entertain the application under s. 33A of the Act.

THE facts appear in the judgment.

I. V. Nanavaty for *H. M. Chinoy*, for the applicant.

M. P. Thakkar, for respondents Nos. 2, 3 and 4.

VYAS J. This is a petition under arts. 226 and 227 of the Constitution of India, made by the New Jehangir Vakil Mills Ltd., Bhavnagar, and it arises out of an order made by the Industrial Tribunal, Rajkot, in Miscellaneous Application No. 196 of 1956. This petition raises an interesting question, and the question raised is the one of construing s. 33 of the Industrial Disputes Act, 1947. This question has arisen in this way. Miscellaneous Application No. 196 of 1956 was an application which was filed by certain three workers of the New Jehangir Vakil Mills Ltd., Bhavnagar, under s. 33A of the Industrial Disputes Act, 1947. The three workers complained under s. 33A of the Act that they were dismissed by notices served upon them on April 17, 1956, and the dismissal was ordered without the previous permission of the Industrial Tribunal, Rajkot. The complaint of the three workers was that at the date of their dismissal, certain disputes in which the New Jehangir Vakil Mills Ltd. and also its workmen were concerned were pending before the Tribunal and, therefore, it was obligatory, under the Act, for the Mills to have sought the previous permission of the Tribunal before dismissing the workmen. It may be noted that the three workmen who made the application under s. 33A of the Act were the workmen belonging to the ring frame department of the New Jehangir Vakil Mills Ltd., at Bhavnagar. They were working as doffers. They were dismissed by

*Decided, February 11, 1958. Special Civil Application No. 64 of 1957.

the Mills on April 17, 1956, and the ground for the dismissal was the misconduct of those workers, the misconduct being that the workers threw bobbins at the Technical Manager. On the date of their dismissal, two disputes were pending before the Tribunal. Those two disputes were Adjudications Nos. 56 and 62 of 1955. In Adjudication No. 56 of 1955, the dispute to be adjudicated upon was a dispute relating to compensation payable to the workers of the winding and warping department. In Adjudication No. 62 of 1955, the dispute to be adjudicated upon was in regard to the determination of seniority between the three workers of the bleaching department and the change over which was to be effected upon the basis of the said seniority. Now, the three workmen Hira Ramji, Prema Nanji and Popat Bhikha, who were dismissed by the Mills on April 17, 1956, contended that since the adjudication proceedings mentioned above were pending at the date of their dismissal, it was obligatory upon the Mills to take the permission of the Industrial Tribunal before dismissing them, and that as the Mills did not obtain such prior permission from the Industrial Tribunal, they violated the provisions of s. 33 of the Act. It was upon these contentions that the three workmen complained under s. 33A of the Act to the Industrial Tribunal, so that the Tribunal might adjudicate upon their complaint.

Upon the above complaint being filed by the three workmen of the ring frame department of the Mills, the Mills raised a preliminary objection to the maintainability of the workmen's application under s. 33A of the Act. The preliminary objection which was taken by the Mills was that the three workmen were not concerned in the disputes which were pending before the Tribunal and, therefore, the provisions of s. 33 would not be attracted and accordingly the Tribunal would have no jurisdiction to entertain the workmen's complaint under s. 33A of the Act.

The Industrial Tribunal at Rajkot, upon the abovementioned preliminary objection being taken by the Mills, held that although it was true that the three workmen, Hira, Prema and Popat, were not directly concerned in the disputes which were pending adjudication in Adjudications Nos. 56 and 62 of 1955, they became concerned in those disputes, since the orders of reference in those disputes, which were pending adjudication, styled the disputes as those between the New Jehangir Vakil Mills Ltd., Bhavnagar, and its workmen represented by the Mill Kamdar Union, Bhavnagar, and since the three workmen mentioned above were members of the said Union. Upon this view of the matter, which the learned Member of the Industrial Tribunal took, he held that the workmen Hira, Prema and Popat were entitled to make an application to the Tribunal under s. 33A of the Act. It is from this order of the Tribunal that the present petition under arts. 226 and 227 of the Constitution of India is filed by the New Jehangir Vakil Mills Ltd., Bhavnagar.

Now the point which falls to be determined in this petition is a point of construction of s. 33 of the Industrial Disputes Act, 1947. Section 33 provides:—

"During the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute, no employer shall—

(a) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or

(b) discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the conciliation officer, Board or Tribunal, as the case may be."

Now, the subject-matter of controversy in this case is the expression "concerned in such dispute". Now it is clear that an industrial dispute may be of various kinds. There may be a dispute which might affect the entire body of workmen; for instance, a dispute in the matter of dearness allowance, or fixation of wage scale, or in the matter of leave rules, etc. On the other hand, there might be disputes which might pertain only to a class of workers as dis-

tinguished from the entire body of workers, or a part of the establishment. For instance, there may be a dispute relating to the dismissal of a new worker. There may be a dispute relating to service conditions of a particular part of the establishment. There may be a dispute in respect of wages, say, of workers of the winding department, and so on. There may be various kinds of industrial disputes. Before the provisions of s. 33 of the Act can be invoked, the Court must be satisfied that the employer had, to the prejudice of the workmen concerned in a dispute, altered the conditions of service applicable to them. We have carefully considered the various submissions which were advanced before us by the learned advocate Mr. Nanavaty for the Mills and the learned advocate Mr. Thakkar for the workmen, and we have come to the conclusion, having regard to the plain language used in s. 33 of the Act, that the expression "concerned in such dispute" means really concerned or directly, personally or primarily concerned in such dispute, and not merely interested in such dispute. It is not inconceivable that if a particular workman working in a particular department of the Mills is dismissed, the workers of the other departments of the Mills might sympathise with him and might make a common cause with his grievance. It is, therefore, conceivable that in a dispute in which only a particular worker might be concerned, the workers of the other departments of the Mills might be interested. But such an interest would not be the same thing as being "concerned" within the meaning of s. 33 of the Act. What we are emphasising is that in the case of legal or quasi-legal proceedings, a person without being a party to the proceedings may still be interested in the result of the proceedings because of various circumstances, such as a close relationship with the parties, or the pendency of other proceedings in which he is involved and in which the same question may be raised. The word "interest" is a wide generic word which clearly enough has not the same legal import as the word "concerned". In our opinion, the word "concerned" connotes a kind of specific, direct interest, and in a given legal or quasi-legal proceedings, it implies a direct and personal interest which a party to the proceedings would have in the result of those proceedings, when the same are capable of directly affecting him in any adjudication beneficially or prejudicially according to the result. It is clear that a mere indirect or altruistic interest in the result of the proceedings is not to be confused with the direct and personal concern in the proceedings. A personal concern in the proceedings would imply that the proceedings are of such a nature that their result would directly benefit or prejudice the persons concerned in the proceedings as parties to those proceedings. Clearly, therefore, if in a given case the entire body of workers make a common cause with a workman who is dismissed from the employment of the Mills and sympathise with the case of that particular worker in a dispute which is raised by that worker, it could not be contended with any validity that the entire body of workers became concerned in the dispute within the meaning of s. 33 of the Act.

At this stage, it would be proper to turn to the orders of reference made in the two disputes which were pending adjudication at the date of the dismissal of these workers, viz., Adjudications Nos. 56 and 62 of 1955. Both these orders of reference were similarly worded. It would, therefore, suffice if I refer to only one of these orders. Now the order of reference in Adjudication Proceeding No. 62 of 1955 was in these words:

"Whereas an Industrial Dispute has arisen between the New Jehangir Vakil Mills Co. Ltd., Bhavnagar, and its workmen represented by the Mill Kamdar Union, Bhavnagar, so far as the Government is aware in respect of the matters specified in schedule I hereto annexed.

Schedule I

(1) Whether Ganpat Gopala, Klerman in temporary 3rd shift of bleaching department is covered by Award in Adjudication No. 20 of 1950.

(2) To decide the relative seniority of the three workers of the Kler section of the bleaching department working in the three shifts of this section. These workers are (1) Jayantlal Gopalji, (2) Ramnarayan Nathuram, (3) Ganpat Gopala.

(3) After deciding the above two issues, how actually the change-over should be made in this sub-section of the bleaching department."

This was the order of reference which was made in Adjudication No. 62 of 1955. Now the question is who were the parties to the dispute which was referred to the Tribunal for adjudication. It is contended for the Mills that the parties to the adjudication were the New Jehangir Mills Co. Ltd., Bhavnagar, and the three workers of the bleaching department viz., Jayantilal Gopalji, Ramnarayan Nathuram and Ganpat Gopala. On the other hand, it is contended for the workers, who are the opponents in this petition, that the parties to the above adjudication were the Mills on the one hand and the entire body of workmen on the other hand. We have taken into anxious consideration the arguments canvassed before us on this point by the learned advocates on both sides, and we have felt ourselves constrained to reject the contention of the workers. Upon the plain language of the preamble to the order of reference, the language being, "whereas an Industrial Dispute has arisen between the New Jehangir Vakil Mills Co. Ltd., Bhavnagar, and its workmen represented by the Mill Kamdar Union, Bhavnagar, so far as the Government is aware in respect of the matters specified in schedule I hereto annexed", we are of the view that the parties to the adjudication were the Mills on the one hand and the workers concerned in the matters which were specified in schedule I on the other hand. It is no doubt true that the words "represented by the Mill Kamdar Union, Bhavnagar" were used immediately after the word "workmen" in the preamble to the order of reference, but this would not, in our opinion, make the Mill Kamdar Union a party to the adjudication proceedings. The parties in our view were the workmen who were concerned in the dispute in respect of the matters specified in schedule I, but the representation of these workers before the Tribunal was to be made by the Mill Kamdar Union, Bhavnagar. In this connection, we have only to turn to s. 36 of the Industrial Disputes Act, 1947. Section 36 provides:

"A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by—

- (a) an officer of a registered trade union of which he is a member;
- (b) an officer of a federation of trade union to which the trade union referred to in clause (a) is affiliated;..."

Now in the language of s. 36 of the Act, the distinction between a workman who is a party on the one hand and the person representing the said party on the other hand is perfectly clear. But for this distinction which the Legislature had in view, the Legislature would not have used the words "workman who is party to a dispute shall be entitled to be represented etc., etc." It is clear, therefore, that the Mill Kamdar Union, Bhavnagar, who represented the workmen before the Tribunal in the adjudication proceedings, was not itself a party to the proceedings. The parties were the workmen, and they were represented by the Kamdar Union. Upon the language of the preamble to the order of reference, it is clear that the workmen were the persons concerned in the dispute in respect of the matters which were specified in schedule I.

If the entire body of the workers were to be deemed to be a party to Adjudication No. 62 of 1955, they would be bound by the result of the adjudication. There is no doubt that in the Adjudication No. 62 of 1955, the parties bound by the result of the adjudication would be the Mills and the employees or the workmen of the bleaching department of the Mills. There could possibly not be any controversy upon this point. Section 18 of the Act is clear. Sub-section (3), cl. (d) of s. 18 provides:

"(3) A settlement arrived at in the course of conciliation proceedings under this Act or an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on—...

- (d) Where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as

the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part."

Now there is no dispute that on the date of the dispute, the three workmen concerned viz., Jayantilal, Ramnarayan and Ganpat, were members of the bleaching section or department of the Mills. The dispute which was referred to the Tribunal for adjudication was a dispute regarding the relative seniority of those three workers of the bleaching department. Therefore, the decision of the Tribunal in that dispute would bind, not the entire body of the workers of the Mills, but only the members of the bleaching section of the Mills who were working in that section on the date on which the dispute arose and also the persons who might subsequently become employed in the bleaching department of the company. No other conclusion is possible upon a plain and natural reading of the provisions of cl. (d) of s. 18 of the Act. The point we wish to emphasise is that it would not be the entire body of the workmen employed by the New Jehangir Vakil Mills, Ltd., Bhavnagar, who would be bound by the result of Adjudication No. 62 of 1955. It would only be a class of workers viz., the persons working in the bleaching department of the company who would be bound by the result of the adjudication. Therefore, it is impossible for us to accept the learned advocate Mr. Thakkar's contention that parties to the Adjudication No. 62 of 1955 were the Mills on the one hand and the entire body of workers of the Mills on the other hand.

Then again, if Shri Thakkar's contention were right, the language of the preamble to the order of reference would have been : "Whereas an Industrial Dispute has arisen between the New Jehangir Vakil Mills Co. Ltd., Bhavnagar, and the Mill Kamdar Union, Bhavnagar". But that was not the language of the preamble and deliberately so. The language used was "Whereas an Industrial Dispute has arisen between the New Jehangir Vakil Mills Co. Ltd., Bhavnagar, and its workmen represented by the Mill Kamdar Union, Bhavnagar", and in our view, this language must mean that the parties to the adjudication were the Mills on the one hand and the workmen of the Mills who were concerned in the dispute in respect of matters referred to in schedule I.

The well-known rule of construction is that a word here or a word there must not be picked up and separated from its context. The word "workmen" which has found place in the preamble to the order of reference must not be separated from the rest of the words used in the preamble. The entire preamble must be read together, and upon a proper reading of the preamble, there is no doubt that the words "its workmen" must be read in the context of words "in respect of the matters specified in schedule I hereto annexed". If we turn to the schedule, we find a reference made to the three workers of the bleaching department. We also find a reference made to the subject-matter of the dispute, viz., the question about the relative seniority and the consequent question of change-over. There is, therefore, no doubt that the persons really concerned or directly concerned in that dispute were the persons who were interested in the question of relative seniority in the bleaching department, viz., the three persons Jayantilal, Ramnarayan and Ganpat. It would be upon the determination of the relative seniority of these persons that the question of change-over would depend. Therefore, it might be said that a certain class of workers of the Mills, viz. those who were working in the bleaching department of the Mills, were the persons directly concerned in the dispute which was the subject-matter of the Adjudication Proceeding No. 62 of 1955, and not the entire body of workers. At this stage, it may be noted, and this is important, that the opponents to the present petition, viz., Hira, Prema and Popat, were not the workers in the bleaching department of the Mills. They were workers in the ring frame department of the Mills. They were doing the work of doffers. That being so, it is difficult to accept Mr. Thakkar's contention that these three workers who were working as doffers in the ring frame department were really concerned or directly, personally or primarily concerned in the dispute which was referred to the Tribunal for adjudication in Adjudication Proceeding No. 62 of 1955.

As I have mentioned above, one of the tests for deciding whether a particular section of the workers was "concerned" in a particular dispute which was referred to the Tribunal for adjudication would be whether those workers would be bound by the award of the Tribunal. Clearly enough if the award of the Tribunal would not be binding upon a class of persons, the said persons could by no stretch of imagination be held to have been the people concerned in the dispute. If they were concerned in the dispute, the result of the dispute viz., the adjudication, must bind them. I have already referred to cl. (d) of sub-s. (3) of s. 18 of the Act. Upon a proper construction of cl. (d) of sub-s. (3) of s. 18 of the Act and upon its application to the facts of the present case, there would be no doubt that only the workers of the bleaching department of the Mills would be bound by the result of the Adjudication Proceeding No. 62 of 1955. By no stretch of imagination could it be said, and indeed that was not the submission of Mr. Thakkar also, that the entire body of the workers of the Mills would be bound by the result of Adjudication No. 62 of 1955. Therefore also we feel ourselves fortified in our view that in the present case, the workmen concerned in the dispute which was pending before the Tribunal in Adjudication Proceeding No. 62 of 1955 were Jayantilal, Ramnarayan and Ganpat, and through them perhaps all the workers of the bleaching department. Certainly, the employees who had nothing to do with the bleaching department of the Mills could not be said to have been concerned in the dispute.

There is another test also which could be usefully applied for determining whether the entire body of the workmen of the Mills could be said to have been the persons concerned in the dispute to which I have referred. For this purpose, we must turn to s. 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950. Section 22 provides:

"During the period of thirty days allowed for filing of an appeal under section 10 or during the pendency of any appeal under this Act, no employer shall—

(a) alter, to the prejudice of the workmen concerned in such appeal, the conditions of service applicable to them immediately before the filing of such appeal, or

(b) discharge or punish, whether by dismissal or otherwise, any workmen concerned in such appeal, save with the express permission in writing of the Appellate Tribunal."

It is to be noted that the expression "workmen concerned in such appeal" which occurs in the body of s. 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950, is similar to the expression "workmen concerned in such dispute" which occurs in s. 33 of the Industrial Disputes Act, 1947. Now if we turn to s. 12 of the Industrial Disputes (Appellate Tribunal) Act, 1950, it would appear that s. 12 provides:

"An appeal under this Act against any award or decision of an Industrial Tribunal may be presented to the Appellate Tribunal by any party which is aggrieved by the award or decision."

It is clear that a party who is aggrieved by the award could only be a party who is bound by the award. A party who is not bound by the award could certainly not at any time feel itself aggrieved by the award, and I have already pointed out, while dealing with s. 18 of the Industrial Disputes Act, 1947, that the persons bound by the award would be the persons employed in the establishment or a part of the establishment, as the case may be, to which the dispute relates on the date of the dispute, and all the persons who subsequently might become employed in that establishment or part. In the context of the present case, therefore, it would be clear that only those persons who were employed in the bleaching section of the Mills on the date upon which the dispute arose, and all those who might subsequently become employed in that section, would be bound by the award of the Tribunal. Therefore, only those persons would be entitled to appeal against the award under s. 12 of the Industrial Disputes (Appellate Tribunal) Act, 1950. This would mean that only those persons, and not the entire body of the workmen, would be concerned in the appeal within the meaning of the expression "workmen concerned in such appeal"

in s. 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950. It would be impossible for us to put a wider construction upon the word "concerned" when the dispute is at the initial stage or the original stage and a narrower construction upon the same word when the dispute reaches an appellate stage. The word "concerned" whether used in the context of the initial stage or the appellate stage must bear the same connotation, and as I have just stated, the persons concerned in the appeal would be, not the entire body of the workmen, but only those who were directly affected by the dispute. In this case, I have stated above that only the workers of the bleaching section would be directly concerned by the result of the adjudication. Therefore, only they would be concerned in the filing of the appeal. Therefore, at the original stage also of the dispute, we must hold that only the workers of the bleaching section would be the persons concerned in the dispute. Thus then, in the provisions of ss. 12 and 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950, we have a test to decide whether the word "concerned" which finds place in s. 33 of the Industrial Disputes Act means directly, personally and primarily concerned, or whether it means remotely interested. We are unable to accept the contention of Mr. Thakkar that anybody who might sympathise with a dismissed employee or who might take interest in the cause of a dismissed employee would also be said to be a person concerned in the dispute.

For the reasons stated above, we are of the view that the opponents to this petition, viz., Hira Ramji, Prema Nanu and Popat Bhikhu were not the workmen concerned in the disputes which were the subject-matter of Adjudications Nos. 55 and 62 of 1955 which were pending at the date upon which they were dismissed, viz., on April 17, 1956. That being so, the provisions of s. 33 of the Industrial Disputes Act would not be attracted in this case and the Industrial Tribunal at Rajkot would have no jurisdiction to entertain the complaint which was filed by these workers under s. 33A of the said Act. The application is accordingly allowed. We make no order as to costs. A writ of prohibition shall issue and the Tribunal shall be directed not to proceed further with the complaint which was filed before it under s. 33A of the Industrial Disputes Act by the opponents.

Application allowed.

[NAGPUR BENCH]

Before Mr. Justice Datar.

MAROTI SADASHIV BAKADE v. GODABAI NARAYANRAO PANDE.*

Defamation—Privilege—Defamatory statements made before police officers in course of regular investigation—Whether such statements absolutely privileged.

Defamatory statements made before police officers in the course of a regular investigation under the Criminal Procedure Code, 1898, are not absolutely privileged but only a qualified privilege attaches to them which is liable to be destroyed by proof of malice.

*Gangappagouda Gadigeppagouda v. Basayya Shikarudrayya,*¹ followed.

*Madhab Chandra v. Nitrod Chandra,*² *Sanjivi Reddy v. Koneri Reddi,*³ *O'Connor v. Waldron*⁴ and *Joseph Mayr v. Charles Warwick,*⁵ referred to.

ONE Godabai (plaintiff) was the widow of one Narayan who was the adopted son of Bhanudas. Narayan died in the year 1943, leaving behind him the plaintiff and the adoptive mother Bainabai (defendant No. 1). Defendant

*Decided, May 2, 1958. First Appeal No. 139 of 1952 (with First Appeals Nos. 22 and 23 of 1953), against the decision of S. N. Hadole, 2nd Civil Judge, Class I, Amravati, in O. S. No. 6B of 1951.

1 (1942) 45 Bom. L. R. 215, s.c. [1943]

A. I. R. Bom. 167.

2 [1939] A.I. R. Cal. 477.

3 (1925) I. L. R. 49 Mad. 315.

4 [1935] A. C. 78.

5 (1942) 47 O. W. N. 627.

No. 2 was Bainabai's sister and defendants No. 3 and 4 were the sons of defendant No. 2. Defendant No. 5 was the brother of Bainabai. Defendants Nos. 6 to 10 were the friends of defendants Nos. 3 to 5. The present suit was filed by the plaintiff for damages for defamation against the defendants. The defamation alleged against the several defendants was that defendant No. 10 made an anonymous application to the District Superintendent of Police which contained the defamatory words that "the plaintiff was pregnant." This application was enquired into and statements were recorded by the police at Dapori on April 29, 1950. The application was read to the plaintiff in the presence of other persons. The plaintiff, however, stated that the application was in the handwriting of defendant No. 10, though it was not signed by him. Defendant No. 9 made an anonymous application on May 3, 1950, to the District Superintendent of Police, Amravati, and other police authorities. This application also, according to the plaintiff, contained defamatory words against her. It was stated in the application that the plaintiff was pregnant and that the plaintiff caused forcible miscarriage of a child and concealed the birth of that child. The plaintiff stated that defendant No. 3 sent two applications respectively on June 26, 1950, and July 19, 1950, to the District Superintendent of Police, Amravati, containing false and defamatory statements that one Bapurao was the cause of the plaintiff's pregnancy and the plaintiff absconded with Bapurao to cause forcible miscarriage. The plaintiff further stated that during the investigation which started upon the said application, defendants Nos. 1, 3, 4, 6 and 8 also made similar statements before the police authorities. So far as defendant No. 5 was concerned, the plaintiff's case was that he published a notice in the local newspaper 'UDAYA' dated July 25, 1950, on the instructions and on behalf of defendant No. 1. The notice which was published in the newspaper mentioned that the plaintiff's character was not good, that the plaintiff was morally defamed, that she became pregnant by illegitimate connection, that in order to cause forcible miscarriage she absconded from the village, and that she had thus brought disgrace to her family. A copy of this notice was got served by defendant No. 5 upon Bapurao who received it on August 3, 1950. Bapurao thereafter showed this notice to the plaintiff. The plaintiff has contended that all these statements in the notice as also those made before the police officers were malicious and caused her immeasurable harm. It was further stated by the plaintiff that defendant No. 7 made two applications on September 22, 1950, under the false signature of one Vinayak Balkrishna Pande to the District Superintendent of Police, Amravati. These two applications also contained defamatory words to the effect that the plaintiff caused forcible miscarriage at Dhamangaon, tahsil Chandur. On September 22, 1950, Champat, (defendant No. 8), made an application to the Station Officer, Nagpur Gate Police Station, Amravati, falsely signed as Vinayak Balkrishna Pande. This application also contained defamatory words and it stated that the plaintiff caused forcible miscarriage at Dhamangaon. The plaintiff states that the several applications and the statements made by the aforesaid defendants were defamatory statements made against her chastity and moral character and they were, therefore, liable in damages.

The defendants resisted the suit. Defendant No. 1, who is the mother-in-law of the plaintiff, in her written statement denied having made any defamatory statements before the police as alleged by the plaintiff. She also stated that she did not give any notice to the plaintiff in 'UDAYA'. Defendant No. 5 remained *ex parte*. He did not file any written statement nor did he enter the witness-box and give any evidence on his behalf. Defendant No. 6, however, took up two defences: One of justification (truth of the statements made by him) and the other of absolute privilege. He stated in his written statement that it was a reality that the plaintiff was pregnant in 1950 and that one Bapurao, plaintiff's husband's cousin, was the cause of this pregnancy, and that the plaintiff did abscond with Bapurao and caused forcible miscarriage. He further stated that he made these statements during the police investiga-

tion and those statements were true. He did not make any false statements and he stated that he was justified in making those statements. Defendant No. 7, however, denied having made any application or statements before the police officers. Defendant No. 8 took up the same defences as were taken up by defendant No. 6. In his written statement, he stated that it was a reality that the plaintiff was pregnant in 1950 and that one Bapurao, brother-in-law (plaintiff's husband's cousin), was responsible for it. The plaintiff had absconded with Bapurao who caused miscarriage. This defendant, during the police investigation, spoke these things which were true. He did not make any false statement. It was denied that it caused any defamation of the plaintiff. Defendants Nos. 9 and 10 denied having made any anonymous application to the police officers or having made any statements before them in the course of the investigation.

The trial Court held that defendants Nos. 2, 3, 4, 6, 8, 9 and 10 were liable for the plaintiff's claim and dismissed the suit as against defendants Nos. 1, 5 and 7. The trial Court held that the words employed by the defendants amounted to a very gross kind of defamation and that the allegations made by the defendants were untrue, and that they had been actuated by malice in making those false statements. It also held that the privilege such as was attached to the statements made by these defendants was qualified and was shown to have been destroyed by the fact that these defendants had made those statements falsely and maliciously. The trial Court awarded Rs. 2,000 as damages to the plaintiff.

First Appeal No. 139 of 1952 was filed by defendants Nos. 6, 8, 9 and 10. First Appeal No. 22 of 1953 was filed by defendants Nos. 2, 3 and 4 and the plaintiff filed First Appeal No. 23 of 1953 against defendants Nos. 1, 5 and 7.

F.As. Nos. 139 of 1952 and 22 of 1953.

D. B. Padhye, for the appellants.

P. N. Behere, for *N. L. Abhyankar*, for respondent No. 1.

F.A. No. 23 of 1953.

P. N. Behere, for *N. L. Abhyankar*, for the appellant.

E. N. Deshpande, for respondent No. 1.

N. L. Belekar, for respondent No. 2.

DATAR J. [His Lordship after stating the facts as above and dealing with points not material to this report, proceeded.] Then Mr. Padhye argues that defendants Nos. 6 and 8 were entitled to a privilege, which according to Mr. Padhye, is an absolute privilege, and says Mr. Padhye, no matter how outrageous the lie which was propagated by these witnesses and no matter how malicious the motive of these persons who made the statements that they made and to which they adhered, they would still be protected and their statements would not be at all actionable. Before I consider this point as to whether defendants Nos. 6 and 8 are entitled to an absolute privilege or to a qualified privilege which is liable to be destroyed by proof of malice, I must set out as a statement of fact that the statements complained of by the plaintiff were made before the police officers in the course of the investigation stated to have started upon certain applications. It is not quite clear whether the police officers in the course of a regular investigation under the provisions of the Code of Criminal Procedure, having registered an offence, called upon these persons, particularly defendants Nos. 6 and 8, to make the statements. It is true that one of these defendants says that in answer to the police officer's query the statements were made; but that cannot clearly show that these statements were made in the course of the investigation of the nature which the police officer has got to start and carry on under the provisions of the Code of Criminal Procedure. But for the sake of Mr. Padhye's argument I may assume that these statements were made in the course of the investigation. Then the question arises: were the statements absolutely privileged or was only a quali-

fied privilege attached to those statements? In support of his contention, reliance is mainly placed upon two decisions; one reported in *Madhab Chandra v. Nirod Chandra*¹ and the other in *Sanjivi Reddy v. Koneri Reddi*.² In *Sanjivi Reddy v. Koneri Reddi* it has been held that the statements made in a complaint to a Magistrate under s. 107, Criminal Procedure Code, praying that security should be taken from a person for keeping the peace and a repetition of the same statements before a police officer to whom the Magistrate referred the complaint for enquiry and report are absolutely privileged and no action for defamation in respect of such statement is maintainable. In the Calcutta case, the learned Judges of the Calcutta High Court held (p. 478):

"No action for libel, or slander lies, whether against Judges, counsel, witnesses or parties, for words written or spoken in the course of any proceeding before any Court recognised by law and this though the words were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed. Further, the statements made with a view to repeating them on oath in a subsequent judicial proceeding are similarly protected. Hence statements made by a party in reports to police and statements made by him in subsequent judicial proceedings as a witness are absolutely privileged even though they are defamatory and false." These two decisions have, however, not been approved in a decision of our own Court which is reported in *Gangappagouda Gadigeppagouda v. Basayya Shivarudrayya*,³ where it was held that a Mahalkari holding a preliminary enquiry in the conduct of a police patil on the directions of the Collector in order to report to the Collector is not acting in a judicial capacity, nor exercising the attributes of a Court and that the evidence given before the Mahalkari in such an enquiry is not absolutely privileged. It is true in this case the statements were made before the Mahalkari and not before a police officer as in the instant case. But the principle underlying the decision was that if a statement is not made before a Court or a tribunal having the attributes of a Court, then it could not be said that the statement was absolutely privileged. This has been made clear by the learned Chief Justice in the course of his judgment when he has stated (p. 218):

"...I am clearly of opinion that it is impossible to hold that the Mahalkari was acting in a judicial capacity, or was exercising the attributes of a Court."

The learned Chief Justice also referred to the well-known case of *Watson v. M'Ewan: Watson v. Jones*,⁴ and to the Madras and Calcutta cases to which I have already referred. The learned Chief Justice in the final paragraph of his judgment observed that he was disposed to think that the Madras and the Calcutta cases referred to above went too far, and could not be reconciled with the decision of the Privy Council in *O'Connor v. Waldron*.⁵ If the test that has been laid down in this case that a statement, if made before an officer who was not acting in a judicial capacity or who was not exercising the attributes of a Court, could not be said to have been absolutely privileged, is correct, then the statements made in this case before the police officers cannot be regarded as absolutely privileged. The police officer can never be stated to have been acting in a judicial capacity or exercising the attributes of a Court when he purported to record the statements in the present case and, therefore, I have no doubt that the statements such as were made before the police officers were not absolutely privileged but that only a qualified privilege attached to them. I am bound by the decision reported in *Gangappagouda Gadigeppagouda v. Basayya Shivarudrayya* in so far as it goes and I must, therefore, hold that these statements were not absolutely privileged. Incidentally I may also refer to a subsequent decision of the Calcutta High Court itself which is reported in *Joseph Mayr v. Charles Warwick*,⁶ where the learned Judge, Mr. Justice Blagden, has reviewed all the cases and

1 [1939] A. I. R. Cal. 477.

2 [1925] I. L. R. 49 Mad. 315.

3 [1942] 45 Bom. L. R. 215, s.c. [1943] A.I.R. Bom. 167.

4 [1905] A. C. 480.

5 [1935] A. C. 76.

6 [1942] 47 C. W. N. 627.

has held that a written communication to the Commissioner of Police, containing defamatory statements, is not absolutely privileged. The learned Judge has, in the course of his judgment, observed that a statement to an officer of the police with a view to his setting the criminal law in motion is certainly not, as such, privileged absolutely in England. After considering the position of law in England, he has further held that it is certainly not the policy of the law in India either to prevent a judicial enquiry into the motive of a person who says something to a policeman defamatory of somebody else. The learned Judge has considered the case reported in *Madhab Chandra v. Nirod Chandra* and has observed (p. 616):

"I think, with great respect, that their Lordships understood *Watson v. MacEwan* to decide more than it really did decide. That was not, as is stated at p. 580, a case of a witness claiming protection for a statement which he repeated in a 'subsequent' judicial proceeding, for the proceeding was pending at the publication and not merely contemplated; and it was a case of a witness, pure and simple, and not of a party who in fact gave evidence."

The learned Judge has also referred to the case in *Sanjivi Reddy v. Koneri Reddi* and also to a subsequent case reported in *Bapalal v. Krishnaswami Iyer*,¹ but he was not inclined to accept the reasoning in either of these two cases. But so far as this case is concerned, as I have already stated, the decision in *Gangappa-gowda Gadigepagowda v. Basayya Shivarudrayya* is clear upon the point and I must, therefore, hold that the statements were not absolutely privileged.

Then the question arises whether the plaintiff has been able to prove malice. As I already stated that the evidence on record shows that the statements made by the defendants were made with full knowledge that those statements were untrue. This itself, in my opinion, is a conclusive proof of malice. It was stated before me in the course of arguments submitted by Mr. Padhye that they might have believed that when the whole village was saying that the plaintiff was carrying, the plaintiff was really pregnant. To say the least, this would be a totally unreasonable belief in the rumour or the gossip of the village and I cannot say that there was any justification for the defendants to have such belief. It is rather surprising that defendants having known that these statements were untrue to their knowledge, they were adhered to and were even repeated during the course of the trial. The defendants persisted again in making these statements in the written statement and repeated the other statements which they had admitted that they had made before the police officers. This conduct itself is some indication of the malice which actuated them in making the statements. When no serious attempt was made to prove these reckless statements, I should think that these statements were made by these defendants having been actuated by the malice which is necessary to be proved before the plaintiff can say that the defendants are not entitled to the qualified privilege. If, therefore, the learned trial Judge has held that the statements being defamatory and untrue, malice can be easily inferred, I have no doubt that this is a case where the statements were made by the defendants being actuated by malice.

[The rest of the judgment is not material to this report.]

Before Mr. Justice Vyas and Mr. Justice Tambre.

RAMBHAU SAKHARAM NAGRE v. D. G. TATKE.*

Minimum Wages Act (XI of 1948), Secs. 26(2), 26(2a), 5, 6—Notification issued by Government under s. 26(2) withdrawing exemption from application of Act whether a quasi-judicial or an administrative act—Whether before issuing such notification necessary for Government to conform to principles of natural justice—Notification when can be challenged as an arbitrary act.

A notification issued by the State Government under s. 26(2) of the Minimum Wages Act, 1948, withdrawing an exemption from the application of the Act previously granted by it, is an administrative act, and therefore before issuing the notification it was not necessary for the Government to conform to the principles of natural justice.

Province of Bombay v. K. S. Advani,¹ referred to.

Such a notification can be challenged as an arbitrary administrative act, if only one party is heard before issuing the notification and no opportunity to be heard is given to the other side.

Board of Education v. Rice,² applied.

THE facts appear in the judgment.

Spl. C.A. No. 68 of 1958.

D. S. Nargolkar, for the petitioner.

B. B. Kotwal, for respondents Nos. 2 to 7.

Spl. C.A. No. 614 of 1958.

H. B. Gokhale and *R. N. Karnik*, for the petitioners.

B. B. Kotwal, for respondents Nos. 2 to 6.

VYAS J. These are applications under art. 227 of the Constitution wherein the petitioners have prayed for the issue of an appropriate writ to set aside the order dated November 6, 1957, of the Authority appointed under the Minimum Wages Act. By the said order the Authority held that the workers in certain bidi manufacturing concerns were not entitled to be paid at the revised rate of Rs. 2-2-0 per thousand bidis from September 1, 1956, to December 15, 1956. These applications raise common questions, and the questions are:

(1) Is the issue of a notification by the State Government under s. 26, sub-s. (2), of the Minimum Wages Act a quasi-judicial act or an administrative act?

(2) Even if it be an administrative act, could it be challenged as an arbitrary act, if only one party is heard before issuing the notification and no opportunity to be heard is given to the other side?

These questions arise upon the following facts. The petitioner in application No. 68 of 1958 is the President of the Sangamner Akola Bidi Kamgar Union. Petitioner No. 1 in application No. 614 of 1958 is a legal practitioner at Sangamner and petitioner No. 2 is an official of the Sangamner Akola Bidi Mazdoor Sabha. The applicants in application No. 614 of 1958 have been authorised in writing to act on behalf of the bidi workers. These petitioners (the applicants in applications Nos. 68 and 614 of 1958) filed applications before the Authority appointed under the Minimum Wages Act, contending that they were paid less wages than what they were entitled to under the Notification dated April 19, 1955, issued by the State Government under s. 26, sub-s. (2) of the Act. The petitioners' case is that the Government of the State of Bombay, by a notification issued by them on April 19, 1955, fixed wages for workers in bidi manufacturing concerns in certain areas at the rate of Rs. 2-2-0 per thousand bidis. By the various notifications, including the notifications dated June 30, 1955, and June 28, 1956, the bidi manufacturers in certain areas were

*Decided, July 2, 1958. Special Civil Application No. 68 of 1958 (with Special Civil Application No. 614 of 1958).

1 [1950] S. O. R. 421, s.o. [1950] 53 Bom. L. R. 1.

2 [1911] A. C. 179.

exempted from the application of the Minimum Wages Act, 1948. This exemption was extended from time to time till December 31, 1956. The exemption, however, was withdrawn or cancelled by the Government by a notification dated August 22, 1956. The cancellation of the exemption was to be effective from September 1, 1956. The petitioners' contention is that consequent upon the withdrawal of the exemption, they became entitled to the wages at the rate of Rs. 2-2-0 per thousand bidis from September 1, 1956, to December 31, 1956. In these applications we are concerned only with the period from September 1, 1956, to December 31, 1956. The petitioners contend that notwithstanding this position, the owners of the bidi manufacturing concerns, who are respondents in these applications, paid wages to them at the rate of Rs. 2 only per thousand bidis so far as the bidi industry at Sangamner was concerned and at the rate of Re. 1-15-0 only per thousand bidis so far as the bidi industry in the villages within seven miles of Sangamner and Akola was concerned. When this happened, the workers claimed difference between the wages which were due to them under the notification dated April 19, 1955, and the wages that were actually paid to them by the employers and they made applications under s. 20 of the Act before the Authority. The owners of the bidi manufacturing concerns submitted a written statement, wherein they raised contentions regarding the constitutionality of s. 3, sub-s. (3), cl. (a), sub-cl. (iv), of the Act and also the constitutionality of the notifications dated April 19, 1955, and August 22, 1956. The Authority negatived these contentions of the employers, but he substantially upheld one contention of theirs, viz., that the notification issued by the Government of the State of Bombay on August 22, 1956, withdrawing the exemption was issued "arbitrarily, dishonestly and in a manner which was contrary to the principles of natural justice." Consistently with this view which the Authority took on the question of the validity of the notification, dated August 22, 1956, he held that the workers would not be entitled to wages in accordance with the notification dated April 19, 1955, during the period from September 1, 1956, to December 31, 1956, since the exemption from the application of the Act would extend to December 31, 1956. It is against this finding of the Authority that the present applications have been filed by the petitioners.

Now, the questions regarding the constitutionality of s. 3, sub-s. (3), cl. (a), sub-cl. (iv), of the Act and also about the constitutionality of the notification issued by the State of Bombay on April 19, 1955, have been decided by us in Special Civil Application No. 67 of 1958. So far as the present petitions are concerned, the question for consideration is about the validity of the notification issued by the Government of Bombay on August 22, 1956, withdrawing the exemption which had been previously granted by the State Government by notifications dated June 30, 1955, and June 28, 1956. It is the contention of the petitioners that the withdrawal of exemption from the application of the Act by a notification of the State Government under sub-s. (2) of s. 26 was an administrative act of the Government, that it was not a judicial or a quasi-judicial act, and that, therefore, the rules of natural justice would not be attracted in this case and it was not necessary for the State Government to hear the parties, consider their representations, record their evidence etc. before issuing the notification. On the other hand, the contention of the owners of the bidi manufacturing concerns is that the granting of exemption from the application of the Act and the withdrawal of the said exemption were quasi-judicial acts and, therefore, it was obligatory on the State Government to follow the rules of natural justice before issuing notifications in that connection under sub-s. (2) of s. 26. Thus, a question arises whether the granting of an exemption from the application of the Act by a notification issued by the appropriate Government under s. 26, sub-s. (2), of the Act and the subsequent withdrawal of the said exemption by a notification are quasi-judicial acts or administrative acts. It may be noted, and this is important, that in these applications we are not called upon to decide whether the initial fixing of minimum rates of wages and revision of those rates are quasi-judicial acts or administrative acts. The

question is this: the minimum rates of wages having already been fixed under the Act, whether the grant of exemption from the application of the Act and the withdrawal of that exemption are quasi-judicial acts or administrative acts.

It would be convenient at this stage to set out the provisions of sub-s. (2) of s. 26 of the Minimum Wages Act, 1948. This is what the sub-section provides:

"The appropriate Government may, if for special reasons it thinks so fit, by notification in the official Gazette, direct that for such period as it may specify the provisions of this Act or any of them shall not apply to all or any class of employees employed in any scheduled employment or to any locality where there is carried on a scheduled employment."

The intention of the Legislature must be gathered from the language used by the Legislature, and the words used by the Legislature in sub-s. (2), viz. "may, if for special reasons it thinks so fit...direct" would clearly show that the Government was not required to adopt any particular procedure before notifying that the Act shall not apply to all or any class of employees employed in any scheduled employment or to any locality where there was carried on a scheduled employment. The Legislature has left it to the discretion of the appropriate Government to grant the exemption if for special reasons it thinks fit to do so. What reasons should be considered special reasons for the exemption is left entirely to the appropriate Government to decide. It is for the Government to see whether the reasons which it considers special reasons are sufficient to justify the grant of the exemption. It would be appropriate in this context to turn to ss. 5 and 6 of the Act. Section 5 prescribes a certain procedure which Government is required to follow in fixing minimum rates of wages. Section 6 lays down a procedure for the revision of minimum rates of wages. We are not suggesting that the Legislature intended to import a judicial element in that procedure or that it intended that the Government should adopt a judicial approach in following that procedure. As I have stated, we are not called upon in this case to decide that question. All that we wish to point out is that in the matter of initial fixation of minimum rates of wages and revision of those rates, the Legislature clearly intended that the Government must follow a certain procedure and expressed that intention by using appropriate words in ss. 5 and 6. If the intention of the Legislature in enacting sub-s. (2) of s. 26 had been to lay down that the Government, before granting exemption from the application of the Act, was required to follow a certain procedure, it would have used language to that effect. In that case it would not have used the words "may, if for special reasons it thinks so fit...direct." Upon a proper construction of the language of sub-s. (2) of s. 26 which, in our view, is free from any ambiguity, it must follow that in granting exemption under this section the Government is not required to follow any particular procedure. It is not required to appoint an advisory committee, or publish its proposal, or invite objections in any other manner, or hear the parties, consider their representations, record evidence or weigh evidence etc. The Government is the sole and absolute judge to decide in such manner as it considers fit whether there are special reasons which, in its judgment, would justify exemption. To the power which is conferred upon the appropriate Government by sub-s. (2) of s. 26 there is not attached any statutory obligation to follow any procedure or adopt any particular mode of approach. When the Legislature leaves it to the executive authority to form an opinion whether it is or is not necessary to apply the provisions of the Act, as a condition precedent to the issue of a notification, it is a subjective satisfaction of the executive authority that a necessity does or does not exist for enforcing the Act. The formation of opinion on the matter whether it is necessary or not necessary to apply the Act, after the minimum rates of wages have already been fixed, to a particular locality or to a particular class of employees in a scheduled employment, is a purely subjective process and a notification which is founded on such subjective process is a purely administrative act. As

Mr. Justice Das observed in *Province of Bombay v. K. S. Advani*¹ (p. 705):

"It is well established that if the Legislature simply confides the power of doing an act to a particular body if in the opinion of that body it is necessary or expedient to do it, then the act is purely an administrative, i.e. an executive act as opposed to a judicial or quasi-judicial act, and, in the absence of proof of bad faith, the Court has no jurisdiction to interfere with it and certainly not by the high prerogative writ of *certiorari*."

Here, in sub-s. (2) of s. 26 of the Minimum Wages Act, 1948, the expression used is "may, if for special reasons it thinks so fit...direct" and there is no doubt that this expression is analogous to the expressions such as "if it appears to", "if in the opinion of", "if so and so is satisfied." In *Advani's* case Mr. Justice Das said that when such expressions were used in the body of the statute, discretion was confided by the Legislature in a particular Authority, and if an act was done in pursuance of that discretion, it could not be said to be a quasi-judicial or a judicial act, but must be held to be an administrative act.

It is well-settled that the tests for deciding whether an act is a judicial or a quasi-judicial act or an administrative act are whether the authority taking the action has legal authority to determine questions affecting the rights of subjects and whether a duty is cast upon that authority to act judicially. In *Province of Bombay v. K. S. Advani*, Kania C.J. said (p. 633):

"...It seems to me that the true position is that when the law under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognised principles of approach are required to be followed."

It would be interesting at this stage to compare the language of s. 3 of the Bombay Land Requisition Ordinance which came up for consideration in *Advani's* case with the language of sub-s. (2) of s. 26 of the Minimum Wages Act, 1948. Section 3 of the Bombay Land Requisition Ordinance was in these words:

"If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may, by order in writing, requisition any land for any public purpose etc., etc."

I have stated above that sub-s. (2) of s. 26 provides:

"The appropriate Government may if for special reasons it thinks so fit, by notification in the official Gazette direct that for such period as it may specify the provisions of this Act or any of them shall not apply to all or any class of employees employed in any scheduled employment or to any locality where there is carried on a scheduled employment."

In *Advani's* case it was held that the opinion and satisfaction of the Provincial Government under s. 3 of the Ordinance were subjective and that the action founded upon that subjective satisfaction was an administrative action. On the same principle, we must hold that the action taken by Government under sub-s. (2) of s. 26 of the Minimum Wages Act would also be an action founded upon a subjective opinion which the Government may form in the exercise of the discretion conferred upon it by the section and would, therefore, be an administrative action. While dealing with the point whether the action taken by Government under s. 3 of the Bombay Land Requisition Ordinance was quasi-judicial action or an executive action, Mr. Justice Fazl Ali in *Advani's* case said that the test was whether there was any duty to decide judicially, and he observed that in the Ordinance there was nothing to show that the Provincial Government had to decide the existence of a public purpose judicially or quasi-judicially. Likewise, in the Minimum Wages Act, there is nothing to show that the appropriate Government has to adopt a judicial approach in order to come to an opinion that it is not necessary to apply the provisions of

¹ [1950] S. C. R. 621; s. c. (1950) 53 Bom. L. R. 1.

the Act to all or any class of employees employed in any scheduled employment or to any locality where there is carried on a scheduled employment. In the same case (*Advani's case*), Mr. Justice Mahajan said that the question whether an act was a judicial or quasi-judicial one or a purely executive act depended on the terms of the particular rule, the nature, the scope and effect of the particular power, in exercise of which the act might be done. Here, the nature and scope of the power conferred upon the appropriate Government under s. 26, sub-s. (2) of the Act leave no doubt that the power is an absolute power and the discretion conferred upon the appropriate Government is unfettered discretion. That being so, the notification issued under sub-s. (2) of s. 26 in pursuance of the power and discretion conferred upon the appropriate Government under that section would be an administrative act.

Mr. Kotwal for the owners of the bidi manufacturing concerns contends that the notification withdrawing the exemption from the application of the Act was a quasi-judicial act and, therefore, it was necessary for the State Government to conform to the principles of natural justice. Mr. Kotwal contends that the rules of natural justice were violated by the State Government in that the Government gave a hearing to Mr. Nagre only who was a representative of the employees and they did not give an opportunity to the employers to be heard in the matter. Mr. Kotwal says that the decision taken by Government to withdraw the exemption from the operation of the Act affected the rights of the parties. It made the Act applicable and thereby affected the employers adversely, making them liable to pay increased wages to the workers. That being so, says Mr. Kotwal, the notification was a quasi-judicial act of the Government and it was obligatory upon the Government to observe the rules of natural justice before issuing the notification. In support of his contention, Mr. Kotwal has invited our attention to sub-s. (2a) of s. 26 which was added by Act XXVI of 1954. Sub-section (2a) provides:

"The appropriate Government may, if it is of opinion that, having regard to the terms and conditions of service applicable to any class of employees in a scheduled employment generally or in a scheduled employment in a local area, it is not necessary to fix minimum wages in respect of such employees of that class as are in receipt of wages exceeding such limit as may be prescribed in this behalf, direct, by notification in the Official Gazette and subject to such conditions, if any, as it may think fit to impose, that the provisions of this Act or any of them shall not apply in relation to such employees."

Mr. Kotwal contends that the Legislature imported a judicial element in the procedure prescribed by sub-s. (2a), in that it made it obligatory upon the Government to pay adequate regard to the terms and conditions of service regulating relationship between the employers and the employees before coming to a conclusion whether it was necessary or not necessary to fix minimum wages in a particular area. Mr. Kotwal says that sub-s. (2) of s. 26 should not be severed from the rest of the Act and that we should have an "over-all picture" of the provisions contained in s. 5, s. 6, s. 10, sub-s. (2a) of s. 26 and other sections. Mr. Kotwal says that, upon an over-all picture of the entire Act being taken, it would appear that the intention of the Legislature was that even in the matter of issuing a notification under sub-s. (2) of s. 26, regard should be had to the principles of natural justice and the approach to be adopted should be a judicial approach. In support of this contention, Mr. Kotwal has invited our attention to certain observations made by Mr. Justice Das in *Advani's case*. The observations to which our attention is invited are these (p. 725):

"What are the principles to be deduced from the two lines of cases I have referred to? The principles, as I apprehend them, are:

(1) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contending parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act;..."

It is to be noted, however, that in the present case, upon the date on which the notification withdrawing the exemption was issued by the Government of the State of Bombay, there was no dispute pending before the Government which arose out of a claim made by one party against the other party. That being so, the above observations in *Advani's* case, to which Mr. Kotwal has referred us, would not assist his clients. We have no doubt, upon the plain language of sub-s. (2) of s. 26 and upon a consideration of the principles laid down by the Supreme Court in *Advani's* case, that the power conferred by sub-s. (2) of s. 26 upon the appropriate Government by the Legislature is an absolute power, that pursuant to the said power the appropriate Government is made the sole judge for the purpose of forming an opinion whether it is necessary or not necessary to apply the provisions of the Act in a particular area and that to that power there is not attached any statutory obligation to follow a particular procedure or adopt a particular approach. Accordingly, we must uphold Mr. Gokhale's contention that the notification dated August 22, 1956, issued by the State Government, withdrawing the exemption previously granted by it under its notifications dated June 30, 1955, and June 28, 1956, was not a quasi-judicial act, but was an administrative act and, therefore, it was not necessary for the State Government to conform to the principles of natural justice before issuing the notification.

Mr. Kotwal's next contention is that even if the notification withdrawing the exemption from the application of the Act was an administrative act of the State Government, even so the said act was done in an arbitrary manner and, therefore, its validity could be challenged. In support of this contention, Mr. Kotwal has drawn our attention to a decision of the House of Lords in the *Board of Education v. Rice*.¹ It was a case under s. 7 of the Education Act, 1902. The duty of maintaining and keeping efficient a non-provided school was imposed, by s. 7 of the Act, upon a local education authority. A local education authority refused to pay salaries to teachers in a non-provided school at the same rate at which it paid the teachers in provided schools. The managers of the non-provided school complained, and the Board of Education directed an inquiry, the result of which was a report that the local education authority had failed to maintain the school and keep it efficient. The questions required by s. 7, sub-s. (3), of the Education Act to be determined by the Board of Education were: (1) Whether the local education authority had, in fixing and paying the salaries of the teachers, fulfilled their duty under s. 7, sub-s. (1)? and (2) Whether the salaries inserted in the teachers' agreements were reasonable in amount and ought to be paid by the authority or what salaries the authority ought to pay? The Board purported to give its decision in a document which failed to deal with the matters in issue. It was held by the House of Lords that inasmuch as the Board had not determined the questions, the decision must be quashed by *certiorari*, and a *mandamus* must issue commanding the Board to determine the questions. In the course of his address to the House of Lords, Lord Loreburn L. C. said (p. 182):

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything... They [meaning thereby the Board of Education] can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

The principle laid down in this case is that it is the duty of everyone who decides anything to give a fair hearing to both sides. Where there are two parties in a controversy, as in the present case where the parties are the employers and the employees, a fair opportunity must always be given to both of them for correcting or contradicting any relevant statement prejudicial to their view. In the present case it would appear that after the exemption from the application of the Act was granted by the State Government by its notifications, Mr. Nagre, a representative of the employees, met the authorities of the Government and discussed the matter with them. The Government thereafter gave no opportunity to the employers to put their views before them. It was impossible for the employers to know what might have been stated by Mr. Nagre to the State Government. It is not improbable that the statements made by Mr. Nagre to the State Government might have been prejudicial to the interests of the employers, in which case it was but fair to give an opportunity to the employers to correct or contradict those statements. The State Government had to decide a question whether it was necessary or not necessary to withdraw the exemption already granted, and upon the principle laid down in *Board of Education v. Rice* it was the duty of the Government to hear the employers upon this point since a hearing had been given by them to a representative of the employees. Mr. Gokhale says that the principle laid down in the House of Lords case would not be attracted in the present case, since the Board of Education was in the nature of an arbitral Tribunal, whereas the character conferred by sub-s.(2) of s. 26 upon the appropriate Government is not that of an arbitral Tribunal. Under sub-s. (2) of s. 26, the State Government is made the sole judge of the question whether it is necessary or not necessary to apply the provisions of the Act, and that being so, says Mr. Gokhale, it was not the duty of the State Government to hear both the sides before forming a subjective opinion on the point. Even if it be assumed that the view which Mr. Gokhale takes of the decision in the House of Lords case is correct, even so it may be remembered that in the present case one party (the employees) was heard by the State Government. It might have been a different matter if the Government had not heard either side. In that case, we might perhaps have accepted the contention of Mr. Gokhale and might have made a distinction between the House of Lords case and the present case. Here, however, since the Government did give a hearing to Mr. Nagre on behalf of the employees before issuing the notification of August 22, 1956, it was its duty, in the interests of fairness and justice, to give a hearing to the other side also. But the other side was admittedly not heard. As the Authority has pointed out in the course of his judgment, there was nothing to show *prima facie* that any change in the material facts had taken place so as to justify the withdrawal of the exemption. In these circumstances, the Authority has given a finding that the notification issued by the Government on August 22, 1956, withdrawing the exemption, was issued arbitrarily. We see no reason why we should take a different view of the matter from the one taken by the Authority. As the notification withdrawing the exemption was issued arbitrarily by the State Government in this case, we must uphold the contention of Mr. Kotwal pressed before us on behalf of the employers, the owners of the bidi manufacturing concerns, that it was an illegal and invalid notification. Once we come to this conclusion, we must confirm the finding of the Authority that the employees would not be entitled to claim wages at the revised scales, that is to say, at the scales prescribed in the notification dated April 19, 1955, during the period from September 1, 1956, to December 31, 1956.

There is one more point which was pressed before us by the learned advocate Mr. Nargolkar for the petitioner in application No. 68 of 1958. Mr. Nargolkar says that the Authority had no jurisdiction to decide the question of the legality or validity of the notification withdrawing the exemption and, therefore, the Authority, in holding that the notification dated August 22, 1956, was arbitrarily issued, held something which he had no authority to hold.

Mr. Kotwal on the other hand contends that this point, regarding jurisdiction of the Authority, not having been taken before the Authority himself, it is not open to the employees now in an application under art. 227 of the Constitution to raise it for the first time. In support of this contention, Mr. Kotwal has invited our attention to a decision of this Court in *Gandhinagar Motor Transport Society v. State of Bombay*.¹ It was held by the learned Chief Justice and Mr. Justice Dixit in that case that before a question of jurisdiction of a tribunal could be raised on a petition under arts. 226 and 227, objection to jurisdiction ought to have been taken before the Tribunal whose order was being challenged. Mr. Nargolkar on the other hand has referred us to a decision in *Municipal Corpn., Bombay v. Labour App. Trib.*², where a Division Bench of this Court consisting of Mr. Justice Shah and Mr. Justice Gokhale took the view that whether the Tribunal did or did not transgress the limits of its jurisdiction could only be ascertained after the judgment was delivered by the Tribunal and not before. The learned Judges said that it might appear a little presumptuous on the part of a litigant to remind a judicial tribunal that it would be wrong for it to transgress the restrictions imposed by the Legislature upon its powers. Relying upon that case, Mr. Nargolkar says that the employees could not have anticipated, until the judgment was pronounced by the Authority, that the Authority would embark upon the decision on a point which it had no jurisdiction to decide. It is to be noted, however, that the expression of the view of this Court in *Municipal Corporation, Bombay v. Labour Appellate Tribunal* was limited expressly to the circumstances of that case. Mr. Justice Shah who delivered the judgment of the Bench said: "The principle of the case to which our attention has been invited has, in our judgment, no bearing whatever on this case," which would show that the principle laid down in *Municipal Corporation, Bombay v. Labour Appellate Tribunal* was limited to the facts of that particular case. Therefore, turning to the facts of the present case, it would appear that in the written statements filed by the owners of the bidi manufacturing concerns in the various applications made by the employees, the bidi owners contended that the notification issued by the State of Bombay withdrawing the exemption was an invalid notification because it was a notification issued arbitrarily and not in good faith. Not only was such a contention expressly taken by the employers, but evidence was also led by them to show that the cancellation of exemption was not done in good faith and that it was done in an arbitrary manner. Not only was evidence led by the employers to that effect, but when Mr. Nagre went into the witness-box, he was cross-examined with a view to show that the withdrawal of the exemption was not done in a bona fide way. That being so, it was amply brought to the notice of the employees that the Authority was being called upon to decide about the legality and validity of the notification cancelling the exemption. In these circumstances, it was necessary for the employees to contend before the Authority that what the employers were wanting him to decide, he had no jurisdiction under the Act to decide. In these particular circumstances of the present case, we must hold that the principle laid down by this Court in *Gandhinagar Motor Transport v. State of Bombay*, must govern the case. Since the contention about jurisdiction was not taken by the employees before the Authority, we must uphold Mr. Kotwal's contention that it is not open to them to take this point now in an application under s. 227 of the Constitution.

In the result, both these applications Nos. 68 and 614 of 1958 fail and are rejected. No order as to costs. We must put it on the record that the Court was greatly assisted by the able arguments of the learned advocates on both the sides.

Applications rejected.

¹ (1953) 55 Bom. L. R. 922, a. c. [1954] A. I. R. Bom. 202.

² (1957) 59 Bom. L. R. 413.

Before Mr. Justice Vyas and Mr. Justice Tamba.

SONAJEE KRISHNAJEE MUJUMDAR v. NATHU YADAV PATIL.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 29(3), 25(1)†
—Whether Mamlatdar can extend time originally granted by him to tenant to pay arrears of rent—Prant Officer whether has also such jurisdiction to enlarge time.

Under s. 29(3) of the Bombay Tenancy and Agricultural Lands Act, 1948, the Mamlatdar has jurisdiction to extend the time originally granted by him to the tenant under s. 25(1) of the Act to pay up the arrears of rent. The Prant Officer, as an appellate authority, has also jurisdiction to enlarge the time granted by the Mamlatdar within which the tenant was called upon to pay up the arrears of rent.

THE facts appear in the judgment.

G. R. Samant and V. V. Divekar, for the petitioner.

M. A. Eane, for opponent No. 1.

VYAS J. This application is made by the petitioner Sonajee Krishnajeet Mujumdar under art. 227 of the Constitution of India and herein the petitioner prays for setting aside the order of the Bombay Revenue Tribunal dated October 14, 1957, by which order the Tribunal confirmed the order of the Prant Officer dated May 31, 1957.

The petitioner is the landlord owning S. No. 509/1 of village Mamurabad, Taluka Jalgaon, District East Khandesh. He filed an application under s. 29 of the Tenancy Act before the Extra Aval Karkun of Jalgaon for recovering possession of this land upon the ground that the tenant had committed three defaults in the payment of rent. He alleged before the Extra Aval Karkun in his application under s. 29 that the tenant had failed to pay rent for the years 1952-53, 1953-54 and 1954-55. The Extra Aval Karkun came to the conclusion that the tenant had paid rent for the years 1952-53 and 1953-54, that even for the year 1954-55 the rent had been paid by the tenant, but it had been paid a little late, and held that so far as the year 1955-56 was concerned, the tenant had not paid the rent to the landlord. In the light of the above findings, the Extra Aval Karkun on October 30, 1956, passed a conditional order granting 15 days' time to the tenant, within which to pay up the arrears of rent. By the said order the Extra Aval Karkun directed that on the tenant's failure to pay up the arrears of rent within 15 days from the date of that order, the possession of the land would have to be handed over by the tenant to the landlord. The tenant failed to pay the arrears of rent; so says the landlord. Therefore, on November 19, 1956, the Extra Aval Karkun made an order directing the tenant to hand over possession of S. No. 509/1 to the landlord. It may be noted that before the Extra Aval Karkun made the aforesaid order on November 19, 1956, the tenant appealed to the Prant Officer from the Extra Aval Karkun's order dated October 30, 1956. In that appeal, the Prant Officer passed an order on May 30, 1957. By that order the Prant Officer found that the Extra Aval Karkun's findings regarding payment of rent by the tenant for the years 1952-53 and 1953-54, regarding the late payment of rent by the tenant for the year 1954-55 and regarding the non-payment of rent by the tenant for the year 1955-56 were correct. By the said order of his, the Prant Officer granted 15 days' more time to the tenant to pay the arrears of rent, that is to say, the rent for the year 1955-56. The 15

*Decided, July 23, 1958. Special Civil Application No. 620 of 1958.

† The relevant sections run thus:—

29. (3) On receipt of application under sub-section (1) or (2) the Mamlatdar shall, after holding an inquiry, pass such order thereon as he deems fit.

25. (1) Where any tenancy of any land held by any tenant is terminated for non-payment of rent and the landlord files any proceeding to eject the tenant, the

Mamlatdar shall call upon the tenant to tender to the landlord the rent in arrears together with the cost of the proceeding, within fifteen days from the date of order, and if the tenant complies with such order, the Mamlatdar shall, in lieu of making an order for ejectment, pass an order directing that the tenancy had not been terminated and thereupon the tenant shall hold the land as if the tenancy had not been terminated.

days' time that was granted by the Prant Officer was granted from May 31, 1957, which was the date upon which the Prant Officer made his order. From that order of the Prant Officer the landlord went in revision before the Bombay Revenue Tribunal and the Tribunal rejected that application on October 14, 1957. It is from that order dated October 14, 1957, that the present application has been filed by the petitioner-landlord under art. 227 of the Constitution of India.

Now, the learned advocate Mr. Samant appearing for the petitioner-landlord has raised three points before us: (1) The Prant Officer had no jurisdiction to enlarge the time granted by the Extra Aval Karkun within which the tenant was called upon to pay up the arrears of rent. (2) As the tenant did not file an appeal from the Extra Aval Karkun's order dated November 19, 1956, by which order he (the tenant) was directed to hand over the possession of the land to the landlord, the Prant Officer had no jurisdiction to alter the said order of the Extra Aval Karkun, dated November 19, 1956. (3) The discretion which the Prant Officer exercised in the matter of granting more time to the tenant to pay up the arrears of rent, being a judicial discretion, grounds should have been assigned before using that discretion. The Prant Officer did not assign any grounds for granting 15 days' time to the tenant with effect from May 31, 1957, to pay up the arrears of rent to the landlord.

Now, so far as the first point is concerned, it raises a question whether the Extra Aval Karkun himself has jurisdiction to extend the time, once granted by him to the tenant, to pay up the arrears of rent. It is not disputed that if the Extra Aval Karkun himself has got jurisdiction to enlarge the time originally granted by him, then of course the Prant Officer, being an appellate authority, has also got that jurisdiction. Now, the position in law seems to be quite clear. Section 29 of the Act provides that if a landlord makes an application before the Mamlatdar in a prescribed form to obtain possession of his land, the Mamlatdar shall hold an enquiry and thereafter he shall pass such order on the landlord's application as he deems fit. It is not disputed before us that even in a case where the tenant has been found guilty of having committed three defaults in the payment of rent, it is within the jurisdiction of the Mamlatdar to give him time to pay the arrears of rent to his landlord. The power which is conferred by the Legislature upon the Mamlatdar under sub-s. (3) of s. 29 is an unfettered power and this is clear from the words "the Mamlatdar shall...pass such order thereon as he deems fit". Whether the Mamlatdar should grant time or the extension of time to the tenant for payment of the arrears of rent to the landlord is a question which the Mamlatdar himself has to answer upon the facts and circumstances of each case, and in answering that question the Legislature has left it entirely to his discretion to pass such orders as he considers appropriate. Mr. Samant contends that although the Mamlatdar has got an unfettered power to grant extension of time to the tenant even in a case where the tenant has committed three defaults in the payment of rent, he has not got a similar jurisdiction where a tenant has committed one default or two defaults. Now, this is a position which it is difficult to understand. If the intention of the Legislature in enacting the Act is, as it obviously is, that the Mamlatdar should have unfettered jurisdiction in the matter of granting relief to the tenant, upon the tenant's paying up the arrears of rent, even if he has committed three defaults, it is not understood why the Legislature should have circumscribed that power of the Mamlatdar in a case where the tenant has committed only one default or two defaults in the payment of rent to the landlord. There is no doubt that under s. 29(3) the Mamlatdar would be competent to grant such time as he considers fit to the tenant to pay the arrears of rent. If the Mamlatdar can do so, we do not understand why, in a case where he initially granted time to the tenant within which to pay the arrears of rent, he could not subsequently extend the time and grant further time to the tenant. In this connection, it is important to bear in mind that s. 25(1) does not in terms say that if the tenant fails to comply with the initial order made by the Mamlatdar regarding time within

which he is called upon to pay the arrears of rent to the landlord, an order of ejectment shall be made by the Mamlatdar. The Legislature has in terms stated while enacting sub-s. (1) of s. 25 that if the tenant pays up the arrears of rent to his landlord, the Mamlatdar shall, in lieu of making an order for ejectment, pass an order directing that the tenancy had not been terminated, and thereupon the tenant shall hold the land as if the tenancy had not been terminated. But the Legislature has not stated that if the tenant does not comply with the order regarding payment of arrears within a certain time the Mamlatdar shall pass an order directing ejectment of the tenant. We have no doubt that if the intention of the Legislature had been to circumscribe the jurisdiction of the Mamlatdar and to provide that the Mamlatdar shall not extend the time once granted by him, they would have made a provision to the effect that upon the tenant failing to comply with the order of the Mamlatdar regarding the payment of arrears within a certain time the Mamlatdar shall pass an order of ejectment. But there is no such provision in s. 25(1). Therefore, we have no doubt that the Mamlatdar has jurisdiction under the Act to enlarge the time originally granted by him under s. 25(1). If the Mamlatdar has got that jurisdiction, the Prant Officer as an appellate authority has also got it. That being so, we see no substance in the first point pressed before us by the learned advocate Mr. Samant for his client, the landlord.

So far as the second point is concerned, it also has no force. Mr. Samant contends that as the tenant did not appeal from the Extra Aval Karkun's order dated November 19, 1956, by which order he was called upon to hand over possession of the land to the landlord, the Prant Officer could not alter the said order of the Mamlatdar dated November 19, 1956. Now, if we are to accept Mr. Samant's contention, it would completely nullify the effect of the Prant Officer's order granting 15 days' time to the tenant with effect from May 31, 1957, to pay the arrears of rent to the landlord. If the arrears of rent are paid by the tenant, surely he must get relief against forfeiture; and if such relief is not to be granted to him simply because he did not appeal from the Extra Aval Karkun's order dated November 19, 1956, the Prant Officer's order would be as good as though it were not passed at all. It is to be remembered in this case that the order made by the Extra Aval Karkun on November 19, 1956, had no independent existence, that is to say, existence independent from his earlier order dated October 30, 1956. The two orders were inter-related and the latter order followed the former. That being so, if the former order dated October 30, 1956, passed by the Extra Aval Karkun was modified or reversed or varied, it would not avail the landlord to say that the latter order, namely, the order dated November 19, 1956, should be given effect to.

In this case, a principle which we might, with advantage, follow by way of analogy was laid down by the Calcutta High Court in *Talebali v. Abdul Aziz*¹. It was held by their Lordships of the Calcutta High Court that an appeal from a preliminary decree was not incompetent if the final decree was made before the appeal was presented and that in such a case it was not necessary for the party aggrieved by the preliminary decree to appeal against the final decree, although the final decree, apart from its being based on the preliminary decree, was otherwise correct. The same view was taken by the Bombay High Court in *Baswant v. Kallappa*². By analogy it must follow that since the Extra Aval Karkun's order dated November 19, 1956, had no existence apart from his earlier order dated October 30, 1956, once the order dated October 30, 1956, was varied or modified, the subsequent order dated November 19, 1956, must stand rescinded in the light of the said variation or modification.

Apart from what has been stated above, it is important to bear in mind, and this is material in an application under art. 227 of the Constitution, that this point was not raised by the petitioner-landlord in his revision application before the Bombay Revenue Tribunal. This by itself would be a sufficient rea-

¹ (1929) I L. R. 57 Cal. 1013, F. B.

² (1957) 40 Bom. L.R. 164.

son for us to reject this particular contention of his at this late stage. However, upon merits also, as I have just stated, the contention has no substance.

The last point raised by Mr. Samant is also a point without substance. Mr. Samant contends that the Prant Officer in giving 15 days' time to the tenant with effect from May 31, 1957, within which to pay up the arrears of rent to the landlord, did not exercise his discretion judicially. In our view, the discretion was exercised for good reasons. This is a case in which the petitioner-landlord went to the Extra Aval Karkun with allegations which were found untrue. He had the hardihood to say before the Extra Aval Karkun in his application that the tenant had defaulted in the payment of rent for the years 1952-53 and 1953-54. This allegation was found without substance by the Extra Aval Karkun, who came to the conclusion that the rent was paid for the years 1952-53 and 1953-54 and that even for the year 1954-55 it was not true that the tenant had not paid the rent, but that the fact was that the payment was made a little late. Upon these circumstances, which in our view were properly appreciated by the Prant Officer, he decided quite rightly to give 15 days' time with effect from May 31, 1957, to the tenant within which to pay the arrears of rent.

The result, therefore, is that all the three contentions raised before us by Mr. Samant are without substance. The application must, therefore, fail and be rejected with costs.

Application rejected.

Before Mr. Justice Vyas and Mr. Justice Tambe.

SATYANARAYAN SHRISHANKAR MARWADI

v.

VITHOBA TATYA NANDARKAR.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 14, 24—Landlord seeking to eject tenant for acts of destruction and permanent injury to land—Whether landlord must give two separate notices to tenant under s. 14 and s. 24 respectively—Landlord whether absolved from giving notice to tenant under s. 24 if notice given under s. 14—Landlord by notice under s. 14 calling upon tenant to hand over possession of land upon expiry of three months from date of its receipt—Whether such notice valid—Validity of notice under s. 14 terminating tenancy forthwith by such notice.

Under the Bombay Tenancy and Agricultural Lands Act, 1948, when a landlord seeks to eject the tenant upon the ground that the tenant had done acts of destruction and permanent injury to the land, he must give two separate notices to the tenant, one under s. 14 of the Act intimating to him that he had done an act which was destructive of or permanently injurious to the land, and another under s. 24 of the Act after the expiry of three months from the date of the first notice i.e. after the tenancy of the tenant had terminated, specifying the act of destruction or injury and intimating to the tenant that if he failed within a period of one year from the date of the receipt of the notice to restore the land to the condition in which it was before the act of destruction or injury was done to it, he would be ejected from the land.

By a notice under s. 14 of the Act the landlord can only communicate to his tenant his decision to terminate his tenancy after the lapse of three months from the service of the notice. If the landlord goes beyond it and calls upon the tenant to do something which the landlord is not entitled to ask the tenant to do under the provisions of s. 14, e.g. calls upon the tenant to hand over possession of the land to him upon the expiry of three months from the date of receipt of the notice then, in so far as he calls upon the tenant to do something which he cannot ask him to do under s. 14, the notice is an invalid notice. A notice under s. 14 does not terminate a tenancy forthwith i.e. with effect from the date of its receipt and, therefore,

*Decided, July 24, 1958. Special Civil Application No. 1060 of 1958.

a notice under s. 14 would also be invalid if it tells the tenant distinctly that by that notice itself his tenancy is terminated.

THE facts appear in the judgment.

V. D. Malpani, for the petitioner.

S. G. Patwardhan, for opponent No. 1.

VYAS J. This is an application under arts. 226 and 227 of the Constitution of India by the petitioner Satyanarayan Shrishankar Marwadi, wherein the petitioner has prayed for the quashing of the order passed by the Bombay Revenue Tribunal on November 8, 1957, by which order the Tribunal confirmed the order made by the Prant Officer on July 3, 1957. It may be noted that the Prant Officer by his order dated July 3, 1957, had confirmed the order of the Mamlatdar dated January 31, 1957.

This application raises a question under ss. 14 and 24 of the Tenancy Act, and the question is this: where a landlord seeks to eject the tenant upon the ground that the tenant had done acts of destruction and permanent injury to the land, must he give two separate notices to the tenant, one under s. 14 and the next one under s. 24? In other words, can a landlord start a proceeding under s. 24 for ejectment of the tenant without having given him in the first instance a notice under s. 14, or, if a notice under s. 14 is given by him, is he absolved from giving a notice under s. 24? This question arises in the following circumstances:

The petitioner contends that he is the owner of the land comprised in S. Nos. 1047 and 1247 of Mangalvedha, District Sholapur. Opponent No. 1 Vithoba Taty Nandarkar is a tenant of this land. The petitioner says that in order to prevent soil erosion and also in order to drain off the excess of rain water he had constructed certain 'bunds' and 'tals' upon his land. It is the petitioner's case that opponent No. 1-tenant destroyed these 'bunds' and 'tals' by doing ploughing operations upon that portion of the land also. Then the petitioner says that opponent No. 1 constructed a new 'tal' in front of the outlets and thereby diverted the flow of the rain water. These acts of opponent No. 1, says the petitioner, resulted in reducing the fertility of the soil and increasing the chances of soil erosion. These acts were, therefore, destructive of the land and had caused permanent injury to it. Upon these facts, says the petitioner, he gave a notice to opponent No. 1 on June 17, 1954. In the said notice he specified the acts of destruction of the land and injury to the land, that were done by opponent No. 1. The petitioner says that by the said notice, which was given by him under s. 14 of the Tenancy Act, he terminated the tenancy of opponent No. 1. Notwithstanding the termination of his tenancy, opponent No. 1 failed to restore possession of the land to the petitioner and, therefore, the petitioner made an application before the Mamlatdar, being Tenancy Case No. 294 of 1956, to obtain possession of the land from opponent No. 1. The Mamlatdar took the view that the notice which was given by the petitioner on June 17, 1954, was a notice under s. 24 of the Tenancy Act, that a separate notice under s. 14(1)(b) of the Act was necessary, but had not been given by the petitioner to opponent No. 1, and that, therefore, the petitioner was not entitled to obtain possession of the land from opponent No. 1. Accordingly, he rejected the petitioner's application for possession. From that order of rejection passed by the Mamlatdar on January 31, 1957, the petitioner went in appeal before the Prant Officer. The Prant Officer observed:

"Section 24 speaks of one year's notice while s. 14 prescribes three months notice. The appellant combined these two notices into one and applied for possession. The Mamlatdar, therefore, rightly dismissed the application."

Thus, the Prant Officer also agreed with the view of the Mamlatdar that a separate notice under s. 14(1)(b) ought to have been given by the petitioner, but was not given by him, and accordingly he also dismissed the appeal of the petitioner. This he did by his order dated July 3, 1957. From this order of

the Prant Officer the petitioner went in revision before the Revenue Tribunal and the Revenue Tribunal rejected the revisional application. It is from this order of the Revenue Tribunal that the petitioner has filed the present application under arts. 226 and 227 of the Constitution of India.

It would appear that all the Courts below took the view that the notice dated June 17, 1954, which was given by the petitioner to opponent No. 1 was not a proper notice. Now, reading s. 14 and s. 24 of the Act, we have no doubt that the Legislature, while enacting these sections, clearly contemplated that two notices were necessary to be given by a landlord to his tenant in a case where a landlord seeks to eject the tenant upon the ground that the tenant had done acts of destruction and/or permanent injury to the land. If we turn to s. 24, it opens with the words

"Where any tenancy of any land held by any tenant is terminated on the ground that the tenant has done any act which is destructive or permanently injurious to the land."

Having used these words, the Legislature went on to say in s. 24: "no proceeding for ejectment against *such tenant* shall lie". It is clear, therefore, that before a proceeding for ejectment under s. 24 of the Act can lie against a tenant, there should have taken place a termination of the tenancy of the tenant by a notice under s. 14 of the Act. In the Tenancy Act there is only one section which deals with the termination of tenancies and that section is s. 14; and it is clear upon the reading of the plain language of s. 24 that before a proceeding for ejectment can be taken by a landlord against his tenant, there should already have taken place a termination of the tenant's tenancy by a notice under s. 14. The important words in s. 24 are the words "such tenant". There is no doubt that the words "such tenant" mean the tenant against whom there has already been issued a notice of termination of tenancy under s. 14 of the Act by his landlord. It is, therefore, clear that the Act contemplates two notices, one under s. 14, that is to say, a notice terminating the tenancy of the tenant, and the other one under s. 24, that is, a notice about a proceeding to eject the tenant. This is also evident from the language used by the Legislature in s. 24. Section 24 says:

"Where any tenancy of any land held by any tenant is terminated on the ground that the tenant has done any act which is destructive or permanently injurious to the land, no proceeding for ejectment against such tenant shall lie unless and until the landlord has served on the tenant a notice in writing specifying the act of destruction or injury complained of and the tenant fails within a period of one year from the service of notice to restore the land to the condition in which it was before such destruction or injury."

The important words are: "where any tenancy...is terminated..., no proceeding for ejectment...shall lie..." It is clear, therefore, that the termination of tenancy must precede the commencement of a proceeding for ejectment. In the present case, the petitioner gave only one notice to opponent No. 1, and that, in our view, was a notice under s. 14. I shall presently point out that even this notice, namely, the notice under s. 14, was a defective notice. For the present, suffice it to say that in this case the landlord gave only one notice and that was a notice under s. 14; he did not give another notice, namely, a notice under s. 24, prior to the proceeding for ejectment, which he started on June 20, 1956.

The learned advocate Mr. Malpani appearing for the petitioner-landlord contends that the notice dated June 17, 1954, which was given by his client to opponent No. 1, was a notice under both the sections, namely, ss. 14 and 24 of the Act. Mr. Malpani says that the Legislature, while enacting s. 24, did not contemplate a separate notice, i.e., a notice distinct from a notice under s. 14, before the institution of a proceeding for ejectment. Upon the reading of the section, it is impossible to accept the contention of Mr. Malpani. If the Legislature had intended that a notice of termination of tenancy under s. 14 would

also be a notice for ejectment, the Legislature would not have said:

"no proceeding for ejectment against such tenant shall lie unless and until the landlord has served on the tenant a notice in writing specifying the act of destruction or injury complained of and the tenant fails within a period of one year from the service of notice to restore the land to the condition in which it was before such destruction or injury."

In that case, the Legislature would have stated:

"where any tenancy of any land held by any tenant is terminated on the ground that the tenant has done any act which is destructive or permanently injurious to the land, no proceeding for ejectment against such tenant shall lie until after the expiry of one year from the service of notice of termination of the tenancy."

But such are not the provisions of s. 24. Besides, as Mr. Malpani himself has fairly pointed out, a notice upon the ground of destruction of land or permanent injury to the land, which is required to be given under s. 14, is not required to specify the act of destruction or injury complained of. Now, this itself would clearly suggest that two distinct notices are contemplated by the Legislature before a tenant could be ejected from the land upon the ground of destruction or permanent injury caused by him to the land. In the first instance, a notice under s. 14 should be given to the tenant, intimating to him that he had done an act which was destructive of or permanently injurious to the land, and after the expiry of three months from the date of that notice, i.e., after the tenancy of the tenant is terminated, another notice under s. 24 *specifying* the act of destruction or injury should be issued against the tenant, intimating to him that if he fails, within a period of one year from the date of receipt of that notice, to restore the land to the condition in which it was before the act of destruction or injury was done to it, he would have to be ejected from the land. It is impossible to accept the contention of Mr. Malpani that the Legislature intended to combine two notices into a single notice. In the present case, only one notice was given by the petitioner-landlord, and that was a notice under s. 14 of the Act; he did not give any notice under s. 24 of the Act before filing a proceeding for ejectment on June 20, 1956, against opponent No. 1.

The Revenue Tribunal in their order dated November 8, 1957, stated two grounds for holding that the notice given by the landlord to the tenant in this case was not a valid notice. One of the grounds, in the words of the Tribunal, was:

"If the landlord noticed that his land was not restored to its original condition within one year from the service of his first notice, he should have given another notice under section 14(b)."

This would suggest that the view taken by the Tribunal in respect of the notice dated June 17, 1954, which was given by the landlord to the tenant was that it was a notice under s. 14 of the Act. This was a correct view to take. But the Tribunal was wrong when it said that the landlord should have given another notice under s. 14(b). As I have stated above, the Legislature contemplated two separate notices, one under s. 14 and another under s. 24 of the Act. It was not necessary for the landlord to give another notice under s. 14(b) to the tenant before starting a proceeding for ejectment of the tenant.

The next ground upon which the Tribunal held that the notice was a bad notice was expressed in these words:

"The landlord cannot, however, claim possession until one year has passed. A period of one year is given under section 24, in order that the tenant may repair the land and restore it to the original condition. So, apart from any other question, the notice itself does not comply with the provisions of section 24."

This view of the Tribunal was a correct view of a notice under s. 24. It is clear from the provisions of s. 24 that if the destruction or permanent injury caused by the tenant to the land is repaired, and if the land is restored to its original condition within one year commencing from the date of receipt of a notice under that section, the possession of the land could not be claimed by

the landlord upon the ground of destruction or injury to the land. Before the landlord could succeed in his proceeding for ejectment, it must be established by him that the tenant had failed to restore the land to its original state within one year from the date of service of the notice to be given to him under s. 24. The point we wish to emphasise is that a notice under s. 14 is only a notice of termination of tenancy. Upon the termination of the tenancy, however, the landlord does not become entitled to possession automatically. He must next ask for possession, and for that purpose the Legislature has provided a procedure under s. 24. Before obtaining possession the landlord must give a notice under that section (s. 24), and only if the land is not restored to its original state within one year of the receipt of that notice, would he be entitled to the possession.

The notice which was given by the landlord in this case on June 17, 1954, was a defective notice. Section 14 provides:

"Notwithstanding any agreement, usage, decree or order of a Court of law, the tenancy of any land held by a tenant shall not be terminated unless such tenant...

Provided that no tenancy of any land held by a tenant shall be terminated on any of the grounds mentioned in this sub-section, unless the landlord gives three months' notice in writing intimating the tenant his decision to terminate the tenancy and the ground for such termination."

The important words in the proviso are the words "intimating the tenant his decision to terminate the tenancy and the ground for such termination". It is clear, therefore, that what the Legislature contemplated while enacting s. 14 was that the notice to be given under this section must contain an intimation by the landlord to the tenant that the landlord had arrived at a decision to terminate the tenancy of the tenant after three months from the date of receipt of the notice. In other words, by a notice under s. 14 the landlord could only communicate to his tenant his decision to terminate his tenancy after the lapse of three months from the service of the notice. If the landlord goes beyond it and calls upon the tenant to do something which he (the landlord) is not entitled to ask the tenant to do under the provisions of s. 14, then, in so far as he calls upon the tenant to do something which he cannot ask him to do under s. 14, the notice is an invalid notice. Now, if we turn to the notice in this case, it would appear that the landlord called upon the tenant to hand over possession of the land to him upon the expiry of three months from the date of receipt of the notice. This the landlord was not entitled to ask for under the provisions of s. 14, and upon this ground we must agree with the view of the Tribunal that the notice was an invalid notice. I have already stated above that so far as the notice under s. 24 of the Act is concerned, the landlord did not give any such notice to the tenant.

There is another reason also why we must hold that the notice given by the landlord to the tenant on June 17, 1954, was an invalid notice. Under s. 14, a notice could only terminate the tenancy upon the expiry of three months from the date of service of the notice. A notice under s. 14 does not terminate a tenancy forthwith, that is to say, with effect from the date of receipt of the notice itself. This is clear enough from the language of the section itself and no more comments are necessary upon this point. If we turn to the notice given in this case, it did not intimate to the tenant-opponent No. 1 that his tenancy would be terminated after the expiry of three months from the date of service of the notice. It told him distinctly that by the notice itself his tenancy was terminated. This is, therefore, a case of "termination forthwith" by the very act of giving a notice on June 17, 1954. Upon this ground also the notice given by the petitioner to opponent No. 1 was an invalid notice.

The result, therefore, is that the landlord has failed to comply with the statutory requirement of s. 24 of the Act, namely, the requirement that even if a notice of termination of tenancy under s. 14 is given to the tenant, another notice under s. 24 must be given to him intimating to him that in case he failed to restore the land to its original condition within one year from the date of service of that notice, he would have to be ejected. The landlord has also fail-

ed to comply with the statutory requirement of a notice under s. 14 itself, in that beyond terminating the tenancy by that notice he went further and asked for possession of the land from the tenant upon the expiry of three months from the date of receipt of that notice. Besides, the landlord sought to terminate the tenancy of the tenant by the very notice itself which also he could not do. The notice dated June 17, 1954, being thus an invalid notice upon various grounds, the landlord's application for ejecting the tenant was rightly dismissed by all the Courts below, though, as I have stated above, the view which they took of the notice was an incorrect view.

This application must accordingly fail and be rejected with costs.

Application rejected.

CRIMINAL APPELLATE.

Before Mr. Justice Datar and Mr. Justice Tarkunde.

THE STATE v. MAHOMEDKHAN NAVRANGKHAN.*

Foreigners Act (XXVI of 1946), Secs. 2(a), 13, 3, 14—Foreigners Order, 1948, Para. 7—Accused, a natural born British subject, entering India on Pakistan passport on July 12, 1956—Visa obtained by accused valid for certain period after entry into India—Accused failing to leave India after expiry of such period—Whether accused a foreigner, when he entered India, within s. 2(a) of Act before its amendment—Accused whether had contravened para. 7 of Order—Words "said period" in para. 7 whether refer to period mentioned in visa.

The accused who was a natural born British subject within the meaning of s. 2(a)(i) of the Foreigners Act, 1946, (before the section was amended by the Foreigners Laws (Amendment) Act, 1957) entered India on July 12, 1956, on a passport obtained from the Government of Pakistan. He had obtained a visa from the High Commissioner for India in Pakistan which was valid for three months from the date of entry into Indian territory. The accused did not leave India after the expiry of this period and he was thereupon prosecuted for an offence under s. 14 of the Foreigners Act, 1946, for having contravened para. 7 of the Foreigners Order, 1948, and s. 13 of the Act:—

Held, that the accused was not a foreigner when he entered India on July 12, 1956, as defined in s. 2(a)(i) of the Act as it stood then and therefore he was not obliged to comply with the provisions of para. 7 of the Order.

Union of India v. Haseenali,¹ referred to.

The words "the said period" occurring in para. 7 of the Foreigners Order, 1948, refer to the period indicated in the permit issued by the Registration Officer and not to the period mentioned in the visa.

THE facts appear in the judgment.

Y. V. Chandrachud, Government Pleader, for the State.

V. J. Desai (appointed), for the accused.

DATAR J. This is an appeal filed by the State of Bombay against the order of acquittal passed by the Judicial Magistrate, First Class, Ankleshwar, in Criminal Case No. 996 of 1957.

The case of the prosecution was that the present respondent Mahomedkhan Navarangkhan is a foreigner being a national of Pakistan. As such national he obtained a passport from the Government of Pakistan at Karachi on June 9, 1952, which was valid upto June 9, 1957.

On July 3, 1956, he applied for visa for India to enable and authorise him to enter the Indian territory to see his father and other relatives in the State

*Decided, September 23, 1958. Criminal Magistrate, First Class, Ankleshwar, in Appeal No. 340 of 1958, against the order of Criminal Case No. 996 of 1957. acquittal passed by L. N. Bhatt, Judicial 1 (1954) 56 Bom. L. R. 552.

of Bombay. The High Commissioner for India in Pakistan granted him visa of the category 'C' being No. 49900 and dated July 3, 1956. It was stated in the visa that it was valid for three months from the date of entry, which meant that the respondent, in whose favour it was issued, was to remain in India for a period of three months from the date of his arrival on the Indian territory. The respondent entered India on July 12, 1956, and accordingly he was allowed to stay in India till October 11, 1956. But he did not leave India even after October 11, 1956.

On June 21, 1957, the District Police Superintendent, Broach, gave him a notice stating that in spite of the last date of the visa obtained from the High Commissioner for India in Pakistan, he was illegally staying in Bharat, and he was therefore ordered to quit Bharat within one month from the date of the receipt of the notice, failing which legal steps would be taken against him in a Court of law and thereafter he would be deported from India. This notice was served upon the respondent on June 22, 1957.

Even after the period mentioned in the notice expired, the respondent did not leave India. Hence, the Police sub-inspector of Ankleshwar filed a complaint on July 31, 1957, against the respondent stating that he was a foreigner under s. 2(a) of Foreigners Act of 1946 and that he had not left Bharat in spite of the notice served on him on June 22, 1957, and had continued to stay in Ankleshwar (Bharat) illegally in spite of the expiry of the notice and had therefore committed a breach of r. 7 of the Foreigners Order, 1948, and s. 13 of the Foreigners Act, 1946, and thus committed an offence punishable under s. 14 of the Foreigners Act, 1946.

The Judicial Magistrate, before whom the case came up for trial, framed a charge against the respondent as follows:—

"That you on or about the 25th day of July 1957 at Ankleshwar being a foreigner entered into India under the authority of 'C' Visa No. 49900 dated July 3, 1956 on July 12, 1956 and were permitted to stay in India upto October 11, 1956 but you did not leave India even after the D.S.P. Broach gave you notice which was served on you on June 22, 1957, and thereby contravened r. 7 of the Foreigners Order, 1948 and also s. 13 of the Foreigners Act, 1946, and thereby committed an offence punishable under s. 14 of the Foreigners Act, 1946."

The respondent resisted the charge. His defence was that he was not a national of Pakistan but was a citizen of India. He was born at Ankleshwar and was officiating as Talathi till 1951 when he resigned from his office. Then he started business, but due to loss in the business he had to stop it in a short time. Thereafter he could not secure a good job or any good business and in search of good service and for a short time he went to Pakistan (Karachi). He did not go to Pakistan permanently. He had no reason, except for service, in going to Pakistan. After going to Pakistan, he found that it was not suitable for him to stay there. He intended to come back to Bharat in a short time; and when he made movements to return to Bharat, he was informed that it was impossible to return to Bharat, unless he obtained the passport of Pakistan for returning to Bharat. At last he obtained the passport from Pakistan. Thereafter, he applied for visa. He further says that he was not informed that he would be considered as national of Pakistan when he obtained the passport and the visa from his agent in Pakistan. The agent had taken his signature on the blank forms and he filled up all the particulars according to his (agent's) wish and he was not made aware of the particulars written by the agent and if it was stated that he was a national of Pakistan in the application for visa, that fact was mentioned in the application without his knowledge and no such declaration was ever made by him.

The learned Magistrate, on appreciation of the evidence led before him, held that the respondent was born in India in 1921 or 1922, that he served as a Talathi from 1944 till 1951 in the District of Broach and that he left India either towards the end of 1951 or in early 1952. He also held that the prosecution had not proved that the respondent migrated from India to Pakistan with the intention of residing and settling in Pakistan and that therefore art. 7

of the Constitution did not apply and in view of art. 5 of the Constitution, the respondent was a citizen of India and not a foreigner. Accordingly, on November 30, 1957, he acquitted the respondent of the offence with which he had been charged.

The State has now come to this Court in appeal against the order of acquittal.

The learned Government Pleader, who appears for the State, contended that even from what had been stated by the respondent in his defence at the trial, the migration of the respondent from India to Pakistan had been more than amply proved. According to the learned Government Pleader 'migration' did not mean leaving one country for another, with a view permanently to reside and settle in the other country. But it only meant leaving one country for another with a view to pursue any normal avocation in the other country. The second contention that was raised by the learned Government Pleader was that in view of r. 3 specified in Sch. III of the Citizenship Rules, 1956, made under s. 18 of the Citizenship Act, 1955, the fact that the respondent (though originally a citizen of India) had obtained a passport on June 9, 1952, from the Government of Pakistan shall be conclusive proof of his having voluntarily acquired the citizenship of that country before that date, and therefore it was not now open to the respondent to contend that he still retained the citizenship of India. The learned Government Pleader also drew our attention to the declaration made by the respondent in his application for visa before the High Commissioner for India in Pakistan, wherein he had stated that he was a Pakistani national and that he had migrated from India in August 1948. In view of these solemn declarations in the application, contended the learned Government Pleader, the respondent could not be regarded as a citizen of India, but was only a foreigner so long as no attempt had been made by him to show that he had been induced to make those declarations either because of some fraud or misrepresentation. The learned Government Pleader also pointed out that in view of the provisions of s. 9 of the Foreigners Act, 1946, the onus of showing that he was not a foreigner was entirely upon the respondent, and in the absence of any relevant evidence in that behalf, it must be held that the respondent was a foreigner and therefore guilty of the offence with which he was charged.

In our view, it is not necessary to consider any of these submissions made by the learned Government Pleader, as this appeal can be disposed of on the ground that the respondent was not a foreigner when he entered India on July 13, 1956, as defined in the Act as it then stood and that the facts proved by the prosecution in this case do not at all make out any case of the contravention of r. 7 of the Foreigners Order, 1948, or s. 13 of the Act, for which the respondent was charged in the trial Court. We have set out the entire charge as framed by the learned Magistrate. Indeed it appears the learned Magistrate while framing the charges relied upon the averments and the allegations made by the sub-inspector in his written complaint filed on July 31, 1957. Both the charge and the written complaint refer to the contravention of r. 7 of the Foreigners Order, 1948, and also s. 13 of the Foreigners Act. Section 13, so far as material, states that any person who fails to comply with any direction given in pursuance of any such order (made under the provisions of the Act) shall be deemed to have contravened the provisions of the Act. The orders referred to in s. 13 are those orders which the Central Government may make in the exercise of their power conferred upon them by s. 3 of the Foreigners Act, 1946. Section 3(1) of the Act says that

"The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner...for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom...

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner...

(c) shall not remain in India or in any prescribed area therein..."

Under s. 12 of the Act, it seems, the Central Government has been authorised

to delegate its powers under s. 3 to any authority subordinate to it. Section 12 reads:

"Any authority upon which any power to make or give any direction, consent or permission or to do any other act is conferred by this Act or by any order made thereunder may, unless express provision is made to the contrary, in writing authorise, conditionally or otherwise, any authority subordinate to it to exercise such power on its behalf..."

From the wording of s. 13 mentioned above, it is clear that it refers to the non-compliance of a direction given in pursuance of any order made by the Central Government under s. 3 or by any authority subordinate thereto under s. 12 of the Act. It is for this reason that the learned Government Pleader relied more upon the reference to the contravention of r. 7 of the Foreigners Order, 1948, than upon the reference to s. 13 in the charge. It is only when there is an order of a competent authority under the Act that the question of any direction being given in pursuance thereof can arise. Therefore, the only question that falls to be considered is whether there was any order the contravention of which amounted to an offence punishable under s. 14 of the Act. The prosecution, as is clear from the complaint and the charge, relies upon the contravention of only para. (rule) 7 of the Foreigners Order, 1948. The Foreigners Order, 1948, was made by the Central Government in the exercise of its powers conferred by s. 3 of the Foreigners Act, 1946. Paragraph 7 (mentioned as r. 7 in the charge) of the Foreigners Order states that:

"Every foreigner who enters India on the authority of a Visa issued in pursuance of the Indian Passport Act, 1920 (XXXIV of 1920) shall obtain from the Registration Officer having jurisdiction... a permit indicating the period during which he is authorised to remain in India and shall, unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period; and at the time of foreigner's departure from India the permit shall be surrendered by him to the Registration Officer having jurisdiction at the place from which he departs."

The wording of this paragraph makes it clear that before there could be any contravention of the provisions thereof it must be shown that the person who entered India was a foreigner, and that having entered India he failed in the first instance to obtain a permit from the requisite authority indicating the period during which he was authorised to remain in India and thereafter failed to depart from India before the expiry of the said period. If so, then the question arises, was the respondent a foreigner on July 12, 1956, when he entered India? As s. 2(a) of the Foreigners Act, 1946, stood on that date, "foreigner" was defined as meaning a person who

(i) is not a natural-born British subject as defined in sub-sections (1) and (2) of section 1 of the British Nationality and Status of Aliens Act, 1914, or

(ii) has not been granted a certificate of naturalisation as a British subject under any law for the time being in force in India, or

(iii) is not a citizen of India."

It is not disputed, and indeed it cannot be disputed in view of the evidence on the record and the finding of the learned Magistrate, that the respondent was at the material time a natural born British subject within the meaning of s. 2(a)(i) of the Foreigners Act of 1946. Therefore, even assuming that the respondent was not a citizen of India, still he was not a foreigner as defined in the Act inasmuch as he was a natural born British subject within the meaning of s. 2(a)(i) of the Act.

The learned Government Pleader tried to construe the three clauses of the definition as meaning that if a person was not a citizen of India, then even though he was a natural born British subject or had obtained a certificate of naturalization as required by cl. (i) or by cl. (ii) of s. 2(a) of the Act, he must nevertheless be deemed to be a foreigner. We do not think that it is possible to put any such construction upon the three clauses mentioned in the definition. In *Union of India v. Hasanali*¹ it was held that the Foreigners

Act, 1946, did not authorise the Government to extern all non-citizens and the only person who could be externed under the provisions of the Act was a person who was a foreigner as defined by the Act. In the course of the judgment the learned Chief Justice observed that it is possible for a person not to be a citizen and yet not to be a foreigner within the meaning of the Act.

It may be noted that s. 2(a) of the Foreigners Act, 1946, was amended by the Foreigners Laws (Amendment) Act, 1957, which came into force on January 19, 1957. By this Amendment Act, cls. (i) and (ii) in s. 2(a) were deleted and "Foreigner" was defined as meaning only a person who was not a citizen of India. But this Amendment Act came into force long after the respondent entered India. We have to determine whether the respondent was a foreigner by reference to the definition as it was in force when he entered India; and in view of the undisputed position that he was a natural born British subject within the meaning of s. 2(a), cl. (i), of the Act, it must be held that he was not a foreigner and therefore not obliged to comply with the provisions of para. 7 of the Foreigners Order, 1948. Further even assuming that the respondent was a foreigner on the date of his arrival in India, it is not clear in what respect there has been any contravention of para. (rule) 7 of the Foreigners Order, 1948. It is not the prosecution case that the respondent contravened the provisions of para. (rule) 7 in that he failed to obtain from the Registration Officer a permit indicating the period during which he was authorized to remain in India. It is also not the gravamen of the charge. It is also not disputed that there was no permit ever obtained by the respondent from the Registration Officer. The learned Government Pleader suggests that there was a failure on the part of the respondent to depart from India before the expiry of the said period as mentioned in para. (rule) 7 of the Foreigners Order, 1948, and therefore there was a contravention of the provisions of the said paragraph. We cannot accept this suggestion. The words "the said period" occurring in the paragraph must refer to the period indicated in the permit. When there was no permit and when failure to obtain such permit was never made the ground of the present complaint, we do not see how any failure to depart from India before the expiry of the period indicated in such permit could ever occur and could be made the basis of the complaint as suggested by the learned Government Pleader.

The learned Government Pleader further suggested that even though it was true that no permit had been obtained by the respondent from the requisite authority and failure to obtain such permit had not been made the subject-matter of the present complaint or the charge, all what para. (rule) 7 mentioned was that the foreigner should depart from India before the expiry of the period mentioned in the visa itself. In other words, the contention of the learned Government Pleader was that the "period" referred to in the paragraph was the period mentioned primarily in the visa and that such period had only to be restated in the permit. If, therefore, there was no departure from India before the expiry of the period mentioned in the visa, there was contravention of the provisions of para. 7 of the Foreigners Order, 1948, which was made punishable under s. 14 of the Act. We do not think that this contention is right. The paragraph expressly refers to the period indicated in the permit and not to the period mentioned in the visa. The visa only mentions that it is valid for three months from the date of entry in India. The date of the issue of visa and the date of entry in India cannot in most cases be the same. It is only when a foreigner enters India, that para. 7 of the Foreigners Order, 1948, makes it incumbent upon him to approach the Registration Officer and obtain a permit from him indicating the period during which he is authorised to remain in India. This period obviously has to be computed from the date of his entering India which is known only after he arrives in India.

Then it was further argued that the notice which was issued by the District Police Superintendent of Broach on June 21, 1957, was in the nature of a direction given in pursuance of a valid order and the contravention thereof

was contravention of the provisions of the Act in view of s. 13 of the Act. It is true that the Central Government could delegate its powers under s. 3 to any authority subordinate to it. The Notification S.R.O. No. 1562 issued by the Government of India, so far as material, states that in exercise of the powers conferred by cl. (i) of art. 258 of the Constitution, the President with the consent of the Government of Bombay hereby entrusts to that Government the functions of the Central Government in making orders of the nature specified in cl. (c) of sub-s. (2) of s. 3 of the Foreigners Act, 1946 (XXXI of 1946) in respect of foreigners other than enemy foreigners as defined in the Enemy Foreigners Order, 1939, subject to the following conditions namely:—

“(1) that notwithstanding this entrustment the Central Government may itself exercise the said function either generally or in any particular case or class of cases, and

(2) that the State Government shall not exercise the said function in a manner inconsistent with any orders which have been, or may hereafter be, issued by the Central Government under the said Act.”

In view of this Notification we can proceed on the basis that the State Government has got the power of making appropriate order under s. 3(2)(c) of the Act.

But so far as the record of the present case stands, we do not find any such order produced on behalf of the prosecution. The learned Government Pleader contends that inasmuch as a notice was issued to the respondent by the District Police Superintendent of Broach that notice must have been given only in pursuance of a valid order of the State Government. It is not possible to accept this contention. In the first place, there is no reference to any such order in the notice given by the District Police Superintendent of Broach; nor is there any mention of any such order either in the written complaint or in the charge. What is mentioned in the charge is only the notice of the District Police Superintendent. In the absence of any reference to any order of the State Government in the evidence of the present case, it is impossible to hold that the State Government had passed the requisite order and had further given directions to the District Police Superintendent of Broach to give the notice which he issued on June 21, 1957. Besides, the evidence on record does not show and the complaint and the charge do not even mention that the order of the State Government (if it existed) was brought to the notice of the respondent before he was charged with contravention thereof or of any direction given in pursuance thereof. It must, therefore, be held that the respondent was neither guilty of any contravention of the provisions of para. (rule) 7 of the Foreigners Order, 1948, nor of the provisions of s. 13 of the Foreigners Act, 1946.

The learned Government Pleader made a grievance that the points upon which we are disposing of the appeal were entirely new and we should not, therefore, consider and give effect to them for the first time in appeal. But it may be noted that these points suggested themselves to us as we proceeded to hear the arguments of the learned Government Pleader and were also urged by the learned advocate on behalf of the respondent. These points could be considered and disposed of on the facts already proved and admitted in the case and the respondent in an appeal against acquittal could support the order of acquittal on any grounds available to him if those grounds did not necessitate any further investigation into facts.

The result is that the order of acquittal is confirmed and the appeal fails and must be dismissed.

Appeal dismissed: acquittal confirmed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Gokhale.

GAJANAN DHUNDIRAJ DESHPANDE

v.

SHRIDHAR MORESHWAR DESHPANDE.*

Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (I of 1951), Secs. 4(1) & (2), 38(1) & (2), 2(g), 3(1)—Central Provinces Land Revenue Act (II of 1917)—Central Provinces Tenancy Act (I of 1920)—Home-farm land held as khudkasht and in possession of persons on date of vesting under Act I of 1951—Title of other persons in such land subsisting at time of coming into force of Act—Whether title of such persons affected by Act—Dispute as to title to land how to be decided.

Under the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, where a home-farm land stands in the name of certain persons as khudkasht land and is in their possession on the date of vesting under the Act, the rights and interests of other persons in this land which were subsisting at the time of the coming into force of the Act are not affected by the Act but are kept intact, and if any dispute arises as to the title to this land, that dispute will have to be decided by the civil Court as contemplated under s. 38 of the Act. If, however, before the coming into force of the Act the persons in whose name the land stands had obtained exclusive title to the land against the other persons who were co-owners of the land, by virtue of adverse possession or by relinquishment or otherwise, then under s. 4(2) of the Act they would be entitled to retain possession of the land and they would become *malik makbuzas* of the land under s. 38(1) of the Act.

*Chhote Khan v. Mohammad Obedullakhan*¹ and *Zamasao v. Hiralal*,² distinguished.

*Rahmatullah Khan v. Mahabir Singh*³ and *Mahadeo v. Yamunabai*,⁴ referred to.

THE facts appear in the judgment.

B. H. Mandlikar, for the appellant.

M. B. Bobde and *G. J. Ghate*, for the respondent.

GOKHALE J. These two second appeals are filed by the original plaintiff against the dismissal of his two suits by both the lower Courts. The few facts which it is necessary to state for appreciating the points involved in these appeals are as follows:—

Moreshwar and Gajanan were brothers and they were co-sharers in two villages of Nandora and Tuljapur. It appears that on May 14, 1930, there was a partition between these two brothers with respect to the home-farm lands in possession of their family, but the proprietorship in respect of these two villages was not partitioned. Moreshwar, the elder brother, acted as the *lambar-dar* in both these villages. In 1931 pre-emption proceedings were started by Moreshwar with regard to field No. 17 of Nandora. These proceedings lasted for five years from 1931 to 1936, and ultimately in January 1936, field No. 17 was acquired by Moreshwar as a result of these proceedings. In 1937 a portion of two acres out of field No. 34/1 situated in mouza Tuljapur was acquired by Moreshwar in ejectment proceedings against one Wajirkhan. This Wajirkhan held at mouza Tuljapur three fields, namely, Nos. 34/1, 36/1 and 52. Field No. 34/1 consisted originally of 12.60 acres, but as I have already

*Decided, August 6/7, 1953. Second Appeal No. 49 of 1955 (with Second Appeal No. 50 of 1955), against the decision of K. B. Tayade, District Judge at Wardha, in Civil Appeal No. 52-A of 1953, confirming the decree passed by K. K. Kolhekar, First Civil Judge, Class II, at Wardha, in Civil Suit No. 63-A of 1952.

1. [1953] Nag. 702.

2. (1957) First Appeal No. 15 of 1952, decided by S. T. Desai J., on December 6, 1957 (Unrep.).

3. [1955] Nag. 983.

4. (1950) Second Appeal No. 323 of 1948, decided by Choudhury J., on January 22, 1954 (Unrep.)

stated, two acres out of it were obtained by Moreshwar in ejectment proceedings against Wajirkhan. Subsequently, by two surrender deeds dated April 16, 1937, and November 12, 1937, Moreshwar acquired the remaining land in field No. 34/1, with the result that field No. 34/1 came to be recorded as 34/1 and 34/8. These two fields were known as *khari* lands. Field No. 16/2 at mouza Nandora was acquired by Moreshwar in ejectment proceedings on October 14, 1938, from its tenant Balaji. Then on November 27, 1940, under a surrender deed Moreshwar acquired the Bhivesni lands, namely, fields Nos. 36/1 and 52 situated at mouza Tuljapur. As I have already stated, the lands at mouza Tuljapur originally were owned by Wajirkhan, and despite the fact that Moreshwar acquired all his lands under separate proceedings, there were disputes between Moreshwar and Wajirkhan resulting in proceedings under s. 145 of the Code of Criminal Procedure. But these disputes were regarding *khari* lands only, that is to say, fields Nos. 34/1 and 34/8 only and they ended in favour of Moreshwar on September 6, 1938. So far, therefore, as the chapter of acquisition of lands by Moreshwar as *lambārdar* was concerned, that chapter closed in 1940. Moreshwar had two sons, Waman and Shridhar, and it appears that Shridhar attained majority sometime before 1942 and he filed a suit for partition against Moreshwar and Waman, being Civil Suit No. 17-A of 1942. Gajanan, the separated uncle, was, it appears, helping Shridhar in this suit and that suit resulted in a compromise. The result of that compromise was that fields Nos. 16/2 and 17 of the village of Nandora were allotted to Waman, while fields Nos. 34/1, 34/8, 36/1 and 52 of mouza Tuljapur were allotted to Shridhar. Moreshwar seems to have died on December 27, 1943, and the fields which had been allotted to Waman and Shridhar in the partition suit came to be respectively entered into their names in the records of the two villages. Nothing happened thereafter till 1952 when Gajanan, the present appellant-plaintiff, filed the two suits, being Civil Suits Nos. 62-A of 1952 and 63-A of 1952. Suit No. 62-A was filed by him against Waman claiming partition and separate possession of half share in fields Nos. 16/2 and 17 of mouza Nandora, and suit No. 63-A was filed by him against Shridhar for partition and separate possession of his half share in fields Nos. 34/1, 34/8, 36/1 and 52 situated at mouza Tuljapur. It is out of these suits that the present two appeals have arisen. Second Appeal No. 50 of 1955 having arisen out of original civil suit No. 62-A of 1952 and Second Appeal No. 49 of 1955 having arisen out of civil suit No. 63-A of 1952. As these two appeals raise common questions, this judgment will govern both of them.

These suits came to be filed by the plaintiff on the basis that being a co-sharer with Moreshwar in the two villages of Nandora and Tuljapur, and as Moreshwar had obtained these suit fields by ejectment, surrender and pre-emption proceedings, they were held by Moreshwar on behalf of the proprietorship belonging to himself and the plaintiff, and these fields came to be entered in the name of Moreshwar as his *khudkasht* lands and the plaintiff was, therefore, entitled to claim partition and separate possession of $\frac{1}{2}$ share in all these fields. The suits were resisted by the defendants in the two suits, Waman and Shridhar, on several grounds. But the principal contentions of the defendants were that the plaintiff had refused to pay his contribution for the acquisition of these fields; that the fields were possessed by Moreshwar, and after his death, as a result of the partition, by the defendants as their own *khudkasht* lands, and the plaintiff was, therefore, not entitled to any share therein. They also alleged that the plaintiff was excluded from enjoyment of these fields, and, therefore, even assuming that he had any original title, that was lost by adverse possession. They also pleaded that the plaintiff was estopped from claiming any share in the property because he had taken an active part in helping Shridhar in Civil Suit No. 17-A of 1942 representing to the defendants that these fields belonged to them only. These were the principal defences to the suit on facts.

A point of law was also raised by the defendants and that point was that as

a result of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (I of 1951), hereinafter referred to as the Abolition of Proprietary Rights Act, the proprietorship in the two villages had ceased, and as the plaintiff had ceased to be a proprietor, he could not file a suit for partition and separate possession of these fields.

The trial Court came to the conclusion that the plaintiff's suit was not barred by virtue of the Abolition of Proprietary Rights Act which came into force on March 31, 1951. It, however, held against the plaintiff on issues of fact and came to the conclusion that the plaintiff had refused to contribute towards the cost of acquisition in respect of field No. 16/2 and also held that the plaintiff was estopped from claiming a share by virtue of the part that he played in the partition suit between Waman and Shridhar. It also found that the plaintiff had been ousted by the defendants for the requisite period, and, therefore, the plaintiff's suit for partition was barred by limitation. On these grounds, amongst others, both the suits were dismissed by the trial Court. The plaintiff filed two appeals against this decision. Civil Appeal No. 51-A of 1953 was filed by him against the decision in Civil Suit No. 62-A of 1952, whereas Civil Appeal No. 52-A of 1953 was filed by him against the decision in Civil Suit No. 63-A of 1952. Both these appeals were disposed of by a common judgment by the learned District Judge at Wardha, who found as a fact that the plaintiff had never been approached for contribution for expenses of acquisition of the suit fields and that there was no estoppel against the plaintiff as alleged by the defendants and also no question of the defendants having acted upon any representation on the part of the plaintiff. The lower appellate Court also came to the conclusion that since the acquisitions were by Moreashwar as lambardar, the plaintiff would be entitled to his share as a co-sharer in respect of these fields and no ouster was proved for the requisite period against the plaintiff by the defendants. But, on the question of law raised by the defendants as regards the effect of the coming into operation of the Abolition of Proprietary Rights Act, the learned Judge was of the view that the plaintiff's suits must fail since the suits were brought by the plaintiff in his capacity as the proprietor of the villages, and that character having been lost by the plaintiff by virtue of the abolition of the *malguzari*, the plaintiff's claim could not be enforced. That was why, for a different reason, the lower appellate Court confirmed the decision of the trial Court in dismissing the plaintiff's suits. That is why the plaintiff has filed these two appeals.

Mr. Mandlekar, learned advocate appearing on behalf of the plaintiff in both the appeals, has contended in the first instance that the view of the lower appellate Court that the suits were incompetent by virtue of the provisions of the Abolition of Proprietary Rights Act is erroneous in law. Mr. Mandlekar also supports the findings of fact which were given in the plaintiff's favour by the lower appellate Court. According to Mr. Mandlekar, if the view of the learned appellate Judge as regards the effect of the Abolition of Proprietary Rights Act is wrong, then he must get a decree in his favour in both the appeals. Now, the short argument of Mr. Mandlekar is that what the Abolition of Proprietary Rights Act does is to abolish the proprietorship of villages. It does not affect the private lands belonging to proprietors, nor does it affect their nature. Mr. Mandlekar contended that Moreashwar was admittedly a lambardar of the two villages of Nandora and Tuljapur. Though in 1930 the home-farm lands belonging to the family of Moreashwar and his client were partitioned, there was admittedly no partition of the proprietorship of these two villages. In between the years 1931-40 Moreashwar acquired the six lands in suit in the two villages by surrender, ejection and pre-emption proceedings, and these he could only initiate as a lambardar acting on behalf of the whole body of the proprietors of the two villages, which consisted of himself and Gajanan, the plaintiff. The lands were, therefore, acquired by Moreashwar not for himself but for the whole proprietary body, and, therefore, the plaintiff got 0/8/0 share in these lands acquired by Moreashwar and he would be entitled to get separate

possession of these lands on his paying his share in the expenses incurred by Moreashwar in acquiring these lands. And Mr. Mandlikar contends that there is nothing in the provisions of the Abolition of Proprietary Rights Act which precludes him from filing a suit against the defendants for his share in the suit lands which are home-farm lands. As against this Mr. Bobde, the learned advocate appearing on behalf of the defendants, admits that no doubt Moreashwar instituted pre-emption, surrender and ejectment proceedings as a lambardar and, therefore, acquired these lands as a lambardar, and consequently Mr. Bobde says that the plaintiff initially might have been entitled to a share in these lands. But Mr. Bobde contends that after the chapter of acquisition, as he puts it, was over, right from the time when these lands were acquired, Moreashwar remained in possession of these lands and cultivated these lands as his own home-farm lands, and all these lands were entered in his name as *khudkashi* lands. Since the plaintiff could only claim a share in respect of these lands on the basis that he was a co-sharer in the proprietorship of these two villages, and since this proprietorship itself was abolished under the Abolition of Proprietary Rights Act, the lower appellate Court was right in its view that the plaintiff's suits were not maintainable. Alternatively, Mr. Bobde contended that even assuming that the suits were maintainable, the evidence on record was not properly appreciated by the lower appellate Court, and according to Mr. Bobde, the lower appellate Court has erred in law in coming to the conclusion that the plaintiff had not been excluded for the statutory period and that his title to the lands was not extinguished.

In order to examine the respective contentions of the parties on the question of the effect of the Abolition of Proprietary Rights Act, it is necessary to refer to some of the provisions of the Central Provinces Land Revenue Act, 1917 (II of 1917), the Central Provinces Tenancy Act, 1920 (I of 1920), and the Abolition of Proprietary Rights Act. There is no dispute that the suit lands are entered in the name of the defendants to the two suits as *khudkashi* lands. Section 2(5) of the C. P. Land Revenue Act defines a *khudkashi* land as that part of the home-farm of a mahal which is cultivated by the proprietor as such and which is not *sir* land. It is not necessary to refer to the two explanations to this definition. Section 2(17) defines *sir* land, but it is not necessary to refer to that definition either. Section 2(6) defines 'lambardar' as meaning the proprietor of a mahal appointed to discharge the duties imposed on a lambardar by the Act. Section 188(1) enumerates the duties of the lambardar, while s. 188(2)(a) states that the lambardar shall, in the mahal or patti for which he is appointed, be deemed to be the landlord within the meaning of the Central Provinces Tenancy Act, 1898; and under cl. (d) of s. 188(2), the lambardar has the power, if necessary, to institute suits and take other proceedings relating to the exercise of his powers of the lambardar and against trespassers on the common property. Then we turn to the provision of the C. P. Tenancy Act, 1920. Section 6-A of this Act refers to landlord's right of pre-emption. Sections 23 and 24 dealt with the landlord's right to recover arrears of rent by ejectment of the tenant and the procedure to be followed by a Revenue Officer in execution of a decree for arrears by ejectment. These two sections are omitted by the C. P. Tenancy (Amendment) Act, 1939; but there is no dispute that when Moreashwar filed ejectment proceedings against the tenants, these provisions of the Tenancy Act were in force. Section 89 of this Act refers to surrender of holding by a tenant in favour of the landlord. As I have already stated, the suit lands were acquired by Moreashwar by instituting ejectment and pre-emption proceedings and getting surrender of some of these lands. Under s. 188(2) of the C.P. Land Revenue Act, as already seen, the lambardar is to be deemed to be the landlord within the meaning of the C. P. Tenancy Act, and it is the lambardar who would be taking proceedings and instituting suits on behalf of the proprietary body in pre-emption and ejectment proceedings and getting surrender deeds from the tenants. There can, therefore, be no doubt that when Moreashwar obtained these lands

before 1940, he was acting as the lambardar of the two villages and acquired the lands for the whole body of the proprietors consisting of himself and his brother Gajanan, and since he acquired these lands for the proprietors, Gajanan would be entitled to a share in those lands, subject to his liability to contribute the necessary amount of expenses incurred by Moreswar; and as I have already stated, Mr. Bobde does not dispute this legal position that so far as the acquisition proceedings are concerned, they were taken by Moreswar as a lambardar and he acquired these lands for the proprietorship, which consisted of himself and his brother Gajanan. But then Mr. Bobde's contention is that the definition of *khudkasht* shows that it is a land which is cultivated by the proprietor as such, and, therefore, since Moreswar was in possession of these lands and cultivating them, and since Gajanan had nothing to do with this cultivation, these lands became the *khudkasht* of Moreswar alone, and they were entered as such in the records of the two villages. And Mr. Bobde further contends that since the only title on which Gajanan can base his present suits for partition being that of a co-sharer in the proprietorship of these two villages and since that proprietorship itself has been abolished, the suits are not maintainable. That takes me to the provisions of the Abolition of Proprietary Rights Act.

Section 2(g) of the Abolition of Proprietary Rights Act, so far as it is material, states:

"Home-farm' means,—

(1) in relation to the Central Provinces—

(i) land recorded as *sir* and *khudkasht* in the name of a proprietor in the annual papers for the year 1948-49,"...

And Mr. Bobde says that so far as the suit lands are concerned, they were entered as *khudkasht* in the names of Waman and Shridhar respectively in the two villages of Nandora and Tuljapur. But, if they were recorded in the names of Waman and Shridhar in the annual papers for the year 1948-49 as *khudkasht*, they could only be so recorded in their names as proprietors; and if admittedly in 1948-49 Gajanan was also a co-sharer in the proprietorship of these two villages, the mere fact that these lands came to be entered in the names of Waman and Shridhar would not, in my judgment, affect the rights of Gajanan in these lands. Under s. 3(1) of this Act—

"Save as otherwise provided in this Act, on and from a date to be specified by a notification by the State Government in this behalf, all proprietary rights in an estate, mahal, alienated village or alienated land, as the case may be, in the area specified in the notification, vesting in a proprietor of such estate, mahal, alienated village, alienated land, or in a person having interest in such proprietary right through the proprietor, shall pass from such proprietor or such other person to and vest in the State for the purposes of the State free of all encumbrances."

By virtue of s. 4(1)(a) when the notification under s. 3 in respect of any area has been published in the Gazette, then, notwithstanding anything contained in any contract or in any other document, all rights, title and interest vesting in the proprietor or any person having interest in such proprietary right through the proprietor shall cease and be vested in the State for purposes of the State free of all encumbrances. Sub-section (2) of s. 4, however, provides as follows:—

"Notwithstanding anything contained in sub-section (1), the proprietor shall continue to retain the possession of his home-stead, home-farm land, and in the Central Provinces also of land brought under cultivation by him after the agricultural year 1948-49 but before the date of vesting."

The date of vesting under the Act was March 31, 1951, so that on that date the interest not only of Gajanan but also of the defendants in the proprietorship of the two villages ceased and vested in the State. But that did not lead to a cesser of the interests of these proprietors in their home-stead or home-farm lands. They continued to have the right to retain possession of their home-farm lands. Now, Mr. Bobde's contention is that if the right of

proprietaryship ended on March 31, 1951, the very basis on which the plaintiff claimed to have his right to a share in these lands enforced, ended, so that Waman and Shridhar alone had the right to retain possession of the suit lands which were entered in their names as *khudkasht*. I am not prepared to accept that contention. As I have already stated, the lands were entered in the name of Moreswar till the partition suit, and as a result of the partition suit, in the names of Waman and Shridhar, as *khudkasht*, because they were the proprietors of the two villages. But they alone were not the exclusive owners of these villages but the plaintiff had admittedly an 0/8/0 share in both these villages. The acquisition of lands being for the whole proprietary body, unless it is shown that the plaintiff had lost his right either by adverse possession or by relinquishment or otherwise, it would be difficult to hold that by virtue of s. 4(1) and (2) of the Abolition of Proprietary Rights Act, the plaintiff ceased to have any right to claim a share in these lands. In this connection, reference may be made to the provisions of s. 38 of the Abolition of Proprietary Rights Act. Under s. 38(1) every proprietor, who is divested of his proprietary rights in an estate or mahal, shall, with effect from the date of vesting, be a *malik-makbuz* of the home-farm land in his possession. The C. P. Land Revenue Act, by s. 2(9), defines '*malik-makbuz*' as meaning any person who owns one or more plots of land separately assessed to land-revenue in a mahal. Now, Mr. Bobde very strenuously relies on s. 4(2) and s. 38(1) of the Abolition of Proprietary Rights Act, in support of his argument that the plaintiff had no right whatever in the suit lands. According to him, it is Waman and Shridhar, the two defendants in the suits, who continued to have the rights to retain possession of the home-farm land, and Mr. Bobde further contends that under s. 38(1), from the date of the vesting i.e. March 31, 1951, it is the defendants who became the *malik-makbuz*s of the home-farm lands in their possession. But Mr. Bobde's argument assumes that the entire proprietary rights on the date of vesting were in Waman and Shridhar. That assumption, in my opinion, is entirely erroneous. In this connection, reference may also be made to sub-s. (2) of s. 38 of the Abolition of Proprietary Rights Act, which provides:

"If there are more persons than one having interest in land held as *sir* or *khudkasht* immediately before the date of vesting, any such person may apply for a partition of his share in the land and the Revenue Officer may, subject to rules made by the State Government in this behalf, after hearing the objection of the co-sharers, divide the land and apportion the assessment:

Provided that no such partition shall be made if any question of title is raised until such question has been decided by a civil Court.

Explanation.—For the purposes of the aforesaid proviso, the claim of any proprietor that he holds any land in exclusive ownership or that he had acquired any *khudkasht* land exclusively for himself shall be deemed to be a question of title."

These provisions would, therefore, clearly indicate that where a home-farm land stands in the name of certain persons, the rights or interests of other persons in this land are not intended to be affected by the provisions of the Abolition of Proprietary Rights Act: they are kept intact; and if any dispute arises as to the title to this land, that dispute has to be settled by the civil Court. It is true that if, before this Act came into force, Waman and Shridhar had obtained exclusive title to these lands as against the plaintiff by virtue of adverse possession, or in any other manner, then under s. 4(2) they would be entitled to retain possession of the home-farm land and they would become *malik-makbuz*s of these lands under s. 38(1); but the coming into force of this Act cannot have any effect on the title of the plaintiff if that title was subsisting at the time when this Act came into force. The trial Court took the view that the plaintiff did not lose his share in the suit lands by virtue of the provisions of the Abolition of Proprietary Rights Act. The lower appellate Court, however, disagreed with the view of the trial Court and relied upon the decision in *Chhote Khan v. Mohammad Obedullakhan*¹ in support of its view. All

1 [1953] Nag. 702.

that that case decides is that the Abolition of Proprietary Rights Act was not retrospective in its operation, and the majority view was that the landlord's powers to institute a suit for evicting the unauthorised occupant of an *abadi* site had come to an end by virtue of ss. 50 and 60 of that Act. The only question, that was before the Court in that case was whether the proprietor was entitled to continue the suit filed by him as lambardar after the coming into operation of the Act, and it was held that the office of the lambardar itself having ceased because of the Act, the *lis* could not be continued by him. Mr. Mandlekar seems to be right in his contention that this case does not come in the way of the plaintiff in the present suits, which are filed by him for enforcing his right to partition and getting separate possession of his share in the home-farm lands. I have already referred to the relevant provisions of the C. P. Land Revenue Act, 1917, as well as the C. P. Tenancy Act, 1920. As Sinha C.J., as he then was, points out in *Chhote Khan's* case, a lambardar had a dual character. He was an agent of the Government for collecting and paying into Government treasury the Government share in the collections from tenants and he had other duties like assisting Government agents in the mofussil in the discharge of their duties. Secondly, he was the statutory agent of the proprietors of the village. Under s. 188(2)(a) he was deemed to be the landlord, and under s. 188(2)(b) he had to exercise the powers of the proprietors in matters relating to the village *abadi* and the enjoyment of their rights and privileges by tenants and others over the wasteland of the village including the grazing of cattle thereon. Under s. 188(2)(c) he was empowered to collect village profits and was under an obligation to render an account of the same to the proprietors within six months of the close of the agricultural year. And under s. 188(2)(d), if necessary, he was entitled to institute suits and take other proceedings in relation to the common property of the proprietors. As a lambardar, when he instituted suits for ejectment or pre-emption, or obtained surrenders from the tenants, he did it in his representative capacity. The effect of the abolition of the Proprietary Rights Act is, as Sinha C.J. points out, to wipe out the interest of the intermediaries between the State and the actual tillers of the soil, with the result that the State comes into direct relationship with persons who are in actual occupation of agricultural lands or house-sites and buildings on such house-sites being parts of village sites. The proprietor as the receiver or collector of rent and as lambardar has been abolished under the Act. But that does not mean that he loses all his private rights and it would be clear from s. 4 that lands in his possession such as home-stead and home-farm lands and any claim of money before the date of vesting of the proprietary rights in the State are saved to him. That is the effect of s. 4(2) and (3) of the Abolition of Proprietary Rights Act. Section 5 also saves the outgoing proprietor certain rights including all open house-sites, buildings, places of worship, wells situated in and trees standing on lands included in such enclosures or house-sites or land appertaining to such buildings or places of worship within the limits of the village site, though he can hold these lands on such terms and conditions as may be determined by the State. The home-farm lands, therefore, which are in possession of the proprietor on the date of vesting still continue to belong to the proprietor, and if he claims exclusive title to the *khudkashi* lands which stand in his name and that claim of his is challenged by the other ex-proprietors, then that would be a question of title which will have to be decided by a civil Court as contemplated under s. 38 of the Act. As I have already pointed out, under sub-s. (2) of s. 38, if there are more persons having interest in the land held as *sir* or *khudkashi* immediately before the date of vesting, any such person may apply for a partition of his share in the land and the Revenue Officer may, subject to rules made by the State Government in this behalf divide the land and apportion the assessment. But, if a question of title is raised, no such partition shall be made unless that question is decided by a civil Court. In my opinion, therefore, the case relied upon by the lower appellate Court has no application to the facts of this case.

Mr. Mandlekar also relied upon a recent decision of the Nagpur High Court in *Rahmatullah Khan v. Mahabir Singh*¹ where the majority of the Judges held that the Abolition of Proprietary Rights Act does not altogether eliminate the interest of the proprietor who has acquired the right to hold specific plots of land as owner of those plots, and a suit for possession of *khudkasht* land by the owner thereof is thus maintainable in spite of the Act. In this case, *Chhote Khan's* case was cited and was distinguished by Sinha C.J. who observed as follows (p. 988) :—

"To give effect to the argument raised on behalf of the appellant in this case would be to hold that if a proprietor has been wrongfully dispossessed of a part of the property being *khudkasht*, the defendant trespassing upon the property can claim to continue his trespass. A distinction has to be made between a suit brought by a proprietor in his character as such for possession of property which the law then in force authorized him to claim by a suit for the benefit of the entire body of proprietors and a suit based upon trespass upon his individual rights obtained by him irrespective of his character as such. In the instant case the plaintiff had purchased specific plots of *khudkasht* lands and would have continued in possession in spite of the enactment of the Abolition of Proprietary Rights Act but for the defendant's trespass. The aforesaid enactment does not govern such a suit. It only substitutes the State for the proprietor in respect of such lands as are not occupied lands. That legislation terminates the character of the landlord as such but does not deprive him of his rights to possess specific lands as his *khudkasht* or home-farm or his own *abad* site which he has appropriated to his personal use and occupation; in other words, the Act aforesaid abolishes the intermediaries between the State and the actual occupier of land for cultivation or residential purposes subsidiary to those purposes, but does not altogether eliminate the interest of the proprietor who has acquired the right to hold specific plots of land as owner of the property."

Hidayatullah J., however, differed from this view, and the matter was referred to Mr. Justice Mudholkar who agreed with the view of the learned Chief Justice. Mr. Bobde tried to distinguish this case on the ground that it was a case of *khudkasht* land which was not recorded as *khudkasht* in the revenue records because of an error on the part of the revenue officers and it was held by Mr. Justice Mudholkar that an erroneous recording of the *khudkasht* land as occupancy land would not in law alter the real character of that land, and despite the wrong entry the land must be regarded as having always been the *khudkasht* of the respondent, who was, therefore, entitled to maintain a suit in spite of the Abolition of Proprietary Rights Act against a person who had trespassed upon it. I am unable to accept the argument that this distinction would make the case inapplicable. In the present case, it is not disputed that the nature of the land in suit is *khudkasht*. What is contended is that the defendants in the two suits alone are the owners of these *khudkasht* lands. As I have already pointed, the lands were acquired by Moreswar in his capacity as the proprietor for the benefit of the proprietary body consisting of himself and his brother Gajanan, the present plaintiff. Gajanan may lose his right therein by adverse possession or in any other manner, but the provisions of the Abolition of Proprietary Rights Act can have no effect on Gajanan's rights if those rights continued till the date of vesting.

Mr. Bobde then drew my attention to an unreported decision of this Court in *Zamasao v. Hirralal*.² That case again is distinguishable because the lands in that case were not recorded as *khudkasht* in the *jamabandi* or the *khasra* of the year 1948-49 and the suit was brought by the plaintiffs in that case to enforce their right to these lands in accordance with the shares and it was held that the plaintiffs' case did not fall under sub-s. (2) of s. 4 of the Act. Then reliance was placed on *Mahadeo v. Yamunabai*³, in which Mr. Justice Choudhury held that the plaintiffs' right to claim a share in the *khudkasht*

¹ [1955] Nag. 983.

² (1957) First Appeal No. 15 of 1952, decided by S. T. Desai J., on December 8, 1957 (Unrep.).

³ (1954) Second Appeal No. 323 of 1948, decided by Choudhury J., on January 22, 1954, (Unrep.).

lands in suit was not maintainable as the character of the plaintiffs as proprietors of the village had been lost under the M.P. Abolition of Proprietary Rights Act, and in taking this view Mr. Justice Choudhary relied upon the decision of the Nagpur High Court in *Chhote Khan v. Mohammad Obedullah Khan* to which I have already made a reference. It is true that this case is in favour of Mr. Bobde's contention; but it appears that Mr. Justice Choudhary, with respect, relied upon the authority of *Chhote Khan's* case which has been subsequently explained and distinguished in a later decision of the Nagpur High Court in *Rahmatullah Khan v. Mahabirsingh* to which I have already referred and which is against Mr. Bobde's contention. As I have already observed the facts in *Chhote Khan's* case are distinguishable from the facts of the instant case. In the present case, the plaintiff does not claim a half share in the suit lands in his capacity as the proprietor of the two villages, because the rights of proprietorship which vested in Waman, Shridhar and the plaintiff had already ceased to have any existence because of the Abolition of Proprietary Rights Act. Waman and Shridhar claim the suit lands as their exclusive home-farm lands and they claim to retain possession of these lands by virtue of the provisions of s. 4(2) of the Abolition of Proprietary Rights Act. That claim of theirs is challenged by the plaintiff, who says that he has 0/8/0 share in these lands, these lands having been originally acquired for the whole body of the proprietors. The question of title, therefore, arises and that must be decided by the civil Court as contemplated under s. 38 of the Abolition of Proprietary Rights Act. The result is that the only ground on which the lower appellate Court non-suited the plaintiff must be held to be erroneous in law.

But Mr. Bobde further contends that he was entitled to support the decree of the lower appellate Court on the ground that assuming that the plaintiff had a title to these lands, the same was extinguished because of ouster on the part of the defendants for the statutory period. In this connection, Mr. Bobde has drawn my attention to the fact that so far as field No. 17 is concerned, which is the subject-matter of Second Appeal No. 50 of 1955, that was obtained by Moreswar by pre-emption in January 1936 and that was an absolute occupancy land and Mr. Bobde points out that the period of limitation in the case of this land would be three years by virtue of art. 1 of the Second Schedule to the C. P. Tenancy Act. But Mr. Mandlekar contends that after Moreswar acquired this land, it became the *khudkasht* land of the proprietor and, therefore, ceased to be an absolute occupancy land. But there can be no dispute that so far as the other lands are concerned, the period of limitation would be 12 years from the date of exclusion. Now, Mr. Bobde argues that the lower appellate Court which delivered one judgment disposing of both the appeals has really mixed up the questions of estoppel and adverse possession and has not considered the documentary as well as the oral evidence on the record separately. That grievance seems to be well-founded. In this connection, he has pointed out that the plaintiff, Gajanan, had, in execution of his decree against Moreswar, actually attached field No. 17 of Nandora as the property belonging to Waman and Moreswar and that attachment was objected to by Waman and Moreswar on the ground that a partition had taken place between Gajanan and themselves on June 8, 1936, and since then they were in possession of these fields in their own right. It is also clear from the finding of the trial Court in Civil Suit No. 63-A of 1952 that Moreswar had sold part of the *khari* lands in suit, namely, fields Nos. 84/1 and 84/8 to Shrawan, Shiva and Mahadeo in 1938, and Mr. Bobde also points out that in the partition suit filed by Shridhar against his father Moreswar and Waman, the present plaintiff actually helped Shridhar and that suit resulted in a compromise, under which the suit lands at Tuljapur which are the subject-matter of Civil Suit No. 63-A of 1952 fell to the share of Shridhar and the suit lands at Nandora which are the subject-matter of Civil Suit No. 62-A of 1952 fell to the share of Waman, and Mr. Bobde contends that in view of the fact that the plaintiff took active part on the side of Shridhar in negotiating this compromise, he knew that these fields had fallen

to the share of these two brothers as their exclusive property. Mr. Bobde argues that the lower appellate Court has not given a clear finding on the question of ouster, and I would, therefore, be entitled to interfere, in second appeal, with that decision. At any rate, Mr. Bobde contends that so far as field No. 17 is concerned, Waman claimed it as his own when Moreswar and he raised an objection to the plaintiff's attachment as evidenced by exhs. D-8 and D-9. Mr. Bobde also says that so far, at any rate, as *khari* lands at Tuljapur, fields Nos. 84/1 and 84/8, are concerned, since they were sold by Waman in 1938, adverse possession would commence from that time, and Mr. Bobde contends that I should remand the case to the lower appellate Court for arriving at a clear finding on the question of ouster and for disposing of the suits in accordance with law. There is considerable force in Mr. Bobde's arguments.

Mr. Mandlekar, on the other hand, contends firstly that Mr. Bobde is not entitled to support the decree of the lower appellate Court on the ground that the plaintiff's claim is barred by limitation because that finding is in favour of the plaintiff and no cross-objections have been filed by the respondents. This contention of Mr. Mandlekar is clearly against the provisions of O. XLI, r. 22, of the Code of Civil Procedure, under which any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal; so that the respondent would be entitled to support the decree even on grounds which are decided against him in the Courts below. Mr. Mandlekar has relied, in this connection, upon *Mahagu v. Narayan*.¹ That case is clearly distinguishable because a part of the decree in that case was against the respondents who filed no cross-objections, and Mr. Justice Mudholkar held that the respondents were not entitled to challenge the finding of the Court below, they having not filed any cross-objections regarding that part of the decree which was against them. On the merits, Mr. Mandlekar supports Mr. Bobde's request that instead of deciding the matter here on evidence, the issue as to ouster and adverse possession should be dealt with by the lower appellate Court on the basis of the evidence on the record and that Court should also consider whether art. 1 of the Second Schedule to the C. P. Tenancy Act would apply in the case of field No. 17. Mr. Bobde has no objection to this being done.

Mr. Bobde also raised a new point of law in this appeal in support of the decree of the lower Courts and his contention was that the plaintiff's suits for partition and separate possession of his shares were incompetent by virtue of s. 38 of the Abolition of Proprietary Rights Act. According to Mr. Bobde, under s. 38(2), if there are more persons than one having interest in land held as *khudkashi*, and one of them wants partition, he has to apply for partition of his share to the revenue authorities, and according to Mr. Bobde, by virtue of the provisions of the Abolition of Proprietary Rights Act, the civil Court would have no jurisdiction to entertain suits for partition and separate possession of *khudkashi* lands. I have allowed Mr. Bobde to raise this point because it is a pure point of law. But there does not seem to me to be any substance in that contention. As I have already pointed out, if any person claims exclusive ownership with regard to *khudkashi* lands, which is challenged by another claiming interest in those lands, a question of title is raised and that question can only be decided by a civil Court by virtue of the explanation to the proviso to s. 38(2). It appears that before the coming into operation of the Abolition of Proprietary Rights Act, the plaintiff had, as a matter of fact, filed proceedings before the revenue authorities for partition of his share in the proprietary rights of the two villages as well as partition of these *khudkashi* lands. But these proceedings, which were proceedings for imperfect partition under Chapter II of the C. P. Land Revenue Act were dropped and ordered to be filed when the Abolition of Proprietary Rights Act came into force. The civil Court, therefore, would be competent to decide the question of title as

between the plaintiff and the defendants, but as regards the actual partition of the land, the plaintiff will have to approach the revenue authorities as contemplated under s. 38(2), just as in the case of revenue-paying lands under O. XX, r. 18(1), of the Civil Procedure Code.

The result is that I hold that the plaintiff would be entitled to 0/8/0 share in the suit lands subject to the decision of the question of limitation which I propose to remit to the lower appellate Court. I, therefore, allow both these appeals, set aside the decrees of the lower appellate Court and remand the cases to the lower appellate Court, with a direction that it will consider the evidence on the record and give a finding as to whether the plaintiff's title to the lands has been barred by adverse possession of the defendants and this will include the question as to whether in the case of field No. 17, art. 1 of the Second Schedule to the C. P. Tenancy Act will apply. These will be the only issues that will be open to the lower appellate Court to consider. After giving its finding, the lower appellate Court will dispose of the appeals in accordance with law in the light of this judgment. As the plaintiff has only partially succeeded in this appeal, there will be no order as to costs in these two appeals. Costs of both the lower Courts will be decided by the lower appellate Court. As these two suits were filed in 1952, I direct the lower appellate Court to dispose of these appeals as expeditiously as possible. The records should be sent down immediately.

Appeals allowed.

Before Mr. Justice Chinnai and Mr. Justice Badkas.

VISHVANATH KRISHNA GOKHALE v. MAHADEO ARJUN KOKATE.*

Indian Limitation Act (IX of 1908), Secs. 144, 120—Suit by purchaser for possession of undivided interest of separated member of joint Hindu family in property kept joint at partition—Whether such suit governed by art. 120 or 144—Such suit whether must be filed within twelve years from date of purchase or within twelve years on which purchaser's title denied.

Article 144 of the Indian Limitation Act, 1908, applies to a suit for possession by the purchaser of the undivided interest of a separated member of a joint Hindu family in property, which was kept joint at the time of the partition or when members of the joint family separated from each other. The purchaser must file his suit for possession within twelve years from the date on which his title is actually denied.

If a person purchases the share of a separated member in property, which was not actually partitioned but which continues to be held jointly by the separated members of the family, by his purchase, such a person acquires all the rights of his vendor, including his right as a co-owner to joint possession of the property jointly held and also his right to obtain by partition separate possession of his share in that property.

Bai Shevantibai v. Janardan Warick; Janardan Warick v. Shevantibai; Udi v. Maru Mal; Subah Lal v. Fateh Muhammad; Nargisbai Acidwala v. Jehangir Mody and P. Lakshmi Reddy v. L. Lakshmi Reddy, referred to.

THE facts appear in the judgment.

S. A. No. 1490 of 1955.

R. B. Kotwal, with G. D. Moghe, for the appellants.

V. V. Albal, for respondent No. 1.

*Decided, August 27, October 8, 1958. Second Appeal No. 1490 of 1955 (with Second Appeals Nos. 1099 and 1100 of 1955), from the order of V. D. Joste, District Judge, Ratnagiri, in Appeal No. 34 of 1954, reversing the decree passed by O. A. Gonsalves, Civil Judge, Junior

Division, Devgad, in Civil Suit No. 302 of 1949.

1 (1939) 41 Bom. L. R. 631.

2 [1924] A. I. R. Lah. 682.

3 (1932) I. L. R. 54 All. 628.

4 (1942) 45 Bom. L. R. 104.

5 [1957] S. C. R. 195.

S. As. Nos. 1099 and 1100 of 1955.

V. V. Albal, for G. R. Madbhavi, for the appellants.

B. B. Kotwal, with G. D. Moghe, for the respondents.

CHAINANI J. These three second appeals have been referred to a Division Bench by Mr. Justice Shah, as in his opinion they involved a question as to the interpretation of arts. 120 and 144 of the Indian Limitation Act. Appeal No. 1490 of 1955 arises out of Suit No. 302 of 1949 filed by Mahadeo Arjun Kokate, to whom I will hereafter refer as the plaintiff. There are six defendants in this suit, who belong to the Gokhale family. Defendant No. 1 Vishwanath had three brothers Kashinath, Ganesh and Parsram. Defendants Nos. 2 and 3 are the sons of Kashinath. Defendant No. 4 Ganesh died during the pendency of the suit and his son Anant has been brought on record in his place. Defendant No. 6 is the widow of Parsram, while defendant No. 5 is Parsram's grandson. The defendants' family and their Bhaubhands jointly owned several properties, in which they had one-fourth share. The defendants' bhaubhands sold their 12 annas share to Limayes prior to 1913. In 1903 defendant No. 1 and his brothers separated from each other. In 1913 Limayes filed a suit for partition of their 12 annas share and obtained a decree. On November 8, 1913, Kashinath, who had a $\frac{1}{4}$ th share in the properties belonging to the Gokhale family, sold his share to Bapuji Vasudeo Lele. In 1937 Limayes filed Suit No. 804 of 1937 against the defendants for partition and separate possession of some properties in which they had twelve annas share. Lele was made a party to that suit. He also claimed partition and possession of the share in the properties purchased by him. His claim was denied by the defendants, who contended that the transaction in his favour was a sham and bogus one. No relief was granted to Lele in this suit. Sometime thereafter, Lele leased four pieces of the suit lands, Hissa Nos. 1, 3, 7 and 10 of Survey No. 132, to one Moru Dhondu Jathar and one other land Survey No. 105/1 to Antu Dhondu Gurav. On January 8, 1948, Lele sold the properties purchased by him from Kashinath to the plaintiff Kokate. The plaintiff then obtained possession of the properties. Defendant No. 1 then filed Suit No. 180 of 1948 under s. 9 of the Specific Relief Act and obtained possession of the properties in execution of the decree passed in that suit. Thereafter the plaintiff filed Suit No. 302 of 1949, out of which appeal No. 1490 arises, for partition and separate possession of his $\frac{1}{4}$ th share in the suit lands. The defendants resisted the suit on various grounds. Their principal contentions were that Lele had not acquired any title to or interest in the suit lands, as the transaction between him and Kashinath was a hollow and sham one, not intended to be acted upon, and that the suit was barred by limitation. The trial Court held that the plaintiff had failed to prove his or his predecessor Lele's title to the suit properties, and also their possession within twelve years before the suit. The suit was, therefore, dismissed. The plaintiff appealed to the District Court. The learned District Judge held that the defendants were not entitled to challenge the plaintiff's title to the properties and that the plaintiff was entitled to a partition thereof. It was urged before him that the suit was barred by limitation under art. 120 of the Limitation Act. The learned District Judge, however, held that art. 144 and not art. 120 applied to the suit. He also held that, as the plaintiff had filed the suit within twelve years from the date on which defendants Nos. 2 and 3 had filed their written statement in Suit No. 304 of 1937 denying the plaintiff's title, the suit was in time. He, therefore, allowed the appeal filed by the plaintiff and passed a decree in his favour. Against this decree appeal No. 1490 of 1955 has been filed by defendants Nos. 1 and 3.

After defendant No. 1 obtained possession of the properties in execution of the decree passed in his favour in Suit No. 180 of 1948, Jathar and Gurav made applications to the Mamlatdar under s. 29 of the Bombay Tenancy and Agricultural Lands Act for obtaining possession of the lands. In these applica-

tions they contended that they were the tenants of the lands. Their contentions were accepted by the Mamlatdar, and in appeal by the Collector. The Bombay Revenue Tribunal dismissed the revision applications filed by defendant No. 1. Thereafter defendant No. 1 filed Suit No. 146 of 1950 against Jathar, the plaintiff Mahadev Kokate and his brother for obtaining possession of the four lands, of which Jathar had taken possession. He filed another Suit No. 147 of 1950 against Gurav, Mahadev Kokate and Krishna Kokate. He succeeded in both these suits and obtained decrees for possession of the five lands leased to Jathar and Gurav. The appeals filed by Jathar, Gurav, and Kokate to the District Court were dismissed. Against the orders passed by the District Court, Jathar and Mahadev Kokate have filed second appeal No. 1099 of 1955, while Gurav and Kokate have filed second appeal No. 1100 of 1955.

In appeal No. 1490 of 1955, the only question, which has been urged by Mr. Kotwal on behalf of the appellants, is that the suit was barred by limitation. He has contended that the article of limitation applicable to the suit is art. 120 and not art. 144. In support of his argument he has relied on *Bai Shevantibai v. Janardan Warick*, *Janardan Warick v. Bai Shevantibai*¹. In that case it was held that under Hindu law a purchaser from a member of a joint family does not acquire a right to be considered himself a member of the joint family in place of the vendor, or a right to have joint possession of the family property in place of the vendor or even a right to possession of any specific part of the property, that being a right which the vendor himself did not possess and that the only right which the purchaser has in such a case is a right to sue for partition and ask for being allotted to himself the share which would have gone to his vendor. It was also observed that as the purchaser from a co-parcener is not entitled to joint possession of the family property, he cannot rely on the ordinary rule that the possession of one co-tenant is the possession of all. Article 144 applies to a suit for possession of immoveable property and the period of limitation runs from the date when the possession of the defendant becomes adverse to the plaintiff. If, however, the plaintiff is not entitled to possession, the possession of the other person cannot become adverse to him, because as observed by Beaumont C.J., adverse possession denotes exclusion of somebody entitled to possession. A purchaser of an undivided interest of a coparcener in the joint family property cannot, as of right, claim joint possession of the property or separate possession of the portion representing the undivided share of his vendor in the property. By his purchase he acquires a right to partition and not a right to possession prior to partition. Consequently, it was held in *Bai Shevantibai v. Janardan Warick*, that art. 144 does not apply to a suit for partition and possession brought by a purchaser of an undivided interest of a coparcener in the joint family property and that the article applicable is the residuary art. 120. An alienation by a coparcener does not put an end to the coparcenary, whether he alienates the whole or part of his interest in the family property and he continues to be a member of the joint family with rights of survivorship between himself and other coparceners in respect of all the family property; see para. 389 in Mayne's *Hindu Law and Usage*, 11th edition. The position is, however, different when the coparcenary has come to an end. The above decision will not, therefore, apply where the members of the joint family have separated and where the joint family has ceased to exist. After separation, the separated members hold the properties, not actually divided, not as joint tenants, but as tenants-in-common, that is, as co-owners. The rule about the exclusion of the purchaser of an undivided portion of the joint family property from possession of the property will not apply in such cases, for there is no longer any joint family or joint family property. If, therefore, a person purchases the share of a separated member in property, which was not actually partitioned but which continues to be held jointly by the separated members of the family, his rights will be governed by the ordinary law.

¹ (1939) 41 Bom. L. R. 631.

By his purchase, he acquires all the rights of his vendor, including his right as a co-owner to joint possession of the property jointly held and also his right to obtain by partition separate possession of his share in that property. A suit for possession by a co-owner, who is not in possession, against the other co-owners, who are actually in possession is governed by art. 144 of the Limitation Act. There being a specific article applicable to such a suit, the residuary art. 120 will not apply. This art. 144 will, therefore, apply to a suit for possession by the purchaser of the undivided interest of a separated member of the family in property, which was kept joint at the time of the partition or when members of the joint family separated from each other.

In this case defendant No. 1 has admitted in his evidence that he and his brothers had separated in 1908. Kashinath sold his share to Lele many years thereafter in 1913. Article 144 and not art. 120 will, therefore, apply to the present suit.

Under art. 144 the period of limitation begins to run when the possession of the defendant becomes adverse to that of the plaintiff. Mr. Kotwal has urged that the rule that possession of one co-owner must be deemed to be the possession of all the co-owners does not apply in the case of a purchaser from a co-owner and that the purchaser of the share of a co-owner must file a suit for possession within twelve years from the date of his purchase and not within twelve years from the date on which his title is actually denied. He has relied on the decision of a single Judge of the Lahore High Court in *Udi v. Maru Mal*.¹ It was held in that case that a transferee cannot by the mere fact of transfer become a co-owner, if his rights as such are denied by the other co-sharers and a suit by him, therefore, for possession against his transferor's co-sharers must be brought within twelve years from date of transfer. The judgment in that case does not give all the facts, for, it is not clear when the right of the purchaser had been denied. In *Sobah Lal v. Fateh Muhammad*² it has been observed:

"As regards co-owners the law is that there can be no adverse possession by one co-owner unless there has been a denial of title and an ouster to the knowledge of the others; and the same principle applies to the case of a transferee from a co-owner... There can be no difference in principle whether a person is the original co-owner or has become a co-owner by virtue of a transfer."

With respect, we agree with these observations. By his purchase of Kashinath's undivided interest, Lele became a co-owner along with Kashinath's brothers. The possession of the properties by the defendants thereafter was the possession on behalf of all the co-owners, including Lele and subsequently his transferee, the plaintiff. Their possession became adverse when Lele's title was denied by the defendants in the written statement filed by them in Suit No. 304 of 1937.

Mr. Kotwal has also contended that as neither the plaintiff nor Lele had received any part of the income realised from the lands since Lele purchased Kashinath's share, there was an ouster and that consequently the defendants have acquired title to the lands by adverse possession. This argument cannot be accepted. As held in *Nargisbai Acidwala v. Jehangir Mody*,³ in the case of joint property, mere exclusive possession and enjoyment by one co-owner is not enough to constitute adverse possession against the other co-owners, unless there is a denial of title justifying a presumption of ouster of the latter. In *P. Lakshmi Reddy v. L. Lakshmi Reddy*,⁴ it has been observed (p. 202):

"...But it is well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession, who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on

1 [1924] A. I. R. Lah. 682.

2 [1932] I. L. R. 54 All. 623.

3 [1942] 45 Bom. L. R. 104.

4 [1957] S. C. R. 195.

the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title... It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster."

Mere possession and enjoyment of the profits of the suit lands for a long period by the defendants will not, therefore constitute ouster. There was in this case no denial of the title of Lele until defendants Nos. 2 and 3 filed their written statement in suit No. 304 of 1937. The defendants' adverse possession, therefore, commenced on the date on which this written statement was filed. The suit has been filed within 12 years from this date and is, therefore, in time.

Appeal No. 1490 of 1955, therefore, fails and is dismissed with costs.

In the other two appeals, the only point, which has been urged by Mr. Albal on behalf of the appellants, is that a direction may be given that while making a partition of the suit lands, the five pieces of lands Hissa Nos. 1, 3, 7 and 10 of Survey No. 132 and Survey No. 105/1, which had been leased to Jathar and Gurav, may, as far as possible, be allotted to the share of Kokate. Mr. Kotwal, who appears on behalf of the contesting respondents in these appeals, has no objection to such a direction being given. Accordingly, in these appeals we direct that while effecting a partition of the lands in Suit No. 302 of 1949, these five lands should, if possible, be allotted to the share of the plaintiff Mahadev Arjun Kokate in that suit. Subject to this direction, these two appeals are dismissed with costs.

Appeals dismissed.

Before Mr. Justice Gokhale and Mr. Justice Patel.

BALGONDA APPANNA PATIL v. BHIMGONDA APPAYA PATIL.*

Hindu Adoptions and Maintenance Act (LXXVIII of 1956), Secs. 4, 30, 12—Plaintiff's adoption made in former Kolhapur State before coming into force of Act—Vat Hukum passed by Kolhapur State providing for ex post facto sanction to adoptions—State Government according ex post facto sanction to plaintiff's adoption after coming into force of Act—Competency of State Government to accord such sanction.

The plaintiff's adoption took place in 1900 in the former Kolhapur State. In a Vat Hukum passed by the Kolhapur Government in connection with adoptions there was a provision under which the Kolhapur Darbar could accord *ex post facto* sanction to adoptions which affected Inam properties and which were made without getting the sanction of the Kolhapur Darbar. The Hindu Adoptions and Maintenance Act, 1956, came into force on December 21, 1956, and on June 26, 1957, the State Government accorded *ex post facto* sanction to the plaintiff's adoption. On the question whether the State Government on the date that the sanction was given was competent to accord that sanction by virtue of the provisions of s. 4 of the Act:—

Held, that as the adoption of the plaintiff took place long before the Act came into force, under s. 30 of the Act none of the provisions of the Act could affect that adoption,

that under the Kolhapur Vat Hukum the giving of *ex post facto* sanctions to adoptions was contemplated and such sanctions have been held to be valid sanctions by the High Court, and

that the State Government continued to have the power of according *ex post facto* sanctions to adoptions which had taken place prior to December 21, 1956, and, therefore, the State Government was competent to accord sanction to the plaintiff's adoption.

THE facts appear in the judgment.

*Decided, August 30, 1958. First Appeal No. 118 of 1958, against the decision of D. G.

Rajadhyaksha, Civil Judge, S. D., Kolhapur, in Special Civil Suit No. 325 of 1945-52.

R. G. Samant, for the appellants.

S. B. Bhasme for B. M. Kalagate, for respondent No. 1.

GOKHALE J. In this appeal, Mr. Justice Shah and myself had, on the application of the appellants, heirs of original plaintiff, sent down an issue as to whether the adoption of the plaintiff had been duly sanctioned by a competent authority. The adoption of the plaintiff took place in 1900 and the trial Court has recorded a finding that Government have accorded *ex post facto* sanction to plaintiff's adoption and the same is valid. Some objections were raised before the trial Court as to the procedure followed in obtaining this sanction from Government. Those objections were negatived and Mr. Bhasme, learned advocate appearing on behalf of respondent No. 1, has not raised these objections before us.

But Mr. Bhasme has raised an interesting point of law as to whether the State Government was competent to accord *ex post facto* sanction to plaintiff's adoption in view of the provisions of the Hindu Adoptions and Maintenance Act, 1956. Though this point was not taken before us before we sent down the case for a finding and though the point was also not raised before the trial Court, we have allowed Mr. Bhasme to argue the point as it is a pure point of law. Mr. Bhasme's contention is that the Hindu Adoptions and Maintenance Act, 1956, which will hereafter be called as the Adoptions Act, came into force on December 21, 1956. The sanction was given by Government on June 26, 1957. But Mr. Bhasme contends that on the date that the sanction was given Government were incompetent to accord that sanction by virtue of the provisions of s. 4 of the Act.

In order to examine Mr. Bhasme's argument, we shall have to refer to the position of adoptions in the former Kolhapur State. Plaintiff's adoption took place in 1900 and the Digest of Hindu Law in the Kolhapur State came into force in 1919, but that part of it which deals with adoptions by Hindus, known as Hindu Dattak Nibandh, came into force on November 11, 1920. Section 2(3) of this Nibandh saved the effect of the Vat Hukums passed by the Kolhapur Government in connection with adoptions. Under Political Agent Judi Niyam of Fasli 1281, published in Volume 2 of the Kolhapur Vat Hukums, at p. 817, there was a provision under which the Kolhapur Darbar could accord sanction to adoptions which affected Inam properties. It appears from this Vat Hukum that the Kolhapur Government had power to accord *ex post facto* sanction to adoptions which were made without getting such a sanction. Then there is Sarsubhe Vat No. 18 of 1907 which dealt with the procedure which was to be followed in order to get the sanction of the Kolhapur Government in such matters. There are other Vat Hukums also to which Mr. Bhasme drew our attention in this connection, but it is not necessary to refer to them for the purpose of this case. Mr. Bhasme argues that as a result of s. 4 of the Adoptions Act, the Digest of Hindu Law at Kolhapur as well as the Vat Hukums dealing with adoptions were repealed, and Mr. Bhasme contends that, if that be so, the Government had no power to accord *ex post facto* sanction to the present adoption on June 26, 1957.

Now, s. 4 of the Adoptions Act runs as follows:—

"Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

Mr. Bhasme contends that this section has a wider repealing power than s. 29 of the Adoptions Act which repeals the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, (XIX of 1946), and sub-s. (2) of s. 30 of the Hindu Succession Act, 1956, (XXX of 1956). Under s. 4(a), according to Mr. Bhasme, all textual law, rules or interpretations of Hindu

law or any custom or usage as part of that law which dealt with adoptions stand repealed, and the contention, therefore, is that on the date that Government gave *ex post facto* sanction on June 26, 1957, the Vat Hukums under which the sanction could be given had no longer any force. Then Mr. Bhasme further contends that even assuming that the relevant Vat Hukums do not fall under s. 4(a), they would fall under s. 4(b) and under that clause in so far as they are inconsistent with any other provisions contained in the Adoptions Act they will cease to apply to Hindus. In this connection, Mr. Bhasme refers us to the provisions of s. 12 of the Act which deals with the effects of adoptions. Under s. 12 an adopted child is to be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. Under proviso (c) to this section, the adopted child shall not divest any person of any estate which vested in him or her before the adoption. Mr. Bhasme's argument is that since the *ex post facto* sanction given by Government would enable plaintiff to divest the defendant of the suit properties which are admittedly Patilki Inam properties, the provisions of the Vat Hukums are inconsistent with proviso (c) to s. 12 of the Adoptions Act and therefore would not have any force. The argument of Mr. Bhasme is undoubtedly ingenious. But, in our opinion, in view of s. 30 of the Adoptions Act, that argument cannot be accepted so far as the present adoption is concerned. Under s. 30,

"Nothing contained in the Act shall affect any adoption made before the commencement of this Act and the validity and effect of any such adoption shall be determined as if this Act had not been passed."

Now, admittedly, the adoption of the plaintiff took place in 1900. The effect of that adoption would have been that plaintiff would be entitled to succeed even to Inam property, provided the requisite sanction of the Government was obtained. Under the Kolhapur Vat Hukums, the giving of *ex post facto* sanctions to adoptions was contemplated. This Court has in a number of decisions taken the view that sanction accorded *ex post facto* would be a valid sanction. As the adoption of the plaintiff took place long before this Act came into force, none of the provisions of this Act would affect that adoption and the validity and effect of such an adoption has to be determined as if the Adoptions Act had not been passed. In our view, therefore, Government would continue to have the power of according *ex post facto* sanction to adoptions which have taken place prior to December 21, 1956. The contention of Mr. Bhasme that *ex post facto* sanction to the present adoption could not be given after the coming into force of the Act must, therefore, be rejected. In that view of the matter, it is not necessary for us to consider whether the Kolhapur Vat Hukums which deal with according of sanctions to adoptions are in any way inconsistent with this Act and will cease to apply under s. 4 of the Act.

The result is that the finding of the learned trial Judge that the adoption of the plaintiff has been duly sanctioned by a competent authority must be upheld and we must also hold that the sanction given is a valid sanction. As the plaintiff's suit was dismissed by the trial Court on the ground that his adoption was invalid, being without sanction, we must allow this appeal, set aside the decree of the trial Court and award plaintiff possession of the five suit lands from the defendants. There will be an inquiry into future mesne profits from the date of the suit till delivery of possession, under O. XX, r. 12, of the Civil Procedure Code.

As regards plaintiff's prayer in para. (i) of the prayer clause in the plaint regarding substitution of his name in the record-of-rights, the plaintiff will have, of course, to approach the authorities concerned.

The plaintiff will be entitled to his costs throughout.

Order accordingly.

INCOME-TAX REFERENCE.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.

MANILAL DHANJI v. THE COMMISSIONER OF INCOME-TAX,
BOMBAY CITY I, BOMBAY.*

Indian Income-tax Act (XI of 1922), Secs. 16(3)(b), 41—Assessee creating trust-deed setting aside amount, and deed providing for adding interest to corpus and his minor daughter to start receiving interest from such augmented corpus on attaining age of eighteen years in 1959—Income derived from trust fund in assessment year 1954-55 whether could be included in assessee's income under s. 16(3)(b)—Trust-deed requiring trustees to pay certain amount to assessee and by the same deed assessee holding amount for his and his wife's and children's maintenance—Whether such amount received by assessee could be included in his total income.

To attract the provisions of s. 16(3)(b) of the Indian Income-tax Act, 1922, an income or benefit must be received or derived by the wife or the minor in the year of account. What is sought to be taxed under the section is not a non-existent income but an existing income which is received by someone other than the assessee. Therefore, under this section an assessee can only be taxed on the income from a trust-deed created by him for the benefit of the minor provided in the year of account the income is either received by the minor or the benefit is derived by the minor under the trust-deed.

By a trust-deed dated January 12, 1953, the assessee set aside a certain amount, and the deed provided that the interest on that amount should be accumulated and added to the corpus and his minor daughter was to receive the income from the corpus increased by the addition of interest when she attained the age of eighteen years on February 1, 1959. She was then to receive the income during her lifetime, and after her, the corpus was to go to other persons. In computing the total income of the assessee for the assessment year 1954-55 the Income-tax Officer included a sum of Rs. 410 which amount represented the income derived in the year of account from the trust fund. On the question whether the sum of Rs. 410 could be so included in the assessee's total income under s. 16(3)(b) of the Indian Income-tax Act, 1922:—

Held, that under s. 16(3)(b) of the Act the assessee cannot be assessed to Rs. 410 which amount was not received by his minor daughter and in respect of which his daughter could not claim any benefit in the year of account.

Under a trust-deed created by the assessee's father the trustees were to hold the trust funds upon trust to pay the net interest and income thereof to the assessee for the maintenance of himself and his wife and for the maintenance, education and benefit of all his children till his death. The assessee received a certain amount under the trust-deed and the Income-tax Officer under s. 41(2) of the Indian Income-tax Act, 1922, included this amount in the total income of the assessee for the relevant assessment year. On the question whether this amount could be properly included in the income of the assessee:—

Held, that under the terms of the trust-deed the assessee was not the sole beneficiary and the amount was received by him in the capacity of a trustee, and

that the assessee could, therefore, be assessed under s. 41(1) of the Act, and the amount received by him under the trust-deed could not be added to his total income.

On January 12, 1953, one Manilal Dhanji (assessee) made a trust in respect of a sum of Rs. 25,000 and appointed himself and others the trustees of the trust settlement. Clause 3 of this settlement was to the following effect:—

"The Trustees shall hold and stand possessed of the Trust Fund and investments for the time being representing the same and receive the income, dividend, interest and rents thereof and invest the same and the resulting income, dividend, interest and rents thereof so as to accumulate at compound interest to the intent that such accumulations shall be added to the principal Trust Fund until the Settlor's daughter CHANDRIKA shall attain the age of eighteen years which age she will attain on February 1, 1959,

*Decided, September 25, 1958. Income-tax Reference No. 3 of 1958.

and after the expiration of the abovementioned period the Trustees shall deal with and dispose of the Trust Fund as hereafter stated."

Clause 4 provided that the trustees

"shall hold and stand possessed of the Trust Fund and the accumulations thereof upon Trust to pay the net interest and income thereof after deducting all outgoings and charges for collection to the said Chandrika for her life for her maintenance."

In computing the total income of the assessee for the assessment year 1954-55, the Income-tax Officer under s. 16(3)(b) and/or s. 16(3)(a)(iv) of the Indian Income-tax Act, 1922, included a sum of Rs. 410, which amount represented the income derived in the year of account from the aforesaid trust fund. The assessee contended that the income of Rs. 410 was not the income of the minor daughter Chandrika in the year of account, that there was a trust for accumulation of income till she attained the age of eighteen on February 1, 1959, and till that date it was the income of the trustees and, therefore, s. 16(3) did not apply to the income of Rs. 410. The Appellate Tribunal held that the income of Rs. 410 fell within s. 16(3)(b). The following question of law was referred to the High Court:—

"1. Whether the sum of Rs. 410 is properly includible in the assessee's total income either in accordance with the provisions of s. 16(3)(b) and/or s. 16(3)(a)(iv) of the Indian Income-tax Act, 1922?"

On December 1, 1941, the assessee's father, Dhanji Devsi, created a trust for the benefit of his four sons. The trust property consisted of certain shares and cash amount of Rs. 30,000. According to cl. 3 of the trust settlement the income arising from the said corpus was to be accumulated for the benefit of the assessee till December 31, 1947, and thereafter under cl. 7

"The Trustees shall hold and stand possessed of the Trust Fund mentioned in the Second Schedule hereto and the accumulations thereof referred to in cl. 3 hereof upon trust to pay the net interest and income thereof to the Settlor's son MANILAL for the maintenance of himself, his wife and for the maintenance, education and benefit of all his children till his death."

The Income-tax Officer for the relevant assessment year included a sum of Rs. 14,170 which arose from the aforesaid trust in the total income of the assessee. The assessee contended that this amount could not be included in his total income as the beneficiaries under the trust settlement were not only the assessee, but the assessee, his wife and all his children. This contention was rejected by the Tribunal.

The following question of law was referred to the High Court:—

"2. Whether the sum of Rs. 14,170 is properly includible in the total income of the assessee as the sole beneficiary thereof under the trust settlement made on 1-12-1941 by Dhanji Devsi?"

The reference was heard.

N. A. Palkhivala, for the applicant.

G. N. Joshi, for the respondent.

CHAGLA C.J. Two questions arise on this reference. There are hardly any matters under the Income-tax Act which have not been considered by some High Court or other. The first question that we have to consider, however, has not been judicially considered at all and therefore we must decide it on first impression by construing the section and on principle.

The first question is concerned with an amount of Rs. 410 which was included in the total income of Manilal Dhanji, the assessee. This amount he received admittedly as a trustee, but the beneficiary is his minor daughter Chandrika, and the contention of the Department was that the case fell under s. 16(3)(b). Now, the scheme of the trust-deed is that a sum of Rs. 25,000 was set aside by the assessee and it was provided that the interest on that amount should be accumulated and should be added to the corpus and Chandrika, the daughter, was to receive the income from the corpus increased by the

addition of interest when she attained the age of 18 years. She was then to receive the income during her lifetime and after her the corpus was to go to persons with whom we are not concerned. Therefore, the significant feature of this trust-deed is that Chandrika was not to receive any income, any interest, any benefit whatsoever from this trust-deed during her minority. When, therefore, the assessee received Rs. 410 as a trustee from the trust fund in the year of account, the minor had no right to this income. She had no beneficial interest in this income and she could not enjoy this income. The assessee received this amount for the specific purpose of adding it on to the corpus of the trust. On these facts the question is whether s. 16(3)(b) is attracted.

Before we look at s. 16(3)(b) we may look at the scheme of s. 16(3) itself as a whole. This sub-section deals with notional income. But as far as cl. (a) is concerned, it is clear that the income is notional in the sense that there is actual income but that actual income is received by the wife or the minor child of the assessee and the law considers that the income received by the wife or the child is the income of the husband or the father. Turning to s. 16(3)(a) it provides:

"(3) In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

(i) from the membership of the wife in a firm of which her husband is a partner;" Therefore, here the wife or the minor child must receive the actual income from the partnership.

"(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner;"

Again, we are dealing with actual income.

"(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart;"

Here too it is only the income actually received by the wife from the assets so transferred that would constitute a part of the total income of the husband.

"(iv) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration;"

Here again, it is the actual income which the minor child derives from assets so transferred that would constitute a part of the total income of the assessee. Then we come to cl. (b). Having made these provisions in cl. (a) of s. 16(3) the Legislature was at pains to see that these provisions were not defeated by the assessee creating a trust and in order to deal with that mischief cl. (b) was enacted and it is in the following language—and we will only reproduce the material words:

"(b) so much of the income of any association of persons as arises from assets transferred otherwise than for adequate consideration to the association by such individual for the benefit of his wife or a minor child or both."

Analysing this sub-section it means that when you have an assessee, that is, an individual, transferring to trustees, that is, the association of persons, without adequate consideration, assets, and the transfer is for the benefit of the wife or the minor child or both of the assessee, then the income of the trustees will be considered to be the income of the assessee.

Now, the contention of Mr. Joshi is that in this case you have a transfer of assets to trustees, the transfer is admittedly for the benefit of the minor child, and once that condition is satisfied, you have not to look further and the income derived by the trustees from this transfer of assets constitutes part of the total income of the settlor. This raises a very important question. If we were to accept Mr. Joshi's contention, the result would be that however remote the benefit that the minor might derive under the trust-deed, however long his interest may be postponed, as soon as there is a transfer by the settlor

under which the minor derives some benefit, the interest received from the trust property must be added on to the total income of the assessee. Mr. Joshi realises that such an extreme position would be untenable and therefore he is prepared to make certain qualifications, and the qualification he is prepared to make is that there must be no intermediary beneficiaries before the minor gets the benefit under the trust-deed. If there are intermediary beneficiaries, then s. 16(3)(b) would not be attracted. He further contends that if you have a trust-deed for the benefit of the minor alone, then there can be no question as to the application of s. 16(3). It is difficult to understand why on principle it is possible to have one limitation on this section and not the other. The limitation suggested by Mr. Joshi is the limitation of other beneficiaries being introduced in the trust-deed before the minor comes in for benefit. The limitation suggested by Mr. Palkhivala is a different type of limitation and that limitation is a limitation as to time, and the contention of Mr. Palkhivala is that the very object of the section and the scheme of the section requires that an assessee can only be taxed on the income from a trust-deed for the benefit of the minor provided in the year of account the income is either received by the minor or the benefit is derived by the minor under the trust-deed. If no income is received, if no benefit is derived, and there is no income at all, then it is difficult to accept the contention that the assessee can be liable to be taxed in respect of that amount.

If we are right in our original assumption that s. 16(3) deals with actual income received by a person other than the assessee, that person being his wife or his minor child, then the proper way to construe and interpret cl. (b) is also to accept the position under that sub-section that an income or benefit must be received or derived by the minor in the year of account. What is sought to be taxed is not a non-existent income. What is sought to be taxed is an existing income which is received by someone other than the assessee. In this case there is no dispute on the facts. It is not suggested and it cannot be suggested that the minor has no right to the sum of Rs. 410. It is not suggested that the assessee has received this amount for the benefit of the minor. The sum of Rs. 410 is impressed with a trust and that trust is that it should be added on to the corpus created under the trust-deed. It is difficult to understand how, therefore, it can be said that the assessee can be assessed to Rs. 410 which was never received by either his wife or his daughter and in respect of which neither his wife nor his daughter can claim any benefit. In our opinion, therefore, on a true construction of s. 16(3)(b) Rs. 410 does not form part of the total income of the assessee.

The second question is concerned with a sum of Rs. 14,170 and that was received by the assessee under the following circumstances. There is a trust-deed created by his father and under the relevant provision the trustees are to hold certain trust funds upon trust to pay the net interest and income thereof to the settlor's son Manilal for the maintenance of himself and his wife and for the maintenance, education and benefit of all his children till his death. The view taken by the Tribunal is that under this provision Manilal is the sole beneficiary and the amount is received by him for his own benefit, that he is not accountable to anyone in respect of this amount, and he can do what he likes with this amount. Before we come to the interesting argument advanced by Mr. Joshi, let us set at rest this particular question on which the decision of the Tribunal is based. It is perfectly clear that when you have a trust created to pay an amount to "X" for the maintenance of himself, his wife and for the maintenance, education and benefit of his children, the amount received by "X" is an amount impressed with a trust. A trust is created in favour of his wife and children and he is accountable for that amount as a trustee. The proposition is clearly stated in Lewin on Trusts at p. 85, 15th edition. Lewin distinguishes between the motive of a gift and a trust, and he points out that when a donor or a settlor gives a particular reason as the motive for making the gift, then the donee takes the gift beneficially and no trust is created. But Lewin points out that when there is a gift in favour of a person

not only for his own use and benefit but also for the maintenance and education of his children or the maintenance of his wife, that does not constitute a motive for the gift but it creates a trust, and this is exactly the case here. The language used in the trust-deed might have been almost bodily taken from Lewin on Trusts and therefore we disagree, with respect to the Tribunal, when they took the view that under this provision Manilal was the only beneficiary.

Now, if that be the true position and if Manilal is a trustee, the question is whether the amount received by him under this trust-deed can be added on to his total income, and Mr. Joshi's contention is that under s. 41 it is competent to the Department either to tax trustees of the trust-deed or to tax those on whose behalf the trustees have received any amount, and the argument put forward is that this is a case where the trustees have received on behalf of Manilal the sum of Rs. 14,170. They have paid the amount to Manilal and therefore it is at the option of the Department either to assess the trustees under s. 41(1) or to assess the person who has received the amount under s. 41(2). Mr. Joshi rightly points out that s. 41(1) does not speak of a beneficiary, and according to him even if Manilal is not a beneficiary so long as he is the person on whose behalf the trustees have received the amount, the taxing department can go either against the trustees or against Manilal. Turning to s. 41(1), the words of that section, to the extent that they are material for the purpose of this argument, are:

"In the case of income, profits or gains chargeable under this Act, the trustee appointed under a trust declared by a duly executed instrument in writing, whether testamentary or otherwise, is entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from the trustee in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are received and all the provisions of this Act shall apply."

Mr. Joshi says that the trustees of the trust-deed are entitled to receive this amount on behalf of Manilal and the tax can be levied upon and recovered from the trustees under this section. But, says Mr. Joshi, under sub-s. (2) the option is given to the Department to recover it from the person on whose behalf the trustees have received the amount and sub-s. (2) provides:

"Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable, or the recovery from such person of the tax payable in respect of such income, profits or gains."

Therefore, Mr. Joshi contends that in this case the Department has preferred to have a direct assessment of the person on whose behalf this amount has been received. The argument sounds very plausible, but when one examines it, it is clear that although it is perfectly competent to the Department to go against Manilal, Manilal in his turn is equally competent to contend that he is a trustee, and if he is to be taxed he can only be taxed as a trustee under s. 41(1). Under the proviso it is provided that where the individual shares of the persons on whose behalf the income is receivable are indeterminate, the tax shall be levied and recoverable at the maximum rate, and says Mr. Manilal, it is quite true that the shares of my wife and children are indeterminate and I am liable to be taxed at the maximum rate, but I can only be taxed as a trustee and not in my individual capacity. The answer given by Mr. Joshi to this contention is that we are not concerned with the second trust; we are only concerned with the first trust. We do not think it is seriously contended that two trusts cannot be created by the same instrument and the real position here is that there is a trust created which requires the trustees to pay a certain amount to Manilal and a second trust is created by which Manilal has to hold that amount in trust for his wife and children. Therefore, Manilal is a trustee within the meaning of s. 41 appointed under a trust declared by a duly executed instrument in writing, and if he is a trustee he has a right to contend that his assessment in respect of the money received by him not as a beneficiary but as a trustee can only be made under the provisions of s. 41. We fail to

appreciate the argument of Mr. Joshi that we are not concerned with the second trust. In our opinion, that is the only trust with which we are concerned. If Manilal is sought to be taxed and if his contention is that he is a trustee, we must look at the document in order to find out whether he has been constituted a trustee. If he is constituted a trustee, then it is difficult to understand what provision of the law prevents him from contending that s. 41 applies to him as much as it would apply to the trustees of the first trust. In our opinion, therefore, the Tribunal was in error in coming to the conclusion which it did with regard to this amount basing its decision on the fact that Manilal was the sole beneficiary under the trust.

We should have mentioned that with regard to the amount of Rs. 410 the Tribunal seems to have proceeded on the basis that the daughter had a vested interest in the sum of Rs. 410. We do not accept that proposition at all. The interest does not vest in the daughter. It is contingent on her attaining majority, and it seems clear that even the tribunal has proceeded to decide against the assessee with regard to the sum of Rs. 410 on the supposition that the daughter had some interest in this sum of Rs. 410. As we have already pointed out, the daughter has no present interest whatever in this sum of Rs. 410.

The result is that we must answer question No. 1 in the negative and question No. 2 also in the negative.

The Commissioner to pay the costs.

Solicitors for the applicant: *Mulla & Mulla and Craigie Blunt & Caroe.*

Solicitor for the respondent: *A. S. Parikh.*

SUPREME COURT.

Present: The Hon'ble Mr. S. R. Das, Chief Justice, Mr. Justice T. L. Venkatarama Aiyar, Mr. Justice B. P. Sinha, Mr. Justice S. K. Das and Mr. Justice A. K. Sarkar.

RAM KRISHNA DALMIA v. MR. JUSTICE S. R. TENDOLKAR.*

Commissions of Enquiry Act (LX of 1952), Sec. 3—Constitution of India, Art. 14, Seventh Schedule, List I entry 94, List III entry 45—Meaning of expression "any definite matter of public importance" in s. 3(1) of Act—Whether conduct of individual person or company or group of individual persons could call for inquiry under Act—Nature of functions, performance of which contemplated by s. 3—Law with respect to inquiries for purpose of any matter in Lists I, II and III whether can cover any aspect of the matter and be for administrative purposes—Scope of inquiry under law made under entries 95 and 45 of Lists I and III respectively whether limited to future legislative purposes—Principles to be followed by Courts when constitutionality of law attacked as violating art. 14—Basis of permissible classification whether can be gathered from extraneous materials—Whether Court can deny existence of discretionary power conferred on Government on the bare possibility that such power may be misused or abused.

The expression "any definite matter of public importance" in s. 3(1) of the Commissions of Enquiry Act, 1952, does not mean only some matter involving the public benefit or advantage in the abstract, e.g. public health, sanitation or the like or some public evil or prejudice, e.g. floods, famine or pestilence or the like. The conduct of an individual person or company or a group of individual persons or companies may assume such a dangerous proportion and may so prejudicially affect or threaten to affect the public well-being as to make such conduct a definite matter of public importance urgently calling for a full inquiry under the Act.

The functions, the performance of which is contemplated by s. 3 of the Commissions of Enquiry Act, 1952, must be such as are ancillary to and in aid of the inquiry itself and cannot be read as a function independent of or unconnected with such inquiry.

**Decided, March 28, 1958. Civil Appeals Nos. 455 to 457 and 656 to 658 of 1957.*

The law to be made by the appropriate Legislature with respect to entry 95 in List I and entry 45 in List III of the Seventh Schedule to the Constitution of India may cover inquiries into any aspect of the matters enumerated in any of the lists mentioned therein and is not confined to those matters as mere heads of legislative topic. The law with respect to inquiries for the purpose of any of the matters in the lists may also be for administrative purposes and the scope of the inquiry under such a law will cover all matters which may properly be regarded as ancillary to such inquiries. The words "for the purposes of" in the aforesaid entries indicate that the scope of the inquiry is not necessarily limited to the particular or specific matters enumerated in any of the entries in the list concerned but may extend to inquiries into collateral matters which may be necessary for the purpose, legislative or otherwise, of those particular matters. Therefore the inquiry which may be set up by a law made under these two entries is, in its scope or ambit, not limited to future legislative purposes only.

The words "as and by way of securing redress or punishment" in the latter part of cl. (10) of notification No. S.R.O. 2993 dated December 11, 1958, issued by the Union of India under s. 3 of the Commissions of Enquiry Act, 1952, go outside the scope of the Act and such provision is not covered by the above two legislative entries and must, therefore, be deleted. The efficacy of the notification is in no way affected by the deletion of the offending words mentioned above.

The following principles must be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws:—

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems manifest by experience and that its discriminations are based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

A statute which may come up for consideration on a question of its validity under art. 14 of the Constitution of India, may be placed in one or other of the following five classes:—

(1) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things.

Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law, as it did in *Chitranjilal Chowdhuri v. The Union of India*,¹ *The State of Bombay v. F. N. Balsara*,² *Kedar Nath Bajoria v. The State of West Bengal*,³ *V. M. Syed Mohammad and Company v. The State of Andhra*⁴ and *Budhan Choudhry v. The State of Bihar*.⁵

(2) A statute may direct its provisions against one individual person or thing or to several individual persons or things, but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the Court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnissa Begum v. Mahboob Begum*⁶ and *Ramprasad Narayan Sahi v. The State of Bihar*.⁷

(3) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such law, as it did in *The State of West Bengal v. Anwar Ali Sarkar*,⁸ *Messrs. Dwarka Prasad Laxmi Narain v. The State of Uttar Pradesh*⁹ and *Dhirendra Kumar Mandal v. The Superintendent and Remembrancer of Legal Affairs to the Government of West Bengal*.¹⁰

(4) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the Court will uphold the law as constitutional, as it did in *Kathi Raning Rawat v. The State of Saurashtra*.¹¹

(5) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by the Supreme Court, e.g. in *Kathi Raning Rawat v. The State of Saurashtra*, that in such a case the executive action but not the statute should be condemned as unconstitutional.

The basis of permissible classification under art. 14 of the Constitution need not appear on the face of the law itself but may be gathered from any extraneous materials.

The bare possibility that the wide discretionary powers conferred on the Government by a statute may be misused or abused by the Government cannot *per se* induce the Court to deny the existence of the powers.

Matajog Dobey v. H. C. Bharti,¹² referred to.

1 [1950] S. O. R. 869.

2 [1951] S. O. R. 682.

3 [1954] S. O. R. 80.

4 [1954] S. O. R. 1117.

5 [1955] 1 S. O. R. 1045.

6 [1953] S. O. R. 404.

7 [1953] S. O. R. 1129.

8 [1952] S. O. R. 284.

9 [1954] S. O. R. 803.

10 [1955] 1 S. O. R. 224.

11 [1952] S. O. R. 435.

12 [1955] 2 S. O. R. 925, 932.

APPEAL from the judgment of the High Court reported at 59 *Bombay Law Reporter* 769.

G. S. Pathak, S. K. Kapur, P. N. Bhagwati and *Ganpat Rai*, for the appellant in C.A. No. 455 of 1957 and respondent in C.A. No. 656 of 1957.

Sachin Choudhary, B. J. Joshi, J. B. Dadachanji, Rameshwar Nath and *S. N. Andley*, for the appellants in C.As. Nos. 456 and 457 of 1957 and respondents in C.As. Nos. 657 and 658 of 1957.

C. K. Daphtary, Solicitor-General for India, *G. N. Joshi, K. H. Bhabha* and *R. H. Dhebar*, for respondent No. 4 in C.As. Nos. 455 to 457 of 1957 and appellant in C.As. Nos. 656 to 658 of 1957.

S. R. DAS C.J. These six several appeals are directed against a common judgment and order pronounced on April 29, 1957, by a Division Bench of the Bombay High Court in three several Miscellaneous Applications under art. 226 of the Constitution, namely, No. 48 of 1957 filed by Shri Ramkrishna Dalmia (the appellant in Civil Appeal No. 455 of 1957), No. 49 of 1957 by Shri Shriyans Prasad Jain and Shri Sital Prasad Jain (the appellants in Civil Appeal No. 456 of 1957) and No. 50 of 1957 by Shri Jai Dayal Dalmia and Shri Shanti Prasad Jain (the appellants in Civil Appeal No. 457 of 1957). By those Miscellaneous Applications the petitioners therein prayed for an appropriate direction or order under art. 226 for quashing and setting aside notification No. S.R.O. 2993 dated December 11, 1956, issued by the Union of India in exercise of powers conferred on it by s. 3 of the Commissions of Enquiry Act (LX of 1952) and for other reliefs. Rules were issued and the Union of India appeared and showed cause. By the aforesaid judgment and order the High Court discharged the rules and dismissed the applications and ordered that the said notification was legal and valid except as to the last part of cl. (10) thereof from the words "and the action" to the words "in future cases" and directed the Commission not to proceed with the inquiry to the extent that it related to the aforesaid last part of cl. (10) of the said notification. The Union of India has filed three several appeals, namely, Nos. 656, 657 and 658 of 1957, in the said three Miscellaneous Applications complaining against that part of the said judgment and order of the Bombay High Court which adjudged the last part of cl. (10) to be invalid.

The Commissions of Inquiry Act, 1952, (hereinafter referred to as the Act), received the assent of the President on August 14, 1952, and was thereafter brought into force by a notification issued by the Central Government under s. 1(3) of the Act. As its long title states, the Act is one "to provide for the appointment of Commissions of Inquiry and for vesting such Commissions with certain powers". Sub-section (1) of s. 3, omitting the proviso not material for our present purpose, provides:

"The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of People or, as the case may be, the Legislative Assembly of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the Inquiry and perform the functions accordingly."

Under sub-s. (2) of that section the Commission may consist of one or more members and where the Commission consists of more than one member one of them may be appointed as the Chairman thereof. Section 4 vests in the Commission the powers of a civil Court while trying a suit under the Code of Civil Procedure in respect of the several matters specified therein, namely, summoning and enforcing attendance of any person and examining him on oath, requiring discovery and production of any document, receiving evidence on affidavits, requisitioning any public record or copy thereof from any Court or officer, issuing commissions for examination of witnesses or documents and any other matter which may be prescribed. Section 5 empowers the appropriate

Government, by a notification in the Official Gazette, to confer on the Commission additional powers as provided in all or any of the sub-ss. (2), (3), (4) and (5) of that section. Section 6 provides that no statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement provided that the statement is made in reply to a question which he is required by the Commission to answer or is relevant to the subject-matter of the inquiry. The appropriate Government may under s. 7 issue a notification declaring that the Commission shall cease to exist from such date as may be specified therein. By s. 8 the Commission is empowered, subject to any rules that may be made, to regulate its own procedure including the time and place of its sittings and may act notwithstanding the temporary absence of any member or the existence of any vacancy among its members. Section 9 provides for indemnity to the appropriate Government, the members of the Commission or other persons acting under their directions in respect of anything which is done or intended to be done in good faith in pursuance of the Act. The rest of the sections are not material for the purpose of these appeals.

In exercise of the powers conferred on it by s. 3 of the Act the Central Government published in the Gazette of India dated December 11, 1956, a notification in the following terms:—

MINISTRY OF FINANCE
(Department of Economic Affairs)

ORDER

New Delhi, the 11th December, 1956.

S.R.O. 2993—Whereas it has been made to appear to the Central Government that:

(1) a large number of companies and some firms were promoted and/or controlled by Sarvashri Ramkrishna Dalmia, Jaidayal Dalmia, Shanti Prasad Jain, Sriyans Prasad Jain, Shital Prasad Jain or some one or more of them and by others being either relatives or employees of the said person or persons, closely connected with the said persons;

(2) large amounts were subscribed by the investing public in the shares of some of these companies;

(3) there have been gross irregularities (which may in several respects and materials amount to illegalities) in the management of such companies including manipulation of the accounts and unjustified transfers and use of funds and assets;

(4) the moneys subscribed by the investing public were in a considerable measure used not in the interests of the companies concerned but contrary to their interest and for the ultimate personal benefit of those in control and/or management; and

(5) the investing public have as a result suffered considerable losses.

And Whereas the Central Government is of the opinion that there should be a full inquiry into these matters which are of definite public importance both by reason of the grave consequences which appear to have ensued to the investing public and also to determine such measures as may be deemed necessary in order to prevent a recurrence thereof;

Now, therefore, in exercise of the powers conferred by s. 3 of the Commissions of Inquiry Act (No. 60 of 1952), the Central Government hereby appoints a Commission of Inquiry consisting of the following persons, namely:

Shri Justice S. R. Tendolkar, Judge of the High Court at Bombay, Chairman.

Shri N. R. Modi of Messrs. A. F. Ferguson & Co., Chartered Accountants, Member.

Shri S. C. Chaudhuri, Commissioner of Income-tax, Member.

1. The Commission shall inquire into and report on and in respect of:

(1) The administration of the affairs of the companies specified in the schedule hereto;

(2) The administration of the affairs of such other companies and firms as the Commission may during the course of its enquiry find to be companies or firms connected with the companies referred to in the schedule and whose affairs ought to be investigated and inquired into in connection with or arising out of the inquiry into the affairs of the companies specified in the schedule hereto;

(3) The nature and extent of the control, direct and indirect, exercised over such companies and firms or any of them by the aforesaid Sarvashri Ramkrishna Dalmia, Jaidayal Dalmia, Shanti Prasad Jain, Sriyans Prasad Jain, their relatives, employees and persons connected with them;

(4) The total amount of the subscription obtained from the investing public and the amount subscribed by the aforesaid persons and the extent to which the funds and assets thus obtained or acquired were misused, misapplied or misappropriated;

(5) The extent and nature of the investments by and/or loans to and/or the use of the funds or assets by and transfer of funds between the companies aforesaid;

(6) The consequences or results of such investments, loans, transfers and/or use of funds and assets;

(7) The reasons or motives of such investments, loans, transfers and use and whether there was any justification for the same and whether the same were made *bona fide* in the interests of the companies concerned;

(8) The extent of the losses suffered by the investing public, how far the losses were avoidable and what steps were taken by those in control and/or management to avoid the losses;

(9) The nature and extent of the personal gains made by any person or persons or any group or groups of persons, whether herein named or not by reason of or through his or their connection with or control over any such company or companies;

(10) Any irregularities, frauds or breaches of trust or action in disregard of honest commercial practices or contravention of any law (except contraventions in respect of which criminal proceedings are pending in a Court of Law) in respect of the companies and firms whose affairs are investigated by the Commission which may come to the knowledge of the Commission and the action which in the opinion of the Commission should be taken as and by way of securing redress or punishment or to act as a preventive in future cases.

(11) The measures which in the opinion of the Commission are necessary in order to ensure in the future the due and proper administration of the funds and assets of companies and firms in the interests of the investing public.

SCHEDULE

1. Dalmia Jain Airways Ltd.
2. Dalmia Jain Aviation Ltd. (now known as Asia Udyog Ltd.).
3. Lahore Electric Supply Company Ltd. (now known as South Asia Industries Ltd.).
4. Sir Shapurji Broacha Mills Ltd.
5. Madhowji Dharamsi Manufacturing Company Ltd.
6. Allen Berry and Co., Ltd.
7. Bharat Union Agencies Ltd.
8. Dalmia Cement and Paper Marketing Company Ltd. (now known as Delhi Glass Works Ltd.).
9. Vastra Vyavasaya Ltd.

Ordered that the Order be published in the Gazette of India for public information. [No. F. 107 (18-INS/56)].

H. M. PATEL,
Secretary.

It should be noted that the above notification did not specify the time within which the Commission was to complete the inquiry and make its report.

On January 9, 1957, the Central Government issued another notification providing that all the provisions of sub-ss. (2), (3), (4) and (5) of s. 5 should apply to the Commission. As the notification of December 11, 1956, did not specify the time within which the Commission was to make its report, the Central Government on February 11, 1957, issued a third notification specifying two years from that date as the time within which the Commission of Inquiry should exercise the functions conferred on it and make its report. On February 12, 1957, three several Miscellaneous Applications were filed under art. 226 of the Constitution questioning the validity of the Act and the notifi-

cation dated December 11, 1956, on diverse grounds and praying for a writ or order for quashing the same.

It will be convenient to advert to a few minor objections urged before us on behalf of the petitioners in support of their appeals before we come to deal with their principal and major contentions. The first objection is that the notification has gone beyond the Act. It is pointed out that the Act, by s. 3, empowers the appropriate Government in certain eventualities to appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and for no other purpose. The contention is that the conduct of an individual person or company cannot possibly be a matter of public importance and far less a definite matter of that kind. We are unable to accept this argument as correct. Widespread floods, famine and pestilence may quite easily be a definite matter of public importance urgently calling for an inquiry so as to enable the Government to take appropriate steps to prevent their recurrence in future. The conduct of villagers in cutting the bunds for taking water to their fields during the dry season may cause floods during the rainy season and we can see no reason why such unsocial conduct of villagers of certain villages thus causing floods should not be regarded as a definite matter of public importance. The failure of a big bank resulting in the loss of the life savings of a multitude of men of moderate means is certainly a definite matter of public importance but the conduct of the persons in charge and management of such a bank which brought about its collapse is equally a definite matter of public importance. Widespread dacoities in particular parts of the country is, no doubt, a definite matter of public importance, but we see no reason why the conduct, activities and *modus operandi* of particular dacoits and thugs notorious for their cruel depredations should not be regarded as definite matters of public importance urgently requiring a sifting inquiry. It is needless to multiply instances. In each case the question is: Is there a definite matter of public importance which calls for an inquiry? We see no warrant for the proposition that a definite matter of public importance must necessarily mean only some matter involving the public benefit or advantage in the abstract, e.g., public health, sanitation or the like or some public evil or prejudice, e.g., floods, famine or pestilence or the like. Quite conceivably the conduct of an individual person or company or a group of individual persons or companies may assume such a dangerous proportion and may so prejudicially affect or threaten to affect the public well-being as to make such conduct a definite matter of public importance urgently calling for a full inquiry. Besides, s. 3 itself authorises the appropriate Government to appoint a Commission of Inquiry not only for the purpose of making an inquiry into a definite matter of public importance but also for the purpose of performing such functions as may be specified in the notification. Therefore, the notification is well within the powers conferred on the appropriate Government by s. 3 of the Act and it cannot be questioned on the ground of its going beyond the provisions of the Act.

Learned counsel for the petitioners immediately replies that in the event of its being held that the notification is within the terms of the Act, the Act itself is *ultra vires* the Constitution. The validity of the Act is called in question in two ways. In the first place it is said that it was beyond the legislative competency of Parliament to enact a law conferring such a wide sweep of powers. It is pointed out that Parliament enacted the Act in exercise of the legislative powers conferred on it by art. 246 of the Constitution read with entry 94 in List I and entry 45 in List III of the Seventh Schedule to the Constitution. The matters enumerated in entry 94 in List I, omitting the words not necessary for our purpose, are "inquiries...for the purpose of any of the matters in this List", and those enumerated in entry 45 in List III, again omitting the unnecessary words, are "inquiries...for the purposes of any of the matters specified in List II or List III." Confining himself to the entries in so far as they relate to "inquiries", learned counsel for the peti-

tioners urges that Parliament may make a law with respect to inquiries but cannot under these entries make a law conferring any power to perform any function other than the power to hold an inquiry. He concedes that, according to the well recognised rule of construction of the provisions of a Constitution, the legislative heads should be construed very liberally and that it must be assumed that the Constitution intended to give to the appropriate Legislature not only the power to legislate with respect to the particular legislative topic but also with respect to all matters ancillary thereto. Indeed, the very use of the words "with respect to" in art. 246 supports this principle of liberal interpretation. He, however, points out that the law, which the appropriate Legislature is empowered to make under these entries must be with respect to inquiries for the purposes of any of the matters in the relevant lists, and it is urged that the words "for the purpose of" make it abundantly clear that the law with respect to inquiries to be made under these two entries must be for the purpose of future legislation with respect to any of the legislative heads in the relevant lists. In other words, the argument is that under these two entries the appropriate Legislature may make a law authorising the constitution of a Board or Commission of Inquiry to inquire into and ascertain facts so as to enable such Legislature to undertake legislation with respect to any of the legislative topics in the relevant lists to secure some public benefit or advantage or to prevent some evil or harm befalling the public and thereby to protect the public from the same. But if an inquiry becomes necessary for, say, administrative purposes, a law with respect to such an inquiry cannot be made under these two entries. And far less can a law be made with respect to an inquiry into any wrongs alleged to have been committed by an individual person or company or a group of them for the purpose of punishing the suspected delinquent. This argument has found favour with the High Court, but we are, with great respect, unable to accept this view. To adopt this view will mean adding words to the two entries so as to read "inquiries...for the purpose of future legislation with respect to any of the matters in..." the List or Lists mentioned therein. The matter, however, does not rest here. A careful perusal of the language used in entry 45 in List III does, in our view, clinch the matter. Entry 45 in List III, which is the Concurrent List, speaks, *inter alia*, of "inquiries...for the purpose of any of the matters in List II or List III." Under art. 246 read with this entry, Parliament as well as the Legislature of a State may make a law with respect to "inquiries for the purpose of any of the matters in List II." Parliament, under art. 246, has no power to make a law with respect to any of the matters enumerated in List II. Therefore, when Parliament makes a law under art. 246 read with entry 45 in List III with respect to an inquiry for the purposes of any of the matters in List II, such law can never be one for inquiry for the purpose of future legislation by Parliament with respect to any of those matters in List II. Clearly Parliament can make a law for inquiry for the purpose of any of the matters in List II and none the less so though Parliament cannot legislate with respect to such matters and though none of the State Legislatures wants to legislate on such matters. In our opinion, therefore, the law to be made by the appropriate Legislature with respect to the two legislative entries referred to above may cover inquiries into any aspect of the matters enumerated in any of the lists mentioned therein and is not confined to those matters as mere heads of legislative topic. Quite conceivably the law with respect to inquiries for the purpose of any of the matters in the lists may also be for administrative purposes and the scope of the inquiry under such a law will cover all matters which may properly be regarded as ancillary to such inquiries. The words "for the purposes of" indicate that the scope of the inquiry is not necessarily limited to the particular or specific matters enumerated in any of the entries in the list concerned but may extend to inquiries into collateral matters which may be necessary for the purpose, legislative or otherwise, of those particular matters. We are unable, therefore, to hold that the inquiry which may be set

up by a law made under these two entries is, in its scope or ambit, limited to future legislative purposes only.

Learned counsel then takes us through the different heads of inquiry enumerated in the notification and urges that the inquiry is neither for any legislative nor for any administrative purpose, but is a clear usurpation of the functions of the judiciary. The argument is that Parliament in authorising the appointment of a Commission and the Government in appointing this Commission have arrogated to themselves judicial powers which do not, in the very nature of things, belong to their respective domains which must be purely legislative and executive respectively. It is contended that Parliament cannot convert itself into a Court except for the rare cases of dealing with breaches of its own privileges for which it may punish the delinquent by committal for contempt or of proceedings by way of impeachment. It cannot, it is urged, undertake to inquire or investigate into alleged individual wrongs or private disputes nor can it bring the supposed culprit to book or gather materials for the purpose of initiating proceedings, civil or criminal, against him, because such inquiry or investigation is clearly not in aid of legislation. It is argued that if a criminal prosecution is to be launched, the preliminary investigation must be held under the Code of Criminal Procedure and it should not be open to any Legislature to start investigation on its own and thereby to deprive the citizen of the normal protection afforded to him by the provisions of the Code of Criminal Procedure. This line of reasoning also found favour with the High Court which, after considering the provisions of the Act and the eleven heads of inquiry enumerated in the notification, came to the conclusion that the last portion of cl. 10 beginning with the words "and the action" and ending with the words "in future cases" were *ultra vires* the Act and that the Government was not competent to require the Commission to hold any inquiry or make any report with regard to the matters covered by that portion of cl. 10, for such inquiry or report amounts to a usurpation of the judicial powers of the Union or the State as the case may be.

While we find ourselves in partial agreement with the actual conclusion of the High Court on this point, we are, with great respect, unable to accept the line of reasoning advanced by learned counsel for the petitioners, which has been accepted by the High Court for more reasons than one. In the first place neither Parliament nor the Government has itself undertaken any inquiry at all. Parliament has made a law with respect to inquiry and has left it to the appropriate Government to set up a Commission of Inquiry under certain circumstances referred to in s. 3 of the Act. The Central Government, in its turn, has, in exercise of the powers conferred on it by the Act, set up this Commission. It is, therefore, not correct to say that Parliament or the Government itself has undertaken to hold any inquiry. In the second place the conclusion that the last portion of cl. 10 is bad because it signifies that Parliament or the Government had usurped the functions of the judiciary appears to us, with respect, to be inconsistent with the conclusion arrived at in a later part of the judgment that as the Commission can only make recommendations which are not enforceable *proprio vigore* there can be no question of usurpation of judicial functions. As has been stated by the High Court itself in the later part of its judgment, the only power that the Commission has is to inquire and make a report and embody therein its recommendations. The Commission has no power of adjudication in the sense of passing an order which can be enforced *proprio vigore*. A clear distinction must, on the authorities, be drawn between a decision which, by itself, has no force and no penal effect and a decision which becomes enforceable immediately or which may become enforceable by some action being taken. Therefore, as the Commission we are concerned with is merely to investigate and record its findings and recommendations without having any power to enforce them, the inquiry or report cannot be looked upon as a judicial inquiry in the sense of its being an exercise of judicial function properly so called and consequently the ques-

tion of usurpation by Parliament or the Government of the powers of the judicial organs of the Union of India cannot arise on the facts of this case and the elaborate discussion of the American authorities founded on the categorical separation of powers expressly provided by and under the American Constitution appears to us, with respect, wholly inappropriate and unnecessary and we do not feel called upon, on the present occasion, to express any opinion on the question whether even in the absence of a specific provision for separation of powers in our Constitution, such as there is under the American Constitution, some such division of powers—legislative, executive and judicial—is, nevertheless implicit in our Constitution. In the view we have taken it is also not necessary for us to consider whether, had the Act conferred on the appropriate Government power to set up a Commission of Inquiry with judicial powers, such law could not, subject, of course, to the other provisions of the Constitution, be supported as a law made under some entry in List I or List III authorising the setting up of Courts read with these two entries, for a legislation may well be founded on several entries.

Learned counsel appearing for the petitioners, who are appellants in Civil Appeals Nos. 456 and 457 of 1957, goes as far as to say that while the Commission may find facts on which the Government may take action, legislative or executive, although he does not concede the latter kind of action to be contemplated, the Commission cannot be asked to suggest any measure, legislative or executive, to be taken by the appropriate Government. We are unable to accept the proposition so widely enunciated. An inquiry necessarily involves investigation into facts and necessitates the collection of material facts from the evidence adduced before or brought to the notice of the person or body conducting the inquiry and the recording of its findings on those facts in its report cannot but be regarded as ancillary to the inquiry itself, for the inquiry becomes useless unless the findings of the inquiring body are made available to the Government which set up the inquiry. It is, in our judgment, equally ancillary that the person or body conducting the inquiry should express its own view on the facts found by it for the consideration of the appropriate Government in order to enable it to take such measure as it may think fit to do. The whole purpose of setting up of a Commission of Inquiry consisting of experts will be frustrated and the elaborate process of inquiry will be deprived of its utility if the opinion and the advice of the expert body as to the measures the situation disclosed calls for cannot be placed before the Government for consideration notwithstanding that doing so cannot be to the prejudice of anybody because it has no force of its own. In our view the recommendations of a Commission of Inquiry are of great importance to the Government in order to enable it to make up its mind as to what legislative or administrative measures should be adopted to eradicate the evil found or to implement the beneficial objects it has in view. From this point of view, there can be no objection even to the Commission of Inquiry recommending the imposition of some form of punishment which will, in its opinion, be sufficiently deterrent to delinquents in future. But seeing that the Commission of Inquiry has no judicial powers and its report will purely be recommendatory and not effective *proprio vigore* and the statement made by any person before the Commission of Inquiry is, under s. 6 of the Act, wholly inadmissible in evidence in any future proceedings, civil or criminal, there can be no point in the Commission of Inquiry making recommendations for taking any action "as and by way of securing redress or punishment" which, in agreement with the High Court, we think, refers, in the context, to wrongs already done or committed, for redress or punishment for such wrongs, if any, has to be imposed by a Court of law properly constituted exercising its own discretion on the facts and circumstances of the case and without being in any way influenced by the view of any person or body, howsoever august or high powered it may be. Having regard to all these considerations it appears to us that only that portion of the last part of cl. 10 which calls upon the Commission of In-

quiry to make recommendations about the action to be taken "as and by way of securing redress or punishment", cannot be said to be at all necessary for or ancillary to the purposes of the Commission. In our view the words in the later part of the clause, namely, "as and by way of securing redress or punishment", clearly go outside the scope of the Act and such provision is not covered by the two legislative entries and should, therefore, be deleted. So deleted the later portion of cl. (10) would read—"and the action which in the opinion of the Commission should be taken...to act as a preventive in future cases".

Deletion of the words mentioned above from cl. 10 raises the question of severability. We find ourselves in substantial agreement with the reasons given by the High Court on this point and we hold that the efficacy of the notification is in no way affected by the deletion of the offending words mentioned above and there is no reason to think that the Government would not have issued the notification without those words. Those words do not appear to us to be inextricably wound up with the texture of the entire notification.

The principal ground urged in support of the contention as to the invalidity of the Act and/or the notification is founded on art. 14 of the Constitution. In *Budhan Choudhry v. The State of Bihar*¹ a Constitution Bench of seven Judges of this Court at pages 1048-49 explained the true meaning and scope of art. 14 as follows:—

"The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, *Chitrattilal Chowdhuri v. The Union of India*², *The State of Bombay v. F. N. Balsara*³, *The State of West Bengal v. Anwar Ali Sarkar*⁴, *Kathi Raning Rawat v. The State of Saurashtra*⁵, *Lachmandas Kewalram Ahuja v. The State of Bombay*⁶, *Qasim Razvi v. The State of Hyderabad*⁷ and *Habeesb Mohamad v. The State of Hyderabad*⁸. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well-established that while art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that art. 14 condemns discrimination not only by a substantive law but also by a law of procedure."

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish—

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and, correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

1 [1955] 1 S. C. R. 1045.

2 [1950] S. C. R. 869.

3 [1951] S. C. R. 682.

4 [1952] S. C. R. 284.

5 [1952] S. C. R. 435.

6 [1952] S. C. R. 710.

7 [1953] S. C. R. 589.

8 [1953] S. C. R. 661.

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.

A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under art. 14 of the Constitution, may be placed in one or other of the following five classes:—

(i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law, as it did in *Chiranjitlal Chowdhuri v. The Union of India* (supra), *The State of Bombay v. F. N. Balsara* (supra), *Kedar Nath Bajoria v. The State of West Bengal*,¹ *V. M. Syed Mohamad and Company v. The State of Andhra*,² and *Budhan Choudhry v. The State of Bihar* (supra).

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the Court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnissa Begum v. Mahboob Begum*³ and *Ramprasad Narayan Sahu v. The State of Bihar*.⁴

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between

1 [1954] S. O. R. 30.

2 [1954] S. C. R. 1117.

3 [1953] S. O. R. 404.

4 [1953] S. C. R. 1129.

persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal v. Anwar Ali Sarkar* (supra), *Messrs. Dwarka Prasad Laxmi Narain v. The State of Uttar Pradesh*¹ and *Dhirendra Kumar Mandal v. The Superintendent and Remembrancer of Legal Affairs to the Government of West Bengal*.²

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the Court will uphold the law as constitutional, as it did in *Kathi Raning Rawat v. The State of Saurashtra* (supra).

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this Court e.g. in *Kathi Raning Rawat v. The State of Saurashtra* (supra) that in such a case the executive action but not the statute should be condemned as unconstitutional.

In the light of the foregoing discussions the question at once arises: In what category does the Act or the notification impugned in these appeals fall?

It will be apparent from its long title that the purpose of the Act is to provide for the appointment of Commissions of Inquiry and for vesting such Commissions with certain powers. Section 3 empowers the appropriate Government, in certain circumstances therein mentioned, to appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions within such time as may be specified in the notification. It seems clear—and it has not been controverted—that on a proper construction of this section, the functions the performance of which is contemplated must be such as are ancillary to and in aid of the inquiry itself and cannot be read as a function independent of or unconnected with such inquiry. That being the position, as we conceive it to be, the question arises as to the scope and ambit of the power which is conferred by it on the appropriate Government. The answer is furnished by the statute itself, for s. 3 indicates that the appropriate Government can appoint a Commission of Inquiry only for the purpose of making an inquiry into any definite matter of public importance and into no other matter. In other words the subject-matter of the inquiry can only be a definite matter of public importance. The appropriate Government, it follows, is not authorised by this section to appoint a Commission for the purpose of holding an inquiry into any other matter. Learned Solicitor-General, in the premises, submits that the section itself on the face of it, makes a classification so that this statute falls within the first category mentioned above and contends that this classification of things is based on an intelligible differentia which has a reasonable relation to the object sought to be achieved by it, for a definite matter of public importance may well call for an inquiry by a Commission. In the alternative the learned Solicitor-General urges that in any case the section itself quite clearly indicates that the policy of Parliament is to provide for the appointment of Commissions of Inquiry to inquire into any definite matter of public importance and that as there is no knowing when, where or how any such matter may crop up Parliament considers it necessary or expedient to leave it to the appropriate Government to take action as and when the appropriate moment will arrive. In the tempo of

¹ [1954] S. C. R. 803.

² [1955] 1 S. C. R. 224.

the prevailing conditions in modern society events occur which were never foreseen and it is impossible for Parliament or any Legislature to anticipate all events or to provide for all eventualities and, therefore, it must leave the duty of taking the necessary action to the appropriate Government. This delegation of authority, however, is not unguided or uncontrolled, for the discretion given to the appropriate Government to set up a Commission of Inquiry must be guided by the policy laid down, namely, that the executive action of setting up a Commission of Inquiry must conform to the condition of the section, that is to say, that there must exist a definite matter of public importance into which an inquiry is, in the opinion of the appropriate Government, necessary or is required by a resolution in that behalf passed by the House of the People or the Legislative Assembly of the State. If the preambles or the provisions of the statutes classed under the first category mentioned above could be read as making a reasonable classification satisfying the requirements of art. 14 and if the preamble to the statute considered in the case of *Kathi Raning Rawat* (supra) could be construed as laying down sufficiently clearly a policy or principle for the guidance of the executive, what objection can there be to construing s. 3 of the Act now under our consideration as also making a reasonable classification or at any rate as declaring with sufficient clarity the policy of Parliament and laying down a principle for the guidance of the exercise of the powers conferred on the appropriate Government so as to bring this statute at least in the fourth category, if not also in the first category? On the authorities, as they stand, it cannot be said that an arbitrary and uncontrolled power has been delegated to the appropriate Government and that, therefore, the law itself is bad.

Learned counsel for the petitioners next contends that if the Act is good in the sense that it has declared its policy and laid down some principle for the guidance of the Government in the exercise of the power conferred on it, the appropriate Government has failed to exercise its discretion properly on the basis of a reasonable classification. Article 14 protects all persons from discrimination by the legislative as well as by the executive organ of the State. "State" is defined in art. 12 as including the Government and "law" is defined in art. 13 as including any notification or order. It has to be conceded, therefore, that it is open to the petitioners also to question the constitutionality of the notification. The attack against the notification is that the Government has not properly implemented the policy or followed the principle laid down in the Act and has consequently transgressed the bounds of the authority delegated to it. It is pointed out that in March, 1946, one Shri Tricumdas Dwarkadas, a solicitor of Bombay, had been appointed an officer on Special Duty to indicate the lines on which the Indian Companies Act was to be revised. He made a report which was, however, incomplete in certain particulars. Thereupon the Government appointed Shri Thiruvengkatachari, the Advocate General of Madras, to make further inquiry. The last mentioned gentleman submitted his report and on the basis of that report, it is said, a memorandum containing tentative proposals was prepared and circulated to elicit the opinions of various organisations. On October 28, 1950, a Committee called the Indian Company Law Committee—popularly known as the Bhaba Committee—was appointed. That Committee went round and collected materials and made its comprehensive report on the basis of which the new Indian Companies Act has recently been remodelled. As nothing new has since then happened why, it is asked, should any further inquiry be made? The conclusion is pressed upon us that there can, in the circumstances, be no definite matter of public importance which can possibly call for an inquiry. We find no force in this argument. In the first place the Bhaba Committee at p. 29 of its Report recommended that further inquiries may, in future, have to be made regarding some matters relating to Companies and, therefore, the necessity for fresh inquiry cannot be ruled out. In the next place the appropriate Government is empowered to appoint a Commission of Inquiry if, in its opinion, it is necessary so to do. The

preambles to the notification recite that certain matters enumerated under five heads had been made to appear to the Central Government in consequence of which the Central Government had come to the conclusion that there should be a full inquiry into those matters which, in its opinion, were definite matters of public importance both by reason of the grave consequences which appeared to have ensued to the investing public and for determining such measures as might be deemed necessary in order to prevent a recurrence thereof. Parliament in its wisdom has left the matter of the setting up of a Commission of Inquiry to the discretion of the appropriate Government, and if the appropriate Government has formed the opinion that a definite matter of public importance has arisen and calls for an inquiry, the Court will not lightly brush aside the opinion.

Learned counsel for the petitioners argues that granting that the question as to the necessity for constituting a Commission of Inquiry has been left to the subjective determination of the appropriate Government, the actual setting up of a Commission is conditioned by the existence of some definite matter of public importance. If there be no such definite matter of public importance, in existence, then no question of necessity for appointing a Commission can arise. Reference is then made to the first preamble to the notification and it is pointed out that all the matters alleged to have been made to appear to the Central Government relate to some supposed act or conduct of the petitioners. The contention is repeated that the act and conduct of individual persons can never be regarded as definite matters of public importance. We are unable to accept this argument as sound, for as we have already stated, the act or conduct of individuals may assume such dangerous proportions as may well affect the public well-being and thus become a definite matter of public importance. We do not, therefore, agree that the notification should be struck down for the absence of a definite matter of public importance calling for an inquiry.

The point which is next urged in support of these appeals and which has given us considerable anxiety is that the petitioners and their companies have been arbitrarily singled out for the purpose of hostile and discriminatory treatment and subjected to a harassing and oppressive inquiry. The provisions of art. 14, it is contended, protect every person against discrimination by the State, namely, against the law as well as the executive action and this protection extends to State action at all its stages. The petitioners' grievance is that the Government had started discrimination even at the earliest stage when it conceived the idea of issuing the notification. Reference is made to the Memorandum filed by the Bombay Shareholders' Association before the Bhaba Committee showing that the same or similar allegations had been made not only against the petitioners and their companies but against other businessmen and their companies, and that although the petitioners and their companies and those other persons and their companies were thus similarly situate, in that allegations had been made against both, the Government arbitrarily applied the Act to the petitioners and their companies and issued the notification concerning them but left out the others from its operation. It is true that the notification primarily or even solely affects the petitioners and their companies, but it cannot be overlooked that Parliament having left the selective application of the Act to the discretion of the appropriate Government, the latter must of necessity take its decision on the materials available to it and the opinion it forms thereon. The appropriate Government cannot in such matters be expected to sit down and hold a judicial inquiry into the truth of the materials brought before it, and examine the informants on oath in the presence of the parties who are or may be likely to be affected by its decision. In matters of this kind the appropriate Government has of necessity to act upon the information available to it. It is the best judge of the reliability of its source of information, and if it acts in good faith on the materials brought to its notice and honestly comes to the conclusion that the act and conduct of the petitioners and the affairs of their companies constitute a definite matter of public importance calling for an inquiry with a view to devise measures for preventing

the recurrence of such evil, this Court, not being in possession of all the facts will, we apprehend, be slow to adjudge the executive action to be bad and illegal. We are not unmindful of the fact that a very wide discretionary power has been conferred on the Government and, indeed, the contemplation that such wide powers in the hands of the executive may in some cases be misused or abused and turned into an engine of oppression has caused considerable anxiety in our mind. Nevertheless, the bare possibility that the powers may be misused or abused cannot *per se* induce the Court to deny the existence of the powers. It cannot be overlooked that Parliament has confided this discretion, not to any petty official but the appropriate Government itself to take action in conformity with the policy and principle laid down in the Act. As this Court has said in *Matajog Dobey v. H. C. Bhari*,¹ "a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the Government and not in a minor official." We feel sure, however, that if this law is administered by the Government "with an evil eye and an unequal hand" or for an oblique or unworthy purpose, the arms of this Court will be long enough to reach it and to strike down such abuse with a heavy hand. What, then, we inquire, are the salient facts here? The Central Government appointed investigators to scrutinise the affairs of three of the petitioners' concerns. Those investigators had made their reports to the Central Government. The Central Government had also the Bhaba Committee Report and all the Memoranda filed before that Committee. It may also have had other information available to it and on those materials it formed its opinion that the act and conduct of the petitioners and the affairs of their companies constituted a definite matter of public importance which required a full inquiry. Up to this stage there is no question of legal proof of the allegations against the petitioners as in a Court of law. The only question is: do those allegations, if honestly believed, constitute a definite matter of public importance? We are unable to say that they do not.

Reference is again made to the several matters enumerated in the five clauses set out in the first preamble to the notification and it is urged that those matters do not at all disclose any intelligible differentia on the basis of which the petitioners and their companies can be grouped together as a class. On the part of the Union of India reference is made to the affidavits affirmed by Shri H. M. Patel, the Principal Secretary to the Finance Ministry of the Government of India, purporting to set out in detail as the background thereof, the circumstances which led to the issue of the impugned notification and the matters recited therein and the several reports referred to in the said affidavit. Learned counsel for the petitioners take the objection that reference cannot be made to any extraneous matter and that the basis of classification must appear on the face of the notification itself and reliance is placed on certain observations in the dissenting judgments in *Chiranjilal Chowdhury's* case (supra) and in item (2) of the summary given by Fazl Ali J., in his judgment in *F. N. Balsara's* case (supra). In *Chiranjilal Chowdhury's* case (supra) the majority of the Court read the preamble to the Ordinance which was replaced by the Act which was under consideration there as part of the Act and considered the recitals, reinforced as they were by the presumption of validity of the Act, as *prima facie* sufficient to constitute an intelligible basis for regarding the company concerned as a class by itself and held that the petitioner there had not discharged the onus that was on him. The dissenting Judges, after pointing out that the petition and the affidavit did not give any indication as to the differentia on the basis of which the company had been singled out, went on to say that the statute also did not on the face of it indicate any basis of classification. This was included in cl. (2) of the summary set out in the judgment in *F. N. Balsara's* case (supra). Those observations cannot, therefore, be read as meaning that the classification must always appear on the face of the law itself and that reference cannot be made to any

1 [1955] 2 S. C. R. 925, 932.

extraneous materials. In fact in *Chiranjitlal Chowdhury's* case (supra) parliamentary proceedings, in so far as they depicted the surrounding circumstances and furnished the background, were referred to. In *Kathi Raving Rawat's* case (supra) the hearing was adjourned in order to enable the respondent to put in an affidavit setting forth the material circumstances. In *Kedamath Bajoria's* case (supra) the situation brought about by the war conditions was taken notice of. The same may be said of the cases of *A. Thangal Kunju Musaliar v. M. Venkitachalam Potti*¹ and *Pannalal Binjraj v. Union of India*². In our judgment, therefore, there can be no objection to the matters brought to the notice of the Court by the affidavit of Shri H. M. Patel being taken into consideration along with the matters specified in the notification in order to ascertain whether there was any valid basis for treating the petitioners and their companies as a class by themselves.

Learned counsel for the petitioners next urges that even if the matters referred to in Shri H. M. Patel's affidavits and those appearing on the face of the notification are taken into consideration one cannot deduce therefrom any differentia which may be taken to distinguish the petitioners and their companies from other persons and their companies. The qualities and characteristics imputed to the petitioners and their companies are not at all peculiar or exclusive to them but are to be found equally in other persons and companies, and yet they and their companies have been singled out for hostile and discriminatory treatment leaving out other persons and companies which are similarly situate. There is no force in this argument. Parliament has confided the task of the selective application of the law to the appropriate Government and it is, therefore, for the appropriate Government to exercise its discretion in the matter. It is to be expected—and, until the contrary is proved, it is to be presumed—that the Government, which is responsible to Parliament, will act honestly, properly and in conformity with the policy and principle laid down by Parliament. It may well be that the Central Government thought that even if one or more of the particular qualities and characteristics attributed to the petitioners and their companies may be found in another person or company, the combination of those qualities and characteristics which it thought were present in the petitioners and their companies was of a unique nature and was not present in any other person or company. In its appreciation of the material facts preparatory to the exercise of the discretion left to it by Parliament the Central Government may have thought that the evil was more pronounced in the petitioners and their concerns than in any other person or concern and that the need for an inquiry was more urgent and clear in the case of the petitioners and their companies than in the case of any other person or company. What is the gist and substance of the allegations against the petitioners and their companies? They are that a small group of persons had from before 1946 acquired control over a number of companies including a banking company and an insurance company; that some of these companies were private companies and the others were public companies in which the public had invested considerable moneys by buying shares; that the financial years of some of these companies were different from those of the others; that the funds of the limited companies were utilised in purchasing shares in other companies having large reserve funds with a view to get control over them and to utilise those funds for acquiring shares in other companies or otherwise utilise those funds for the personal benefit of these individuals; that the shares were acquired on blank transfer deeds and were not registered in the names of the companies with whose funds they were purchased so as to permit the same shares to be shown in the balance sheets of the different companies having different financial years; that after 1951 several of these companies were taken into voluntary liquidation or their assets were transferred to another company under some pretended scheme of arrangement or re-organisation; that after getting control of a company they appointed some of themselves as managing

1 [1955] 2 S. O. R. 1196.

2 [1957] S. O. R. 233.

director or selling agent on high remuneration and after a while cancelled such appointment on paying fabulous amounts as and by way of compensation; that funds of one company were transferred to another company to cover up the real financial position. It is needless to add other allegations to explain the matter. The question before us is not whether the allegations made on the face of the notification and in the affidavits filed on behalf of the Union of India are true but whether the qualities and characteristics, if honestly believed to be found in the petitioners, are so peculiar or unique as to constitute a good and valid basis on which the petitioners and their companies can be regarded as a class by themselves. We are not of opinion that they do not. It is not for us to say on this application and we do not in fact say or even suggest that the allegations about the petitioners and their concerns are at all well founded. It is sufficient for our present purpose to say that the facts disclosed on the face of the notification itself and the facts which have been brought to our notice by the affidavits afford sufficient support to the presumption of constitutionality of the notification. There being thus a presumption of validity in favour of the Act and the notification, it is for the petitioners to allege and prove beyond doubt that other persons or companies similarly situate have been left out and the petitioners and their companies have been singled out for discriminatory and hostile treatment. The petitioners have, in our opinion, failed to discharge that onus. Indeed nowhere in the petitions is there even an averment that there are other persons or companies similarly situate as the petitioners and their companies. It has to be remembered that the allegations set forth in the memorandum submitted by the Bombay Shareholders' Association to the Bhaba Committee have not been proved by legal evidence. And further that report itself contains matters which may be taken as calculated to lend support to the view that whether regard is had to the combination of a variety of evils or to their degree, the petitioners may quite conceivably be grouped as a class by themselves. In our judgment the plea of the infraction of the equal protection clause of our Constitution cannot be sustained.

The next contention is that the notification is bad, because the action of the Government in issuing it was *mala fide* and amounted to an abuse of power. Learned counsel appearing for the petitioner, who is the appellant in Civil Appeal No. 455 of 1957, makes it clear that no personal motive or ill-will against the petitioners is imputed to any one, but he points out that the Bhaba Committee had been set up and the Companies Act has been remodelled and, therefore, the present Commission was not set up for any legitimate purpose. The main idea, according to learned counsel, was to obtain information which the Government could not get by following the ordinary procedure under the Code of Criminal Procedure and this ulterior motive clearly makes the governmental action *mala fide*. This point has been further emphasised by learned counsel appearing for the petitioners, who are appellants in Civil Appeals Nos. 456 and 457 of 1957. He has drawn our attention to the affidavits filed by his clients and contends that it was well-known to the Government that none of them was concerned in promoting or managing any of the companies and their position being thus well-known to the Government, their inclusion in the notification was both outside the power conferred by the Government and also constituted a *mala fide* exercise of the power conferred on it. No substantial ground in support of this point has been brought before us, and we are not satisfied that the circumstances referred to in the notification and the affidavits filed on behalf of the Union of India, may not, if true, be the basis of a further inquiry into the matter. It will be for the Commission to inquire into the allegations and come to its own findings and make its report containing its recommendations. It is not desirable that we should say anything more on this point. All that we need say is that the charge of *mala fides* has not been brought home to the Government.

A point was taken that the original notification was defective in that it did

not fix the time within which the Commission was to complete its report and that a subsequent notification fixing a time could not cure that defect. We do not think there is any substance in this too. The third notification quoted above amended the original notification by fixing a time. There was nothing to prevent the Government from issuing a fresh notification appointing a Commission and fixing a time. If that could be done, there was no reason why the same result could not be achieved by the combined effect of two notifications.* In any case the amending notification taken together with the original notification may be read as a fresh notification within the meaning of s. 3 of the Act, operative at least from the date of the later notification.

It is feebly argued that the notification is bad as it amounts to a delegation of essential legislative function. Assuming that there is delegation of legislative function, the Act having laid down its policy, such delegation of power, if any, is not vitiated at all, for the legislation by the delegatee will have to conform to the policy so laid down by the Act. Lastly a point is raised that the notification is bad because it violates art. 23 of the Constitution. It is frankly stated by the learned counsel that this point is rather premature at this stage and that he desires to reserve his client's right to raise it in future.

No other point has been urged before us and for reasons stated above the appeals Nos. 455, 456 and 457 of 1957 are dismissed with costs. Appeals Nos. 656, 657 and 658 of 1957 succeed only in part, namely, to the extent that only the words "by way of redress or punishment" occurring in the later portion of cl. 10 will be deleted so that the later portion of cl. 10 will read as: "and the action which in the opinion of the Commission should be taken...to act as a preventive in future cases" as indicated above. We make no order as to the costs of these three appeals.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Kotwal.

SHIOSINGH DAULATSING RAJPUT v. THE BOMBAY REVENUE TRIBUNAL.*

Berar Regulation of Agricultural Leases Act (XXIV of 1951), Secs. 4, 3, 19(2)—Person holding more than fifty acres of land failing to make selection as required under s. 4(2)—Application by such person under s. 19(2) of Act for reinstatement in possession of other land—Whether such person can be deemed to be a protected lessee of the land in his possession—Maintainability of application.

If at any time the area in possession of a person claiming to be a protected lessee under the Berar Regulation of Agricultural Leases Act, 1951, exceeds fifty acres, it is incumbent on him to make a selection of an area upto fifty acres and give intimation to the landholder and Revenue Officers as required by s. 4(2) of the Act. If he does not do so, he cannot be deemed to be a protected lessee at all, in respect of any area in his possession.

Narayan v. Bhalchandra¹ and Buckingham Court Ltd. v. Narayan Gangaram,² referred to.

THE facts appear in the judgment.

R. K. Thakur, for the petitioner.

C. P. Kalele, for respondent No. 4.

*Decided, July 3, 1958. Special Civil Application No. 81 of 1958.

† Section 19 (2). "Any protected lessee who has been dispossessed by the land-holder of his land except in accordance with the provisions of this Act, may within one year

from the date of such dispossession, apply to a Revenue Officer for reinstatement of possession."

1 [1958] N. L. J. 269.

2 (1957) Miscellaneous Petition No. 428 of 1956, decided on September 10, 1957.

KOTVAL J. This petition arises out of an application made by the petitioner Shiosingh for his reinstatement in possession of a field under s. 19(2) of the Berar Regulation of Agricultural Leases Act, 1951.

The circumstances under which the petitioner preferred that application before the revenue authorities are as follows: On April 26, 1954, respondent No. 4 Bhikanrao purchased the field, survey No. 56, from respondent No. 5, Chandansingh, by a registered sale-deed. Shiosingh is the brother of Chandansingh. Shiosingh filed his application under s. 19(2) of the Act on November 8, 1954, alleging that he had cultivated the field in the year 1953-54; that he was a protected lessee of the said field; that he had been forcibly dispossessed by Bhikanrao; and that, therefore, he should be reinstated in possession.

Respondent No. 4 Bhikanrao pleaded in reply to this application, that he had purchased the field for a sum of Rs. 4,000 from Chandansingh, that the two brothers in collusion were playing a trick on him—one brother selling it to him and the other claiming it back on the ground that he was a protected lessee. In any case, Bhikanrao pleaded that Shiosingh had more than 50 acres of land in his possession as he was cultivating survey Nos. 63, 64/2 B, 3, and 64/3, situate at mouza Wadi, admeasuring in all 55 acres; that he had not made any selection as required by s. 4(2) or s. 4-A of the Act and, therefore, he had no right to claim as a protected lessee.

The Sub-Divisional Officer before whom the application came held that Shiosingh had more than 50 acres and since he had not made a selection, the petitioner was not a protected lessee and, therefore, he was not entitled to ask for any redress under s. 19(2) of the Act. In appeal, however, the Deputy Commissioner, Buldana, held that Shiosingh did not hold more than 50 acres since the *perepatrak* entries were unreliable. He held that respondent No. 4 had admitted that the petitioner had cultivated Survey No. 56 in the year 1953-54 and was, therefore, deemed to be a protected lessee of that field. In Second Appeal before the Bombay Revenue Tribunal, the decision of the Deputy Commissioner was set aside and the petitioner's original application under s. 19(2) was dismissed. The Tribunal held that the petitioner had failed to prove that he was a protected lessee of the suit land and, therefore, he had no *locus standi* to make an application under s. 19(2). It also held that since the petitioner was holding more than 50 acres of land, it was incumbent on him to have made a selection as to which 50 acres he desired to continue to hold and since he had failed to make such a selection within the time allowed under s. 4(3) read with sub-s. (2) thereof, he cannot claim to be a protected lessee. Both these conclusions of the Revenue Tribunal are challenged in this petition.

Now, it is not in dispute before us that the petitioner had held more than 50 acres of land prior to the date of his application under s. 19(2). He had held four survey numbers as was found by the Sub-Divisional Officer, viz. Nos. 63, 64/3, 3 and 64/2-B, having a total acreage of 51.24 acres. Therefore, he was even apart from the field in dispute, in possession of more than 50 acres of land.

Section 3 of the Berar Regulation of Agricultural Leases Act, 1951, defines who is a protected lessee. It divides protected lessees into three classes: (1) those who had been holding land in the agricultural year 1951-52, (2) those holding leases from landholders after 1951-52, and (3) "Every person who holds land from a landholder on a lease for a term of eight years or more...". The first two classes were "deemed to be" leases for a period of eight years (it was five years before amendment) whatever may be the agreed duration of the lease. All the above three classes viz. those "deemed to be" for eight years and those leases actually for eight years or more are deemed to be protected lessees. Then there follow certain exceptions, in sub-ss. (4) and (5) of s. 3. With these exceptions we are not here concerned.

Having defined who is a protected lessee, s. 4 places what are termed restrictions, on protected lessees. For the purposes of the present case, s. 4, sub-ss.

(1) and (2) are important. They run as follows:—

"4. (1) No person shall, at any time, be deemed to be a protected lessee in respect of any area in excess of fifty acres.

(2) If the area in which a lessee is entitled under s. 3 to be deemed to be a protected lessee at any time together with any other area, if any, held by him as protected lessee, exceeds fifty acres, he shall select so much only of the first mentioned area as would make the total area to be held by him as protected lessee equal to fifty acres, and he shall give an intimation in writing to the landholder or landholders, as the case may be, and to the Revenue Officer and thereupon he shall be deemed to be a protected lessee of the area so selected."

Having regard to the provisions of sub-s. (1) of s. 4, it is clear that no person claiming to be a protected lessee can be in possession of any area in excess of fifty acres, and this rule is by virtue of the words in sub-s. (1) "at any time" clearly applicable whenever the question falls to be determined. In sub-s. (2) a protected lessee who holds land in excess of fifty acres has been given the right to select such area as is equal to fifty acres within a certain time i.e. within two months before the commencement of the agricultural year. The time for the first selection was by the addition of s. 4-A, included by the amending Act of 1953, extended up to February 1, 1954.

Reading these provisions together, it appears to us clear that if at any time the area in the possession of a person claiming to be a protected lessee exceeds fifty acres, it is incumbent on him to make a selection of an area upto 50 acres and give intimation to the landholder and Revenue Officers as required by s. 4(2). If he does not do so, he cannot be deemed to be a protected lessee at all, in respect of any area in his possession. The moment a protected lessee becomes entitled to hold land in excess of 50 acres, he must make a selection; otherwise he ceases to be a protected lessee altogether. That, in our opinion, is the proper construction to be placed on the provisions of s. 4(1).

Mr. R. K. Thakur on behalf of the appellant has urged that if the area already in possession of the protected lessee has once vested in the lessee in the right of a protected lessee prior to 1951-52, then he cannot be divested of that right and cannot cease to be a protected lessee at least in respect of that area. Mr. Thakur derived support for his argument from the decision of a Member (Mr. M. W. Pradhan) of the Bombay Revenue Tribunal in *Narayan v. Bhalchandra*¹.

In the first place, the view expressed by the Member (Mr. M. W. Pradhan) was really an opinion in that case because under the rules of the Tribunal, the operative order was that of the Member designated to try the case (Mr. P. D. Deshmukh) who took a contrary view. The argument, plausible as it may seem, in our opinion, ignores the provisions of sub-s. (1) of s. 4, and particularly the words "at any time". The same words are repeated in sub-s. (2) and, therefore, even if the protected lessee holds land as a protected lessee, if he ever comes to hold more than fifty acres and fails to make a selection required of him under sub-s. (2), sub-s. (1) states that he shall not be deemed to be a protected lessee because he holds an area in excess of fifty acres. We endorse the view expressed by Mr. Deshmukh in *Narayan v. Bhalchandra*.

In the present case it is also not in dispute that the petitioner, who was already holding more than fifty acres, failed to make at any time the selection required of him under sub-s. (2) of s. 4. No notice was ever given by him as required by s. 4(2) or s. 4-A of the Act. Therefore, he cannot be deemed to be a protected lessee in respect of the area in dispute, because that area, coupled with the area which he already held, was certainly in excess of fifty acres.

The view we have taken above, though not directly taken, was adverted to by us in *Buckingham Court Ltd. v. Narayan Gangaram*², where we held that the failure to give notice within the time prescribed by s. 4A would have this effect

¹ [1953] N. L. J. 269.

1956, decided on September 10, 1957.

² [1957] Miscellaneous Petition No. 428 of

that the protected lessee would cease to hold the land as a protected lessee if the area in his possession is in excess of fifty acres. Having heard counsel in the present case, we see no reason to modify the view we had taken in that case.

For these reasons, we are of opinion that the order impugned before us took the correct view in law of ss. 3 and 4 of the Berar Regulation of Agricultural Leases Act and correctly decided the matter in controversy in the present petition. Upon the view we have taken, we need not decide the other point raised. The petition is dismissed with costs.

Petition dismissed.

FULL BENCH.

[NAGPUR BENCH]

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, Mr. Justice Gokhale and Mr. Justice Badkar.

YADAORAO HANUMANTRAO DESHMUKH

v.

THE BOMBAY REVENUE TRIBUNAL.*

Madhya Pradesh Land Revenue Code (II of 1955)—States Reorganization Act (XXXVII of 1956), Sec. 122, Notification issued under—Order terminating services of Patel passed by Deputy Commissioner under Code after reorganization of States—Whether such order appealable to Bombay Revenue Tribunal—Meaning and connotation of expression "Revenue Cases" in Schedule to notification.

An order passed under the Madhya Pradesh Land Revenue Code, 1953, by a Deputy Commissioner terminating the services of a Patel, which order came into effect after the coming into force of the States Reorganization Act, 1956, is by reason of the notification issued by the State Government under s. 122 of the Act, appealable to the Bombay Revenue Tribunal.

The facts appear in the judgment.

B. B. Banade, for respondent No. 4.

N. L. Abhyankar, Special Government Pleader, for the petitioner.

CHAGLA C.J. A rather important question as to the jurisdiction of the Bombay Revenue Tribunal arises in this Full Bench, and the few facts, which have to be stated in order to understand what the contention is, are that certain Patels were appointed under the Berar Land Revenue Code. The relevant Act is the Berar Patels and Patwaris Law of 1900, and the Patels that used to be appointed under this Act were either Patels who had certain Watan rights or Patels who were appointed *ad hoc*. This was continued under the subsequent Madhya Pradesh Laws till we come to the Madhya Pradesh Land Revenue Code (II of 1955) and that law abolished the system of the appointment of these Patels. When we turn to the Code, s. 214 provides:—

"At the end of one year from the date appointed for the coming into force of this Code or on any earlier date which the State Government may, by notification, specify, the Berar Patels and Patwaris Law, 1900, shall stand repealed and any right or claim to continue or to be appointed as a Patel or Patwari under the said Law shall stand extinguished."

This Code came into force on October 1, 1955, and therefore the Berar Law of 1900 stood repealed on September 30, 1956, and any right which a Patel had to continue as a Patel or to be appointed as a Patel was extinguished. Under s. 237, which is the section dealing with the rule-making power, power is conferred upon the requisite authority to make rules under sub-cl. (xix) for the appointment of Patels under s. 205(1) of the Code, and when we turn

*Decided, July 22, 1958. Special Civil Civil Applications Nos. 52, 53, 59, 80, 86, 90, 91, Application No. 50 of 1957 (with Special 92 and 108 of 1957).

to that section we find that the Deputy Commissioner has been given the power to appoint for each village or groups of villages one or more Patels. Therefore, the position that emerges is that the mode of appointment of Patels and the rights which Patels had under the law of 1900 ceased to exist on September 30, 1956, and under the Madhya Pradesh Land Revenue Code, from October 1, 1956, the Deputy Commissioner was given the power to appoint Patels and the mode of appointment was to be regulated by the rules to be framed under sub-cl. (xix) of s. 237.

In fact these rules were not framed, but it appears that certain memoranda were issued dealing with the appointment of Patels, and the first is of June 25, 1956, and this memorandum states that on the abolition of the Watan, Patels and Patwaris should be appointed in the resultant vacancies by the Deputy Commissioner under s. 205 of the Code and that the following decisions have been taken by the State Government in this connection—

(a) The Watan of Patels and Patwaris in Berar shall be abolished with effect from 30th September 1956.

(b) Appointment of Patels in Berar should be made by the Deputy Commissioner for one year.

Then the memorandum further states:—

"Detailed rules are being framed. You are requested to take early action for appointment of temporary Patels for one year equal to the present strength so that the new Patel may take over charge of their duties with effect from 1st October 1956."

Then the next memorandum is of July 21, 1956, and that is to the following effect:

"Government have decided that you should select persons fulfilling the conditions laid down below and submit a list to the State Government for approval before appointing them as Patels."

Then comes the list of qualifications. The next relevant memorandum is of September 29, 1956. This is addressed to the Deputy Commissioner by the Revenue Secretary, and it says:

"The list of persons submitted by you for appointment of Patels is being considered by Government. It is possible that some time may be taken in finalising the list. The appointment of new Patels must be made with effect from 1st October, 1956. Government have therefore decided that existing Patels should be appointed by you as Patels under s. 205 of the Madhya Pradesh Land Revenue Code."

Pursuant to this, the Deputy Commissioner on the next day addressed letters to the Sub-Divisional Officers to the effect that until orders are issued by the Government on the proposals and appointments of Patels are made, all the present Patels at present working are hereby appointed temporarily under the Madhya Pradesh Land Revenue Code, s. 205. Pursuant to this, the Patels who were functioning on September 30, 1956, continued to function and their services were terminated when new appointments were made from the approved list submitted by the Officers to Government, and the grievance of these Patels was that they were appointed for one year and their services were terminated before the termination of that year. They wanted these grievances to be ventilated before the Bombay Revenue Tribunal. Their case was that the order of termination of their services was passed by the Deputy Commissioner and they had a right of appeal to the Bombay Revenue Tribunal. The Bombay Revenue Tribunal held that it had no jurisdiction to entertain the appeal, and these Patels, on the various applications which we have before us, have come to us challenging the order of the Revenue Tribunal, and the question that arises for our determination is that when we have an order passed under the Madhya Pradesh Land Revenue Code by a Deputy Commissioner terminating the services of a Patel, is that order appealable, and if it is appealable, is it appealable to the Bombay Revenue Tribunal?

Now, there would have been no difficulty at all but for the fact that the State was reorganized on November 1, 1956. Before that, under the Madhya Pradesh Land Revenue Code, it was clear, as we shall presently point out, that

an appeal lay to the Board of Revenue. This Board of Revenue was set up under the Madhya Pradesh Land Revenue Code under s. 3 and its jurisdiction was defined under s. 6, and sub-s. (1) of s. 6 provides:—

"The Board shall exercise powers and discharge functions conferred upon it by or under this Code and the functions of the State Government specified in Schedule I and such other functions as have been conferred or may be conferred by or under any Central or Madhya Pradesh Act on the Chief Revenue Authority or the Chief Controlling Revenue Authority."

Then sub-s. (2) provides:

"The State Government may, subject to such conditions as it may deem fit to impose by notification, confer upon, or entrust to the board or any member of the Board additional powers or functions assigned to the State Government by or under any enactment for the time being in force."

We are not concerned with sub-s. (3). Then s. 7 confers administrative functions upon the Board:

"The Board shall, in respect of all matters subject to its appellate jurisdiction, have superintendence over all authorities in so far as such authorities deal with such matters and may call for returns."

The expression used here is "administrative functions" which may also be considered to be revisional functions, functions which a Revisional Court exercises of superintendence over Courts subordinate to it. Section 27 constitutes the Board, while exercising its powers and functions, as a Revenue Court, and s. 41 deals with appeal, revision and review from an order, and cl. (e) of sub-s. (1) provides:

"(e) if such order is passed by a Deputy Commissioner, whether exercising the powers of Deputy Commissioner or Settlement Officer during the currency of the term of settlement—to the Board."

Therefore, there can be no doubt that this order of the Deputy Commissioner under the Madhya Pradesh Land Revenue Code was appealable and the appeal lay to the Board of Revenue. Therefore, if the reorganization had not come about and Madhya Pradesh had continued as it was, these Patels would have had the right to go in appeal to the Board of Revenue.

The question is, what is the proper authority to whom the Patels could go if they were aggrieved by an order which had been made by the Deputy Commissioner? As already pointed out, the order terminating the services came into effect after the reorganization had taken place. Their services were terminated under the Madhya Pradesh Land Revenue Code and under the orders passed by an Officer acting under the provisions of the Land Revenue Code. The scheme of the States Reorganization Act is to set up authorities corresponding to the authorities which existed under the law of that part of the State which joined the Bombay State. Therefore, if there was an authority under the Madhya Pradesh Land Revenue Code which functioned in Nagpur, and Nagpur having merged with the Bombay State, some corresponding authority had to be set up under the States Reorganization Act which should function in its place, and when we turn to the States Reorganization Act, that position is made clear by s. 122. Section 122 provides:

"The Central Government, as respect any Part C State, and the State Government as respects any new State or any transferred territory, may by notification in the Official Gazette, specify the authority, officer or person who, as from the appointed day, shall be competent to exercise such functions exercisable under any law in force on that day as may be mentioned in that notification and such law shall have effect accordingly." This the State Government did by a notification which really calls for interpretation at our hands. The notification states:

"In exercise of the powers conferred by s. 122 of the States Reorganization Act, read with the provisions of laws referred to in columns 1 and 2 of the Schedule hereto annexed, and all other powers enabling it in this behalf, the Government of Bombay hereby specifies in col. 6 of the Schedule the authority, officer or person as the corresponding authority, officer or person who or which in relation to the law mentioned in

col. 1 of the Schedule, shall be competent to exercise functions specified in col. 5 of the Schedule exercisable under that law by the authority, officer, or person mentioned in col. 3 of the Schedule."

When we turn to the Schedule, the relevant entry is that the law is the Madhya Pradesh Land Revenue Code, the provision is s. 3, the existing authority is the Board of Revenue, the functions are appellate and revisional powers in Revenue cases, and the corresponding authority is the Bombay Revenue Tribunal, and for all other functions the corresponding authority is the State Government.

Now, the very narrow question that arises for our decision is: Is this a Revenue case? If it is a Revenue case, then the appellate powers were exercised by the Board of Revenue and the corresponding authority which should now exercise those powers is the Bombay Revenue Tribunal. A Full Bench of the Bombay Revenue Tribunal in *Abdul Latif v. Mahadeo*,¹ has taken the view that this particular case is not a Revenue case and therefore this is not a case in which the Board of Revenue could have exercised appellate authority, and the case would fall under the other functions of the Board of Revenue if at all, and therefore the appeal should go to the State Government. As we understand the judgment, it really comes to this that under the law which applied to Madhya Pradesh before reorganization, if the Patel had been dismissed or his services terminated by the Deputy Commissioner and he was aggrieved by that order, he could have appealed to the Board of Revenue. But, in view of the notification issued by the Government of Bombay, the Bombay Revenue Tribunal cannot hear this appeal. The question is: What meaning and what connotation must be given to the expression "Revenue case"? If we interpret the expression "Revenue case" in its strict etymological sense, then undoubtedly a Revenue case would mean a case dealing with revenue which the State derives. It may also be true that if we were to interpret this expression in the sense in which it was used in the Government of India Act, then also it would mean a case which dealt with the revenues of the State, and it may even be that if we were to interpret it according to the Bombay law, then a Revenue case would be only that case which dealt with revenue. But, in our opinion, it is entirely fallacious to construe this expression from the point of view either of its ordinary dictionary meaning or from the point of view of its being understood in a particular way either by the Government of India or by the Bombay law. The fundamental position which has got to be accepted and appreciated is that this notification was setting up an authority to correspond to an authority which already existed under the law which applied to Nagpur, and what we have to consider is what were the functions of that authority which having ceased to exist another authority was created to take its place? Therefore, the proper approach is to consider in what sense was the expression "Revenue case" understood in Madhya Pradesh, and whether this particular decision of the Deputy Commissioner would have been appealable to the Board of Revenue, because, as we have pointed out, the object of the States Reorganization Act was not to create a vacuum, not to allow a state of affairs where persons would be deprived of their rights or would be deprived of the proper forum before which they could assert their rights, and applying that principle to the present case, the object of the States Reorganization Act was to provide to these Patels, a Tribunal corresponding to the Board of Revenue before which they could go and ventilate their grievances. If that position is appreciated, then it is not difficult to come to a decision as to whether the Bombay Revenue Tribunal was right or wrong in refusing to assume jurisdiction in this case.

Mr. Abhyankar has taken us through various Madhya Pradesh legislations which clearly establish that as far as Madhya Pradesh is concerned a Revenue case was not a case dealing with Government or State revenue, but a Revenue case was a case where an officer functioning under the Land Revenue Code, and may be other laws with which we are not concerned, gave a certain deci-

¹ [1957] N. L. J. 161.

sion after entertaining certain proceedings. So that, what constituted a Revenue case was the decision by a Revenue Officer functioning under the Land Revenue Code. If that be the correct position, then there can be no doubt that as far as Madhya Pradesh was concerned, a decision of the Deputy Commissioner terminating the services of the Patels would constitute a Revenue case. Let us see whether this is the correct position. We first turn to the Hyderabad Assigned Districts Land Revenue Code of 1896. Under s. 178 of that Code r. 278 was enacted and that rule provides:

"It should be borne in mind that only those cases which are taken cognizance of by Revenue Officers as such should be considered Revenue business..." And r. 283 provides:

"A paper which constituted the commencement of a 'Revenue Case' should invariably be registered and given the number of the heading under which it falls and the date on which it was registered before any action is taken on it."

This rule is consequential upon r. 278. So, as far back as 1896, all matters which were taken cognizance of by Revenue Officers were considered as constituting Revenue business and any proceedings arising out of it as Revenue cases. This rule was continued first by the Code of 1928 and ultimately by the Code of 1955. We have also the Berar Revenue Manual and there is at p. 79 of that Manual a circular which says:

"The proceedings of Revenue Officers under the Land Revenue Code and other allied Acts as well as certain proceedings relating to general administration constitute Revenue Cases which are classified under the subject heads given in Appendix I."

Therefore, as far as this position is concerned, there is no doubt that under the Madhya Pradesh law this particular action on the part of the Deputy Commissioner would be a Revenue case. Nor is there any doubt that an appeal would have lain from his decision to the Board of Revenue.

Now, the view taken by the Bombay Revenue Tribunal is that under the Revenue Tribunal Act, under which it is constituted, it would have no jurisdiction to hear this case. That is perfectly correct because, as we have pointed out, the expression "Revenue" is understood in a different sense in Bombay, and we will concede that if this case had arisen in Bombay, the Revenue Tribunal would have no jurisdiction. But, with great respect, the error into which the Revenue Tribunal has fallen is this. It is not considering and it should not consider the jurisdiction it is exercising under the Bombay Revenue Tribunal Act. What has to be considered is the jurisdiction it is exercising under the Madhya Pradesh Land Revenue Code. It is that jurisdiction that is conferred upon it by the States Reorganization Act and by the relevant notification to which we have drawn attention. If we may so put it, it is an additional jurisdiction conferred upon the Bombay Revenue Tribunal and the extent and ambit of that jurisdiction must be judged by the provisions of the Madhya Pradesh Land Revenue Code and not by the provisions of the Bombay Revenue Tribunal Act. Therefore, in our opinion, the Revenue Tribunal was in error in refusing to assume jurisdiction in the case of these appeals preferred by different Patels whose services were terminated under the circumstances we have indicated and whose appeals under the Madhya Pradesh Law would have lain to the Board of Revenue.

We will, therefore, quash the order passed by the Bombay Revenue Tribunal and direct it to deal with the appeals preferred by the Patels according to law. Petitioners to get the costs.

Order accordingly.

APPELLATE CIVIL.

[NAGPUR BENCH]

*Before Mr. Justice Mudholkar and Mr. Justice Kotval.*SHANKARRAO BALADAS NIKHARE v. SECOND ADDITIONAL
DISTRICT JUDGE, NAGPUR.*

City of Nagpur Corporation Act (II of 1950), Secs. 9(3), 420(2)(f)—Rules framed under Act, r. 9(2)—Voter entering polling booth before closing hour but not obtaining voting paper before closing hour—Whether such voter could be excluded from voting under r. 9(2).

Under r. 9(2) of the Rules framed under s. 9(3) read with s. 420(2)(f) of the Nagpur Corporation Act, 1948, if a voter has entered the polling booth before the closing hour appointed in this behalf, then, whether he has obtained a voting paper or not, he would be entitled to vote.

THE facts appear in the judgment.

M. N. Phadke, for the petitioner.

M. P. Kelkar, for respondent No. 2.

KOTVAL J. This is a petition by a defeated candidate in a municipal election to the Corporation of the city of Nagpur. The petitioner and respondents Nos. 2, 3 and 4 were candidates for election as councillor from ward No. 29 of the city of Nagpur. The election was held on June 11, 1957, between 8-30 a.m. and 4-30 p.m. Respondents Nos. 5 to 9 had also filed their nomination papers but had withdrawn before the date of election and they are made parties in this petition to obviate any formal objection. Respondent No. 2 was declared elected. He obtained 967 votes while the petitioner got 946 votes. The difference thus was only of 21 votes.

In the election petition filed by the petitioner under s. 428 of the City of Nagpur Corporation Act, the Second Additional District Judge, Nagpur, acting as the District Court declared 16 of these 21 votes invalid. Thus the difference in the votes obtained by respondent No. 2, the elected candidate, and the petitioner was only of 5 votes. The District Court held the election of respondent No. 2 valid.

Among other grounds, Mr. Phadke, appearing on behalf of the petitioner, has raised ground No. 11 in his petition which is to the effect that

"The election officers illegally refused the right to vote to forty voters who had presented themselves before the Polling Officer before the closing time and hence by not giving an opportunity to these forty voters to vote the result of the election is materially affected."

On this question the District Court framed issue No. 5(a). It answered the issue in the negative. The District Court referred, among other witnesses, to the evidence of respondent No. 2 and it found that

"These witnesses also stated that all of these voters were standing in the queue since before 4-30 P.M. Even the petitioner admitted that he did not find any voting papers with those persons and that he had only found them standing at booths Nos. 5 and 6 at about 4-30 P.M. and onwards...I therefore hold that about 20 persons who had reached the polling station before 4-30 P.M. could not exercise their right of vote because they could not obtain ballot papers because the voters standing ahead of them had not also done so by that time."

Mr. Phadke accepts this finding, but he urges that on this finding, these 20 voters were illegally excluded from voting. In spite of the District Court's finding that some 20 voters were unable to exercise their franchise because of the rush of voters and because of others standing in a queue ahead of them, it decided the issue in the negative, because it relied on the provisions of r. 9(2) of the Rules framed under s. 9(3) read with s. 420(2)(f).

*Decided, August 7, 1958. Special Civil Application No. 145 of 1958.

Rule 9(2) runs as follows:

"The polling officer shall close the polling station at the hour appointed in this behalf by the Chief Executive Officer under rule 1, so as to prevent the admission thereto of any elector after that hour, but any elector who has been furnished with a voting paper shall be allowed a reasonable opportunity to record his vote."

It is an admitted fact that the closing hour was 4-30 p.m. Now the view which the District Court took was that because 20 voters had not succeeded in obtaining the ballot papers by 4-30 p.m. the polling officer was bound to exclude them. In other words, the District Court read the clause occurring in r. 9(2) "so as to prevent the admission thereto of any elector after that hour" as implying that the polling officer was bound to have the door of the polling booth closed and exclude all voters from voting whether the voters had entered the booth or not, unless they were already given a ballot paper.

Rule 9(2) is in two parts. The first part lays down the duty of the polling officer to close the polling station at the appointed hour i.e. at 4-30 p.m. so as to prevent voters from entering after that time. The second part lays down the duty of the polling officer to allow any elector who has received a voting paper a reasonable opportunity of recording his vote. The latter part presumably applies to all voters whether in or out of the polling booth, but with this part we are not immediately concerned. For the purposes of this petition we would point out that the rule does not say anything about persons who are inside the polling booth at 4-30 when the booth is closed. It also does not say that they shall be excluded from voting after 4-30 p.m.

Counsel for respondent No. 2 urged that that is the necessary implication to be drawn from the first part of the rule. He urged that there would be no sense in ordering the polling officer to close the booth at 4-30 p.m. and in also directing him to continue to permit voting. He also emphasized that the two clauses of the rule are connected by the word 'but' thus showing that they are in opposition to each other.

The first part of the rule itself states the purpose for which it was made viz. "so as to prevent the admission thereto of any elector after that hour". It does not at all deal with the cases of those voters who have already gained admission to the polling booth by 4-30 p.m. The word 'but' which has been used to connect the two clauses was, in our opinion, merely inserted to provide for the exceptional case viz. that even a voter who at 4-30 p.m. is not inside the booth by some fortuitous circumstance should be allowed to vote if he has been furnished with a voting paper.

We think that it is against all principles governing a right of free franchise that in the absence of any specific provision governing his case, a voter who has entered the polling booth before the closing but who has, on account of rush of voters or voters standing before him in a queue, been unable to vote should not be allowed to do so simply because the polling officer is enjoined to prevent further admission after the closing hour.

We are thus unable to accept the interpretation of r. 9(2) which prevailed with the District Court. On the other hand, it seems to us that if a voter had entered the polling booth, then, whether he had obtained a voting paper or not, he would be entitled to vote. Unfortunately, the finding reached by the District Court is not a finding on this precise point, but the District Court accepted the evidence of certain witnesses including that of the petitioner on this point. The petitioner in his evidence stated as follows:

"At about 4-30 P.M. I had gone to booth No. 5. I found that there were 12 voters admitted inside the booth and who had not voted until then."

In para. 14 he further stated:

"I did not find any ballot papers with those 8 to 10 persons."

The witness does not, of course, prove the exact number which had been excluded. That is otherwise proved. But he certainly proves that at least 12 voters were excluded though they were inside the polling booth at 4-30 p.m.

In our opinion, this evidence which was accepted by the District Court can

only show that r. 9(2) was not complied with. These persons were, therefore, illegally excluded from exercising their franchise. As we have indicated above, the difference in the votes received by respondent No. 2 and by the petitioner was only five. Therefore, if 12 voters were illegally excluded from the election, the result of the election would be materially affected. For these reasons, we are unable to sustain the finding of the District Court on issue No. 5(a). We set it aside and declare the election of respondent No. 2 June 1956 void.

Rule 15(c) read with r. 16 of the Rules framed under s. 420(3) (xviii) and (xix) of the Act enact that if an election is declared void, as we have done, the Court may either declare that a casual vacancy has been created, or that the applicant or any other candidate has been duly elected. The second alternative cannot be availed of by the petitioner in this case because it is impossible to say for whom the excluded voters would have voted. Therefore, the only proper order to pass in the present case would be that the petition is allowed, the election is declared void and a declaration is made that a casual vacancy has been created in ward No. 29 of the City of Nagpur Corporation. We order accordingly.

In the circumstances there shall be no order as to costs throughout.

Order accordingly.

APPEAL FROM ORIGINAL CIVIL.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.

RAJA NARAYANLAL BANSILAL v. MANECK PHIROZE MISTRY.*

Companies Act (I of 1956), Secs. 235, 237, 239, 240, 645, 646—Indian Companies Act (VII of 1913), Secs. 137, 138, 140, 141—Constitution of India, Arts. 20, 14—Inspector appointed under s. 138(iv) of Act of 1913—Pending investigation, Act of 1956 coming into force—Central Government according approval to inspector under s. 239(2) of Act of 1956 exercising powers of investigation into affairs of managing agent including his personal books and accounts—Whether inspector can exercise powers under s. 239(2)—Accusation referred to in art. 20(3) of Constitution whether an accusation without reference to any criminal proceeding—Investigation held by inspector whether a criminal proceeding—Applicability of art. 20(3) to s. 240(5) of Act of 1956—Obiter of Supreme Court—Whether High Court must accept such obiter as laying down correct law—Supreme Court in interpreting clause of statute or article of Constitution interpreting whole section or article—Whether such interpretation of whole section or article binding upon High Court—Construction of statute—Section saving certain provisions of earlier law generally—Later section in same statute saving particular provision of provisions generally saved in previous section—Whether by reason of such specific mention of particular provision, provisions dealt with by earlier section not saved.

An inspector appointed under s. 138(iv) of the Indian Companies Act, 1913, can, by virtue of s. 645 of the Companies Act, 1956, with the prior approval of the Central Government under s. 239(2) of the Companies Act, 1956, exercise the powers under s. 239 of the Companies Act, 1956.

If the Legislature saves and deals with a particular provision of the law, when in the earlier sections it had dealt generally and saved other provisions of the law, it does not follow that by reason of the specific mention of a particular provision of the law the other provisions dealing with the same subject are not saved and do not fall within the general provisions contained in the earlier sections.

*Decided, September 3, 1958. O.C.J. Appeal 201 of 1957.
No. 28 of 1958: Miscellaneous Petition No.

Commissioners for Special Purposes of Income Tax v. Pemsel,¹ referred to.

The accusation referred to in art. 20(3) of the Constitution of India is an accusation with reference to a criminal proceeding and, therefore, as an investigation held by an inspector appointed under the Companies Act, 1956, to investigate the affairs of a company, is not a criminal proceeding, art. 20(3) of the Constitution is not applicable to the provisions of s. 240(5) of the Companies Act, 1956, under which there is an obligation upon the person examined to answer questions put to him and the possibility of these answers being used in evidence against him although the answers may be of an incriminating nature.

Calcutta M. & Co. v. Collector of Customs,² dissented from.

M. P. Sharma v. Satish Chandra, District Magistrate, Delhi,³ explained.

Maqbool Hussain v. The State of Bombay,⁴ *S. A. Venkataraman v. The Union of India*,⁵ *Hearts of Oak Assurance Co. v. Attorney General*,⁶ *Boyd v. United States*,⁷ *Counselman v. Hitchcock*,⁸ *Blau v. United States*,⁹ *McCarthy v. Arndstein*,¹⁰ *Atherton, In re*¹¹ and *Paget, In re: Official Receiver, Ex parte*,¹² referred to.

Even an obiter of the Supreme Court of India deserves the highest respect and it is incumbent upon the High Court to accept even the obiter as correctly laying down the law.

When in a case a particular clause of a section or an article in the Constitution of India calls for interpretation, and in order to interpret it the Supreme Court interprets the whole section or article and lays down the proper canon of construction, that interpretation is binding upon the High Court unless the Supreme Court in any subsequent decision has departed from the interpretation laid down by it in this decision.

ONE Narayanlal Bansilal (petitioner) was the manager and *Karta* of a joint and undivided Hindu family, consisting of himself and his three sons, and the joint family carried on business in the firm name and style of Messrs. Narayanlal Bansilal. The petitioner as the manager and *Karta* of the joint family managed and looked after the business of Messrs. Narayanlal Bansilal. Messrs. Narayanlal Bansilal were the Managing Agents of the Harinagar Sugar Mills Ltd. (hereinafter referred to as the company): The company was a public limited company incorporated under the provisions of the Indian Companies Act VII of 1913. The company owned a sugar factory at Harinagar in the State of Bihar and carried on business of manufacturing sugar at the factory and selling such sugar. The petitioner looked after the business and affairs of the company subject to the control and supervision of the directors of the company. The Registrar of Companies by his letter dated February 14, 1954, called upon the company to furnish certain information to the Registrar under s. 137 of the Indian Companies Act, 1913. The company sent a reply on April 30, 1954. The Registrar of Companies on November 15, 1954, addressed a letter to the company, stating that it had been represented to him under s. 137(6) of the Indian Companies Act, 1913, that the business of the company was being carried on "in fraud". He called upon the company to furnish certain information in connection with various matters set out in that letter. At the end of that letter the Registrar stated that he was giving an opportunity to the company under s. 137(6) of the Indian Companies Act, 1913, of being heard and producing such evidence as the company might desire to disprove the allegations contained in the said letter. On April 15, 1955, the Registrar of Companies made a report to the Central Government under s. 137(5) of the Indian Companies Act, 1913. In the course of that report the Registrar observed that the affairs of the company were carried on in fraud of the contributories and that the affairs of the company disclosed an unsatisfactory state of affairs. In the course of his

1 [1891] A. C. 531.

2 [1956] A. I. R. Cal. 253.

3 [1954] S. C. R. 1077.

4 [1953] S. C. R. 730, s.o. (1953) 56 Bom. L. R. 135.

5 [1954] S. C. R. 1150.

6 [1932] A. C. 392.

7 (1885) 116 U. S. 616, 618, 29 Law. ed. 746.

8 (1890) 142 U. S. 547, 35 Law. ed. 1110.

9 (1950) 340 U. S. 159, 95 Law. ed. 170.

10 (1924) 266 U. S. 34, 69 Law. ed. 158.

11 [1912] 2 K. B. 251.

12 [1927] 2 Oh. 85.

report, the Registrar further observed that the moneys of the company were utilised for the purchase of farms at Harpur and Bhawanipur for and on behalf of the petitioner. He further observed that the farms having been purchased out of the funds of the company, the income thereof should have been included in the company's books of account. He opined that the profits derived from such farms appeared to have been misappropriated. He further stated that there was no doubt that the Managing Agents were utilising the property of the company for their personal gain. He stated that the company had to pay compensation to one Shri Vallabh Ramdeo Pittie in the sums of Rs. 1,83,995 and Rs. 6,35,937 in respect of a contract for the sale of sugar entered into with him, which could not be fulfilled. He observed that the whole transaction appeared to be bogus. He stated that the company must be aware of the fact that the company would not be able to honour the contract and that the management perhaps to benefit by such transaction might have entered into the aforesaid contract, perhaps deliberately to share the compensation. The Registrar stated that the income-tax authorities had also required the reopening of the income-tax assessment of the previous years on the ground of suppression of true income, false debits and suppression of sales which disclosed that the affairs of the company were actually carried on in fraud and that the company had been borrowing moneys ostensibly for the purpose of investing in or financing the other companies in which the petitioner appeared to be interested.

On November 1, 1955, the Central Government issued an order which stated that a report under sub-s. (5) of s. 137 of the Indian Companies Act, 1913, had been submitted by the Registrar of Companies on the affairs of the Harinagar Sugar Mills Ltd., Bombay, and that the Central Government considered it desirable that an inspector should be appointed under sub-s. (iv) of s. 138 of the said Act to investigate into the affairs of the company and to report thereon. The Central Government, therefore, in exercise of the powers conferred by sub-s. (iv) of s. 138 of the Act appointed one Maneck P. Mistry as an inspector to investigate into the affairs of the company from the date of its incorporation and point out all irregularities and contraventions in respect of the provisions of the Indian Companies Act, 1913, or any other law and report in the manner indicated in a separate communication sent to him. The relevant portions of the communication were as under:—

"While investigating the affairs of companies, inspectors should bear in mind that for a successful prosecution the evidence in support of a charge must be clear, tangible and cogent. They should, therefore, specify in their reports with reference to the evidence, either oral or documentary or both collected during the investigations, on the following among other matters:—

- (a) What the charge in brief is;
- (b) What is the offence committed, quoting as far as possible the section contravened;
- (c) names, designation and addresses of the accused who are alleged to have committed the offence;
- (d) the precise evidence, oral, documentary, or both, which implicates each of the named accused and goes to prove the charge; and
- (e) in case of misappropriation, the amount misappropriated. Charges should be enumerated by successive serial numbers in the report and the evidence available in support of each charge and the inspectors' findings thereon should be discussed and indicated thereunder...

Inspectors should make proper use of the rights available to them under section 140 of the Act including the right to examine a person on oath. Questions should be so put to persons examined on oath as to bring out their admissions with reference to facts, books and accounts and other documents relating to the company."

The communication further stated that the examination of officers of the company made by the inspector should be conducted in private and that the inspector was not entitled to make public the information received by him on examination as aforesaid.

On April 1, 1956, the Indian Companies Act, 1956, came into operation. On April 27, 1956, respondent No. 1 as the inspector appointed by the Central Government addressed a notice to the petitioner, stating that under sub-s. (2) of s. 140 of the Indian Companies Act, 1913, he had to examine the petitioner on oath in relation to the business of the company and requested the petitioner to attend his office on May 10, 1956, for that purpose. He further drew the attention of the petitioner to sub-s. (3) of s. 140 of the Indian Companies Act, 1913, which provided for a fine of Rs. 50 for each offence if a person refused to answer any question relating to the affairs of the company. On May 8, 1956, the petitioner's attorneys asked for an adjournment until the first week of June 1956. Respondent No. 1 did not grant the adjournment as requested, but gave a fresh appointment fixing May 15, 1956, for examining the petitioner. On the same day he required the petitioner to produce various books and documents and drew the attention of the petitioner to the provisions of s. 240(3) of the new Companies Act, 1956, which deal with the question of contempt of Court for a refusal to produce any books or papers required to be produced by the inspector. Between June 6, 1956, and July 31, 1956, the petitioner was examined by respondent No. 1 on solemn affirmation on or about 14 different occasions. On June 6, 1956, the petitioner had appeared before respondent No. 1 with his attorneys. During the course of his examination the petitioner was asked about the various documents which the petitioner had been called upon to produce. The petitioner expressed his inability to produce the same, stating that he would produce the same, if so advised, by his lawyers. Respondent No. 1 drew the attention of the petitioner in terms to provisions of s. 240 of the new Companies Act and read out the same and explained the import thereof to the petitioner. On June 11, 1956, the petitioner had appeared with his attorneys before the inspector. At the end of the day's proceedings, an application was made on behalf of the petitioner for an adjournment for about 2-3 days in order to enable the petitioner to consult his counsel on the point whether the proceedings before the inspector, which were being carried on under the new Companies Act, were competent in law having regard to the fact that the inspector had been appointed under the old Companies Act, 1913. Respondent No. 1 as such inspector had also issued notices against L. H. Daga and B. Jhalani, two of the other Directors of the said company and Chandmal Choradia, the Chief Accountant of the company for their examination under s. 140(2) of the Indian Companies Act, 1913. Respondent No. 1 examined on solemn affirmation L. H. Daga. B. Jhalani did not appear before him and Choradia made a statement before him without being put on solemn affirmation. Respondent No. 1 made an interim report to the Central Government.

On July 26, 1956, the Central Government in exercise of its powers under sub-s. (2) of s. 239 of the Companies Act, 1956, accorded its approval to respondent No. 1 as an inspector exercising the powers of investigating into and reporting on the affairs of

"(i) Shiv Narainlal Bansilal (including his personal books and accounts);

(ii) Messrs. Narainlal Bansilal, the Managing Agents of Harinagar Sugar Mills Ltd;

(iii) The Shangrilla Food Products Limited; and

(iv) Harinagar Cane Farm."

The order referred to the correspondence carried on by the inspector with the Central Government, resting with his letter dated June 2, 1956. It in terms referred to the memorandum of respondent No. 1 regarding the progress of the investigation. On May 9, 1957, respondent No. 1 addressed a notice to the petitioner "by virtue of the provisions contained in s. 240 of the Companies Act, 1956." After reciting that the petitioner was an officer and agent of the company, respondent No. 1 called upon the petitioner to attend the office of respondent No. 1 on May 14, 1957, for the purpose of being examined on oath in relation to the affairs of the company. By this notice he called upon the petitioner to produce several books of account and papers. Among the books of account and papers required to be produced were the personal books of

account of the petitioner from the year 1933 to the date of the notice, the books of account of Messrs. Narayanlal Bansilal, the Managing Agents of Harinagar Sugar Mills Ltd. from the year 1933 to the date of the notice and the books of account of Harinagar Cane Farm from 1934 to the date of the notice. The petitioner did not appear on the appointed day, but applied for an adjournment. Thereafter on May 16, 1957, another notice in terms similar to the notice dated May 9, 1957, was addressed to the petitioner. The petitioner did not appear in pursuance of that notice and applied for an adjournment on the ground of sudden illness. On May 29, 1957, respondent No. 1 addressed a third notice to the petitioner in terms similar to the notice dated May 9, 1957. As the petitioner again did not attend, a fourth notice was addressed to the petitioner on June 29, 1957, in terms similar to the notice issued to the petitioner on May 9, 1957. On July 5, 1957, the petitioner with his attorneys and counsel appeared before respondent No. 1. At that time counsel for the petitioner submitted that respondent No. 1 was not entitled to proceed with the investigation as his appointment as an inspector as also the proceedings taken by him were *ultra vires* the Constitution and offended against arts. 14 and 20 of the Constitution. He also submitted that respondent No. 1 had no right in law to summon any witnesses under s. 240 of the new Act and that he was not entitled in law to call upon the witnesses to produce before him books of account, documents etc. Respondent No. 1 adjourned the matter to July 12, 1957.

On July 10, 1957, the petitioner filed the present petition against respondent No. 1 as well as the Union of India (respondent No. 2) for the issue of a writ of *certiorari* or any other appropriate direction, order or writ under art. 226 of the Constitution of India against respondent No. 1 calling for the records of the case relating to the aforesaid notices, the said examination of the petitioner and L. H. Daga, B. Jhalani and Chandmal Choradia made by respondent No. 1 and the interim report made by respondent No. 1 to the Central Government and for quashing and setting aside the notices, the examination and the interim report. He further prayed for the issue of a writ of prohibition or any other appropriate direction, order or writ under art. 226 of the Constitution of India prohibiting and restraining respondent No. 1 from acting upon or proceeding under the notices and/or from making any investigation under or in pursuance of the notices and/or from exercising any powers of investigation under ss. 239 and/or 240 of the Companies Act, 1956, and/or from investigating into the affairs of any of the persons and concerns mentioned in the petition. The petitioner further prayed for the issue of a writ of *mandamus* or a writ in the nature of *mandamus* or any other appropriate direction, order or writ under art. 226 of the Constitution of India directing respondent No. 1 to withdraw and/or cancel the notices and to forbear from acting or proceeding under the notices and/or from making any investigation under or in pursuance of the notices and/or from exercising any powers under ss. 239 and/or 240 of the Companies Act, 1956, and/or from investigating into the affairs of any of the persons and concerns mentioned in the petition.

The petition came up for hearing before K. T. Desai J. who dismissed it on April 8, 1958, observing in his judgment as follows:—

K. T. DESAI J. The principal contention advanced by Mr. Manecksha, the learned counsel for the petitioner, is that s. 240 of the new Companies Act under which respondent No. 1 required the production of documents by the petitioner and under which he examined and desired further to examine the petitioner on solemn affirmation is void and inoperative in law as offending against the provisions of art. 20(3) and art. 14 of the Constitution. He further urges that the provisions contained in s. 239 of the new Act, under which the Central Government accorded its approval to respondent No. 1 exercising the powers of investigating into and reporting on the affairs of "Shiv Narainlal Bansilal (including his personal books of account), Messrs. Narainlal Bansilal, the Managing Agents of Harinagar Sugar Mills Ltd., the Shangrila Food Products Limited and the Harinagar Cane Farm", are illegal, void and

inoperative in law as being in violation of the fundamental rights guaranteed under the Constitution under art. 20(3) and art. 14 of the Constitution. He further contends that apart from the constitutionality of the provisions contained in ss. 239 and 240 of the new Act, respondent No. 1, being a person appointed under the provisions of s. 138 of the old Companies Act, 1913, had no right to require the production of any documents or to examine any person under the provisions of s. 239 or 240 of the new Act and that the notices issued by respondent No. 1 and the proceedings taken by him since the coming into force of the new Companies Act are without jurisdiction, void and inoperative in law. In para. 11 of the petition the order of the Central Government, dated July 26, 1956, (exh. D) has been challenged on the ground that it violated the provisions of art. 19(1)(g) of the Constitution. The said argument, however, has not been urged before me at the hearing. It is further stated that the said order is null and void as the same has been passed without giving a hearing to the petitioner and without giving any opportunity to the petitioner to show cause against the same and that it has been passed contrary to the fundamental principles of natural justice. At the hearing of the petition, the said argument has not been urged before me. In para. 12(a) of the petition it has been stated as under:—

"The said examination was made by the 1st respondent in purported exercise of his powers under section 140 of the Indian Companies Act VII of 1913 as appears clearly from the said notice Exh. "E" hereto. After the commencement of the Companies Act 1956 the 1st respondent was not entitled to exercise any powers under section 140 of the Indian Companies Act VII of 1913 inasmuch as the said section stood repealed on 1st April 1956 on the commencement of the Companies Act, 1956."

It was not contended before me that the examination was held in the exercise of powers conferred under s. 140 of the Indian Companies Act. It was, on the contrary, strongly urged before me that the examination was held under the provisions of s. 240 of the new Companies Act and that it clearly appeared from the notices, exh. E, that respondent No. 1 was purporting to act in exercise of powers conferred under s. 240 of the new Act. The learned counsel for the petitioner did not contend at the hearing that respondent No. 1 was not entitled to exercise any powers under s. 140 of the Indian Companies Act VII of 1913 after the repeal of the said section under the new Companies Act. In the affidavit in reply of respondent No. 1, which has been adopted by respondent No. 2, it is urged that the petitioner has been guilty of gross delay in filing the petition and that the petition is liable to be dismissed on that ground. It is further urged that the petition has not been filed *bona fide* and it is submitted that the petition is premature, misconceived and not maintainable as the investigation had still to be completed. At the hearing none of the aforesaid contentions has been pressed by the learned Advocate General who appears for the respondents. My attention was drawn to various statements contained in the affidavit of respondent No. 1 in order to show that after the coming into force of the new Companies Act, respondent No. 1 purported to act under the provisions of the new Companies Act. As that statement has not been disputed before me, it is not necessary for me to examine the various documents and the statements made by the parties in connection therewith. The learned Advocate General stated that he desired to meet the constitutional challenge to the provisions of ss. 239 and 240 of the Indian Companies Act, 1956, and did not press any of the preliminary objections.

Article 20 of the Constitution provides as under:—

"20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

It is urged that the provisions of ss. 239 and 240 of the new Companies Act offend against the fundamental rights guaranteed under art. 20(3) of the Constitution. It is submitted by the learned counsel for the petitioner that the provisions contained in art. 20(3) should be liberally construed and that the Court should look more to the substance than to the sound. It is urged that the Inspector who has been appointed by the Central Government to investigate into the affairs of the company because of the report of the Registrar of Companies, which contained allegations about the petitioner having carried on the business of the company fraudulently and about the petitioner having committed the offence, among others, of criminal breach of trust, would have to examine the petitioner in connection with the offences which he is alleged to have committed; that under the provisions of s. 240(3) the petitioner is compellable to make a statement on solemn affirmation in connection therewith; that his testimony is liable to be used against him in any criminal proceeding and that he is liable to be prosecuted for offences, which may be discovered to have been committed by him as a result of the investigation by the Inspector. It is urged that in case he has committed any offence he is obliged to confess to a crime or be prosecuted for perjury or for contempt and that this clearly violates the constitutional guarantee given under art. 20(3) of the Constitution. The argument in substance is that if a person has committed an offence, if he was compelled to answer truthfully he would be compelled on solemn affirmation or oath to confess to a crime; that if he answered falsely he was liable to be prosecuted for perjury and that if he refused to answer, he was liable to be committed for contempt.

Mr. Manecksha referred to three judgments of the Supreme Court of the United States of America relating to the construction of the 5th Amendment to the Constitution of the United States. That amendment *inter alia* provided as under: "No person... shall be compelled in any criminal case to be a witness against himself." The decision in *Counselman v. Hitchcock*,¹ lays down that the privilege given by the Fifth Amendment to the Constitution that no person shall be compelled in any criminal case to be a witness against himself extends to a proceeding before a grand jury. In Willis Constitutional Law of the United States, it has been stated at page 543 that the function of a grand jury is to inquire whether or not a crime has been committed. If it finds that a crime has been committed, it then charges a person with the crime and returns its charge to the Court. That charge is the indictment or presentment. That case lays down that the privilege is available not merely in the proceedings before a Court where the trial takes place, but in prior proceedings when the investigation whether a crime has or has not been committed takes place before a grand jury. Mr. Justice Blatchford, who delivered the opinion of the Court, observes in that case as follows (p. 1113):—

"It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the Constitution. Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favour of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the Act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the question was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case.

1 (1890) 143 U. S. 547, 35 Law. ed. 1110.

It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard...

It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures."

The case of *Blau v. United States*¹ lays down that a witness called to testify before a Federal grand jury cannot, over his claim of privilege against self-incrimination under the Fifth Amendment to the Federal Constitution, be compelled to answer questions concerning the Communist Party or his employment by it, where a Federal statute makes it a crime to advocate knowingly the desirability of overthrow of the government by force or violence, to organize or help to organize any society or group which advocates such overthrow or to be or become a member of such a group with knowledge of its purposes, since these provisions make future prosecution of the witness far more than a mere imaginary possibility. Mr. Justice Black, who delivered the opinion of the Court, observes as follows (p. 172):—

"...Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent."

The case of *Boyd v. United States*,² relied upon by Mr. Manecksha, was a case where the proceedings were *in rem* to establish a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon, pursuant to the 12th section of the Act to amend the Customs Revenue Laws. It was there held that an order of the Court requiring the claimants of the goods to produce a certain invoice in Court for the inspection of the government attorney, and to be offered in evidence by him, was an unconstitutional exercise of authority and that the inspection of the invoice by the attorney and its admission in evidence were erroneous and unconstitutional proceedings. Mr. Justice Bradley, who delivered the opinion of the Court, observes as follows (p. 751):—

"...Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

At p. 752, the learned Judge further observes as under:—

"...The information, though technically a civil proceeding, is in substance and effect a criminal one...As, therefore, suits for penalties and forfeitures, incurred by the commission of offences against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself, and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution;...but illegitimate and unconstitutional practices get their first footing in that

1 (1950) 340 U. S. 154, 95 Law. ed. 170. 2 (1885) 116 U. S. 616-618, 29 Law. ed. 746.

way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law..."

Mr. Manecksha invites me to follow the principles laid down in these American cases and to hold that the constitutional guarantee given in art. 20(3) renders the provisions of ss. 239 and 240 of the new Companies Act nugatory.

The Supreme Court of America has no doubt given a very extended meaning to the words contained in the Fifth Amendment to the Constitution. The Supreme Court of America has gone so far as to extend the constitutional protection of a witness against self-incrimination to civil proceedings. My attention has been drawn to the case of *McCarthy v. Arndstein*,¹ where it has been set out that the constitutional protection of a witness against self-incrimination applies in civil proceedings.

The principle of testimonial compulsion against self-incrimination is not a universally accepted principle of jurisprudence. The maxim embodying it is *nemo tenetur seipsum prodere* which means that no one is bound to criminate himself and to place himself in peril. Wigmore in this connection says (section 2251) as follows:—

"Indirectly and ultimately it works for good—for the good of the innocent accused and of the community at large. But directly and concretely it works for ill, for the protection of the guilty and the consequent derangement of civic order. There ought to be an end of judicial cant towards crime. We have already too much of what a wit has called 'justice tampered with mercy'. The privilege therefore should be kept within limits, the strictest possible."

Some Judges have pronounced against the retention of this privilege stating that it has outlived its usefulness. In *Ex-parte Reynolds*,² Jessel, M. R. said: "Perhaps our law has gone too far in that direction". Our Supreme Court in the case of *M. P. Sharma v. Satish Chandra, District Magistrate, Delhi*,³ has observed at pp. 1085 and 1086 as follows:—

"Since the time when the principle of protection against self-incrimination became established in English law and in other systems of law which have followed it, there has been considerable debate as to the utility thereof and serious doubts were held in some quarters that this principle has a tendency to defeat justice. In support of the principle it is claimed that the protection of accused against self-incrimination promotes active investigation from external sources to find out the truth and proof of alleged or suspected crime instead of extortion of confessions on unverified suspicion. (See Wigmore on Evidence, Vol. VIII, page 300). It is also claimed that that privilege in its application to witnesses as regards oral testimony and production of documents affords to them in general a free atmosphere in which they can be persuaded to come forward to furnish evidence in courts and be of substantial help in elucidating truth in a case, with reference to material within their knowledge and in their possession. (See Wigmore on Evidence, Vol. VIII, page 307). On the other hand, the opinion has been strongly held in some quarters that this rule has an undesirable effect on social interests and that in the detection of crime, the State is confronted with overwhelming difficulties as a result of this privilege. It is said this has become a hiding place of crime and has outlived its usefulness and that the rights of accused persons are amply protected without this privilege and that no innocent person is in need of it. (See Wigmore on Evidence, Vol. VIII, pages 314 and 315). Certain passages at pages 441 and 442 of Vol. I of Stephen's History

1 (1924) 266 U. S. 34, 69 Law. ed. 158.

3 [1954] S. C. R. 1077.

2 (1882) 15 Cox Cr. Cas. 108, at p. 115.

of the Criminal Law of England are also instructive in this context and show a similar divergence of opinion."

In dealing with the constitutional guarantee contained in art. 20(3) of the Constitution, Mr. Justice Jagannadhadas in that case further observes as follows (p. 1086):—

"In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intentment thereof and to prevent its circumvention."

There are three important reported judgments of our Supreme Court cited at the bar dealing with art. 20 of the Constitution. The first of such cases is the case of *Maqbool Hussain v. The State of Bombay*.¹ That was a case under the Sea Customs Act, and the provisions of the Constitution which came up directly for consideration were those contained in art. 20(2) of the Constitution. In that case, proceedings had been taken by the Sea Customs authorities against a person under s. 167 of the Sea Customs Act and an order for confiscation of goods had been passed. Thereafter that person was prosecuted before the Presidency Magistrate for an offence under s. 23 of the Foreign Exchange Regulation Act in respect of the same act. Mr. Justice Bhagwati, who delivered the judgment of the Court, held that the proceeding before the Sea Customs authorities was not a "prosecution" and the order for confiscation was not a punishment inflicted by a Court or Judicial Tribunal within the meaning of art. 20(2) of the Constitution and that the prosecution before the Presidency Magistrate was not barred. At p. 738 the learned Judge observes as follows:—

"The words 'before a court of law or judicial tribunal' are not to be found in article 20(2). But if regard be had to the whole background indicated above it is clear that in order that the protection of article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of article 20 and the words used therein:—'convicted', 'commission of the act charged as an offence', 'be subjected to a penalty', 'commission of the offence', 'prosecuted and punished', 'accused of any offence', would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."

The words "commission of the act charged as an offence" and the words "be subjected to a penalty" appear in art. 20(1) of the Constitution. The words "accused of any offence" appear in art. 20(3) of the Constitution. These words have been pressed into service by the learned Judge in order to give the correct meaning to the words used in art. 20(2) of the Constitution. According to the learned Judge, having regard to the subject-matter of art. 20, the words used in art. 20(2) contemplate proceedings of the nature of criminal proceedings before a Court of law or a judicial tribunal. The learned Judge has, after referring to the various provisions of the Sea Customs Act, further observed as follows (p. 743):—

"...All these provisions go to show that far from being authorities bound by any rules of evidence or procedure established by law and invested with power to enforce their own judgments or orders the Sea Customs Authorities are merely constituted administra-

tive machinery for the purpose of adjudging confiscation, increased rates of duty and penalty prescribed in the Act...

We are of the opinion that the Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy."

The next case on the subject is the case which I have already referred to viz., *M. P. Sharma v. Satish Chandra District, Magistrate, Delhi*.¹ That was a case of a person against whom a first information report had been lodged with the police, and the District Magistrate had ordered an investigation of the offences and issued warrants for simultaneous searches for discovery of the documents pertaining thereto. The petitioner in that case prayed for quashing the search warrants and asked for the return of documents seized in pursuance thereof. In dealing with art. 20(3) Mr. Justice Jagannadhas, who delivered the judgment of the Court, observes as under (p. 1086):—

"... (1) It is a right pertaining to a person 'accused of an offence'; (2) It is a protection against 'compulsion to be a witness'; and (3) It is a protection against such compulsion resulting in his giving evidence 'against himself'. The cases with which we are concerned have been presented to us on the footing that the persons against whom the search warrants were issued, were all of them persons against whom the First Information Report was lodged and who were included in the category of accused therein and that therefore they are persons 'accused of an offence' within the meaning of article 20(3) and also that the documents for whose search the warrants were issued, being required for investigation into the alleged offences, such searches were for incriminating material...

Broadly stated the guarantee in article 20(3) is against 'testimonial compulsion'. It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Article 20(3) is 'to be a witness'. A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see section 119 of the Evidence Act) or the like. 'To be a witness' is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes... Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in article 20(3) is 'to be a witness' and not to 'appear as a witness'. It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case."

That case clearly lays down that where there is a formal accusation relating to the commission of an offence, the constitutional guarantee under art. 20(3) extends to the stage of investigation before trial in a Court of law. That case has left the question open whether such constitutional guarantee extends to other proceedings in other situations.

The third case is the case of *S. A. Venkataraman v. The Union of India*.² That was a case under art. 20(2) of the Constitution. In that case the Supreme Court held that an enquiry made and concluded under the Public Servants (Inquiries) Act, 1850, does not amount to prosecution and punishment for an offence as contemplated by art. 20(2) of the Constitution. In that case, Mr. Justice Mukherjea in delivering the judgment of the Court observes at pp. 1153

1 [1954] S. C. R. 1077.

2 [1954] S. C. R. 1150.

and 1154 as follows:—

- “The scope and meaning of the guarantee implied in article 20(2) of the Constitution has been indicated with sufficient fullness in the pronouncement of this court in *Maqbool Hussain v. The State of Bombay*...the ambit and contents of the guarantee, as this Court pointed out in the case referred to above, are much narrower than those of the common law rule in England or the doctrine of ‘double jeopardy’ in the American Constitution. Article 20(2) of our Constitution, it is to be noted, does not contain the principle of ‘*autrefois acquit*’ at all. It seems that our Constitution makers did not think it necessary to raise one part of the common law rule to the level of a fundamental right and thus make it immune from legislative interference. This has been left to be regulated by the general law of the land.”

In the course of his judgment the learned Judge further observes as follows (p. 1154):—

“It has also been held by this court in *Maqbool Hussain’s* case that the language of article 20 and the words actually used in it afford a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of criminal proceeding, before a court of law or judicial tribunal, and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute, but which is not required by law to try a matter judicially and on legal evidence.”

Dealing with the facts of that case, the learned Judge at pp. 1155 and 1156 further observes as under:—

“...The Commissioner (who had been appointed under the Public Servants Inquiries Act, 1850) was a judicial tribunal in the proper sense of the expression. He had to adjudicate on the charges judicially, on evidence, recorded on oath, which he was authorised by law to administer. The prosecution was conducted by a prosecutor appointed under the Act, charges were read out to the accused person and his plea was taken; witnesses on both the sides were examined on oath and they were cross-examined and re-examined. The Commissioner had all the powers of a court; he could summon witnesses, compel production of relevant documents and punish people for contempt. At the close of the enquiry, the Commissioner did record his finding against the petitioner on some of the charges. He had undoubtedly no power to impose any punishment and had only to forward his report to the Government. Under section 22 of the Act, however, the Government was entitled to pass such orders within its authority, as it considered proper and in exercise of this authority the President did impose upon the petitioner the penalty of dismissal...”

It is true that the Commissioner appointed to make an enquiry under Act XXXVII of 1850 is invested with some of the powers of a court, particularly in the matter of summoning witnesses and compelling the production of documents and the report, which he has to make, has to be made on legal evidence adduced under sanction of oath and tested by cross-examination. But from these facts alone the conclusion does not necessarily follow that an enquiry made and concluded under Act XXXVII of 1850 amounts to prosecution and punishment for an offence as contemplated by article 20(2) of the Constitution.”

At p. 1160 it is further observed as follows:—

“...The mere fact that the word ‘prosecution’ has been used, would not make the proceeding before the Commissioner one for prosecution of an offence. As the Commissioner has to form his opinion upon legal evidence, he has been given the power to summon witnesses, administer oath to them and also to compel production of relevant documents. These may be some of the trappings of a judicial tribunal, but they cannot make the proceeding anything more than a mere fact finding enquiry...At the close of the enquiry, the Commissioner has to submit a report to the Government regarding his finding on each one of the charges made. This is a mere expression of opinion and it lacks both finality and authoritativeness which are the essential tests of a judicial pronouncement. The opinion is not even binding on the Government.”

The learned Advocate General urges that some of the observations made in this judgment aptly apply to the facts of this case. He says that an Inspector

appointed under the Indian Companies Act is constituted merely a fact finding authority and that his opinion is neither authoritative nor final. He further says that even though the Inspector might administer oath and compel production of documents and may have some of the trappings of a Court, he is neither a Court nor a judicial tribunal. He further says that an Inspector appointed under the said Act is, under no duty to act judicially, that he does not discharge any judicial functions and that the proceedings before him are neither judicial nor quasi judicial. He says that it is open to the Inspector to take evidence behind the back of the person, whose affairs may be investigated and that the person concerned is not entitled as of right to have an opportunity of leading evidence or of cross-examining the witnesses who may give evidence against him.

None of the aforesaid Supreme Court judgments directly deals with the matter that has arisen before me.

It was contended that art. 20(3) does not restrict its operation to any particular proceeding, and that once a person is accused of an offence, the constitutional guarantee would extend in any proceeding of whatsoever nature where the evidence of the person accused is being taken. It was then pointed out that if such was the ambit of the article, the provisions contained in s. 132 of the Evidence Act would have to be considered to be invalid in the case of a person who has been accused of an offence. Section 132 of the Evidence Act provides as under:—

"132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

Under s. 132 of the Evidence Act, a witness is compelled to give an answer in any suit or in any civil or criminal proceeding which might incriminate him. The only safeguard, which is provided is that such answer, which he is compelled to give, would not subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. If under the constitutional guarantee he was not compellable to give such answer, then by merely providing a safeguard the constitutional guarantee is not prevented from being violated. Under s. 132, he is compellable to give answers which tend directly or indirectly to incriminate him and he is liable to be prosecuted for giving false evidence even under such compulsion.

At the stage of his final reply Mr. Manecksha, the learned counsel for the petitioner, however, made his submissions on art. 20(3) as follows:—

"Where a person is accused of an offence and pursuant to or in view of such accusation an enquiry is held by a person legally authorised to take evidence, the constitutional guarantee embodied in Art. 20(3) would apply irrespective of the nature or character of the inquiry held."

The words used in art. 20(3) require that the person claiming the protection must be accused of an offence. The accusation referred to in that article is not a bare allegation made by one person against another. It must be an allegation of an offence made with a view to secure the prosecution of the person for that offence before an authority entitled to investigate into it for the purpose of taking proceedings for punishment of that person for the said offence before a criminal Court or a judicial tribunal entitled to inflict punishment for such offence. The proceeding in which a person is not to be compelled to be a witness against himself must be a proceeding before a criminal Court or judicial tribunal before whom the prosecution has been launched for that offence with the object of having the accused punished by that Court or tribunal

for that offence, or a proceeding preliminary thereto in the course of investigation into that offence after such person is accused of the offence and the machinery of the criminal law has been set in motion. This construction is borne out by the context in which sub-cl. (3) of art. 20 is set out. Article 20(1) deals with the conviction of a person of any offence and the penalty therefor. Article 20(2) deals with prosecution and punishment for the same offence and art. 20(3) deals with a person accused of an offence. The whole art. 20 deals with proceedings starting from the accusation of a person of any offence and ending with his conviction. Sub-clause (3) of the said article in that context refers to compulsion of a person to be a witness after he is accused of an offence and the machinery of the criminal law has been set in motion in the course of the investigation into such offence and the prosecution of such person. It refers to criminal proceedings which commence with the accusation of an offence and which end in the conviction of the person so accused in the event of his being found guilty. Article 20(3) does not refer to any evidence that may be given in the course of any fact finding investigation or inquiry which may result in the discovery of material which would show that the witness is guilty of any offence. It does not refer to proceedings which are not criminal proceedings.

The investigation in the present case is taking place under the provisions of the Companies Act. Section 235 of the Companies Act, 1956, provides that the Central Government may appoint one or more competent persons as inspectors to investigate the affairs of any company and to report thereon in such manner as the Central Government may direct. The key words of the section are "to investigate the affairs of any company". The object of appointing inspectors is to investigate the affairs of a company. Section 235 thereafter provides for the persons on whose application such an appointment may be made. Section 236 provides for safeguards against an improper application being made, s. 237 provides for investigation of a company's affairs in other cases. It runs as follows:—

"237. Without prejudice to its powers under section 235, the Central Government—

(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if—

(i) the company, by special resolution; or

(ii) the Court, by order, declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government; and

(b) may do so if, in the opinion of the Central Government, there are circumstances suggesting—

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose;

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) that the members of that company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, the managing agent, the secretaries and treasurers, or the manager of the company."

Section 239 of the Companies Act, 1956, provides as under:—

"239. (1) If an inspector appointed under section 235 or 237 to investigate the affairs of a company thinks it necessary for the purposes of his investigation to investigate also the affairs of—

(a) any other body corporate which is, or has at any relevant time been, the company's subsidiary or holding company, or a subsidiary of its holding company, or a holding company of its subsidiary;

(b) any other body corporate which is, or has at any relevant time been, managed

(i) by any person as managing agent or as secretaries and treasurers who is, or was at the relevant time, either the managing agent or the secretaries and treasurers of the company;

(ii) by any person who is, or was at the relevant time, an associate of the managing agent or secretaries and treasurers of the company; or

(iii) by any person of whom the managing agent or secretaries and treasurers of the company is, or was at the relevant time, an associate;

(c) any other body corporate which is, or has at any relevant time been, managed by the company; or

(d) any person who is, or has at any relevant time been, the company's managing agent or secretaries and treasurers or an associate of such managing agent or secretaries and treasurers,

the inspector shall, subject to the provisions of sub-section (2) have power so to do, and shall report on the affairs of the other body corporate or of the managing agent, secretaries and treasurers or associate of the managing agent or secretaries and treasurers, so far as he thinks the results of his investigation thereof are relevant to the investigation of the affairs of the first-mentioned company.

(2) In the case of any body corporate or person referred to in clause (b)(ii), (b)(iii), (c) or (d) of sub-section (1), the inspector shall not exercise his power of investigating into and reporting on, its or his affairs without first having obtained the prior approval of the Central Government thereto."

Section 240 runs as follows:—

"240. (1) It shall be the duty of all officers and agents of the company, and where the company is or was managed by a managing agent or secretaries and treasurers, of all officers, and agents of the managing agent or secretaries and treasurers, and where the affairs of any other body corporate, or of a managing agent or secretaries and treasurers, or of an associate of a managing agent, or secretaries and treasurers, are investigated by virtue of section 239, of all officers and agents of such body corporate, managing agent, secretaries and treasurers or associate, and where such managing agent, secretaries and treasurers or associate is or was a firm, of all partners in the firm—

(a) to produce to an inspector all books and papers of, or relating to the company or, as the case may be, of or relating to the other body corporate, managing agent, secretaries and treasurers or associate, which are in their custody or power; and

(b) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

(2) An inspector may examine on oath any of the persons referred to in sub-section (1) in relation to the affairs of the company, other body corporate, managing agent, secretaries and treasurers or associate as the case may be; and may administer an oath accordingly.

(3) If any such person refuses—

(a) to produce to an inspector any book or paper which it is his duty under sub-section (1) to produce; or

(b) to answer any question which is put to him by an inspector in pursuance of sub-section (2),

the inspector may certify the refusal under his hand to the Court; and the Court may thereupon inquire into the case; and after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, punish the offender as if he had been guilty of contempt of the Court.

(4) If an inspector thinks it necessary for the purpose of his investigation that a person whom he has no power to examine on oath should be so examined, he may apply to the Court and the Court may, if it sees fit, order that person to attend and be examined on oath before it on any matter relevant to the investigation, and on any such examination—

(a) the inspector may take part therein either personally or by a legal practitioner;

(b) the Court may put such questions to the person examined as the Court thinks fit;

- (c) the person examined shall answer all such questions as the Court may put or allow to be put to him, but may at his own cost employ a legal practitioner, who shall be at liberty to put to such person such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him:

Provided that notwithstanding anything in clause (c), the Court may allow the person examined such costs as in its discretion it may think fit, and any costs so allowed shall be treated as part of the expenses of the investigation.

(5) Notes of any examination under sub-section (2) or (4) shall be taken down in writing and shall be read over to or by, and signed by the person examined, and may thereafter be used in evidence against him.

(6) In this section—

(a) the expression "officers" in relation to any company or body corporate, includes any trustee for the debenture holders of such company or body corporate;

(b) the expression "agent" in relation to any company, body corporate or person, means any one acting or purporting to act for or on behalf of such company, body corporate or person and includes the bankers and legal advisers of, and persons employed as auditors by such company, body corporate or persons; and

(c) any reference to officers, agents or partners shall be construed as a reference to past as well as present officers, agents or partners, as the case may be."

Sections 242, 243 and 244 of the said Act run as under:—

"242. (1) If, from any report made under section 241, it appears to the Central Government that any person has, in relation to the company or in relation to any other body corporate, managing agent, secretaries and treasurers, or associate of a managing agent or secretaries and treasurers, whose affairs have been investigated by virtue of section 239, been guilty of any offence for which he is criminally liable, the Central Government may, after taking such legal advice as it thinks fit, prosecute such person for the offence; and it shall be the duty of all officers and agents of the company, body corporate, managing agent, secretaries and treasurers, or associate, as the case may be (other than the accused in the proceedings), to give the Central Government all assistance in connection with the prosecution which they are reasonably able to give.

(2) Sub-section (6) of section 240 shall apply for the purposes of this section, as it applies for the purposes of that section.

243. If any such company or other body corporate, or any such managing agent, secretaries and treasurers or associate, being a body corporate, is liable to be wound up under this Act and it appears to the Central Government from any such report as aforesaid that it is expedient so to do by reason of any such circumstances as are referred to in sub-clause (i) or (ii) or clause (b) of section 237, the Central Government may, unless the company, body corporate, managing agent, secretaries and treasurers or associate is already being wound up by the Court, cause to be presented to the Court by any person authorised by the Central Government in this behalf—

(a) a petition for the winding up of the company, body corporate, managing agent, secretaries and treasurers, or associate, on the ground that it is just and equitable that it should be wound up;

(b) an application for an order under section 397 or 398; or

(c) both a petition and an application as aforesaid.

244. (1) If from any such report as aforesaid, it appears to the Central Government that proceedings ought, in the public interest, to be brought by the company or any body corporate whose affairs have been investigated in pursuance of clause (a), (b) or (c) of section 239,

(a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs, of such company or body corporate; or

(b) for the recovery of any property of such company, or body corporate, which has been misapplied or wrongfully retained;

the Central Government may itself bring proceedings for that purpose in the name of such company or body corporate.

(2) The Central Government shall indemnify such company or body corporate

against any costs or expenses incurred by it in, or in connection with, any proceedings brought by virtue of sub-section (1)."

From these provisions it is clear that the primary object of the appointment of inspectors is to investigate into the affairs of companies. It is a fact finding enquiry. It is intended to bring to light all the malpractices adopted by those in charge of the management of the company and the offences, if any, committed by them. One of the consequences which may follow no doubt is the launching of prosecutions, if as a result of such inquiry it is found that any offence or offences have been committed. The mere allegation by the Registrar or by persons referred to in s. 235 that any person has committed any offence cannot be said to result in such person being "accused of an offence" within the meaning of art. 20(3) of the Constitution. The inquiry before an inspector is not a proceeding of the nature contemplated in art. 20(3) of the Constitution.

Even in England the inquiry contemplated under the provisions of the English Companies Act is merely a fact finding inquiry. This conclusion is supported by the remarks made by Lord Esher M. R. in the case of *Re. Grosvenor and West-end Railway Terminus Hotel Company Limited*.¹ In that case an examination into the affairs of a joint stock company was being held by an inspector appointed by the Board of Trade under s. 56 of the Companies Act, 1862, corresponding to the provisions contained in s. 138 of the Indian Companies Act, 1913. Lord Esher, in the course of his judgment, observes as under:—

"What is the nature of that inquiry? The object of the inquiry which the Board of Trade has authority to order under s. 56 is to examine into and ascertain facts to enable the inspector to make a report of the opinion to the Board of Trade. That is all... The report will not be evidence in a Court of Justice of the existence of any fact mentioned in it; it binds no one and has no effect upon any one or any company.... The report itself is not evidence of anything contained in it, and can only be given in evidence as showing the opinion of the inspector in relation to any matter contained in it... The beginning and the end of the duty of an inspector appointed under s. 56 is to examine and report. He does not occupy a quasi-judicial position."

In the case of *Hearts of Oak Assurance Co. v. Attorney General*,² it has been held that the object of the examination by an inspector appointed under the Industrial Assurance Act, 1923, was merely to recover information as to the companies affairs and that it was in no sense a judicial proceeding for the purpose of trial of an offence.

There are proceedings under other Acts whereunder, in England, a person may be compelled to give testimony which might incriminate him. In William's Law and Practice in Bankruptcy, 16th edn., at p. 92 it has been stated as under:—

"A debtor who is in custody or under remand on a criminal charge is bound at his public examination to answer all such questions as to 'his conduct, dealings and property' as the Court may put or allow to be put to him even though the answers may criminate him, since the examination is for the protection of the public and not merely for the sake of the creditors. The scope of the inquiry is not limited to offences under s. 11 of the Debtors Act, 1869..."

In *Atherton In re*³ it is observed that the usual practice of not pressing such questions in relation to the alleged offence while the criminal charge is hanging over the debtor, but of adjourning the public examination until after the trial, is only a rule of convenience. The fact that a debtor cannot refuse to answer questions which incriminate him when he is examined in his public examination in bankruptcy appears also from a judgment in the case of *Paget In re: Official Receiver, Ex parte*,⁴ and the case of *Re. Jawett*.⁵ The provision is the same so far as Indian Courts are concerned. See in this connection Sir Dinshaw Mulla's Law of Insolvency, Second edn., p. 281.

¹ (1897) 76 L. T. 337.

² [1922] A. C. 892.

³ [1912] 2 K. B. 251.

⁴ [1927] 2 Ch. 85.

⁵ [1929] 1 Ch. 108.

Mr. Maneeksha has strongly urged that there is a clear allegation of criminal misappropriation made against the petitioner in the report of the Registrar of Companies and that the petitioner has been accused of an offence. In my view, the statements made by the Registrar in the report even though they amount to an allegation of the petitioner having committed an offence, do not result in the petitioner being "a person accused of any offence" within the meaning of art. 20(3) of the Constitution. In determining whether the provisions of s. 240 of the Companies Act infringe the fundamental rights guaranteed under art. 20(3) of the Constitution, the question that I have really to consider is not what has in fact been actually done in the present case, but what may be done under the provisions of that section. The provisions of s. 237, sub-cl. (c), contemplate the existence of circumstances suggesting that the business of a company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose. The said provisions as well as the provisions contained in s. 242 envisage the existence of circumstances which may amount to the commission of an offence by an individual in relation to the affairs of the company. The existence of such circumstances is contemplated whilst appointing an inspector for investigating into the affairs of a company, and the possibility of a prosecution being launched as a result of such investigation is also envisaged. But that is not sufficient to render the enactment of s. 240 invalid as offending against art. 20(3) of the Constitution.

Mr. Maneeksha has strongly relied on the judgment in the case *Calcutta M. & Co. v. Collector of Customs*.¹ Sinha J. in that case held that the provision of s. 171-A of the Sea Customs Act, in so far as it enabled the authorities to compel a person accused of an offence to give evidence against himself and/or to produce documents for that purpose, offended against art. 20(3) of the Constitution and was bad. In the course of his judgment, when his attention was drawn to the decision in *M. P. Sharma v. Satish Chandra, District Magistrate, Delhi*,² the learned Judge remarked that a formal accusation need not depend upon a first information report being filed and that it depended on the facts of each case. Dealing with the provisions of the said s. 171-A, the learned Judge observes at p. 257 as follows:—

"But the proceedings under S. 171A, are of a different nature altogether. Here, he is compelled to give evidence and to depose truthfully. He is also compelled to produce any document. In either case, he might incriminate himself. Although such a proceeding is not in course of a criminal trial, it is obvious that it is preliminary to it."

When it was pointed out to the learned Judge that in the case of *M. P. Sharma v. Satish Chandra* there was actually a first information report, he observed that in his opinion that was not a fatal objection. According to the learned Judge the question was whether an accusation had been made that an offence had been committed and whether the investigation might lead to a prosecution for the alleged offence. The learned Judge has in that judgment extended the constitutional guarantee to cases where there is no first information report filed and where the object of the inquiry was proceedings under the Sea Customs Act. The learned Judge in that case has made no reference at all to the process of reasoning whereby Mr. Justice Bhagwati in *Maqbool Hussain v. The State of Bombay*³ came to the conclusion that the proceedings contemplated under art. 20(2) were proceedings of a criminal nature before a Court or a judicial tribunal. The learned Judge's attention does not seem to have been drawn to the distinction drawn by Mr. Justice Mukherjea in *S. A. Venkataraman v. The Union of India*,⁴ between a fact finding inquiry and an investigation into an offence. With respect to the learned Judge, I am unable to agree with his reasoning on the scope and object of art. 20(3) of the Constitution.

The petitioner challenges the investigation only on the ground of unconsti-

1 [1956] A. L. R. Cal. 253.

2 [1954] S. C. R. 1077.

3 [1953] S. C. R. 780, s.c. 58 Bom. L. R.

13, S. C.

4 [1954] S. C. R. 1150.

tutionality of the provisions contained in s. 240 of the Companies Act. He has not come before me with an allegation that even though the provisions of s. 240 may be good in law and do not offend against the provisions of art. 20(3), in the exercise of the authority given under s. 240, there is a violation of the fundamental rights of the petitioner and that the petitioner is entitled to claim relief by reason thereof. Mr. Manecksha has frankly conceded that he has not claimed any such relief and that he is not, on the present petition, claiming any such relief.

On the same reasoning which applies to the provisions of s. 240, I hold that s. 239 also does not in any way infringe the provisions of art. 20(3) of the Constitution.

It is next urged by Mr. Manecksha, the learned counsel for the petitioner, that the provisions of ss. 239 and 240 of the Companies Act, 1956, offend against the provisions of art. 14 of the Constitution. That article provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Mr. Manecksha contends that there is no reasonable classification for depriving a company and its management of the protection afforded by the provisions of the Criminal Procedure Code and the Indian Evidence Act. He strongly relies upon the protection afforded by s. 132 of the Evidence Act and the protection afforded by ss. 161(2) and 162(1) of the Criminal Procedure Code. He says that s. 239 confers an arbitrary and unfettered power to discriminate. The provisions of the Indian Evidence Act only apply to all judicial proceedings in or before any Court. It is in terms stated in s. 1 of that Act that they are not to apply to proceedings before an arbitrator. The term 'Court' for the purpose of the Evidence Act has been defined to include all persons except arbitrators, legally authorised to take evidence. The provisions of the Evidence Act do not extend to proceedings other than judicial proceedings. The provisions contained in s. 132 of the Evidence Act have not been accorded the status of a fundamental right and it cannot be said that the provisions of art. 14 have been violated by non-application of the provisions of the Evidence Act to proceedings other than judicial proceedings. The proceedings before an inspector are in no sense judicial proceedings and by the non-application of the provisions of the Evidence Act it cannot be said that any fundamental right has been violated.

So far as the provisions contained in ss. 161(2) and 162(1) of the Criminal Procedure Code are concerned, an investigation before a police officer stands entirely on a different footing from an investigation before an inspector. The provisions of art. 14 came up for consideration before the Supreme Court in the case of *Budhan Choudhary v. The State of Bihar*.¹ Mr. Justice Das, as he then was, who delivered the judgment of the Court, observes as follows (p. 1049):—

"...It is now well-established that while art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question.... What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration."

The learned Judge further observes that art. 14 condemns discrimination not only by a substantive law but also by a law of procedure. So far as the impugned provisions are concerned, the classification is founded on an intelligible differentia and that differentia bears a rational relation to the object sought to be achieved by the Companies Act. A company is the creature of statute. The object of the Companies Act, as observed by Palmer in *Palmer's Company Law*, 19th edn., at p. 8, was to throw open to all the coveted privilege

of carrying on business with limited liability. It is in the nature of things that the business of the company has to be carried on through human agency and it is but natural that those who are specially placed in a position to carry on the business of the company should be made to exercise their powers in the name of the company for the benefit of the company and that protection should be afforded to members and to creditors and other persons dealing with the company. A person can protect his own interest. A company's interest may need protection when those in charge of the affairs of the company act prejudicially to its interest. Privileges are conferred under the Companies Act. Those privileges are liable to be withdrawn when abused. The object of an inquiry before an inspector appointed under the Companies Act is different from the object of an inquiry before a police officer investigating into an offence. The object of the appointment of an inspector is "to investigate the affairs of any company". There are various safeguards provided before an investigation is launched. The object of the inquiry is to see that the salutary provisions of the Companies Act, subject to which privileges are granted to companies, are carried out and that damages suffered by reason of the fraud, misfeasance or misconduct of any person in connection with the promotion, formation or management of the affairs of the company are recovered and that any property which has been misapplied or wrongfully retained may be recovered. As a result of the investigation a prosecution is liable to be launched in respect of an offence committed in relation to a company. The object of an investigation by an inspector appointed under the Companies Act is totally different from the object of an investigation conducted under the provisions of the Criminal Procedure Code. In this case, if there is any discrimination it is with reason and it is with a view to carry out the object of the Legislature as envisaged in the Act itself. The classification can in no sense be considered to be arbitrary or without any substantial basis or not founded upon any rational and substantial distinction bearing a reasonable or just relation to the object sought to be achieved. The provisions of s. 239 are necessary in order to have an effective investigation into the affairs of the company. The section itself provides that if an inspector appointed under s. 235 or 237 to investigate the affairs of a company thinks it necessary for the purpose of his investigation to investigate also the affairs of other bodies therein set out, he would have a right to do so subject to the provisions contained in sub-s. (2) of that section. It cannot be said that the provisions of s. 239 confer an arbitrary or unfettered power to discriminate. Safeguards are provided by sub-s. (2). In my view, ss. 239 and 240 do not offend against art. 14 of the Constitution.

The learned Advocate General desired to refer to several cases in which it has been held that where there has been a discrimination in the course of the exercise of its powers by an authority, the discrimination may be bad, but the power may be good. It is not necessary for the purpose of this case to refer to any of those authorities as it is not the case of the petitioner that he has been singled out or discriminated against in any particular manner in the course of the exercise of a lawful power and that he is, therefore, entitled to the protection of the Court.

It has been strongly urged by Mr. Manecksha that as respondent No. 1 has been appointed under the provisions of s. 138 of the Old Companies Act, 1913, he cannot exercise any of the powers conferred under ss. 239 and 240 of the new Companies Act, 1956, and that the Central Government had no right or authority to extend its approval to the exercise by respondent No. 1 of any powers under s. 239 of the new Act. The opening words of s. 239(1) are as follows:—

"239. (1) If an inspector appointed under section 235 or 237 to investigate the affairs of a company thinks it necessary for the purposes of his investigation to investigate also the affairs of..."

Mr. Manecksha urges that the powers conferred under s. 239 could only be exercised by an inspector appointed under s. 235 or 237 of the new Companies Act. He says that an inspector appointed under s. 138 of the Companies Act, 1913,

is not an inspector appointed under s. 235 or 237 of the new Companies Act and that the provisions of s. 239 are inapplicable to him. The Advocate General in answer points out that under the provisions of the new Companies Act an inspector appointed under s. 138 of the old Companies Act, 1913, is deemed to have been appointed under the new Companies Act, 1956, and that he is entitled to exercise the powers referred to in s. 239 of the new Act. Mr. Manecksha urges that there is no scope for such argument as s. 239 speaks of a person "appointed under section 235 or 237" and that it does not speak of a person deemed to have been appointed under s. 235. In my view, this argument of Mr. Manecksha is not sound. If in law a person could be deemed to be appointed under s. 235, then he would be entitled to exercise all the powers and authorities exercisable by a person appointed under s. 235. The words "appointed under section 235 or 237" have been used by the Legislature not with a view to distinguish persons appointed under s. 235 or 237 from persons who might be deemed to have been so appointed, but to distinguish them from inspectors who may be appointed under the other provisions of the Companies Act. Section 247 of the Companies Act, 1956, provides that where it appears to the Central Government that there is good reason so to do, it may appoint one or more inspectors to investigate and report on the membership of any company and other matters relating to the company, for the purpose of determining the true persons who are or have been financially interested in the success or failure, whether real or apparent, of the company, or who are or have been able to control or materially to influence the policy of the company. Section 249 of the Companies Act provides that where any question arises as to whether any body corporate, firm or individual is or is not, or was or was not, an associate of the managing agent or secretaries and treasurers of a company and it appears to the Central Government that there is good reason to investigate such question, it may appoint an inspector for the purpose of making the investigation. In view of the various provisions of the Act relating to the appointment of inspectors, the Legislature has thought it fit to restrict the powers mentioned in s. 239 to those persons appointed under s. 235 or s. 237. In my view, these powers are equally exercisable under the circumstances mentioned in s. 239 by inspectors deemed to have been appointed under s. 235 or 237 of the new Companies Act, 1956.

Mr. Manecksha then urges that if a person is appointed as an inspector under the old Companies Act, 1913, he cannot be deemed to be an inspector appointed under the new Companies Act, 1956. He says that by s. 644 of the new Act the old Companies Act, 1913, has been repealed. According to him, the only sections which save the appointment of an inspector made under the old Companies Act are ss. 646 and 658 of the new Companies Act. The Advocate General, on the other hand, contends that the real sections which are applicable to such appointments are ss. 645 and 652 of the Companies Act, 1956. In order to appreciate the rival contentions, it is necessary to set out the relevant provisions of the new Companies Act, 1956, relating to repeals and savings. They run as under:—

"645. Nothing in this Act shall affect any order, rule, regulation, appointment, conveyance, mortgage, deed, document or agreement made, fee directed, resolution passed, direction given, proceeding taken, instrument executed or issued, or thing done, under or in pursuance of any previous companies law; but any such order, rule, regulation, appointment, conveyance, mortgage, deed, document, agreement, fee, resolution, direction, proceeding, instrument or thing shall, if in force at the commencement of this Act, continue to be in force, and so far as it could have been made, directed, passed, given, taken, executed, issued or done under or in pursuance of this Act shall have effect as if made, directed, passed, given, taken, executed, issued or done under or in pursuance of this Act.

646. Nothing in this Act shall affect the operation of section 138 of the Indian Companies Act, 1913 (VII of 1913) as respects inspectors, or as respects the continuation of an inspection begun by inspectors, appointed before the commencement of this Act; and

the provisions of this Act shall apply to or in relation to a report of inspectors appointed under the said section 138 as they apply to or in relation to a report of inspectors appointed under section 235 or 237 of this Act.

652. Any person appointed to any office under or by virtue of any previous companies law shall be deemed to have been appointed to that office under or by virtue of this Act.

658. The mention of particular matters in sections 645 to 657 or in any other provision of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897 (X of 1897), with respect to the effect of repeal."

The Advocate General urges that s. 645 in terms provides that nothing in the new Companies Act, 1956, would affect any order issued, appointment made or proceeding taken under or in pursuance of any previous companies law, viz. under or in pursuance of the Indian Companies Act, 1913, and that if such order, appointment or proceeding was in force at the commencement of the Act, it would continue to be in force, and so far as it could have been made, issued or taken under or in pursuance of the new Companies Act shall have effect as if made, issued or taken under or in pursuance of the new Companies Act and that by reason of the aforesaid provisions respondent No. 1's appointment under the old Act is to have effect as if made under the new Act. The Advocate General further contends that by virtue of s. 652 any person appointed to any office under or by virtue of any previous companies law shall be deemed to have been appointed to that office under or by virtue of the new Companies Act, 1956. He says that the appointment of an inspector by the Central Government is an appointment to an office and that respondent No. 1 being an inspector appointed under or by virtue of the old Act should be deemed to be an inspector appointed under or by virtue of the new Companies Act. Mr. Manecksha frankly conceded that the ambit of s. 645 is wide enough to include what the Advocate General says it includes, but he says that so far as appointments of inspectors are concerned, there is a specific provision contained in s. 646 of the new Companies Act and it is that provision which must operate. He urges that whenever a special provision has been made in relation to a specific matter, it is that provision which would prevail and not the general provision. In my view, a special provision may prevail over a general one where there is a conflict between the two. Where a special provision does not deal with all the circumstances and situations that may arise in respect of the subject-matter dealt with under the special provision, recourse can be had to the general provisions contained in other sections of the Act.

Section 646 in its earlier part sets out that nothing contained in the new Companies Act shall affect the operation of s. 138 of the Indian Companies Act, 1913, as respects inspectors, or as respects the continuation of an inspection begun by inspectors appointed under the old Act. Section 138 of the old Act provides that the Central Government may appoint one or more competent inspectors to investigate the affairs of any company and report thereon in such manner as the Central Government may direct in the circumstances therein mentioned. Even though by s. 644 the old Companies Act, 1913, is repealed, by s. 646 the operation of s. 138 is saved. That has been done with a view to avoid the possibility of a contention that on the repeal of a provision empowering a person to appoint, the authority of the person already appointed would cease. The later part of s. 646 provides that the provisions of the new Act would apply to or in relation to a report of inspectors appointed under s. 138 of the old Act as they apply to or in relation to a report of inspectors appointed under s. 235 or 237 of the new Companies Act. By reason of this provision efficacy is given to the report of inspectors as if it had been made under the new Act so that the same can be used for the purpose of proceedings that may be taken under the provisions of the new Companies Act. The powers of inspectors appointed under the old Act are contained in s. 140 of the old Companies Act. The operation of that section has not been saved. This clearly shows that s. 646 is not intended to deal exhaustively with

the question relating to inspectors appointed under the old Companies Act. When the special provisions contained in s. 646 do not exhaustively deal with the matter, there is no reason why the general provisions contained in s. 645 should not be operative. Mr. Manecksha, however, states that recourse should be had to s. 658 and not to s. 645. By s. 658 the general application of s. 6 of the General Clauses Act has been preserved. Section 6(e) of the General Clauses Act provides that the repeal shall not affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment acquired, accrued or incurred under any enactment so repealed and that any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed. In view of this provision, the powers conferred under s. 140 of the old Companies Act would be preserved.

Section 658 says in terms that the mention of particular matters in ss. 645 to 657 or in any other provision of the Act shall not prejudice the general application of s. 6 of the General Clauses Act. It cannot be said that the intention of the Legislature in enacting ss. 646 and 658 was to exclude the operation either of s. 645 or s. 652 in relation to inspectors. If s. 646 is silent as regards the powers to be exercised by an inspector appointed under the old Act, there is no reason why the provisions of s. 645 should not be looked at and given effect to in that connection.

It is a little interesting to examine the corresponding provisions of the English Companies Act, 1948, which have been taken as a model by the draftsmen of the Companies Act, 1956. Section 135(1) of the English Companies Act, 1929, corresponded to s. 138 of the Indian Companies Act, 1913. The powers conferred under the Indian enactment on the Central Government were conferred on the Board of Trade under the English enactment. Section 135(2) of the English Companies Act, 1929, corresponded to s. 139 of the Indian Companies Act, 1913. Section 135, (3), (4) and (5) of the English Companies Act, 1929, corresponded to the provisions contained in s. 140 of the Indian Companies Act, 1913, and s. 135(6) of the English Companies Act, 1929, corresponded to s. 141(1) and (2) of the Indian Companies Act, 1913. Section 137 of the English Companies Act, 1929, which corresponded to s. 142 of the Indian Companies Act, 1913, provided that a company may by special resolution appoint inspectors to investigate its affairs and that the inspectors so appointed shall have the same powers and duties as inspectors appointed by the Board of Trade, except that instead of reporting to the Board, they shall report in such manner and to such persons as the company in general meeting may direct. It was further provided that if any officer or agent of the company refused to produce to the inspectors any book or document, which it was his duty under that section so to produce, or refused to answer any question which was put to him by the inspectors with respect to the affairs of the company, he would be liable to be proceeded against in the same manner as if the inspectors had been inspectors appointed by the Board of Trade. In s. 142 of the Indian Companies Act, 1913, similar provisions appear, with the exception that instead of the Board of Trade the Central Government has been substituted. When the Parliament in England enacted the English Companies Act, 1948, it repealed the provisions contained in the English Companies Act, 1929. Sub-section (2) of s. 459 of the English Companies Act, 1948, corresponds to s. 645 of the Indian Companies Act, 1956. It is by virtue of s. 459(2) of the Act that the orders passed, appointments made and proceedings taken under the old English Companies Act, 1929, have been continued and so far as the same could have been made, passed or taken under or in pursuance of the new English Companies Act, 1948, have effect as if made, passed or taken under or in pursuance of the new English Companies Act, 1948. Section 646 of the Indian Companies Act, 1956, corresponds to s. 459(6) of the English Companies Act with very material variations. Section 459(6)

of the English Companies Act, 1948, runs as follows:—

- “459. (6) Nothing in this Act shall affect the operation of section one hundred and thirty-seven of the Companies Act, 1929, as respects inspectors appointed before, or to continue an inspection begun by inspectors appointed before the commencement of this Act, and section one hundred and seventy-one of this Act shall apply to a report of inspectors appointed under the said section one hundred and thirty-seven as it applies to a report of inspectors appointed under section one hundred and sixty-four of this Act.”

Under the aforesaid provision what has been saved is the operation of s. 137 of the English Companies Act, 1929, which provided for appointment of Inspectors by Companies and not of s. 135 of that Act which provided for appointment of inspectors by the Board of Trade. Section 158 of the Indian Companies Act, 1913, the operation of which is saved by s. 646 of the new Companies Act, 1956, refers to the appointment of inspectors by the Central Government under the Act of 1913 and not to the appointment of inspectors by the company under the provisions of s. 142, with the curious result that what is sought to be saved by s. 646 is that which is already saved under the provisions of s. 645. There is no provision in the Indian enactment saving the operation of s. 142 of the old Indian Companies Act, 1913. It is not for the Court to consider why the Legislature should have made a reference to s. 138. In interpreting the provisions of an enactment, the Court has to consider what in fact has been enacted irrespective of the provisions of any other statute passed by the Legislature of a different country even though such legislation might have furnished a model to the draftsmen. In England by s. 459(2) of the English Companies Act, 1948, orders, appointments and proceedings under the old English Act of 1929 have been saved and effect has been given thereto as if the same had been issued, made or taken under the new English Act of 1948. A similar effect should be given to the corresponding provisions of s. 645 of the Indian Companies Act, 1956. In my view, in respect of matters not specifically dealt with in s. 646, recourse must be had to s. 645 and s. 652 before turning to the residuary s. 658. In my view, the appointment of an inspector made under s. 138 of the old Companies Act, 1913, is liable to be deemed to have been made under the Companies Act, 1956, since the day it came into force and must have effect as if the appointment had been made under the new Companies Act of 1956. I hold that respondent No. 1 as such inspector is entitled to exercise all the powers conferred under s. 239 or s. 240 of the new Companies Act, 1956, and the order of the Central Government according its approval under s. 239(2) of the new Companies Act, 1956, to the exercise by respondent No. 1 of the powers conferred under s. 239 is valid.

In view of what I have stated above, the notices issued by respondent No. 1, the examination held by respondent No. 1 and the interim report made by respondent No. 1 are valid in law and are not liable to be set aside.

The petitioner appealed.

M. L. Maneksha, with *P. N. Bhagwati* and *A. B. Diwan*, for the appellant.

H. M. Seervai, Advocate General, with *J. M. Thakore*, for the respondents.

CHAGLA C.J. This appeal raises several important questions concerning the provisions of the new Companies Act of 1956. The facts which are necessary to state are very few. The appellant, who is also the petitioner, is the managing agent of a limited company called the Harinagar Sugar Mills Ltd. On November 15, 1954, the Registrar of Companies called for an explanation from the Harinagar Sugar Mills Ltd., and the Registrar stated in his letter that it had been represented to him under s. 137(6) of the Indian Companies Act that the business of the company was carried on in fraud and he had, therefore, to call upon the company to furnish the information which he required which was set out in the latter part of the letter. On April 15, 1955, the Registrar

made a report to the Central Government. This report was made under s. 187(5) of the old Companies Act, and the report was that the affairs of the company were carried out in fraud of contributories and he was of the opinion that the affairs of the company disclosed an unsatisfactory state of affairs. He pointed out that the appellant as the managing agent of the company was also the promoter of the company. He stated in his report that, under a fictitious name of Bansilal Uchant Account, the company was advancing money to the several farms owned by the appellant but ostensibly purchased from the company's funds. He also recorded that between the years ending September 1942 and 1951 about Rs. 19,200 were paid for Harpur Farm and Rs. 39,300 were paid for Bhawanipur Farm, which showed that Uchant Account was mainly operated for purchasing such lands out of the funds of the company but for and on behalf of the appellant. The Registrar also further stated in this report that the managing agents were interested in Harinagar Cane Farm which is the principal property of the appellant, and there was no doubt that the managing agents were utilising the property of the company for their personal gain. On this report the Central Government passed an order on November 1, 1955, appointing respondent No. 1 as an Inspector to investigate into the affairs of the company under s. 188(iv). In the operative part of this order it is stated that the Central Government, in exercise of the powers conferred by sub-s. (iv) of s. 188 of the said Act, is hereby pleased to appoint Shri Maneck P. Mistry (i.e. respondent No. 1), F.S.A.A., F.C.A., Chartered Accountant, Bombay, as an Inspector to investigate into the affairs of the company from the date of incorporation and point out all irregularities and contraventions in respect of the provisions of the Indian Companies Act, 1913, or any other law and report in the manner indicated in a separate communication sent to him. This separate communication dealt with the mode of inquiry and the memorandum states:

"As provided by section 141A if on an examination of the report the Central Government find that any person has been guilty of any offence in relation to the company for which he is criminally liable, Government will refer the matter to the Advocate-General or the Public Prosecutor."

Then comes a direction to the Inspectors that they should bear in mind that for a successful prosecution the evidence in support of a charge must be clear, tangible and cogent. Inspectors were further asked that they should specify in their reports with reference to the evidence, either oral or documentary or both, collected during investigations on the following amongst other matters; and the material matters to which reference might be made are: What is the offence committed, quoting as far as possible the section contravened; the precise evidence, oral, documentary or both, which implicates each of the named accused and goes to prove the charge; and in case of misappropriation, the amount misappropriated. There is a further direction to the Inspectors that they should make proper use of their rights available to them under s. 140 of the Act including the right to examine a person on oath. Questions should be so put to persons examined on oath as to bring out their admissions with reference to facts. Now, this memorandum was annexed to the order because this memorandum contains directions issued to all Inspectors appointed under the provisions of the Companies Act, and a copy of it was sent to respondent No. 1 for his guidance in the investigations which he was called upon to undertake pursuant to this order. Pursuant to the powers conferred upon him under this order, respondent No. 1 wrote to the appellant a letter intimating to him that under sub-s. (2) of s. 140 of the Indian Companies Act he will examine him on oath in relation to the business of the company. On July 26, 1956, the Central Government accorded its approval under s. 239(2) of the new Companies Act (I of 1956) to respondent No. 1 exercising the powers of investigation into and reporting on the affairs of the appellant including his personal books and accounts and Messrs. Narainlal Bansilal, the managing agents of Harinagar Sugar Mills Ltd. It may be stated that the appellant is

the proprietor of the firm of Narainlal Bansilal. After approval was accorded, respondent No. 1 served upon the appellant four notices dated May 9, 1957, May 16, 1957, May 29, 1957 and June 29, 1957. The four notices are substantially identical and it is sufficient to refer to the first one of them. The notice of May 9, 1957, states:

"NOW THEREFORE by virtue of the provisions contained in s. 240 of the Companies Act, 1956, I hereby call upon you to attend my office on 14th May 1957 at 3 P.M. at the offices of Messrs. Kalyaniwalla & Mistry, 32, Apollo Street, Fort, Bombay, for the purpose of being examined on oath in relation to the affairs of the said company and I also hereby call upon you to produce to me all the books of account and papers relating to the said company as mentioned below. Please take further notice that in default of compliance with the requisition aforesaid necessary legal steps will be taken without further reference to you."

Then comes a list of books and papers to be produced, and among them are the personal books of account of the appellant for the year 1933 up-to-date, books of account of Messrs. Narayanlal Bansilal, the managing agents of Harinagar Sugar Mills Ltd., for the years 1933 up-to-date, and books of account of Harinagar Cane Farm from 1934 up-to-date. The petition which the appellant filed, and out of which this appeal arises, challenged these four notices as being bad in law, and the challenge was based on three grounds which were urged before the Court below and which have been very effectively and strongly urged by Mr. Manecksha before us. The three grounds which were urged were that respondent No. 1 having been appointed under the old Act had no jurisdiction to exercise powers under the relevant provisions of the new Act. The second contention was that certain portions of s. 240 of the Companies Act, to which we will make reference at the proper time, offend against the provisions of art. 20(3) of the Constitution, and it was also urged that certain portions of ss. 239 and 240 offend against the provisions of art. 14 of the Constitution. The learned Judge rejected all the three contentions raised by the appellant and dismissed the petition. Hence this appeal.

Turning to the first point which deals with the powers of the appellant, it is necessary in the first place to look at the relevant provisions of the old Act of 1913 and the new Act of 1956. Under the old Act, under s. 137 power was conferred upon the Registrar to call for information or explanation from a company in respect of the affairs of the company, and sub-s. (5) of that section provided that on the receipt of the necessary information if it disclosed an unsatisfactory state of affairs as far as the company was concerned, it was made incumbent upon the Registrar to report the circumstances of the case to the Central Government. Then s. 138 conferred upon the Central Government the power to appoint one or more competent Inspectors to investigate the affairs of any company, and the case with which we are concerned is sub-cl. (iv)—

"(iv) in the case of any company, on a report by the Registrar under section 137(5)."

It was under this section that the Central Government appointed an Inspector on a report made by the Registrar under s. 137(5). Section 140 deals with inspection of books and examination of officers and it provides:

"(1) It shall be the duty of all persons who are or have been officers of the company to produce to the inspectors all books and documents in their custody or power relating to the company.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly."

And it is made penal by sub-s. (3) to refuse to produce any book or to answer any question put by the Inspector relating to the affairs of the company. It will be noticed that s. 140 confers rather wide powers upon the Inspector, but the power was confined to investigation relating to the affairs of the company, and the power to administer oath and obtain documents was also confined to matters relating to the business of the company under investigation. There was no power in the Inspector to investigate into the affairs of any other body or any other person. Section 141 dealt with results of the examination

held under s. 140, and sub-s. (1) made it incumbent upon the Inspector to report his opinion to the Central Government. Section 141A dealt with the institution of prosecutions and these prosecutions were to be launched by reason of the facts disclosed in the report of the Inspector. But before a prosecution could be launched, the matter had to be referred by the Central Government to the Advocate General or the Public Prosecutor. But it was left to the subjective determination of the Central Government whether to refer the matter to the Advocate General or the Public Prosecutor because sub-s. (1) expressly provided:

"If from any report made under s. 138 it appears to the Central Government that any person has been guilty of any offence in relation to the company for which he is criminally liable..."

Sub-section (2) dealt with the case where the matter was referred to the Advocate General or the Public Prosecutor, and if either of them came to the conclusion that the case was one in which a prosecution ought to be instituted, he had to institute the proceedings and it was made obligatory upon all officers and agents of the company, past and present, to give him all assistance in connection with the prosecution which they were reasonably able to give. But it is material to note that the accused in the proceedings was exempted from this duty; in other words, it was not obligatory upon him to render any assistance to the law officer of the State. Section 142 gave the power to the company to appoint Inspectors in contradistinction to the power conferred upon the Central Government under s. 138. Under this section the company could appoint an Inspector by a special resolution, and the report was to be made to the company instead of to the Central Government. Section 143 provided that the report of the Inspector shall be admissible in any legal proceeding as evidence of the opinion of the Inspector in relation to any matters contained in the report. Therefore, this was the scheme under the old Act with regard to investigation into the affairs of a company which the Registrar found was not managed as it should be managed, and it will be noticed that the scope and purpose of the investigation was to investigate the affairs of the company and all powers which were conferred upon the Inspector were germane to the main purpose of the investigation which was to find out how the affairs of the company were being managed.

Turning to the new Act of 1956, certain important alterations were made in the provisions with regard to inspection and we will now proceed to point out what the main alterations were. Section 234 substantially corresponded to s. 137. Section 235 also substantially corresponded to s. 138. Then we have s. 237 which confers power upon the Central Government to appoint Inspectors in cases other than those covered by s. 235 and without prejudice to the powers of the Central Government under that section, and it is made incumbent upon the Government to appoint Inspectors to investigate the affairs of the company if the company by special resolution or the Court by order declares that the affairs of the company ought to be investigated by an Inspector appointed by the Central Government. So that the power that was given under the old Act to the company under s. 142 to appoint Inspectors who were to report to the company itself was taken away, and instead of that s. 237 made it obligatory upon the Government to appoint Inspectors if the company itself by special resolution declared that the affairs of the company should be investigated, and an important power was conferred upon the Court that the Court could also direct the Government to appoint an Inspector or Inspectors. Then we come to s. 239 and this provision considerably enlarges the power of the Inspector with regard to inspection. It will be remembered that s. 140 confined the power of the Inspector with regard to investigation within certain definite bounds. Section 239 extended the power of the Inspector not only to investigate into the affairs of the company concerned, but also into the affairs of related companies or of managing agents or associates as defined by the Companies Act. It is under this section that respondent No. 1 is purporting,

under the notices issued and which are impugned, to call upon the appellant to submit to an investigation of his affairs both as managing agents and also of his individual business. But while conferring this very extensive power upon the Inspector, the Legislature was careful to provide that this examination was to be held if an Inspector appointed under s. 235 or s. 237 to investigate the affairs of the company thinks it necessary for the purposes of this investigation. So that it was not as if the Inspector was at large and he could call upon a managing agent to disclose his private books of account or the books of account of his private business or to indulge in a roving inquiry. The Inspector had to be satisfied that such inspection of books or such inquiry was necessary for the main purpose for which he was appointed an Inspector and for which the inquiry was ordered and that was to investigate into the affairs of the company. In other words, what the Inspector had constantly to keep in mind was that his primary function and duty was to investigate the affairs of the company. It is in order to discharge that primary function that he was empowered to go further on what he could do under s. 140 and to examine the managing agent and also examine his personal books of account and the books of account of his own personal business. Sub-section (2) of s. 239 provides:

"In the case of any body corporate or person referred to in clause (b)(ii), (b)(iii), (c), or (d) of sub-section (1), the inspector shall not exercise his power of investigating into, and reporting on, its or his affairs without first having obtained the prior approval of the Central Government thereto."

As will be remembered, respondent No. 1 only sought to exercise his power under s. 239 after he had obtained the prior approval of the Central Government. Therefore, by this sub-section the Central Government kept control over the Inspector and would permit him to exercise his extensive powers under s. 239 with regard to investigation of persons and bodies other than the company concerned, provided the Central Government gave its approval to such investigation. Then s. 240 casts an obligation upon all officers and agents of the company and all companies and persons referred to in s. 239, whose affairs are being investigated through the approval of Government, to produce all documents and evidence in their possession. Sub-section (2) of that section empowers the Inspectors to examine any person on oath, and sub-s. (3) provides that if such a person refuses to produce before an Inspector any relevant book or paper or answer any question put to him by the Inspector, he may certify the refusal to a competent Court and the Court may punish such person for contempt. Then sub-s. (4) empowers the Inspector to apply to the Court for the purposes of investigation to examine on oath a person whom he has no power to examine pursuant to the power conferred upon him, and the Court may, if it thinks fit, order such a person to attend and be examined on oath. This examination is to be held by the Court itself. There is an obligation upon the person examined to answer all questions. Then comes the important provision in sub-s. (5) that the notes of examination, whether of evidence taken by the Inspector under sub-s. (2) of s. 240 or taken by the Court under sub-s. (4), shall be taken down in writing and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him. Section 241 deals with the Inspector's report which has got to be forwarded to the Central Government, and s. 242 deals with prosecution which substantially is the same as s. 141A but it emphasises the discretion conferred upon the Central Government in regard to launching of prosecution because it says that the Central Government may, after taking such legal advice as it thinks fit, prosecute such person for the offence.

The first question that arises for our consideration is this. Respondent No. 1 was appointed an Inspector under s. 138 of the old Companies Act and, as already pointed out, if that Act had continued to be the law of the land, admittedly he could not have issued the impugned notices. He has issued these impugned notices because he has received the prior approval of the Central

Government under s. 239(2), and the contention of the Union of India is that notwithstanding the fact that respondent No. 1 was appointed under the Act of 1913, notwithstanding the fact that under that Act he had no power or no authority to issue these notices, once the Act of 1956 was placed on the statute book and he received the approval of the Central Government, he was authorised to exercise the powers conferred upon him under s. 239, and what he has done by issuing these notices is to exercise powers which he has a right to exercise under s. 239. What is urged by Mr. Manecksha on this head of his argument is that respondent No. 1 has not been appointed an Inspector under s. 235 of the Act of 1956 or under s. 237 of the Act, and according to him it is only an Inspector appointed under s. 235 or s. 237, as s. 239 expressly states, who can exercise the extended powers conferred under s. 239. So the question which we have to decide lies in a very narrow compass. Is it necessary under the law that respondent No. 1 should have been appointed an Inspector by the Central Government under s. 235 before he could exercise the powers under s. 239? Or are there provisions in the Act of 1956 which permit respondent No. 1, although appointed under the Act of 1913, to exercise the powers under s. 239 with the prior approval of the Central Government without a fresh appointment under s. 235? The sections which throw light on this question are sections which we find at the end of the new Companies Act and which are grouped together under the heading "Repeals and savings".

The first section to which reference might be made is s. 645, and to the extent that it is relevant it provides that nothing in this Act shall affect any appointment made or thing done under or in pursuance of any previous companies law, but any such appointment or thing shall, if in force at the commencement of this Act, continue to be in force, and so far as it could have been made or done under or in pursuance of this Act shall have effect as if made or done under or in pursuance of this Act. Now, if this section stood by itself, the question that we have to decide will present no difficulty because looking to the plain language of this section what it provides is that an appointment made or a thing done under the old Act is continued not under the provisions of the old Act but as if it was made or done under the provisions of the new Act. This is a provision contrary to the provision of s. 6 of the General Clauses Act which, as is well known, provides for the continuance of any appointment made or any thing done under the repealed statute as if the repealing statute had not been passed. Section 645 on the contrary provides that the thing which was set in motion, as it were, under the old law was to continue, but not under the provisions of the old law but under the provisions of the new law. Therefore, applying this section to the facts of the present case, we have an Inspector appointed under s. 138 of the Act of 1913. He had carried on part of his investigation under s. 140. By reason of this section his appointment is to continue in force, and if his appointment could have been made under the Act of 1956, it shall have effect as if it was made under this Act. Now, undoubtedly, under this Act an Inspector could have been appointed under s. 235, and therefore what s. 645 does is by a legal fiction to equate the appointment of the Inspector under s. 138 with his appointment under s. 235. Therefore, we must look upon the Inspector as being appointed under s. 235 if the legal fiction is to have full effect. Then, obviously, it is not necessary to make a fresh appointment. If it was necessary to make a fresh appointment, there was no need for the legal fiction. Therefore, the law looks upon the Inspector, respondent No. 1, as being appointed under s. 235 after the Act of 1956 came into force, and if he is appointed under s. 235, then with the prior approval of Government under s. 239(2) he can exercise the powers under s. 239.

But the difficulty is caused by s. 646 which follows upon s. 645, and that section provides:

"Nothing in this Act shall affect the operation of section 138 of the Indian Companies Act, 1913, as respects inspectors, or as respects the continuation of an inspection begun

- by inspectors, appointed before the commencement of this Act; and the provisions of this Act shall apply to or in relation to a report of inspectors appointed under the said section 138 as they apply to or in relation to a report of inspectors appointed under section 235 or 237 of this Act."

Briefly put, Mr. Manecksha's argument is that s. 646 must be looked upon as a proviso to s. 645. Section 646 in terms says: "Nothing in this Act shall affect. . ." which would include obviously the provisions of s. 645. So according to Mr. Manecksha it was in s. 646 that the Legislature was specifically legislating with regard to the operation of s. 138. We must look only at s. 646 in order to decide what the effect of this provision incorporated in the Act by the Legislature is. According to Mr. Manecksha, what s. 646 does is to continue the operation of s. 138 and s. 138 only deals with the appointment of the Inspector. It does not deal with the powers of the Inspector. Under the old Act it was s. 140 that dealt with his powers. Therefore, says Mr. Manecksha, what is saved by s. 646 is the appointment of respondent No. 1 under s. 138 of the old Companies Act because as the operation of that section is not affected by anything in the Act, s. 138 continues to be in operation. Further, s. 646 also saves the inspection already begun by the Inspector appointed under s. 138, and having saved both the appointment and the inspection under the old Act, s. 646 goes on to provide that the provisions of the new Act shall only apply to or in relation to a report to be made by Inspectors and the provisions of the new Act shall apply to this report as if the Inspector had been appointed under s. 235 or 237 of the new Act. Therefore, what Mr. Manecksha contends is that there is nothing in s. 646 which confers upon the Inspector appointed under s. 138 the extended powers conferred by the new Act under s. 239. Not only is there nothing in s. 646 conferring these powers, but on the contrary s. 646 limits the application of the Act of 1956 to the specific provisions mentioned in s. 646 itself. According to Mr. Manecksha, it is not permissible to the Court to extend the scope of s. 646 and to hold that not only the provisions of the Act of 1956 with regard to the report apply to the Inspector, but also the provisions with regard to investigation contained in s. 235. The other two sections to which reference might be made with reference to this argument are s. 653 which provides:

"The offices existing at the commencement of this Act for the registration of companies shall be continued as if they had been established under this Act," and s. 658 which provides:

"The mention of particular matters in sections 645 to 637 or in any other provision of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897, with respect to the effect of repeals."

Now, the argument advanced by Mr. Manecksha undoubtedly looks very impressive, but a three-fold answer has been given by the Advocate General and we must proceed to examine this answer. Any one of the three arguments, if accepted, would constitute an effective reply to the difficulties raised by Mr. Manecksha with regard to the exercise of the power under s. 239 by respondent No. 1. The first answer given by the Advocate General is that s. 646 is a saving provision, and it is settled law that if the Legislature saves and deals with a particular provision of the law, when in the earlier sections it has dealt generally and saved other provisions of the law, it does not follow that by reason of the specific mention of a particular provision of the law the other provisions dealing with the same subject are not saved and do not fall within the general provisions contained in the earlier sections. As was said by Lord Macnaghton in *Commissioner for Special Purposes of Income Tax v. Pemsel*¹ (p. 589):

"...It is not so very uncommon in an Act of Parliament to find special exemptions which are already covered by a general exemption. Nor is surplusage or even tautology wholly unknown in the language of the Legislature."

¹ [1891] A. C. 531.

Therefore, the whole of Mr. Manecksha's argument really comes to this that because a special exemption is made in connection with the operation of s. 138 and the report of the Inspector under s. 646, therefore the general exemption contained in s. 645 cannot apply to the continuance of the appointment of the Inspector under the Act of 1956. This argument is undoubtedly based upon the normal and natural canon of construction which requires that we must not attribute to the Legislature either redundancy or tautology. But as Lord Macnaghton points out—and what he points out is true not only in the history of English legislation—legislators have been known for the sake of caution to indulge in surplusage or in tautology, and it would indeed be extraordinary that the Legislature should have exempted the Inspectors appointed under s. 138 of the old Act from the operation of s. 645. No possible reason can be suggested why the Legislature did not intend that the Inspectors appointed under s. 138 of the old Act should continue and be deemed to be Inspectors appointed under s. 235 of the new Act. Therefore, in our opinion, s. 646 does not furnish any answer to the plain interpretation of s. 645 which, as already pointed out, does cover the case of an Inspector appointed under s. 138 of the old Act. We refuse to read s. 646 as being an exception to the provision made in s. 645 that all appointments made under the old Act should be deemed to be appointments made under the new Act.

We have been taken through the provisions of the English Act of 1948 and our attention has been drawn to the difference in drafting between the English Act and the Indian Act. There can be no doubt that our Act of 1956 is based upon the English Act of 1948. Indeed, there is a great deal of ill-informed criticism in our country that the Legislature has passed a company law which is sweeping in its effect and which is draconic in consequences. But this ill-informed criticism forgets that our Act is substantially based on the English Act with this important amendment that many sections of our Act are devoted to managing agencies and managing agents, an institution which fortunately or unfortunately for the British people does not flourish on the English soil. We may just in passing refer to what the provision of the English Act of 1948 was with regard to the saving clause corresponding to s. 646. The English section is s. 459(6):

"Nothing in this Act shall affect the operation of section 137 of the Companies Act, 1929, as respects inspectors appointed before, or to continue an inspection begun by inspectors appointed before, the commencement of this Act, and section 171 of this Act shall apply to a report of inspectors appointed under the said section 137 as it applies to a report of inspectors appointed under section 284 of this Act."

Now, really, this section to our mind is in entirely a different context because s. 137 of the English Act dealt with the power of the company to appoint Inspectors corresponding to the provision of s. 142 of the old Act, and s. 137 was not reproduced in the English Act of 1948 just as it was not reproduced in our Act of 1956. This section purported to save the operation of s. 137 to the extent that Inspectors had been appointed by companies and inspection had been begun by those Inspectors, and this section applies only s. 171 of the new Act to the report made by the Inspectors and put that report on the same footing as a report made under the provisions of s. 164 of the new Act. Section 171 of the new Act only deals with the report of the Inspector to be evidence, corresponding to an identical provision in our old Act. When we turn to s. 646, it deals with the operation of s. 138 which deals with the appointment of an Inspector by the Central Government and not by the company and, as has been rightly pointed out by the Advocate General, the latter part of s. 646 applies not only to the case of an Inspector appointed under s. 138 the provision of any particular section, but it applies all the provisions of the Act to or in relation to a report of Inspectors appointed under s. 138 as they applied to or in relation to a report of Inspectors appointed under s. 235 or 237. So that s. 646 equates the report of the Inspector under s. 235 or 237 to an Inspector appointed under s. 138 with this important addition

that not merely the report is equated but the provisions of the new Act are made applicable to this report or in relation to this report, and this brings us to the second answer given by the Advocate General.

The second answer is that even if Mr. Manecksha's argument were to be accepted and s. 646 was to be construed as an exception to s. 645, the language of s. 646 makes it clear that all the provisions of the new Act including the provisions contained in s. 239 were to apply to an Inspector appointed under s. 138. What is argued is that it is not merely the provisions of the Act which are to apply to a report, but they are to apply in relation to a report, and the Advocate General says that the expression "in relation to" is an expression of very wide import and the provisions of the Act which deal with the powers of the Inspector antecedent to the making of the report and all that has to be done in connection with the report after it has been made, are all covered by the expression "in relation to". It is pointed out that the first part of s. 138 only deals with the appointment of the Inspector. Indeed, it is nothing more than a reproduction in substance of s. 6 of the General Clauses Act. Having continued that appointment, according to the Advocate General, the latter part of s. 646 deals with the powers of the Inspector, and in dealing with that, it uses language wide enough to include the powers conferred upon the Inspector under the new Act under s. 239. In view of what we have held with regard to the effect of s. 646, it is unnecessary to decide whether the expression "in relation to" is of such wide import as to cover the conferment of power upon an Inspector under s. 239.

The third answer suggested by the Advocate General is that if s. 646 deals only with the power of the Central Government to appoint an Inspector and does not deal with the power of the Inspector himself, then that power falls within the ambit of s. 645 and is not affected by s. 646. What is said is that s. 646 deals with, according to the argument of Mr. Manecksha, the limited subject-matter expressly set out in that section. Well, says the Advocate General, let s. 646 apply to that limited subject-matter; with regard to all matters that are outside that subject-matter we should look to s. 645 for its application. It is again unnecessary for us to express any opinion on this argument as the first answer given by the Advocate General is sufficient to dispose of the first contention of the appellant.

The second contention urged by Mr. Manecksha is of very great importance and it affects certain important rights conferred by the Constitution upon the citizens of our country. Article 20(3) of the Constitution, which provides that no person accused of any offence shall be compelled to be a witness against himself, is based upon, as we shall presently point out, the well-known principles of English law and also upon a specific article in the American Constitution. As has been pointed out, the abuses of the Star Chamber where confessions were extracted from those who appeared before that Chamber led to a revulsion of feeling in England against self-accusation and the feeling assumed such strong proportions that the principle became incorporated in the English Common law that a person cannot be compelled to testify against himself. The principle was known as testimonial compulsion, the basic features of which were that it is wrong to compel a man to give an answer or to give evidence and to use that answer or that evidence against him. He has given the answer because he is not a free agent. He does not do it voluntarily; he does it under compulsion, and then to make use of that answer obtained under compulsion against himself in order to convict him or to hold him liable for any omission or default is contrary to basic principles of justice. Now, this principle of English Common law was so well established that when the American founding fathers drafted their Constitution it was incorporated in that Constitution, not at the first stage, but later on by means of an amendment, and the form that the amendment took in the American Constitution is in the Amendment Art. V, and the relevant portion of that amendment for the purpose of this discussion is that "no person shall be compelled in any criminal

case to be a witness against himself." Reference may also be made to the Amendment Art. IV which deals with unreasonable searches and seizures and provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

So that the Fourth Amendment safeguarded the privacy of the home and made it unconstitutional for the issue of searches and seizures unless they were on reasonable grounds. The Fifth Amendment dealt with what is known as testimonial compulsion.

Now, our Constitution makers in art. 20(3) did not deal with the Fourth Amendment but, as the authorities have made it clear, only dealt with testimonial compulsion leaving searches and seizures to be dealt with under the general law, unless, as we shall point out, searches or seizures constitute a contravention of art. 20(3) as being testimonial compulsion for the production of documentary evidence. The difference between the language used in art. 20(3) and the Fifth Amendment will become immediately apparent. The American Constitution limits the right of immunity from compulsory testimonial to a criminal case. In art. 20(3), as Mr. Manekshaw has rightly pointed out, that limitation does not appear. The protection against this compulsion under our Constitution is general. It is not confined to any particular criminal case as would appear if art. 20(3) were to be read by itself. But in construing art. 20(3) we must adopt certain canons of construction. The first and the obvious one is to read the article as a whole and not to divorce cl. (3) of that article from the rest of it. The second is that we must not overlook the fact that the Constitution makers in India had knowledge not only of the American Constitution but also the principles of English Common law and also the exceptions engrafted upon those principles. Finally, we must give to this article an interpretation which is for the greatest good of the people. We are not dealing with an ordinary statute or with an ordinary piece of legislation. We are dealing with the Constitution of India and in interpreting any provision of the Constitution we must not overlook the fact that the Constitution was enacted for the purposes set out in the preamble to the Constitution. Therefore, any interpretation which advances the good of the people must be preferred to an interpretation which would retard the interest of the people of our country. Fortunately, in this case the interpretation of art. 20(3) is not a matter of first impression. We have assistance, and more than assistance, from the decisions of the Supreme Court to which reference will be made, and these decisions, as we shall presently point out, make it clear that art. 20(3) should be read in the context of the two clauses which precede it and this article should not be read in the light of the American Constitution or the American decisions but more in the light of our own legislative provisions, our own legislative history, the background of English law, and the Constitution looked upon as an organic whole.

Turning first to the article itself, the marginal note is "Protection in respect of conviction for offences", and cl. (1) provides:

"(1) No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

Clause (2) provides:

"(2) No person shall be prosecuted and punished for the same offence more than once."

Then we come to the clause in question:

"(3) No person accused of any offence shall be compelled to be a witness against himself."

Looking at the language used and the expressions, it seems clear that what the

- Constitution makers were contemplating was various privileges conferred upon persons either in the conduct of a criminal proceeding itself or in respect of a criminal proceeding. The expressions in cl. (1) "convicted of any offence, commission of the act charged as an offence, subjected to penalty;" in cl. (2) "prosecuted and punished"; and in cl. (3) "accused of any offence", inevitably leads one to that conclusion. Although the marginal note does not clearly apply to all provisions of art. 20, the emphasis placed on the marginal note is "conviction for offences."

Turning next to the decisions of the Supreme Court, there are three decisions which are of importance and which have got to be taken into consideration in interpreting this article. The first and the earliest is *Magbool Hussain v. The State of Bombay*.² In that case the Supreme Court undoubtedly was dealing with the provisions of cl. (2) of art. 20 and the question that arose for the decision of their Lordships was whether, where a person against whom proceedings had been taken by the Sea Customs Authorities under s. 167 of the Sea Customs Act and an order for confiscation of goods had been passed was subsequently prosecuted before the Presidency Magistrate for an offence under s. 23 of the Foreign Exchange Regulation Act in respect of the same act, it could be said that that constituted a contravention of cl. (2) of art. 20 and whether he was prosecuted and punished for the same offence more than once, and the Court came to the conclusion that cl. (2) of art. 20 had not been contravened. Mr. Maneksha is right when he contends that this is not a direct decision on the particular provision of art. 20 which we are considering, but there are important and weighty observations in the judgment of Mr. Justice Bhagwati at p. 738 which observations are not confined to cl. (2) of art. 20 but which are pertinent to the construction of the article as a whole, and this is what the learned Judge says:

"The words 'before a court of law or judicial tribunal' are not to be found in article 20(2). But if regard be had to the whole background indicated above it is clear that in order that the protection of article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of article 20 and the words used therein:—'convicted', 'commission of the act charged as an offence', 'be subjected to a penalty', 'commission of the offence', 'prosecuted and punished', 'accused of any offence', would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."

Therefore, it is clear that Mr. Justice Bhagwati in this decision, construing art. 20 as a whole, took the view and the clear view that the proceedings contemplated in art. 20, not in cl. (2) only but in the article as a whole, were criminal proceedings, and dealing particularly with cl. (2) the learned Judge took the view that the prosecution in that context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal. Mr. Maneksha again rightly contends that in cl. (2) of art. 20 we are concerned with accusation and not with prosecution and he submits that accusation must be antecedent to prosecution, and according to him the proper construction of cl. (2) of art. 20, notwithstanding these remarks of Mr. Justice Bhagwati, is that if there is an allegation of an offence having been committed before a tribunal or an authority competent to investigate into that allegation, then a person is accused of an offence within the meaning of this clause and he cannot be compelled to be a witness against himself.

Therefore, really, the question before us narrows itself down to this. What is the meaning we must give to the expression "accused of an offence". In this case there is no doubt that the compulsion against which art. 20(3) affords protection is present because, as we have pointed out when we were looking at the scheme of the Act, under s. 240(5) there is provision for an obligation on the part of any person examined by an Inspector or by the Court to answer questions put to him and the possibility of those answers being used in evidence against him and it is also clear that those answers could be used in evidence against him although the answers may be of an incriminating nature. Therefore, if we may pose the question which we have to consider and decide, the question is this. Is the expression "accused of any offence" used in a general sense or is it used in a technical sense? Is the accusation referred to in this clause an accusation without any reference to any criminal proceeding or is it an accusation with reference to a criminal proceeding? Mr. Manecksha concedes, and rightly concedes, that the investigation held by the Inspector is not a judicial proceeding, and in our opinion it cannot be seriously urged that it is a criminal proceeding. But according to Mr. Manecksha that is an irrelevant fact. The appellant is accused of having committed an offence under the Company Law and under other laws. In respect of that accusation investigation is being held by the Inspector and in the course of the investigation there is a compulsion upon the appellant to answer such questions as might be put to him. Those answers may be incriminating and they may be used against him, and therefore Mr. Manecksha says that the Constitutional safeguard given to every person in India has been violated. Now, if we had to accept the observations of Mr. Justice Bhagwati as correctly laying down the interpretation of art. 20, then it is clear that Mr. Manecksha's contentions must be rejected, because the passage just referred to leaves no doubt that in the opinion of the learned Judge the construction of art. 20 required that the proceedings in respect of the various protections given by art. 20 are criminal proceedings. But Mr. Manecksha says that this decision was a decision on art. 20(2), that the observations with regard to the interpretation of art. 20 are *obiter*, and that the real decision of the Supreme Court on art. 20(3) is *Sharma's* case to which we shall presently come. But before we come to that decision, we must point out, as we have said in this Court before, that even an *obiter* of the Supreme Court deserves the highest respect and it is incumbent upon this Court to accept even the *obiter* as correctly laying down the law. When in a case a particular clause of a section or an article calls for interpretation and in order to interpret it the Supreme Court interprets the whole section or article and lays down the proper canon of construction, it is impossible to contend that that interpretation is not binding upon this Court, unless of course the Supreme Court in any subsequent decision has departed from the interpretation laid down by it in this decision, and, as has been pointed out by the Advocate General, far from the Supreme Court departing from it, what it has laid down in this case as to the proper interpretation of art. 20 is reiterated and re-emphasised by it in a subsequent decision in *Venkataraman's* case.

Turning to *M. P. Sharma v. Satish Chandra, District Magistrate, Delhi*,³ on which Mr. Manecksha has rightly placed strongest reliance, it is true that this is the only case of the Supreme Court where the question of the construction of art. 20(3) directly arose for consideration and decision. The facts are a little important. The Registrar of the Joint Stock Companies, Delhi State, lodged information with the Inspector-General, Delhi Special Police Establishment, that Messrs. Dalmia Jain Airways Ltd. had committed various offences. This was recorded by the Special Police as the first information report. On the basis of that report an application was made to the District Magistrate, Delhi, under s. 96 of the Criminal Procedure Code for the issue of warrants for the search of certain documents. Permission to investigate in respect of some of the non-cognizable offences mentioned in the first

information report was also asked for by this application and the District Magistrate ordered investigation of the offences and issued warrants for simultaneous searches at various places. The searches were made pursuant to this order and the petition was filed in the Supreme Court praying that the search warrants may be quashed as being illegal. What was argued before the Supreme Court was that this was testimonial compulsion and violated the provisions of art. 20(3). It was argued before the Supreme Court that the expression "compelled to be a witness against himself" only applied to the actual evidence given in a Court of law and that when documents were being seized which may be used against an accused person art. 20(3) had no application. That argument was rejected by the Supreme Court and the Supreme Court held that the safeguard afforded by art. 20(3) was not restricted to testimony in Court itself, but it also applied to documentary evidence, and it also applied to compulsion which may be used against a person to be a witness against himself in a proceeding antecedent to the trial itself. But the particular application was dismissed on the ground that in the American Constitution search warrants were dealt with by the Fourth Amendment, the Constitution makers had not chosen fit to incorporate that provision in the Constitution, and therefore the search warrants were to be governed by the ordinary law of the land and art. 20(3) did not apply to search warrants. Now, there is a passage at p. 1086 on which strong emphasis has been placed by Mr. Maneksha.

"In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intentment thereof and to prevent its circumvention. Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components. (1) It is a right pertaining to a person 'accused of an offence'; (2) It is a protection against 'compulsion to be a witness'; and (3) It is a protection against such compulsion resulting in his giving evidence 'against himself'."

Therefore, Mr. Maneksha says that the attempt of the Advocate General to persuade us to give a limited and restricted meaning to this provision in the Constitution should be repelled by us in view of this emphatic observation by the Supreme Court.

Now, this observation must be understood and appreciated in its own context. The Supreme Court refused to confine the protection afforded by art. 20(3) to the narrow ambit of oral evidence given in the Court itself. To that extent a wider signification must be given to that article and to that extent it will be wrong to construe this article literally. But the question still remains whether, within the larger ambit as envisaged by the Supreme Court, it should be confined to criminal proceedings or it should be further extended to cases like this where an inquiry is being held which is not a criminal proceeding in which allegations have been undoubtedly made against the appellant which are allegations of having committed an offence, and whether it could be said that in such a proceeding any provision of law by which the person against whom the inquiry is being held may be compelled to answer incriminating questions should be held to be a contravention of the constitutional safeguard. Fortunately, this very case throws considerable light on the manner in which art. 20(3) should be construed because at p. 1088 Mr. Justice Jagannadhas J. in the judgment of the Supreme Court says:

"...Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court room. The phrase used in Article 20(3) is 'to be a witness' and not to 'appear as a witness': It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room

but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case."

Therefore, the test laid down by the Supreme Court is that this protection is available when there is a formal accusation against a person, and the second test is that that formal accusation must in the normal course result in prosecution. Now, can it be said that in this case the accusation levelled against the appellant is a formal accusation, and can it be said that in the normal course the accusation would result in prosecution? Mr. Manecksha says that in this very case there was no formal accusation. All that had happened was that a first information was given to the police and on the strength of that information an application was made for a search warrant. Therefore, the Supreme Court obviously took the view that an allegation made to the police of Messrs. Dalmia Jain Airways Ltd. having committed an offence was an accusation which came within the ambit of art. 20(3). Mr. Manecksha further says that this is certainly not a case where a formal accusation is made in a criminal Court or before a tribunal holding criminal proceedings.

Now, it is true, as Mr. Manecksha has pointed out to us, that the Supreme Court has taken the view that a mere application for a search warrant by the police does not result in the Magistrate, to whom the application is made, taking cognizance of the case. "Cognizance" as understood in the Criminal Procedure Code is a very technical expression and it may be that when the Magistrate granted the application for search warrant he had not taken cognizance within the meaning of s. 191 of the Criminal Procedure Code. See in this connection *Legal Remembrancer v. Abani Kumar*⁴ and *R. R. Chari v. State of U.P.*⁵ But whether cognizance was taken or not, it was certainly, to use the language of Mr. Justice Bhagwati, initiation or starting of proceedings before a Court of law and the initiation was done by the filing of the first information report before the police authorities. It may also be said that if there was not a formal accusation before a Court, it was certainly a formal accusation with reference to a criminal proceeding, and it can also be said that in this particular case the accusation would have normally resulted in a prosecution. Now, are these elements present in the case before us? It is true as pointed out by Mr. Manecksha in the various documents to which reference has already been made, that the appellant was charged with having misappropriated the funds of the company and having committed an offence under the Companies Act and also under the Indian Penal Code. In the sense that there was an allegation that he had done or omitted to do something which was against the law, undoubtedly he was accused of an offence. But it would be stretching the language too far to suggest that there was any formal accusation against the appellant. Nor would it be true to say that the accusation was either before a criminal Court or tribunal or was with reference to a criminal proceeding. Nor would it be true to suggest, looking to the provisions of the Criminal Procedure Code, that this accusation in the normal course would result in prosecution. It is fallacious to suggest that the only object of the inquiry and the only purpose of the report was to launch a prosecution under s. 242 of the Companies Act. It was left to the discretion of the Central Government under s. 242 to launch or not to launch a prosecution, and, as we shall point out in another context, the report of the Inspector and the inquiry held by him serve under the Companies Act many more important purposes than the mere prosecution of a defaulting managing agent or a defaulting director.

We then come to the third Supreme Court case which is *S. A. Venkataraman v. The Union of India*.⁶ That case decided that an inquiry made and con-

⁴ [1950] A. I. R. Cal. 437.

⁶ [1954] S.C.R. 1150.

⁵ [1951] A. I. R. S.C. 207.

cluded under Public Servants (Inquiries) Act, 1850, (Act XXXVII of 1850) did not amount to prosecution and punishment for an offence as contemplated by art. 20(2) of the Constitution. It is true that this decision again is not on art. 20(3) but art. 20(2). But here too we have very weighty observations of the Supreme Court which have a direct bearing on the interpretation of art. 20(3). The Advocate General has taken us through the provisions of the Public Servants (Inquiries) Act, 1850, and that Act does suggest from the language used in the various sections with regard to the framing of the charge and the person against whom the inquiry is being held as being described as an accused, that the inquiry was more or less similar to a criminal proceeding. It is also true that we do not find any provision in that Act which makes the accused a compellable witness, and therefore the element of compulsory testimonial which we find in the Companies Act is absent and to that extent no question with regard to art. 20(3) would arise when an inquiry is being held against a public servant. But the point of the decision is not that. The point of the decision is two-fold. One is that the Supreme Court confirmed the decision in *Maqbool Hussain's* case with regard to the interpretation of art. 20 and it will be noticed that *Venkatraman's* case is subsequent to *Sharma's* case, and the other point is that in construing art. 20(2) the Supreme Court laid down certain tests which may be equally applicable in construing art. 20(3). At p. 1154 Mr. Justice Mukherjee says:

"It has also been held by this court in *Maqbool Hussain's* case that the language of article 20 and the words actually used in it afford a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of a criminal proceeding, before a court of law or judicial tribunal, and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute, but which is not required by law to try a matter judicially and on legal evidence."

So once more the Supreme Court emphasises what according to it is the correct approach, and the only approach, to art. 20 as a whole. At p. 1160 the Court observes referring to the inquiry under the Public Servants (Inquiries) Act:

"...At the close of the enquiry, the Commissioner has to submit a report to the Government regarding his finding on each one of the charges made. This is a mere expression of opinion and it lacks both finality and authoritativeness which are the essential tests of a judicial pronouncement."

Now, these observations apply fully to the report to be made by the Inspector investigating under the Companies Act. The report is nothing more than an expression of his opinion and there is neither finality nor authoritativeness about it. That finality and authoritativeness can only be given by the Central Government if the Central Government decides to launch a prosecution accepting the opinion given by the Inspector. At p. 1161 the Supreme Court considers the analogous case of a member of the Bar whose name is struck off the rolls on grounds of professional misconduct in exercise of the disciplinary jurisdiction by the proper authority, and what the Supreme Court says is that primarily the inquiry is into the professional misconduct of the member of the Bar and not into an offence committed by him or an investigation into that offence. Attention might also be drawn to another observation of Mr. Justice Mukherjee at p. 1156:

"...In order to arrive at a proper decision on this point, it is necessary to examine the entire background of the provisions relating to enquiry into the conduct of public servants and to ascertain the exact scope and purpose of the enquiry as is contemplated by Act XXXVII of 1850 and the ultimate result that flows from it."

Mr. Manekshaw also referred to a judgment of a single Judge of the Calcutta High Court in *Calcutta M. & C. Co. v. Collector of Customs*,⁷ where the learned Judge has applied the ratio of *Sharma's* case and has come to the conclusion that art. 20(3) was not merely applicable to a criminal trial in Court, it

applied to proceedings which may lead to such a trial, and that in proceedings under s. 171A of the Sea Customs Act the party is compelled to give evidence and to depose truthfully and produce any document, in such a case he might incriminate himself, and although such a proceeding is not in the course of a criminal trial it is obvious that it is preliminary to it, and hence the provisions of s. 171A in so far as it enables the authorities to compel a person to give evidence against himself and to produce documents for that purpose offends against art. 20(3) of the Constitution and is bad. Of course, we are not considering the provisions of the Sea Customs Act. But with very great respect, the reasoning which commended itself to the learned Judge is not acceptable to us. In our view, the learned Judge has not attached sufficient importance to the observations of the Supreme Court in *Magbool Hussain's* case and *Venkataraman's* case, because, if he had done so, we are sure he would not have come to the conclusion which he did.

Now, following the advice given by the Supreme Court, it would only be proper if we try to consider the real scope and nature of the inquiry under the Company's Act. What the scope and nature of the inquiry is, is made clear by the words used by the Legislature in s. 235 and those words are "to investigate the affairs of any company and to report thereon." Therefore, the main and primary function of this investigation is to look into the affairs of the company from the point of view of the provisions of the Companies Act, to consider its working, to see whether it is worked in the interest of the shareholders, and to find out whether the privilege of incorporation has or has not been abused. We may briefly look at what the consequences of the report made by the Inspector may be. It may result in an application for a winding up under s. 243, it may lead to proceedings for recovery of damages or property under s. 244, it may lead to an application for relief in case of oppression under s. 397, and it may lead to an application for relief in case of mismanagement under s. 398. As pointed out by the Advocate General, these impugned provisions under the head of "Investigation" appear in Part VI which deals with management and administration of the company. These provisions with regard to inspection came up for consideration by the House of Lords in the case of *Hearts of Oak Assurance Co. v. Attorney-General*⁸, and the House of Lords was dealing with the Industrial Assurance Act, 1923, the provisions of which with regard to inspection were in *pari materia* with the provisions of the Companies Act, and Lord Thankerton at p. 396 says:

"It appears to me to be clear that the object of the examination is merely to recover information as to the company's affairs and that it is in no sense a judicial proceeding for the purpose of trial of an offence; it is enough to point out that there are no parties before the inspector, that he alone conducts the inquiry, and that the power to examine on oath is confined to the officers, members, agents and servants of the company."

Of course, this last observation now will no longer be correct in view of the extension brought about in the provisions of the law both in India and in England. At p. 401 Lord Macmillan says:

"...Then it will be noticed that the Commissioner may either himself conduct the inspection or entrust it to an inspector appointed by him for the purpose. The object manifestly is that the Commissioner may either by himself directly or through the medium of a delegate obtain the information necessary to enable him to decide what action, if any, he should take. The cardinal words of the section are those which empower the Commissioner or his inspector 'to examine into and report on the affairs of the society'."

If those were the cardinal words in the case before the House of Lords, as far as we are concerned the cardinal words, as pointed out, which are used in s. 235 are "to investigate the affairs of the company."

Therefore, it is clear on an examination of the provisions of the Companies Act that the scope and nature of the inquiry is not investigation into an

offence. The scope and nature of the inquiry is investigation into the affairs of the company. It is equally clear that the report is not made for the purpose of a prosecution being launched by the Central Government and that the function of the Inspector is to express an opinion on the way the affairs of the company are conducted in order that appropriate action may be taken which action may take different forms like applications under the different sections of the Companies Act to which reference has been made or a prosecution under s. 242 of the Companies Act.

Mr. Manecksha has cited before us several American decisions which undoubtedly have given to this Constitutional safeguard a much wider content than what we have suggested is the right one, and Mr. Manecksha says that these American decisions correctly interpret the important Constitutional safeguard, that they emphasise the importance and value of that safeguard to the citizen, and it will be wrong for the Court to whittle down that safeguard in any manner whatsoever. Our attention was drawn to the observations in *Boyd v. United States*.⁹ Mr. Justice Bradley observes at p. 751:

"...Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

It is difficult to imagine stronger words than these which could have been possibly used by any Judge from the Bench. Now, in construing the article as we propose to do, if we are doing anything to help despotic power or to contaminate the atmosphere of political liberty and personal freedom or doing something which is abhorrent to the instincts of an Englishman or an American, we will certainly pause and ponder before we come to that conclusion. But, as we shall presently point out, with great respect, Mr. Justice Bradley has used the language of exaggeration because in certain matters an exception has been made to the doctrine of safeguard against self-incrimination, and it is incorrect to say that those exceptions can ever be looked upon by an Englishman as abhorrent to his instincts or contrary to principles of free government. But before we come to these exceptions, let us look at the American cases on which Mr. Manecksha relies.

The first is *Counselman v. Hitchcock*,¹⁰ and the second is *Blau v. United States*.¹¹ Both were cases dealing with proceedings before a Grand Jury and undoubtedly the observations in both these cases give a much wider import and connotation to art. 20(3) than what in our opinion the Supreme Court has suggested as the right one. In *Counselman v. Hitchcock* the investigation by the Grand Jury was in respect of alleged violations of a certain Act of Congress to regulate commerce. At p. 1118 Mr. Justice Blatchford says:

"It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the Constitution. Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favour of the right which it was intended to secure."

And at p. 1121:

"But, as the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guarantees however differently worded, should have as far as possible the same interpretation;..."

⁹ (1885) 116 U. S. 616, 618, 29 Law. ed. 746.

¹⁰ (1890) 142 U. S. 547, 35 Law. ed. 1110.

¹¹ (1850) 340 U. S. 189, 95 Law. ed. 170.

Therefore, the emphasis is placed in this case that the constitutional provision in order to be valid must afford absolute immunity against future prosecution for the offence to which the question relates, and at p. 1114 Mr. Justice Blatchford went to the length of stating:

"...It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such Court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

Therefore, the American Supreme Court took the view that absolute immunity against prosecution required that the person in whose affairs inquiry was being held should be given absolute immunity against future prosecution. The next case is *Blau v. United States*, and there the American Supreme Court laid down that it was sufficient if the person being compelled to give evidence reasonably feared that criminal charges may be brought against him if he testified. In *McCarthy v. Arndstein*,¹² notwithstanding the language of the American Amendment, the Court took the view that that immunity applied both to civil and criminal proceedings.

Now, the Advocate General has very fairly conceded that if we were to interpret art. 20(3) in the light of these American decisions, he would have no answer to the petition presented by the appellant and that the appellant was entitled to succeed. But his contention is, apart from the decisions of the Supreme Court on which reliance has been placed, that our legislative history, which is based upon English law and not American law, further supports and strengthens his argument that a narrower connotation should be given to art. 20(3). Now, in England, as Mr. Justice Bradley says, however abhorrent testimonial compulsion may be to the instincts of an Englishman, an exception has always been made in the department of Company law and Insolvency law. Before we turn to the legislative provisions, we must first look at the principle of it. In Insolvency, law is administered partly for the benefit of the creditors, but primarily in public interest. The same is true of Company law. It is administered undoubtedly for the benefit of the shareholders, but again primarily it is administered in public interest. Company law permits incorporation with limited liability and the public has got to be safeguarded against that privilege being abused, and the English law has always taken the view that when you are investigating into the affairs of a bankrupt or into the affairs of a company, the doctrine of self-incrimination cannot defeat or should not be permitted to defeat the interest of the public, and it is rightly pointed out that our law has taken the same view and has enacted the same privileges. Now, this legislative history was before our Constitution makers and it is impossible to take the view that by enacting art. 20(3) our Constitution makers wanted to make a violent departure from the principles it had followed and observed for years past to make many laws *ultra vires* and to adopt the American system in preference to the English system. In English law under s. 15 of the Bankruptcy Act, in the public examination of the debtor the answers given by him have to be taken down in writing, to be signed by him, and could be used in evidence against him, and there is compulsion upon the debtor to answer all questions as the Court may put or allow to be put to him. This question of compulsory testimonial under English Bankruptcy Law came up for consideration in two English cases, in *Atherton*, In re,¹³ where it was held that a bankrupt was bound to answer questions in his public examination even if they be incriminating, and again in *Paget*, In re: *Official Receiver*, Ex parte,¹⁴ it was pointed out by the Court at p. 92 that in matters of bankruptcy it is not merely the creditors who have their rights, but it is also the public themselves whose interests have to be safeguarded.

¹² (1924) 266 U. S. 34, 69 Law. ed. 168.

¹⁴ [1927] 2 Ch. 85.

¹³ [1912] 2 K. B. 251.

Turning to Company Law, apart from the impugned provisions, let us consider the provisions with regard to misfeasance summonses. First turning to the English Act, under s. 270 the person who is being examined is bound to answer questions put to him, and it is clear law as pointed out by Buckley at p. 566 that a person examined cannot refuse to answer relevant questions on the ground that by doing so he may incriminate himself. Our own Companies Act had similar provisions. The Act of 1913 under s. 196(7) which deals with the power to order public examination of promoters, directors, etc. provided:

"Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection of any creditor or contributory at all reasonable times."

So here the use of this evidence was confined to civil proceedings. But now by the new Act under s. 478 this evidence can be used in all proceedings, thus bringing our provisions in line with the English law, and with regard to the impugned provision of our Company's Act, s. 167 of the English Act on which our Act is based provides also for evidence given in the course of investigation being used against the person giving the testimony. The only difference between the English Act and our Act is that under the English Act this provision could only be used when the person is examined by Court. In our Act the provision applies whether the person is examined by the Inspector or by the Court. Therefore, wider power was taken by the Legislature under our law, and the view of Buckley, to which respect must be paid, is that this provision is similar to the provision with regard to the Bankruptcy Act and apparently the person who is under examination cannot refuse to answer questions on the ground that the answer may incriminate himself.

We must not fail to notice one argument which was advanced by Mr. Manecksha which has a bearing both on this aspect of the case and on the next aspect which we will presently consider, that the present provisions are so stringent and according to him so barbarous that they put his client in a worse position than if the police were actually investigating into an offence committed by him. He says that if there was a police investigation, any statements made by him in the course of investigation would not be evidence. He further says that if there was a judicial proceeding, then under s. 132, although he was compelled to answer, protection was given by the provisions of the Act. Now, the answer to that complaint is two-fold. The first is, as we have already stated, that this is not an investigation into an offence, in which case the rights of the accused are safeguarded by the provisions of the Criminal Procedure Code, and, as the Advocate General pointed out, in our opinion under the Companies Act when we come to actual prosecution the Legislature is at pains to provide that assistance should be given by everyone concerned for the purpose of the prosecution except the accused in the proceedings. Therefore, when we reach that stage, the safeguards rightly afforded by our Criminal Procedure Code are given to the person concerned. With regard to the Evidence Act, in terms the Act applies to judicial proceedings. It does not apply to a proceeding which is not judicial. It is an adjectival law which can be qualified and modified by the substantive law of the country. It undoubtedly happens that in a non-judicial proceeding a person who is being examined cannot claim the privilege of the benefit of s. 132. But even in a judicial proceeding it would be open to the Legislature to provide that the adjectival law should be altered if it can be done undoubtedly consistent with the provisions of art. 20(3) of the Constitution.

Having taken all the circumstances into consideration we have come to the conclusion that art. 20(3) has no application to the facts of this case. There is no accusation in the sense in which we have construed that expression, viz., a formal accusation, and inasmuch as there is no accusation, the compulsion introduced by the provisions of the Companies Act which is impugned is not a compulsion which can be struck down by this provision of the Constitution.

We may also add that in giving this restricted meaning to the constitutional safeguard, we have carefully weighed the rights of the individual against the interest of the public and of the State. In our opinion, it is the duty of the Court, to the extent that it can legitimately do without doing violence to the language used by the Constitution makers, to arrive at a solution which, while maintaining the rights of the individual as far as possible, does not overlook the rights which the public and the State are entitled to claim.

Turning to the third head of Mr. Manecksha's argument, it can be very briefly disposed of. The argument is based on art. 14. Now, there are very few articles of the Constitution which have received so much attention by the different Courts as art. 14 and it is unnecessary to repeat what has been laid down as the basis of classification which will prevent the application of that article. What is urged in this case is that there is no equality before the law because a person who is being examined under the provision of the Companies Act does not get the protection which another person is entitled to under s. 132 of the Evidence Act, and it is also said that this particular company or this particular managing agent has been picked out for special treatment and thereby there has been discrimination. The latter part of the argument, as Mr. Manecksha fairly conceded, is now conclusively answered in *Ram Krishna Dalmia v. Tendolkar J.*¹⁵ by the Supreme Court. That, Mr. Manecksha says, is true as far as the challenge to s. 239 is concerned, but he says that the challenge to s. 240(5) still remains and that has not been considered by the Supreme Court. In our opinion, it is impossible to urge that there is discrimination and that there is no proper classification on a rational basis, when an important system of law as the English system recognises these exceptions as pointed out both in Insolvency law and Company law. Therefore, if our law makes a distinction between the rights of persons who are examined under the provisions of the Company Law and the rights of persons under other laws, it cannot be said that that classification is without a rational basis.

The result, therefore, is that the appeal fails and must be dismissed with costs. Two counsel certified.

Liberty to the respondents' attorneys to withdraw the sum of Rs. 500 deposited in Court.

Leave to appeal to the Supreme Court under arts. 132(1) and 133(1)(c) on the appellant undertaking to file a proper petition within a fortnight. The Advocate General agrees not to proceed with the inquiry for six weeks from today to enable the appellant to get the necessary order of stay from the Supreme Court.

Appeal dismissed.

Solicitors for the appellant: *Ambubhai & Divanji.*

Solicitor for the respondent: *N. B. Vakil.*

APPEAL FROM ORIGINAL CIVIL.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.

THE STATE OF BOMBAY v. KULSUMBAI JAFFERALI G. PADAMSEE.*

Bombay Land Requisition Act (Bom. XXXIII of 1948), Secs. 4(3), 6(4)(a), 6(1), 2(1) & (2)†—Bombay Land Requisition Ordinance, 1947, Sec. 4(1)—Premises let out prior to January 1947 but thereafter till November 1955 used as lodging house—Order of requisition made in October 1957—Landlord alleging that premises occupied by licensees on date of order—Whether premises intended to be let within s. 4(3) and therefore premises liable to be requisitioned—Notification under s. 6(1) whether necessary before s. 6 can apply to scheduled areas mentioned in s. 2(1).

Certain rooms in a building situated in the city of Bombay were let out by the landlord before January 1, 1947. From January 1, 1947, to November 1955 these rooms were used as a lodging house. After November 1955 they were occupied by certain persons and it was alleged by the landlord that the occupation by these persons was as licensees and not as tenants. On October 10, 1957, an order for requisitioning these rooms was made under s. 6(4)(a) of the Bombay Land Requisition Act, 1948. The order was challenged by the landlord *inter alia* on the ground that the rooms did not constitute premises within the meaning of the Act as these were not intended to be let, because they had never been in fact let after the Bombay Land Requisition Ordinance, 1947, came into force on December 4, 1947, or the Act came into force on April 11, 1948. On the question whether it could be said of the premises, assuming that these were given to licensees on October 10, 1957, that they were intended to be let as defined in s. 4(3) of the Act and were, therefore, premises which were liable to be requisitioned under the Act:—

Held, that as the landlord had expressed his volition by letting out the rooms prior to January 1, 1947, he could be said to have intended the rooms to be let within s. 4(3) of the Act, although these were not let when the Act came into force, and

that, therefore, the rooms were premises within the meaning of the Act and the Government could exercise its power under s. 6 of the Act in respect of the premises.

State of Bombay v. Virendra Motabhai,¹ applied.

The Notification referred to in s. 6(1) of the Bombay Land Requisition Act, 1948, is an entirely different notification to the notification mentioned in s. 2(2) of the Act.

Section 6(1) of the Bombay Land Requisition Act, 1948, provides that even in the scheduled areas mentioned in s. 2(1) of the Act the provisions of s. 6 are not auto-

*Decided, September 4, 1958. O. C. J. Appeal No. 35 of 1958: Miscellaneous Application No. 336 of 1957.

†The relevant sections run thus:

4. In this Act, unless there is anything repugnant to the subject or context—...

(3) "premises" means any building or part of a building let or intended to be let separately including—...

6. (1) If any premises situate in an area specified by the State Government by notification in the *Official Gazette*, are vacant on the date of such notification and wherever any such premises are vacant or become vacant after such date by reason of the landlord, the tenant, or the sub-tenant, as the case may be ceasing to occupy the premises or by reason of the release of the premises from requisition or by reason of the premises being newly erected or reconstructed or for any other reason the landlord of such premises shall give intimation thereof in the prescribed form to an officer authorised in this behalf by the State Government.

(4) Whether or not an intimation under sub-section (1) is given and notwithstanding anything contained in section 5, the State

Government may by order in writing—

(a) requisition the premises for the purpose of the State or any other public purpose and may use or deal with the premises for any such purpose in such manner as may appear to it to be expedient; or

Provided that where an order is to be made under clause (a) requisitioning the premises in respect of which no intimation is given by the landlord, the State Government shall make such inquiry as it deems fit and make a declaration in the order that the premises were vacant or had become vacant, on or after the date referred to in sub-section (1) and such declaration shall be conclusive evidence that the premises were or had so become vacant:

2. (1) This Act shall extend to the areas specified in the Schedule hereto annexed and shall continue to extend to any such area notwithstanding that the area ceases to be of the description therein specified.

(2) The State Government may, by notification in *Official Gazette*, extend any or all of the provisions of this Act to any other area and on such date as may be specified in the notification.

1 (1950) 52 Bom. L. R. 627.

matically to apply. A notification by Government issued under s. 6(1) is necessary before the provisions of s. 6 can apply to a scheduled area as a whole or any part of it.

The observation made in *State of Bombay v. Virendra Motabhai* to the effect that there was a drafting error in s. 6(1) of the Act because it refers to premises situated in the areas specified by the Provincial Government by a notification in the Official Gazette and it does not refer to areas specified by the Act itself under s. 2(1), is not justified by the language used in the Act.

ONE Kulsumbai (petitioner) was the owner of a building known as "Chhotu Terrace" situate at 105, Colaba Road, Bombay-5. This building was composed of various independent rooms and on the fifth floor of the building there were three such rooms bearing Nos. F1, F2 and F3. From January 1947 till November 1955 the petitioner used the whole of the building for the purpose of a lodging house known as the Chhotu Terrace Lodging House. In November 1955 the lodging house was closed. In December 1955 the petitioner entered into an agreement with one Hamid Sayani, her son-in-law, in connection with the aforesaid three rooms on the fifth floor of the building. Under that agreement the petitioner purported to grant her leave and licence to Hamid Sayani to use and occupy the said three rooms. On November 1, 1956, a fresh agreement was entered into with Hamid Sayani and the period of the licence mentioned in the agreement was eleven months. Before the expiration of this period Hamid Sayani left the rooms, and on March 5, 1957, the petitioner entered into an agreement with M. R. Shetty and B. T. Shenova purporting to grant her leave and licence to M. R. Shetty and B. T. Shenova for the occupation of the rooms. On October 10, 1957, Government passed an order requisitioning the premises consisting of the three rooms. That order was as under:—

"Whereas, on inquiry it is found that the premises specified below had become vacant in the month of March 1957.

Now, therefore, in exercise of the powers conferred by clause (a) of sub-section (4) of section 6 of the Bombay Land Requisition Act, 1948 (Bom. XXXIII of 1948), the Government of Bombay is pleased to declare that the said premises had become vacant after the 4th December 1947 and to requisition the said premises for a public purpose, namely, for housing a Bombay State Government servant."

The petitioner challenged the validity of this order on various grounds and prayed for the issue of a writ of *mandamus* or a writ in the nature of *mandamus* or a direction, order and/or appropriate writ under art. 226 of the Constitution of India ordering the State of Bombay to forbear from enforcing the requisition order dated October 10, 1957, and/or from taking any steps or proceedings in the enforcement of the said order and further ordering the State of Bombay to withdraw and cancel the said order. The petition was heard by K. T. Desai J. who held that the order of requisition was bad in law and directed that a writ of *mandamus* do issue, delivering the following judgment on February 10/11, 1958:—

K. T. Desai J. [His Lordship after stating the facts, proceeded:] Mr. Bhabha, the learned counsel for the petitioner, has urged that before any premises can be requisitioned under s. 6 of the Bombay Land Requisition Act, 1948, the premises must be situate in an area specified by the State Government by notification in the Official Gazette. He says that the premises in question are not situate in any such area and that the Government had no authority to requisition the said premises. The material portion of the said s. 6 runs as under:—

"6(1). If any premises situate in an area specified by the State Government by notification in the Official Gazette, are vacant on the date of such notification and wherever any such premises are vacant or become vacant after such date by reason of the landlord, the tenant or the sub-tenant, as the case may be, ceasing to occupy the premises or by reason of the release of the premises from requisition or by reason of the

premises being newly erected or reconstructed or for any other reason the landlord of such premises shall give intimation thereof in the prescribed form to an officer authorised in this behalf by the State Government."

Mr. Bhabha contends that s. 6 is only applicable to those premises which have been notified by the State Government under the provisions of s. 2(2) of the Act. In order to appreciate this contention, it is necessary to set out the provisions of s. 2 of the Act. That section runs as under:—

"2. (1) This Act shall extend to the areas specified in the Schedule hereto annexed and shall continue to extend to any such area notwithstanding that the area ceases to be of the description therein specified.

(2) The State Government may, by notification in the *Official Gazette*, extend any or all of the provisions of this Act to any other area and on such date as may be specified in the notification.

(3) The State Government may, at any time by like notification, direct that any or all of the provisions of this Act shall cease to extend to any area and on such date as may be specified in the notification; and on that date the said provisions shall cease to be in force in such area."

The said Schedule specifies (1) City of Bombay, (2) Bombay Suburban District, (3) Thana District, (4) Ahmedabad District, (5) Surat District, (6) Nasik District, (7) Poona District, (8) Sholapur District, (9) Ahmednagar District, (10) Belgaum District and (11) Dharwar District, with the result that under the provisions of s. 2(1), the Act is operative in the aforesaid areas. In order that the Act may extend to any area outside the areas specified in the Schedule, it would be necessary for the State Government to issue a notification in exercise of the powers conferred under s. 2(2) of the Act. Mr. Bhabha argues that the notification contemplated under s. 6(1) of the Act is the notification referred to in s. 2(2) of the Act. According to his submission, s. 6 could under no conceivable circumstances apply to any of the areas specified in the Schedule to the Act i.e. amongst other areas to the city of Bombay, because they are the areas to which the Act extends by virtue of the provisions of s. 2(1). In my view, Mr. Bhabha has completely misread the provisions contained in s. 6(1). The notification in the *Official Gazette* referred to in s. 6 is not the notification whereby the operation of the Act is extended by the State Government under the provisions of s. 2(2). It is a notification independent of the notification referred to in s. 2(2). Even though the Act may be extended to any area outside the areas mentioned in the Schedule in exercise of the powers given to the State Government under s. 2(2), it would be necessary for the State Government to issue a notification under s. 6 in order to attract the provisions of that section. In order to make the provisions of s. 6 applicable, a notification under s. 6 is necessary in all cases whether the premises are situate in any area mentioned in the Schedule to which the Act extends by virtue of the provisions of s. 2(1) or are situate in any area outside it to which the provisions of the Act may be extended under s. 2(2). Section 6 provides for an intimation of a vacancy being given to an officer authorised in this behalf by the State Government within the time therein mentioned. It further provides that a landlord shall not be entitled without permission of the State Government, to let, occupy or permit to be occupied such premises before giving the intimation and for a period of one month from the date on which the intimation is received. It is further provided that any landlord who fails to give such intimation within the period specified in sub-s. (2) shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine or with both and that any landlord who lets, occupies or permits to be occupied the premises in contravention of the provisions of sub-s. (3), shall, on conviction, be punished with imprisonment for a term which may extend to one year and with fine. The areas specified in the Schedule are vast areas. They include numerous villages. They include even undeveloped areas within the State of Bombay. It was not the intention of the Legislature that the power of requisition given under s. 6 should be exer-

cised in respect of premises in all the areas covered by the Schedule. It, therefore, by s. 6 provided that the power of requisition under that section was to be exercised by the State Government only in respect of premises situate in an area which the State Government may by notification specify. If Mr. Bhabha's contention were to be accepted, it would to a large extent frustrate the very object of the legislation. If there are any areas to which the provisions of s. 6 could fittingly be extended, they are some of the areas specified in the Schedule. Some of them are the most developed areas within the State of Bombay and it could not possibly be the object of the Legislature to exclude those areas from the ambit of the provisions of s. 6 and to confine the operation of s. 6 to the areas to which the Legislature did not in the first instance extend even the operation of the Act.

Mr. Bhabha has drawn my attention to the decision in *State of Bombay v. Virendra Motabhai*.¹ In that case in dealing with the scheme of the Act, the learned Chief Justice has, at page 633, observed as follows:—

"...Then we come to s. 6 which is a material section and that section deals with requisition of vacant premises. I may point out that there is a drafting error in s. 6(1) because it refers to premises situated in the area specified by the Provincial Government by notification in the Official Gazette, and it does not refer to the areas specified by the Act itself under s. 2(1). But it is clear that the object of the Act was to apply s. 6 both to areas covered by s. 2(1) and areas covered by s. 2(2). The error arises because this Act took the place of an earlier Ordinance and under that Ordinance the Ordinance could only be applied to the areas specified in the Official Gazette, whereas the scheme of s. 2 of the Act is different."

These observations of the learned Chief Justice about a drafting error in s. 6(1) to some extent support Mr. Bhabha's argument. The learned Chief Justice himself, however, observes that it was clear that the object of the Act was to apply s. 6 to areas covered by s. 2(1). If Mr. Bhabha's argument was accepted, the provisions of s. 6 could not extend at all to the areas covered by s. 2(1). Such a contention is clearly negatived by the aforesaid decision.

When one refers to the provisions of the Bombay Land Requisition Ordinance of 1947, which was repealed by the Bombay Land Requisition Act, 1948, the intention of the Legislature as therein expressed appears to be clear beyond any doubt. By s. 1(2) of the Ordinance, the Ordinance was extended to the whole of the Province of Bombay. By s. 4 it was provided that if any premises situate in an area specified by the Provincial Government by notification in the Official Gazette were vacant on the date of such notification and whenever any such premises became vacant after such date either by the landlord ceasing to occupy the premises, or by the termination of a tenancy, or by the eviction of a tenant, or by the release of the premises from requisition or otherwise, the landlord of such premises shall give intimation thereof in the prescribed form to an officer authorised in that behalf by the Provincial Government. That section clearly contemplated the issue of a notification specifying the area in which the premises should be situate before the provisions of that section could apply. When the Bombay Land Requisition Act, 1948, was enacted, the Act was not extended to the whole of the Province of Bombay. It was extended only to certain areas specified in the Schedule. As regards the rest it was provided that the Act would extend to such further areas as may be specified by the State Government by notification in the Official Gazette under s. 2(2). The notification referred to in s. 2(2) of the Act for extending the operation of the Act is different from the notification referred to in s. 6(1) of the Act specifying the area in which the premises must be situate before the provisions of s. 6 would apply.

Mr. Bhabha next argues that no notification at all has been issued under s. 6 of the Act and that the provisions of s. 6 are not applicable in respect of the rooms which have been requisitioned in the present case at all. Mr. Bhabha is right when he says that no express notification has been issued after

the Act came into force. The notification relied upon by the State is a notification dated December 4, 1947, issued by the Government in exercise of the powers conferred by sub-s. (1) of s. 4 of the Bombay Land Requisition Ordinance, 1947. By that notification Government has notified the city of Bombay as the area for the purpose of sub-s. (1) of s. 4 of that Ordinance with the result that the provisions of s. 4(1) of the Ordinance have been made applicable to premises situate within the city of Bombay. This Ordinance has been repealed by the Bombay Land Requisition Act, 1948. Section 20 of the Bombay Land Requisition Act, 1948, provides as under:—

"20. (1) The Bombay Land Requisition Ordinance, 1947, is hereby repealed and it is hereby declared that the provisions of sections 7 and 25 of the Bombay General Clauses Act, 1904, shall apply to the repeal as if that Ordinance were an enactment..."

Section 25 of the Bombay General Clauses Act, 1904, referred to above, runs as follows:—

"Where any enactment is, after the commencement of this Act, repealed and re-enacted by a Bombay Act with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, bye-law or form made or issued under the repealed enactment shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded, by any appointment, notification, order, scheme, rule, bye-law or form made or issued under the provisions so re-enacted."

By virtue of the operation of s. 20 of the Bombay Land Requisition Act, 1948, the Ordinance of 1947 has to be treated as an enactment within the meaning of s. 25 of the Bombay General Clauses Act. Mr. Bhabha says that s. 25 of the Bombay General Clauses Act would apply only if it could be said that the Ordinance had been re-enacted by the Bombay Land Requisition Act, 1948, with or without modification. He strongly urges that the Act does not re-enact the Ordinance with or without modification. He says that there is such a change in some of the provisions of the Act that it cannot properly be said that the Act is a re-enactment of the Ordinance. He drew my attention to the provisions of s. 4 of the Ordinance and s. 6 of the Act. He says, and rightly, that there is a difference between the provisions contained in s. 4 of the Ordinance and s. 6 of the Act. Section 6 of the Act applies in a case where a vacancy occurs by reason of the landlord, tenant or the sub-tenant ceasing to occupy the premises. Section 4 of the Ordinance applied when a vacancy occurred by reason of the landlord ceasing to occupy the premises or by the termination of a tenancy or by the eviction of a tenant. Section 6 of the Act provides for a vacancy arising by reason of the premises being newly erected or re-constructed. That provision does not find a place in s. 4 of the Ordinance. Sub-section (3) of s. 6 of the Act provides that a landlord shall not, without the permission of the State Government let, occupy or permit to be occupied such premises before giving the intimation and for a period of one month from the date on which the intimation is received. Sub-section (3) of s. 4 of the Ordinance only provides that a landlord shall not, without the permission of the Provincial Government, let the premises before giving such intimation and for a period of one month from the date on which such intimation is given. It is further pointed out that under sub-s. 4(a) of s. 6 of the Act, premises could be requisitioned "for the purpose of the State or any other public purpose". Under sub-s. (4) of s. 4 of the Ordinance, no purpose has been specified. Sub-section (5) of s. 6 of the Act runs as under:—

"6. (5) Any landlord who fails to give such intimation within the period specified in sub-section (3) shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine or with both and any landlord who lets, occupies or permits to be occupied the premises in contravention of the provisions of sub-section (3), shall, on conviction, be punished with imprisonment for a term which may extend to one year and shall also be punished with fine..."

Sub-section (5) of s. 4 of the Ordinance ran as follows:—

"4. (5) Any landlord who fails to give such intimation within the period specified in sub-section (3), shall on conviction, be punishable with fine which may extend to one thousand rupees and any landlord who lets the premises in contravention of the provisions of sub-section (3), shall on conviction, be punishable with imprisonment which may extend to three months or with fine or with both."

Mr. Bhabha strongly contends that under sub-s. (5) of s. 6 of the Act, an offence is made punishable with imprisonment whereas there is no such provision for imprisonment under the Ordinance. He further says that new offences have been created by the Act, which did not exist under the Ordinance. He says that it is an offence under the Act for a landlord to himself occupy or permit to be occupied the premises before giving the intimation and that such offence is punishable with imprisonment and fine whereas under the Ordinance there is no such provision. He further says that an explanation has been added to sub-s. (5) of s. 6 of the Act setting out a variety of circumstances under which premises are deemed to be or become vacant. He urges that all these changes cannot properly be said to amount to mere modification. Mr. Bhabha urges that the word "modification", as used in s. 25 of the Bombay General Clauses Act, refers to a partial alteration, where the alteration tones down what is contained earlier or it makes a thing which existed earlier less severe or makes partial changes and he relies upon the dictionary meaning of the word modification as given in the Concise Oxford Dictionary.

As the points raised in this case have arisen for decision in numerous other cases and as this case is being fought out as a test case, I have permitted counsel in other cases to address me on the points of law which have arisen for determination in the present case. Mr. Sorabjee, who appears for one of the parties in another matter, very fairly drew my attention to the dictionary meaning of the word "modify" appearing in Murray's Dictionary. There the word "modify" has been stated to mean "to make partial changes in; to change in respect of some of its qualities, to alter or vary without radical transformation." The question that I have to consider is whether it could be said that in enacting the Bombay Land Requisition Act, 1948, the Legislature has effected a radical transformation in the provisions of the Ordinance. The subject dealt with by the provisions of the Bombay Land Requisition Ordinance and by the Bombay Land Requisition Act is the same. The changes that have been made in the Act have been made with a view to carry out more effectively the object of the Legislature in enacting the Ordinance. It cannot be said that there has been a radical transformation effected by the Act. New offences have no doubt been created. Punishment of imprisonment is also sought to be imposed. But all that has been done with a view to carry out the purposes of the Act so that the provisions of the Act may not be violated and the policy underlying the Act may not be frustrated. The changes made in the Act requiring a landlord not to occupy or permit to be occupied any premises without giving the requisite intimation are made in order that no loophole may be left in the Act and the object of the Act may be fully carried out.

In Stroud's Judicial Dictionary, Vol. III, at page 1810, it is stated that 'modification' may be by extension as well as by narrowing of the provisions of an Act. In support the case of *Stevens v. The General Steam Navigation Company*² has been cited. In that case the Master of the Rolls was concerned with the provisions of the Interpretation Act, 1889. Sub-section (1) of s. 38 of that Act ran as under:—

"38. (1) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

Collins M. R. in that case observes as follows (p. 893).—

"...This intention the Interpretation Act, 1889, enabled the Legislature to carry out

in the way in which it has been carried out, for in my opinion, there is no reason to limit the word 'modification', which is equally applicable whether the effect of the alteration is to be narrow or to enlarge the provisions of the former Act."

This decision is an authority for the proposition that it is not necessary that there should be a narrowing of the provisions of the earlier enactment in order that it could be said that there has been a modification. There might equally be a modification where the provisions of the earlier enactment have been enlarged. I respectfully agree with the remarks of the Master of Rolls on the subject.

My attention has been drawn to an unreported judgment of Mr. Justice Coyajee in *Shri Ali Akbar Ahmed v. The State of Bombay*³. In that case it was urged that s. 25 of the Bombay General Clauses Act had no application, on the ground that there was no re-enactment of the Ordinance. That contention was negatived by the learned Judge. Dealing with the words "with or without modification" appearing in s. 25 of the Bombay General Clauses Act, the learned Judge, in the course of his judgment, observed as follows:—

"There is no authority cited before me or any principle enunciated from Maxwell or other similar work of interpretation of statute to show that this modification must be modification of an uneffectual character and not of material type or material kind."

The learned Judge has further observed that the Ordinance had been in substance revived and resuscitated in the Act with certain modifications. In my view, there has been a re-enactment with modification of the provisions of the Ordinance within the meaning of s. 25 of the Bombay General Clauses Act when the Bombay Land Requisition Act of 1948 was enacted.

It is then urged by Mr. Bhabha that on a true construction of s. 25 of the Bombay General Clauses Act the modification made must not be inconsistent with the provisions of the previous enactment. This argument proceeds upon an erroneous reading of the provisions of s. 25. The words "so far as it is not inconsistent with the provisions re-enacted" in the said s. 25 refer to "any appointment, notification, order, scheme, rule, bye-law or form made or issued under the repealed enactment" and not to any modification. The provisions of the notification issued under the Ordinance must not be inconsistent with the provisions re-enacted in order that such notification may continue in force and may be deemed to have been issued under the subsequent enactment. In my view, the notification dated December 4, 1947, issued under the Ordinance is in no way inconsistent with the provisions of the Act. All that has been done by the notification could equally have been done by a notification issued under the Act and the applicability of s. 25 of the Bombay General Clauses Act cannot be excluded. In my view, s. 25 of the Bombay General Clauses Act is made expressly applicable by s. 20 of the Bombay Land Requisition Act, 1948, as if the Ordinance were an enactment. Having regard to the provisions contained in s. 25 of the Bombay General Clauses Act, the notification dated December 4, 1947, continues to be in force and must be deemed to have been issued under the provisions of the Bombay Land Requisition Act, 1948, and the provisions of s. 6 of the Act have been made applicable to premises situate within the city of Bombay.

The next point urged by Mr. Bhabha is that the declaration made by the order, dated October 10, 1957, is *ex facie* bad. The declaration as made is to the effect that the premises had become vacant after December 4, 1947. He says that the Bombay Land Requisition Act, 1948, came into force on April 11, 1948, and that the vacancy, which is to be declared under s. 6(4)(a) of the Act must be a vacancy which occurred after the Act came into force. This argument does not take into account the provisions of s. 20 of the Act read with s. 25 of the Bombay General Clauses Act, 1904. As already stated by me, the provisions of the notification dated December 4, 1947, have been continued and have to be given effect to as if the notification had been issued under the provi-

³ (1956) O. C. J. Miscellaneous Petition on January 11, 1956 (Unrep.).
No. 332 of 1955, decided by Coyajee J.,

sions of the Bombay Land Requisition Act, 1948. It is, however, urged that even though the notification could be deemed to have been issued under the provisions of the Bombay Land Requisition Act, 1948, it could be so deemed to have been issued only on the date on which the Bombay Land Requisition Act, 1948, came into force viz. April 11, 1948, and that the declaration must be a declaration about the premises having become vacant after the Act came into force and not before that. The declaration has been made under the proviso to s. 6(4) (a) of the Act. That proviso requires that where an order is to be made under cl. (a) of s. 6(4) requisitioning the premises in respect of which no intimation is given by the landlord, the State Government shall make such inquiry as it deems fit and make a declaration in the order that the premises were vacant or had become vacant "on or after the date referred to in sub-section (1)" of s. 6 and that such a declaration shall be conclusive evidence that the premises were or had so become vacant. It is not disputed that no intimation of the kind referred to in the proviso had been given. The declaration that is required to be made is a declaration about the premises being vacant or having become vacant on or after the date referred to in sub-s. (1) of s. 6. The date referred to in sub-s. (1) is the date of the notification in the Official Gazette issued by the Government in exercise of the powers conferred under s. 6. The date that is to be given is not the date when the notification became effective under the Act, but the date of the notification itself. The date of the notification in this case is December 4, 1947, though it became effective under the Act on April 11, 1948. In the order the date mentioned is "after 4th December 1947". Even though the expression "after 4th December 1947" could be said to include December 5, 1947, and the dates subsequent thereto before the coming into force of the Act, the declaration cannot be said to be a declaration made otherwise than in accordance with the provisions contained in the proviso to sub-s. (4) of s. 6 of the Act and cannot be said to be a declaration not contemplated by the proviso. In this case, however, the order contains a recital that on inquiry it was found that the premises had become vacant in the month of March 1957. Following upon that recital appear the words "the said premises had become vacant after the 4th December 1947". Reading the order as a whole it cannot be said that the vacancy referred to in the order is a vacancy which occurred prior to the coming into force of the Act. Even if the contention of Mr. Bhabha was right that the declaration should state the date of vacancy after the coming into force of the Act, on the facts of the present case there does not appear to be any merit in the objection.

It was next urged that the order itself shows that the authority had not applied its mind to the matter in making the order inasmuch as the declaration that has been made states that the premises had become vacant after December 4, 1947. It is urged that the authority concerned has merely reproduced what was considered to be the requirement of law without applying its mind to the matter. I do not think there is any substance in this contention. The authority making the declaration having applied its mind to the matter has stated that on inquiry it was found that the premises had become vacant in the month of March 1957. Thereafter the authority proceeds to make the declaration that the premises had become vacant after December 4, 1947. It cannot possibly be said that no mind was applied when it was stated that the premises had become so vacant.

Mr. Bhabha then urged that, on the facts of the present case, the premises which had been requisitioned were not in fact 'premises' within the meaning of s. 4(3) of the Act. "Premises" have been defined in that section as under:—
 "Premises" means any building or part of a building let or intended to be let separately... but does not include a room or other accommodation in a hotel or lodging house."

It was urged by the learned counsel for the petitioner that the premises in this case had not been let and were not in fact intended to be let at any time after the coming into force either of the Ordinance or of the Act and were not "pre-

misses" within the meaning of the Act. In the case of *State of Bombay v. Virendra Motabhai*⁴ relied upon by the respondent, it has been laid down by the learned Chief Justice of this Court as follows (p. 635):—

"...The word 'intended' must import a volition; a volition on the part of the landlord. But, in my opinion, that volition cannot be a fluctuating or an ambulatory volition. If a volition is once expressed by the owner or the landlord quae a building, then that volition becomes an incident of the building itself, and it is not open then to the landlord by changing his intention from time to time to say that the particular building was not intended to be let. It should be noted that the Legislature has not used the expression 'building or part of building let or which the landlord intends to let.' The Legislature has deliberately used the expression 'intended to be let' as an expression qualifying building. Therefore the expression 'intended to be let' is a characteristic or an incident of the building. It is perfectly true that that characteristic or incident is to be determined by the volition of the landlord, but it is not to be determined from time to time."

It is submitted on behalf of the petitioner that the letting, if any, of the rooms prior to December 4, 1947, was entirely irrelevant if the intention to let had ceased when the Ordinance came into force. The petitioner was given an opportunity to make an affidavit, if she so desired, to set out whether the petitioner had at any time prior to December 4, 1947, not let out the premises. The petitioner did not avail herself of that opportunity. The learned counsel for the petitioner stated that whilst he was not admitting that the premises had in fact been let by the petitioner at any time prior to January 1947, he was prepared to proceed with the case on the footing that the premises had been let by the petitioner prior to January 1947 and that I may act on that footing. The definition of the word "premises" excludes from its operation a room or other accommodation in a hotel or lodging house. It is clear on the facts of the present case that the premises in question viz. the three rooms referred to in the petition formed part of a lodging house from January 1947 until November 1955. Thereafter the said rooms have been used under the terms of the agreements referred to by me earlier. It is clear from these facts that from and after the coming into force of the Ordinance upto the month of November 1955, the said rooms were used for the purpose of a lodging house and did not constitute "premises" within the meaning of s. 4(3) of the Bombay Land Requisition Act, 1948. It has been strongly urged on behalf of the respondent that the user of the premises subsequent to November 1955 was a user referable to letting and that the agreements under which the premises were allowed to be occupied since November 1955 show that the premises had been let out. In order to consider whether under the said agreements or any of them the premises were in fact let to the person or persons allowed to occupy the same under the terms of the agreements, it would be necessary to examine the said agreements. The first agreement is dated December 1, 1955. Under that agreement Hamid Sayani was permitted to occupy the said three rooms. In the recitals it has been stated that the said Hamid Sayani had requested the petitioner to grant him "leave and licence to allow him to continue occupation of the said rooms as her licensee" and that the petitioner had consented to allow the said Hamid Sayani to occupy the said room "as her licensee". It is further expressly stated in the recitals that the petitioner had no intention to give the said room to Hamid Sayani as a monthly tenant and that she did not want to create any tenancy in favour of the said Hamid Sayani and that she made it absolutely clear that the said Hamid Sayani was only allowed "use and occupation" of the said rooms as merely a bare licensee. The consideration for the said licence stated in the said agreement is "a monthly fee amounting to Rs. 300." That fee was for the use of the said three rooms and for the furniture lying in the said three rooms. It is stated in the said agreement that the particulars of the furniture were mentioned in the Schedule to the said agreement. The Schedule, however, does not contain any list of any furniture.

The Schedule annexed is blank. In the operative part of the said agreement, it has been stated as under:—

"The said Shri Hamid Sayani the party hereto of the second part is granted leave and licence to occupy rooms Nos. F-1-3, 5th fl. in Chhotu Terrace at Colaba Causeway, Bombay 5, as from 1-12-1955 by Mrs. Kulsumbai the party hereto of the first part." Clauses 3, 5 and 6 of the said agreement run as under:—

"3. The party hereto of the second part shall pay to Mrs. Kulsumbai the sum of Rs. 300 which will be the licence fee for the occupation of rooms Nos. F-1-3, fifth floor. The said amount shall be payable every month in advance on or before 10th of each and every succeeding month to Mrs. Kulsumbai the party hereto of the first part.

5. It is clearly understood between the parties hereto that the said Hamid Sayani granted bare licence and leave to occupy the said rooms Nos. F-1-3 of Chhotu Terrace as mere licensee and that he is not accepted by Mrs. Kulsumbai as a tenant in respect of the said rooms Nos. F-1-3. That no monthly tenancy is created in respect of the said rooms Nos. F-1-3 in favour of the said Shri Hamid Sayani. It is not the intention of the parties that the monthly tenancy is to be created.

6. The said Shri Hamid Sayani shall take all care of all pieces of furniture as also shall keep the premises in good state of repair and shall make good the damages that may have been caused either to the said rooms or to the said pieces of furniture."

It is urged by the learned counsel for the respondent that even though this agreement speaks of leave and licence being granted and even though the agreement states that no tenancy was created thereby, the agreement on its true construction has in fact created a tenancy and that the premises must be considered to have been let within the meaning of the Bombay Land Requisition Act, 1948.

The question whether an agreement amounts to a lease or licence has been considered in numerous cases and it is not necessary for the purpose of this case to cite all those cases. The matter has been succinctly stated in Halsbury's Laws of England, 2nd edn., Vol. XX, at pages 8 and 9. In para. 5 at page 8 it has been stated as under:—

"It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a licence and not as a lease. In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance of the agreement. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and control of the owner, it is a licence. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee require that he should have exclusive possession. On the other hand, the employment of words appropriate to a lease will not prevent the grant being a licence merely, if from the whole document it appears that the possession of the property is to remain with the grantor. In order that a licence may give an exclusive right to the benefit conferred by it, it must either be expressed to be exclusive in the grant, or it must be possible to infer from the language of the grant a clear intention to that effect."

In the case of *Addiscombe Garden Estates Ltd. v. Crabbe*,⁵ it has been observed that the relationship was to be determined by the law and not by the label which the parties chose to put on an agreement. In that case the trustees of a members' lawn tennis club entered into an agreement with the owners of tennis courts and clubhouse, whereby the owners purported to license and authorize the trustees to use and enjoy the premises for two years from May 1, 1954, in consideration of monthly payments of "courts fees". In that case on a true construction of the said agreement the Court of Appeal came to the conclusion that a tenancy had in fact been created in spite of the label of a licence being put on the

agreement and in spite of the fact that the amount payable was termed as "fee" instead of "rent". The licence in that case was for a fixed period of two years. The grantees were authorised and licensed, *inter alia*, to enter upon and enjoy the club house with the dressing rooms and other appurtenances enjoyed therewith. The grantees agreed with the grantors to repair and maintain the said club house with the dressing rooms in good tenantable repair and condition and to render the same up upon the expiration or sooner determination of the licence in such good tenantable repair and condition. The grantees further agreed not to erect any building or other structures upon the said property except such as would be approved by the grantors. The grantees further agreed to permit the grantors and their agents at all reasonable times to enter upon the said premises to inspect the condition thereof and for all other reasonable purposes. The grantees further agreed during the continuance of the said licence to insure against loss or damage by fire in the joint names of the grantors and the grantees, the said club house. The grantors agreed with the grantees that the grantees making the said payment of courts fees and observing the stipulations on their part to be observed should during the licence "quietly enjoy the said premises without interruption by the grantors or any person claiming under or in trust for them". Jenkins L.J. in the course of his judgment in that case observes as follows (p. 985):—

"...as to the first question—whether the so-called licence of April 12, 1954, in fact amounted to a tenancy agreement under which the premises were let to the trustees—the principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence."

After dealing with the various clauses of the said agreement, the learned Judge further observes as under (p. 988):—

"The next provision of importance is the agreement to permit the grantors and their agents at all reasonable times to enter 'the said premises to inspect the condition thereof and for all 'other reasonable purposes.' The importance of that is that it shows that the right to occupy the premises conferred on the grantees was intended as an exclusive right of occupation, in that it was thought necessary to give a special and express power to the grantor to enter. The exclusive character of the occupation granted by a document such as this has always been regarded, if not as a decisive indication, at all events as a very important indication to the effect that a tenancy, as distinct from a licence, is the real subject-matter of a document such as this."

The learned Judge further observed that the provision as to insurance and the covenant for quiet enjoyment pointed in the direction of a tenancy being created, and that the reference to re-entry was really inappropriate to the case of a licence. The learned Judge stated that the conception of re-entry was the resumption of possession by the landlord and the determination of the interest of the tenant. Dealing with the observations made by Denning L.J. in *Errington v. Errington and Woods*,⁶ that the test of exclusive possession was by no means decisive, the learned Judge observed that that wide statement must be treated as qualified by the observations of the same learned Judge in *Facchini v. Bryson*,⁷ and it seemed to the learned Judge that save in exceptional cases of the kind mentioned by Denning L.J. the law remained that the fact of exclusive possession, if not decisive against the view that there was a mere licence, as distinct from a tenancy, was at all events a consideration of the first importance. On the facts of the case, the learned Judge observed that there was not only the indication afforded by the provisions which showed that

⁶ [1952] 1 K. B. 290,

⁷ [1952] 1 T. L. R. 1386, 1389.

L.R.—18.

exclusive occupation was intended, but there were all the various other matters which appeared to him to show that the actual interest taken by the grantees under the document was the interest of tenants, and not the interest of mere licensees.

So far as this Court is concerned, there is a decision of a Division Bench of this Court in *Ramjibhai Virpal v. Gordhandas*.⁸ Mr. Justice Gajendragadkar in the course of his judgment in that case observes as under (p. 369):—

"...Where the agreement is reduced to writing, it is but trite to say that the relationship brought into existence by the writing must always be determined in the light of the words used by the parties in executing the document. The substance of the transaction has no doubt to be determined and if in substance the transaction appears to be one of lease, the fact that an effort is made to clothe the transaction with an appearance of licence by the use of ingenious and clever words would not alter the essential character of the transaction. In that sense the use of words such as 'meane profits' or 'compensation' can have no material effect. But this is a statement of one aspect of the matter. In determining the nature of the transaction itself Courts have inevitably to take into account the words used by the parties, and in that sense it would be wrong to suggest that the words used in the document, such as 'compensation' or 'meane profits' are of no consequence whatever. In deciding the question as to what was the intention of the parties in executing the document Courts would have to look at the document as a whole, give the words used in the document their plain, grammatical meaning and determine the intention of the parties in that manner. If the intention of the parties clearly appears to be not to create the relationship of landlord and tenant between them, then in construing the words used in the document the Courts would have to bear that fact in mind. In such a case if the words used in the document are consistent both with a lease and a licence, Courts would naturally prefer to treat the document as a licence rather than as a lease in view of the intention of the parties which is otherwise clear beyond a doubt. Even so, the intention can be given effect to in construing the words of the document only where the words are capable of two constructions, one of which is consistent with the said intention. If the words used in the document are unambiguous and lead only to the inference that the relationship of landlord and tenant is thereby intended to be created, the doctrine of intention cannot materially affect the construction of the document."

After dealing with the various authorities cited at the bar, the learned Judge observes as under (p. 372):—

"...It would, however, be necessary to add that I feel some hesitation in holding that these decisions lay down the categorical proposition that a licence of any kind can never import the notion of exclusive possession by agreement between the parties. That may probably be the consequence of the definition of a licence contained in s. 52 of the Indian Easements Act; but this aspect of the matter does not appear to have been considered and decided in these decisions."

The learned Judge further proceeds to say that it must be conceded that the right to exclusive possession and enjoyment of the property let out to him is an important feature of the rights of a lessee. It must, however, be borne in mind that for the creation of a valid lease it is necessary to prove the presence of some other equally important ingredients as laid down in s. 105 of the Transfer of Property Act, so that it cannot be said that merely because a person is given the right to exclusive possession he becomes a tenant even if he does not satisfy the other requirements of the definition of "lease" contained in s. 105. At page 373 the learned Judge further observes as follows:—

"...the statement that a licence is always ruled out as soon as the right to exclusive possession is granted to a party may not be regarded as a correct statement of the law without some qualification. The question as to whether a licensee can be given an indefeasible right to remain in possession for a stated period by an agreement between the parties has been considered by English Courts on several occasions in recent years, and it may be stated, with respect, that the tendency of recent decisions appears to be

to widen the scope of the licensee's rights and to hold that if a licensee is also given the right to exclusive occupation for a stated period, this right does not convert the licence into a lease but merely adds certain contractual rights to the licence."

Reading the document as a whole, I have to find out the intention of the parties as expressed in the instrument. To my mind, the parties have done their level best to express their intention in as clear terms as possible. They have clearly stated in the agreement that the intention was not to create a tenancy but that only a licence was intended to be granted. The mere fact that the moneys liable to be paid for the use of the property referred to therein were payable in advance and the fact that the grantee was under an obligation to keep the premises granted in a good state of repair are not sufficient for the purpose of negating the intention of the parties as expressly stated in the agreement to grant a licence and not to create a tenancy.

After the said agreement was entered into, the parties thereto have chosen again to enter into another agreement on November 1, 1956. That agreement begins by saying that it was an agreement of leave and licence. The period of the agreement of leave and licence is stated to be 11 months. The licence fee is fixed at Rs. 300 both for the said rooms and the hire of the furniture. Here again, the particulars of the furniture are stated to be set out in the Schedule, but in the Schedule no articles are mentioned, the said schedule being left blank. This agreement also sets out in clear terms that only leave and licence was being granted and that no tenancy was to be created thereby. Clause 11 of the said agreement provides as under:—

"The said Shri Hamid Sayani shall not permit anybody else except the members of his family only to stay with him in the said room given to him as licensee by the said Mrs. Kulsambal J. G. Padamsee."

Clause 13 of the said agreement is as under:—

"The control on the said room shall be with Mrs. Kulsambal J. G. Padamsee and for the sake of convenience the duplicate key is given to the said Shri Hamid Sayani by Mrs. Kulsambal J. G. Padamsee."

It seems that the draftsman of the agreement was at pains to set out that only a licence was to be granted and that a tenancy was not to be created. In order to safeguard against the argument that exclusive possession was intended to be granted, it has been expressly provided that the control of the premises was to be with the grantor and that for the sake of convenience a duplicate key was being given by the grantor to the grantee.

Mr. Baptista, the learned counsel for the respondent, strongly relies upon two clauses contained in the said agreement viz. cls. 7 and 10. Clause 7 of the said agreement runs as under:—

"Mrs. Kulsambal J. G. Padamsee shall not be bound to take back the pieces of furniture given on hire until the possession of the room given for use as licensee is returned back to her and whether the said Shri Hamid Sayani uses the furniture or not he shall be bound to pay hire charges for the said furniture as agreed hereto."

Mr. Baptista emphasises the fact that this clause indicates that the possession of the room was given to the grantee. In the document the said statement however is qualified by the words "for use as licensee". The mere use of the word "possession" in that context is not sufficient to negative the intention of the parties as expressly stated in the instrument in clear language. Clause 10 of the said agreement provides as under:—

"On the expiry of the period hereby demised the said Shri Hamid Sayani shall vacate and hand over the possession of the said room No. F-1-3 as also shall hand over the pieces of furniture stated in the schedule herebelow in a good state of repair."

Mr. Baptista states that the word "demised" indicates that only a tenancy was sought to be created. The word "demised" no doubt has been used, but it has been used not in connection with the tenancy, but in connection with the period of the grant viz. 11 months. The use of the word "demised" in this context is not apt. The use of that word in the manner in which it has been

done and in the context in which it has been done is not such as would lead to the inference that a licence was not intended to be given, but a tenancy was intended to be created, in the face of the express words to the contrary that only a licence was being granted and that a tenancy was not being created. In my view, this agreement does not create a tenancy and the rooms cannot be said to be let thereby.

The last agreement is couched in terms similar to some of the terms contained in the earlier agreements. It starts by saying that it was agreement of leave and licence. It is made in favour of M. R. Shetty and B. T. Shenova. A sum of Rs. 275 is payable under that agreement per month by way of licence fee, both for the rooms as well as the furniture. The furniture is stated to have been specified in the Schedule. But here again, the schedule is completely blank. Mr. Baptista has strongly urged that as the Schedule in all these documents is blank, in fact no furniture had been given. In my view, the fact whether furniture had been given or not is not material for the purpose of determining whether there has been a lease of the rooms or merely a licence to use the said rooms. In this document also, it has been clearly stated that possession of the rooms had been given for use as a licensee. The same reasoning which applies to the agreement dated November 1, 1956, equally applies to the agreement of March 5, 1957. In my view, reading this document as a whole, on a true construction thereof it appears to me that the clear intention of the parties was only to grant a licence and not to create a tenancy. The rooms in question cannot be said to have been let by reason of anything contained in these three documents.

My attention has been drawn to the statements contained in para. 14 of the affidavit in reply of P. M. Kulkarni, dated December 9, 1957. In that paragraph it is stated as follows:—

"I say that from the enquiries caused to be made by Government the business of the Lodging House came to an end in November 1953. Thereafter the petitioner let out different rooms separately to different persons. Certain amounts were taken by the petitioner from the alleged occupants of the said separate rooms. The alleged occupants of those separate rooms were put in exclusive and independent occupation and possession of the rooms. The petitioner herself is not residing in the premises or even in the said building. On a consideration of all the facts, Government came to the conclusion that the premises were let out by the petitioner and the alleged occupants are really tenants and that the premises were let by the petitioner in contravention of the provisions of the said Act. I submit that the alleged leave and licence agreements do come within the ambit of the word 'let' used in the said Act."

As I have already held, it cannot be said that under the said agreements the rooms in question have been let to any person. It is no doubt stated in the aforesaid affidavit that the occupants were put in exclusive and independent occupation and possession of the said rooms. That statement has been based on the inquiries caused to be made by Government. It is not stated that apart from the said three agreements, there was any other arrangement under which the said rooms were occupied. It is not even stated that the documents were executed merely as a cloak to hide the real transaction between the parties. There is no transaction apart from the transaction as represented by each of the aforesaid three documents. In my view, it cannot be said that the rooms in question constituted "premises" by reason of the use thereof and the agreements entered into in connection therewith since the coming into force of the Ordinance or the Act.

It is next urged by the learned counsel for the respondent that these rooms had been let prior to the coming into force of the Ordinance, and that once these rooms have been so let, then the letting would become a characteristic of these rooms and that the intention to let them would be fastened upon the landlord and that it is not open to the landlord thereafter to contend that the rooms were not intended to be let. Very strong reliance was placed upon the deci-

sion in the *State of Bombay v. Virendra Motabbhoy*,⁹ already referred to by me. From the facts in that case it appears that the flat in that case had in fact been let by the owners and the contractual tenancy continued upto December 31, 1947, i.e. after the coming into force of the Ordinance. The premises having in fact been so let, the intention to let them had become a characteristic of that flat. The learned Chief Justice at p. 635 in that case observes as follows:—

"Now, in this case it is perfectly clear that this particular flat not only was intended to be let but was actually let to a tenant, and therefore, when the vacancy occurred it could be postulated of this flat that it was a flat which was intended to be let."

That decision is not an authority for the proposition that if the flat had at any time been let prior to the coming into force of the Ordinance, the intention to let it must fasten upon the property, even though that intention had ceased long before the coming into force of the Ordinance. I will assume for the purpose of this case that the rooms in question had in fact been let before the coming into force of the Ordinance i.e. prior to January 1947. From and after January 1947 till November 1955 the rooms had been used for the purpose of a lodging house and were not "premises" within the meaning of the Ordinance or the Act. It cannot be said that at the time when the Ordinance came into force the rooms were intended to be let within the ordinary meaning of those words. In fact they were not intended to be let, but were intended to be used for the purpose of a lodging house. Not merely these 3 rooms but the whole building in which these rooms are situate was being used and was intended to be used for the purpose of a lodging house. The question that arises for consideration is whether it can be said that the rooms were intended to be let within the meaning of the words used in s. 2(3) of the Ordinance or s. 4(3) of the Act. It cannot be said that the Legislature intended to fasten upon the property the characteristic of being intended to be let, even though at the time when the Ordinance or the Act came into force the landlord did not in fact intend to let the same and continued not to intend to let the same. Mr. Baptista on behalf of the respondent has asked me to extend the meaning of the words "intended to be let" as construed by the learned Chief Justice in the decision referred to above also to cases where the premises had at any time been let after they were constructed even though the owner thereafter had ceased to have any intention to let them prior to the coming into force of the Ordinance or the Act. If the argument of Mr. Baptista is accepted, it would mean that in a case where premises had been constructed 60 years back and had been let out for a year immediately after construction and had thereafter been purchased by a person for his personal use and had used them for the remaining 59 years for his own residence without ever intending to let the same, the premises must be considered as premises intended to be let. In my view, in order that the intention to let may fasten upon the property and may be regarded as a characteristic of the property, such intention must exist at some point of time on or after the date when the Ordinance or the Act came into force. Such a characteristic cannot be deemed to have been acquired by something done prior to the coming into force of the Ordinance if the owner of the property had thereafter ceased to have that intention and had no intention to let the property on or after the date when the Ordinance came into force. If any property which had at one time been let had been purchased long prior to the coming into force of the Ordinance and the purchaser had immediately thereafter settled the same on trust and provided that the premises shall not be let by the trustees at any time but that the same shall be used for the purpose of the trust, it cannot be said that the property was intended to be let. It is too much to say that as soon as the Ordinance or the Act came into force, the property was intended to be let. The Bombay Land Requisition Ordinance was a piece of temporary legislation. So is the Act. In

considering the words "intended to be let" used in s. 4(3) of the Act, the appeal Court laid down that the volition cannot be fluctuating or ambulatory. That decision, in my view, does not refer to any change of intention which might have taken place prior to the coming into force of the Ordinance. In my view, the characteristic of being intended to be let did not attach to the said three rooms at the time when the Ordinance came into force and has not attached thereto by anything done thereafter and the said rooms cannot be said to be rooms "let or intended to be let" within the meaning of s. 4(3) of the Act and do not constitute "premises" within the meaning of that section.

I may state that it was urged by the learned counsel for the respondent that if it is held that the rooms in question had been let or were intended to be let then the words of exclusion viz. "but does not include a room or other accommodation in a hotel or a lodging house" would not apply to the rooms in question which were used for the purpose of a lodging house. He relies upon the decision in *Jhamandas Ramchand v. State of Bombay*¹⁰, where it has been laid down that an entire hotel or lodging house is within the definition of "premises" in s. 4(3) of the Act. The rooms which are sought to be requisitioned in the present case only formed part of a lodging house. There were numerous other rooms used for the purpose of the same lodging house. The whole place used for the purpose of the lodging house is not sought to be requisitioned, but only three rooms thereout. Such rooms have been expressly excluded from the definition of the word "premises" and it cannot be said that these rooms constituted premises within the meaning of the Act.

I may also state that placing reliance upon the decision in *State of Bombay v. Bhanji Munji*¹¹ it was urged that the onus was on the petitioner to establish that the rooms that were requisitioned were not "premises" within the meaning of the Act. In my view, the petitioner has discharged such onus.

As the rooms that have been requisitioned were not "premises" within the meaning of s. 4(3) of the Act, the State Government was not entitled to requisition the same and the order of requisition is bad in law. I direct that a writ of *mandamus* do issue in terms of prayer (a) of the petition. The respondent to pay to the petitioner the costs of the petition fixed at Rs. 375, including the costs of the notice.

The State of Bombay appealed.

H. M. Seervai, Advocate General, with *S. Baptista*, for the appellant.

K. H. Bhabha, with *S. J. Sorabjee*, for the respondent.

CHAGLA C.J. Various interesting and ingenious points arise in this appeal. That is to be expected because this is an appeal from a petition challenging a requisition order, and so long as the Requisition Act is on the statute book and so long as requisition orders are made, novel and ingenious arguments will always be advanced before the Court.

The facts that give rise to this appeal are that the impugned requisition order was passed on October 10, 1957, under s. 6(4)(a) of the Requisition Act. The order stated that the vacancy had occurred in the month of March 1957, there was a declaration by the Government that the premises had become vacant after December 4, 1947, and the premises were being requisitioned for a public purpose, viz., for housing a Bombay State Government servant. The premises concerned are three rooms Nos. F1, F2 and F3 on the 5th floor of a building known as Chhotu Terrace situated at 105, Colaba Road, Bombay 5. The facts with regard to these premises are that from January 1, 1947, to November 1955 these three rooms were used as a lodging house. After November 1955 they were occupied by certain persons, and it is a matter in dispute between the parties whether the occupation by these persons was as tenants or as licensees. In view of the decision we have come to on the main question argued in this appeal, it is unnecessary to resolve that dispute. It is also admitted for the

10 (1954) 57 Bom. L. R. 938.

11 (1954) 57 Bom. L. R. 595.

purposes of this appeal that these three rooms were in fact let out before January 1, 1947, and the order was challenged by the petitioner on the ground that these three rooms did not constitute premises within the meaning of the Act. What was urged was that these premises were in fact not let out at the date of the requisition order because the contention was that they were in possession of a licensee, and it was further urged that these premises were not intended to be let because they had never been in fact let after the Ordinance came into force on December 4, 1947, or the Act came into force on April 11, 1948.

In order to determine whether these premises were liable to be requisitioned and in order to determine whether the Government could exercise the power to requisition it conferred upon it under s. 6, it is necessary to determine that the premises were situated in the area to which the Act applies and also that the premises sought to be requisitioned were premises as defined by the Act. Under this head of the argument we are only considering the question as to whether the three rooms were premises within the meaning of the Act. It is undoubtedly true that the relevant point of time to be taken into consideration is the date when the power to requisition is exercised. At that date not only must there be a vacancy as required by the Act, but the vacancy must be with reference to the premises as defined by the Act. The declaration of vacancy is conclusive, but whether the premises are premises within the meaning of the Act is a justiciable issue, and what is urged by the petitioner is that at the date when the power was exercised the three rooms did not fall within the ambit of the definition given by s. 4(3). Now, "premises", to the extent relevant, is defined as any building or part of a building let or intended to be let, and it is clear that on October 10, 1957, assuming for the purpose of this argument that the premises were given to licensees, the premises were in fact not let. So the narrow question that we have to consider is whether it could be said of these premises that they were intended to be let, and what calls for our decision is the meaning to be attached to the expression "intended to be let."

Now, this is not a matter of first impression. The matter is concluded by the decision of the Court of Appeal in *State of Bombay v. Virendra Motabhoj*.¹ It is necessary carefully to consider that judgment. In that case one Mrs. Coultrup was a tenant of a flat on the first floor of a building. Her contractual tenancy was terminated on December 31, 1947, but Mrs. Coultrup continued to occupy the flat as a statutory tenant right upto January 1949. In the second week of January 1949 she left the premises and someone else went into possession, and Government then requisitioned the premises. The petitioners challenged the requisition order and Mr. Justice Bhagwati held that the order was bad because at the date when the order was passed the premises were not let and the landlord had clearly indicated that he did not intend to let the flat, and therefore the premises did not fall under one or the other head of the definition. The matter came in appeal and the Court of appeal held that the word "intended" imported a volition on the part of the landlord, but that volition was not a fluctuating or an ambulatory volition and if the volition was once expressed by the owner or the landlord *quae* the building, then that volition becomes an incident of the building itself, and it was not open then to the landlord by changing his intention from time to time to say that the particular building was not intended to be let. Applying this test we hold that inasmuch as the landlord had clearly expressed his volition by letting out these premises to Mrs. Coultrup who was at one time a contractual tenant, it was not open to the landlord subsequently to turn round and say that he had altered his intention and he no longer intended to let out the premises. One distinguishing feature on which great emphasis has been laid by Mr. Bhabha, and rightly so, and which has also been emphasised by the learned Judge below, is that in the case of *Virendra Motabhoj* there was in fact

1 (1950) 52 Bom. L. R. 627.

a letting after the Act came into force because, as pointed out, Mrs. Coultrup was a contractual tenant upto December 31, 1947. What is urged before us, as it was urged before the Court below, is that it is necessary that there must be a volition expressed by the landlord after the Act comes into force, and that the fact that a volition has been expressed before the coming into force of the Act is irrelevant for the purpose of determining whether the premises were intended to be let. It is, therefore, pointed out that in this case the premises were used as a lodging house from January 1, 1947, whereas the Ordinance came into force on December 4, 1947, and the Act came into force on April 11, 1948, and for the purpose of this argument there has been no letting after the rent law came into force and even if the landlord had let the premises before January 1, 1947, that letting cannot be taken into consideration for determining the volition referred to in *Motabhoy's* case.

Turning to s. 4(3) it is clear that the premises which were sought to be brought within the purview of the Government's requisitioning power were the premises as defined by the Act. Whatever buildings were there which satisfied the definition of premises when the Act came into force became liable to be requisitioned. Therefore, every building at the date when the Act came into force which was actually let undoubtedly came within the purview of Government's power. That is conceded by Mr. Bhabha. It is difficult to understand why, if a building which was actually let, came within the purview of the Government's power, a building which at that date was intended to be let did not equally come within the purview of the Government's power. It should be made clear that the interpretation which we are putting upon the expression "intended to be let" is not intended to give any retrospective effect to the Act at all. What we are trying to construe is the definition given in a statute which applies to certain buildings from the date when it comes into force. If any building had been let by the landlord before the Act came into force, could it possibly be said that that was not a building intended to be let, as the expression has been understood and defined in *Motabhoy's* case? The simple question that the Court has to ask is—here is a building which was not always occupied by the landlord but which the landlord himself had let out and, to use a rather popular expression, which he had by his own action made lettable. If there was such a building at the date when the Act came into force, even though at that date it was not actually let, could it possibly be suggested that that was a building which the landlord had never intended to let? Could it be said of that building that that volition which is described in *Motabhoy's* case had never been exercised by the landlord *quas* this building? In our opinion, the contention advanced by Mr. Bhabha is as untenable as the argument that only those premises come within the purview of the Act as were constructed after the Act came into force, because if the Act applies to buildings which were already in existence, then the particular incident which is the result of the volition of the landlord having attached to the building, the building that existed at the date when the Act came into force was a building with a certain incident attached to it and it is that incident which made the building liable to be requisitioned and which made it possible for the State Government to exercise its power.

The learned Judge has drawn attention to a possible hardship that may result by our giving this interpretation to the expression "intended to be let", and the hardship suggested is that you may have a building which for 60 years has been occupied by the landlord himself and which before 60 years might have been let out for a short time to a tenant, and the learned Judge says that it would indeed be hard and unfair to compel the landlord in the case of such a building to the overriding powers of the State. With respect to the learned Judge, we do not see any hardship even in the extreme case taken by him. It is not as if the Bombay Land Requisition Act of 1948 can drive a landlord out of his home and hearth and occupy his residence when he is occupying it. The whole object of the Land Requisition Act is to bring about equitable distribu-

tion of premises. What is the hardship if the landlord, after occupying the property for 60 years, leaves it or thinks of letting it out to a tenant? In such a case there is a vacancy and instead of the landlord regulating the vacancy the State steps in and says—"I will regulate it because I know what the public interest demands." Apart from that, the Requisition Act is a piece of social legislation and we must construe its various provisions in a manner which would help the achievement of the object which the Legislature had in mind rather than retard it.

Now, the reason for passing this Act was that it was felt in 1948 that there was a shortage of housing and that it would be contrary to public interest to allow vacancies to be filled up in any manner that the landlord thought proper, and therefore the State acquired to itself the undoubtedly drastic powers which it has under the Land Requisition Act, 1948. But the object was to regulate all vacancies which occurred after the Act came into force, and if we were to accept Mr. Bhabha's contention, a large number of vacancies would be ruled out from the operation of the Act, because according to him the only buildings which could be requisitioned were the buildings which were actually let at the date when the Ordinance or the Act came into force. Even if there were a large number of vacancies at that date, the State could not requisition those buildings if the landlord subsequent to the relevant date did not actually let the building or, Mr. Bhabha concedes, showed an intention to let the building. It is difficult to understand what social purpose was sought to be served by excluding from the category of buildings which could be requisitioned, buildings which in fact fell vacant and buildings which in fact were let out in the past. Nor is it possible to understand what hardship or anomaly could be caused by including these buildings within the purview of the State's requisitioning power. Undoubtedly, if the language of the section is clear, the Court cannot be influenced by social purpose or the object which the Legislature had in mind. But when the expression "intended to be let" is capable of being construed in a wider manner and that wider manner helps us to bring about the result which the Legislature had in mind, then surely we should accept the wider meaning rather than the narrower meaning which we are asked to place upon this expression.

It is then said that on the facts of this case the three rooms were in the exempted class, because s. 4(J) exempts from the definition of "premises" a room or other accommodation in a hotel or lodging house, and it is said that from January 1, 1947, to November 1955 these rooms were in a lodging house and therefore they fell within the exempted category, and Mr. Bhabha does not understand how they could come back within the category of premises which could be requisitioned without some provision in the law. It seems to us that the explanation is very simple. It is quite clear that these premises could not be requisitioned from January 1, 1947, to November 1955, because they were exempted by a specific provision of the Land Requisition Act. But when they ceased to be rooms in a lodging house and if the interpretation that we are placing upon the expression "intended to be let" is correct, then they fell within the category of "premises" and not within the exempted class, and at the relevant date when the order of requisition was passed they were admittedly not rooms in a lodging house; they were premises within the meaning of the definition because they were a part of the building which, although not let, were intended to be let.

We are, therefore, of the opinion, with respect to the learned Judge, that although on the facts *Motabkoy's* case may not apply to the question that we have to decide in this appeal, the *ratio decidendi* of that case applies to the different facts which we have to consider, and on that ratio we must hold that the premises in question were premises intended to be let because they had in fact been let before January 1, 1947.

The second contention urged by Mr. Bhabha is that the declaration made on the face of the order that they became vacant after December 4, 1947, is not a

proper declaration required by law, and the contention is that the Bombay Land Requisition Act came into force on April 11, 1948, and the date of vacancy under s. 6(4)(a) must be a date after April 11, 1948. It may be pointed out that the date December 4, 1947, is mentioned in the order with reference to the Ordinance which came into force on that date, and it is urged that the date with reference to the Ordinance is not the relevant date as required by an order issued under s. 6 of the Requisition Act. It is unnecessary to consider this question because it is covered by a judgment recently delivered by my brother Mr. Justice S. T. Desai and Mr. Justice Miabhoy in *Shri Jagir Singh v. The State of Bombay*.²

The third point urged is that on a true construction of s. 6, it applies only to areas which have not been notified under s. 2(2) and not to areas specified in the Schedule under s. 2(1) of the said Act. Turning to the scheme of the Act, s. 2(1) extends the whole of the Act to the areas specified in the Schedule, and the city of Bombay is one of the areas mentioned in the Schedule. Section 2(2) empowers the State Government, by notification in the Official Gazette, to extend any or all of the provisions of this Act to any other area and on such date as may be specified in the notification. Therefore, going by this section alone, it is clear that the scheme of the Act was to have certain, what might be called, scheduled areas to which the Act applied and to leave it to the State Government by notification to apply the whole Act or certain provisions of it to what might be described as the non-scheduled areas. Turning to s. 6(1), it provides:

"If any premises situate in an area specified by the State Government by notification in the Official Gazette, are vacant on the date of such notification..." and then follow the words with which we are not concerned, and ultimately power is given to the State Government to requisition premises. A notification under what is in substance this section was issued on December 4, 1947, by which the city of Bombay was described as a specified area for the purpose of the section. In fact, the notification was issued under the Ordinance, but it is not disputed that s. 4(1) of the Ordinance corresponds to s. 6(1) of the Act and the notification issued under the Ordinance was continued under the Act which took the place of the Ordinance. Therefore, what this section did was to provide that even in the scheduled areas the provisions of s. 6 were not automatically to apply. A notification by Government was necessary before the provisions of s. 6(1) could apply to a scheduled area as a whole or any part of it, and therefore but for this notification s. 6 could not have been made applicable to the city of Bombay. Although the Act applied to the city of Bombay, as far as s. 6 was concerned, a special notification was necessary to make its provisions applicable to the city of Bombay.

Now, what is urged is that the notification referred to in s. 6 is the same as the notification referred to in s. 2(2), and therefore a curious argument is advanced that s. 6 can only apply to the non-scheduled area mentioned in s. 2(2) when a notification is issued extending certain provisions of the Act to that area, but s. 6 cannot apply to the scheduled areas mentioned in s. 2(1). The fallacy underlying this argument is to equate the notification referred to in s. 2(2) with the notification referred to in s. 6(1). The notification referred to in s. 6(1) is an entirely different notification to the notification mentioned in s. 2(2). Mr. Bhabha says that there is a drafting error in this section and that error is brought about by the provisions of the earlier Ordinance which replaced this Act and the draftsman did not realise or understand the different scheme adopted in the Ordinance and the scheme adopted in the Act. We do not agree. Turning to the Ordinance, the scheme adopted in the Ordinance, which is Ordinance V of 1947, was that the Ordinance extended to the whole of the Province of Bombay, and by s. 4, which corresponded to s. 6 of the Act, that section was only made applicable provided a notification was issued to

² (1958) O. C. J. Appeal No. 44 of 1958, June 23, 1958, (Unrep.).
decided by S. T. Desai and Miabhoy JJ., on

that effect by the State Government. Therefore, the scheme of the Ordinance was to make the Ordinance applicable to the whole Province of Bombay, but with regard to s. 4 to make it applicable only to such areas as may be specified in the notification. As pointed out, the scheme of the Act undoubtedly is different. The scheme is not to make the Act applicable to the whole State of Bombay, but to make the Act applicable only to scheduled areas, to make the Act applicable to non-scheduled areas by notification, and even with regard to the scheduled areas to make the provisions of s. 6 applicable only to such portion of the scheduled areas as may be specified in a notification to be issued under s. 6 of the Act or which has been issued under s. 4 of Ordinance V of 1947.

Now, some support is lent to Mr. Bhabha's contention by certain observations made in the judgment of the Court of Appeal, and I must take the whole blame for it myself, because in delivering the judgment I was considering the scheme of the Act and I did say that there was a drafting error in s. 6(1) because it refers to premises situated in the areas specified by the Provincial Government by a notification in the Official Gazette, and it does not refer to areas specified by the Act itself under s. 2(1); but it is clear that the object of the Act was to apply to s. 6 both the areas covered by s. 2(1) and the areas covered by s. 2(2). Therefore, I cannot blame Mr. Bhabha for putting forward this argument relying on the observation in the judgment delivered by me in *Motabhai's* case. But it is clear from the judgment that this particular point was never argued, and what the judgment was doing was taking a bird's eye view of the various provisions of the Ordinance and the Act in order to construe the particular section which called for construction. Now that the point has been directly raised, we have looked more carefully into it and we are of the opinion that the particular observation is not justified by the language used in the Act.

The result is that all the three contentions raised by Mr. Bhabha fail.

In fairness to Mr. Bhabha we must point out, in case the matter goes higher, that the question as to whether there was leave and license granted to the persons who occupied these rooms after November 1955 or there was a tenancy, has not been considered by us. The Advocate General wanted to satisfy us that the judgment of the learned Judge also on this aspect was erroneous. But in view of our decision that a letting of these rooms prior to January 1, 1947, is sufficient to permit the State Government to exercise its power under s. 6, it is unnecessary to decide that particular question.

The result is that the appeal succeeds and must be allowed with costs. The order of the trial Court will be set aside. The learned Judge directed that the State should pay to the petitioner costs which he quantified at Rs. 375. Inasmuch as the State has won, the order for costs of the trial of the petition in the lower Court will be that the respondent should pay to the appellant costs of the petition fixed at Rs. 375, and the respondent will also pay to the appellant costs of this appeal.

The Advocate General agrees not to enforce the requisition order for three weeks in order to enable the appellant to file a petition to appeal to the Supreme Court, if so advised.

Liberty to the appellant's solicitors to withdraw the sum of Rs. 500 deposited in Court.

In Appeals Nos. 34 and 36 of 1958 we make the same order, except that the figure of costs will be Rs. 325 instead of Rs. 375.

Appeal allowed.

Solicitors for the appellant: *Little & Co.*

Solicitors for the respondent: *Ambubhai & Divanji.*

APPELLATE CIVIL.

Before Mr. Justice Vyas and Mr. Justice Tambe.

THE URAN ISLAMPUR MUNICIPALITY v. SHANKARRAO
AMBITRAO JADHAV.*

Bombay District Municipal Act (Bom. III of 1901), Secs. 76-79, 164, 82(1)(a)—Article on which octroi duty leviable brought by person within octroi limits of municipal district—Refusal by such person to pay octroi duty—Suit filed by municipality against person to recover amount of octroi duty whether maintainable—Expression “distress and sale” in s. 164 whether relates to distress and sale dealt with in Chapter VII of Act.

If a person brings into the octroi limits of a municipality, governed by the Bombay District Municipal Act, 1901, an article, on which octroi is payable, and refuses to pay the octroi leviable upon it, he is not under the Act civilly liable for the recovery of the amount of the octroi duty, and, therefore, a suit to recover the amount is not tenable against him.

The words “distress and sale” which occur in the expression “in lieu of proceeding by distress and sale” in s. 164 of the Bombay District Municipal Act, 1901, relate to distress and sale under Chapter VIII of the Act; they have no relation to distress and sale dealt with under Chapter VII of the Act.

*Bhusawal Municipality v. Hindustan Construction Company, Bombay,*¹ distinguished.

THE facts appear in the judgment.

Civil Revision Application No. 1454 of 1956.

V. V. Albal, for the applicant.

Opponents served.

Civil Revision Application No. 1455 of 1956.

V. V. Albal, for the applicant.

Opponent served.

Civil Revision Application No. 1457 of 1956.

V. V. Albal, for the applicant.

G. B. Madbhavi, for the opponent.

VYAS J. : These revisional applications raise a common question of law and therefore we have decided to dispose of them by a common judgment. The point of law which is raised in all these applications is this: If a person, who brings or introduces an article, on which octroi is payable, into the octroi limits of a municipal district, refuses to pay the octroi leviable upon the article, is a suit tenable against him under the Bombay District Municipal Act, 1901 (Bom. Act III of 1901)? There has been no decision of this High Court, and we have not been referred to any decision of any other High Court, upon this point. It is for this reason that these revisional applications raise a point of some importance.

For the purpose of delivering judgment, it will be convenient to set out the facts which have given rise to Civil Revisional Application No. 1454 of 1956. This revisional application has arisen out of a judgment and decree passed by the learned Civil Judge, Junior Division, at Islampur in Small Cause Civil Suit No. 33 of 1953. The plaintiff of that suit is the applicant in Civil Revisional Application No. 1454 of 1956. The said plaintiff is the Uran Islampur Municipality. This Municipality filed Small Cause Civil Suit No. 33 of 1953 to recover from the defendants the amount of Rs. 156-4-0 as octroi duty. It may be noted that the defendants are traders residing within the limits of the Uran Islampur Municipality. The plaintiff's allegation is that in June 1948

*Decided, June 24, 1958. Civil Revision Application No. 1454 of 1956 (with Civil Revision Applications Nos. 1455 and 1457 of 1956), from the order passed by S. M. Patna;

Civil Judge, Junior Division, Islampur, in Small Cause Suit No. 33 of 1953.

¹ (1942) 44 Bom. L. R. 890.

the defendants imported a goods truck bearing No. 6140 within the municipal area and therefore they were bound to pay the octroi duty upon the truck. It is further the contention of the plaintiff that the defendants ran the truck within the municipal limits without paying the octroi duty. Repeated demands were made upon the defendants to pay the octroi, but, says the plaintiff, the defendants did not comply with those demands. As the result of the above mentioned circumstances, a small cause suit being Suit No. 33 of 1953 was filed in the Islampur Court by the plaintiff against the defendants for recovering octroi duty to the tune of Rs. 156-4-0.

The suit was resisted by the defendants, and one of the contentions which the defendants took was that the suit was not maintainable under the provisions of the Bombay District Municipal Act, 1901, and the by-laws made by the plaintiff municipality under the said Act. The defendants contended that under the Bombay District Municipal Act the liability to pay octroi upon the goods was cast upon the goods themselves and, therefore, no suit could be filed against the defendants to recover the octroi from them. The learned trial Judge accepted the contention of the defendants and held that no suit was maintainable against the defendants for the recovery of octroi from them under the Bombay District Municipal Act and the by-laws made by the plaintiff municipality under the said Act.

Under sub-s. (1) of s. 48 of the Bombay District Municipal Act, 1901, which I shall hereafter refer to as "the said Act" in the course of this judgment, every municipality may from time to time with the previous sanction, in the case of city municipalities, of the State Government or, in other cases, of the Commissioner, make, alter or rescind by-laws, but not so as to render them inconsistent with the Act. Under cl. (j) of sub-s. (1) of s. 48 the municipality may make, alter or rescind by-laws fixing octroi limits and stations; providing for the exhibition of tables of octroi; regulating, subject to any general or special orders which the State Government may make in this behalf, the system under which refunds are to be made when the animals or goods on which the octroi has been paid, or articles manufactured wholly or in part from such animals or goods, are again exported, etc., etc. The Uran Islampur Municipality, purporting to act under s. 48, sub-s. (1), cl. (j), of the Act, framed octroi rules and by-laws. Amongst these rules we find an important rule which is rule No. 6. Rule No. 6, sub-r. (1), provides, amongst other things, that every Import Naka Karkun shall, whenever goods are brought to his Naka, prepare an import bill by ascertaining and noting certain particulars. Amongst the particulars to be so noted are the rate at which the tax is calculated, the amount of the tax, if any, leviable on the goods, the name of the owner or person in charge of the goods, etc., etc. Sub-rule (2) of r. 6 provides that the Import Naka Karkun shall prepare so many separate import bills for each of such different portions of the goods taxable with not less than eight annas as the owner or person in charge of the goods desires. Then there is sub-r. (3) of r. 6 and this lays down that on payment of the amount, if any leviable, the Karkun shall sign the foil, detach it and deliver it to the person making the payment and shall retain the counterfoil undetached in his import bill book. Then there is an important sub-rule, viz. sub-r. (5) of r. 6, and it will be convenient to set out the text of this sub-rule. Sub-rule (5) provides:

"Every Import Naka Karkun is hereby authorised under section 76 of the Bombay District Municipal Act III of 1901 to require a person to comply with the provisions of that section, and in case of refusal on demand to permit an inspection of the goods or to pay the amount leviable thereon shall, unless there is any special reason to the contrary, exercise the powers conferred on him by sections 76 and 79 of the said Act as set forth in Schedule E hereto annexed."

This would take us to ss. 76 to 79 of the Act. It is important to bear in mind that part (5) of Chapter VII of the Act is the only part of the Act dealing with the levy and recovery of octroi and tolls. Sections 76 to 79 occur in part 5 of Chapter VII. Section 76, sub-s. (1), provides that every person bringing

into, or receiving from beyond, the octroi limits of a municipal district any article on which octroi is payable shall, when required by an officer authorized in this behalf by the municipality, and so far as may be necessary for ascertaining the amount of tax chargeable, permit that officer to inspect, examine and weigh, and otherwise deal with, the article, and communicate to that officer any information and exhibit to him any bill, invoice or document of a like nature, which he may possess relating to the article. It is thus clear that under sub-s. (1) of s. 76 an obligation is cast upon a person, who introduces, from beyond the octroi limits of a municipal district, an article, on which octroi is payable, into the octroi limits of a municipal district, to permit an officer authorized in this particular behalf by the municipality to inspect, examine and weigh the article concerned. It also casts an obligation upon the person concerned to communicate to the above officer any information which he may possess relating to the article. Then there is sub-s. (2) of s. 76 and this sub-section says that if a person, who introduces an article on which octroi is leviable into the limits of a municipal district from beyond those limits, refuses to permit the officer concerned to inspect the contents of the goods so introduced in order to ascertain whether the goods contain an article in respect of which octroi is leviable, the said officer may cause the goods to be taken without unnecessary delay before a Magistrate or such officer of the municipality as the State Government appoints in this behalf. Then there is s. 77 which says that every officer demanding octroi shall tender to every person introducing any article, on which tax is claimed, into the limits of a municipal district, a bill specifying the article taxable, the amount claimed and the rate at which the tax is calculated. Then there is sub-s. (2) of s. 77 and this sub-section is an important sub-section since it provides for penalty for evasion of octroi. We next proceed to s. 79 and sub-s. (1) of s. 79 says that in the case of non-payment on demand of any octroi or of any toll leviable by a municipality, the person appointed to collect such octroi or toll may seize any article on which the octroi is chargeable, or any vehicle or animal on which the toll is chargeable, or any part of its burden, which is of sufficient value to satisfy the demand, and may detain the same. Then there is sub-s. (2) of s. 79 and this sub-section provides that when any article seized is subject to speedy and natural decay, or when the expense of keeping it together with the amount of the octroi or toll chargeable is likely to exceed its value, the person seizing such article may inform the person in whose possession it was that it will be sold at once, and shall sell it or cause it to be sold accordingly, unless the amount of octroi or toll demanded be forthwith paid. Then there is sub-s. (5) of s. 79 and it deals with the surplus of the sale-proceeds of the article which is sold under sub-s. (2). It is thus clear that under part (5) of Chap. VII, which, as I have said, is the only part of the Act which deals with octroi and tolls, certain obligations are cast upon a person introducing from beyond the limits of a municipal district an article, upon which octroi is leviable, into the octroi limits of the municipal district and amongst those obligations is an obligation to permit a certain officer to inspect, examine and weigh the article, to communicate to that officer any information and exhibit to him any bill, invoice or document of a like nature, which he may possess, etc., etc. There is no provision under part (5) of Chap. VII casting a civil liability upon a person introducing the goods into the octroi limits of a municipal district. In other words, there is no charging section under part (5) of Chap. VII under which it would be competent to a municipality to proceed by way of a civil action against a person who refuses to pay octroi or toll. In case a person, who introduces an article, upon which octroi is leviable, into the octroi limits of a municipal district, refuses to pay octroi, then under part (5) of Chap. VII the municipality has only one remedy to which it can have recourse and that remedy is that a person, whom the municipality may appoint in this behalf, may seize the article concerned and may, after seizure, detain the article and, where the article is subject to speedy and natural decay, may sell the article

or cause it to be sold. While we are on this point it is important to bear in mind that under sub-s. (2) of s. 77 a criminal liability is cast upon a person who refuses to pay octroi. He is made liable to prosecution and he can be fined up to the limit of ten times the value of the octroi or up to fifty rupees, whichever may be greater. It is thus clear that while enacting the various sections which are to be found in part (5) of Chap. VII, the Legislature had in its mind the question of the procedure to be adopted in case the person concerned refuses to pay octroi, and even so, under Chap. VII we do not find any section casting a civil liability upon the defaulter, i.e., the person who refuses to pay octroi.

The learned advocate Mr. Albal appearing for the plaintiff municipality invited our attention to the provisions of s. 164 of the Act. Section 164 provides:

"In lieu of proceeding by distress and sale, or in case of failure to realise by so proceeding the whole or any part of any amount recoverable under the provisions of Chapter VIII, or of any compensation, expenses, charges or damages awarded under this Act, it shall be lawful for the Municipality to sue in any Court of competent jurisdiction the person liable to pay the same, as also any other person who may have in any other way caused, or may appear likely to cause, any injury to any property, rights or privileges of the Municipality."

Mr. Albal contends that the words 'distress and sale' in the expression "in lieu of proceeding by distress and sale" which occurs in s. 164 refer to distress and sale wherever distress and sale are dealt with in the body of the Act. Now, there is no doubt that there are provisions about distress and sale in Chap. VII of the Act, as also in Chap. VIII of the Act, and Mr. Albal says that the expression "distress and sale" which occurs in s. 164 would extend to the provisions of distress and sale both in Chap. VII and Chap. VIII. As I have said above, part (5) of Chap. VII relates to the levy of octroi and tolls. Therefore, says Mr. Albal, if any person refuses to pay the octroi, he would be liable to be proceeded with under s. 164 of the Act. We have considered this contention of Mr. Albal, but we find it difficult to accept the contention. For the purpose of an argument, let it be assumed that Mr. Albal's contention is correct and let us examine the result which would arise out of it. Let us assume that when the Legislature used the words "distress and sale" in s. 164 of the Act, they intended these words to extend to distress and sale of an article under Chap. VII and also under Chap. VIII of the Act. Then, in that event, the Legislature would have made a provision as to what would happen in case of failure to realise the amount of the octroi by such distress and sale, that is to say, by distress and sale under Chap. VII and under Chap. VIII. If we turn to s. 164, however, the Legislature, while providing for a remedy in case of failure to realise the amount of the octroi by distress and sale under the provisions of Chap. VIII, has made no provision to meet the case of failure to realise the amount of the octroi under the provisions of Chap. VII. The material words in s. 164 are the words "so proceeding" which occur in the expression "in case of failure to realize by so proceeding the whole or any part of any amount recoverable under the provisions of Chap. VIII," and there is no doubt that these words "so proceeding" relate to a proceeding by distress and sale under Chap. VIII. They have no relation to distress and sale under Chap. VII. As the language of s. 164 reads, it is clear that the words "so proceeding" have a relation to the words "distress and sale" occurring in the expression "in lieu of proceeding by distress and sale". In other words, the clause "in lieu of proceeding by distress and sale" and the clause "or in case of failure to realise by so proceeding the whole or any part of any amount recoverable under the provisions of Chapter VIII" are not to be read disjunctively as Mr. Albal says. They are to be read in a connected way. That being so, upon a proper construction of s. 164, we are of the view that the words "distress and sale" which occur in the expression "in lieu of proceeding by distress and sale" in s. 164 relate to distress and sale under Chap. VIII of the

Act. They have no relation to distress and sale dealt with under Chap. VII of the Act.

On this point Mr. Albal invited our attention to a decision of this Court in the case of *Bhusawal Municipality v. Hindustan Construction Company, Bombay*¹. It was held by Mr. Justice Wassoodew in that case that s. 203 of the Bombay Municipal Boroughs Act, 1925, provided an alternative remedy to make recovery of municipal dues by a suit. Mr. Justice Wassoodew stated that according to the first part of s. 203 of the Bombay Municipal Boroughs Act, 1925, the said alternative remedy, viz. the remedy by way of suit, could be adopted 'in lieu of any process of recovery allowed by or under the Act,' provided the person sued 'was liable to pay'. There are more reasons than one why this decision would not avail the plaintiff municipality. In the first place, as I have said, there is no provision in part (5) of Chap. VII of the Act, which is the only part relating to octroi and tolls, which makes a person, who introduces an article into the octroi limits of a municipal district, liable to pay. Therefore, unless there is a provision in the Act which makes a person sued liable to pay, that person cannot be sued. Then, again, and this is important, *Bhusawal Municipality v. Hindustan Construction Company, Bombay*, was not a case under the Bombay District Municipal Act, 1901, but it was a case under the Bombay Municipal Boroughs Act, 1925. Now, if we turn to s. 203 of the Bombay Municipal Boroughs Act, 1925, and compare the language of that section with the language of s. 164 of the Bombay District Municipal Act, 1901, we would find a substantial and fundamental difference between the language of the two sections. Section 203 of the Bombay Municipal Boroughs Act, 1925, provides:

"In lieu of any process of recovery allowed by or under this Act or in case of failure to realise by such process the whole or any part of any amount recoverable under the provisions of Chapter VIII, or of any compensation, expenses, charges or damages payable under this Act, it shall be lawful for a municipality to sue in any Court of competent jurisdiction the person liable to pay the same."

Now, if we turn to s. 164 of the Bombay District Municipal Act, 1901, the section provides:

"In lieu of proceeding by distress and sale, or in case of failure to realise by so proceeding the whole or any part of any amount recoverable under the provisions of Chapter VIII, etc., etc."

The important words which find place in s. 203 of the Bombay Municipal Boroughs Act, 1925, and which are significantly absent in s. 164 of the Bombay District Municipal Act, 1901, are "by or under this Act". If, for instance, s. 164 had read as follows: "In lieu of proceeding by distress and sale allowed by or under this Act, etc., etc.," then Mr. Albal would have been right in his contention, and he would also have been right in relying upon the above mentioned case in support of his contention, that the words "distress and sale" would relate not merely to distress and sale provided under Chap. VIII, but also to distress and sale provided under Chap. VII of the Act. But the Legislature while enacting s. 164 of the Bombay District Municipal Act, 1901, did not use the significant words "by or under this Act" after the words "distress and sale". Instead, while dealing with a case of failure to realise the whole or any part of the amount of octroi, they dealt with a case of failure under Chap. VIII of the Act, clearly indicating thereby that when they used the words "distress and sale" in the opening part of s. 164, they intended to refer to distress and sale under Chap. VIII of the Act. Then, again, if we turn to s. 82, sub-s. (1), cl. (a) of the Act, it provides "When any amount, which, by or under any provisions of this Act, is declared to be recoverable in the manner provided by this Chapter, etc., etc." Here again, the important words "by or under any provisions of this Act" are to be found. I have already stated above that such words, namely the words "by or under

any provisions of this Act", are not to be found after the words "distress and sale" in s. 164 of the Act. Clearly, therefore, when the Legislature used the words "distress and sale" while enacting s. 164, they did not intend to refer to "distress and sale" under Chap. VII of the Act.

For the aforesaid reasons, we are of the view that the learned Judge was right in coming to the conclusion that if a person who introduces an article, upon which octroi is leviable, into the octroi limits of a municipal district, from beyond those limits, refuses to pay the octroi, there is no provision in the Act which would make him civilly liable for the recovery of the amount from him. In these circumstances, the learned Judge was also right in dismissing the suit.

Civil Revisional Application No. 1454 of 1956 accordingly fails and is rejected without any order as to costs.

For the reasons stated above, Civil Revisional Applications Nos. 1455 and 1457 of 1956 are also rejected. Civil Revisional Application No. 1455 of 1956 is rejected without any order as to costs, while Civil Revisional Application No. 1457 of 1956 is rejected with costs.

Applications rejected.

Before Mr. Justice Vyas and Mr. Justice Tambe.

SHAM KEKHUSHRU v. N. P. SHAH.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948); Secs. 10, 25(1), 70(f) and (h)—Tenant tendering amount under s. 25(1) to obtain relief against forfeiture—Application made by tenant under s. 10 to Mamlatdar for refund of excess amount tendered under s. 25(1)—Whether Mamlatdar has jurisdiction to decide such application.

The Mamlatdar has no jurisdiction under s. 10 of the Bombay Tenancy and Agricultural Lands Act, 1948, to decide a tenant's application for the refund of a portion of the amount tendered by him to the landlord under s. 25(1) of the Act for obtaining relief against forfeiture.

The facts appear in the judgment.

K. H. Buck, A. A. Rizvi and E. A. Sethna, for the petitioner.

O. J. Jathar for H. R. Gokhale, for respondent No. 2.

VYAS J. This is an application made by the petitioner Sham Kekhushru under art. 227 of the Constitution of India wherein the petitioner has prayed for the setting aside of the order made by the Bombay Revenue Tribunal on November 22, 1957.

This application raises an interesting point under the Bombay Tenancy and Agricultural Lands Act, 1948. The point is: Has the Mamlatdar got jurisdiction under s. 10 of the Act to decide a tenant's application for the refund of the excess amount if any tendered by him to the landlord under s. 25(1) for obtaining relief against forfeiture? This point arises in the following circumstances:

The petitioner-landlord filed an application on October 11, 1954, for ejecting opponent No. 2, who was his tenant, from S. Nos. 285, 289, 290 and 297 of village Bakrol situated in the District of Baroda. The ejectment was sought by the landlord upon the ground that opponent No. 2 had committed three defaults in the payment of rent and the defaults alleged to have been committed by the tenant were in respect of the years 1951-52, 1952-53 and 1953-54. A notice terminating the tenancy of opponent No. 2 was duly given by the petitioner-landlord. On May 30, 1955, the Mamlatdar rejected the application of the landlord as he held that the defaults for the three years alleged by the landlord were not proved. From this order of the Mamlatdar the landlord appealed to the Prant Officer. The Prant Officer held that the three defaults in the payment of rent,

*Decided, July 15, 1958: Special Civil Application No. 416 of 1958.

which were alleged by the landlord, were established in this case and accordingly he allowed the appeal of the landlord and passed an order for ejectment against the tenant. This order was passed on August 18, 1955. It may be noted at this stage that the petitioner's case is that the contractual rent for the aforesaid lands which the tenant had agreed to pay to him was Rs. 501 per year. On the other hand, the case of opponent No. 2 is that the contractual rent was Rs. 325 per year. The Prant Officer who heard the appeal of the petitioner-landlord held that even on the assumption that the contractual rent was Rs. 325 per year, the defaults in the payment of rent for the years 1951-52, 1952-53 and 1953-54 had been established by the landlord. It was upon this finding which he arrived at that the Prant Officer passed an order directing the ejectment of the tenant from the lands of the petitioner. From the aforesaid order of the Prant Officer opponent No. 2 went in revision before the Revenue Tribunal. The Revenue Tribunal accepted the finding of the Prant Officer to the effect that the defaults alleged by the landlord were proved. It is to be noted, however, that when the matter was pending before the Tribunal, opponent No. 2 asked for relief against forfeiture. He agreed that the contractual rent for the survey numbers in question was Rs. 501 per year and he agreed to pay all the arrears of rent at that rate. On June 4, 1956, the Tribunal ordered that relief against forfeiture be granted to opponent No. 2 upon his paying the rent at the rate of Rs. 501 per year till the end of 1955-56. On June 12, 1956, opponent No. 2 paid the amount of Rs. 2,505, that is to say, all the arrears of rent up to date at the rate of Rs. 501 per year. Two days thereafter, on June 14, 1956, opponent No. 2 applied to the Mamlatdar under s. 12 of the Act, as it stood before amendment, for determination of the reasonable rent. To that application the petitioner-landlord filed his objections, wherein he contended that such an application was not tenable. Thereafter on October 25, 1956, opponent No. 2 filed another application, which was an application under s. 10 of the Act, claiming refund of a part of the amount tendered by him under s. 25(1) of the Act. It may be noted that the Amending Act came into force on August 1, 1956, with the result that upon that date the old s. 12 stood deleted from the statute book. On October 31, 1956, the Mamlatdar rejected both the applications which were made by opponent No. 2, viz., the application under s. 12 and also the application under s. 10 of the Act. The application under s. 12 was rejected upon the ground that with effect from August 1, 1956, s. 12 had been deleted from the statute book. The application under s. 10 of the Act was rejected by the Mamlatdar in view of the fact that opponent No. 2, consequent upon the Tribunal's order, had voluntarily paid up all the arrears of rent at the agreed rate of Rs. 501 per year. From the aforesaid order of the Mamlatdar dated October 31, 1956, rejecting both the applications of opponent No. 2, opponent No. 2 appealed to the Prant Officer. The Prant Officer dismissed the appeal on March 27, 1957. Thereupon opponent No. 2 went in revision before the Tribunal and by an order made on November 22, 1957, the Tribunal remanded the case to the Mamlatdar, directing the Mamlatdar to determine the reasonable rent for the survey numbers concerned under s. 12 of the Act as it stood before amendment and also to hear and decide the application of opponent No. 2 made by him under s. 10 of the Act. It is this order made by the Tribunal on November 22, 1957, which is challenged by the petitioner in this application.

Now, at the outset, the learned advocate Mr. Gokhale appearing for opponent No. 2 raised a preliminary objection to the maintainability of this application. Mr. Gokhale said that the Tribunal by its order of remand dated November 22, 1957, did not pass any final order. The rights of the parties were not affected by reason of that order. All that the Tribunal had done was to direct the Mamlatdar to determine the reasonable rent and to decide the application of opponent No. 2 made under s. 10 of the Act. Mr. Gokhale contended that unless the Mamlatdar had determined the reasonable rent and had decided the application of opponent No. 2 for refund under s. 10, no question

would arise of the rights of the parties being affected and therefore the present application of the petitioner-landlord was not tenable.

We are unable to uphold Mr. Gokhale's preliminary objection. By the order of remand passed by the Tribunal the rights of the parties are affected, in that the Tribunal has laid down a principle which the Mamlatdar would follow. Upon the principle so laid down by the Tribunal the Mamlatdar would merely make arithmetical calculations, i.e., he would determine the rent under s. 12 as directed by the Tribunal, would deduct the amount of the said rent from the amount tendered by opponent No. 2 under s. 25(1) for obtaining relief against forfeiture and would direct refund of the balance by the landlord. The Prant Officer, upon the facts of the case, took the view that since opponent No. 2 had voluntarily tendered the amount under s. 25(1) of the Act to obtain relief against forfeiture, this could not be said to be a case of recovery of excess amount by the landlord and therefore no question could arise of opponent No. 2 legitimately claiming a refund. The Tribunal did not accept that view and held that merely because the agreed rent was tendered to the landlord under s. 25(1) it could not be said that "the landlord had not recovered the rent so as to bring him within the mischief of sec. 10". It is this principle laid down by the Tribunal by its remand order which affects the rights of the parties and which is challenged by the landlord by this petition. In these circumstances, the preliminary objection taken by the learned advocate Mr. Gokhale must be rejected.

Mr. Gokhale says that since s. 12 of the Act stood deleted from the statute book with effect from August 1, 1956, the Mamlatdar could now determine competently only the rent under s. 9 of the Act and not reasonable rent under s. 12. It is to be noted that opponent No. 2 had applied for determination of reasonable rent under s. 12 on June 14, 1956, i.e., before the Amended Act came into force on August 1, 1956. In other words, he had already instituted a legal proceeding viz., an application under s. 12 in respect of his right to have reasonable rent determined. That legal proceeding was pending on August 1, 1956, the date upon which the Amended Act came into force. Under s. 89(2) (b)(ii) of the Act that proceeding was saved and therefore the application made by opponent No. 2 under s. 12 of the old Act could be decided as if s. 9 of the new Act had not been on the statute book. The remand order of the Tribunal directing determination of reasonable rent under s. 12 of the Act, as it stood before amendment, is therefore right. It must, however, be pointed out that the determination of reasonable rent in this case must be confined to a period after June 12, 1956, the date upon which opponent No. 2 tendered the amount of Rs. 2,505 under s. 25(1) to obtain relief against forfeiture. Opponent No. 2 having tendered the amount under s. 25(1), no enquiry as to reasonable rent for the period preceding the tender is permissible under the Act. The Mamlatdar would, therefore, determine the reasonable rent for the period subsequent to June 12, 1956, and not prior to it.

The next point is whether the Mamlatdar has jurisdiction under s. 10 of the Act to decide an application for refund made by a tenant who has tendered the amount to the landlord under s. 25(1) to obtain relief against forfeiture. The learned advocate Mr. Buch for the petitioner-landlord says that the Mamlatdar has no jurisdiction under the Act to decide such an application, whereas the learned advocate Mr. Gokhale for opponent No. 2 says that under s. 10 it is competent to the Mamlatdar to decide such an application and determine the amount of refund. In our view, upon examination of the language of s. 10, s. 25(1) and s. 70, cl. (f) and (h), of the Act, Mr. Buch's contention appears to be correct and must be upheld. It would be appropriate at this stage to set out the provisions of s. 10. Section 10 provides:

"If any landlord recovers rent from any tenant in contravention of the provisions of ss. 8, 9, 2A or 9C, he shall forthwith refund the excess amount recovered to the tenant and shall be liable to pay such compensation to the tenant as may be determined by

the Mamlatdar in this behalf and shall also be liable to such penalty as may be prescribed by rules made under this Act."

It is significant to note that the Legislature has coupled "refund" with "compensation" and "penalty" while enacting s. 10. Now, coupling of "compensation" and "penalty" with "refund" in s. 10 would show that when the Legislature used the expression "recovers rent" in s. 10, it contemplated recovery of rent by the landlord in a manner contrary to law or otherwise improper or objectionable. If the recovery of rent by the landlord is in order and does not offend against any provision of law, no question can possibly arise of compensation and penalty in respect of the said recovery. A scope for compensation and penalty could only arise when something which is not right, something which offends against the provisions of law, is done by a person. Now, when a tenant tenders the amount under s. 25(1) and when the landlord accepts it, the acceptance is in conformity with the law; it is not an improper or offensive recovery. In other words, in our view, it is not recovery which would fall under s. 10 of the Act. Therefore, when a tenant has tendered the amount under s. 25(1) to obtain relief against forfeiture, no subsequent application by him for the refund of a portion of that amount can lie under s. 10 of the Act.

Then, again, we have no doubt that the expression "as may be determined by the Mamlatdar" which is used in s. 10 of the Act, is used in relation to "compensation" and not in relation to "refund". This becomes clear upon a perusal of cls. (f) and (h) of s. 70. Now, whatever jurisdiction the Mamlatdar has under the Act to decide the various matters and questions falling under the Act, it is derived from s. 70 of the Act. Clause (f) of s. 70 provides that for the purposes of the Act it shall be the duty and function of the Mamlatdar to determine the amount of compensation under s. 10 for contravention of ss. 8, 9, 9A and 9C. Clause (h) provides that it shall be the duty and function of the Mamlatdar to determine the amount to be refunded to a tenant under s. 13(5). It is thus clear from the provisions of cls. (f) and (h) of s. 70 that the only applications under s. 10 which the Mamlatdar has jurisdiction under the Act to hear and decide are applications claiming compensation for the contravention of ss. 8, 9, 9A and 9C of the Act. I have mentioned above that s. 10 consists of three elements, viz., the elements of refund, compensation and penalty. It is impossible to believe that while referring to s. 10 while enacting cl. (f) of s. 70, the Legislature did not have before its mind all the elements of s. 10; and yet when it came to enacting cl. (f) the Legislature purposely omitted the words "refund" and "penalty" and used only the word "compensation". If the intention of the Legislature was to confer jurisdiction upon the Mamlatdar to hear and decide applications for refund made under s. 10 of the Act, we have no doubt that alongside the word "compensation" the Legislature would have used the word "refund" also in cl. (f) of s. 70. The Legislature did not do so and herein lies a clear clue to the intention of the Legislature upon the question of conferring jurisdiction upon the Mamlatdar so far as an application for refund under s. 10 is concerned. In our view, the Legislature did not intend to confer jurisdiction upon the Mamlatdar to entertain and decide an application for refund under s. 10. Then again, if we turn to cl. (h) of s. 70, it would be clear that the only applications for refund which the Mamlatdar is given jurisdiction to hear and decide are applications for refund under s. 13(5) of the Act. In cl. (h), which is a clause specifically dealing with applications for refund, the Legislature omitted a reference to s. 10. The learned advocate Mr. Jathar appearing for Mr. Gokhale says that s. 70 of the Act is not comprehensive or exhaustive and, therefore, even if the expression "refund" does not find place in cl. (f) of s. 70 and even if s. 10 does not find place in cl. (h) of s. 70, it would be competent to the Mamlatdar to decide an application made by a tenant for refund under s. 10. Mr. Jathar has invited our attention to the provisions of s. 29, sub-s. (3) and has contended that under this sub-section the Act has cast a duty upon the Mamlatdar to hold an enquiry and pass an appropriate order in the matter of delivering pos-

session either to the landlord or to the tenant as the case may be. Mr. Jathar says that although such a jurisdiction is conferred by the Act upon the Mamlatdar under s. 29(3), there is no reference to s. 29 in s. 70. Therefore, says Mr. Jathar, s. 70 is not a comprehensive section, laying down all the duties of the Mamlatdar under the Act. We have examined this contention of Mr. Jathar, but we are unable to see substance in it. Mr. Jathar has probably overlooked cl. (n) of s. 70. Clause (n) provides that for the purposes of the Act it shall be the duty and function to be performed by the Mamlatdar to take measures for putting the tenant or landlord or the agricultural labourer or artisan or person carrying on an allied pursuit into the possession of the land or dwelling house under the Act. There is no doubt that when the Legislature enacted cl. (n) of s. 70, it was clearly conferring jurisdiction upon the Mamlatdar to decide questions of handing over possession to the tenant or the landlord as the case may be. In our view, the fact that the Legislature, while conferring jurisdiction under cl. (f) of s. 70 upon the Mamlatdar to determine certain applications made under s. 10, did not refer to applications for refund and the further fact that while conferring jurisdiction upon the Mamlatdar under cl. (h) of s. 70 the Legislature referred only to applications for refund made under s. 13(5) would clearly show that the Legislature did not intend to confer any jurisdiction upon the Mamlatdar to decide the question of refund agitated by a tenant under s. 10. That being so, the present application made by opponent No. 2 under s. 10, claiming refund of a portion of the amount tendered by him for claiming relief against forfeiture under s. 25(1), would not be competent.

Then again, there is another reason why opponent No. 2 cannot invoke the assistance of s. 10 in this case for claiming refund of a portion of the amount tendered by him under s. 25(1). Unless opponent No. 2 is able to establish in the first place that this is a case in which the landlord had recovered rent from him, the provisions of s. 10 cannot assist him. In order that the provisions of s. 10 can come into operation, it must first be established that the landlord had recovered rent from a tenant. Now, in this case, as I have mentioned above, opponent No. 2 tendered the amount of Rs. 2,505 on June 12, 1956, to obtain relief against forfeiture. It was a tender by a person who was a one time tenant of the landlord, but whose tenancy had been terminated and whom the landlord had become entitled to evict from the land. This is clear enough, if we turn to the provisions of s. 25(1). It is to be remembered that it was under this section that the tender of the amount of Rs. 2,505 was made by opponent No. 2. Section 25(1) provides:

"Where any tenancy of any land held by any tenant is terminated for non-payment of rent and the landlord files any proceeding to eject the tenant, the Mamlatdar shall call upon the tenant to tender to the landlord the rent in arrears together with the cost of the proceeding, within three months from the date of order, and if the tenant complies with such order, the Mamlatdar shall, in lieu of making an order for ejectment, pass an order directing that the tenancy had not been terminated and thereupon the tenant shall hold the land as if the tenancy had not been terminated."

The words italicised above are the important words in s. 25(1). They would show that the tender which is made under this section is made by a person whose tenancy was terminated for non-payment of rent and whom his landlord has become entitled to eject from the land, in other words by a person who had ceased to be a tenant. The section speaks of an artificial revival of tenancy, which had already come to an end, upon a certain event happening, viz., upon the tender of a certain amount being made by the one time tenant to the owner of the land. In these circumstances, it is impossible to say that when the amount of Rs. 2,505 was tendered by opponent No. 2 and was made over to the petitioner, the petitioner recovered rent from his tenant within the meaning of s. 10 of the Act. For these reasons also we are of the view that a recourse to s. 10 of the Act cannot avail opponent No. 2.

Apart from what has been stated above, it is clear in this case that if oppo-

nant No. 2 had not tendered the amount of Rs. 2,505 to be paid over to the petitioner, he would not have obtained the relief against forfeiture. His tenancy had been terminated by the landlord giving him a notice under the Act and the landlord had become entitled to an order of ejectment, which the Court would have passed, but for the tender of the amount. His tenancy which had been terminated would not have been revived, but for the tender of the amount. In these circumstances, to entertain an application from opponent No. 2 for the refund of a portion of the amount tendered by him under s. 25(1) would be permitting him to approbate and reprobate at the same time. We cannot allow this in the absence of a specific provision to that effect in the Act. He cannot expect to retain the benefit of relief against forfeiture, obtained by him under s. 25(1), and at the same time ask for the refund of a portion of the amount tendered by him. We are referring to this aspect of the case quite independently of what has been stated above.

In the result, the application of opponent No. 2 made by him for refund under s. 10 of the Act fails and is rejected. The case shall be remanded to the Mamlatdar for determination of the reasonable rent, bearing in mind the provisions of ss. 8 and 9 of the Act, for the period after June 12, 1956. So far as the question of costs is concerned, opponent No. 2 will bear his own costs as also the petitioner's costs of this application.

Order accordingly.

Before Mr. Justice Vyas and Mr. Justice Tambe.

MARZBAN RUSTOMJI v. KHUSHALBHAI PITAMBAR.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 31B(1), 31—Termination of tenancy with dissection of lands originally leased out to tenant whether permissible under Act—Whether notice of termination of tenancy can relate to a part of property leased and sought to be possessed or must relate to the entire property.

Under s. 31B(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, a tenancy can be terminated in such a way as would result in a landlord getting back possession of only a part of the land leased out to the tenant. A notice given under s. 31 of the Act terminating the tenancy of only a part of the property leased out, of which part the possession is sought by the landlord, is a good notice.

Woodward v. Dudley, referred to.

THE facts appear in the judgment.

N. C. Shah, for the petitioner.

I. C. Dalal, with *J. B. Nagarsheth*, for opponents Nos. 1 to 3.

VYAS J. This is an application made under art. 227 of the Constitution of India by the petitioner Marzban Rustomji, wherein the petitioner has prayed for the quashing of an order made by the Bombay Revenue Tribunal on February 8, 1958, by which order the Revenue Tribunal confirmed the order passed by the Prant Officer on October 21, 1957. The circumstances under which this application arises may be briefly stated:

The petitioner-landlord let out his lands, comprising two survey numbers, being S. No. 409 admeasuring 7 acres 12 gunthas and S. No. 410/2 admeasuring 2 acres 25 gunthas, of Olpad, to opponents Nos. 1, 2 and 3 under a registered lease dated August 18, 1942. On December 20, 1956, the petitioner served opponents Nos. 1, 2 and 3 with a notice under s. 31 of the Tenancy Act, asking the opponents to quit S. No. 410/2. The ground upon which the petitioner required the opponents to hand over possession of S. No. 410/2 to him was

*Decided, July 23, 1958. Special Civil 1 [1954] 1 All E.R. 559.
Application No. 1013 of 1958.

that he (the petitioner) *bona fide* required possession of the said land for personal cultivation. After serving opponents Nos. 1, 2 and 3 with notice in respect of S. No. 410/2 only as stated above, the petitioner made an application in April 1957, under s. 29(2) of the Act, to the Mamlatdar for obtaining possession of the land in respect of which he had given the notice. The Extra Aval Karkun, Olpad, who heard the application of the petitioner-landlord, observed in the course of his order that the notice which was given by the petitioner-landlord to his tenants was not in respect of both the survey numbers, viz., S. No. 409 and S. No. 410/2, but that the notice related only to S. No. 410/2, admeasuring 2 acres 25 gunthas, and that, therefore, at best the possession of only half the said S. No. 410/2, i.e., possession of only half of 2 acres 25 gunthas could be awarded to the landlord, and that if that be done, there would result a fragmentation of land which would be contrary to law, and in that view of the matter the Extra Aval Karkun dismissed the application of the petitioner-landlord. From that order the petitioner-landlord went in appeal before the Prant Officer, and the Prant Officer by an order made on October 21, 1957, dismissed the appeal and confirmed the order of the Extra Aval Karkun. From that order of the Prant Officer the petitioner-landlord went before the Bombay Revenue Tribunal by way of a revisional application and the Tribunal by an order made by them on February 3, 1958, rejected the said revisional application of the landlord. It is from that order of the Revenue Tribunal that the landlord, feeling aggrieved, has approached this Court under art. 227 of the Constitution.

Now, in our view, the conclusion of the Extra Aval Karkun that if the landlord's application for possession of S. No. 410/2 be allowed, there would be a violation of the provisions of law contained in s. 31B(1) of the Tenancy Act is clearly erroneous. It is difficult to understand why the Extra Aval Karkun took the view that although the landlord asked for possession of the entire S. No. 410/2 he could be awarded possession of only half of that survey number, i.e., possession of only half of 2 acres and 25 gunthas. The learned advocate Mr. Dalal appearing for the tenants in this case has not been able to point out to us any provision of law in the Tenancy Act, pursuant to which the Extra Aval Karkun could validly hold that although the landlord had asked for possession of the entire S. No. 410/2 he could only be entitled at best to possession of half of that survey number. If we turn to the relevant provision of law contained in sub-s. (1) of s. 31B, the law only lays down that a tenancy in no case shall be terminated in such a way as will result in leaving with a tenant, after termination, less than half the area of the land leased to him. Now, in this case, it is to be borne in mind that the lease under which the petitioner leased out his lands to the tenants was only one transaction. There were no two distinct leases although the lands leased out were two survey numbers. The transaction was one, although the subject-matter of the transaction was lands more than one. Bearing this position in mind, namely, that the lands leased out by the petitioner-landlord to the tenants admeasured 7 acres 12 gunthas plus 2 acres 25 gunthas, i.e., in all 9 acres 37 gunthas, it is necessary to remember that even if the possession of the entire S. No. 410/2 admeasuring 2 acres 25 gunthas has to be returned by the tenants to the petitioner-landlord, even so the tenants would continue to remain in possession of much more than half of the lands originally leased out to them. They would still have the possession of 7 acres 12 gunthas out of 9 acres 37 gunthas of lands that were leased out to them. That being so, it is difficult to understand how it could be validly contended that the provisions of law contained in sub-s. (1) of s. 31B of the Act would be violated by handing over possession of the entire S. No. 410/2 to the petitioner-landlord.

The learned advocate Mr. Dalal appearing for the tenants contends that it is not known whether the notice which was given by the petitioner-landlord to the tenants referred only to S. No. 410/2 or referred only to S. No. 409 or referred to both S. No. 410/2 and S. No. 409; and, says Mr. Dalal, if the

notice related only to S. No. 409, then, if the possession of S. No. 409 is to be given back by the tenants to the petitioner-landlord, less than half of the lands leased out to the tenants would thereafter remain in the possession of the tenants. Of course, Mr. Dalal would be right, if we were to act on the assumption that the notice given by the landlord to the tenants was a notice in relation to S. No. 409. Survey No. 409 admeasures 7 acres 12 gunthas and therefore if that survey number is to be handed over by the tenants to the landlord, what would thereafter remain in the possession of the tenants would be only S. No. 410/2 admeasuring 2 acres 25 gunthas, and obviously, on the very face of things, 2 acres 25 gunthas would be much less than half of 9 acres 37 gunthas. But this contention of Mr. Dalal rests entirely upon the assumption made by him that the notice given by the landlord to the tenants might be a notice in relation to S. No. 409 only and not in relation to S. No. 410/2; and for this assumption we find no justification on the record. It is true that the Bombay Revenue Tribunal has pointed out in the course of its order that the notice itself has not been produced in the lower Courts nor is a copy of it placed on the record even now. However, if we turn to the order passed by the Extra Aval Karkun, whose Court was the first Court to deal with this matter in the first instance, it would appear that in the proceedings before him a reference was made to a notice which related only to S. No. 410/2 admeasuring 2 acres 25 gunthas. This is what the Extra Aval Karkun observed in the course of his order:—

"The applicant has not given a notice to the opponent for the S. No. 409, admeasuring 7 acres 12 gunthas, for handing over the possession. He has only given notice for the land of S. No. 410/2 admeasuring 2 acres 25 gunthas and hence he is not entitled for getting possession of S. No. 409 admeasuring 7 acres 12 gunthas."

If we turn to the order made by the Prant Officer in this case, once again it would appear that he referred to a notice which related to S. No. 410/2. The Prant Officer says in the course of his order:—

"In the notice under s. 31 the applicant had failed to mention S. No. 409 and therefore the lower Court had dismissed his application."

It may be, as the Bombay Revenue Tribunal has observed in the course of its order, that no notice was brought on the record of the case before any Court. But even so, we have got before us, in this proceeding under art. 227 of the Constitution, a finding of fact recorded by the Extra Aval Karkun and confirmed by the final fact finding authority, namely, the Prant Officer, the finding being to the effect that the notice which was given by the landlord to the tenants related only to S. No. 410/2 and that it did not relate to S. No. 409. The finding may be an erroneous finding. Nevertheless, it is a finding of fact and, therefore, in the exercise of our jurisdiction under art. 227 of the Constitution, it would not be open to us to go behind that finding and take the view, which the learned advocate Mr. Dalal is contending for, that the notice might be a notice relating to S. No. 409 only and not relating to S. No. 410/2.

The next point which Mr. Dalal has sought to make before us is that it is well settled that a tenancy cannot be dissected. What Mr. Dalal means by this contention is that a tenancy cannot be kept intact in respect of a part of the land leased out and cannot be terminated in respect of the other part of the land leased out. In effect, what Mr. Dalal contends is that the petitioner-landlord could either get possession of both the S. Nos. 409 and 410/2 or could get possession of neither of them. We have considered this contention of Mr. Dalal, but we are unable to see force in it. In our view, termination of tenancy, with the dissection of lands originally leased out to the tenants, is made expressly clear in sub-s. (1) of s. 31B, which provides:—

"In no case a tenancy shall be terminated under s. 31 in such manner as will result in leaving with the tenant, after termination, less than half the area of the land leased to him."

It is, therefore, clear in our view that when the Legislature enacted s. 31B(1) it had in its mind the restoration of possession by a tenant to the landlord.

upon the termination of tenancy, of a portion of lands leased out by the landlord to the tenant. Besides, it is clear that a lease is a matter of contract. There might have been a contract between the landlord and the tenants in this case that the lease of S. No. 410/2 alone could be terminated. In this connection it is to be noted, and this is relevant, that no plea was taken by the tenants at any stage of the proceedings in this case that the tenancy of one survey number only could not be terminated.

Mr. Dalal has invited our attention to an English case of *Woodward v. Dudley*¹. In this case there was an agreement between a landlord and his two tenants in respect of agricultural property which was described in two parcels. These two parcels were Jeffries Farm and Langley Lodge Farm. The agreement was dated September 24, 1928, and by the said agreement the landlord let out the above two parcels of land to his tenants A and B. On December 17, 1952, B died and the probate of his will was granted to C, his sole executor, who remained in possession of the demised property. On February 5, 1953, D's agents, on behalf of D, gave C a notice to quit which required the delivery of "land known as Jeffries Farm" and contained no reference to Langley Lodge Farm. It was held that the notice referred to part only of the demised property and therefore it was a bad notice. Relying upon this decision Mr. Dalal for the tenants contends that as the notice given by the landlord in this case referred to only a part of the lands leased out, it was a bad notice. In this connection, it is to be noted, however, that by s. 81B(1) the Tenancy Act itself has expressly created a tenancy which could be terminated in such a way as would result in a landlord getting back possession of only a part of the land leased out. If the landlord under the law contained in the Tenancy Act could legitimately ask for restoration of possession of only a part of the property leased out to the tenants, then naturally the notice must relate only to a part of the property leased out and it cannot relate to the entire property leased out. The present application which we are deciding is an application which raises a point under the Tenancy Act and, therefore, the intention which the Legislature had in view in enacting the Act must be the governing factor on the point of construction whether the notice given by the landlord was a good notice or a bad notice. Apart from this, it is to be borne in mind that the principle laid down by the English case, which is a principle of common law, would be subject to the contract to the contrary, since leases are matters of contract between the parties; and, as I have stated above, the tenants in this case do not plead, and have not pleaded at the previous stages of the proceeding, that the contract was that the landlord would ask for possession either of both the survey numbers or of none of them. In this view of the matter, we cannot accept Mr. Dalal's contention that the landlord cannot ask for possession of only a part of the lands leased out to the tenants.

I have already stated above that even if the possession of S. No. 410/2 admeasuring 2 acres 25 gunthas be handed over by the tenants to the landlord, even so the tenants would continue to be in possession of 7 acres 12 gunthas, which is much more than half of the lands originally leased out to them, the lands originally leased out being 9 acres 37 gunthas in area.

It is important to bear in mind at this stage that the Courts below have not gone into the question whether the requirement of the petitioner-landlord for personal cultivation of S. No. 410/2 is a *bona fide* requirement or not. Somehow, for reasons which are not clear to us, the Extra Aval Karkun took the view that if the possession of S. No. 410/2 were to be given over to the landlord, only half the survey number could be given to the landlord and not the entire survey number, and the Extra Aval Karkun thought that if only half of S. No. 410/2 were to be returned to the landlord, there would be a fragmentation which would be contrary to the provision of law. The Prant Officer, on appeal, seems to have shared the same view, namely, that only half the S. No. 410/2 could be given back to the landlord and not the whole of it. The Bombay Revenue Tribunal, who could not go into questions of fact, confirmed

the orders passed by the Prant Officer and the Extra Aval Karkun. The result of all this has been that there has been no finding upon a question of fact, namely, whether the petitioner-landlord *bona fide* requires possession of S. No. 410/2 admeasuring 2 acres 25 gunthas for personal cultivation.

In these circumstances, we set aside the order passed by the Revenue Tribunal and remand the case to the Mamlatdar with a direction that the Mamlatdar shall give a finding on the point raised by the petitioner-landlord, namely, that he *bona fide* requires possession of the entire S. No. 410/2 for personal cultivation. The Mamlatdar shall decide the case bearing in mind the provisions of s. 31A of the Act. So far as the question of costs is concerned, the costs shall abide by the result.

Order accordingly.

APPEAL FROM ORIGINAL CIVIL.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.

THE ENGINEERING STAFF UNION v. THE STATE OF BOMBAY.*

Industrial Disputes Act (XIV of 1947), Sec. 12(5)—Whether open to Government not to refer dispute to adjudication on ground that demands of workers not justified or not appropriate in context of times or financial conditions—Statutory satisfaction of Government whether must be based only on report of Conciliation Officer—Such satisfaction arrived at whether a judicial or quasi judicial act—When reasons given by Government for not making reference disclose extraneous matter taken into consideration or reasons disclose failure to consider relevant factor required by law, whether in such case Court can compel Government to give proper reasons—Whether incumbent on Government to give particulars for reasons given—Whether competent to Court to make reference where Court satisfied that it should be made.

Under s. 12(5) of the Industrial Disputes Act, 1947, it is open to Government to consider in each case whether conciliation has failed and whether the demands of the workers are such as required adjudication. Not only when the demands are frivolous, but even if they are not justified, even if they are not appropriate in the context of the times or in the context of financial conditions, it would be open to Government not to refer the disputes to adjudication.

Section 12(5) of the Industrial Disputes Act, 1947, makes it obligatory upon the Government to consider the report of the Conciliation Officer. The section does not provide that the satisfaction ultimately required by the Government is a satisfaction that can only be based upon the report of the Conciliation Officer. It would, therefore, be open to Government to rely on other materials, other facts, other statistics other than those which appear in the report of the Conciliation Officer. All that is relevant and germane to the statutory satisfaction can be availed of by the Government in coming to its conclusion.

The satisfaction that the Government has got to arrive at is not a judicial or quasi judicial act. It does not call for any judicial process, although it would be more satisfactory if Government were to discuss various matters in the presence of both the parties before it came to a particular conclusion.

When reasons are given by Government under s. 12(5) of the Industrial Disputes Act, 1947, for not making a reference, and the Court is considering those reasons, if the reasons disclose any extraneous matter taken into consideration by the Government, or if they disclose a failure on the part of the Government to take into consideration any relevant factor required by law, the Court can say that these reasons are not reasons which fall within the ambit of s. 12(5) and compel the Government to give proper reasons.

*Decided September 5, 1958. O. C. J. Appeal 383 of 1957.
No. 58 of 1958: Miscellaneous Application No.

The reasons must disclose the mental process which has resulted in Government not being satisfied. The Court will not be concerned with how that mental process worked or how the conclusion was arrived at. But if the conclusion is germane to the failure on the part of the Government to be satisfied, then the Court cannot ask the Government to give particulars for the reasons given so that the particulars could be considered and investigated by the Court.

The satisfaction of the Government is a condition precedent to the making of a reference under s. 12(5) of the Industrial Disputes Act, 1947, and, therefore, however satisfied the Court may be, the Court, on a petition made to it to direct the Government to make a reference, cannot place itself in the position of the Government and make a reference by reason of its own satisfaction.

Firestone T. & R. Co. v. K. P. Krishnan,¹ *Allcroft v. Lord Bishop of London*, *Lighton v. Lord Bishop of London*² and *Associated Provincial Picture House Ltd. v. Wednesbury Corporation*,³ referred to.

THE Engineering Staff Union (petitioners) was a Union registered under the Trade Unions Act, 1926, and a majority of the workmen of Messrs. Heatly and Gresham Ltd.,⁴ Bombay, were its members. In March 1956, the petitioners formulated certain demands of the workmen of the company and forwarded these to the company by the letter of its Secretary, dated March 27, 1956. As the company did not send a reply thereto, the General Secretary of the petitioners by his letter dated April 6, 1956, requested the Conciliation Officer appointed by the State Government under the provisions of the Industrial Disputes Act, 1947, to take up the demands of the Union in conciliation with a view to bringing about an amicable settlement. Between May 8, 1956, and September 12, 1956, certain preliminary discussions took place between the parties and the Conciliation Officer. Ultimately the Conciliation Officer took certain of the demands of the Union in conciliation under the provisions of the Act. Several meetings were thereafter held by the Conciliation Officer in order to bring about a settlement of the disputes. The conciliation proceedings, however, did not fructify.

On April 2, 1957, the Conciliation Officer made his report to the Government of Bombay under s. 12(4) of the Act reporting his failure to bring about a settlement. By an order dated July 30, 1957, the Government of Bombay in exercise of the powers conferred under s. 12(5) of the Act referred to the adjudication of an Industrial Tribunal the disputes with regard to some of the demands of the workmen. The Government, however, did not refer for adjudication the disputes with regard to several other demands of the workmen giving their reasons therefor.

On November 18, 1957, the petitioners filed the present petition, praying for the issue of a writ of *mandamus* or any other writ and/or directions and/or orders in the nature of the said writ ordering and requiring the State of Bombay (respondent No. 1) to cancel and withdraw their letter dated August 14, 1957, whereby the Deputy Secretary to the Government of Bombay, Labour and Social Welfare Department, informed the petitioners that the Government having considered the report submitted by the Conciliation Officer under s. 12(4) of the Industrial Disputes Act had referred certain of the demands to an Industrial Tribunal and that as regards the other demands the Government was satisfied that there was no case for a reference and giving reasons therefor. The petitioners further prayed that respondent No. 1 may be directed to refer to the adjudication of an Industrial Tribunal the various items of dispute forming the subject-matter of the petitioners' demands, except those which had already been referred by the Government, or in the alternative, at least

"those aspects of the demands which have not been so referred and for the non-reference of which proper reasons within the meaning of section 12(5) of the Act have not been furnished by Government."

1 (1955) 57 Bom. L. R. 1188.

3 [1948] 1 K. B. 223.

2 [1891] A. C. 688.

The petition was heard by K. T. Desai J. who delivered the following judgment on August 7, 1958:—

K. T. DESAI J. [His Lordship after stating the facts proceeded]: The principal contentions urged by the petitioners are that the reasons given by Government for not referring some of the demands made by the workmen are not reasons warranted by the provisions of the Act, that in giving some of the reasons the Government has usurped the functions of an Industrial Tribunal and has in fact adjudicated upon some of the demands and that the Government has not, in respect of some of the demands, applied its mind to the matter.

I will proceed to deal with the various items, disputes in connection where-with have not been referred by the Government and the grounds given in respect thereof.

Pay Scales: The demand of the Union in connection with pay scales is set out in exh. A to the petition. The Union demanded that the existing pay of the employees should be revised and adjusted according to the scales set out. The Union further demanded that the scales of pay should be made effective retrospectively from the date of joining of each employee. The Union demanded that while giving effect to the new scales of pay "adjustment should be made on a point to point basis" taking into account the service and/or experience of the employees prior to their joining the company and/or their age also and that the adjustment should be done in such a manner that no junior employee should receive basic pay higher than that of any senior employee of the same category. It further demanded that in the case of an employee whose present pay was less than the minimum of the scale applicable to him, his pay should be first brought to the minimum of the scale and then he should be adjusted in the scale, the adjustment being effective from April 1, 1955. The reason given by Government for not referring the demand in connection with pay scales is as follows:—

"The pay scales in the company compare favourably with those obtaining in other comparable concerns in Bombay."

The petitioners contend that it is not permissible to the Government to refuse a reference on the ground of the alleged adequacy of the existing pay scales. They further contend that there were no pay scales in the company applicable to a number of categories of workmen such as store-keepers, assistant store-keepers, fitters and carpenters and that the reason given by Government was non-existent as regards such workmen and could not possibly arise out of consideration of the report of the Conciliation Officer. The petitioners further contend that in fact the pay scales offered by the company do not compare favourably with those obtaining in other comparable concerns in Bombay and that the Government had committed an error which was apparent on the face of the record. It is further urged that the Union had demanded adjustment of pay of various categories of workmen in their respective demanded scales of pay and that the company had not offered any adjustment whatsoever even in respect of those categories of workmen in respect of whom they had offered some scales of pay.

Reliance has been placed by the learned counsel for the petitioners on two decisions of this Court. The first decision relied upon is the one given in *Firestone T. & R. Co. v. K. P. Krishnan*¹. It is a decision of a division bench of this Court, consisting of the Chief Justice and Mr. Justice S. T. Desai. The other judgment relied upon is an unreported judgment of Mr. Justice S. T. Desai, in *Engineering Masdoor Sabha v. The State of Bombay*.² In the case of *Firestone T. & R. Co. v. K. P. Krishnan*, the Government had refused to refer a dispute under s. 12(5) of the Industrial Disputes Act, on the ground that the workmen had resorted to go-slow tactics. In that case the learned Chief Justice,

¹ (1955) 57 Bom. L. R. 1138.

No. 215 of 1955,* decided by S. T. Desai J.

² (1955) O. C. J. Miscellaneous Application on September 28, 1955 (Unrep.).

who delivered the judgment of the appeal Court, observed that under s. 12(5) of the Act an obligation had been imposed on the Government in connection with making of a reference to an Industrial Tribunal. Section 12(5) of the Industrial Disputes Act runs as follows:—

"12. (5) If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor."

In dealing with this section, the learned Chief Justice observes as follows (p. 1145):—

"...The Government undoubtedly has been given the power to make a reference, but that power has been coupled with a duty and the duty is that if on a perusal of the report Government is satisfied that there is a case for reference, the duty imposed upon it clearly arises and the Government cannot refuse to discharge that duty. In that sense, therefore, 'may' has the implication of an obligation, an obligation to discharge a duty which follows upon the satisfaction arrived at on a perusal of the report... The next part of sub-s. (5) makes it obligatory upon Government when it does not make a reference to record and communicate to the parties concerned its reasons therefor. It is perfectly true that the reasons given by Government are not justiciable in the sense that the Court will not consider the weight or value or the quality or even the adequacy of the reasons given by Government. But it is equally clear that the reasons which the Government has to give under this sub-section are reasons connected with the perusal of the report and with Government not being satisfied that there is a case for reference. It is because Government is not satisfied that there is a case for reference that the duty to refer does not arise, and what the Legislature required was that Government must give reasons why it was not satisfied that there was a case for a reference. In our opinion, therefore, the reasons must be connected with the failure on the part of Government to be satisfied that there was no case for reference. It is equally clear that if the reasons had no connection, no bearing and no relevance to this question, then they are not reasons at all contemplated by sub-s. (5), and if there are not reasons contemplated by sub-s. (5), then it would be open to the Court to ask Government to give proper reasons which the law requires under sub-s. (5)."

Proceeding further, the learned Chief Justice observes as follows (p. 1145):—

"...therefore in our opinion the only question we have to consider in this appeal—and it is a very short question—is whether the reason given by Government for not making the reference is a reason germane to their not being satisfied that there was a case for reference... A reason which is not germane to the industrial dispute or is not connected with the industrial dispute would obviously not be the reason contemplated by s. 12(5)."

The learned Chief Justice at p. 1146 observes as follows:—

"...If the Government took the view that there was no case whatever on merits, that the demands of the workers were frivolous or vexatious, that merely the time of the Industrial Court would be wasted by making the reference, that the decision was a foregone one, undoubtedly all these considerations would lead to the Government being satisfied that there was no case for a reference."

The appeal Court in that case confirmed the decision of Mr. Justice Tendolkar who dealt with the matter in the first instance. In the course of his judgment, which appears at pp. 1139 to 1143 of the same report, Mr. Justice Tendolkar observes at p. 1140 as under:—

"Now, in the first instance it is quite plain that the authority that is to be satisfied under s. 5 is the Government, and no doubt where the Government gives a reason, the adequacy or validity of that reason shall not be inquired into by any Court of law, provided the reason is germane to the question of making or not making a reference... The question, therefore, that I have to determine is whether the reason that has been assigned by the Government in this case is germane to the consideration of the question of making or not making a reference or wholly extraneous to it."

The lower Court as well as the appeal Court held that the reason given by Government in that case for not making a reference viz. the workers' resorting to go slow tactics, was not a reason germane to the matter and an order was made directing the issue of a writ of *mandamus* against the State of Bombay to reconsider the question of making or refusing to make a reference under s. 12(5) ignoring the fact that there was a slow down and taking into account only such reasons as were germane to the question of determining whether a reference should or should not be made. This decision is an authority for the proposition that the reason given by Government for not making a reference must be germane to the industrial dispute. In this case observations have been made to the effect that if the reason is germane to the matter, then it is not open to the Court to enquire into the weight or value or the quality or even the adequacy of the reason given by the Government.

It is urged by the learned counsel for the petitioners that the remarks of the learned Chief Justice when he says that the reasons given by the Government are not justiciable in the sense that the Court will not consider the weight or value or the quality or even the adequacy of the reasons given by Government are remarks which do not constitute a binding pronouncement on the subject. He urges that the remarks made merely show the trend of the mind of the learned Chief Justice. He urges that what the Court in that case had to consider was whether the reason given by Government for not making a reference viz. go slow tactics adopted by the workmen was a valid reason under the Act. It was sufficient for the purposes of that case to hold that the reason given was clearly not germane to the question of referring or not referring the dispute. He urges that in that case the wider question as to whether the Court could consider the weight, value or the quality or adequacy of the reasons given by Government did not directly arise for decision.

The learned counsel for the petitioners has placed strong reliance upon the observations of the House of Lords in the case of *Quinn v. Leathem*³. At page 506 the Earl of Halsbury in that case observes as follows:—

"...that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found...case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

I am in respectful agreement with these observations.

The appeal Court in the case of *Firestone T. & R. Co. v. K. P. Krishnan* was dealing with a matter which arose under s. 12(5) of the Act. The Court had to consider what meaning should be given to the words "may refer" appearing in that section. The Court had also to consider the question in connection with the reasons that may be given by the Government for not making a reference and the power of the Court to interfere in respect of a matter where reasons are given by Government. It was not, strictly speaking, necessary for the purpose of that case to decide the question about the weight, value, quality or adequacy of the reason given in view of the fact that the Court held that the reason given was not germane to the question of making or not making a reference. However, the remarks of the learned Chief Justice, when he observes that the Court would not consider the weight or value or the quality or even the adequacy of the reasons given by Government where the reasons given are germane to the matter, represent, if I may say so with respect, a correct enunciation of the law on the subject. The Court is not constituted an appellate authority in connection with the decision of the Government and is not entitled to consider the question of the weight, value, quality or adequacy of the reason given by Government which is germane to the matter.

The unreported decision of Mr. Justice S. T. Desai, given in the case of *Engineering Maadoor Sabha v. The State of Bombay*, on which a strong

reliance has been placed by the learned counsel for the petitioners, does not in any way militate against what is stated above. The dispute in that case related to dearness allowance. After the Conciliation Officer made his report under s. 12(4), Government entered into an agreement with the persons in management of the company whereunder those in management of the company agreed to revise the dearness allowance payable to the monthly rated employees whose monthly basic salaries did not exceed Rs. 330 with effect from a particular date. This agreement was arrived at without the knowledge and behind the back of the Engineering Mazdoor Sabha, the petitioners in that case. The Government refused to make a reference of the dispute to an Industrial Tribunal. The only reason given by Government was as follows:—

"The management have agreed to revise the dearness allowance payable to the monthly rated employees whose monthly basic salaries do not exceed Rs. 330/- at the following rate with effect from 1st July 1953."

Dealing with this case the learned Judge observes as follows:—

"...the whole controversy that has arisen before me is whether the Government has given a reason which was relevant or germane to the matter which came up for its consideration on the report made by the Conciliation Officer."

The learned Judge after discussing the matter further observes as follows:—

"The conclusion which I have reached is that the reason given by the first respondent in the order challenged before me is not germane to the matter and was one which in a case under s. 12(5) it was not permissible to the first respondent to take into consideration in declining to make the reference. Therefore, the effect of this is that there is no valid reason recorded by the Government and communicated to the parties concerned for the refusal to make a reference, in the matter of the report made by the Conciliation Officer to the Government under s. 12 of the Act."

This decision also lays down that the question which the Court has to consider is whether the reason given is germane to the matter. There are other observations made in this judgment which are relied upon by the learned counsel for the petitioners. They are as follows:—

"It was repeatedly stressed that the Government had gone outside the bounds of its sphere of action in a matter arising under s. 12(5) and taken upon itself the functions of the Tribunal which was to decide whether dearness allowance should or should not be given or on what basis the same should be given. There is considerable force in this argument...Moreover, it is not competent to the Government to adjudicate upon the dispute between the parties. That is the province of the Tribunal. The Government in a case falling under s. 12(5) has to consider the report of the Conciliation Officer and decide whether there is a case for making a reference. The section itself lays down the scope and ambit of the powers of the Government in any such case."

I am in respectful agreement with the observations made as above. It is the duty of the Government to examine the matter for the purpose of considering whether it should or should not make a reference. It is not the function of the Government to adjudicate upon the dispute. It may be that for the purpose of considering whether the Government should refer or should not refer a dispute to the Industrial Tribunal the Government may have to evaluate the demands, Government may have to consider whether the demands are frivolous or vexatious, and the Government may have to consider whether the demands are such that no reasonable Tribunal could be expected to grant them. In doing so the Government does not take upon itself the function of the Tribunal or adjudicate upon the dispute. The adjudication of a dispute by a Tribunal would be an adjudication binding on the parties. The decision of Government not to refer a dispute to an Industrial Tribunal does not result in an adjudication of the dispute. It only leaves the dispute unresolved and leaves the parties to their other remedies.

It is next urged that in not making a reference under s. 12(5) Government cannot travel beyond the report made by the Conciliation Officer and that the reasons given by Government for not making a reference must be such as can

be given only on a perusal and consideration of the report. It is urged that if any reason is given the basis for which cannot be found in the report, then the reason would be one which it is not open to the Government to give under s. 12(5) of the Act and the decision of Government would be vitiated by reason thereof. Reliance has been placed by the learned counsel for the petitioners on some of the observations of Mr. Justice S. T. Desai in the unreported judgment referred to above. In the course of his judgment in that case the learned Judge has observed as follows:—

"I have already observed that the reasons on which the decision must be based must have for their basis the report made by the Conciliation Officer. The reason cannot be anything which may have subsequently transpired between the Government and the employers."

He further observes as follows:—

"The Government in a case falling under s. 12(5) has to consider the report of the Conciliation Officer and decide whether there is a case for making a reference."

The Court in that case was concerned with considering whether the happening of an event subsequent to the making of the report, behind the back of the petitioners, could be relied upon for the purpose of not making a reference, and the Court held that it could not be done. This is not the same thing as saying that the report and nothing but the report can be considered and that the reasons which can be given are only those found by a person only on a perusal and consideration of the report. The report has to be considered. It is nowhere provided that it should constitute the only material from which Government must derive its reasons. I have on several occasions found that the report merely sets out the disputes between the parties and says that the Conciliation Officer in spite of his best efforts has not been able to resolve the disputes. If Government had only to look to the report for its reasons and nothing else, a situation may arise where it would be impossible for Government to apply its mind to the matter and come to a conclusion one way or the other whether a reference should or should not be made. The mere statement of the disputes between the parties and the mere statement that the Conciliation Officer has not been able to resolve the disputes would not furnish any reason whatsoever for either making a reference or for not making a reference. No doubt, it is obligatory on the Government to consider the report of the Conciliation Officer in considering whether to make a reference or not to make a reference. But the reasons given by Government for not making a reference need not be drawn only from what is stated in the report.

There is an unreported judgment of a division bench of this Court, consisting of Mr. Justice Baydekar and Mr. Justice Shah, in *Baroda City Municipal Servants Union v. The State of Bombay*⁴, dealing with a case arising under s. 12(5) of the Act. In that case, Government refused to refer the dispute that had arisen for adjudication by an Industrial Tribunal after considering the report of the Conciliation Officer. The reasons given by Government for not doing so were as follows:—

"(1) The decision of the Municipality to reduce the retiring age from 60 to 55 is in keeping with the current policy of Government for fixing the retirement age;

(2) The present case is for the enforcement of contractual conditions and in such cases the matter should be settled through a Civil Court rather than through adjudication proceedings;

(3) The dispute was raised after more than two years and it is not proper to refer stale cases for adjudication; and

(4) The dispute is between a public body in a merged State area which has acted in keeping with its former practice of passing a resolution and the want of a technical sanction was due to ignorance of the rules of this State during the transaction period."

In that case it was urged on behalf of the petitioner that if there was a *primo*

⁴ (1955) Special Civil Application No. 715 on July 13, 1955, (Unrep.) of 1955, decided by Baydekar and Shah JJ.

facie case made out by the petitioner, then the Government was under an obligation to refer the dispute for adjudication by an Industrial Tribunal. In dealing with this argument, Mr. Justice Baydekar, who delivered the judgment of the Court, observes as follows:—

"The meaning of the words 'there is a case' therefore is that there is a case for reference, not only because a *prima facie* case has been made out, but also because of several other reasons which the Government is entitled to take into consideration, as they appear to have taken into consideration in the present case. Government may, for example, refuse to make a reference in spite of the fact that the employee has got a good case if the employee comes up—say after ten years. There may be other grounds upon which the Government may refuse to make a reference in spite of the fact that the employee has got a good case. It is unnecessary to go into the various reasons for which the Government may refuse to make a reference. But there is no reason whatsoever for restricting the discretion which the Government has got only to such cases in which there is no *prima facie* case either for the employer or the employee as the case may be..."

The learned Judge further observes as follows:—

"In this case Government have given reasons as they were required by law to do. The considerations for which they would not make a reference are obviously such as they could take into consideration in deciding whether a reference should be made or not. It is obvious that none of them is irrelevant to the question which the Government had to decide *viz.* whether a reference should be made or should not be made. In that case whether we think that the reasons which were given were good in the sense that we would have made a reference if the matter had been left to us is neither here nor there. Government having made up their mind that they would not make a reference for the reasons which are all relevant for the consideration of the question which was before them, it could not be said that the exercise of discretion was arbitrary."

This decision also lends support to the conclusion to which I have arrived at. The reasons there given by Government were germane to the question whether a reference should or should not be made. Some of the reasons given were such that they could not have been drawn from the report and the report of the Conciliation Officer could not be regarded as the only material from which the Government had to find its reasons for not making a reference.

Coming to the facts of the present case, as regards pay scales the reason given by Government for not making a reference is that the pay scales in the company compared favourably with those obtaining in other comparable concerns in Bombay. That is a reason germane to the question whether a reference should or should not be made and the Court is not concerned with the adequacy of that reason. The mere fact that the pay scales of company did not meet all the demands of the Union could not be made a ground for challenging the decision of Government in not referring the dispute in relation to pay scales to the Industrial Tribunal. The statement made by Government that the pay scales compare favourably with those obtaining in other comparable concerns does not, in any sense, amount to an adjudication of the dispute between the Union on the one hand and the company on the other. There is in fact no adjudication by the Government in the matter. Government has merely evaluated the demand of the Union which it has every right to do in not making a reference. It is not possible to say that Government has in any way exceeded its powers or functions in giving the aforesaid reason for not making a reference in connection with this demand.

The next item in respect whereof a complaint is made is as regards the demand of the workmen under the heading "Confirmation". The ground given by Government in not referring the same is as follows:—

"The offer made by the company during the conciliation proceedings to make employees permanent after six months of continuous service is reasonable."

It is urged on behalf of the petitioners that there was no such concrete offer whatsoever "as could be easily ascertained" and that the reason given was non-existent. In the affidavit in reply filed by Shri B. B. Brahmabhat, Deputy

Secretary to Government, Labour and Social Welfare Department, dated April 25, 1958, it is stated as follows:—

"Government's decision for not referring this demand is based on the Conciliation Officer's report and the said reason is germane to the dispute. I further say that the second respondent company's offer to make every employee permanent after completion of six months continuous service was acceptable to the Union in respect of clerical staff, but not in respect of subordinate staff."

There was, in fact, an offer made by the company. The complaint made is that there was no "concrete offer" such as could be easily ascertained. The Conciliation Officer's report in this connection is as follows:—

"The management agreed to make every employee permanent after completion of 6 months continuous service. This was acceptable to the Union only in respect of clerical staff. The Union wanted subordinate staff, however, to be made permanent after completion of 4 months continuous service. The management was not agreeable to this." In view of what is stated in the conciliation report there is no substance in this objection. At the hearing before me, the learned counsel for the petitioners contended that the reason given by Government for not making a reference in this connection amounts to an adjudication of the matter. In my view, there is no adjudication by the Government of the dispute that had arisen in connection with this demand.

It was further urged before me that there was non-application of the mind by Government in giving this reason. In my view, there is no such non-application of the mind in giving this reason.

The third item complained of relates to 'Provident Fund'. The reason given by Government for not referring the matter in connection with provident fund is as follows:—

"The demand was not pressed by the Union during the conciliation proceedings." It is contended on behalf of the petitioners that this statement is totally divorced from the facts. The petitioners say that during the conciliation proceedings they at no time did not press the demand. The report of the Conciliation Officer supports them in what they say. In connection with the demand for provident fund, the Conciliation Officer observes as follows:—

"The Union contended that the company was having some kind of provident fund for employees since 1st April 1939 and the initial rate of contribution by an employee was 5% of his basic pay and the contribution by the company was only 1.25% of an employee's basic pay. This unequal rate continued upto 1947. From 1947 to 1950, the company's contribution was raised to the same level as that of an employee i.e. 5% of his basic pay for both sides. From 1-4-1950 to 1-2-1956 this rate was raised to 6½% of basic pay for both sides. Since 1-2-1956 the rate of contribution has been increased to 8½% on total emoluments i.e. basic pay including dearness allowance. The Union further contended that provident fund has been in existence in Bombay in various companies at the rate of 8½/3% of basic pay. The Union also contended that as the company had no gratuity scheme upto now, the rate of contribution should be increased to 10% of the total emoluments from the date of the joining of each employee. The management contended that a provident fund has been in existence in the company since 1939. For the benefit of those employees who joined prior to 1939, a supplementary provident fund was instituted consisting of 15 days' basic wages for each completed year of service prior to the date when provident fund came into being. The rates of contribution to provident fund varied progressively from time to time, the present rate being 6½% of total emoluments i.e. basic plus dearness allowance with an equal contribution by the company. The company was not prepared to consider any change in the existing provident fund."

This clearly indicates that the Union pressed its demand for provident fund during the course of the conciliation proceedings and that the company was not prepared to consider any change in the existing provident fund. The statement made by Government is clearly erroneous, and it cannot be made a ground for refusing to refer the question relating to provident fund for adju-

dication by the Industrial Tribunal. It seems, however, that after the conciliation proceedings were over and the Conciliation Officer had made his report, the General Secretary of the Union on April 11, 1957, made a representation to the Secretary to the Government of Bombay, Labour and Social Welfare Department, in connection with the reference of the disputes by Government, for adjudication to an Industrial Tribunal. In the course of that letter, under the heading 'Provident Fund', he stated as under:—

"If our demand for Gratuity is either conceded *in toto* or referred to adjudication *in toto* without any modification we would not press this demand."

The only time when the Union stated that it would not press the demand for provident fund is by this letter. This offer was a conditional offer, the condition being that the demand for gratuity should be conceded *in toto* or referred to adjudication "*in toto*" without any modification. This demand for gratuity was neither conceded *in toto* nor referred to adjudication *in toto* without any modification as stipulated by the Union. As a matter of fact, Government has itself in its letter dated August 14, 1957, whilst giving reasons for not referring the demands of the Union under the heading "Additional Gratuity" stated that the demand was not justified. In my view, whatever other reason might be open to Government for not referring the demand in connection with provident fund, the reason as given is not warranted by the facts, and the Government's decision not to refer the demand in connection with provident fund cannot be justified for the reason stated by Government. Really, that reason having no foundation in fact is no reason at all. The Government would be under an obligation to reconsider the matter and if it decides not to refer the matter, to give a reason for not doing so which is germane to the question.

The fourth item complained of is the item relating to "Additional Gratuity". The reason given by Government for not referring that item is as follows:—

"The demand is not justified."

The demand in connection with additional gratuity is as follows:—

"Employees should be given additional gratuity at the rate of one month's pay for the period from the date of his joining till the date when Provident Fund with 10% rate of contribution by employees and company comes into effect."

The Government having declined to refer the question relating to provident fund for adjudication, this demand for additional gratuity was liable to meet with the same fate inasmuch as the demand was for payment at the rate of one month's pay for the period commencing from the date of an employee's joining till the date when provident fund with 10 per cent. rate of contribution by the employees and the company was to come into effect. Under the provident fund scheme which was in operation the contribution was at the rate of 6½ per cent. and not at the rate of 10 per cent. It was the demand of the Union that it should be at the rate of 10 per cent. The aforesaid demand was not referred. The Government, consistently with its decision in not referring the question relating to provident fund, could not refer the dispute relating to additional gratuity. The question of reference of the dispute as regards provident fund is connected with the question of the reference of the dispute relating to additional gratuity. As the reason given by Government for not referring the demand in connection with provident fund is not warranted by facts and the question of referring the dispute in connection with provident fund is again opened up, the question relating to referring the dispute in connection with additional gratuity is liable equally to be opened up and the reasoning given in connection with additional gratuity cannot be sustained. Government would be under an obligation to consider the question of referring or not referring the demand in connection with the additional gratuity afresh.

The next item complained of relates to leave under the headings "Privilege Leave", "Sick Leave" and "General". The ground for not referring the dispute relating to privilege leave given by Government is as follows:—

"The 21 days privilege leave per year granted by the company is adequate."

It is urged on behalf of the petitioners that this really amounts to an adjudication of the matter and that the Government has usurped the functions of the Industrial Tribunal in connection therewith. In my view, the reason given by Government is germane to the question whether a reference should or should not be made. It does not amount to an adjudication between the parties and the action of Government in not referring that dispute is not liable to be challenged.

As regards sick leave, the reason given by Government for not referring the dispute in connection therewith is as under:—

“The Union is satisfied with the 30 days sick leave per year granted by the company.”

The demand in connection with sick leave was as follows:—

“Each employee should be granted one month's sick leave with full pay and dearness allowance for every eleven months' service, and it should be allowed to be accumulated throughout the entire period of service. This leave should be available retrospectively from the date of joining of each employee.”

In the report of the Conciliation Officer, in connection with the question of sick leave, it has been stated as follows:—

“Sick leave: 30 days annually subject to medical certificate when absence is over two days (3 days under exceptional circumstances) and subject to a maximum of 12 months in all during the whole of an employee's period of service.

The Union is satisfied with 30 days sick leave with pay and dearness allowance. As regards accumulation of sick leave, the Union contended that there should not be any ceilings. The Union wanted the privilege leave and sick leave to be given effect to from January 1951.

The management was not prepared for the retrospective effect.”

The reason given by Government in connection with sick leave is not factually correct. The Union's demand about giving retrospective effect to the provisions relating to sick leave was not satisfied. The Union's demand that there should be no ceilings in connection therewith was not met. The Union was not satisfied with the same. The reason given by the Government does not apply to those two aspects of the matter. There is no reason given for not referring the dispute in connection with these two matters. The Government will have to consider the question about referring the demand in connection with sick leave to the extent stated above afresh, and if Government decides not to refer the question, Government would be under an obligation to give reasons therefor.

The demand in connection with leave under the heading “General” has not been referred by the Government on the ground that the demand was not reasonable. The reason given is germane to the question of referring or not referring that demand. The contention that Government has adjudicated upon that demand is not tenable.

Then comes the dispute relating to “Standing Orders”. The reason given by Government for not referring the same is as follows:—

“The company is not covered by the Industrial Employment (Standing Orders) Act, 1946, but it has agreed to frame service rules providing, *inter alia*, for classification, leave, retirement, discharge etc.”

The reason given by Government is germane to the question of referring or not referring the aforesaid demand and that reason is not liable to be challenged. It is, however, urged that the company had agreed before the Conciliation Officer to frame service rules providing, *inter alia*, for classification, leave, retirement, discharge etc. within two months. The conciliation proceedings had ended on March 19, 1957, and the said period of two months would in any event expire by May 19, 1957. It is urged that on the date Government refused to make a reference in connection with that dispute, there was already a breach of the agreement by the company to frame the service rules within the time mentioned by the company. I am informed by Mr. Joshi, the learned counsel for the company, that the service rules have hitherto not been framed.

and that they are in the process of being framed. The fact that the company has failed to frame service rules within the time mentioned by it does not mean that after the lapse of two months the company did not remain under an obligation to frame service rules. The question about the advisability of the Government relying upon an agreement which had not been carried out within the time mentioned by the company is not one which can be agitated before the Court. The Court cannot consider the question of the adequacy of the reason given. The reason given is germane to the question of reference, and the action of Government cannot be challenged on the ground of the alleged inadequacy of the reason given. The Court on a petition for the issue of a writ is not sitting in appeal against the decision of the Government. The objection urged in this connection must fail.

The last item complained of is the item relating to "Mr. Ferns". The reason given by Government for not referring the dispute in connection with that item is as follows:—

"The demand is not reasonable. Shri Ferns had resigned and was offered re-employment later on but he refused to accept it."

The reason given by Government is germane to the matter and it cannot be said that the Government has usurped the functions of an Industrial Tribunal or has adjudicated upon the matter in giving the aforesaid reason. The objection in connection with this item is not tenable.

In the result, the petitioners are entitled to the issue of a writ of *mandamus* against respondent No. 1 requiring them to reconsider the question of making or refusing to make a reference under s. 12(5) of the Act in connection with the disputes under the headings "Provident Fund" and "Additional gratuity" and "Sick Leave", in so far as the dispute relates to retrospective effect to be given to the provisions relating to sick leave and the imposition of ceilings, taking into consideration only such reasons as are germane to the question of determining whether a reference should or should not be made in connection therewith. The Rule is made absolute to that extent.

The petitioners appealed.

N. V. Phadke, and *M. C. Bhandare*, for the appellants.

H. M. Seervai, Advocate General, with *R. J. Joshi*, for the State.

CHAGLA C.J. This appeal raises some important questions as to the interpretation of s. 12(5) of the Industrial Disputes Act, and we have listened to a very able argument from Mr. Phadke about the manner in which that section should be construed. It appears that appellant No. 1 which is a union of workers who were employed in respondent No. 2 company made certain demands on March 27, 1956, and as these demands were not accepted by respondent No. 2 company, an application was made to the Conciliation Officer on April 6, 1956. After some preliminary discussions between May and September 1956 conciliation proceedings commenced and ultimately, as unfortunately so often happens in labour disputes, they failed. The Conciliation Officer made a report under s. 12 on April 2, 1957. On July 30, 1957, Government referred to adjudication certain items in the disputes. But they refused to refer certain other items and on August 14, 1957, the Government communicated to the parties the reasons for their refusal. Now, the items which the Government refused to refer were ten. They dealt with pay scales, confirmation, provident fund, additional gratuity, leave, overtime payment, uniforms, allowance, standing orders and the case of one Mr. Ferns. On receiving this intimation, appellant No. 1 and appellant No. 2, who is an employee of respondent No. 2 company, presented this petition for a writ of *mandamus* to compel the Government to refer these matters for adjudication. Mr. Justice K. T. Desai issued a limited writ of *mandamus* calling upon the Government to reconsider their decision with regard to the question of provident fund and sick leave. With regard to the rest of the matters, he held that it was not

open to the Court to interfere with the decision arrived at by the Government. It is against this decision that this appeal is preferred.

Now, before we go to the merits of the matter, it is necessary to look at the section and to consider what is the obligation of Government under that section. The section came up for consideration in *Firestone T. & B. Co. v. K. P. Krishnan*¹, and in that judgment we pointed out that the expression 'may' referred to in s. 12 refers to a duty imposed upon Government and that, although the Government undoubtedly had been given the power to make a reference, that power had been coupled with a duty and the duty was that if on a perusal of the report Government was satisfied that there was a case for reference, the duty imposed upon it clearly arose and the Government could not refuse to discharge that duty. We also pointed out that the next part of sub-s. (5) made it obligatory upon Government, when it did not make a reference, to record and communicate to the parties concerned its reasons therefor. We were at pains to observe that it was perfectly true that the reasons given by the Government were not justiciable in the sense that the Court would not consider the weight or value or the quality or even the adequacy of the reasons given by the Government; but we pointed out that it was equally clear that the reasons which the Government had to give under this sub-section were reasons connected with the perusal of the report and with Government not being satisfied that there was a case for reference. It was observed that it was because Government was not satisfied that there was a case for reference that the duty to refer did not arise, and what the Legislature required was that Government must give reasons why it was not satisfied that there was a case for reference. It was under these circumstances that we came to the conclusion that the reasons must be connected with the failure on the part of the Government to be satisfied that there was no case for reference. We, therefore, decided what our power in this case was by observing that it was equally clear that if the reasons had no connection, no bearing and no relevance to this question, then they were not reasons at all contemplated by sub-s. (5), and if they were not reasons contemplated by sub-s. (5), then it would be open to the Court to ask Government to give proper reasons which the law required by sub-s. (5). One further observation may be noted:

"A reason which is not germane to the industrial dispute or is not connected with the industrial dispute would obviously not be the reason contemplated by s. 12(5)."

Now, this matter has been further elaborated in this case by Mr. Phadke and his first contention is that it is not open to Government to refuse to refer a matter by deciding the matter themselves. According to him, it is only in a limited class of cases that Government could exercise its powers of not referring a matter for adjudication; and he contends that to the extent that refusal to refer is connected with the merits of the dispute, it is only when the Government comes to the conclusion that the demands made by the workers are frivolous or they are such as no reasonable Tribunal could possibly entertain, that Government can refuse to refer the matter for adjudication. Therefore, according to Mr. Phadke, if the reason given by Government suggests that in exercising their power, they have considered the merits of the matter and have satisfied themselves that on merits the workers had no case, then they are giving a reason which is not a reason contemplated by sub-s. (5). Mr. Phadke uses a rather impressive expression that a distinction must be drawn between deciding a dispute and deciding whether a dispute should be referred to arbitration; and according to him the power of Government is merely to decide whether the dispute should be referred and not to decide the dispute itself. According to him, the Legislature has set up competent Tribunals to decide disputes between the workers and the employers and under sub-s. (5) of s. 12, it is not the function of the Government to arrogate to themselves the power of Industrial Tribunals. Now, in considering this matter, we must not overlook the important object of this legislation and that object is to maintain

peace in industry and to bring about good and friendly relations between employers and employees. Section 12 comes into operation only after there is a failure in the conciliation proceedings, and if Mr. Phadke's contention were to be accepted, the result would be this that however intractable the attitude taken up by the workers may be in the conciliation proceedings, when these proceedings fail by reason of that intractability, the Government was bound to refer the dispute for adjudication and it did not have the power to consider whether the offer made by the employer in the conciliation proceedings was a fair and reasonable offer or whether the demands made by the employees were unreasonable demands. To take that view of the matter would be to make the provisions of s. 12 entirely nugatory. It is true, as again pointed out by Mr. Phadke, that under the Industrial Disputes Act, the Government may itself be an employer and Mr. Phadke says that to assume that the Government has the power to go into the merits of a dispute would lead to serious prejudice being caused to the workers when the dispute is between the workers on the one hand and the Government as the employer on the other hand. Now, the fallacy underlying this argument is that the "appropriate Government" referred to in s. 12(5) is not the Government which is acting as an employer in a particular case. That Government is the executive power of the State and when the Legislature entrusts certain power to Government it does so in the hope and expectation that that power would be exercised in the interest of the people at large. When Government is functioning under s. 12(5), it is not functioning in the interest of employers or of employees. It is functioning in the interest of industrial peace and in order to bring about a fair and equitable settlement in the disputes between the parties. Therefore, we refuse to assume that in any dispute—even in a dispute to which Government as employer is a party—Government would not act with that sense of duty and responsibility which the Legislature required of it. It would be improper and in our opinion contrary to the plain language of the section to cut down the power of Government in the manner suggested by Mr. Phadke. It is open to Government and indeed it may be the duty of Government to consider in each case whether conciliation has failed and whether the demands of the workers are such as required adjudication. Not only when the demands are frivolous such as reasonable people would not put forward, but even if they are not justified, even if they are not appropriate in the context of the times or in the context of financial conditions, it would be open to Government not to refer the disputes to adjudication. To suggest that in any decision of Government, the element of decision should be absent is to make s. 12(5) entirely nugatory. Even in the case given by Mr. Phadke, if Government were to come to the conclusion that certain demands were wholly unreasonable or frivolous, even in that conclusion there would be inevitably an element of decision. In this connection, question arises whether the only material which the Government is entitled to consider under s. 12(5) is the report made by the Conciliation Officer. The language of the sub-section is:

"If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference..."

What is made obligatory is the consideration of the report of the Conciliation Officer. But the section does not provide that the satisfaction ultimately required by the Government is a satisfaction that can only be based upon the report of the Conciliation Officer. It would, therefore, be erroneous to suggest that it would not be open to Government to rely on other materials, other facts, other statistics other than those which appear in the report of the Conciliation Officer. All that is relevant and germane to the statutory satisfaction can be availed of by the Government in coming to its conclusion. The satisfaction that the Government has got to arrive at is not a judicial or quasi-judicial act. It does not call for any judicial process, although undoubtedly it would be more satisfactory if Government were to discuss various matters in the presence of both the parties before it came to a particular conclusion. But the law does not

cast any obligation upon the Government to do so and the very fact that the Legislature has left the matter to the subjective satisfaction of Government clearly shows that any idea or suggestion of judicial process is excluded.

Then, the next question that we have to consider is what is the nature of the reasons which the Government has to record and communicate to the parties under sub-s. (5) when it does not make a reference. Now, in *Firestone T. & R. Co. v. K. P. Krishnan*, we laid down that the reasons contemplated under this sub-section were reasons which must be germane to the issue before the Government. It must be relevant to the industrial dispute and to the demands made by the workers, to the answer given by the employer and all matters with which, in substance, the Conciliation Officer was concerned. Therefore, we can straight away exclude one possible reason from the category of the statutory reasons referred to in s. 12(5), and that reason is the reason which we defined and excluded in *Firestone T. & R. Co. v. K. P. Krishnan*. Therefore, when reasons are given and the Court is considering those reasons, if the reasons disclose any extraneous matter taken into consideration by the Government, or if they disclose a failure on the part of the Government to take into consideration any relevant factor required by law, undoubtedly the Court would say that these are not the reasons contemplated by the statute. Now, it is obligatory upon the Government to consider the report of the Conciliation Officer. If Government were to state in its reasons that it has not taken that report into consideration, obviously the reason would be bad; equally so as laid down in *Firestone T. & R. Co. v. K. P. Krishnan* if the Government takes into consideration the conduct of a worker in deciding whether he is entitled to a bonus or any other circumstance which is foreign to any determination as to the question of the right of a worker to get bonus. But Mr. Phadke has contended for a much wider obligation being cast upon the Government and what he says is that reasons should not be conclusions of fact or expressions of opinion. They should disclose facts and circumstances on the basis of which the conclusion is arrived at. Now, this test would be perfectly sound if the reasons which the Government has to give were subject to judicial review or subject to judicial correction. As we pointed in *Firestone T. & R. Co. v. K. P. Krishnan* it is not for this Court to consider the value or quality or even the inadequacy of these reasons and this Court cannot constitute itself a Court of Appeal from the decision of the Government. The very limited jurisdiction that the Court has to exercise is to compel Government to give proper reasons if the reasons given by Government are not reasons which fall within the ambit of s. 12(5). It is true that it would not be sufficient for Government merely to assert *ipse dixit* and to say that we are not satisfied that a reference should be made. That would be no reason at all. The reason must disclose the mental process which has resulted in Government not being satisfied. The Court would not be concerned with how that mental process worked or how the conclusion was arrived at. But if the conclusion is germane to the failure on the part of the Government to be satisfied, then the Court cannot ask the Government, as it were, to give particulars for the reasons given so that the particulars could be considered and investigated by the Court. Mr. Phadke referred to a legislation, which is not strictly *in pari materia* but which has some bearing on the question which we are considering, which is well known or notorious whichever way you call it, the Preventive Detention Act. What Mr. Phadke says is that under that law there is an obligation upon the detaining authority to furnish grounds and this Court very early in the history of that legislation held that it was incumbent upon the Government to give particulars in respect of those grounds. Now, the reason for that decision is obvious. The reason was that that legislation gave a statutory right to the detainé to make a representation to the Government against his detention after he had received the grounds and what we said was that if a statutory right of making a representation was given, that should be considered to be an effective right and that right could not be effective if the grounds given were vague and did not contain necessary particulars. Now,

applying that principle, if s. 12(5) had given a right to the parties to make a representation to Government against the reasons given by it for not making a reference, then undoubtedly we would have told the Government to give particulars so that that right could be effectively exercised. No such right is given nor is there any right of appeal or review provided against the decision. But says Mr. Phadke there is always the jurisdiction of this Court under the Constitution under arts. 226 and 227. But before a party can invoke the jurisdiction of this Court, he must satisfy us that there is any obligation upon the Government to give particulars, which obligation must be found in the statute itself. If we were to accept Mr. Phadke's argument, then really we would be submitting the reasons to be given by the Government under s. 12(5) to judicial scrutiny and, as already pointed out earlier, that was not the intention of the Legislature. It may then be asked: Why is it then that law requires the Government to give reasons? If they are not subject to judicial scrutiny, if no particulars need be given, if Government can go into the merits of the matter, why provide for something which is so pale and ineffective in its potentialities. The reason for this provision is obvious and, as we shall presently point out, in a well-known House of Lords decision it has been stated that the object of the Legislature of providing for Government giving reasons is to ensure that Government will act with a sense of responsibility. A mere satisfaction without giving reasons is apt to be abused. But when Government has to give reasons, it would apply a much closer mind to the question because otherwise it may not be easy for the Government to give reasons for the decision it has come to. The further reason for making this provision is that reasons given by Government can be subjected to public scrutiny and public criticism and no Government—surely not a democratic Government—would ever take the risk of giving a reason which would be open to public criticism and even condemnation.

Now, there are two decisions both very interesting to which reference has been made by Mr. Phadke. The first is a decision of the House of Lords reported in *Allcroft v. Lord Bishop of London, Lighton v. Lord Bishop of London*.² That case arose under the Public Worship Regulation Act, 1874, which provided for a representation to be sent to the Bishop of the diocese with a view that he should take specified steps to have the matter of the representation tried in one of the ways prescribed by the Act and then the Act went on to say:

"unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation in which case he shall state in writing the reason for his opinion."

Now, this case contains many answers to the questions raised by Mr. Phadke. At p. 675 Lord Halsbury gives a conclusive and convincing answer to the contention of Mr. Phadke that it is only when the demands of the workers are frivolous that Government can refuse to make a reference. This is what the Lord Chancellor says (p. 675):

"It is to my mind obvious that if the only discretion intended to be vested in the bishop was 'a particular discretion,' that is to say, whether the complaint was frivolous or that there had been really some infraction of the law, it would have been very easy to find appropriate language to give effect to such a provision; but the language of the Legislature has, I think, been careful to shew that the bishop's discretion is not so fettered, and that the inquiry into all the circumstances of the case is one which may justly include considerations of the good to be done or the mischief involved in proceedings which, unless they obtain the bishop's sanction, cannot proceed."

Just as under the Act which the House of Lords was considering the discretion of the Government here is unfettered and to suggest that Government can only take into consideration only certain facts and not the others is to limit and qualify the discretion which the Legislature has not thought fit to do. At p. 678 in the speech of Lord Bramwell, the learned Law Lord says:

"Then it was said that there was something he had considered which he ought not

to have considered, and something he had not considered which he ought to have, and so he had not considered the whole circumstances and them only. It seems to me that this is equivalent to saying that his opinion can be reviewed. I am clearly of opinion it cannot be. If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him",

and lower down the page, the Law Lord says:

"Then it is said why if his decisions cannot be reviewed is he to state his reasons? Lindley L.J. has given an excellent answer to this. It is that he may be under the necessity of forming a careful opinion, and one that will bear public examination."

And Lord Herschell, on a reference to the same topic, at p. 681 says:

"It was contended that inasmuch as the Legislature requires the bishop to state the reasons for his opinion, it was contended that these reasons should be reviewed to the extent at least of seeing that the bishop had considered all the circumstances of the case. I can draw no such conclusion. I think this obligation was imposed upon him, in order to secure, as I think it was calculated to do, a careful consideration of the circumstances of the case, and a conclusion for which in the bishop's opinion, he was able to disclose adequate reasons. The knowledge that his reasons would be made public and be the subject of criticism, would manifestly tend to prevent capricious and ill-considered action."

The other judgment is a recent judgment of Lord Greene reported in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*.³ There the English Court of Appeal was considering the discretion exercised by the Licensing Authority under the Cinematograph Act and the power given to the local Authorities was to allow a licensed place to be open and used on Sundays subject to such conditions as the authority thinks fit to impose and when a local authority granted to the plaintiffs leave for Sunday performances subject to the condition that no children under fifteen years of age should be admitted to Sunday performances with or without an adult, the condition was challenged and the Court held that the local authority had not acted unreasonably or *ultra vires* in imposing this restriction. At p. 228 Lord Green says:

"...When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal."

And then the Master of the Rolls says (p. 228):

"...When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law",

and then he enunciates these principles. The first is that the exercise of such a discretion must be a real exercise of the discretion. If the statute requires the authority to have regard to certain matters, then the authority must have regard to those matters. If the nature of the subject-matter and the general interpretation of the Act makes it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. Bad faith and dishonesty, as the Master of the Rolls says, constitute a class by themselves. Then he considers the argument that was advanced by counsel that the discretion must be exercised with reason and the Master of the Rolls says at p. 230:

"...but once it is conceded, as it must be conceded in this case, that the particular subject-matter dealt with by this condition was one which it was competent for the authority to consider, there, in my opinion, is an end of the case."

He concedes that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Court can interfere but to prove a case of this kind—and here the Master of the Rolls gives a neces-

sary warning "to prove a case of that kind would require something overwhelming" and he again repeats that the decision of the local authority can be upset if it is proved to be unreasonable. The proposition really means that it must be proved to be unreasonable in the sense that the Court considers it to be a decision which no reasonable body could have come to. He sums up the discussion by saying that (p. 230):

"...The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere."

These observations apply in their full vigour to the question of the power of the Government that we are considering under s. 12(5). Mr. Phadke is right that there may be cases where the Court would come to the conclusion that the action of the Government is unreasonable as disclosed by the reasons given by them. But those cases would be extremely rare and it would require, as the Master of the Rolls said, something overwhelming.

One thing more with regard to the law and then we come to the facts. It is clear that when the Court is satisfied that the reasons given by the Government are not proper or not the reasons contemplated by the law, the Court can compel the Government to give proper reasons as indeed the Court did in *Firestone T. & B. Co. v. K. P. Krishnan* and as the learned Judge did with regard to certain matters. But what is urged by Mr. Phadke is that if Government has given all the reasons and if the Government does not suggest that there are any other reasons and if the Court comes to the conclusion that those reasons are not proper reasons, the Court must perform a ministerial task of referring the matter for adjudication. Now, it is clear that it is only if the Government is satisfied that there is a case for reference that a duty arises to make a reference. The satisfaction of the Government is a condition precedent to the making of the reference. However satisfied the Court may be, the Court cannot place itself in the position of the Government and make a reference by reason of its own satisfaction. As we pointed out in *Firestone T. & B. Co. v. K. P. Krishnan* we may have an extreme case where the Government were to say: "We are satisfied and yet we do not propose to make a reference." In such a case the Court would have the power to order the Government to make a reference and it is highly doubtful that from the reasons given by the Government it will be possible for the Court to infer that those reasons disclose satisfaction on the part of the Government to make a reference. In such a highly hypothetical eventuality, we do not dispute the power of the Court to compel the Government to make a reference under s. 12(5).

Now, turning to the facts and dealing with each reason given by Government, the first is with regard to pay scales and the reason given by Government is:

"The pay scales in the Company compare favourably with those obtaining in other comparable concerns in Bombay."

Now, it is pointed out that all that the report of the Conciliation Officer on this point stated was that the management also contended that the total emoluments of their employees in each category were higher than concerns comparable to their concern. The management was not prepared to change its scales and the rate of dearness allowance. Now, what is urged is that there was no reference in the report to pay scales in comparable concerns. The only reference was to the total emoluments of the employees and according to Mr. Phadke, the two matters are entirely distinct. Now, the Advocate General has satisfied us that pay scales of comparable concerns were actually annexed in the Memorandum submitted by respondent No. 2 company to the Conciliation Officer and these papers were before the Government when they gave reasons for not referring the question of pay scales for adjudication. In view of what we have said earlier, it is difficult to take the view that this is not a reason which comes within the ambit of s. 12(5).

With regard to the second demand, confirmation, the reason given by the Government is:

"The offer made by the company during the conciliation proceedings to make employees permanent after six months of continuous service is reasonable."

In the report of the Conciliation Officer itself it is stated that the management agreed to make every employee permanent after completion of 6 months continuous service. Now, what is pointed out by Mr. Phadke is that the offer made by the company was a conditional offer and the condition was that the confirmation depended on whether or not there existed a permanent vacancy and that the departmental head should report upon temporary worker's ability as good. It is clear that the offer of the company, whether it was conditional or not, being before the Government and the Government taking a view that the offer was reasonable, the reason does not suffer from any infirmity.

With regard to provident fund and additional gratuity, the learned Judge has taken the view, with which we agree, that it requires reconsideration by the Government, and as the cross-objections filed by the Government, as fairly conceded by the Advocate General in view of our judgment in *Firestone T. & R. Co. v. K. P. Krishnan*, are not pressed, it is unnecessary to say anything more about these two matters.

Coming to leave, with regard to privilege leave, the reason given by Government is that 21 days privilege leave per year granted by the company is adequate, and the grievance, which seems to us to be justified, of Mr. Phadke is that the Government has not given any reason with regard to the other aspects of the question of privilege leave; one is the question of accumulation and the other is with regard to its retrospective effect. Now, the learned Judge dealing with sick leave, where also Government has not given any reason with regard to this aspect of the matter, has asked Government to reconsider their decision. In our opinion, the privilege leave stands on the same footing as sick leave and we will vary the judgment of the learned Judge by including in it the head of privilege leave among the heads which the learned Judge has referred back to Government for giving proper reasons.

With regard to casual leave, that point has not been pressed by Mr. Phadke.

With regard to leave in general, all that the Government says is that the demand is not reasonable. Now, *prima facie* we would have taken the view that this is hardly a reason contemplated by s. 12(5), but when we turn to the demand of the employees, the demand is:

"Any leave taken in any year should be treated as part of service of 11 months. Leave should be available according to the convenience of the employees."

And it seems to us that on the face of it, this demand is untenable and the Government was right in characterising it as unreasonable. Even Mr. Phadke could not say anything in support of this rather extra-ordinary demand on the part of the workers.

The demands with regard to overtime payment, uniforms and allowances are not pressed.

With regard to Standing Orders, the reason given by the Government is that the company is not covered by the Industrial Employment (Standing Orders) Act, 1946, but it has agreed to frame service rules providing, *inter alia*, for classification, leave, retirement, discharge etc. Now, what Mr. Phadke says is that it is left to the sweet will of the company to frame Standing Orders or not. Now, the Government points out that there is no obligation upon the company to frame Standing Orders as it does not fall within the Industrial Employment (Standing Orders) Act, 1946. But even so, in the interest of industrial peace it has accepted the agreement of the company to frame rules dealing with certain service conditions. We are sure that the company will carry out this agreement. If it does not, it is always open to the employees to raise a dispute with regard to this matter, and we are sure that if such a dispute is raised and the Government finds that the company has not abided by this agreement, it will take necessary action.

Now, finally coming to the case of Mr. Ferns, the reason given by the Government is:

"Shri Ferns had resigned and was offered re-employment later on but he refused to accept it."

Now, in the report of the Conciliation Officer, what is stated with regard to Mr. Ferns is that:

"the Union contended that the management had forced Mr. Ferns to retire and as such he should be given all benefits retrospectively in particular different types of leave, bonus, gratuity, provident fund and medical expenses. The management contended that Shri Ferns had resigned of his own accord, due to ill-health, the management was not prepared to consider the demand."

Now, what is urged by Mr. Phadke is that there is nothing in the report of the Conciliation Officer to suggest that Mr. Ferns was offered re-employment. Now, the fact that Ferns was offered re-employment is stated in the affidavit made by Mr. Brahmabhatt on behalf of the Government and the Advocate General has also pointed out to us that in the notes maintained by the Conciliation Officer, which were before the Government, there is a clear statement that during the conciliation proceedings the company had stated that it had offered re-employment to Mr. Ferns who refused to accept it.

Mr. Phadke also argued that the learned trial Judge should not have referred the matter back to the Government in respect of the heads to which reference has been made but should have issued a writ of *mandamus* to Government to refer these matters to adjudication. In view of what we have stated earlier in the judgment about the law, it is clear that this contention of Mr. Phadke is untenable and must fail.

Under the circumstances, we are of the opinion that the judgment of the trial Court should be maintained except with the slight modification that the Government will reconsider the question of making or refusing to make a reference under s. 12(5) not only with regard to the disputes under the heads provident fund, additional gratuity and sick leave but also with regard to privilege leave. In substance, the appeal fails.

With regard to the costs, the learned Judge made the order that each party should bear its own costs. It is true that in substance the appellants have failed. But the appeal had raised questions of considerable importance and it is just as well as far as this Court is concerned that the law should be finally settled by the Court. Under the circumstances we think the fairest order to make should be—no order for costs of the appeal and no order for costs of the cross-objections. The order made by Mr. Justice K. T. Desai directing the Government to pay Rs. 75 as costs of an adjournment will be vacated.

Liberty to the appellants' attorneys to withdraw the sum of Rs. 1,000 deposited in the Court.

Solicitors for the appellants: *Vakil, Dadabhoy & Bharucha.*

Solicitors for the respondents: *Little & Co.*

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.

THE STATE OF BOMBAY v. MORARJI COOVERJI.*

Bombay Land Requisition Act (Bom. XXXIII of 1948), Sec. 6—Intimation of vacancy given by landlord to authorised officer in prescribed form—Intimation sent by ordinary post and beyond time prescribed under s. 6(2)—Intimation received by officer—Whether such intimation effective—Mode prescribed by s. 6(2) that intimation to be given by registered post whether mandatory or directory—Intimation referred to in s. 6(3) whether intimation referred to in s. 6(1) or whether such intimation must fulfil requirements of ss. 6(1) and 6(2)—Failure to give intimation under s. 6(2) whether precludes landlord from giving intimation subsequently—When Court can construe expression "shall" in statute as directory or procedural.

Where an intimation of vacancy of premises was given by the landlord under s. 6(1) of the Bombay Land Requisition Act, 1948, to an authorised officer, in the prescribed form, but it was given by ordinary post and not within the time prescribed by s. 6(2) of the Act, and it was established that the officer had received it, such an intimation would be an intimation within s. 6(3) of the Act, and the landlord could occupy the premises after the lapse of one month from the date of the receipt of the intimation by the officer and it is not open to the State Government to requisition the premises after the lapse of such period unless there was a fresh vacancy.

In order to get relief from the Court on a writ petition, not only must the petitioner come with clean hands, not only must he not suppress any material facts, not only must he show the utmost good faith, but he must also satisfy the Court that the making of the order will do justice and that justice lies on his side.

The mode prescribed by s. 6(2) of the Bombay Land Requisition Act, 1948, that the intimation shall be given by registered post is directory.

The intimation referred to in s. 6(3) of the Bombay Land Requisition Act, 1948, is the intimation referred to in s. 6(1) of the Act.

The failure on the part of the landlord to give the intimation required by s. 6(2) of the Act does not debar him from giving a subsequent intimation.

In order to place a proper construction on the expression "shall" in a statute the Court must look to the scheme of the Act in order to determine what are the consequences which the law has laid down as a result of non-compliance with that mandatory direction. The consequence may be penal, the consequence may be that a particular order passed is invalidated, the consequence may be that a particular right is not acquired or a particular obligation is imposed, or the consequence may be not stated in the law at all. When no consequence is apparent in the law it is possible for the Court to take the view that although the statute has used the expression "shall" it must be construed as being directory or procedural rather than mandatory in the strict sense of the term.

*Jethanand Moorjimal Metha v. N. S. Varma,*¹ agreed with.

*Sayad Abdul Hamid v. The State of Bombay,*² dissented from.

*Narashedrai D. Dave v. The Asian Assurance Co. Ltd.,*³ distinguished.

*State of U.P. v. Manbodhan Lal,*⁴ referred to.

ONE Morarji Cooverji (petitioner) was the manager and *karta* of a joint Hindu family and as such was the owner of an immoveable property known as Hirji Mansion, situate at Darabshah Road, Bombay. Prior to 1953 flat No. 5 in this building was in the occupation of one Ashraf Dharamsey. The petitioner sent a notice to Ashraf Dharamsey terminating his tenancy as from April 30, 1953, as the said Ashraf Dharamsey was in arrears of rent and had sub-let the premises and as the petitioner claimed that he required the premises reasonably and *bona fide* for his own use and occupation. Thereafter the

*Decided, September 9, 1958. O. C. J. Appeal No. 45 of 1958; Miscellaneous Application No. 168 of 1957.

1 (1958) O. C. J. Miscellaneous Petition No. 216 of 1956, decided by Tendolkar J., on October 10, 1956 (Unrep.).

2 (1951) O. C. J. Miscellaneous Petition

No. 324 of 1950, decided by Tendolkar J., on November 29, 1951 (Unrep.).

3 (1941) O. C. J. Suit No. 809 of 1941, decided by Kania J., on September 11, 1941 (Unrep.).

4 [1957] A. I. R. S. C. 912.

petitioner filed a suit for ejectment against the said Ashraf Dharamsey in the Court of Small Causes at Bombay. On September 23, 1953, a decree was passed in the said suit in favour of the petitioner whereunder Ashraf Dharamsey was ordered to vacate and deliver up possession of the flat to the petitioner on or before October 23, 1953. The petitioner in execution of the decree obtained a warrant for possession and on January 18, 1954, the bailiff of the Court of Small Causes delivered to the petitioner possession of the flat with the exception of the kitchen which was found locked. On January 20, 1954, the bailiff also gave delivery of possession of the kitchen by breaking open the lock thereof. On January 27, 1954, the petitioner gave an intimation of vacancy in the official form to the Controller of Accommodation in respect of the flat. The intimation was enclosed with a letter dated January 27, 1954, addressed to the Controller of Accommodation. By that letter the petitioner informed the Controller of Accommodation that the flat was required by the petitioner for "the joint family residential purposes" and that he proposed to use the same as the landlord for the residence of the members of the said joint family. He requested the Controller of Accommodation to sanction his request for retaining the premises for the residential purposes of the members of the joint family. This intimation was received by the Controller of Accommodation on February 1, 1954. This intimation was not given by registered post.

On January 11, 1954, a notification was issued by the Deputy Custodian of Evacuee Property in pursuance of sub-s. (3) of s. 7 of the Administration of Evacuee Property Act, notifying the tenancy rights of Ashraf Dharamsey in the flat as evacuee property. The petitioner filed an appeal against the same and obtained a stay order as the Deputy Custodian was taking steps to obtain possession of the flat. On February 2, 1954, the petitioner by his advocate's letter of that date intimated to the Controller of Accommodation, Bombay, about the said notification issued by the Deputy Custodian of Evacuee Property, about the appeal filed by the petitioner and the stay order obtained by him and requested the Controller to allot the premises in question to the petitioner. It was stated in that letter that if the petitioner lost the appeal before the Custodian of Evacuee Property, he would have no other alternative but to hand over possession of the said premises to the Custodian. On February 12, 1954, the Controller of Accommodation acknowledged receipt of the letter of the petitioner, dated January 27, 1954, giving intimation of the vacancy of the premises and stated that as the property was declared as an evacuee property and vested in the Deputy Custodian of Evacuee Property, the petitioner may report the vacancy to Government if and when he succeeded in the appeal and the property was declared as non-evacuee property. On March 3, 1954, the petitioner having waited for a period of over a month from the date of the receipt by the Controller of Accommodation of the letter dated January 27, 1954, went in actual occupation of the said flat. The petitioner having thereafter realised that some objection may be taken to the intimation of vacancy that had been given, on the ground that it had not been sent by registered post, addressed a letter on November 3, 1954, to the Controller of Accommodation and asked the Controller of Accommodation to confirm if the intimation sent by him was in regular form and complied with all the requirements of law. For the sake of abundant caution, however, the petitioner enclosed therewith an intimation of vacancy in the official form duly signed by him and forwarded the same to the Controller by registered post. By that letter he requested the Controller to let him know whether the first intimation, which had not been sent by registered post, or the intimation which was then being sent by registered post, was complete.

On November 15, 1954, the petitioner through his advocate sent to the Controller of Accommodation a certified copy of the notification issued by the Deputy Custodian of Evacuee Property, dated January 11, 1954. By his letter dated November 30, 1954, addressed to the petitioner the Controller of Accommodation referred to the aforesaid intimation dated November 27, 1954, given

by the petitioner and received in the office of the Controller on February 1, 1954, and also to the aforesaid intimation dated November 3, 1954, received in the office of the Controller on November 8, 1954, and stated that as the property vested in the Custodian of Evacuee Property, his office had no jurisdiction in the matter. The petitioner was asked to report the vacancy to the office of the Controller of Accommodation as soon as the appeal filed by the petitioner against the decision of the Deputy Custodian of Evacuee Property had been decided and possession was handed over to the petitioner.

The vacancy in respect whereof the Controller of Accommodation required the petitioner to report was the vacancy which might arise on possession of the flat being handed over to the petitioner on the appeal filed by the petitioner being decided in favour of the petitioner. At this time, the flat in question was in the actual possession and occupation of the petitioner.

The appeal filed by the petitioner before the Custodian of Evacuee Property was allowed and the order of the Deputy Custodian notifying the tenancy of Ashraf Dharamsey in the flat as evacuee property was set aside on the ground that no notice under s. 7 of the Administration of Evacuee Property Act, 1950, had been given to the petitioner, who was interested in the property. The case was remanded back to the Deputy Custodian for a rehearing and decision on the merits after the petitioner and other interested persons, if any, were given an opportunity of being heard. On a rehearing of the matter, the tenancy rights of Ashraf Dharamsey were again declared as evacuee property. The petitioner appealed therefrom to the Custodian of Evacuee Property. On February 1, 1956, the Custodian of Evacuee Property allowed the appeal, holding that "on the date of the notification no property existed which could either be notified or could be taken into possession". He directed the tenancy rights in the flat to be de-notified.

On July 14, 1956, the petitioner received a letter from the Inspector of Accommodation Department calling upon the petitioner to appear before him on July 16, 1956, in connection with the flat with rent receipts, ration cards etc. The petitioner appeared before the Inspector as required. On February 5, 1957, the petitioner received a letter from the Controller of Accommodation stating that there was a suppressed vacancy in respect of the said flat. The petitioner thereafter made a representation in that connection. On May 11, 1957, the State Government passed an order, which ran as follows:—

"Whereas, on inquiry it is found that the premises specified below had become vacant on the 20th day of January 1954.

Now, therefore, in exercise of the powers conferred by clause (a) of sub-section (4) of section 6 of the Bombay Land Requisition Act, 1948 (Bom. XXXIII of 1948), the Government of Bombay is pleased to declare that the said premises had become vacant after 4th December 1947 and to requisition the said premises for a public purpose, namely, for housing a Bombay State Government Servant.

Premises.

Flat No. 5, 2nd Floor, Hirji Mansion, 4, Darabai Road, Nepean Sea Road, Bombay."

On May 30, 1957, another order was passed authorising Mr. J. B. Desai, an Inspector in the office of the Controller of Accommodation, to take possession of the said flat.

On June 6, 1957, the petitioner filed the present petition for the issue of a writ of *mandamus* or a writ in the nature of *mandamus* or a direction, order or other appropriate writ under art. 226 of the Constitution of India against the State of Bombay ordering the State of Bombay to withdraw, cancel and set aside the said requisition order dated May 11, 1957, and the order dated May 30, 1957, and further ordering the State of Bombay to forbear from enforcing and/or taking any steps or proceedings in the enforcement of the said requisition order and the said order dated May 30, 1957. The petition was heard by K. T. Desai J. who held that the order of requisition was invalid

and directed the issue of a writ of *mandamus*, delivering the following judgment on April 29/30, 1958:—

K. T. DESAI J. [His Lordship after stating the facts as above, proceeded:] The vacancy referred to in the order of requisition, dated May 11, 1957, is the vacancy which occurred on January 20, 1954, when the bailiff of the Court of Small Causes completed giving possession of the whole of the said flat No. 5 to the petitioner. The said order proceeds on the footing as if no intimation of vacancy had been given. It is urged on behalf of the petitioner that the vacancy which occurred on that day was the vacancy in respect whereof due intimation had been given by the petitioner, that after the expiration of a period of one month from the date of the receipt of such intimation the petitioner was entitled to occupy the said premises and that he had in fact lawfully occupied the same on March 8, 1954, after the expiration of the said period of one month. It is further urged that the said vacancy having ceased, the Government could not thereafter requisition the said premises as it had purported to do.

The learned counsel for the petitioner relies upon the decision in *Dwarkadas Jivraj v. State of Bombay*¹. In that case Mr. Justice Tendolkar at page 969 observes as under:—

“...Where in the exercise of the rights conferred upon him by sub-s. (3) a landlord proceeds to exercise his rights as a landlord after waiting for a period of one month from the date on which intimation is received and either goes into occupation or lets the premises to a tenant, it appears to me that by that act which is lawful and expressly permitted by the Bombay Land Requisition Act, the vacancy of which intimation was given comes to an end and therefore the right of Government to requisition the premises comes to an end with the termination of the vacancy, as it has been repeatedly laid down that the existence of a vacancy is a condition precedent to the exercise of the power to requisition. Therefore, in a case in which the landlord has so exercised his right, it appears to me that as there is no vacancy the power of Government to requisition comes to an end from the date when the landlord has exercised his rights.”

It is urged on behalf of the respondent that the intimation given in this case on January 27, 1954, is not an intimation in due compliance with the provisions of s. 6(2) of the Bombay Land Requisition Act, 1948, inasmuch as the said intimation was not given by registered post as required by that section. Strong reliance was placed on behalf of the respondent on an unreported judgment delivered by Mr. Justice Tendolkar in *Sayed Abdul Hamid v. The State of Bombay*². In that case the learned Judge held that no proper notice was given by registered post of the vacancy that had arisen and that any letting of premises without giving such notice did not prevent the State from making inquiries and making the requisite declaration of vacancy and requisitioning the premises. Section 6(2) in terms now provides that “the intimation shall be given by registered post”. It is not disputed that the intimation given on January 27, 1954, was not given by registered post. In view of the aforesaid decision I must hold that the giving of the said notice did not preclude the State from making the requisite declaration after due inquiry and requisitioning the premises even though the premises had been occupied one month after the receipt of the aforesaid notice, dated January 27, 1954.

It is, however, urged on behalf of the petitioner that an intimation by registered post was in fact given on November 8, 1954, that the said intimation was received by an officer authorised in that behalf by the respondent on November 8, 1954, that after the expiry of one month from the date of the receipt of such intimation the petitioner continued to occupy the said premises and that even though the occupation of the said premises by the petitioner prior thereto may not be authorised, the occupation subsequent to the expiration of the period of one month from the date of receipt of the intimation given by

¹ (1954) 56 Bom. L. R. 969.

² 324 of 1950, decided by Tendolkar J., on

³ (1951) O. C. J. Miscellaneous Petition No. November 29, 1951 (Unrep.).

registered post became authorised and that from the date of such occupation the vacancy ceased and the Government ceased to have any right thereafter to requisition the premises in respect of the vacancy which had thus lawfully ceased.

It is contended on the other hand on behalf of the respondent that under sub-s. (2) of s. 6, the intimation is not merely required to be given by registered post, but it is required to be given in the case like the one before me "within seven days of the premises becoming vacant or becoming available for occupation". It is urged that as the intimation which was given by registered post was an intimation given more than seven days after the premises became vacant or became available for occupation, it was not a proper intimation as contemplated by sub-s. (2) of s. 6 and that the petitioner was not authorised under the provisions of sub-s. (3) to occupy the said premises so as to terminate the vacancy which had arisen.

It is necessary in order to appreciate the rival contentions to set out the provisions of sub-s. (3) of s. 6. It runs as follows:—

"A landlord shall not, without the permission of the State Government let, occupy, or permit to be occupied such premises before giving the intimation and for a period of one month from the date on which the intimation is received."

It is urged on behalf of the respondent that the words "before giving the intimation" in that sub-section mean "before giving the intimation by registered post within the time specified in sub-s. (2) of section 6." On the other hand, it is urged on behalf of the petitioner that there is no warrant for adding in that section the words "within the time mentioned in sub-section (2) of section 6." It is further urged that if the words "before giving the intimation" are held to mean "before giving the intimation within the time mentioned in sub-section (2) of section 6", a result would be produced which could never have been contemplated by the Legislature and it would be contrary to the very object and spirit of the Act. Under the provisions of sub-s. (5) of s. 6 it is provided that any landlord who lets, occupies or permits to be occupied the premises in contravention of the provisions of sub-s. (3), shall, on conviction, be punished with imprisonment for a term which may extend to one year and shall also be punished with fine. If the contention of the respondent is accepted, then if seven days once expire after the premises become vacant or become available for occupation without the requisite intimation being given, then thereafter the premises could not be let out or occupied or permitted to be occupied by the landlord without incurring the penalty of imprisonment and fine provided by sub-s. (5), as any notice that may thereafter be given by him would not be an intimation within the period specified in sub-s. (2) of s. 6. The State Government, though it has the power to requisition such premises, is under no obligation to requisition the same. If the contention of the State is accepted, the result would be that a landlord who does not wish to court imprisonment and incur the liability for a fine would have to allow the premises to remain vacant and unoccupied during the subsistence of the Bombay Land Requisition Act, unless in the meantime the Government chose to requisition the premises.

The Bombay Land Requisition Act, 1948, was enacted in view of the housing shortage prevailing in the city of Bombay. It was never intended that any premises should remain vacant indefinitely. An obligation has been cast upon the landlord to give intimation of the vacancy and not to let, occupy or permit to be occupied the premises for a period of one month after an intimation of such vacancy was received without the permission of the State Government in order to enable the Government to requisition the premises, if it so desired. If the Government did not requisition the premises within the said period of one month then the landlord is at liberty to let, occupy or permit to be occupied the said premises. It could never have been the intention of the Legislature that if on account of sickness, insanity of mind, minority, absence from Bombay, want of knowledge or any other cause, the intimation is not given within a period of seven days after the premises became vacant or became available

for occupation, they should be kept vacant or unoccupied during the subsistence of the Act by a law-abiding landlord. Where the Legislature intended to refer to the period within which the intimation is required to be given, it has expressly stated so. The language used in sub-s. (3) of s. 6 may well be contrasted with the language used in sub-s. (5) of s. 6. In sub-s. (5) the words used are as follows:—

"Any landlord who fails to give such intimation within the period specified in sub-section (2) shall on conviction be punishable with imprisonment for a term which may extend to three months or with fine or with both."

If the Legislature intended by sub-s. (3) to refer also to the time of giving the intimation, it would equally have used the words "before giving the intimation within the period specified in sub-section (2)," instead of the words "before giving the intimation". The contravention of the provisions of sub-s. (2) is constituted a distinct offence punishable separately. The only reasonable construction that could be placed upon the words in sub-s. (2) which would safeguard the rights of the Government to requisition the premises and which would carry out the object and spirit of the Act is that no landlord is entitled, without the permission of the State Government, to let, occupy or permit to be occupied any premises, which have become vacant or become available for occupation, without giving an intimation in the prescribed form by registered post and without waiting for a period of one month from the date on which such intimation is received.

In Maxwell on the Interpretation of Statutes, 10th edn., p. 229, it is observed as follows:—

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

In the present case, it is not necessary to modify the meaning of any words or the structure of any sentence to give the meaning to sub-s. (3) of s. 6 which I hold it bears. The meaning which I have given to the words used is the plain, ordinary meaning which the words bear. The construction suggested by the State is one which would lead to inconvenience, absurdity and injustice not intended or contemplated by the Act.

In the present case, the petitioner did give the intimation by registered post on November 3, 1954, and the same was received on November 8, 1954. After the expiry of one month from the date of the receipt of such intimation it would have been lawful for the petitioner to occupy the said premises without incurring the liability provided for by sub-s. (5) if he had not occupied the premises earlier. His continuing in occupation after the said period must be regarded as authorised occupation of the premises with the result that the vacancy which occurred on January 20, 1954, must on such authorised occupation be considered to have ceased to exist and the power of the respondent to requisition the premises on account of such vacancy must equally be regarded as having ceased. In my view, the State Government was not entitled in law to issue the order of requisition, dated May 11, 1957, in respect of the vacancy which arose on January 20, 1954, and to pass the order, dated May 30, 1957, for taking possession of the said premises.

It was urged before me on behalf of the petitioner that under sub-s. (2) of s. 6 a provision has been made for giving the intimation to the Government by registered post for the benefit of the Government, that it is open to the Government to waive that condition and that in the present case the Government has in fact waived that condition. On the other hand, it has been strongly urged on behalf of the respondent that this is a statutory condition the non-observance of which is visited by the Legislature with the penalty of imprisonment and fine and that such a condition is incapable of being waived and has in fact not

been waived. It is not necessary for the purpose of the present case to decide these points.

The petitioner has challenged the order of requisition, dated May 11, 1957, also on the ground that by the said order a declaration has been made to the effect that the premises had become vacant after December 4, 1947, and that such a declaration is bad as it refers to a vacancy which may have arisen prior to the coming into force of the Bombay Land Requisition Act, 1948, i.e. prior to April 11, 1948. It is further urged that as the said declaration is bad in law, the requisition order itself is bad in law. The order itself recites that the premises had become vacant on January 20, 1954, a date subsequent to the date of the coming into operation of the Bombay Land Requisition Act. I have held in a decision given by me in *Kulsumbai J. G. Padamsey v. The State of Bombay*³ that such a declaration is a valid declaration and that the order is not liable to be challenged by reason thereof. For the reasons given by me in that judgment, I hold that the order is not invalid on the aforesaid ground.

There is no substance in the plea that the order was passed mala fide or that the order indicates a non-application of the mind on the part of the respondent.

It was urged on behalf of the State that the petitioner has not shown abundant good faith, which he is bound to show in proceedings for the issue of a writ, and that he has thereby disentitled himself from claiming any relief. The statements complained of are statements in relation to the occupation of the premises by persons other than the petitioner in the year 1956. The statements made in that connection are totally immaterial for the purpose of the present petition. Even if there was any substance in the complaint of the respondent, the petitioner is not disentitled to relief by reason thereof.

In my view, the order of requisition, dated May 11, 1957, and the order for taking possession, dated May 30, 1957, are bad and are liable to be set aside. The petitioner is entitled to succeed and I direct the issue of a writ of *mandamus* in terms of prayer (a) of the petition. In view of the fact that the petitioner succeeds only on a ground taken after the case was heard for a considerable length of time, the fair order to make as regards costs is that there should be no order as to costs.

At this stage, without prejudice to their rights and contentions, the parties are agreed that the Government will be at liberty not to deliver up possession of the premises upto June 10, 1958.

The State of Bombay appealed.

H. M. Seervai, Advocate General, with *R. M. Kantawala*, for the appellant.
S. V. Gupta, with *K. H. Bhabha*, *R. L. Dalal*, *Shelton Samuel*, and *Jivabhai*, for the respondent.

CHAGLA C. J. Although this appeal is capable of being disposed of on a very narrow ground, viz., that the petitioner has disentitled himself for any relief from this Court on the ground of misconduct and on the ground that justice is not on his side, as the matter is of considerable importance and has been argued at some length, it is necessary to dispose of the various questions that were argued at the Bar.

The appeal arises out of a petition filed challenging an order of requisition passed by Government on May 11, 1957, and what was requisitioned was flat No. 5 in Hirji Mansions, Darabshah Road, off Nepean Sea Road. It appears that this flat was let by the landlord to one Ashraf Dharamsey, and the landlord, who is the respondent before us, filed an ejectment suit on June 21, 1953, and obtained a decree on September 23, 1953, from the Small Causes Court. By this decree possession was to be given to the landlord within one month. On January 13, 1954, the respondent obtained a warrant of possession. On January 18, 1954, possession was taken of the premises, except for the kitchen and the possession of the kitchen was taken on January 20, 1954. Therefore, the

landlord took possession of the vacant premises on January 20, 1954. On January 11, 1954, a notification was issued declaring the tenancy rights in this flat to be evacuee property. On January 27, 1954, the landlord gave intimation to the Controller of Accommodation of this vacancy. The letter was sent by ordinary post, and it is common ground that it was received by the Controller on February 1, 1954. On February 2, 1954, the advocate of the respondent informed the Controller of Accommodation of the proceedings under the Evacuee Property Act. On February 12, 1954, the Controller wrote to the respondent that "since the property is already declared as an evacuee property and vests in the Deputy Custodian of Evacuee Property, you may report the vacancy to Government, if and when you succeed in the appeal and the property is declared as no Evacuee Property." On November 3, 1954, the landlord wrote to the Controller stating that the premises still continued to be notified as evacuee property. He asked the Controller to confirm if the intimation sent by him was in regular form and did comply with all the requirements of law. But he pointed out in this letter that as the intimation of vacancy had to be given by registered post and as that had not been done, by way of abundant caution he was sending an intimation in the prescribed form by registered post, and such intimation was sent by registered post. On November 12, 1954, the Custodian of Evacuee Property allowed the appeal of the respondent and remanded the matter to the Deputy Custodian. On November 25, 1954, the Custodian of Evacuee Property wrote to the Controller that the tenancy rights in respect of the premises *prima facie* appear to vest in the Custodian and the matter was pending, and he requested the Controller not to take any action in the matter pending the disposal of the matter. The ultimate result of the proceedings taken by the respondent was that the tenancy rights were de-notified by the Custodian on February 1, 1956. On July 14, 1956, an inquiry was held by the Inspector of Accommodation with regard to the vacancy in this flat and statements of the respondent and one Kalyanji Dhanji were recorded. It appears that by this time Kalyanji Dhanji was in occupation of the flat. On May 11, 1957, after the inquiry was held the impugned requisition order was passed. This requisition order relies on the vacancy having taken place on January 20, 1954, and the premises are requisitioned under the powers conferred by cl. (a) of sub-s. (4) of s. 6 of the Bombay Land Requisition Act. The order of enforcement was issued on May 30, 1957, and the possession was taken on June 7, 1957. The learned trial Judge, after consideration of the law and of the facts and circumstances of the case, came to the conclusion that the requisition order was invalid and gave the necessary relief to the respondent, and the State of Bombay has come in appeal.

The first question that arises is whether the intimation given by the landlord on January 27, 1954, is the intimation required by the law. Turning to the section, s. 6(1) imposes upon the landlord of vacant premises a duty to give intimation in the prescribed form to an officer authorised in this behalf by the State Government. It is not disputed by the State that the intimation was given by the landlord in the prescribed form to an officer authorised in that behalf by the State Government and that intimation was given on January 27, 1954, and was received by the Controller of Accommodation on February 1, 1954. But the difficulty is caused by sub-s. (2) of s. 6. That sub-section provides that intimation shall be given by registered post within one month of the date of the notification in the case of premises which are vacant on such date and in other cases within seven days of the premises becoming vacant or becoming available for occupation. Now, the intimation referred to in sub-s. (2) is undoubtedly the intimation to which reference has been made in sub-s. (4) of s. 6. The law, after imposing the obligation upon the landlord to give an intimation, as prescribed by s. 6(1), proceeds under s. 6(2) to lay down the mode by which the intimation is to be given and the time within which it is to be given. The mode prescribed is registered post and the time, prescribed in this particular case, is within seven days of the premises becoming

vacant or becoming available for accommodation. With regard to time, the intimation in this particular case would be in time if it was given on January 27, 1954. There is some controversy about it with which we shall deal later. Admittedly in this case the intimation was not given by registered post and the question that arises for our consideration is whether the failure on the part of the landlord to give intimation by registered post as required by s. 6(2) renders that intimation of no effect. Turning to sub-s. (3) of s. 6 it provides:—

“A landlord shall not, without the permission of the State Government let, occupy, or permit to be occupied such premises before giving the intimation and for a period of one month from the date on which the intimation is received.”

Therefore, this places an impediment in the way of the landlord from making such use as he wants of his premises which have become vacant. He can only make use of these premises after the lapse of one month from the date on which the intimation is received. In other words, during this period Government is given the power to requisition the premises. If they exercise that power within the period prescribed, the premises become requisitioned premises and the premises would be given to such allottee as the Government may nominate. If the Government do not exercise their power, the right of the landlord to make use of his premises arises and on the lapse of that period he may let, occupy or permit to be occupied the premises in any manner he likes. But it will be noticed that if he does not give the intimation he has no right to deal with the premises, and therefore what we have to consider in this case is—what is the proper effect to give to the expression “the intimation” used in sub-s. (3)? The rival contentions are that the intimation referred to in s. 6(3) is the intimation referred to in s. 6(1), and the other contention is that the expression “the intimation” in s. 6(3) is the intimation with all its requirements set out not only in s. 6(1) but also in s. 6(2). In other words, it is only that intimation which is in the prescribed form which is given to an officer authorised in that behalf, which is given by registered post, and which is given within seven days of the premises becoming vacant that constitutes the intimation required to be given by the landlord under s. 6(3), and if any of these requirements is absent a landlord cannot be deemed to have given the intimation required by law. It is, therefore, pointed out that admittedly in this case the intimation of January 27, 1954, was not by registered post and therefore the landlord never gave the intimation, and not having given the intimation the right of the Government to requisition the premises continued and any use that the landlord might make of his premises would be an unauthorised use and any person occupying the premises would be an unauthorised occupant. It is also urged on behalf of the State that the only intimation that a landlord can give is the intimation within seven days of the premises becoming vacant. If that period elapses and an intimation is not given, a landlord can never give the intimation required in s. 6(3). In other words, if the landlord fails to give the intimation with all its requisites as contained in s. 6(1) and 6(2), even though the premises may not be required by the State and even though the premises may not be requisitioned at any time, the landlord has no right at all to let or occupy those premises. In other words, those premises must continue to remain untenanted during the whole period that the Bombay Land Requisition Act is in force. That, indeed, is a startling conclusion to come to, and unless justified by the clear language of the law, the Court would be reluctant to accept such a construction being put upon a law which although intended for social good is also intended to restrict and control the proprietary rights of a landlord.

It is said that the Court must give effect to the mandatory words used by the Legislature in s. 6(2). The Legislature has used the words of obligation when it provides that the intimation shall be given by registered post and within the time mentioned in sub-s. (2). Now, the expression “shall” normally connotes undoubtedly a mandate on the part of the Legislature and also connotes an obligation upon the person or authority to whom the mandate is is-

sued. In order to place a proper construction on that expression the Court must look to the scheme of the Act in order to determine what are the consequences which the law has laid down as a result of non-compliance with that mandatory direction. The consequence may be penal, the consequence may be that a particular order passed is invalidated, the consequence may be that a particular right is not acquired or a particular obligation is imposed, or the consequence may be not stated in the law at all. When no consequence is apparent in the law it is possible for the Court to take the view that although the Legislature has used the expression "shall" it must be construed as being directory or procedural rather than mandatory in the strict sense of the term. The Legislature may be anxious that a particular procedure may be followed. The Legislature may require that procedure to be followed in the interest of the party for whose benefit the direction is laid down. But it does not follow that because the party does not follow that particular procedure or give effect to that particular direction, the result would be so serious or so calamitous as for the party losing his rights to deal with and use his own property. It is clear, in our opinion, that the mode prescribed by s. 6(2) that the intimation shall be given by registered post is directory. It is clearly in the interest of the landlord himself that he should leave no possibility of any dispute about his having given an intimation at the proper time, and therefore the Legislature as a safeguard in his interest has provided that he should give intimation by registered post. But it is too much to suggest that even though in fact intimation has been given and although the intimation is admitted by the State, merely because the landlord has failed to follow the mode prescribed in s. 6(2) he should be totally deprived of the right to make use of his property although the Government may at no time requisition it.

Now, an indication and a very clear and emphatic indication as to what the Legislature thought of this particular provision in s. 6(2) is to be found in s. 6(5) of the Act. That is the penal section and that section provides that:—

"Any landlord who fails to give such intimation within the period specified in sub-section (2) shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine or with both and any landlord who lets, occupies or permits to be occupied the premises in contravention of the provisions of sub-section (3), shall, on conviction, be punished with imprisonment for a term which may extend to one year and shall also be punished with fine."

Therefore, the first part of sub-s. (5) creates an offence with a certain punishment and the offence consists in failing to give such intimation within the period specified in sub-s. (2). It is clear that "such intimation" refers to the intimation set out in s. 6(1). If the intimation referred to here was the intimation with all its requirements as set out in sub-ss. (1) and (2), then the Legislature would not have proceeded to mention in this part of sub-s. (5) only one requirement of sub-s. (2) because what is made penal is failure to give intimation within the time specified in sub-s. (2). It will be noticed that failure to give intimation by registered post is not made penal. Therefore, the two ingredients to which the Legislature attached the greatest importance were the ingredients with regard to failure to give intimation required by sub-s. (1) and the failure to give the intimation within the time specified in sub-s. (2). The Legislature itself thought that the mode of giving the intimation, viz., by registered post, was not a matter of substance, it was a matter of procedure; it was a matter of detail, the failure to follow which would not and should not result in penal consequences. The second part of sub-s. (5) constitutes an offence with a higher punishment and that offence is constituted by the landlord using the premises in contravention of the provisions of sub-s. (3). Coming back to the provisions of sub-s. (3), it is difficult to take the view that the intimation referred to in this sub-section is not the intimation referred to in sub-s. (1); but the intimation referred to in sub-s. (1) with the additional requirements set out in sub-s. (2). It is undoubtedly true that it is possible to take the one or the other view of the expression "the intimation" in sub-s. (3),

but we should rather take the view which will lead to the least inconvenience and which will serve the purpose of the Act without causing unnecessary hardship to the landlord.

Now, if we were to take the view that the intimation refers to an intimation with all its details and requirements as contained not only in s. 6(1) but also in s. 6(2), the result would be that if an intimation is not given by registered post and within seven days, the landlord thereafter could never give an intimation. As already pointed out, he would be perpetually, or at least for the duration of the Act, deprived of his right to deal with the premises although the State may not choose to requisition it. On the other hand, if we place upon the expression "the intimation" the narrower construction, especially in view of what we have already stated with regard to s. 6(5) that the intimation referred to in s. 6(3) is only the substance of the intimation as set out in s. 6(1), then no serious consequences ensue either to the landlord or to the State because the position will be this. So long as an intimation is not given, the State will have the full right to requisition the premises. The Advocate General says that this would give the right to the landlord at any time he thinks proper to give an intimation. Assuming that is so, the only consequence of a landlord giving such intimation would be not to deprive the Government of the right to requisition, but on the contrary it will draw the attention of the Government to a vacancy and will permit the Government to requisition the premises within the time specified in s. 6(3). It is only after the lapse of that time that the right of the landlord to use the premises would arise. If there is a vacancy under s. 6(1) the landlord would not be in a position to make use of those premises. As already pointed out, any use that he might make would be an unauthorised use and any person he might put in occupation would be an unauthorised person. Therefore, it would be in the interest of the landlord himself, if he wants to make use of the premises, to give the intimation, because not only would the landlord be making an unauthorised use of the premises, but he would be liable to penal consequences under s. 6(5). Therefore, it is difficult to understand what possible good the landlord can achieve by not giving the intimation required by s. 6(3).

The Advocate General said that assuming the time mentioned in s. 6(2) has passed, there is no intimation, and Government starts making the inquiry which it has a right to do under the proviso to s. 6(4)(a) to which we shall presently come, and if the landlord gives the intimation subsequently, the inquiry would be rendered futile and serious inconvenience might be caused. Now, the inquiry contemplated by the proviso to s. 6(4)(a) is in cases where no intimation is given. It is a case of what is popularly known as a suppressed vacancy. The landlord having suppressed the vacancy, someone having informed the Controller of such a vacancy, the State launches upon an inquiry as provided in the proviso to s. 6(4)(a). But if the landlord himself comes forward and says that there is a vacancy and gives intimation, we should have thought that the purpose of the Government would be better achieved than by holding an inquiry under the proviso. But the answer of the Advocate General to this contention is that the destination—and this is his expression—of the requisitioned premises in the case of a vacancy declared by the landlord is different from the destination of the vacancy which is found as a suppressed vacancy, and the Advocate General wanted to draw our attention to the policy of Government that when there is a suppressed vacancy, the vacancy should go to the first informant and when intimation was given by the landlord it should be used for a public purpose and given to a Government servant or used for some other similar purpose. Now, in construing the Act we are not concerned with the policy of Government. It is sufficient for us to note that even when an inquiry is being held by Government with regard to a suppressed vacancy, and the landlord gives intimation, the premises would become available for being requisitioned for a public purpose. For what particular public purpose the Government may use that vacancy we are not con-

cerned. There is nothing in the law which compels the Government not to give a vacancy declared by the landlord to a homeless person, nor is there anything in the law which compels the Government to give a suppressed vacancy to the first informant and not to a Government servant. Policy of Government cannot possibly influence us in construing provisions of a law in a particular manner.

Now, sub-s. (4) of s. 6 also throws some light on the construction we should place upon the expression "the intimation" used in s. 6(3). Sub-section (4) provides:

"Whether or not an intimation under sub-section (1) is given and notwithstanding anything contained in section 5, the State Government may by order in writing—" and then follows the power to requisition. Therefore, here the Legislature gives the power to the State to requisition, whether an intimation is given or is not given. Where an intimation is given, the power to requisition is as laid down in s. 6(3). Where intimation is not given, it is dealt with by the proviso to s. 6(4)(a). But the relevant fact to be noticed is that in referring to the intimation in sub-s. (4), the reference is only to sub-s. (1) and not to sub-s. (2). This again shows that what the Legislature was emphasising was the substance and the important ingredients of the intimation which are contained in sub-s. (1) and not in sub-s. (2). Turning to the proviso to sub-s. (4)(a), the proviso deals with a case where no intimation is given and makes an inquiry by Government obligatory and permits the Government to make a declaration with regard to a vacancy which is conclusive.

Therefore, looking at the whole scheme of the Act, it seems to us that the Legislature itself in various parts of s. 6 has made a distinction between the intimation referred to in sub-s. (1) and the other requirements of the intimation referred to in sub-s. (2). It is equally clear that the Legislature has emphasised the giving of intimation in the prescribed form and to an officer authorised in that behalf by the State Government; and that the Legislature has attached less importance to the question of time except to the extent that failure to give this intimation has been made penal; and for the obvious reason that it was the policy of the law that the landlord should report vacancies as soon as possible. But because the policy of the law was to put compulsion upon the landlord to report a vacancy, it does not follow that if the vacancy was not reported in time and if the landlord made himself liable to penal consequences, the landlord was deprived for all time from giving an intimation subsequently; and it is equally clear that the Legislature has laid the least emphasis on one particular aspect of this intimation, which is the mode of giving the intimation, viz., by registered post.

Reliance was also placed at the Bar on a judgment of Mr. Justice Kania in *Nurshedrai B. Dave v. The Asian Assurance Co. Ltd.*¹ There the learned Judge construed a provision in a rule, which required notice to be given by registered post, as mandatory. In that case the learned Judge was dealing with the right of policy holders to elect a director and he was considering the Election Rules, and it is well known that when you construe Election Rules you have to construe them technically and have to take the view that every requirement of the Election Rules is intended to be given effect to. Therefore, the judgment of Mr. Justice Kania is not in *pari materia* with the question we have to consider under the Land Requisition Act.

Mr. Gupte also referred to another judgment of Mr. Justice Tendolkar in *Jethanand Moorjmal Mehta v. N. S. Varma*², where he seems to have taken a view contrary to the view he took in *Sayed Abdul Hamid v. The State of Bombay*.³ There the learned Judge was construing r. 117 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, and sub-r. (1) of that

¹ (1941) O. C. J. Suit No. 809 of 1941, decided by Kania J., on September 11, 1941 (Unrep.).

² (1958) O. C. J. Miscellaneous Petition No. 216 of 1956, decided by Tendolkar J., on Octo-

ber 10, 1956 (Unrep.).

³ (1951) O. C. J. Miscellaneous Petition No. 324 of 1950, decided by Tendolkar J., on November 29, 1951 (Unrep.).

rule provided that every order made under the Act or the Rules shall be served by registered post, and the learned Judge was at pains to repel the contention at the Bar that "shall" was a word of obligation and no order made under the Act or the Rules could take effect until it was served in the manner provided, and the learned Judge says:

"There is no doubt that the rule requires that an order shall be served by registered post but it does not necessarily follow therefrom that if it is not served, it does not take effect. The word 'shall' is undoubtedly a word of compulsion or obligation, but from that alone it does not follow that the rule is mandatory and not procedural only. That a rule has to be observed does not necessarily make it mandatory, because even procedural rules ought to be observed, and whether or not the requirement of rule 117 is mandatory or whether it is merely procedural must be determined having regard to what it provides and the purpose for which the provision is made. Obviously, the particular mode of service, viz., registered post, is merely a convenient method of service and it seems to me difficult to hold that if the order is in fact known to the person who is affected by the order, there yet has to be service by registered post, because the object of service is to acquaint the person affected with the contents of the order so that he can, if he so chooses, seek to challenge it by any method open to him."

With respect, we subscribe to the view taken by the learned Judge in this judgment and, differ from the view taken by the learned Judge in the earlier judgment which is relied upon by the Advocate General.

In passing, a reference might be made to the recent decision of the Supreme Court in *State of U.P. v. Manbodhan Lal*,⁴ where the Supreme Court, differing from this Court, took the view that the expression "shall" used in art. 320(3)(c) was not mandatory and there was no obligation upon the State Government to consult the Public Service Commission in the cases set out in that article, and the observation in the judgment to which reference might be made is at p. 917:

"This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word 'shall' in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid."

On this view of the law, let us turn to the facts before us and see what is the consequence. We have here an intimation given by the landlord on January 27, 1954. If it was sent on that day, it is sent within seven days. It is in the prescribed form and it is sent to the authorised officer. Admittedly, it is not sent by registered post. Therefore, in the view that we take, it would be an intimation contemplated by s. 6(3), and if that is so, the landlord was within his rights in occupying these premises after the lapse of one month and it was not open to the State Government to requisition these premises on May 11, 1957, unless there was a fresh vacancy. But some difficulty is caused in this case by the fact that there is no clear evidence on the record that the intimation was in fact sent by the landlord on January 27, 1954. All that the record shows is that the particular letter bears the date January 27, 1954, but there is no averment in any affidavit or any oral evidence that the letter was posted on that day. It may be that in most cases when a letter bears a particular date it is posted on that date or it is put by post in transmission. But it is not necessarily so. A letter may be written on a particular day, it may be laid aside, it may be posted on the next day or even a day later; and here we have a fact that the letter was only received by the Controller on February 1, 1954, although the letter was sent from Bombay by post and received in Bombay by post. It may be that there was delay in the post office, it may equally be that the letter was posted after January 27, 1954, but we agree with the Advocate General that it is difficult to take the view on the record as it stands that the intimation was given within the time prescribed

by s. 6(2). But even so it would be an intimation within the meaning of s. 6(3), because it is an intimation in the prescribed form and it is given to an officer authorised in that behalf, and as it was admittedly received on February 1, 1954, the landlord was debarred from making use of his property for one month from February 1, 1954.

Now, the learned Judge came to the conclusion that this was not an intimation within the meaning of s. 6(3) by reason of an unreported judgment of Mr. Justice Tendolkar in *Sayed Abdul Hamid v. The State of Bombay*. With great respect to the learned Judge, the view that he took was, having called to his assistance the provisions of the General Clauses Act, that the provision in the Act before it was amended by Act V of 1952 which required the intimation to be given by post, that post must be read as registered post and that it was obligatory upon the landlord to give intimation by registered post, and he refused to permit evidence being led to prove as a fact that intimation had been received by Government. His view was that if the intimation was not sent by registered post, the intimation was not the intimation required by law. As this was a judgment of a co-ordinate authority, Mr. Justice K. T. Desai felt bound to follow it and, therefore, he came to the conclusion that in this case the intimation of January 27, 1954, was not the intimation required by s. 6(3). Now, we have had a look at the judgment. In our opinion, again with respect, the construction placed by the learned Judge on s. 28 of the Bombay General Clauses Act is not warranted by the language used by that Act. But that is a question that does not arise in this appeal. But we are unable to agree with the learned Judge that the failure to comply with any of the requisites contained in s. 6(2) with regard to the intimation makes that intimation one which does not fall under s. 6(3). In other words, the view taken by the learned Judge was that the intimation referred to in s. 6(3) is not only the intimation referred to in s. 6(1) but with all the requisites set out in s. 6(2). In view of what we have stated, that view does not commend itself to us. The Advocate General has strongly emphasised the fact that after this judgment of Mr. Justice Tendolkar, the Legislature altered the law and substituted "registered post" for "post". From that he wants us to draw the inference that the Legislature adopted the view of Mr. Justice Tendolkar, and instead of leaving the matter to the General Clauses Act, the Legislature incorporated in the Act itself the provision that the intimation should be by registered post. Now, in the first place, the judgment of Mr. Justice Tendolkar was an unreported judgment, and there is nothing before us to show that it was the result of that judgment which led to this legislative amendment. But assuming that was so, all that it means is that the Legislature thought in the interest of the landlord that he should send the intimation by registered post rather than by ordinary post. Even so, the requirement with regard to registered post still remains directive and not mandatory in the sense in which we have explained the expression.

The view of the learned Judge below was that even assuming this intimation was not a proper intimation, the landlord was entitled to rely on the subsequent intimation of November 3, 1954, which was admittedly by registered post, in the prescribed form, and sent to the requisite authority. Of course, the objection taken by the Advocate General to this intimation is that it was not sent within the period prescribed by s. 6(2). But as we have already pointed out, the failure on the part of the landlord to give the intimation required by s. 6(2) did not debar him from giving a subsequent intimation. It only prevented him from making use of the premises because he could not make use of his premises in a authorised manner till he had given the intimation and till the period mentioned in s. 6(3) had elapsed.

Therefore, whichever way one looks at it, the requisition order passed by Government on May 11, 1957, is not justified by law. It was passed after the lapse of the period mentioned in s. 6(3), whether the period commenced from February 1, 1954, when the intimation of January 27, 1954, was received, or

it commenced from November 8, 1954, when the second intimation was received by the Controller.

But it is not sufficient that a party should come to this Court and make out a case that a particular requisition order is not valid. In order to get that relief from the Court on a writ petition, not only must he come with clean hands, not only must he not suppress any material facts, not only must he show the utmost good faith, but he must also satisfy the Court that the making of the order will do justice and that justice lies on his side. The Advocate General has drawn our attention to the rather curious attitude taken up by the petitioner with regard to this intimation of January 27, 1954. In his petition as originally presented he relied on a vacancy of October 23, 1953, and he relied on an intimation of November 27, 1953, and he actually denied any knowledge about the intimation of January 27, 1954. Now, this was partly due to the confusion created by the letter written by the Controller himself by which he erroneously referred to the intimation of January 27, 1954, as of November 27, 1953, having been received on February 1, 1954. But this particular fact would not have induced us to refuse relief to the petitioner. This is not a case where the intimation of January 27, 1954, is being challenged as a fabricated document, in which case we would certainly consider the averments of the petitioner with regard to this document. It is an admitted document and whatever the petitioner might have said about this document, the undisputed fact remains that he did send it to the Controller and the Controller received it.

But the position is different with regard to what happened after the intimation was sent by the landlord and the use that he made of the premises and the statements that he made with regard to that use. It appears from the record that for about a year preceding the requisition order, one Kalyanji Dhanji was occupying this particular flat, the landlord and his family were occupying the adjoining flat, and the curious case put forward by the landlord on the affidavits was that this Kalyanji was a relation of his, that he was staying as a guest, that he had his own kitchen and cooked his own food, and that technically the premises were still in his occupation. Now, we have before us the statement of this Kalyanji himself and he admits that for one year he had been staying in this flat with the members of his family, that he was cooking independently in this flat and making payments to the cook and servant. He said that he was not paying any rent to the landlord who was his relative. But he had furniture in this flat—cupboards, tables, chairs, etc.—, although some furniture belonged to the landlord, and that he had his visiting card where he showed his business office as in this flat. Now, the traditions of Indian hospitality are very great, but the manner in which Kalyanji stayed in this flat is not quite in conformity with those traditions. We have a person who is described as a guest, who does his own cooking, who pays his own servants, who carries on business, and who prints on his card the business address of this flat. But whatever that may be—and Mr. Gupte is right that it is a disputed fact on the record—, whether Kalyanji was a mere guest as the landlord alleges, or was a licensee, or an invitee, or even a tenant of the landlord as suggested by the State, the important fact that emerges is that the landlord was not actually in occupation of this flat for a year before it was requisitioned and it was in the occupation of this Kalyanji. At the date of the petition Kalyanji had left, the premises were requisitioned, a Government officer was put in possession, and the result of setting aside this requisition order would be to throw this Government servant out and restore possession to the landlord when in fact the landlord was not staying there. There is also force in the Advocate General's contention that on the record it would be open to the Government to requisition these premises afresh on the ground of vacancy constituted by Kalyanji Dhanji leaving these premises, and that the Court will not make an order which could be, in substance, set aside by the Government issuing a fresh requisition order. This is not a case where a

landlord has been deprived of his possession. This is not a case where a tenant in occupation has been thrown out. This is, on the contrary, a case where the premises requisitioned for a public purpose are occupied by a Government servant and are sought to be taken possession of by the landlord by asking the Court to throw the Government servant out and restore possession to the landlord when that landlord has never shown his need of those premises by occupying them himself. Therefore, this is clearly a case where justice is not on the side of the petitioner; it is on the side of the State, and we see no reason why we should grant any relief to the petitioner.

We would not have interfered if the learned Judge had exercised his discretion in favour of the petitioner. But as appears clearly from the judgment, this is not a case where the learned Judge has exercised his discretion. On this aspect of the matter the learned Judge says:

"It was urged on behalf of the State that the petitioner has not shown abundant good faith, which he is bound to show in proceedings for the issue of a writ, and that he has thereby disentitled himself from claiming any relief. The statements complained of are statements in relation to the occupation of the premises by persons other than the petitioner in the year 1956. The statements made in that connection are totally immaterial for the purpose of the present petition. Even if there was any substance in the complaint of the respondent, the petitioner is not disentitled to relief by reason thereof."

With respect to the learned Judge, the matter is much more serious than merely the question of this particular vacancy of 1956 not being relevant to the vacancy which is the subject-matter of the requisition order. On a writ petition, as we have already said, the petitioner has not merely to show good faith, but he has not to suppress any facts and has also to show that justice lies on his side. If the learned Judge had taken these circumstances into consideration and then had come to the conclusion that the discretion should be exercised in favour of the landlord, then undoubtedly we would not have interfered with the order passed by the learned Judge.

The result, therefore, is that the appeal will be allowed, the order of the trial Judge will be set aside, and the petition will be dismissed. There will be no order as to costs of the petition and no order as to costs of the appeal.

Liberty to the appellant's attorneys to withdraw the sum of Rs. 500 deposited in Court.

Appeal allowed.

Solicitors for the appellant: *Little & Co.*

Solicitors for the respondent: *Shelam & Jivabhai.*

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.

**EAST INDIA TRADING CO., NEW YORK v. BADAT AND COMPANY,
BOMBAY.***

Foreign judgment—Decree passed by foreign Court on award of domestic tribunal—Suit by plaintiff based on award—Pleadings establishing that defendants carrying on business within jurisdiction accepting terms of business including submission to arbitration—Whether cause of action had arisen within jurisdiction—Suit on award where foreign judgment passed on it whether maintainable—Whether suit can be filed only on award enforceable as such—Civil Procedure Code (Act V of 1908), Secs. 13, 14—Award given by domestic tribunal not set up by laws of foreign country—Whether open to party to such award to contend that award not given on merits—Whether an ex parte decision necessarily a decision not on merits—Copy of judgment of foreign Court duly certified by legal keeper thereof and with proper certificate from Indian Consul but evidence to prove character of such document not led—Whether such document admissible in evidence—Indian Evidence Act (I of 1872), Secs. 78(6), 74(1) (iii).

A suit was filed in the High Court by the plaintiffs, a company incorporated in the State of New York, which was based on an award given by a domestic tribunal

*Decided, September 12, 1958. O.C.J. Appeal No. 12 of 1958; Suit No. 71 of 1954.

in New York and on which award a decree was obtained from the Supreme Court of the State of New York. It was established on the pleadings that the defendants, who were alleged to be carrying on business in Bombay, had accepted the terms of business in Bombay which terms of business included a submission to arbitration to the tribunal in New York. On the question whether the Court had jurisdiction to entertain the suit, it was contended by the defendants that no part of the cause of action had arisen in Bombay, that as a foreign judgment was passed on the award, the only suit that could be filed was a suit on the foreign judgment and not on the award and that a suit could be filed only on an award which was enforceable by itself and which did not require in any way to be completed in order that it should become enforceable:—

Held, that the agreement to go to arbitration constituted an important material and necessary part of the cause of action and that part of the cause of action had arisen in Bombay,

that as it is open to a party who has obtained a foreign judgment to sue in the alternative on the original cause of action which resulted in his obtaining the foreign judgment, it was competent to the plaintiffs who had obtained a foreign judgment on the award to rely on the original cause of action which in the present case was the award,

that the plaintiffs were suing on the award which could be enforced in the State of New York and it was made enforceable and complete by obtaining the foreign judgment, and

that, therefore, the suit on the award was maintainable and the Court had jurisdiction to hear the suit on the award.

Oppenheim & Co. v. Mahomed Haneef,¹ referred to.

Section 114 of the Indian Evidence Act, 1872, is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence.

Where a copy of the judgment of a foreign Court duly certified by the legal keeper thereof and with a proper certificate obtained from the Indian Consul was sought to be admitted in evidence but its production was objected on the ground that under s. 78(6) of the Indian Evidence Act, 1872, further proof of the character of the document according to the law of the foreign country was not given:—

Held, that this was a clear case where the necessary presumption as to the character of the document could be drawn under s. 114 of the Indian Evidence Act, 1872, and, therefore, the failure to tender formal evidence as to the nature of the document did not prevent the document from being admitted into evidence.

Where an award is given by a tribunal selected by the parties and when the tribunal is a domestic tribunal and not a tribunal set up by the laws of a foreign country, it is not open to a party, who is a party to the award, to contend that the award was not given on merits. If the award was given against the rules of natural justice or it was fraudulently obtained, the party may not be prevented from putting forward that contention.

It is only in those cases where the Court for some reason or other passes a judgment against a party without investigating into the merits of the matter that it could be said that the decision is not given on the merits. The mere fact that the decision is *ex parte*, the mere fact that the defendant after being served does not choose to appear, does not make an *ex parte* decision a decision not on merits.

Keymer v. Visvanatham Reddi,² referred to.

There are cases where it can be said that a Court or a tribunal has not considered the point and therefore the decision, in the absence of such consideration, is not a decision on a particular matter. But there are also cases where the point is so obvious that it would have been taken if it was a good point, and then it is open to the Court to say that indirectly the matter has been decided by that Court because the decision was not based upon the acceptance of that particular submission.

THE facts appear in the judgment.

¹ (1922) I. L. R. 45 Mad. 496, s.c. 24 Bom. L. R. 1245, P.O.

² (1916) I. L. R. 40 Mad. 112, s.c. 19 Bom. L. R. 206, P. C.

M. R. Parpia, with *M. S. Sanghvi*, for the appellants.

J. M. Thakore, with *P. B. Vakil*, for the respondents.

CHAGLA C.J. This is an appeal against a judgment of Mr. Justice Mody and the learned Judge begins his judgment by stating: "This is a normal case wherein abnormal developments have taken place." We wholly subscribe to that proposition. We might add that this is not only a normal case but a very simple case where every conceivable technical defence has been taken in order to put off the evil day when judgment will be passed against the respondents, who are the defendants in the suit. Mr. Thakore, who has done his best for his client, realising how dishonest the defence was and arguing before what he might have felt a very hostile Bench, did not omit to put before us every possible circumstance which could help his clients. But the more he argued the more we felt that the attempt was, as Mr. Thakore frankly conceded, to see that the judgment was delayed as far as possible, and Mr. Thakore also told us that as his clients were not in a position to pay any amount at all it did not matter to them whether heavy costs were incurred and the litigation became as protracted as possible. According to Mr. Thakore, his clients might as well be adjudicated insolvent for a larger amount as for a smaller amount, and perhaps they prefer to be adjudicated later for a larger amount than for a smaller amount at present.

Now, the suit out of which this appeal arises is substantially based on a foreign judgment and in the alternative on an award given by a domestic tribunal functioning in New York and the judgment and the award came to be given under the following circumstances. The plaintiff company was incorporated in the State of New York and the defendant company, it is alleged, was at the relevant time carrying on business in Bombay, and the case of the plaintiffs was that by two letters dated September 7, 1948, and September 13, 1948, the first written by the plaintiffs and the second by the defendants, the terms of business were agreed upon between the parties. The terms with which we are concerned were that the business was to be done on the terms of the American Spice Trade Association contract with a letter of credit to the extent of 95 per cent. to be opened by the plaintiffs. Pursuant to these terms of business, according to the plaintiffs, two contracts were entered into. By these contracts it is alleged by the plaintiffs that the defendants agreed to sell certain number of tons of spices to the plaintiffs. The plaintiffs opened the letter of credit as required by the terms of business, but ultimately the defendants failed to supply the goods and committed a breach of the contract. Thereupon, pursuant to the American Spice Trade Association contract the plaintiffs required that the dispute between the parties should be referred to arbitration. It was so referred, although the defendants did not nominate their own arbitrator or appear before the arbitrators who ultimately entered upon the arbitration. An award was made and a decree was obtained on this award from the Supreme Court of the State of New York. The plaintiffs then came to this Court to enforce that foreign judgment and in the alternative they asked for relief on the basis of the award itself. The learned Judge raised various issues and ultimately dismissed the plaintiff's suit.

The first issue that we have to consider is the issue of jurisdiction. Now, it is normal to look to the jurisdiction clause in the plaint in order to ascertain what are the various facts on which the plaintiff is relying as conferring jurisdiction upon the Court, and when we turn to para. 10 of the plaint it is averred:

"The defendants used to carry on business and reside in Bombay. Their present whereabouts are not known. But the terms of business were accepted by the defendants in Bombay and the proposal of acceptance of the said contracts by the defendants took place in Bombay. The defendants' refusal to pay the said sum also took place in Bombay. A material part of the cause of action took place in Bombay and with leave granted under clause 12 of the Letters Patent this Hon'ble Court has jurisdiction to try this suit."

In fact leave was granted under cl. 12. Considering this paragraph it is clear that the averments with regard to the carrying on of business and residence in Bombay cannot confer jurisdiction upon the Court. The defendants must carry on business or reside within jurisdiction at the date when the plaint is presented to the Court and the fact that the defendants used to carry on business or used to reside in Bombay cannot help the plaintiffs to invoke the jurisdiction of this Court. Mr. Thakore may be right that to the extent that the suit is based on a foreign judgment, there is no necessary averment which would confer jurisdiction upon the Court. The foreign judgment was passed in New York and the defendants did not reside and carry on business within jurisdiction at the relevant date. The only way that jurisdiction could possibly have been attracted was by an averment that there was an obligation under the judgment on the part of the defendants to pay the amount in Bombay or that the defendants had undertaken the obligation to pay the judgment amount in Bombay. There is no such averment in the plaint, and in the absence of any such averment, if the plaint had been based only on the foreign judgment then we might have agreed with the learned Judge and held that the Court had no jurisdiction. But it is unnecessary finally to decide this matter.

We must now turn and consider whether the Court has jurisdiction if the suit is based on the award given by the domestic tribunal in New York. For that purpose the necessary averment is to be found in para. 10 of the plaint and that averment is that the terms of business were accepted by the defendants in Bombay and the proposal or acceptance of the said contracts by the defendants took place in Bombay. The learned Judge has taken the view that this averment is not an averment of fact but it is a submission of law. Although the latter part of this sentence may be characterised as a submission of law, it is difficult, with great respect to the learned Judge, to take the view that the statement that the terms of business were accepted by the defendants in Bombay is a submission of law and not an averment of fact. When we turn to the written statement, para. 15, which deals with this paragraph of the plaint, states:

"With reference to paragraph 10 of the plaint the defendants deny that any of the partners of the defendants reside and/or carry on business in Bombay. The defendants submit that no part of the cause of action has arisen in Bombay. The defendants therefore submit that leave granted to the plaintiffs under clause 12 of the Letters Patent should be revoked."

It is clear that the only averment of fact in para. 10 of the plaint which is denied by the draftsman is the averment that the defendants or any of the partners of the defendants reside or carry on business in Bombay. The averment that the terms of business were accepted by the defendants in Bombay has not been denied, and accepting that averment, the draftsman goes on to say:

"The defendants submit that no part of the cause of action has arisen in Bombay."

Mr. Thakore sought to argue that in the submission that no part of the cause of action has arisen in Bombay was implicit the denial that the terms of business were accepted by the defendants in Bombay. We refuse to put that interpretation upon para. 15. The written statement has been drafted by a senior and experienced counsel and Mr. Thakore found himself in this difficulty from stage to stage that the counsel not only was experienced and able but was also extremely conscientious because having the correspondence before him, as we shall point out later, it was impossible for him to allege that the terms of business had not been accepted by the defendants. Therefore, if there is no denial of the specific averment in para. 10, then we must by the rules of pleadings come to the conclusion that this averment has been accepted in the written statement. Therefore, we find ourselves in this position that the defendants accepted the terms of business in Bombay, which terms of business included a submission to arbitration. If, therefore, a suit can lie on an award, then we have here pleaded a necessary ingredient of the cause of action on the award, viz., that the agreement to submit disputes to arbitration was arrived

at in Bombay. Whether the averment is proved or not is a different matter, but if that averment is established, it is difficult to contend that in a suit on an award the agreement to go to arbitration does not constitute an important material and necessary part of the cause of action, and if that part of the cause of action has arisen in Bombay the Court has undoubtedly jurisdiction.

It was then sought to be argued by Mr. Thakore that it is not competent to the plaintiffs to file this suit on the award, because the award has become merged in the foreign judgment, and Mr. Thakore urged before us that once a foreign judgment is passed on the award, the only suit that can be filed is the suit on the foreign judgment and not on the award. Now, it is clear and well established law that it is open to a party who has obtained a foreign judgment to sue in the alternative on the original cause of action which resulted in his obtaining the foreign judgment. Mr. Thakore does not dispute that principle of law, but he says that whatever may be the law with regard to a foreign judgment obtained on a contract or any other cause of action, that principle does not apply when a party obtains an adjudication from a domestic tribunal and then goes to a competent Court and obtains a decree or a judgment on the award. Apart from authorities, it is difficult to understand how the two positions can be distinguished on principle. If it is open to a party suing on a foreign judgment to rely in the alternative on the original cause of action, we should have thought that it would be equally competent to a party who has obtained a foreign judgment on the award to rely on the original cause of action which in this case happens to be the award. Therefore, the award is as much a cause of action *quas* the foreign judgment as a contract or any other right which the party has litigated and which has resulted in a foreign judgment. Instead of going to Court on the contracts which were entered into between the parties and obtaining a decree, the parties here first went to the domestic tribunal, obtained the award, and then proceeded to complete the award and make it enforceable by obtaining a judgment. Therefore, in this case, the cause of action was constituted by the award and the judgment was obtained because the plaintiffs had the award in their favour. Therefore, it would seem to us that on principle there is no reason why the plaintiffs should be debarred from relying on the award as the original cause of action which resulted in the foreign judgment being obtained.

The next contention of Mr. Thakore is that even so the only award on which a suit can be filed is an award which is enforceable by itself and which does not require in any way to be completed in order that it should become enforceable, and what is said is that in this case the award of the domestic tribunal in New York could not have been enforced as such. The parties had to go to the New York Supreme Court and obtain a judgment on it before it became enforceable, and it is said on authorities that such an award cannot be the subject-matter of a suit. Again, first looking to the principle of the matter, it may well be said that an award which is incomplete and unenforceable cannot be made a subject-matter of a suit, and that before a party can file a suit on the award he must make the award enforceable. In this case, if that be the true principle, that objection cannot survive because by obtaining a foreign judgment the plaintiffs have made the award enforceable and they are suing on an award which is not unenforceable but which has been made enforceable and which has been completed in every legal manner. But we fail to understand the principle of the submission made by Mr. Thakore that even though the award has been made enforceable and has been completed, still the party cannot sue on it because this award was not enforceable as such; that it could not be enforced without the aid of a competent Court in New York.

In our opinion, the matter is really concluded by a decision of the Privy Council which though not directly deciding these two questions indirectly has decided these questions, because it is patent from that decision that if these were good submissions in law they would have been urged before the Privy Council and the Privy Council would not have decided the matter as it did.

There are cases where it can be said that a Court or a Tribunal has not considered the point and therefore the decision, in the absence of such consideration, is not a decision on a particular matter. But there are also cases where the point is so obvious that it would have been taken if it was a good point, and then it is open to the Court to say that indirectly the matter has been decided by that Court because the decision was not based upon the acceptance of that particular submission. Turning to the Privy Council case, it is *Oppenheim & Co. v. Mahomed Haneef*¹. In that case, as the facts at p. 501 show, the appellants filed a suit against the respondent in the High Court of Judicature at Madras claiming a certain amount under a foreign judgment or in the alternative being the amount of the award. The respondent pleaded that the judgment of the High Court of Justice in London was not binding upon him as it was not given on the merits, that the claim under the contract was barred by limitation, and as to the award, it was not binding upon him as no notice was given to him by the arbitrator that he was proceeding to arbitrate. The suit was heard by Mr. Justice Coutts Trotter and he decided in favour of the plaintiffs on the award. There was an appeal to the Division Bench of the Madras High Court and the Division Bench reversed that decision, and the appellants came before the Privy Council, and it is to be noted that the respondent did not appear and the appeal was heard *ex parte*. We are specially mentioning this fact in order to emphasise that the Privy Council would have been even more careful in considering every possible defence that was open to the respondent as he was not represented before them. The Privy Council upheld the decision of the trial Court, thereby, as we said, indirectly repelling both the contentions of Mr. Thakore. The Privy Council had before it an award which according to Mr. Thakore was merged in the foreign judgment, and still the judgment was given on the award. The Privy Council had before it an award which was not enforceable as such because a decree on the award had been taken before the High Court of Justice in London. Both the features on which emphasis has been placed by Mr. Thakore were present in the case of the Privy Council. Notwithstanding these features, the Privy Council gave to the plaintiffs a decree on the award.

Strong reliance has been placed by Mr. Thakore on a statement of the law appearing in Russell on Arbitration. The two propositions of law are:

"An award made by foreign arbitrators, which requires an enforcement order to render it enforceable by the local law, is not a judgment of a foreign tribunal which can be enforced by action in English Courts."

This is a proposition, with respect, which is perfectly correct. Therefore, the learned author is dealing with an award which is unenforceable. Then comes the next proposition:

"But an award which is complete and could be enforced in the country where it was made is enforceable in England at common law, quite apart from any rights given by part II of the Act."

Mr. Thakore wants to read into this statement the words which do not appear there and the words are:

"But an award which is complete and could be enforced as such in the country where it was made."

Now, there is no warrant for reading these words into the statement of the law. As it stands, the statement, again with respect, is perfectly correct. If you have an award which is complete and could be enforced in the country where it was made, then it is enforceable in England. We have here an award which could be enforced in the State of New York and was made enforceable and complete and it is on that award that the plaintiffs are suing in this Court. We have had a look at the judgment on which reliance is placed by the learned author for these two statements of the law, and that is the case of *Merrifield, Ziegler & Co. v. Liverpool Cotton Association*,² and Mr. Thakore

¹ (1922) I. L. R. 45 Mad. 496, s.c. 24 Bom. L. R. 1245, P. O. ² (1911) 105 L. T. 97.

concedes that that authority is not a proposition for the submission for which he is contending.

Therefore, in our opinion, the plaintiffs' suit on the award was maintainable, and the Court had jurisdiction to hear the suit on this award.

Now, we must deal with a series of technical objections which were taken in the Court below with regard to the admission of certain documents. The first objection was to admitting the judgment given by the Supreme Court of New York on the award, and the view taken by the learned Judge was that the record of the Supreme Court was not certified as required by the provisions of the Evidence Act. Turning to the provisions of the Evidence Act, s. 74 defines "public documents" and the one with which we are concerned is cl. (1) (iii)—documents forming the acts or records of the acts of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country. We are here concerned with the acts or records of the acts of judicial public officers of a foreign country. Turning now to s. 78, it deals with the proof of official documents, and it provides—

"The following public documents may be proved as follows (and we are concerned with cl. 6):

(6) public documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of an Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country." Now, the appellants submitted the record of the Supreme Court with the certificate obtained from our Consul General in New York. That certificate was found to be unsatisfactory and not in compliance with the requirements of s. 78(6) and so a fresh certificate was obtained. This certificate was to the following effect:

"This is to certify (a) that the annexed proceedings have been duly had in accordance with the laws of the State of New York.

(b) that the annexed proceedings are duly certified by the officer having the legal custody of the originals thereof at the time such annexed proceedings were issued by the Supreme Court of New York.

(c) that the several persons named in the annexed proceedings as holding the respective offices stated therein in respect of each of them did in fact hold such respective office at the time the same took place."

We have the certificate of the County Clerk and Clerk of the Supreme Court of New York who has annexed the seal of the Supreme Court and which has been attested by one of the Justices of the Supreme Court and who certifies that the seal is in proper form affixed by the County Clerk, and then there is a further attestation by the County Clerk who certifies that the Hon. John E. Mc. Gheenan who is the Justice who testified to the fixing of the seal by the County Clerk is a Justice of the New York Supreme Court. It is difficult to imagine a certificate given with more elaboration or more thoroughness or completeness than the certificate that was produced by the appellants. But even so, the production of the record of the Supreme Court was objected on the ground that although the certificate of the Consul General might be in proper form, s. 78(6) further required proof of the character of the document according to the law of the foreign country and the appellants not having led any evidence as to the character of the document according to the law of the foreign country, the document was not proved as required by s. 78(6). The appellants wanted to rely on an affidavit produced by a citizen of the United States to prove the character of this document and that affidavit was also not allowed to be used.

Now, the Evidence Act is a very technical Act and a party is undoubtedly entitled to insist on every technicality being complied with. Fortunately for this Court, large amount of commercial litigation has gone on for years on the Original Side where solicitors and counsel have never insisted on any technical defence being pressed when the document on the face of it is a genuine document. It is very rare that a party objects to the record of the Supreme Court

of a State in the United States being produced, although bearing all the insignia of genuineness and a certificate by the Consul General, on the technical ground that there is no proof as to the character of this document. In our opinion, work would become impossible on the Original Side if a little element of commonsense was not introduced into the application of the Evidence Act. Of course, the learned Judge is helpless if parties insist on the technicalities, but the question of mode of proof is entirely left to the good sense of the parties. No one suggests that if a document is inadmissible the parties by their consent can make it admissible. But if a document is admissible and when it is clearly genuine, to insist on technical proof is really to forget the substance for the letter of the law. We do not blame Mr. Thakore for having insisted upon every technicality in the conduct of this appeal because he told us that the instructions given to him were that he must resist the plaintiffs' suit on every available defence open to him. But let us see whether even this strict technicality of the Evidence Act has not been complied with.

It is clear that the proof required by s. 78(6) is for the purpose of the Court being in a position to decide whether a document is a document which falls within the definition of "public documents" in s. 74, because unless the character of the document is that it is an act of a public officer, legislative, judicial or executive, it would not be a public document. Can there be any doubt in this case that the document sought to be tendered was a public document within the meaning of s. 74? It is difficult to understand why the Court should insist upon proof of a matter which is so clearly self-evident. However technical the Evidence Act may be, fortunately it has a section which should often be resorted to by Courts and that is s. 114, because the Legislature realised that there are many matters which are so obvious, so clear, so demonstrably true, that formal proof would be sheer waste of time. In our opinion, this is a clear case where proof should not have been insisted upon as to the character of this document. If the necessary presumption could have been drawn under s. 114, there is no reason why on the failure on the part of the plaintiffs to tender formal evidence as to the nature of this document, the document should have been rejected. We do not accept Mr. Thakore's contention that the presumption arising under s. 114 does not arise with regard to documents. The presumption which s. 114 speaks of is the existence of any fact which the Court thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The section is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence. Therefore, in our opinion, with great respect to the learned Judge, he was in error when he was persuaded by the respondents to insist upon formal proof being given of the character of this document by the appellant. We must, therefore, admit this document into evidence.

A question has been raised as to whether even so the petition which was presented by the appellants to the Supreme Court for a decree on the award can be considered to be a public document. The documents which the learned Judge rightly held would be public documents which would be admissible in evidence if the necessary formality of s. 78(6) had been complied with are:

1. An order dated February 14, 1956, calling upon the defendants to show cause on March 7, 1950, against the said petition.
2. An order dated March 8, 1950, granting on default the plaintiffs' motion to confirm the award of the arbitrator and for judgment in accordance therewith and directing that the order be settled.
3. An order dated March 21, 1950, passing judgment on the said awards in the sum of \$ 18,748 together with interest and costs as mentioned in the order. The learned Judge has taken the view that the petition dated February 10, 1950, which as we have just stated was filed by the appellants for obtaining the award, was not a public document. The question is whether the learned Judge

is right. We agree with Mr. Thakore that the authorities lay down, and in our opinion rightly lay down, that a petition is not the record of a judicial authority. It is neither the act nor the record of the act of a judicial authority. It is really the act of a private party. It is the party who moves the Court by his petition to obtain a certain order, and, therefore, the petition as such would not come within the definition of a public document under s. 74. On the same principle, the affidavits, except formal affidavits of service, would not come within the purview of a public document, and therefore the learned Judge was right in including only the two affidavits which are merely formal affidavits proving service. Now, if these documents are admitted into evidence, they establish that a foreign judgment was passed by the Supreme Court of the New York State on an award.

The question now is whether the award which is annexed to the petition can be admitted into evidence as a public document. In our opinion it cannot. Mr. Parpia's contention was that the Court has acted on this award, it has perused the award, it has considered its contents and has then passed judgment, and, therefore, if the judgment is evidence then the various documents which led up to that judgment and resulted in the judgment should equally constitute public documents. In our opinion, that contention cannot be accepted. All that can be said is that the particular award or copy of the award which is annexed to the petition was before the Court and it was on that award that the Court gave judgment. But there is nothing in the Evidence Act which gives any sanctity to the copy of the award annexed by the appellants to their petition. There is nothing to suggest by reason of the certificate given by the Consul General or by the Justice of the Supreme Court that the award on which the Supreme Court acted was the genuine award given by the arbitrators. It often happens that a Court may pass a decree on a forged or fabricated document; the document is before the Court, but there is nothing to testify to its genuineness. Therefore what Mr. Parpia wants us to do is to bring within the purview of the certificate given under s. 78 not only the official acts of the Supreme Court but also the documents annexed by the parties to their own petition or affidavits which they bring before the Court. In our opinion, that is not the purpose of s. 78(6). We must consider whether, apart from proof of the award in the manner suggested by Mr. Parpia, there is anything on the record which would justify us in holding that the document was admitted by the defendants. Turning to the plaint, in para. 5 it is expressly averred by the plaintiffs that—

"On the 12th July 1949 the said arbitrators and Umpire duly made, signed, acknowledged and published their awards whereby they unanimously held that the defendants had committed a breach of the said two contracts and awarded that the defendants should pay to the plaintiffs a sum of \$ 9,538.64 in respect of the said contract dated 3rd March 1949 and a sum of \$ 9,209.36 in respect of the said contract dated 7th March 1949 as and by way of damages."

And in para. 10 of their written statement all that the defendants say is—

"With reference to paragraph 5 of the plaint, the defendants say that they are not bound by or concerned with any of the statements contained in the said paragraph. The defendants say that the awards alleged to have been passed by the said arbitrators and Umpire are not binding on them."

Therefore, there is no denial of the award or its contents, and what is more, in para. 17 of the written statement the defendants, as is usual, averred that they will rely on documents a list whereof is hereto annexed, and one of the documents is a copy of the petition and order to show cause issued by the Supreme Court, New York County. Therefore, the defendants received the petition to which was annexed the award. The learned Judge has taken the view—a strictly correct view in law—that even if there is implied admission, the Court has a discretion to compel a party to prove a particular fact notwithstanding an implied admission on the part of the defendant. But, with respect, we do not think that this is a case where the Court should have availed

itself of that discretion. There is an award passed, it is part of the record of the Supreme Court, it is sent by the Court to the defendants, the defendants are in possession of that document, and nowhere in the pleadings is it suggested that such an award was not passed or that the copy of the award is not a genuine document. Surely, this is hardly a case where the plaintiffs who are in New York should be compelled to prove the original award by means of a commission or by some other means which would constitute a very expensive procedure. Therefore, in our opinion, the copy of the award relied upon by the plaintiffs should have been admitted into evidence, and we will admit it into evidence.

A further difficulty still remains, and that is with regard to the agreement to refer matters in dispute to arbitration. Now, this agreement is to be found in the two letters to which reference has been made, the letters of September 7, 1948, and September 13, 1948. These two letters have been referred to in para. 2 of the plaint and their contents are set out, and all that the written statement has to say with regard to this paragraph is:

"With reference to paragraph 2 of the plaint the defendants deny that they at any time entered into any contract with the plaintiffs as alleged in the said paragraph or otherwise."

Therefore, there is no denial of this correspondence. Indeed, there could not be, because before the written statement was filed, inspection was given by the plaintiffs of this correspondence and again the conscientious draftsman of the written statement could not possibly have controverted the statement that these letters passed between the parties. Therefore, in our opinion, these two letters of September 7, 1948, and September 13, 1948, are admissible in evidence, and we will formally admit them in evidence.

The same is true of the letters and telegrams which constitute the two contracts which were entered into according to the plaintiffs pursuant to the terms of business contained in these two letters of September 7, 1948, and September 13, 1948. These letters and telegrams are also referred to in para. 2 of the plaint, inspection was given of this correspondence to the defendants before the written statement was filed, and the denial in para. 7 is that the defendants at any time entered into any contract with the plaintiffs as alleged in the said paragraph. Now, we read this denial to mean not a denial of the exchange of letters and telegrams, not a denial of the correctness of the copies of the documents of which the defendants have taken inspection, but a submission in law that no contract emerges from the exchange of these letters and telegrams. That is something very different from denying the correctness or genuineness of the copies relied upon by the plaintiffs. Therefore, in our opinion, these letters and telegrams which constitute in the record exhs. X to X-7 marked for identification, should have been admitted into evidence, and we will admit them into evidence.

Now, with the admission of this evidence we must consider whether it is necessary to remand this suit or to pass any other order, or we could ourselves dispose of the suit and pass the necessary decree in favour of the plaintiffs. Turning to the issues for this purpose, the first issue—Whether this Hon'ble Court has jurisdiction to entertain and try this suit—we have already answered. We will, therefore, reverse the finding of the learned Judge on this issue and answer that issue in the affirmative.

Issue No. 2 is—Whether the arbitrators and umpire had jurisdiction to make the said awards—, and issue No. 3 is—Whether the Supreme Court of New York had jurisdiction to pass the judgment and order. Issue No. 3 has been answered in the negative and issue No. 2 in the affirmative. With regard to issue No. 3 there is a presumption which arises under s. 14 of the Civil Procedure Code that the Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by prov-

ing want of jurisdiction. There is nothing on the record to show that the defendants even attempted to displace the presumption raised by s. 14. With regard to the jurisdiction of the arbitrators and umpires, we agree with the learned Judge, that they had jurisdiction. On this point what is urged by Mr. Thakore is that inasmuch as the contracts on which the award was based are denied by the defendants, the arbitrators had no jurisdiction. Now, the principle of the matter is this that when a party denies the arbitration agreement, the very basis on which the arbitrator can act is challenged and therefore the Courts have taken the view that in such a case the arbitrator has no jurisdiction to decide whether he himself has jurisdiction to adjudicate upon the dispute. The real principle is this, and not what is sometimes loosely stated, that if the factum of a contract is denied, the arbitrators have no jurisdiction to adjudicate in respect of that. If the arbitration agreement is part and parcel of the contract itself, by denying the factum of the contract the party is denying the submission clause and denying the jurisdiction of the arbitrators. But in this case the position is different. We have an independent agreement by which the parties agreed to refer the disputes to arbitration. Pursuant to this agreement, contracts were entered into and when the plaintiffs made a claim against the defendants, the defendants denied their liability. Therefore, what was denied was not the jurisdiction of the arbitrators, not the submission clause, but business done pursuant to the submission clause and to which the submission clause applied. We are unable to accede to Mr. Thakore's contention that there was no binding agreement with regard to arbitration till a contract actually was entered into, and according to Mr. Thakore it was only then that the terms of business contained in the two letters of September 7, 1948, and September 13, 1948, became incorporated in the contract. The true position here is that there is an antecedent independent arbitration agreement and this agreement would apply to every business done between the parties and every contract entered into between the parties. Therefore, in denying the contracts and in denying that any business was done, the defendants were not challenging the jurisdiction of the arbitrators, not denying the agreement to go to arbitration, but were merely denying the fact that pursuant to that agreement any business was done between the parties. In our opinion, therefore, the learned Judge was right in the view that he took that the arbitrators and umpire had jurisdiction to make the award.

Issue No. 4 is—Whether the said judgment and order of the said Supreme Court were given on the merits of the case—and the learned Judge has answered that issue in favour of the appellants.

The next issue was—Whether the said awards were given on the merits of the case—and that issue has not been answered. It was unnecessary to answer that issue because the learned Judge took the view that the suit was on the foreign judgment and he considered the rights of the plaintiffs from the point of view of the suit being based on the foreign judgment. Mr. Thakore says that not only the finding of the learned Judge on issue No. 4 is erroneous, but that we must permit him to argue issue No. 5 which becomes material in view of our decision that the suit is based on the award and not on the foreign judgment. Now, in the first place, it is difficult to accept Mr. Thakore's contention that the principles laid down in s. 13 apply to what he calls a foreign award. In s. 13 there are safeguards laid down to protect a defendant in our municipal Courts from being sued on a judgment given by a foreign Court, and undoubtedly those safeguards must be strictly complied with. But could the same principle apply where the judgment is given not by a Court of a foreign State but by a tribunal selected by the parties and when the tribunal is a domestic tribunal and not a tribunal set up by the laws of a foreign country? We are inclined to agree with the learned Judge that it is not open to a party, who is a party to the award, to contend that the award was not given on the merits of the case. We do agree that if the award was given against the rules of natural justice or it was fraudulently obtained, the party

may not be prevented from putting forward those contentions. But it is difficult to accept the view that because on a foreign judgment it is open to a party to contend that it was not given on the merits of the case, it is equally open to a party who is resisting the suit on the award to contend that the award was not given on the merits of the case. But even if it were open, in our opinion in this case the award was given on the merits of the case. It is true that the award was *ex parte* and the defendants did not appear before the arbitrators, but in our opinion the true interpretation to give to the expression "given on the merits" is that the tribunal giving the award considered the merits of the matter and came to a decision. The expression does not mean that every decision given *ex parte* is necessarily a decision not on merits. This view is clearly borne out by the judgment of the Privy Council in *Keymer v. Visvanatham Reddy*³. That was a suit on a foreign judgment and the judgment was given as a penalty because the defendant refused to answer the interrogatories which had been submitted to him, and the Privy Council points out that the merits of the case were never investigated and his defence struck out. Therefore, it is only in those cases where the Court for some reason or other passes a judgment against a party without investigating into the merits of the matter that it could be said that the decision is not given on merits. The mere fact that the decision is *ex parte*, the mere fact that the defendant after being served does not choose to appear, does not make an *ex parte* decision a decision not on merits. Not only there is no evidence here that the award was not given on the merits in the sense we have indicated, but on the evidence it is clear that it was given on the merits. We must, therefore, answer issue No. 5—if necessary, in the affirmative.

Issue No. 6 was not pressed.

Issue No. 7 is—Whether defendants entered into any contract with the plaintiffs as alleged in para. 2 of the plaint—and the answer is in the negative. We have already pointed out that the correspondence dealing with the contracts has been admitted by the defendants and the only submission made by the defendants is a submission of law that this correspondence does not amount to a contract in law. One has only to look at these letters and telegrams to come to the conclusion that if these letters and telegrams were admitted in evidence they clearly resulted in a contract being arrived at between the parties as alleged by the plaintiffs in para. 2 of the plaint. In our opinion, the learned Judge answered this issue in the negative because the view he took was that the documents which we have admitted were not admissible in evidence. We will, therefore, answer this issue in the affirmative.

Issue No. 8 is—Whether the said awards are binding upon the defendants. In view of what we have stated in the judgment, it is clear that the awards are binding upon the defendants and we will give a finding on this issue as in the affirmative and set aside the finding of the learned Judge which was in the negative.

The result, therefore, is that on the record and on the evidence that we have now admitted, there is no answer to the claim made by the plaintiffs. The claim consists of the actual amount mentioned in the awards on which the Supreme Court has passed judgment. Therefore, the relief sought is in respect of an award which has been made enforceable by the law of the country in which it was passed. With regard to interest, the interest claimed is from March 21, 1950, that is, the date on which the Supreme Court passed its judgment. Mr. Parpia agrees that interest should be allowed only from the date of the filing of this suit, which is January 14, 1954.

The result, therefore, will be that there will be a decree, equivalent in rupees, for \$ 18,748 and at the same rate of exchange as the amount is calculated in prayer (a) of the plaint, with interest thereon at 4 per cent. from January 14, 1954, till judgment, and costs of the suit and interest on judgment, except costs, at 4 per cent.

The appeal will, therefore, be allowed and the decree passed by the trial Court set aside. The appellants will be entitled to the costs of the appeal.

Undertaking given by Mr. Parpia vacated. Undertaking given by Mr. Thakore also vacated.

Liberty to the appellants' attorneys to withdraw the sum of Rs. 500 deposited in Court.

Solicitors for the appellants: *Minocher Hiralal & Co.*

Solicitors for the respondents: *Mulla & Mulla and Craigie Blunt & Caroe.*

Appeal allowed.

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Shelat.

ABU ISMAIL MERCHANT v. THE STATE.*

Constitution of India, Art. 20(3)—Criminal Procedure Code (Act V of 1898), Sec. 162—

Accused without compulsion furnishing evidence which could be used against him—

Whether using such evidence at trial of accused violates constitutional guarantee under art. 20(3)—Whether asking accused to give his handwriting for purpose of comparison with disputed document amounts to taking statement under s. 162 of Code.

The constitutional guarantee under art. 20(3) of the Constitution of India protects a person accused against being compelled to furnish evidence against himself. Where the evidence is collected by a police officer under a judicial mandate as in the case where pursuant to a search warrant, documents or things are seized and produced in Court, there is no circumvention of the constitutional guarantee; nor is every volitional act of a person accused which is evidence, or facilitates collection of evidence against him to be deemed compelled merely because the act is relied upon in the judicial proceeding against the person accused. Therefore, the Constitution does not prohibit a person accused of an offence from furnishing evidence which may be used against him; it only affords a protection against compulsion in furnishing evidence.

M. P. Sharma v. Satish Chandra, District Magistrate, Delhi, State v. Arabsha Ahmed Sayeed and In re Palani Goundan, referred to.

When a person accused of an offence accompanies a police officer in the course of investigation or complies with a request to give his handwriting or thumb impression for comparison, he does not give a statement, proof of which is prohibited by s. 162 of the Criminal Procedure Code, 1898.

MESSRS. HIREMANI AND JAGLUR & Co. a firm doing business in Hubli and the firm of K. Umakant doing business in Bombay had dealings between them and as a result of these dealings an amount of Rs. 16,000 became due by the Hubli firm to the Bombay firm. On May 21, 1956, in part payment of the above amount a demand draft for Rs. 8,000 drawn on the Bombay branch of the Canara Industrial and Banking Syndicate Ltd., Hubli, was sent by the Hubli firm to the Bombay firm and it was drawn in favour of K. Umakant. This demand draft was lost in transit and somehow or other it found its way into the hands of one Abu Ismail Merchant (accused). On May 25, 1956, the accused went to the Queens Road branch of the New Citizen Bank of India Ltd. and opened an account in the name of Kamalakant Umakant Joshi by crediting a sum of Rs. 600. Later on in the afternoon of the same day the accused again went to the Bank

*Decided, September 18, 1958. Criminal Appeal No. 420 of 1958, from the orders of conviction and sentence passed by V. D. Tulzapurkar, Additional Sessions Judge, Greater Bombay, in Case No. 21 of V Sessions, 1957.

1 [1954] S. C. R. 1077, 1079.

2 (1958) Confirmation Case No. 4 of 1958, decided by Vyas and Kotval JJ., on March 18, 1958 (Unrep.).

3 [1957] A. I. R. Mad. 546.

and presented the aforesaid draft of Rs. 8,000 and forged the endorsement on the back of the draft, in the name of K. Umakant. On May 28, 1956, the accused on getting information from the ledger keeper of the bank that the draft had been cleared, withdrew Rs. 7,900 from the bank by a cheque. On these facts the accused was tried before the Additional Sessions Judge, Bombay, with a common jury, for offences under ss. 411, 467, and 471 read with s. 467 of the Indian Penal Code. The jury brought in a majority verdict against the accused for the three offences charged against him and the Sessions Judge accepted the verdict of the jury and convicted the accused and sentenced him to suffer rigorous imprisonment for different periods for the three offences.

The accused appealed to the High Court.

B. B. Kotval, with *N. M. Patil*, for the appellant-accused.

B. R. Sompura, Assistant Government Pleader, for the State.

SHAH J. [His Lordship after stating the facts and dealing with points not material to this report, proceeded:] It was then urged by Mr. Kotval that there had been a serious irregularity in the trial. Mr. Kotval contended that the accused was by threats compelled to give his handwriting to the police officer and that this writing was utilised by Phansalkar, the handwriting expert, and that by the use of that writing the provisions of s. 162 of the Code of Criminal Procedure and art. 20(3) of the Constitution of India were infringed. Mr. Kotval submitted that the prosecution had in using the writing given by the accused in substance compelled the accused to give evidence against himself. Mr. Kotval also submitted that the learned trial Judge had allowed evidence to go on the record without deciding the question as to the admissibility thereof and on that account also there was irregularity in the trial. It is true that when the panch witness Gopal Ramprasad was examined on behalf of the prosecution, an objection was raised by counsel for the accused that the sheets of paper alleged to be in the handwriting of the accused could not be used as evidence, and admitting the documents on the record as evidence amounted to infringement of the provisions of art. 20(3) of the Constitution. The learned Judge held that the question whether art. 20(3) of the Constitution had any application must depend upon proof of certain facts: viz., whether any compulsion was used on the accused when he gave his handwriting; and on that point a suggestion was made by Mr. Neemuchwala for the accused that threats were held out to the accused before specimen handwritings were obtained, which suggestion was denied by the police officer. He observed that as the decision on what was essentially a question of fact depended upon proof or disproof of certain facts, it must of necessity be given after all the evidence was recorded and that he would tell the jury to consider the question in the course of his summing up. In our view, in so doing the learned Judge was not in error. Evidently the question whether the writings had been obtained by the police officer from the accused by compulsion was a question of fact which had to be decided by the jury and the jury could not be called upon to give an interlocutory verdict on that question. The learned Judge was, therefore, justified in admitting the evidence of the panch as well as the police officer and of the handwriting expert and then in asking the jury to consider the question whether the writings had been procured by compulsion or threats as alleged by the accused. The jury having come to the conclusion that the accused is guilty of the offence charged must be deemed to have held that this evidence relating to the handwriting on the papers relied upon by the prosecution was reliable and that the accused was not compelled by threats or coercion to give his handwriting. The learned Judge has told the jury in the course of his charge that if they came to the conclusion that the writings had been procured by threats or compulsion as alleged by the accused, they were entitled to reject the evidence of the handwriting expert. The learned Judge having given proper directions

to the jury in this behalf, we cannot say that there was any misdirection by the Judge or any error of procedure in the trial in allowing the documents to go on the record, the admissibility whereof was in doubt till certain questions of fact were decided.

By art. 20(3) of the Constitution it is enacted that no person accused of any offence shall be compelled to be a witness against himself. It is now well settled that the expression "to be a witness" means "to furnish evidence", and the constitutional guarantee is not restricted in its ambit to proceedings in the Court room: the protection afforded to an accused person in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room, but may well extend to compelled testimony previously obtained from him. It is, therefore, available to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. (*M. P. Sharma v. Satish Chandra, District Magistrate, Delhi*¹). The guarantee, however, protects a person accused from being compelled to furnish evidence against himself. Where the evidence is collected by a police officer under a judicial mandate as in the case where pursuant to a search warrant documents or things are seized and produced in Court, there is no circumvention of the constitutional guarantee; nor is every volitional act of a person accused which is evidence, or facilitates collection of evidence against him, to be deemed compelled merely because the act is relied upon in the judicial proceeding against the person accused.

A division bench of this Court in *State v. Arabsha Ahmed Sayeed*,² held that by using the finger-prints of an accused person taken during the course of investigation by a police officer, as evidence at the trial, the constitutional guarantee under art. 20(3) was not violated.

The Madras High Court in *In re Palani Goundan*³, also has expressed the same view. In that case it was observed (p. 547):

"The principle of protection against self-incrimination is not confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand, and it refers to all kinds of evidence which the accused might be compelled to produce as a positive volitional evidentiary act. It follows that any attempt to compel the accused to produce evidence of any kind which is likely to support a prosecution against him would be struck down by Art. 20(3) of the Constitution. Any incriminating or relevant object or document or other form of evidence can be seized under process of law from the custody or person of the accused; but he cannot be compelled to produce it... It is important to bear in mind that while it may be open to a police officer to seize such incriminating articles of evidence from the person of the accused, he cannot himself be compelled to produce them... The taking of thumb-impression or the signature of the accused does not stand on a different footing from the seizure of documents or articles or other facts of evidence from the person of the accused. Though he cannot be compelled to produce such evidence, it can be taken or seized from him. That is 'an act of another to which he is obliged to submit', and not 'the positive volitional evidentiary act' of the accused."

It is evident, therefore, that the Constitution does not prohibit a person accused of an offence from furnishing evidence which may be used against him; it only affords a protection against compulsion in furnishing evidence.

In the case before us it appears that the jury regarded the evidence that the disputed handwriting on the endorsements on the draft, the application form, pay-in-slip and cheques were of the accused was reliable. The jury also appear to have been of the view that the writings with which these documents were compared were not procured by compulsion. There being no compulsion in procuring the handwriting of the accused in the course of investigation, there was, in our judgment, no infringement of art. 20(3).

1 [1954] S. C. R. 1077, at p. 1088.

1958 (Unrep.).

2 (1958) Confirmation Case No. 4 of 1958, decided by Vyas and Kotval JJ., on March 18,

3 [1957] A. I. R. Mad. 546.

The contention that asking a person accused to give his handwriting for the purpose of comparison with a disputed document amounts to taking a statement within the meaning of s. 162 of the Code of Criminal Procedure has, in our judgment, no substance. Under the Code of Criminal Procedure the investigating officer is invested with wide powers. He is entitled to collect evidence and for that purpose to search for documents or things and seize incriminating articles or documents and compel the presence of persons believed by him to be conversant with matters relating to the case under investigation for examination, to make *panchnamas*, to hold identification parades and to send persons to a competent Magistrate for their statements to be recorded under s. 164. All these are steps in the investigation and are primarily acts done by the investigating officer; and because he is directly or indirectly concerned with them, the acts done by the person accused do not become his statements within the meaning of s. 162. When a person accused of an offence accompanies a police officer in the course of investigation or complies with a request to give his handwriting or thumb-impression for comparison, he does not, in our judgment, give a statement, proof whereof is prohibited by s. 162 of the Code of Criminal Procedure.

[The rest of the judgment is not material to this report.]

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Miabhoj.

BHAGWANT VINAYAK MAHAJAN v. RADHAKISAN GANGABISAN MARWADI.*

Civil Procedure Code (Act V of 1908), O. XX, r. 12; s. 97—*Preliminary decree stating that mesne profits to be awarded until delivery of possession—Whether decree could be construed as awarding mesne profits only upto three years from date of decree.*

When a preliminary decree is passed under O. XX, r. 12, of the Civil Procedure Code, 1908, for payment of mesne profits until delivery of possession of property, mesne profits cannot be awarded for a period of more than three years from the date of the decree.

Narayan Govind v. Sono Sadashiva and *Girish Chunder Lahiri v. Shoshi Shikhera* applied.

Gurudas Kundu Chowdhury v. Hemendra Kumar Roy,¹ referred to.

The facts appear in the judgment.

T. N. Walawalkar, for the appellant.

B. V. Chavan, for *M. V. Paranjpe*, for respondent No. 4.

MIABHOJ J. This appeal raises a short question relating to the interpretation of a preliminary decree which was passed in Suit No. 36 of 1940. That suit was brought by some sons against their father and his alienees. The suit was for partition and separate possession of the shares of the sons in the joint family properties. A preliminary decree was passed on December 22, 1941. *Inter alia*, that decree directed that the sons shall obtain future mesne profits from the date of the suit till delivery of possession. The direction was given against the alienees of the father. The alienees were defendants Nos. 1 and 2. They are now represented by a Receiver appointed in another litigation. The decree was assigned by the sons to one Radhakisan who is respondent.

*Decided, September 22, 1958. First Appeal No. 242 of 1955, from the decision of R. M. Kulkarni, Joint Civil Judge, Senior Division, Poona, in Special Suit No. 86 of 1940.

¹ (1899) I. L. R. 24 Bom. 345, s.c. 1 Bom.

L. R. 846.

² (1900) L. R. 27 I. A. 110, s.c. 2 Bom. L. R. 709.

³ (1929) L. R. 56 I. A. 290, s.c. 32 Bom. L. R. 148.

ent No. 4. He filed darkhast No. 1185 of 1948 for partition of the properties in accordance with the directions given in the preliminary decree. It is not disputed that he got on September 10, 1951, actual possession of the properties allotted to the shares of the sons. Thereafter, respondent No. 4 filed an application on December 4, 1953, for ascertainment of the mesne profits in respect of the properties allotted to the shares of the sons from the date of the suit till the date of delivery of possession. Thus the period for which respondent No. 4 claimed mesne profits was from January 8, 1940, the date of the suit, to September 10, 1951, the date on which he obtained possession of the properties allotted to the shares of the sons. The period is 11 years and 8 months and 2 days. Mesne profits have been calculated at the rate of Rs. 75 per annum. The shares of the sons has been ascertained to be 3/4th. Accordingly, mesne profits have been awarded to respondent No. 4 at the rate of Rs. 56-4-0 per year. The contention of the Receiver, who represents the interest of the alienees of the father, is that, though the decree states that the mesne profits shall be awarded until delivery of possession without specifying that the period shall be restricted to a period of three years from the date of the decree, in law, the decree should be construed as awarding mesne profits to the sons only up to three years from the date of the decree and not until September 10, 1951. At first, I was not inclined to agree with the contention of Mr. Walawalkar. This disinclination was due to the provisions contained in s. 97 of the Civil Procedure Code, which states that where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. A plain reading of the decree itself would show that mesne profits were awarded to the sons up to the date of delivery, and it did not in specific terms lay down that the mesne profits were to be restricted up to a period of three years from the date of the decree. Hence if defendants Nos. 1 and 2 were aggrieved by the decree they should have preferred an appeal and got the direction for payment of mesne profits restricted to 3 years. However, Mr. Walawalkar relied upon two authorities, in support of his proposition. In view of those authorities, I cannot but come to the conclusion that the point raised by Mr. Walawalkar is right and must be held. The first ruling on which he relies is reported in *Narayan Govind v. Sono Sadashiva*¹. In that case, their Lordships had to deal with a decree which was passed in terms which were similar to the terms of the decree in the present appeal. That decree was passed under s. 211 of the Civil Procedure Code of 1882. The decree stated that mesne profits were to be awarded till delivery of possession. But, their Lordships came to the conclusion that the decree must be construed subject to sub-s. (2) of s. 211 and, therefore, the plaintiff in that case was held not entitled to recover mesne profits for more than three years from the date of the decree. Mr. Chavan, who appears on behalf of respondent No. 4, wanted to draw a distinction between that case and the present case. The distinction was based upon the ground that, under the old Code of 1882, a preliminary decree was not passed but a final decree was passed straight off, whereas under the present Code, a preliminary decree has to be passed under O. XX, r. 12, and I have to deal with a preliminary decree. I do not think how this distinction can avail respondent No. 4. If, at all, the position is worse so far as respondent No. 4 is concerned. Under the old Code a decree giving mesne profits was a final decree, and for executing that decree, the parties were required to go to the executing Court. It is well known that an executing Court cannot go behind a decree and must execute the decree as it stands. In spite of this, the Division Bench came to the conclusion that the plaintiff was not entitled to mesne profits for more than three years from the date of the decree, and this conclusion was arrived at by interpreting the decree in such a manner as to bring it in accordance with the provisions of sub-s. (2) of s. 211 of the Civil Procedure Code, 1882. There-

1 (1899) I. L. R. 24 Bom. 345, s.c. 1 Bom. L. R. 846.

fore, the ratio of this case viz., *Narayan v. Sono* is that, when a decree is passed for payment of mesne profits, until delivery of possession, there is always an implied term in the decree that mesne profits are not to be awarded for a period of more than three years in any case. The language of s. 211 of the Civil Procedure Code of 1882 is the same as the language which is used in O. XX, r. 12, and I do not see any distinction between the two provisions. The same view appears to have been taken by the Privy Council also in the case reported in *Girish Chunder Lahiri v. Shoshi Shikhereswar*.² In that case also, the decree was for mesne profits for the period of dispossession, and the decree for mesne profits was not restricted to a period of three years from the date of the decree. However, their Lordships, at page 126, observed as follows:

"...The Subordinate Judge gives the plaintiff mesne profits up to the date of possession. But that is more than three years from the date of the decree, and to the extent of the excess is unauthorised by s. 211 of the Code."

On this view, their Lordships gave a declaration as follows:—

"...Declare that mesne profits for Nyadlar should not be allowed for any later time than three years from the date of the decree,..."

Mr. Chavan, however, referred me to the ruling reported in *Gurudas Kundu Chowdhury v. Hemendra Kumar Roy*.³ He contended that, in that case, a different view was taken. I do not think I can agree. In that case, there was no question of the construction of a decree passed for mesne profits until the date of delivery of possession. There, the decree was passed in the following terms: "That the claim of this suit be decreed with costs and mesne profits," and the contention was that the mesne profits which were awarded were mesne profits up to the date of the suit and not up to the date of delivery of possession. There was no question of mesne profits having been granted in that case for a period of three years from the date of the decree. The matter was finally decided by the Privy Council in 1917, and the mesne profits were being claimed until 1919 i.e. within two years from the date on which the Privy Council had passed the decree. Therefore, in my opinion, it is not correct to say that in *Gurudas'* case, the Privy Council has taken a different view.

In view of the aforesaid legal position, respondent No. 4 shall be entitled to mesne profits only for a period of three years from December 22, 1941, to December 22, 1944, and he will not be entitled to receive mesne profits for the subsequent period. Calculating the mesne profits at the rate of Rs. 56-4-0 per year, the amount would be Rs. 168-12-0. This figure will be substituted in the final decree of the trial Court for the figure of Rs. 618-12-0.

Therefore the appeal is allowed. I order that the figure "Rs. 168-12-0" shall be substituted for the figure "Rs. 618-12-0" wherever it occurs in the decree of the trial Court. Respondent No. 4 shall receive proportionate costs from the appellant in the trial Court. Each party shall bear its own costs of this appeal.

Appeal allowed.

² (1900) L. R. 27 I. A. 110, s.c. 1 Bom. L. R. 709.

³ (1929) L. R. 56 L. A. 290, s.c. 32 Bom. L. R. 148.

Before Mr. Justice Miahboy.

NAMDEV BHIKHA v. RAMNATH SHIVNARAYAN.*

Hyderabad Tenancy and Agricultural Lands Act, Secs. 11, 17, 13—Whether s. 11 of Act as amended in 1954 retrospective—Application for fixation of standard rent relating to period prior to amendment—Rent whether to be determined with reference to law existing before coming into operation of amendment.

Section 11 of the Hyderabad Tenancy and Agricultural Lands Act, 1950, as amended by the Hyderabad Tenancy and Agricultural Lands Amendment Act, 1954, is not retrospective but it is prospective.

If an application comes to be made under s. 17 of the Act, then that application will have to be decided on the basis as to whether the application relates to rent for the period prior to the date of the amendment or subsequent to the date of the amendment. If the application relates to a period which is prior to the date of the amendment, then, the rent must be determined with reference to the law existing before the amendment came into operation, and, if the application relates to a period subsequent to the date of the amendment, then, the rent will have to be decided with reference to the subsequent amendment.

Subraya Rama Bhatta v. Pyara Krishna Gouda, referred to.

THE facts appear in the judgment.

K. B. Deshpande, for *S. L. Newasekar*, for the applicant.

S. M. Shah and *R. G. Bhadekar*, for the opponent.

MIABHOY J. This petition is filed under s. 91 of the Hyderabad Tenancy and Agricultural Lands Act, 1950. The petition is by one Namdeo. He was the protected tenant of Survey No. 1, measuring 4 acres 33 gunthas, assessed at Rs. 10-4-0, situated in the village Easgaon. This Namdeo made an application on November 4, 1952, to the Deputy Collector for fixation of standard rent in respect of this land. This application was made under s. 17 of the Act. The application was decided by the Deputy Collector on September 8, 1954. The Hyderabad Tenancy and Agricultural Lands Act, 1950, fixes the maximum rent in respect of agricultural lands. This is done by s. 11 of the Act. On the date on which the application was made by Namdeo, the section was as follows:—

"Notwithstanding any agreement or usage or any decree or order of a Court, or any law to the contrary, the maximum rent payable by a tenant for a lease of any land shall not, in the case of irrigated land except land under wells exceed 1/3rd, and in the case of unirrigated land or irrigated land under wells exceed 1/4th of the crop of such land or of the value of such crop as determined in the prescribed manner."

Therefore, on the date on which Namdeo made the application, the maximum rent, which was payable by a tenant to his landlord was 1/3rd or 1/4th according to the class of land in respect of which the tenancy existed. However, this s. 11 was changed during the pendency of the application of Namdeo, and a new s. 11 was introduced on February 4, 1954. That new section stands as follows:—

"Notwithstanding any agreement or usage or any decree or order of the Court, or any law to the contrary, the maximum rent payable by a tenant for a lease in respect of the following classes of land shall be the multiples of the land revenue for the time

*Decided, September 23, 1958. Civil Revision Application No. 263 of 1957, (with Civil Revision Application No. 245 of 1957), from the order passed by S. A. L. Razvi, Collector at Aurangabad, in File No. 284/57 of 1954, varying the orders passed by Mr. Kazim Hussain,

Deputy Collector, Vizapur Division, in Case No. Ten/566 of 1952.

1 (1955) Civil Revision Application No. 1958 of 1953, decided by Gajendragadkar J., on September 22, 1955 (Unrep.).

being in force or if no land revenue is in force the land revenue which may be assessed thereon, as shown hereunder against them:—

(a) Dry land of Chalka soil	.. .. .	4 times the land revenue.
(b) Dry land of Black cotton	.. .. .	5 times the land revenue.
(c) Bakhat	.. .. .	5 times the land revenue.
(d) Wet land—		
(i) Irrigated by wells	.. .. .	3 times the land revenue.
(ii) Irrigated by other sources	.. .. .	4 times the land revenue.
(e) Classes of land which do not fall within the clause (a), (b), (c) or (d)	.. .. .	Reasonable rent determined having regard to the classes of land and the rent fixed for the said categories."

The opponent Ramnath is the landlord of the aforesaid field. The agreed rent was Rs. 625. The Deputy Collector divided the periods for which reasonable rent was determined into two. The first period was from November 4, 1952, to February 3, 1954, and the second period was from February 4, 1954, onwards. In respect of the first period, the Deputy Collector decided that the reasonable rent was Rs. 300 per annum. This decision appears to have been arrived at by the Deputy Collector on a statement made by Namdeo that he was prepared to pay that much amount as reasonable rent to the landlord. In respect of the second period, the Deputy Collector fixed the rent at five times the land revenue, and he calculated it at Rs. 51-4-0. The parties are not agreed as to whether this figure is correct. However, it is not necessary for me to enter into this question, because, the principle on which the Deputy Collector has proceeded is quite clear that the reasonable rent is five times the assessment. If once the figure of assessment is ascertained, then the amount of rent, which would be payable by the tenant to the landlord, can easily be ascertained. Ramnath, then, preferred an appeal to the Collector. His contention was that reasonable rent was the agreed rent, and should have been fixed at Rs. 625. Namdeo also preferred a cross-appeal. His contention was that the amendment of s. 11 had retrospective effect, and, therefore, rent in respect of the first period from November 4, 1952, to February 3, 1954, should also have been fixed at five times the assessment. Both these appeals were decided by the Collector by his impugned order dated March 21, 1955. The Collector rejected the contention of Namdeo that the amended s. 11 had retrospective effect. He ordered Namdeo to pay rent at the agreed rate of Rs. 625 per annum for the years 1952-53 and 1953-54. He upheld the order of the Deputy Collector for standard rent from February 4, 1954, onwards. Namdeo has come in revision to this Court from this order. [His Lordship after considering points not material to this report, proceeded.]

The question for consideration is whether, on the facts of the present case, the newly amended s. 11 of the Hyderabad Tenancy and Agricultural Lands Act is applicable or the old unamended s. 11 of the Act is applicable. It cannot be disputed that s. 11 of the Act deals with vested rights and contractual obligations. It is well known that, when a statute deals with or affects vested rights or impairs contractual obligations, ordinarily, the presumption is that the Legislature did not intend to give it a retrospective effect. In such a case, the proper construction of the statute would be that it is prospective. Therefore, the question for consideration is whether there is anything in the amending Act or in the amended s. 11, which would show an intention which would rebut this presumption in favour of the Act being prospective. Mr. Deshpande firstly relied upon the language of s. 11 itself. He contended that this amended section was to come into operation in spite of any agreement or law or decree or order of the Court. It was contended that this was an indication that the Legislature intended that this section was to have retrospective effect. I do not agree. In my opinion, all that the new section means is that, if there was any law or any order, which was in operation on the date on which

the amended section came into operation, then, in spite of such law or agreement or order of the Court the newly amended section will come into force. I do not think this can be regarded as an indication of the mind of the Legislature that s. 11 was to be applied in such a way as to affect rights which had become vested in the parties before the newly amended s. 11 came into operation. Another section to which Mr. Deshpande referred was sub-s. (2) of s. 13 of the Hyderabad Tenancy and Agricultural Lands Act. That sub-section is in the following terms:

"The rent due shall be payable by the tenant at the rate fixed in accordance with the provisions of sections 11 and 12 and the tenant will have the option to pay the rent in cash so fixed or in equivalent produce grown on the land estimated according to the market value thereof."

The submission is that this sub-section obviously deals with a situation which arises after the rent has become due, and this sub-section states in terms that, in such a case, the rent due is to be determined with reference to s. 11. However, in my opinion, this sub-section cannot, in any way, affect the question which has got to be answered in this case. All that the section means is that, if the rent becomes due, then, it is to be fixed in accordance with the provisions contained in s. 11, but it does not state as to whether the section which is to be applied is the unamended section or the amended section. In my opinion, sub-s. (1) of s. 13 is more apposite for deciding this question. That sub-section was amended at the same time when s. 11 was amended, and that sub-section states that a tenant shall not be liable to pay rent at any rate exceeding that specified in s. 11 with effect from the date of the commencement of the Hyderabad Tenancy and Agricultural Lands Amendment Act, 1954. Therefore, this sub-section is a clear indication of the mind of the Legislature that the amended s. 11 is to be applied with effect from the commencement of the Amending Act, 1954. Therefore, in my opinion, not only there is no indication in the amending Act or the amended s. 11 to show that the Legislature intended to give retrospective effect to the amended s. 11, but there is a clear indication of the intention of the Legislature that the amended s. 11 will not have any retrospective effect.

Another argument which was advanced was based upon s. 17 of the Act. That section provides for the making of an application in a prescribed form for determination of reasonable rent. It was contended that, under similar legislation, when this Court was dealing with a similar point, it had taken the decision that, when an application for determination of reasonable rent is made, rent is effective not only from the time it became due after the making of the application for reasonable rent, but is effective even in respect of arrears of rent. For this purpose, reliance was placed upon the judgment delivered by Mr. Justice Gajendragadkar in *Subraya Rama Bhatta v. Pyara Krishna Gouda*¹. With respect, this decision cannot affect the decision which I have arrived at on its own merits. The question which Mr. Justice Gajendragadkar was dealing with was entirely different from the question which I have got to decide in the present application. In that case, the question which arose was whether, when an application is made for determination of standard rent, the authority concerned can fix standard rent only with respect to rent which becomes due after the date when the application for standard rent is made or whether he can do so for an anterior period also. That is not the question which I have got to decide in the present case. In the present case, the question is whether the amended s. 11 of the Hyderabad Tenancy and Agricultural Lands Act applies or the old s. 11 of the Act applies, and, in my opinion, having regard to the reasons which I have already given, the only answer which can be given to this question is the one which I have given, namely, that the amended section is not retrospective, but it is prospective. If an application comes to be made under s. 17 of the Act, then,

1 (1955) Civil Revision Application No. on September 22, 1955 (Unrep.), 1598 of 1953, decided by Gajendragadkar J.,

in that case, that application will have to be decided on the basis as to whether the application relates to rent for the period prior to the date of the amendment or subsequent to the date of the amendment. If the application relates to a period which is prior to the date of the amendment, then, the rent must be determined with reference to the law existing before the amendment came into operation, and, if the application relates to a period subsequent to the date of the amendment, then, the rent will have to be decided with reference to the subsequent amendment.

Therefore, in my opinion, the present revision application will have to be allowed, and it will have to be sent back to the Deputy Collector with a direction that the Deputy Collector shall fix rent for the years 1952-53 and 1953-54 in accordance with the provisions as laid down in the old s. 11 of the Hyderabad Tenancy and Agricultural Lands Act, 1950. I am not determining the question as to whether the maximum rent applicable to the facts of the present case is 1/4th or 1/3rd of the produce of the land. That is a question which the Deputy Collector will have to decide in accordance with his decision as to the class of land to which the land which is the subject-matter of the present tenancy dispute belongs...

Therefore, rule is made absolute. The matter is sent back to the Deputy Collector with a direction that the Deputy Collector shall fix rent for the years 1952-53 and 1954 in accordance with the provisions of the old s. 11 of the Hyderabad Tenancy and Agricultural Lands Act, 1950. Appropriate orders in accordance with law will be passed by the Deputy Collector regarding the amount already deposited by the tenant Namdeo with the Deputy Collector. Each party to bear its own costs.

In Civil Application No. 2100 of 1958, stay is vacated. No order as to costs therein.

Order accordingly.

INCOME-TAX REFERENCE.

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.

**MAULADIN AYUB v. THE COMMISSIONER OF INCOME-TAX,
BOMBAY SOUTH, BOMBAY.***

Indian Income-tax Act (XI of 1922), Secs. 23(4), 27, 30—Income-tax officer calling upon assessee by notice under s. 22(4) to produce suppressed books—Order passed under s. 23(4) on non-compliance of notice by assessee—Assessee not applying under s. 27 for cancellation of assessment under s. 23(4)—Assessee in appeal under s. 30 challenging validity of assessment under s. 23(4) and seeking to contend that books required to be produced not in existence—Whether open to assessee to challenge validity of assessment under s. 23(4) in appeal under s. 30.

The Income-tax Officer on certain evidence produced before him came to the conclusion that the assessee was maintaining a separate set of books which had not been produced before him and which recorded the transactions which had not been entered in the account books that the assessee had produced. On that the Income-tax Officer issued a notice under s. 22(4) of the Indian Income-tax Act, 1922, and on the failure of the assessee to comply with the notice, he proceeded to assess the assessee under s. 23(4) of the Act. The assessee appealed to the Assistant Appellate Commissioner under s. 30 and attempted to argue the question whether the Income-tax Officer was right in the view that he took that the assessee maintained two sets of books of account and also whether the Income-tax Officer was right in assessing the assessee under s. 23(4). The Appellate Assistant Commissioner held that it was

*Decided, September 23, 1958. Income-tax Reference No. 1 of 1958.

not open to the assessee to argue that question as he had not made an application under s. 27 for cancellation of the assessment made under s. 23(4):—

Held, that in the circumstances of the case the assessee could have made an application under s. 27 and that as he had failed to do so, it was not open to him to challenge the validity of the assessment under s. 23(4) in an appeal under s. 30.

The question whether on a notice issued under s. 22(4) of the Indian Income-tax Act, 1922, the assessee was justified in not producing books which were held by the Income-tax Officer to be suppressed and which the assessee contended did not exist, is a question which falls within the ambit of s. 27 of the Act, and therefore, the assessee cannot agitate this question in an appeal under s. 30 of the Act against the order passed by the Income-tax Officer under s. 23(4) of the Act on the failure of the assessee to comply with the notice under s. 22(4).

Suganchand Kanhaiyalal Rathi v. Commr. of Inc.-Tax,¹ dissented from.

Naba Kumar Singh Dudhuria v. Commr. of Inc. Tax,² *Commr. of Inc.-Tax v. Shri Yodh Raj Bhalla*³ and *Sir Padampat Singhania v. Commr. of Inc.-Tax*,⁴ agreed with.

In the course of assessment proceedings of a partnership firm Messrs. Mauladin Ayub of Akola (assessee) for the assessment year 1951-52 (accounting year S.Y. 2006 ended on November 9, 1950), the Income-tax Officer received certain information that the account books produced before him by the assessee did not record all the business transactions of the assessee and the transactions omitted therefrom were recorded in another set of books. The Income-tax Officer after taking certain evidence on this matter came to the conclusion that the assessee was maintaining another set of account books in addition to the one produced before him, and as these were not produced in compliance with the notice issued under s. 22(4) of the Indian Income-tax Act, 1922, he completed the assessment under s. 23(4) of the Act. In completing this assessment to the best of his judgment the Income-tax Officer added a sum of Rs. 4,000 as income from undisclosed sources. The assessee filed an appeal before the Appellate Assistant Commissioner against the total income determined by the Income-tax Officer, and in this appeal the assessee sought to challenge the validity of the Income-tax Officer's assessment made under s. 23(4) for default under s. 22(4). The Appellate Assistant Commissioner held that this contention could not be taken in the quantum appeal before him. On appeal the Appellate Tribunal held that the Appellate Assistant Commissioner in the quantum appeal was justified in not considering the question whether the assessment was properly made under s. 23(4) and dismissed the appeal, observing in its order as follows—

"...this assessment was made under s. 23(4) for default under s. 22(4). The assessee did not file any application under s. 27 and he sought to challenge the validity of the assessment made under s. 23(4) in the quantum appeal that he filed to the Appellate Assistant Commissioner. Relying upon several High Court decisions, mentioned by him, the Appellate Assistant Commissioner held that the contention could not be properly taken in that appeal. It was argued before us that there was no point in making an application under s. 27 to the Income-tax Officer inasmuch as he would not have changed his conclusion that the assessee did maintain a duplicate set of books and did not produce it before him. It is not necessary to speculate as to how the Income-tax Officer would have reacted to an application under s. 27 if it was made to him. It was urged that in asking compliance with notice under s. 22(4) the Income-tax Officer was asking the assessee to do an impossible thing, viz. to produce the account books which were maintained. On the material that was before him, he came to a certain conclusion. That conclusion would have been tested by making an application under s. 27 and, if necessary, by taking an appeal from an adverse order under that section. In the quantum appeal the Appellate Assistant Commissioner was justified in not considering the question whether the assessment was properly made under s. 23(4)."

1 (1957) 34 I. T. R. 152.

2 (1944) 12 I. T. R. 327.

3 (1953) 23 I. T. R. 371.

4 (1953) 24 I. T. R. 141.

The following question of law was referred to the High Court:—

"Whether in an appeal under s. 80(1), the validity of an assessment made under s. 23(4) for assessee's failure to comply with all the terms of the notice issued under section 22(4), can be challenged when no application was made under section 27 of the Act to get the assessment made under section 23(4) cancelled?"

The reference was heard.

M. V. Samarth, with *A. A. Omer*, for the assessee.

G. N. Joshi, for the Commissioner of Income-tax.

CHAGLA C. J. A rather important and interesting question arises on this reference, which has not been considered by any decision of this Court, although there is authority of the Calcutta High Court, Allahabad High Court and the Madhya Pradesh High Court, and the question arises under the following circumstances.

The assessee is a firm and the assessment year is 1951-52 the relevant accounting year being S.Y. 2006 ended on November 9, 1950. Now, on certain evidence which the Income-tax Officer took, he came to the conclusion that the assessee was maintaining a separate set of books which had not been produced before him and which recorded transactions which had not been entered in the account books that the assessee had produced. On that, he issued a notice under s. 22(4). The contention of the assessee was that he did not have two sets of books, that whatever books he had had been produced and, therefore, he could not comply with the notice. As the assessee failed to comply with the requisition made by the Income-tax Officer, the Income-tax Officer proceeded to assess the assessee under s. 23(4), the best judgment assessment. The assessee appealed against this to the Appellate Assistant Commissioner and before the Appellate Assistant Commissioner the assessee attempted to argue the question as to whether the Income-tax Officer was right in the view that he took that the assessee maintained two sets of books of account and also whether the Income-tax Officer was right in assessing the assessee under s. 23(4). The Appellate Assistant Commissioner took the view that it was not open to the assessee to argue that question he not having made an application under s. 27. The assessee went in appeal to the Tribunal and the Tribunal upheld the decision of the Appellate Assistant Commissioner and the assessee has now come on this reference.

Now, turning to the relevant provisions of the Act, the right of appeal to the Appellate Assistant Commissioner is conferred under s. 30 and that section provides that any assessee objecting to the amount of income assessed under s. 23 or s. 27 or the amount of loss computed under s. 24 or the amount of tax returned under s. 23 or s. 27, we will only quote the relevant provisions of this section, may appeal to the Appellate Assistant Commissioner against the assessment. Now, this is an assessment under s. 23 and an appeal against that assessment lies under s. 80. What is contended by the Department is that when an appeal is limited to the question of the amount of income assessed or the amount of tax determined, it is not competent to the assessee in such an appeal to raise a question as to the validity of the assessment made by the Income-tax Officer under s. 23. What is pointed out is that the Legislature has provided a special machinery for challenging the validity of the assessment, and if the assessee does not avail himself of that machinery, then he cannot challenge the validity under s. 80. Now, the machinery provided is under s. 27 and that section provides that where an assessee within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by s. 22 or that he did not receive the notice issued under sub-s. (4) of s. 22, or sub-s. (2) of s. 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last mentioned notices, the Income-tax Officer shall cancel the assess-

ment and proceed to make a fresh assessment in accordance with the provisions of s. 23.

Now, what is urged is that after the Income-tax Officer had made an assessment under s. 23(4), within the time limited by s. 27 it was open to the assessee to satisfy the Income-tax Officer that he was prevented by sufficient cause from complying with the terms of the notice issued under s. 23(4) and that on such an application being made by the assessee it was open to the Income-tax Officer to cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of s. 27. If the Income-tax Officer had refused to cancel the assessment, a right of appeal against such refusal is expressly given under s. 30 and it was open to the assessee to have had the matter decided in appeal by the Appellate Assistant Commissioner with further appeal to the Tribunal and, if necessary, on a reference to this Court. Therefore, what is urged is that the question whether the assessee had sufficient cause which prevented him from complying with the terms of the notice issued by the Income-tax Officer could only be litigated under s. 27 on an application made by the assessee and it could only be litigated before the Appellate Assistant Commissioner and the Tribunal and if necessary on a reference to the High Court in an appeal made against the order of the Income-tax Officer under s. 27 refusing to cancel the assessment. It is further urged that the assessee not having availed himself of the machinery provided by s. 27, he has accepted the validity of the assessment. He has not challenged the fact that he was contumacious in not complying with the requisition issued by the Income-tax Officer, and having accepted the validity of the assessment, all that he can challenge in appeal is the quantum of the assessable income and the quantum of the tax that he has to pay on that assessable income.

Now, Mr. Samarth's contention is that this is not a case which falls under s. 27 and he concedes both in view of the authorities, which we shall presently refer and also on principle that if the case fell under s. 27 then the only way to litigate that matter is in accordance with the machinery laid down under the Act. In other words he admits that if his client could have made an application under s. 27 then he should have appealed against the order made by the Income-tax Officer under s. 27 and he cannot now agitate this question not having made an application under s. 27.

Now, the first question that we have to consider is whether the assessee could have applied under s. 27 for cancellation of the assessment made by the Income-tax Officer under s. 23(4).¹ Now, what is urged by Mr. Samarth is that this is not a case where the assessee had books of account or materials which he refused to produce. This is a case where the assessee's contention is that he does not possess the books which the Income-tax Officer suspects he does and he is being called upon to do something which it is impossible for him to do, and according to Mr. Samarth, the Income tax Officer having taken the view that the assessee is maintaining double sets of books, it would be futile for him to apply under s. 27 to convince the Income-tax Officer that his view is wrong and he should cancel the assessment made by him under s. 23(4). Now, the scheme of the Act makes it clear that whenever an order is made under s. 23(4) which is a best judgment assessment and which may be compared to an *ex-parte* judgment or order passed in a civil Court, the Legislature has made a provision for challenging that order, if we may use the expression, "the *ex-parte* order" and that provision is to be found in s. 27. We would make the machinery unworkable, if we were to take the view that there are certain cases in which the Income-tax Officer may proceed *ex-parte* and make a best judgment assessment and yet to these cases s. 27 would have no application. We can only make a distinction between a case and a case if the distinction is based on some principle. It is difficult to understand the principle for which Mr. Samarth is contending. What is the difference in principle between a case where the assessee refuses to produce books which he admits he possesses and a case where the assessee refuses to produce books which the Income-tax Officer believes he possesses and which

he contends he does not possess. In both the cases, the basis of the Income-tax Officer's order is that the conduct of the assessee is contumacious and being contumacious he proceeds to make a best judgment assessment. Therefore, in our opinion, s. 27 is wide enough to cover every kind of case where the Income-tax Officer proceeds to make a best judgment assessment by reason of the contumacious conduct of the assessee. In this very case, it is difficult to understand why it was not open to the assessee to show sufficient cause which prevented him from complying with the notice issued by the Income-tax Officer. The cause might have been the same which he had shown before the Income-tax Officer or he might have had a better cause or he might have had more materials to satisfy the Income-tax Officer. Even if the cause might be the same, it is difficult to take the view that it is inconceivable that the Income-tax Officer would have ever changed his mind or would admit that he had made a mistake. Therefore, there is no reason to assume that in the case which we are dealing with and which is a rather extreme case where the Income-tax Officer has taken the view that the assessee maintains a double set of books and calls upon him to produce the other set and the assessee contends that he does not maintain a double set of books, that s. 27 has no application and that in such a case it is not possible for the assessee to show sufficient cause why he did not comply with the notice issued by the Income-tax Officer. Therefore, if the case falls under s. 27—and we hold that it does—there is no question that a specific right of appeal has been given to the assessee under s. 30 against the order passed under s. 27 and if he has not availed himself of that right, he is now precluded from agitating the same question. To put it in a different language, the order made by the Income-tax Officer that under the circumstances he is entitled to make a best judgment assessment has become final and conclusive. To that extent when the assessee appeals against an assessment under s. 23(4) he cannot challenge that order. Apart from that, it is open to him to challenge the actual assessment made, and in challenging that it is open to him to satisfy the Appellate Assistant Commissioner that the assessment made by the Income-tax Officer was not a proper assessment.

The larger question as to whether it is open to an assessee to raise a question of the validity of the assessment even though he could have applied under s. 27 has been argued at some length; our attention has been drawn to various authorities, and we might now proceed to consider it. Now, in this connection we might look at what the legislative provision was with regard to appeal prior to the Act of 1939. Under the old Act, while s. 30 gave a right of appeal against the assessment under s. 23 or 27, the proviso limited the right of appeal by providing that no appeal shall lie in respect of assessment made under s. 23(4) or under that sub-section read with s. 27. Therefore, against a best judgment assessment, the assessee had no right of appeal at all. He could not appeal against the quantum of the assessable income determined by the Income-tax Officer. His only right was to appeal against an order made under s. 27, and if he did not do so, the assessment under s. 23(4) not only became conclusive with regard to the matters covered by s. 27 but it also became conclusive with regard to the quantum. Now in the Act of 1939 the proviso was deleted with the result that an important additional right was given to the assessee, namely, to challenge the best judgment assessment with regard to the quantum. But the provision with regard to challenging the assessment with regard to its validity continued to be the same. In other words, an appeal could only lie with regard to the validity of the assessment provided an application has been made under s. 27 and an application was refused by the Income-tax Officer.

Now, in this connection, a certain provision of the Act may be looked at which is with regard to the cancellation of a certificate of registration. Now, s. 23(4) while providing for the best judgment assessment also empowers the Income-tax Officer when the assessee is a firm to refuse to register it or to cancel its registration if it is already registered. Now, it is clear that this

provision is penal in character. The result of the contumacy of the assessee is not only that he is liable to be assessed as it were *ex-parte*, but if the assessee happens to be a firm, the result of its contumacy may be that the registration of the firm may be cancelled. Now, when we turn to s. 27, no provision is made under s. 27 for applying to set aside cancellation of the registration, as there is a provision for setting aside the best judgment assessment. The only right with regard to the cancellation of registration is a substantive right of appeal given under s. 30; so that when a registration is cancelled under s. 23(4) the only right that the assessee has is to appeal against that order under s. 30. When he does so, undoubtedly it would be open to him to satisfy the appellate authority that the penalty was erroneously imposed upon him and in doing so it would be equally open to him to satisfy the appellate authority that he was not contumacious. Mr. Samarth says that it is rather illogical that if he can do so when he appeals against the cancellation of registration, he should be prevented from urging the same point when he is appealing against the best judgment assessment under s. 23(4). The answer is obvious. Whereas the Act has set up a machinery under s. 27 for challenging the decision of the Income-tax Officer to assess according to his best judgment assessment under s. 23(4), the Legislature has not set up any such machinery with regard to the challenging of the order cancelling the registration and, therefore, when the Legislature gives a right of appeal against that order, we must see to it that that right is an effective right and that right can only be effective provided the assessee is entitled to urge in that appeal every circumstance which will go to satisfy the appellate Authority that the order should not have been made by the Income-tax Officer and that he was not contumacious in failing to comply with the notice issued by the Income-tax Officer. Therefore, the whole scheme is a harmonious one and constitutes a coherent whole. When a case falls under s. 27, then any grievance that the assessee has against the Income-tax Officer for not making the requisite order must be litigated in an appeal against an order under s. 27. When s. 27 has no application, then any question that might arise in appeal which has a bearing with regard to an order made by the Income-tax Officer under s. 23(4) can be litigated in an appeal under s. 30. But as we have already pointed out, apart from cases of cancellation of registration, which, in terms, do not fall under s. 27 every other case of contumacious refusal of an assessee of complying with any notice issued by the Income tax Officer must necessarily fall under s. 27 and an order made by the Income-tax Officer that he would proceed to assess under s. 23(4) can only be challenged under s. 27.

In the light of this, let us turn to the authorities which were referred to at the bar. The decision, which is very strongly relied upon by Mr. Samarth is a recent judgment of the Madhya Pradesh High Court and that is reported in *Saganchand Kanhaiyalal Bathi v. Commr. of Inc.-Tax*.¹ Now, we agree that this is a case which on facts is almost identical with the case that we have before us. That was also a case where the assessee contended that no separate books were maintained at a particular branch where the business was carried on and the Income-tax Officer took the view that the books had been suppressed and the Income-tax Officer proceeded to assess the assessee under s. 23(4) as he failed to produce these books, which, according to the Income-tax Officer he had suppressed. The assessee appealed against the order of the Income-tax Officer under s. 30, and the Madhya Pradesh High Court held that in that appeal the question whether the Income-tax Officer was justified in holding that the books of account were suppressed was implicit and it was incumbent on the Appellate Assistant Commissioner to decide whether the contention of the assessee that the books of account did not exist was correct. Now, with great respect, we are unable to agree with the view of the Madhya Pradesh High Court that the question whether the assessee was justified in not producing the books which were held to be suppressed was a question which did not fall

within the ambit of s. 27. The learned Chief Justice at p. 154 points out the cases to which s. 27 applies, and the last case which is there enumerated is "where he was prevented by sufficient cause from complying with the terms of the notice". The learned Chief Justice goes on (p. 154):

"The section does not contemplate a situation in which the assessee says that no books of account were maintained separately at a branch office and the Income-tax Officer holds on evidence before him or otherwise, that such books of account must have been maintained. Where such a finding is given by the Income-tax Officer, the words of s. 27 are inapposite, and no application can really be made for a *de novo* assessment."

With very great respect, it is difficult to understand why the expression "prevented by sufficient cause" was inapposite or was not wide enough to cover a case where the assessee wants to satisfy the Income-tax Officer that he could not produce the books because not that he had suppressed them but in fact they did not exist. This decision is confined to a case where, according to the Madhya Pradesh High Court, a case does not fall under s. 27, and as we have already pointed out earlier, there would be considerable force in the contention of Mr. Samarth if we were to accept his submission that the present case following the view of the Madhya Pradesh High Court does not fall under s. 27. We are always reluctant to differ from an Indian High Court when it considers an all India statute. But in this case, no authority was cited before the Madhya Pradesh High Court and the earlier decisions of the Calcutta and the Allahabad High Courts were not referred to at all. We are sure that if the attention of the learned Judges had been drawn to these decisions, they would have come to the same conclusion which we have come to.

The next case to which reference may be made is the judgment of the Calcutta High Court reported in *Naba Kumar Singh Dudhuria v. Commr. of Inc.-Tax*², and the Calcutta High Court took the view that the right of appeal under s. 30 should be limited as regards s. 23 and s. 27 to the quantum of assessment of tax. Section 30 does not entitle the assessee to challenge the assessment under s. 23(4) if he has not taken any steps under s. 27 to cancel the order. In our opinion, with respect, this correctly represents the law on the subject.

To the same effect are the two judgments of the Allahabad High Court: *Commr. of Inc.-Tax v. Shri Yodh Raj Bhalla*³ and *Sir Padampat Singhania v. Commr. of Inc.-Tax*⁴. Now, Mr. Samarth has made an attempt to distinguish these cases and what he contends is that in the case before the Calcutta High Court the facts were that a Hindu undivided family was served with a notice for submitting a return. The return was made by a particular person and that return was challenged as not being by an authorised person and the view taken by the Income-tax Officer was that there had been no proper return and therefore he proceeded to assess under s. 23(4). In *Commr. of Inc.-Tax v. Shri Yodh Raj Bhalla*, it is pointed out that it was a case of non-production of existing books. Similar is the case in *Sir Padampat Singhania v. Commr. of Inc.-Tax*, and what Mr. Samarth says is that in none of these three cases they had a case similar to the one before us where the ground of proceeding under s. 23(4) was not a non-production of existing books but of books having been suppressed. As we have already pointed, we see no distinction in principle between the facts in the three cases to which reference has been made and the facts in the case before us. All these are cases which fall under s. 27, and if they do fall under s. 27, then all the three authorities have laid down that an appeal against the assessment under s. 23(4) must be restricted to the quantum.

The result, therefore, is that we must uphold the view of the Tribunal, although, with respect, we feel that the controversy between the parties has not been properly brought out in the questions as framed by the Tribunal. We

² (1944) 12 I. T. R. 327.

³ (1953) 23 I. T. R. 371.

⁴ (1953) 24 I. T. R. 141.

will, therefore, reframe the question and divide it into two parts. The first question will be:

(1) Whether in the circumstances of the case the assessee could have made an application under s. 27?

To that our answer will be in the affirmative.

(2) If the assessee could have made an application under s. 27, whether it was open to him to challenge the validity of the assessment under s. 23(4) in an appeal under s. 30?

And our answer to that question will be in the negative.

The assessee must pay the costs.

The Notice of Motion is dismissed with costs.

Solicitor for the appellant: *N. H. Helekar.*

Solicitor for the respondent: *A. S. Parikh.*

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice S. T. Desai.
NARANDAS MATHURADAS & CO., BOMBAY v. THE COMMISSIONER OF INCOME-TAX, BOMBAY SOUTH AND CENTRAL, BOMBAY.*

Indian Income-tax Act (XI of 1922), Sec. 10—Assessee in course of their business submitting tender to supply certain commodities—Assessee under terms of tender depositing certain amount as security for carrying out contract—Forfeiture of amount deposited on failure of assessee to carry out contract—Whether assessee can claim deduction of amount forfeited as trading loss.

The assessee firm, which carried on business in several commodities, in the course of their business submitted a tender to a railway company and undertook to supply certain commodities to the company. In accordance with the terms of the tender the assessee deposited a certain amount as a security for properly carrying out the contract. The assessee failed to carry out the contract with the result that the company forfeited the amount which was deposited with it in respect of the tender. On the question whether in computing the business profits of the assessee under s. 10 of the Indian Income-tax Act, 1922, the assessee was entitled to claim deduction of the amount forfeited as a trading loss:—

Held, that as the making of the deposit was incidental to the business which the assessee was carrying on, the deposit could be looked upon as a business expenditure and as it was forfeited it was a business loss in respect of which the assessee could claim deduction.

Lord's Dairy Farm, Ltd. v. Com., I. T.¹, Tata Hydro-Electric Agencies, Ltd., Bombay v. Commissioner of Income-tax, Bombay² and Commissioner of Income-tax, Lucknow v. Motiram Nandaram,³ referred to.

MESSES. NARANDAS MATHURADAS & Co. (assessee), which carried on business in several commodities, submitted tenders to the former B.B. & C.I. Railway and undertook to supply certain commodities. In accordance with the terms of the tenders, the assessee deposited certain amounts as security for properly carrying out the contracts. The assessee could not carry out the contract with the result that an amount of Rs. 4,419 deposited in respect of the contract was forfeited. The assessee claimed deduction of this amount in computing his business profits as a trading loss but the Income-tax Officer disallowed it on the ground that the loss was of a capital nature. The Appellate Assistant Commissioner and the Appellate Tribunal rejected the assessee's contention.

The following question of law was referred to the High Court:—

"Whether in computing the business profits under section 10, the assessee is entitled to claim deduction of Rs. 4,419, that being loss that occurred on account of forfeiture of the security deposit?"

The reference was heard.

*Decided, September 24, 1958. Income-tax Reference No. 2 of 1958.

¹ (1955) 57 Bom. L. R. 448.

² (1937) 39 Bom. L. R. 775, F.C.

³ (1939) 42 Bom. L. R. 223, F.C.

H. G. Advani, with P. Ramaswamy, for the applicant.
G. N. Joshi, for the respondent.

CHAGLA C.J. The question raised on this reference is the difficult and highly debatable one of whether a particular expenditure constitutes a revenue or a capital expenditure. The facts are very few. The assessee firm carries on business in several commodities and in the course of their business they submitted tenders to the B.B. & C.I. Railway and undertook to supply certain commodities. In accordance with the term of the tender it had to deposit a certain amount as security for properly carrying out the contract. In the particular case with which we are concerned, the assessee could not carry out the contract, with the result that the amount of Rs. 4,419 deposited in respect of that particular tender was forfeited, and the assessee claimed this as a trading loss. The Tribunal has taken the view that this was a capital loss and, therefore, no deduction was permissible. We have not the advantage of any reason given by the Tribunal as to why it has come to this conclusion.

Now, it has often been said that the line to be drawn between a revenue and a capital expenditure is a very thin line and it is always difficult to decide on which side of the line a particular case falls. But we have laid down a principle in *Lord's Dairy Farm, Ltd. v. Commr., I.T.*¹ which we think may be safely applied to the facts of this case, and this is what we say: (p. 446):

"...As has been often pointed out, the object of s. 10 is to ascertain the true profits and gains of an assessee. The profits must be ascertained from a commercial point of view. Sub-section (2) of s. 10 deals with certain specific cases of permissible deductions. But even apart from these permissible deductions, if there is any loss which from the commercial point of view can be considered to be a trading loss, then that loss must be deducted before the true profits can be ascertained."

Therefore, we must approach this question not from any technical point of view, but from the broad commercial aspect of the matter, and what we have really to decide is whether in arriving at the profits and gains of a business carried on by the assessee it would be permissible to him to deduct this particular loss in order to arrive at the true profits of the business. It should be borne in mind that this expenditure is not claimed as any specific allowance falling under sub-s. (2) of s. 10. The contention of the assessee is that this is a trading loss and the true profits of his business which are subject to tax cannot be ascertained unless this deduction is permitted to him.

The argument of Mr. Joshi is that this deposit was made by the assessee not for the purpose of earning profits but for the purpose of obtaining a business which would make it possible to earn profits. In other words, his contention is that the payment of this deposit is antecedent to and *de hors* the business which the assessee carried on and which yielded profits to him. Apart from authorities to which we shall presently turn, the contention does not seem to be tenable. This is not a case where the assessee makes this deposit in order to acquire a business, nor is this a case where an amount is deposited as a sort of a temporary investment yielding interest, the deposit being necessary in order that the assessee should be permitted to carry on a particular business. The assessee already has his business. His business is to sell various commodities and in the course of this business, not *de hors* it, he submits a tender to the railway company. It is one of the terms of the tender that he must make the deposit. Therefore, the making of the deposit is incidental to the business which he is carrying on. This is not a case where it is suggested that the assessee committed a breach of the contract fraudulently or that he deliberately failed to discharge his obligations under the contract. The failure to deliver the goods to the railway company was incidental to the business. It is something which would happen in any business and which would happen to any businessman. Therefore, looking at the matter on principle and from a

broad point of view that we have suggested, it seems to us that this is a trading loss and the assessee is entitled to deduct it from his profits in order that the assessable profits can be ascertained.

The two authorities on which Mr. Joshi relied are both decisions of the Privy Council, and as will be noticed, the facts in those two cases were entirely different. The first is *Tata Hydro-Electric Agencies, Ltd., Bombay v. Commissioner of Income-tax, Bombay*². That is the well known case and it is in the context of the facts there that the Privy Council said (p. 781):

"Their Lordships recognise, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains."

Now, in the first place, the Privy Council was not considering the case of a trading loss. The Privy Council was considering a specific allowance claimed under the provisions of s. 10(2) of the Income-tax Act, and even in deciding that the Privy Council felt difficulty, and the Privy Council points out that the payments they were considering were not made in the process of earning profits. They did not arise out of any transactions in the conduct of their business. That the assessee had to make those payments no doubt affected the ultimate yield in money to them from their business but that is not the statutory criterion. The obligation to make these payments was undertaken by the assessee in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business. Now, this according to Mr. Joshi is the criterion and the ratio. Assuming that is the criterion and the ratio, surely it is not applicable to the facts before us. How can it possibly be said in this case that this deposit was made by the assessee in order to acquire the right to conduct the business and not for the purpose of producing profits in the conduct of the business? The business was already being carried on by the assessee. This was a transaction in that business. It is in order to put through that transaction that the deposit was necessary.

The second case referred to by Mr. Joshi is *Commissioner of Income-tax, Lucknow v. Motiram Nandram*³. In that case the assessee were carrying on business of cloth, yarn and money-lending and they wanted to start a new business and for that purpose they deposited with an oil company Rs. 50,000. In consideration of that the assessee were appointed organising agents of the oil company for five years for a particular area. They were to recommend the selling agents and the sales were to be conducted by these selling agents, but the assessee were to receive certain commission on all goods sold by the selling agents within the area and also on all sales effected in the area by the company. The deposit was to yield interest at 7 per cent. Part of the deposit was repaid and then the company went into liquidation, and the assessee claimed the part of the deposit which was lost to them and that claim was rejected by the Privy Council. Now, in the first place, the Privy Council took the view that the deposit was made by the assessee for the purpose of being permitted to be engaged in a business and that must be considered to be a purpose of securing an enduring benefit of a calculating nature. Therefore, on the facts of that case where the assessee were launching upon a new business and they could only start this business by making this deposit, the Privy Council observed that by making the deposit they were getting a capital asset of an enduring nature, the capital asset being the business. Mr. Joshi says that in this case also by making the deposit the assessee is obtaining a business. But that is not correct. It is true that under the Income-tax law even a single venture may be business, but this is not a case of a single venture. As we have pointed out before, it is in the course of the business which the assessee had been carrying on that it entered into this particular transaction. So this is neither a case of acquiring a new business, nor acquiring a joint venture which may be looked upon as a capital asset of an enduring nature. Further,

² (1937) 39 Bom. L. R. 775, F.C.

³ (1939) 42 Bom. L. R. 323, F.C.

at p. 138 Sir George Rankin, who delivered the judgment of the Privy Council, points out that the deposit of Rs. 50,000 may be looked upon as a temporary investment because it yielded interest while it remained with the oil company. That feature is also absent in the case before us. Nobody can suggest that the deposit was made by the assessee as a temporary investment with the railway company. It was expressly made as an earnest; as security for carrying out the particular contract. Their Lordships also say that a deposit must be considered in relation to the particular business, and when we look upon this deposit and the relation it has to the business of the assessee, it is clear that the deposit was made not for the purpose of acquiring any capital asset of an enduring nature or acquiring a new business, but it was made solely for the purpose of earning profits in the course of the business. The Privy Council also points out that the question that should be posed is—"What is the object of the expenditure?"—and they proceed to answer that question by saying—"It must be answered from the standpoint of the assessee at the time the deposit was made." From the point of view of the assessee in this case there cannot be the slightest doubt that the deposit was looked upon as a business expenditure and if the deposit was forfeited it was a business loss.

The result is that we must answer the question submitted to us in the affirmative. The Commissioner to pay the costs.

APPELLATE CIVIL.

Before Mr. Justice Gokhale and Mr. Justice Patel.

CHANDRABHAGA SADASHIV VERALKAR v. BHIKACHAND HANSAJI.*

Arbitration Act (X of 1940), Secs. 31, 32, 33—Dispute between plaintiff and defendants relating to breach of agreement by defendants and refund of earnest money paid by plaintiff referred to arbitration—Court refusing to pass decree on award made by arbitrators on ground that award compulsorily registrable not registered—Suit filed by plaintiff against defendants to recover earnest money—Whether suit barred by virtue of award.

A dispute between the plaintiff and the defendants relating to a breach of agreement by the defendants to sell certain property to the plaintiff and the refund of earnest money to the plaintiff was referred to arbitration by the parties. When the award made by the arbitrators was sought to be filed in Court under the Arbitration Act, 1940, the Court refused to pass a decree in terms of the award on the ground, alleged by the defendants, that the award which was compulsorily registrable was not registered. The plaintiff then filed a suit against the defendants to recover the earnest money paid by him to the defendants. On the question whether the suit was barred under ss. 31, 32 and 33 of the Arbitration Act, 1940, by virtue of the award:—

Held, that as the award had no legal existence, it did not bar the plaintiff's suit which was based on his original cause of action.

*Babul S. K. Kuer v. B. N. Sinha*¹, applied.

*Nathulal v. Beharilal*², differed from.

*Laldas v. Bai Lala*³, *Bhaurao Givaji v. Radhabai*⁴, *Bhajahari Saha Banikya v. Behary Lal Barak*⁵, *Muhammed Nawaz Khan v. Alam Khan*⁶, *Nani Bala v. Ram Gopal*⁷, *Venkatasubayya v. Bapadu*⁸ and *Suryanarayana v. Venkata Reddy*⁹, referred to.

*Decided, September 8, 1953. Letters Patent Appeal No. 30 of 1953, from the orders of Mr. Justice Bavdekar in Second Appeal No. 972 of 1953, setting aside the decree passed by V. M. Solanki, Extra Assistant Judge, Thana, in Civil Appeal No. 423 of 1953, confirming the order passed by V. V. Ghotge, Joint Civil Judge, Junior Division, Thana, in Regular Civil Suit No. 122 of 1952.

1 (1952) I. L. R. 31 Pat. 886.

2 [1952] A. I. R. Nag. 65.

3 (1908) 11 Bom. L. R. 20.

4 (1909) 11 Bom. L. R. 408.

5 (1906) I. L. R. 33 Cal. 881.

6 (1891) L. R. 18 I. A. 73.

7 [1945] A. I. R. Cal. 19.

8 [1951] A. I. R. Mad. 458.

9 [1948] A. I. R. Mad. 436.

CERTAIN disputes between one Bhikachand (plaintiff) and Chandrabhaga and another (defendants), in respect of an agreement dated February 6, 1950, to purchase property, were referred to arbitrators appointed under the agreement executed by them. The arbitrators gave their award and applied to the Court for pronouncing judgment in terms of the award. The plaintiff agreed to have a decree in terms of the award but the defendants objected to the award on the ground that as the award which was compulsorily registrable was not registered, it was inadmissible in evidence. The Court upheld this objection and dismissed the application of the arbitrators.

The plaintiff filed the present suit against the defendants for return of earnest money paid by him to the defendants under the aforesaid agreement dated February 6, 1950. The trial Judge held that the suit was barred under ss. 31, 32 and 33 of the Arbitration Act, 1940. On appeal the District Judge confirmed the decree of the trial Court and dismissed the appeal. The plaintiff appealed to the High Court. The appeal was heard by Bavdekar J. who set aside the decree of the lower Court and remanded the suit to the trial Court for disposal according to law. His Lordship delivered the following judgment on January 18, 1956:—

BAVDEKAR J. This is an appeal arising from a suit filed by the appellant for recovery of money which he had paid to the defendant under an agreement of purchase dated February 6, 1950. It appears that inasmuch as it was the contention of the plaintiff that the defendant had no marketable title, he was entitled to avoid the transaction and to refund of the purchase money. The defence to the action was an award which was alleged to have been made on a reference made by the parties. It is common ground now that there was an award made; but when the award was sent to the Court in which it was to be filed, the defendant resisted, contending that the award was required to be registered and that it was not registered. The Court thereupon refused to file the award either with or without the charge owing to which it was said that the award required registration. The defendant made a separate application for setting aside the award; but the Court said that in view of its order in regard to the filing of the award, this application no longer survived. The plaintiff then filed the suit from which the present appeal arises. The defendant relied upon the award as a defence to the suit. This contention has prevailed so far, and the plaintiff has come to this Court in second appeal.

Now, an award is a defence to a suit. But it has got to be remembered that in the present case the plaintiff did seek to get a decree upon the award. He was resisted by the defendant who claimed that the plaintiff was not entitled to get a decree for money; he could not only not get a decree for money with a charge being incorporated in it, but that he was not entitled to get any decree at all. The argument which was made before the learned Judge, who was considering the question whether the award should be filed or not, was that the award not having been registered could not even be received in evidence and the order which the learned Judge thereupon made was that he would not file the award. He said, besides, that in view of this order of his, no order was necessary upon the application which was made by the defendant to set aside the award. Now, it is obvious that the result of this order is that it was held that the plaintiff was not entitled to get any decree of any kind upon the award. He could not get a decree with the charge; he could not get a decree without the charge. I cannot hold that the learned Judge held that the plaintiff could, if he liked, get a decree without the charge. If he had so held, then it is obvious that he would have had to go into the application which was made by the defendant for setting aside the award, because in case the award was set aside upon the grounds which were urged by the defendant, the plaintiff could not get any decree in terms of the award, whether with the charge or without the charge. It is obvious, therefore, that the result of what the Judge has decided is that the plaintiff's award could not be filed at all.

In that case it must be held that the Court which had got exclusive jurisdiction to decide the question of the validity and effect of the award has pronounced that the award is ineffective for obtaining a decree thereon, though not invalid on the ground of partiality in the arbitrator or such other grounds and cannot be looked into for finding out its terms. The effect of the decision is that inasmuch as the award cannot even be looked into, no decree could be given upon it. The plaintiff could not consequently recover upon that award his amount even without having recourse to the properties which were charged.

It is said, however, that in this case the learned Judge seems to have made a wrong order, and if the plaintiff was aggrieved by that order, he should have gone in appeal. Now, I fail to understand that as a matter of fact a wrong order has been made. There was an application to file the award. The difficulty with regard to the filing of it was that the award could not be looked into for finding what its terms were. I fail to understand how the learned Judge could have given a decree to the plaintiff upon the award even without the charge.

In any case, it is obvious that whatever order was passed then is binding between the plaintiff and the defendant. The defendant cannot say now that this was an award which could have been filed and upon which the plaintiff could have obtained a decree. That being so, the plaintiff was entitled to file a suit upon his original cause of action. To that suit the defendant is entitled to raise a defence that the dispute between the parties was referred to arbitration and the arbitrators have made an award. It is, however, only a valid award which is a defence to a suit. Before the awards were made compulsorily registrable when the Act of 1940 was not in force if a defence had been raised that the dispute between the parties was referred to arbitration and the arbitrators had made an award, it would have been permissible for the plaintiff to raise a contention that the award was an invalid one, and the question would have been gone into in the suit. It is not permissible for the plaintiff now to raise for the first time in such a suit a contention that an award was invalid or ineffective because under s. 31(2) all questions relating to validity, effect and existence of the award shall be decided by the Court in which the award under the agreement has been or may be filed by an order of the Court. Even if the Court in which the question of validity of an award is raised is the same Court in which the suit is filed, the procedure for raising that question is by an application under s. 33. As a matter of fact the defendant himself seems to have raised a contention that the award in this case was an invalid one by an application under s. 33, but when the Court to which the award was sent for filing decided that it could not be filed for lack of registration, it held upon that application that it was not necessary to decide the defendant's application for setting aside the award. The plaintiff does not say, however, in this case that the award was invalid, e.g. for the misconduct of the arbitrators. As a matter of fact, even if he had made a contention in this suit that the award was invalid for the very reasons for which the defendant said that it was invalid, that question could not be determined by the Court in which the suit was filed, because it could only be decided by an application under s. 33. Such an application by the plaintiff was probably out of time at the time when the suit was filed. The plaintiff's objection, however, is that the award was not registered; that it could not be looked at even for the purpose of finding out what its terms were; and he contends that such an award is not available to the defendant as a defence to the suit. Now, while conceding that the only award which can be a defence to a suit upon the original cause of action was a valid award, the defendant says that an award which has not been registered still affords him a defence to the suit. But when it is said that only a valid award can be a defence to the suit what is meant thereby is that an award which has disposed of the dispute which had been referred to the arbitrators is a defence. The Court cannot, however, in this case say whether the award which has been made has disposed of the dispute between the parties because the award is not admissible in evidence and conse-

quently it cannot be looked at for the purpose of finding out its terms, and when we cannot find out its terms it cannot be said whether the award disposed of the dispute between the parties. Similarly it cannot be said whether the award is open to the objections in s. 16(1).

It is necessary now to notice an objection which has been taken under ss. 31, 32 and 33. It is said in the first instance that to allow a plaintiff to file a suit upon the original cause of action when an award has been made even when that award has not been registered is allowing him to get over the provisions of ss. 31, 32 and 33. This objection is easy to understand when no attempt to file an award or have it set aside is made. It is conceded, that in case an award has been declared by the Court, in which it could be filed or it has been filed, to be invalid e.g. for misconduct and set aside, there is nothing which prevents the plaintiff from having his recourse to the original cause of action and filing a suit upon it. The plaintiff's case is that even when the award has not been registered and the Court has pronounced it to be inadmissible in evidence and ineffective for the purpose of getting a decree upon it, he is entitled to fall back upon the original cause of action and sue. That contention may be good or bad. But there is nothing in s. 31, 32 or 33 which prevents a suit upon the original cause of action. The suit which is barred by s. 32 is a suit which seeks to obtain a decision upon the existence, effect or validity of an award, and when the plaintiff sues upon his original cause of action he does not sue for obtaining a decision upon the existence, effect or validity of the award. In effect he is ignoring the award. To such a suit the defendant is entitled to put forward as his defence the award, and if for any reason it is contended on behalf of the plaintiff that that award is an invalid one, the defendant can say that that is not a question which can be agitated in the plaintiff's suit, for the reason that such a question can only be decided upon an application under s. 33, and if without there having been any proceedings with regard to the award in the Court in which the award has been or may be filed, the plaintiff comes to the Court, the objection must necessarily prevail. But in this case the award apparently did go to the Court for the purpose of filing. Objection to the validity of the award was taken though it was taken by the defendant. The Court did not decide upon the validity of that objection, because it held that it was unnecessary to decide whether the award was valid or invalid for the reason that the award was not registered and it could not be even looked at for the purpose of finding out what its terms were and it could not be filed. It seems to me that when the Court in which the award was filed has as a matter of fact decided that the award required registration and cannot be looked at for the purpose of finding out its terms it has determined the effect of the award to this extent that the Court of law cannot find out its terms in the absence of registration. It is not in terms stated that the award is not effective even as a defence to any suit which the plaintiff might have filed on it but the question is whether it can be said that the plaintiff's suit does not lie because the plaintiff has not obtained a decision from the Court in which the award was filed and could be filed that the award is ineffective even as a defence to the plaintiff's suit. It appears to me that once the Court to which the award was sent for filing has held that the award not being registered it could not be looked at for the purpose of finding out its terms, it has in effect decided that the award cannot be used as a defence to a suit because no one can say that the award is a defence to a suit unless and until one looks at its terms and finds out that the dispute has been disposed of. The mere fact that the arbitrators purport to make an award is not sufficient to say that they have disposed of the dispute between the parties. It seems to me, therefore, as the Calcutta High Court observed in *Nani Bala v. Ram Gopal*¹ that the award does not exist. It has actual but not legal existence. It would be an unnecessary formality to ask the plaintiff to get an express decision by an application under s. 33 that the award cannot be used as a defence to a suit upon the original cause of action.

It is necessary to consider finally the argument that that would be putting a premium upon failure to get an award registered when it ought to have been registered. But it appears to me that that is not so. It may be that the plaintiff was in fault in this case because he was apparently anxious to have a decree upon it. It is also true that whoever wants to get the benefit of the award would be considered to be the person who ought to get it registered. But then just as in this case the plaintiff wanted to get a decree upon the award and therefore it can be said that he ought to have got it registered if the defendant wanted to use this award and a defence in any suit which the plaintiff might file, then it was he also who ought to have got it registered. Just as if the plaintiff who has failed to get the award registered cannot get a decree upon it, similarly the defendant who has failed to get the award registered owing to which the award cannot be looked at for the purpose of even finding out what its terms are can sue it as a defence to a suit upon the original cause of action.

The appeal must, therefore, be allowed and the suit remanded to the trial Court for further disposal in accordance with the law. The respondent will pay the appellant costs of the first appeal and second appeal.

The defendants appealed under the Letters Patent.

V. B. Raje, for the appellant.

R. B. Kotwal, for the respondent.

PATEL J. The plaintiff-appellant filed the suit for refund of earnest paid under an agreement to purchase to the defendant on February 6, 1950. According to him the defendant has committed the breach. Previous to this there was an arbitration between the parties, but the application made by the arbitrator for a decree in terms of the award was dismissed by the Court as the award was not registered. The defendants raised various contentions to the claim by their written statement one amongst them being a legal one, that the suit was not maintainable in view of ss. 31, 32 and 33 of the Arbitration Act, 1940, as there was a previous arbitration.

The trial Judge raised a preliminary issue and held that the suit was barred and dismissed the same with costs. Plaintiff's appeal to the District Court failed.

The plaintiff thereupon came to the High Court in Second Appeal which was heard by Mr. Justice Baydekar. He did not accept the views of the Courts below. He held agreeing with the Calcutta High Court that the award had a factual existence but no legal existence. He also held that it is only a valid award which is a defence to a suit. In the result he set aside the decisions of the Courts below and remanded the suit for disposal in accordance with law. He, however, gave leave under cl. 15 of the Letters Patent and hence this appeal.

The question, therefore, which falls to be decided is whether the award between the parties had the result of preventing the plaintiff's suit on his original cause of action.

The question must necessarily be decided by reference to the Arbitration Act of 1940. Section 9 of the Civil Procedure Code provides for the jurisdiction of the civil Courts to entertain all suits of a civil nature. A party, therefore, has the right of enforcing his civil rights and remedies by a suit unless it has been taken away by statute either expressly or by necessary implication as provided by s. 9. Mr. Raje for the appellant, insists that that remedy of the plaintiff is taken away by ss. 31, 32 and 33 of the Indian Arbitration Act, and it is equally insisted by Mr. Kotwal for the other side that these sections have not either by express language or by necessary implication taken away his right to file a suit on the original cause of action.

Section 14 of the Arbitration Act requires the arbitrators to make and sign the award and give notice of the fact in writing to the parties. Sub-section (2) provides that at the request of a party the arbitrator shall cause the award to be filed in Court and when this is done the Court shall give notice of its filing to the

parties. Sections 15 and 16 empower the Court to modify the award or to remit it to the arbitrators for further consideration. Section 17 states that when the Court sees no cause to remit the award for reconsideration, it shall, after the time for making an application to set it aside has expired or when such an application has been made and refused, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow. It is further provided that there should be no appeal from that decree except on limited grounds which are not relevant for the purpose. It appears that there does not appear any option in the Court to do anything but to pass a decree in terms of the award, if it sees no reason to remit the award as shown by the words, "shall pass" in s. 17. Section 33 provides that any party to an arbitration agreement or award desiring to challenge the existence or validity of the arbitration agreement or award or to have effect of either determined shall apply to the Court and the Court shall decide the question on affidavits, provided that where the Court deems it just and expedient, it may set down the application for hearing on evidence also and may pass such orders as it may do in a suit. It appears that one of the purposes of this section is to enable the parties to file their objections to the award on a notice under s. 14. It, however, appears from the provisions of s. 17 of the Arbitration Act, that it was intended that the Court must carry to its conclusion any proceedings commenced in Court and from the provisions of ss. 31, 32 and 33 that it is the final decree of the Court which can be executed. Section 31 provides an exclusive jurisdiction in the Court for the purpose of deciding any question with regard to the validity, effect or existence of an award or an arbitration agreement. Section 33 in consonance with the exclusive jurisdiction conferred under s. 31 requires that a party desiring to challenge either the existence or validity of an arbitration agreement or award or to have the effect of either determined shall apply to that Court and the Court shall decide that question. Section 32 is as follows:—

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

As natural corollary and in consonance with the intention of the Act, it provides that no suit should lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award or for the other purposes mentioned there. The Act of 1940, as the preamble shows, was enacted to consolidate and amend the law relating to arbitration in India; and the scheme of the Act appears to be to bring all arbitrations under the control of the Court and treat them as effective only if a decree were obtained on the award in accordance with the Act and to prevent the parties from agitating any question relating to existence, validity, or effect of an arbitration agreement or award in any manner other than that provided by the Act. These sections do not by express language or by implication provide that a suit on the original cause of action after an abortive or incomplete arbitration would not lie.

Mr. Rege contends that ss. 31, 32 and 33 exclude the right of the plaintiff to file the suit on the original cause of action. As stated before the sections themselves do not contain any prohibition nor do the words used necessarily imply such a prohibition. The award cannot be regarded as a judgment as that stage was not reached. After it becomes a judgment in accordance with the Act the provisions of s. 11, Civil Procedure Code, would apply and a suit on the original cause of action barred. It is, therefore, not possible to accept Mr. Rege's contention that the suit of the plaintiff is barred by anything to be found within the terms of ss. 31, 32 and 33.

Mr. Rege has relied on the case of *Laldas v. Bai Lala*¹ and *Bhaurao Jivaji v. Radhabai*². The decisions in these two cases are to the effect that an award is as much binding as a judgment and is indistinguishable from a judgment.

¹ (1908) 11 Bom. L. R. 20.

² (1909) 11 Bom. L. R. 406.

However, as explained in the case of *Bhajakari Saha Banikya v. Behary Lal Basak*³, it is only a valid award that could operate to extinguish the original cause of action. In this case this is what Mr. Justice Mookerjee has observed (p. 888):

"...To put the matter in another way, as an ordinary rule, a valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand; see *Curley v. Dean*⁴;...It is a mistake, therefore, to contend that, if an award has been validly made, as it has been found to have been made in this case, it does not become operative until it has been enforced by suit or application; in reality, it possesses all the elements of vitality even though it has not been formally enforced, and it may be relied upon in a litigation between the parties relating to the same subject-matter. Obviously, if such reliance is placed upon the award, it is open to the party against whom it is sought to be used, to question its validity: but if it is established to be a valid award, it is binding upon the parties as embodying an adjudication of their rights".

It would also appear on a reference to the case of *Muhammed Nawaz Khan v. Alam Khan*,⁵ that if an award is a legally valid award then it would be binding between the parties. Unless therefore the award is one which can be operative, it will not merge in itself the original cause of action and since after the enactment of the Arbitration Act of 1940 an award is ineffective unless made a rule of the Court, even on general principles it is difficult to say that the original cause of action would merge in the award which has no vitality of its own. Indeed the Act of 1940 being an Act to consolidate and amend the law relating to arbitrations in India, it is doubtful if recourse to the previous law and general principles is permissible. Even assuming however it is open to consider the general principles, for the reasons mentioned before, even according to general principles, unless the award is legally effective, it would not merge in itself the original cause of action, the determination of which question in any suit is by express terms of s. 32 of the Act prohibited. This is the view taken in the case of *Babui S. K. Kuer v. B. N. Sinha*⁶ with which we respectfully agree.

Mr. Rege has relied upon the decision of the Nagpur High Court in *Nathulal v. Beharilal*⁷. In that case the dispute between the plaintiff and the defendant related to damages for breach of contract in respect of purchases of cotton seed for non-delivery. The matter between the parties was referred to the Nagpur Chamber of Commerce Ltd. The defendants challenged the jurisdiction of the arbitrators. The arbitrators overruled that contention and awarded compensation to the plaintiffs. The plaintiffs' application to have a decree in terms of the award was dismissed by the Court as it was filed after the period of limitation was over. The plaintiffs, thereafter, brought a suit for damages for the breach of the contract. In the plaint the plaintiffs recited the history of the infructuous arbitration. Their Lordships referred to the case of *Manick Lal v. Shiva Jute Baling*⁸ and the case of *Chaturbhuj Mohanlal v. Bhicam Ch.*⁹ which related to the opening words of s. 33, "any party to an arbitration agreement" and then they say that (p. 68):

"while it is not necessary to consider the full effect of the second ruling quoted above, it is obvious that the plaintiff (respondent) cannot escape being called 'a party to the arbitration agreement', whatever may be said of the defendant."

They further say:

"...some difference at least should be made between a plaintiff who, having pushed the arbitration proceedings to an award, seeks to get rid of the award by ignoring it, and a defendant who has not taken any part in the proceedings at all and has objected to the jurisdiction and legality thereof. It appears to us that a plaintiff, in the given

3 (1906) I. L. R. 33 Cal. 881.

4 (1887) 4 Com. 259.

5 (1891) L. R. 18 I. A. 73.

6 (1952) I. L. R. 31 Pat. 886.

7 [1952] A. I. R. Nag. 65.

8 (1947) 52 C.W.N. 389.

9 (1948) 53 C.W.N. 410.

circumstances is especially hit by the bar contained in ss. 31 to 33 of the Arbitration Act, 1940." (p. 87)

What is barred is a suit in relation to the arbitration agreement and/or the award. It has no reference whatsoever to what was the subject-matter of the award with regard to which there is no prohibition either express or implied and it would not make any difference whether or not the plaintiff mentioned in his plaint that there was an arbitration agreement and an award, which was ineffective. It does not take into account the express provisions of ss. 31 and 32 which prohibit the determination of the existence, validity or effect of an award otherwise than under the Act. If the award is unfavourable to the plaintiff or actor before the arbitrator, the defendant resistor then has equal right to have it made a rule of the Court. We, therefore, are with respect unable to agree with the conclusion.

The conclusion that a suit on the original cause of action is not barred by the provisions of ss. 31, 32 and 33 appears to be one justifiable on principle and is supported by authority. We hold, therefore, accordingly. The appeal must, therefore, fail and must be dismissed with costs.

GOKHALE J. The only point which falls for consideration in this appeal is whether the plaintiff's suit is barred under the provisions of the Arbitration Act by virtue of the award which the Court under the Arbitration Act refused to file on the ground that it was inadmissible in evidence being compulsorily registrable. Mr. Justice Bavdekar was of the view that the award had no legal existence and therefore could not come in the way of the plaintiff's suit.

Now, at one stage of his arguments, Mr. Rege seemed to contend that the view of the Court in the arbitration proceedings that the award being compulsorily registrable could not be looked into at all was wrong in view of s. 49 of the Registration Act. But he had to concede that the objection as to registration was taken by his own client and the finding of the Court would be binding on both the parties. He, however, contends that an award is not a mere agreement but operates as a judgment and is binding on the parties in matters which it professes to decide, and once an award is passed the rights of the parties become merged in that award, whether the award has merged into a decree or not. In this connection, he relied on two rulings of this Court in *Laldas v. Bai Lala*¹ and *Bhaurao Jivaji v. Radhabhai*². We are concerned in this case with an award passed after the Arbitration Act, 1940, came into force. Prior to the passing of this Act, the view was undoubtedly held that an award did not lose its effectiveness merely because it was not filed or it was not made the subject of any proceedings under the Arbitration Act. A valid award was then an operative award by itself and a suit filed to enforce such an award was competent. But it was only a valid award that could operate to merge and extinguish all claims which were involved in the submission to arbitration and then it could furnish the only basis by which the rights of the parties could be determined and it was a valid award that could constitute a bar to any action on the original demand. See *Bhajahari Saha Banikya v. Bhary Lal Basak*.³ After the coming into force of the Arbitration Act of 1940, however, it is well settled that a suit to enforce an award is not maintainable. See *Bai Narbadabai v. Natvarlal Chunilal*.⁴ It was held in this case that the expression "effect of the award" in s. 32 of the Indian Arbitration Act, 1940, was wide enough to cover a suit to enforce an award. But in the present case, the plaintiff is not asking the Court to give him relief on the basis of the award that was passed by the arbitrators. On the defendants' objection the Court refused to file the award on the ground that it was inadmissible in evidence for want of registration. In my opinion, therefore, plaintiff's suit cannot now be defeated by the defendants on the ground that it would be barred by virtue of the provisions of ss. 31, 32 and 33 of the Arbitra-

¹ (1908) 11 Bom. L. R. 20.

² (1909) 11 Bom. L. R. 406.

³ (1906) L. L. R. 33 Cal. 881.

⁴ (1953) 53 Bom. L. R. 408.

tion Act. In *Nani Bala v. Ram Gopal*,⁵ it was held by the Calcutta High Court that want of registration is a defect *de hors* the award and in case of such an award the proper order which the Court should pass on an application for filing it is one of dismissal as there would be no legal evidence to show what the award was. That was what precisely the Court did in connection with the present award when it was sought to be filed, and once it is held that the award does not legally exist it would be difficult to hold that such an award would be a bar to the maintainability of plaintiff's suit. In *Venkatasubayya v. Bapadu*,⁶ a single Judge of the Madras High Court held that where the defendant, who is himself relying upon the award, does not take steps to have it filed and dealt with under the appropriate provisions of the Arbitration Act, nor is the award fully performed by him, it is not competent to him to rely upon it in answer to an action. This case clearly goes against Mr. Rege's contention. But Mr. Rege drew our attention to another Division Bench ruling of the Madras High Court in *Suryanarayana v. Venkata Reddy*,⁷ where it was held that a party to an award was not precluded by the provisions of the Arbitration Act from putting forward an award which was fully performed by him, but which was not filed under s. 14 and according to which a judgment was not pronounced or a decree given under s. 17, in answer to the other party's claim which was the subject-matter of the reference and the award. But this case was rightly distinguished in the later case in *Venkatasubayya v. Bapadu*, referred to above, on the ground that in the earlier Madras case the defendant had actually performed that part of the award which had to be performed by him. In the present case, the defendant has not only failed to act up to the award but actually resisted the filing of it, by contending that it could not be looked into for want of registration. In *Babui S. K. Kuer v. B. N. Sinha*⁸ an award was made by an arbitrator appointed under a private reference relating to the partition of moveable and immoveable property held in common by the family of the plaintiffs and the family of the defendants. The award was duly registered, but no application was made by either party to file the award under s. 14, sub-s. (1), of the Arbitration Act, 1940. Subsequently, as the defendants refused to comply with the directions of the arbitrator, the plaintiffs filed a suit for partition on the original title and it was held that the suit was not barred by reason of the award made by the arbitrator. In my opinion, the principle of this case would be applicable to the case before us.

The result is that the view of Mr. Justice Baydekar that the award set up by the defendant as a bar to plaintiff's suit had no legal existence and, therefore, could not make the plaintiff's suit incompetent appears to me to be correct. I, therefore, agree that the present appeal should be dismissed with costs.

Per curiam: As the suit is one of 1952, we direct that the hearing of the suit be expedited as far as possible. Papers to be sent down immediately.

Order accordingly.

⁵ [1945] A. I. R. Cal. 19.
⁶ [1951] A. I. R. Mad. 458.

⁷ [1948] A. I. R. Mad. 430.
⁸ [1952] L. L. R. 31 Pat. 896.

INCOME-TAX REFERENCE.

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

THE EXECUTORS AND TRUSTEES OF SIR COWASJI JEHangIR,
1ST BART., BOMBAY

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY.*

Indian Income-tax Act (XI of 1922), Secs. 23A, 17(6)(7), 12B—Order under s. 23A(1) made on company and undistributed portion of assessable income determined—Total income of company as determined including a sum directly taken to general reserve by company—Sum so taken taxed as capital gains in hands of company—Proportionate share in undistributed income of company included in total income of assesses-shareholders of company—Whether portion of s. 23A dividend attributable to capital gains of company should be taxed as capital gains of assesses under s. 17(6).

The Income-tax Officer made an order in the case of a company under s. 23A(1) of the Indian Income-tax Act, 1922 (as it stood before its amendment in 1955). In making the order of assessment on the company the Income-tax Officer determined the total income of the company and determined the undistributed portion of the assessable income of the company for the relevant year. The total income of the company as determined included a certain amount which the company had taken directly to the general reserve fund and not to the profit and loss account and no part of it was distributed as dividend. This sum was brought to tax in the hands of the company as "capital gains" under s. 12B of the Act. The Income-tax Officer in assessing the assessee, who was a shareholder of the company, for the relevant year, included in his total income his proportionate share in the amount of the undistributed portion of the income of the company. The assessee contended that the portion of s. 23A dividend attributable to capital gains in the hands of the company should be taxed in his hands also at the rate appropriate to "capital gains" as indicated in s. 17(6) of the Act:—

Held, that an equation could not be established between the capital gains of the company and the dividend which the assessee was deemed to have received by operation of s. 23A of the Act, and

that by reason of the legal fiction contained in s. 23A, the proportionate undistributed income of the company had become the dividend income of the assessee and was liable to be taxed as such.

*East End Dwellings Co. Ltd. v. Finsbury Borough Council*¹ and *Venkatachalam v. Bombay Dyeing and Mfg. Co., Ltd.*², referred to.

AN order under s. 23A(1) of the Indian Income-tax Act, 1922, was made by the Income-tax Officer in the case of Messrs. Cawasji Jehangir & Co. Ltd. in respect of its income, profits and gains of the "previous year" 1946. In making that order the Income-tax Officer determined the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof.

	Ra.
Total income finally determined	20,83,016
Less: Tax payable	8,03,115
	12,59,901
Less: Dividend declared by the Company	4,34,768
	8,25,133

The aforesaid total income included Ra. 7,86,900 which amount was taken by the company directly to the General Reserves and not to the profit and loss

*Decided, September 30, 1958. Income-tax
Reference No. 8 of 1958.

1 [1952] A. C. 109.

2 (1958) 34 I. T. R. 143.

account and no part thereof was distributed as dividend. This amount was brought to tax in the hands of the company under s. 12B of the Act as "capital gains."

In the assessments made on six shareholders of the company (assesseees), for the assessment year 1948-49, the Income-tax Officer included in the total income of each of the shareholders a proportional share of Rs. 8,25,133. After grossing up the proportionate share under s. 16(2), the Income-tax Officer computed the total income of each of the assesseees by including a sum of Rs. 6,31,527 as s. 23A dividend in the case of one of the assesseees and a sum of Rs. 1,26,805 in the case of each of the five remaining assesseees. The assesseees contended that the portion of s. 23A dividend attributable to capital gains in the hands of the company should be taxed in the hands of the assesseees at the rate appropriate to "capital gains" under s. 17(6). On appeal the Tribunal held that the s. 23A dividend included in the total income of the assesseees could not be dissected for the purpose of determining income-tax and super-tax payable thereon by the assesseees.

The following question of law was referred to the High Court:—

"Whether the section 23A dividend of Rs. 6,31,527 can be dissected into two parts in the ratio of Rs. 7,86,900: Rs. 20,63,016 for the purpose of determining the amount of income-tax and super-tax payable by the assessee-shareholder on his total income and if so, whether that smaller portion of Rs. 6,31,527 is liable to be taxed at the rates applicable to 'Capital gains' as laid down in Section 17(6) of the Income-tax Act, 1922?"

The reference was heard.

N. A. Palkhivala, with *Sir Jamshedji Kanga* and *E. J. Kolah*, for the assesseees.

G. N. Joshi, with *E. J. Joshi*, for the Commissioner of Income-tax.

S. T. DESAI J. These six references arise out of assessments made on the six assesseees who are shareholders of Messrs. Cawasji Jehangir & Co. Ltd. The assessment year is 1948-49. An order was made under s. 23A(1) in the matter of M/s. Cawasji Jehangir & Co. Ltd.—whom we shall refer to as 'the company'—by the Income-tax Officer in respect of the previous year, which was 1946. The total income of the company was determined at Rs. 20,63,016. What the company had done was that out of this amount it had taken a sum of Rs. 7,86,900 directly to the General Reserves and not to the profit and loss account and no part of the same was distributed as dividend. The dividend declared amounted to Rs. 4,34,768. This was less than 60 per cent. of the assessable income of the company for that previous year as reduced by the amounts of income-tax and super-tax payable by the company in respect of the same. In making the order of assessment on the company the Income-tax Officer determined the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof. This will appear from the following figures:—

Total income finally determined	.. ..	Rs. 20,63,016
Less: Tax payable	.. ..	Rs. 8,03,115
		Rs. 12,59,901
Less: Dividend declared by the company	.. ..	Rs. 4,34,768
		Rs. 8,25,133

The sum of Rs. 7,86,900 was brought to tax in the hands of the company under s. 12B as "capital gains". Having determined the figure of Rs. 8,25,133 as pointed out by us above, the proportionate share thereof was included by the Income-tax Officer in the total income of each shareholder for the purpose of assessing his total income. Suitable grossing up was done as required by

s. 16(2). Having done that, the Income-tax Officer computed the total income of the six shareholders by including a sum of Rs. 6,31,527 (as s. 23A dividend) in the case of "the Executors and Trustees of late Sir Cawasji Jehangir, 1st Bart." and a sum of Rs. 1,26,305 in the case of each of the five other shareholders.

The contention of the assesses before the Income-tax Officer and the Appellate Assistant Commissioner was that the portion of s. 23A dividend attributable to capital gains in the hands of the company should be taxed in the hands of the shareholders also at the rate appropriate to "capital gains" as indicated in s. 17(6) of the Act. The Income-tax Officer as well as the Appellate Assistant Commissioner negatived that contention. The matter was carried in appeal by the assesses to the Tribunal and the Tribunal also dismissed that contention. The view taken by the Tribunal was that s. 23A dividend that is included in the total income of an assessee shareholder cannot be dissected as urged on behalf of the assesses for the purpose of determining the income-tax and super-tax payable by them on the "deemed dividend income". The assesses have now come before us on these References.

The question which we are called upon to determine is:

"Whether the s. 23A dividend of Rs. 6,31,527 can be dissected into two parts in the ratio of Rs. 7,86,900: Rs. 20,63,016 for the purpose of determining the amount of income-tax and super-tax payable by the assessee-shareholder on his total income and if so, whether that smaller portion of Rs. 6,31,527 is liable to be taxed at the rates applicable to "capital gains" as laid down in s. 17(6) of the Income-tax Act, 1922?"

We may state that the same question of law arises in the case of all the shareholders, the only difference being that in the case of one shareholder the amount is Rs. 6,31,527 and in the case of others Rs. 1,26,305 each.

Two contentions have been pressed before us by Mr. Palkhivala, learned counsel for the assesses. The first contention is that the actual distribution of dividend by the company out of the capital gains would be capital gains in the hands of the shareholders. We shall presently examine this argument. It will suffice here to observe that the argument in effect seeks to establish an equivalence between the capital gains of the company and the capital gains of the shareholders. The second contention urged before us by learned counsel for the assesses is that under s. 23A it is not the income of the company which is deemed to have been distributed among the shareholders but it is the income as computed in the hands of the company that is distributed.

Before examining the arguments, it will be convenient to refer to the relevant sections. Section 12B has now been recast. We are concerned with the old section, the relevant part of which ran as under:—

"12B. Capital Gains: (1) The tax shall be payable by an assessee under the head "Capital Gains" in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after the 31st day of March 1946 and before the 1st day of April 1948; and such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place..."

Section 17(7) as it stands today is different. The old sub-section with which we are concerned in these references was as follows:—

"17(7). Where the total income of a company includes any income chargeable under the head "Capital Gains", the super-tax payable by the company in any year shall be reduced by an amount computed on that part of its total income which consists of such inclusion at the rate of super-tax (excluding the rate of additional super-tax, if any) specified in the case of a company by the annual Central Act fixing the rate or rates of tax for that year."

It will be seen that in this section the Legislature is laying down a rule in respect of the total income of a company. Section 17(6) as it stands today is different. The relevant part of the old sub-section, with which we are concerned in these references, was as under:—

"17(6). Where the total income of an assessee, not being a company, includes any

income chargeable under the head "Capital Gains", the tax, including super-tax, payable by him on his total income shall be—

(i) income-tax and super-tax payable on his total income as reduced by the amount of such inclusion, had such reduced income been his total income..."

Clause (ii) has been altered. It relates to rates. Section 23A as it stands to-day has also been recast. The material part of the section as it stood before its amendment by the Finance Act, 1955, was as under:—

"23A. Power to assess individual members of certain companies: (1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent. of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income:..."

It is not very necessary to set out the provisos and the explanation to sub-s. (1) of s. 23A.

The material words of the section quoted above are:

"where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company...are less than sixty per cent. of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall,... make...an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes...shall be deemed to have been distributed as dividends amongst the shareholders...and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income."

Therefore, it is laid down in terms express and explicit that for the purpose of assessing the total income of the assessee his proportionate share of the undistributed income of the company is to be deemed to have been paid to and received by him as dividend. The question is whether there is anything in the language of the section which suggests that what is chargeable to the company as part of its total income under the head of "capital gains" is also *quoad* a shareholder chargeable not merely as dividend under the head of "income from other sources" as stated in s. 6(v), but to be split up and partly chargeable as "capital gains" and partly chargeable as dividend income.

Now, it is argued that on a proper reading of the relevant sections, the actual distribution of dividends by a company out of the capital gains would be capital gains in the hands of the shareholders. Mr. Palkhivala has drawn our attention to a decision of the Supreme Court in the case of *Bacha Guedar v. Comr. I. T. Bombay*.¹ It is said that the Tribunal was in error in placing too much reliance on certain observations in that case. We shall presently quote them. The argument is that the *ratio decidendi* of that case was quite different because in that case the Supreme Court was dealing with "agricultural income" under s. 4(3) (viii). An attempt is made to show that there is nothing in the observations made by their Lordships in that case which goes counter to the submission urged before us and which submission, if analysed, requires an equivalence to be established between the capital gains of a company and the

capital gains of the shareholders of that company. Now, we agree with Mr. Palkhivala that in that case the Supreme Court was not dealing with any question under s. 23A. There are, however, some general observations of their Lordships in that case, which, if we may respectfully say so, throw light and afford guidance on the question of the nature of the rights of a shareholder *vis-a-vis* the company in the context of income-tax law. At p. 619 of that report, it is observed as under:—

“...That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word “assets” in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them...It is true that the shareholders of the company have the sole determining voice in administering the affairs of the company and are entitled, as provided by the articles of association, to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders...”

The Tribunal has relied on this decision in support of its conclusion that the capital gains of the company under s. 12B are not the capital gains of the shareholders.

The argument of counsel ran that the observations quoted by us immediately above were made in a somewhat different context and that they are not applicable to the facts of this case. It was emphasised that the decision turned on the construction of the expression “agricultural income”. We shall accept for the purpose of these references the argument of learned counsel that the question of law before us is not covered by the decision of the Supreme Court in the case of *Bacha Guzdar v. Comr. I. T. Bombay*.

It is not necessary to examine this argument of Mr. Palkhivala in any details since, as we understand it, it is the second contention on which the assesses seem to rely much more in these references. There are a number of answers to this argument. One is to be found in the language of sub-ss. (6) and (7) of s. 17, the relevant parts of which we have already quoted. The “Capital gains” are considered and had to be considered separately in the case of the company and in the case of an assessee who is not a company in these two sub-sections. What is more important is the language of s. 12B. The tax payable by an assessee under the head of “capital gains” relates to the assessee and it relates to the capital gains of the assessee in respect of any profits or gains arising from the sale, exchange or transfer of capital assets of the assessee himself. If the assessee is a company, the capital gains are the gains of the assessee company; if the assessee is an individual shareholder, the capital gains are the capital gains of the individual shareholder. There is nothing in the language of sub-ss. (6) and (7) of s. 17 or in the language of s. 12B which lends slightest support or countenances the suggestion that an equation can possibly be established between the capital gains of a company and the dividends which the assessee is deemed to have received by the operation of s. 23A. They are apart.

The other argument of Mr. Palkhivala is founded on s. 23A. It is stated that under that section it is not the income of the company which is deemed to have been distributed amongst the shareholders, but it is the income as computed in the hands of the company that is distributed amongst the shareholders. So far, there is no difficulty. But the difficulty of the assessee arises when he practically chooses to ignore the most important part of s. 23A which brings into the assessment of the shareholders a notional income. It is by *fiction juris*

that the undistributed income of the company as computed in accordance with the requirements of the section, is to be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting referred to in the section and it is the proportionate share of the undistributed income of the assessable income of the company computed as aforesaid that is to be included in the total income of the shareholders for the purpose of assessing their total income. Learned counsel for the assesses has further submitted that the right principles governing the nature of dividends generally, and in any event having regard to the language of s. 23A, are that the impress of capital gains remains on the notional gains and it is only the notional gains which are distributed amongst the shareholders. It is the notional dividend which is to be deemed to have been received by the shareholders although they have in fact not received the dividend that is included in their total income and, therefore, says Mr. Palkhivala, the impress of capital gains must continue to attach to what is deemed to have been distributed as dividends amongst the shareholders. In this context also, learned counsel has stressed that the decision of the Supreme Court to which we have already made reference requires to be distinguished because in that case the Court had to consider the actual distribution and not a notional distribution. It is also stated that the notional distribution cannot change the character or nature of the income. The argument is that a shareholder is entitled to identify himself with the company and that his individual income must be understood as a species of the income made by the company. It is then stated that the crucial words in s. 23A are "as computed for income tax purposes". These words, it is urged, have a dual meaning: (1) the quantum as computed and (2) the nature and the head of computation. It is impossible for us to acquiesce in this line of reasoning. We have to construe s. 23A and to see if there is anything in the language or phrasing of any part of that section which permits an assessee-shareholder to take advantage of the provisions relating to assessment of capital gains on the income of a company in the manner and at the rate laid down in the relevant provisions.

It has so often been emphasized that as far as possible nothing can be read and nothing can be implied in a taxing statute. We have to look fairly at the language used. The indispensable starting point and the first step is to examine the words of the provision under consideration. When we examine the words of the provision itself, we find nothing in it which may even remotely be said to suggest that the assessee is entitled to say that when he is deemed to have received dividend by the fiction of law incorporated in s. 23A(1), he is entitled to identify himself with the company or to assert an equivalence between his income and the income of the company or the mode or method of assessing his income and the income of the company. True, we have to remember that we are dealing with a *fiction juris*.

Now, in the judgment of the Tribunal we find that Mr. Palkhivala, who appeared before the Tribunal, had also urged that full effect must be given to the legal fiction that is created by s. 23A. The Tribunal states in its judgment: "we are unable to accept this contention". We do not agree with the Tribunal that full effect should not be given to the legal fiction. We wholly agree with Mr. Palkhivala in the suggestion made by him before the Tribunal that full effect must be given to the legal fiction incorporated in s. 23A. However, it is the legal fiction which is the main difficulty of the assesses and it is the effect of that legal fiction which Mr. Palkhivala has very valiantly tried to struggle against. We must now examine the submission made before us. The submission now is that the legal fiction is not to be applied in this case with all its effect because there are words in the section itself which retard or prevent the legal fiction having full force. What we are concerned with, however, is not the argument that was urged before the Tribunal, but the argument which has been pressed before us.

The words that something will be deemed to have been done for the pur-

pose of incorporating a legal fiction have been considered by Courts in some very recent decisions both in England and in India. There is a passage in the judgment of Lord Asquith of Bishopstone in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*² which has taken a very short time to become *locus classicus*. His Lordship observed in that case (p. 132):

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it...The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

In a very recent judgment given by their Lordships of the Supreme Court in *Venkatachalam v. Bombay Dyeing and Mfg. Co. Ltd.*,³ Mr. Justice Gajendragadkar in delivering the judgment of the Court cited these observations in support of the view taken on the construction of similar words. Now, it is clear from the language of s. 23A that we are dealing with an imaginary state of affairs as real. The dividend income which is not paid to nor received by the shareholders is to be deemed for the purpose of assessment to have been distributed as dividend to the shareholders along with other shareholders and it is to be included in their total income for the purpose of assessing their total income. We have not to permit our imagination to boggle and have to continue to imagine as real the consequences and incidents of that putative state of affairs, and the putative state of affairs is that dividend is deemed to have been declared and received by the shareholders. Therefore, we have to take it that dividend was in fact received by the shareholders, and if the dividend was in fact received by the shareholders the only consideration that remains is can a shareholder who has received dividend in respect of the profits of a company say that the dividend which he has received is to be split up into a number of heads for the purpose of assessment in arriving at his total income. Can he say that a part of that dividend income is income from "capital gains" and a part of that dividend income is dividend income assessable under the head "other sources"? The answer to this seems to us to be obvious. There is, as we have already mentioned, not the remotest suggestion in any relevant section which can lend support to the proposition canvassed before us. The shareholder and the company are separate entities. Section 17(6) with which we are more concerned clearly postulates an income of the assessee chargeable under the head "capital gains". It is extremely difficult for us to see how it can be said that in the present case the assessee shareholder himself became chargeable under the head of "capital gains". We have gone beyond the stage of the initial fiction and we are at this stage dealing with s. 17(6) because the income has for the present purposes to be treated as income already paid to and received by the assessee and it is that income which is to be charged to tax. "Capital gains", to go back once again to s. 12B, is a head which relates to tax payable by an assessee in respect of any profit or gain arising from the sale, exchange or transfer of a capital asset effected by the assessee. Mr. Palkhivala has not been able to point out to us as to what property of the shareholders it was that was sold or exchanged or transferred to the general reserves of the company, and the argument of Mr. Palkhivala can only succeed if we hold that it was the income or to be more precise the property of the shareholders themselves which was transferred to the general reserves of the company. The argument has not been taken by learned counsel to that extreme position and rightly. Obviously, there were no profits or gains which could be said to have arisen to the assessee from the sale, exchange or transfer of a capital asset belonging to them to the general reserves of the company.

The attempt, therefore, has been to show that there are words in s. 23A which prohibit the Court from applying the legal fiction with its inevitable

corollaries and what is stated is that the key words are "as computed for income tax purposes". These words, it is said, refer not merely to the quantum of the undistributed profits deemed to have been distributed amongst the shareholders, but to the nature and heads of computation mentioned in s. 6 which relates to the heads of income chargeable to income-tax. We have negatived this argument. There is nothing in the language of s. 23A which prohibits or retards the consequences and incidents of the notional income being treated as real for the purpose of taxing the shareholder. By the supposition of law in s. 23A a proportionate undistributed income of the company has for this purpose become the divided income of the assesses. The argument is not cogent when it asks us to impose a supposition about capital gains on that supposition of law. There is no warrant in the language of the relevant provisions to subjoin or tack a fiction upon a fiction.

In the result, both the arguments pressed before us on behalf of the assesses must fail. Our answer to the question will be in the negative.

Assesses to pay the costs.

Solicitors for the applicants: *Mulla & Mulla and Craigie Blunt & Caroe.*

Solicitor for the respondents: *A. S. Parikh.*

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY
v.

THE GARKWAR FOAM AND RUBBER COMPANY, LIMITED.*

Indian Income-tax Act (XI of 1922), Sec. 15C—Assessee company purchasing assets and goodwill of partnership firm doing business since July 1, 1948—Payment of consideration made by allotting to partners fully paid up shares of assessee company—Whether assessee company can claim benefit of exemption from tax under s. 15C—What is reconstruction of a business—Construction of statute—Provision for exemption in taxing statute whether to be liberally construed.

Under an agreement of sale the assessee company which was registered on July 21, 1949, took over all the assets (namely building, machinery, plant, furniture and tools) of the business of a partnership firm which had started doing business from July 1, 1948, including its goodwill for a consideration. Payment of consideration was made by the assessee company by allotting a certain number of fully paid up shares of the assessee company. Neither the credits and outstandings nor the debts and liabilities of the partnership firm were taken over by the assessee company. For the relevant assessment year the assessee company claimed the benefit of an exemption from tax under s. 15C of the Indian Income-tax Act, 1922, on the ground that it was a newly established industrial undertaking. The Department contended that this was a case of reconstruction of a business already in existence within s. 15C(2)(i) of the Act and, therefore, the assessee company could not claim exemption under s. 15C:—

Held, that this was not a case of a newly established industrial undertaking formed by reconstruction of a business already in existence and, therefore, the assessee company was entitled to relief from tax under s. 15C of the Act.

The underlying idea of a reconstruction must be of a "business in existence". There must be a continuation of the activities and business of the same industrial undertaking. The undertaking must continue to carry on the same business though in some altered or varied form. If the alterations and changes are substantial, there would be little scope for describing what emerges as a reconstruction of the business. Thus, if the ownership of a business or an undertaking changes hands not ostensibly but in reality and effectively, that would not be reconstruction or if the very nature of the business is changed, that again would not be reconstruction. On the other hand, reorganization of the business on sounder lines or alterations in the

*Decided, October 3, 1958. Income-tax Reference No. 13 of 1958.

mode or method or scope of the activities of the business or in its personnel or infusion of new blood in the management or control of the business which may even be by some changes in the constitution of persons interested in the undertaking would be no more than reconstruction of the business if it is substantially the same business carried on by substantially the same persons.

South African Supply and Cold Storage Company, In re: Wild v. Same Company, referred to.

A provision relating to exemption in a taxing statute must as far as possible be liberally construed and in favour of the assessee, provided in doing so no violence is done to the language used.

Commissioner of Income-tax, Bombay v. Messrs. Chhaganlal & Co., referred to.

THE facts appear in the judgment.

G. N. Joshi, with R. J. Joshi, for the Commissioner of Income-tax.

N. A. Palkhivala, for the assessee.

S. T. DESAI J. A short but interesting question of construction of s. 15C of the Income-tax Act arises for our determination on this reference, which comes before us at the instance of the Commissioner of Income-tax, Bombay, under s. 66(1). The facts may be briefly stated. A partnership firm consisting of three partners started doing business of manufacturing shoes from July 1, 1948, in the firm name of "Coral & Co.". There was another concern—The Gaekwar Foam & Rubber Co. which was a limited liability company registered on July 21, 1949. Owing to devaluation of currency, this latter company had difficulties in carrying on its business of foam rubber. It came to the notice of this company, which is the assessee company before us, that the firm of Coral & Co. wanted to sell its business. The assessee company took over all the assets of the business of Coral & Co. including its goodwill for the consideration of Rs. 1,50,000. The payment was not made in cash but was by allotting 1500 shares of the face value of Rs. 100 each to the three partners in the firm of Coral & Co. The nominal capital of the assessee company was Rs. 5,03,000 divided into 5000 ordinary shares of Rs. 100 each and 3000 'B' shares of Rs. 1 each. Neither the credits and outstandings nor the debts and liabilities of Coral & Co. were taken over by the assessee company. We shall refer to the agreement, which is one of sale, little later in our judgment. In respect of the assessment year 1952-53, the assessee company claimed the benefit of and exemption from tax under s. 15C on the ground that it was a newly established industrial undertaking. The Income-tax Officer rejected the assessee's contention. According to him, the assessee company was formed by reconstruction of a business already in existence and, therefore, the assessee company was not entitled to the benefit of s. 15C claimed by it. The Appellate Assistant Commissioner took the contrary view. His conclusion was that this was a case of transfer of building and machinery to a new business, and as the business of the transferor came into existence after April 1, 1948, the assessee was entitled to the exemption claimed by it. The matter was carried in appeal by the Department and the Tribunal took the view that the Appellate Assistant Commissioner was right in the conclusion reached by him. In its order, it stated:

"If we were to accept the contention of the Department, it will only mean that the whole object of the provision made has been frustrated. With a view to help the building up of new industries, it has been provided that industries started after 1-4-1948 will get some special benefits. The Income-tax Officer would have been right in not allowing the exemption if the business taken over by the assessee had been commenced prior to 1-4-1948. The exemption is attached to the business and not to the assessee. It matters little if the business changes hands six times over a period of one year. As

1 [1904] 2 Ch. 268.

2 (1957) Income-tax Reference No. 27 of

1954, decided by Tendolkar and S. T. Desai JJ., on September 23, 1957.

long as the industrial undertaking commenced business after 1-4-1948, it will, in our opinion, be entitled to claim the benefit of Section 15C."

The question we are called upon to answer on this reference is:

"Whether on the facts and in the circumstances of the case, the assessee company is entitled to relief from tax under Section 15C of the Income-tax Act?"

It has been argued before us by Mr. G. N. Joshi, learned counsel for the Revenue, that the Tribunal was in error in interpreting cl. (i) of sub-s. (2) of s. 15C. The argument briefly stated is that this was a case of an industrial undertaking formed by reconstruction of a business already in existence, and if it was a newly established industrial undertaking, which was formed by reconstruction of a business already in existence, it could not claim the exemption granted by s. 15C. It will be convenient at this stage to set out that part of s. 15C which is material for the purpose of this Reference:

"(2) This section applies to any industrial undertaking which—

(i) is not formed by the splitting up, or the reconstruction of, business already in existence or by the transfer to a new business of building, machinery or plant used in a business which was being carried on before the 1st day of April 1948."

In sub-s. (2) there are two other clauses and there is a proviso to this sub-section. But it is not necessary to set out the same because they have little bearing on the part of s. 15C which we are called upon to interpret in this reference. Clauses (ii) and (iii) relate to certain periods and to the number of workmen employed by the industrial undertaking and the proviso empowers the Central Government by a notification to direct that the exemption cannot be availed of by any particular industrial undertaking.

The argument of Mr. Joshi is that an assessee who wants to avail of the benefit of the exemption must fulfill all the conditions and requirements of the section. That proposition is not disputed. Then, the argument has proceeded that in cl. (i) there are three requirements or conditions. We agree with Mr. Joshi that all the three requirements or conditions specified in cl. (i) of sub-s. (2) must be satisfied before an assessee can claim the benefit of the exemption granted by the section and the argument in effect has been that since this is a case of reconstruction of a business already in existence, the assessee cannot get any relief. It is suggested by Mr. Joshi that the words at the end of cl. (i): "before the 1st day of April, 1948" apply to the third condition or requirement of cl. (i) of sub-s. (2) and not to all the three conditions or requirements specified in that clause. On the other hand, it has been suggested by Mr. Palkhivala that those words apply to all the three requirements or conditions of that clause. It is not necessary for us to decide on this reference whether the words "before the 1st of April 1948" apply to all the three conditions or requirements of cl. (i) of sub-s. (2). We shall, therefore, confine our consideration only to the point, which is directly before us, namely, whether this is a case of reconstruction of a newly established industrial undertaking formed by reconstruction of a business already in existence. If it is not a newly established industrial undertaking formed by reconstruction of a business already in existence, the assessee must succeed because it is not the contention of Mr. Joshi that this is a case of an undertaking formed by splitting up of a business already in existence nor is it the contention of Mr. Joshi that this is a case of an undertaking formed by transfer to a new business of building, machinery or plant used in a business which was being carried on before April 1, 1948. Mr. Joshi has taken us through the various clauses of the agreement between the firm of Coral & Co. the vendors and the assessee. On the face of it, it is an agreement of sale of the assets of building, machinery and plant of an industrial undertaking and also of the stock-in-trade of that firm, as we shall presently point out. The sale includes the goodwill of the vendor firm. What is kept out, however, is the credits and outstandings of the vendor firm and its debts and liabilities. Clause (2) refers to the nominal capital of the transferee company, the assessee. Clause 3(1) speaks of the operation of the sale and purchase as from March 1,

1950. The agreement is dated February 28, 1950. Then, the goodwill of what is described as "the late company" is mentioned. Then, the right to use the premises occupied by the vendors is mentioned. Next is mentioned the plant, machinery, furniture and other tools of the vendors. Consideration is mentioned thereafter as being Rs. 1,50,000 to be paid and satisfied by the allotment to the vendors of 1500 fully paid up ordinary shares of the assessee company of the face value of Rs. 100 each. The price of the plant, machinery etc. is shown as agreed upon at Rs. 1,43,758 and the goodwill at Rs. 6,242. Then there is a reference to the credits and outstandings and the debts and liabilities of the vendor firm, to which we have already made reference. Then there is stipulation about the indemnity given to the purchaser by the vendors against any proceedings, claims and demands in respect of their debts, liabilities, contracts and previous engagements and in respect of tax. As to stock-in-trade, it is mentioned that it was a matter left to the transferee company whether it should take it up or not. Lastly there is a restrictive condition which restrains the vendors from carrying on a competing business within the area of 100 miles of Bombay. On these stipulations and conditions in the agreement of sale, it is argued by counsel for the Revenue that this is clearly a case of reconstruction of a business already in existence. Considerable emphasis has been laid by Mr. Joshi on the expression "business" and we propose to bear in mind the importance we are asked to attach to the business of the vendors. It is said that here the goodwill has been transferred. It is said that although the outstandings and liabilities were not taken up, that made no difference. It is then said that the fact that the stock-in-trade was not taken up at the time of the sale made little difference. The argument has been that what is of importance and consequence is that all the assets of the vendor firm were taken up as a going concern. Now, we do not think we would be justified in reading this agreement as one under which all the assets of the vendor firm were taken up by the assessee company as a going concern. But at the same time it is true that the premises where its business was being carried on and all the plants, machinery, furniture and other tools of the vendor firm were taken up by this agreement described as one of sale. Then it is said that it was the same persons who are carrying on the business of the assessee company. Here we are unable to accept Mr. Joshi's suggestion. We have carefully read the agreement and the statement of the case and there is nothing to suggest that it is the same persons, that is, the vendors who are carrying on the business of the assessee company. No such fact has been found by the Tribunal. The capital of the assessee company, as we have already mentioned, is Rs. 5,03,000 and the consideration was that the vendors were to get only 1500 ordinary shares of the face value of Rs. 100 each allotted to them in payment of consideration. Then it is said that the identity of the vendor firm was completely merged in the assessee company. It cannot be said that this was a case of amalgamation or identity of the vendor firm being merged in the assessee company if it was a transaction of sale. What appears to have happened is that the vendor firm sold its plant, machinery, furniture and tools and ceased to carry on its business. It is the case of a business of a firm ceasing after the sale of its machinery, plant, etc. when it could not possibly carry on business. The goodwill of that firm, as we have already said, was sold to the assessee company.

The argument of counsel for the Revenue is that in view of the stipulations and conditions mentioned in the agreement, this is a case simply of reconstruction of the business of the vendor's firm. Learned counsel stated that a business is reconstituted when it is carried on after the liabilities of the business which made it difficult to carry on are removed, that is, when the burden of debts is removed and it starts with a clean slate. Then it is said that the dictionary meaning of the expression "reconstruction" is "to rebuild or to reconstitute" and says Mr. Joshi, this is a business "which is reconstituted or rebuilt".

The question before us, therefore, is: Is this a case of reconstruction of a

business already in existence? Now, it is clear that all the conditions and requirements of sub-cl. (i) of sub-s. (2) must be satisfied before the benefit of the exemption can be claimed by a newly established industrial undertaking. The section does not apply and the exemption cannot be claimed by an assessee if the industrial undertaking is formed by splitting up of its business or by reconstruction of its business or in case of transfer to a new business of building, machinery or plant used in a business which was being carried on before April 1, 1948.

The expression "reconstruction" represents a legal conception. It has been used in statutes relating to company law but even there, as we shall point out, little later in our judgment, no Judge has ever attempted to give a comprehensive definition of that expression. The Income-tax Act does not define the expression. This is just as well since it seems difficult to have a definition which may aptly meet with every particular instance and it seems permissible to enter a caveat against any judicial attempt at a definition exclusive or inclusive of a legal expression which, as has so often been said, has no precise meaning. The expression, though difficult to define, may be described without difficulty.

It is well established that the words which express a legal conception must have attributed to them their legal meaning. Technical words, where we find them, must have their technical sense ascribed to them and not their popular sense—*uti loquitor vulgus*. The principle is of cogency when the words in question represent legal conceptions. The reconstruction of a business or an industrial undertaking must necessarily involve the concept that the original business or undertaking is not to cease functioning, and its identity is not to be lost or abandoned. The concept essentially rests on changes but the changes must be constructive and not destructive. There must be something positive about the whole matter as opposed to negative. The underlying idea of a reconstruction evidently must be—and this is brought out by the section itself—of a "business already in existence". There must be a continuation of the activities and business of the same industrial undertaking. The undertaking must continue to carry on the same business though in some altered or varied form. If the alterations and changes are substantial, there would be little scope for describing what emerges as a reconstruction of the business. Thus, for instance, if the ownership of a business or an undertaking changes hands not ostensibly but in reality and effectively, that would not be reconstruction or if the very nature of the business is changed, that again would not be reconstruction. On the other hand, reorganization of the business on sounder lines or alterations in the mode or method or scope of the activities of the business or in its personnel or infusion of new blood in the management or control of the business which may even be by some changes in the constitution of persons interested in the undertaking would certainly be no more than reconstruction of the business if it is substantially the same business carried on by substantially the same persons.

Now, support is to be derived for the view we take of the interpretation of the material words of cl. (i) of sub-s. (2) of s. 15C from certain observations of Mr. Justice Buckley, as he then was, in *South African Supply and Cold Storage Company*, In re: *Wild v. Same Company*.¹ We may immediately observe that the word "reconstruction" was being considered by the Court in that case in the context of company law and in referring to these observations we are conscious of the fact that the observations are not made in the self-same context, but even so they are general observations which can be of guidance and assistance if taken as no more than stating a broad general principle, and coming from an authority like Lord Wrenbury we think they are entitled to be read with respect. At p. 286 of the report in that case the learned Judge

¹ [1904] 2 Ch. 288.

was considering the question of reconstruction "of an undertaking". He observes:

"What does 'reconstruction' mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on—that would be a mere sale—but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be the same. Does it make any difference that the new company or resuscitated company does or does not take over the liabilities? I think not. I think it is none the less a reconstruction because from the assets taken over some part is excepted provided that substantially the business is taken, and it is immaterial whether the liabilities are taken over by the new or resuscitated company or are provided for by excepting..."

Later on, the learned Judge observes that "it is not vital that either the whole assets should be taken over or that the liabilities should be taken over. We have to see whether substantially the same persons carry on the same business; and if they do, that, I conceive, is a reconstruction". Now fully appreciating the distinction which counsel for the Revenue has sought to make between the case of a reconstruction of a company and the case of reconstruction of a business, these observations, as we read them, are equally illuminating in the context of reconstruction of a business already in existence in the case of a newly established industrial undertaking. In fact the learned Judge speaks of an undertaking of some definite kind being carried on. The emphasis, it will be noticed, is on two things—when substantially the same business was carried on and substantially the same persons were carrying it on. It is also to be noticed that the learned Judge draws a clear distinction between a reconstruction and a sale of an undertaking. In the case of a sale, there can be no question of reconstruction. Now, in these matters, we have to look at the substance of the transaction and not the form. If looking at the substance of the transaction, it is a sale, then the concept of reconstruction must be ruled out for in such a case there is no scope for speaking about any reconstruction of an existing business. It is not necessary to pursue the question of reconstruction in the context of the company law because in this case we are not concerned with any such question and it is not necessary, therefore, to refer to the observations on the point of the leading text book writers on the subject of company law in England.

Now, there are some other words in this clause to which also we are bound to attach some importance. The clause speaks of a newly established industrial undertaking formed by the reconstruction of its business already in existence. In the forming of this industrial undertaking, those, who owned the original business, must have a large say if they reconstruct it. Speaking broadly it is they who can be said to reconstruct the company in any such case and if it is floating of a new company it is they who can be said to have floated a new company for their business which was already in existence. It would be a misnomer to speak of a buyer of an undertaking reconstructing the vendor's business. He may reconstruct his own business thereafter. But that would be a totally different matter. Can it, therefore, be said on the facts of this case that it was the vendors who have formed a new company by reconstruction of a business which was already in existence? Here is a case of transfer of building, machinery, plant and other implements of a shoe factory. The agreement is both in substance and in form one of out and out sale. The only relation that remained between the vendors and the ~~assess~~ company which thereafter carried on its business in the name of Carona Shoe Co. is that the

vendors became some of the shareholders in the assessee company they having been allotted 1500 ordinary shares of the face value of Rs. 100 each. There is little scope for doubt or difficulty in interpreting the relevant part of cl. (i) of sub-s. (2) and it is not necessary for us, therefore, to discuss in any detail the object underlying the clause or the scheme of exemption with which s. 15C deals. The object is to benefit newly established industrial undertakings. The marginal note to which we may turn to see the drift of the section also lends support to the view which we are taking.

There is some difference of judicial opinion about the canon of construction applicable to a provision for exemption in a taxing statute. In *Commissioner of Income-tax, Bombay v. Messrs. Chhaganlal & Co.*² my brother Tendolkar and I, although we took different paths, were agreed that a provision relating to exemption must as far as possible be liberally construed and in favour of the assessee, provided in doing so no violence was being done to the language used. But in this case, as we have already mentioned, we find no difficulty in interpreting the relevant provision of the Act. If we had found any difficulty, it would have been necessary for us to bear in mind that salutary canon of construction.

Our answer to the question is in the affirmative.

Commissioner to pay the costs.

Solicitor for the applicant: *A. S. Parikh.*

Solicitors for the respondent: *Crawford Bayley & Co.*

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

MAHESH ANANTRAI PATTANI v. THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH, AHMEDABAD.*

Indian Income-tax Act (XI of 1922), Sec. 7(1) Explanation 2—Amount paid by employer to employee after termination of services as gift “in consideration of having rendered loyal and meritorious services”—Whether such amount a taxable receipt in hands of employee.

A certain amount was paid by the employer to his employee, after he had ceased to be in his service, as a gift “in consideration of...having rendered loyal and meritorious services”. On the question whether this amount could be brought to tax in the hands of the employee as a taxable receipt within s. 7(1) read with Explanation 2 (as it stood before its amendment by the Finance Act, 1955) of the Indian Income-tax Act, 1922:—

Held, that, in the circumstances of the case, the amount was given to the employee to recompensate or remunerate past services and, therefore, the amount could be brought to tax under s. 7(1) read with Explanation 2 of the Act.

Explanation 2 to s. 7(1) of the Act even before its amendment applied to cases of remuneration for past services received by an employee from his quondam employer.

Moorhouse (Inspector of Taxes) v. Dooland,¹ *David Mitchell v. Commr. of Inc.-Tax*,¹ *Reed v. Seymour*,⁴ *Cooper v. Blakiston*¹ and *Beynon v. Thorpe*,¹ referred to.

The facts appear in the judgment.

B. J. Kolah, with *D. Dwarkadas*, for the assessee.

G. N. Joshi, with *R. J. Joshi*, for the respondent.

S. T. DESAI J. In this reference under s. 66(1), the principal question that arises for our determination relates to the ambit and scope of s. 7(1) and *Ex-*

² (1957) Income-tax Reference No. 27 of 1954, decided by Tendolkar and S. T. Desai JJ., on September 23, 1957.

*Decided, October 6, 1958. Income-tax Reference No. 10 of 1958.

¹ (1955) 28 I. T. R. 86.

² (1956) 30 I. T. B. 701.

³ (1926) 11 T. C. 625.

⁴ (1908) 5 T.C. 247.

⁵ (1927) 14 T.C. I.

Explanation 2 to the same prior to the amendment of the section by the Finance Act, 1955, and the question arises in the context of a payment of rupees five lacs made as a gift by the employer, the Maharaja of Bhavnagar, to the assessee who had been his Chief Dewan "in consideration of...having rendered loyal and meritorious services." The section, relevant parts of which we shall presently set out, as is well-established, was couched and also after its amendment in 1955 remains couched, in the broadest possible terms. So stringent and embracing has been the rule that even a purely voluntary payment of the nature of a gift or prize or reward when given by a quondam employer to his employee has been regarded as falling within the very wide reach of the section if the object or consideration which moved the employer in making the payment was of remunerating or recompensating past services. Within its compass, have been all employees, high and low, regardless of nomenclature or designation.

In 1937 the Maharaja of Bhavnagar appointed the assessee Mr. Anantrai Prabhashankar Pattani as the Chief Dewan of his State. Mr. Pattani continued to hold that office till January 1948 when responsible Government was introduced in the State by the Maharaja. At that time Mr. Pattani was drawing a salary of Rs. 2,000 per month and enjoyed certain additional perquisites. On January 22, 1948, the Maharaja passed an order (ॐॐ). By that order the Maharaja fixed a monthly pension for the retiring Chief Dewan at Rs. 2,000. An extract of that order is as follows:—

"During our minority he (i.e. Chief Dewan) looked well after us and during the difficult times of the last World War and thereafter he has rendered valuable services sincerely and conscientiously to us and our State with the result that the prosperity and reputation of the State have been enhanced and the position of the State and its subjects has received increased estimation in India. In appreciation thereof, it is resolved to give him a monthly pension of Rs. 2000/- which is the monthly remuneration being paid to him."

It appears that for about two months thereafter Mr. Pattani continued to look after the management of the Bhavnagar State Bank without any remuneration. On May 31, 1950, the Maharaja directed Messrs. Premchand Roychand & Sons, Bombay, with whom he had an account, to pay to Mr. Pattani by cheque a sum of Rs. five lacs out of the amount lying to the credit of the Maharaja in that account. That payment was made to the assessee on June 12, 1950. Then it appears that towards the close of the year i.e. on December 27, 1950, the Maharaja passed an order (ॐॐ) which is very strongly relied upon by the Revenue in this case. It is as under:—

"In consideration of Shri Anantrai P. Pattani the Ex-Dewan of our Bhavnagar State having rendered loyal and meritorious services Rs. 5,00,000/- (Rs. five lacs) are given to him as gift. Therefore, it is ordered that the said amount should be debited to our Personal Expenses Account."

In course of time, question arose during the assessment proceedings of Mr. Pattani for the assessment year 1951-52 whether this sum of rupees five lacs was a taxable receipt. At the request of the assessee, the Maharaja wrote the following letter to the assessee on March 10, 1953:

"I confirm that in June 1950 I gave you a sum of rupees five lacs (Rs. 5,00,000/-) which was a gift as a token of my affection and regard for you and your family. This amount was paid to you by Premchand Roychand & Sons according to my letter of 31st May 1950 from moneys in my account with them."

The Income-tax Officer concluded that the amount of rupees five lacs received by the assessee was a taxable receipt within the provisions of s. 7(1) read with *Explanation 2* as it stood before its amendment by the Finance Act, 1955.

It will be convenient to set out the relevant part of that section at this stage. Section 7(1) ran as follows:—

"7. (1) The tax shall be payable by an assessee under the head "Salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions,

perquisites or profits in lieu of, or in addition to, any salary or wages, which are due to him from, whether paid or not, or are paid by or on behalf of...any private employer...

Explanation 2.—A payment due to or received by an assessee from an employer or former employer or from a provident or other fund, is to the extent to which it does not consist of contributions by the assessee or interest on such contributions a profit received in lieu of salary for the purpose of this sub-section, unless the payment is made solely as compensation for loss of employment and not by way of remuneration for past services;..."

The Appellate Assistant Commissioner confirmed the order passed by the Income-tax Officer. The matter was carried by the assessee in appeal to the Tribunal and the Tribunal dismissed the appeal. The Tribunal in its order laid stress on the order (३४३) of December 27, 1950. It was not impressed by, and found it difficult to rely on, the contents of the letter dated March 10, 1953, written by the Maharaja to the assessee. The assessee has now come before us on this reference.

The question we are called upon to determine is:

"Whether the sum of Rs. 5 lacs has been properly brought to tax in the hands of the assessee for the assessment year 1951-52."

It is argued by Mr. Kolah, learned counsel for the assessee, that the Tribunal was in error when it discarded the contents of the Maharaja's letter dated March 10, 1953. It is not necessary for us to dwell on the matter of this letter at any length. This is what the Tribunal has said in its order about this letter:—

"In due course, the question arose in the course of assessment proceedings relating to the assessment year 1951-52 whether the said sum of Rs. 5 lacs was a taxable receipt. In response to a request made by the assessee to the Maharaja (we were told that it was orally made) he wrote the following letter to the assessee on 10-3-1953:—...."

Then are quoted the contents of that letter which we have already stated. The Tribunal proceeds to state in its order:—

"We have already indicated the circumstances in which that letter came to be written and would merely observe that we find it difficult to bring ourselves to believe in the contents of that letter and would leave the matter at that. We would attach more importance to the contemporaneous document viz. the order dated 27-12-1950. It clearly mentions why the sum of Rs. 5 lacs was being paid to the assessee by the Maharaja."

The Tribunal found it difficult to bring itself to believe in the contents of that letter. We feel bound to bear that in mind and deem it unsafe to attach weight to what the employer's impressions or recollections were after more than two years of the order dated December 27, 1950, which is a formal document and a writing made within a few months of the payment. The Tribunal has described the order as a contemporaneous document.

Then it is argued by Mr. Kolah, learned counsel for the assessee, that *Explanation 2* to s. 7(1) does not apply to the case of a person who has ceased to be an employee when the payment was made. It is stressed that a payment of the nature before us cannot be regarded as made in lieu of "salaries" within the meaning of these words in sub-s. (1) of s. 7. The argument ran that once full salary is paid, as in this case it has been paid, the *Explanation* has no application. The argument stands repelled by the language of the sub-section itself and of *Explanation 2*. The section read with the *Explanation* plainly covers any payment received by the employee in addition to his stipulated salary, in addition to what was due to him and what he was entitled to claim and any voluntary payment received by him, the object or purpose of which was to remunerate or recompensate him for past services. Compensation for loss of employment stands on a different footing, and we are not concerned here with that aspect of the rule for which the *Explanation* made an express provision by excluding from its purview any payment made solely as compensation for loss of employment. In our opinion, *Explanation 2* even before its amendment did apply to the case of remuneration for past services received by an employee from his quondam employer.

Then the matter was put on a different ground. It was urged that on a proper reading of the writing of December 27, 1950, the dominant intention of the Maharaja was to make a gift pure and simple to the assessee, who had been fully remunerated for loss of service and also for past services by a full and generous pension equal to the amount of his salary which was Rs. 2,000 per month. The argument has been that this payment of rupees five lacs was a personal gift and was nothing different from a voluntary payment given by way of a present or testimonial.

Reference was made by Mr. Kolah to certain decisions to which we shall immediately turn. In the first case cited, *Moorhouse (Inspector of Taxes) v. Dooland*,¹ the assessee was a cricket professional who had been employed under a contract made in 1949 between himself and the East Lancashire Cricket Club upon the terms that he should be paid a salary and a certain sum for expenses and talent money. It was further provided that "collections shall be made for any meritorious performance by the professional with bat or ball in certain matches" in accordance with the rules for the time being of the Lancashire Cricket League. The assessee played in 25 matches in the cricket season of 1951 and on eleven occasions collections were made on his behalf under the Club's rules and the total sum of £ 48 15 s. was collected. He was assessed in that sum, the Crown claiming that it was subject to tax as being "fees, wages, perquisites or profits" arising from his employment. The Court of Appeal considered the matter at some length and *inter alia* enunciated a test of liability to tax on a voluntary payment made to an employee by the employer from the standpoint of the person who receives it. One of the considerations laid down by the Court of Appeal, and on which counsel for the assessee has relied upon before us, is:

"If a voluntary payment is made in circumstances which show that it is given by way of present or testimonial on grounds personal to the recipient, the proper conclusion is likely to be that the voluntary payment is not a profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual, paid and received by reason of his personal needs or by reason of his personal qualities."

Applying the principle enunciated in that case, the Court of Appeal held that the proceeds of the collections were by the terms of his contract of employment received by the assessee as part of what he was to get by way of remuneration or reward and that the collections were liable to tax. We are in respectful agreement with the principle laid down in that case.

The next case to which Mr. Kolah has drawn our attention is *David Mitchell v. Commr. of Inc. Tax*.² In that case the assessee was an accountant by profession and a partner in a firm of chartered accountants. The promoters of a company engaged the services of that firm to assist them in the floatation of the company and the assessee, as a partner in the firm, attended to that work. After the company was floated and after charges for that work were fully paid to the firm for the services rendered by it, one of the promoters "as a token of appreciation for the assistance rendered to him by the assessee in connection with the floatation of the company made an unsolicited gift of 2,500 shares in the company" to the assessee. It was held by the High Court of Calcutta that as the contract of service was with the firm and not with the assessee and the assessee was not an employee of the promoters, the value of the shares could not be assessed under s. 7 as perquisites or profits received by the assessee in lieu of or in addition to salary or wages. It was, however, held on the facts of the case that the payment was not made in appreciation of the personality or character of the assessee, but in appreciation of the professional services rendered by the assessee and in order to give him an extra profit over and above the share of the profit he may get from the firm, and the value of the shares was, therefore, assessable as the assessee's income under s. 10 of the Income-tax Act. One of the contentions in that case was that the receipt was of the nature of a

1 (1955) 28 I. T. R. 26.

2 (1946) 30 I. T. R. 701.

casual and non-recurring receipt. That contention also was dismissed by the Court.

Mr. Kolah has also drawn our attention to a decision of the House of Lords: *Reed v. Seymour*.³ That case also related to the assessment of a professional cricketer, who was granted a benefit match by the committee of a cricket club in the exercise of their absolute discretion. The proceeds of the match, together with certain public subscriptions, were invested in the names of the trustees of the club and the income therefrom was paid to the beneficiary in accordance with the rules of the Club. Subsequently the investments were realised and the proceeds paid over to the beneficiary were applied with the approval of the trustees in purchasing a farm. The assessee cricketer was assessed in respect of the proceeds of the benefit match other than the public subscriptions. The order was discharged by the General Commissioners on appeal and ultimately the matter was carried to the House of Lords. It was held that the award of the proceeds of the benefit match to the cricketer was not a profit accruing to him in respect of his office or employment, but was in the nature of a personal gift and not assessable to income-tax. Now, the case turned mainly on the meaning and effect of the rules of the cricket club. In the speeches of their Lordships are to be found references to the case of *Cooper v. Blakiston*⁴ which has been frequently referred to in tax cases of voluntary payments. The head-note of that case fairly states what was the pith of the decision. It is there set forth that voluntary Easter offerings given as free gifts to the incumbent of a benefice as such for his personal use are, if given for the purpose of increasing his stipend, assessable to income-tax as profit accruing to him by reason of his office. In that case Lord Loreburn observes (p. 355):

"...Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

That principle was acceptable to the majority of the Judges in the House of Lords in the case of *Reed v. Seymour* relied on by Mr. Kolah.

One more decision to which our attention has been drawn by Mr. Kolah is *Beynon v. Thorpe*.⁵ That was a case of a pension to a retiring director of a company. It was the company's custom to give retiring employees voluntary pensions or allowances. In 1923 the directors passed a resolution awarding the respondent-assessee during his retirement a pension of £5,000 a year. That resolution was rescinded in 1925 and a final payment of £5,000 was voted to the respondent "not as or because he is a director but as a personal gift". An examination of the decision shows that these express words in the resolution weighed with the Court when it reached the conclusion that it was not a taxable receipt. Mr. Kolah has relied upon the following observations of Rowlatt J. in that case (p. 14):

"Now the question is whether this ceases to be a mere gift because what has led to it is a past employment, an employment which has ceased. It has been made abundantly clear by the Court in Scotland in Duncan's case that this sort of sums received by a person cannot possibly be put as receipts from his office or in respect of his office or employment, and they said in terms of that kind in a case like this that these emoluments cannot be taxed under Schedule E, and I am bound to say I think that goes a very long way to conclude this case. But it is said that nevertheless they are in respect of the employment. Well, it seems to me that is a complete fallacy. It is nothing but a gift moved by the remembrance of past services already efficiently remunerated as services in themselves; it is merely a gift moved by that sort of gratitude or that sort of moral obligation if you please: it is merely a gift of that kind. In this case it happens to be very large; in many cases it is very small, but in all the cases it seems to me, whether it is a large gift like this or whether it is a small gift to a humble servant, they are exactly on the same footing as gifts which are made to a child or gifts which are

³ (1926) 11 T. C. 625.

⁴ (1906) 5 T. C. 347.

⁵ (1927) 14 T. C. 1.

made to any other person whom the giver thinks he ought to supply with funds for one reason or another; and as the Lord President in Scotland points out it is only a matter of history that the feeling between the parties which has generated the gift arises out of an employment."

Now, these observations have to be read in the light of the facts of the case before the learned Judge. The resolution of the directors in terms stated that the sum was voted to the assessee "not as or because he was a director but as a personal gift". Of course, there had been the relationship of an employer and an employee between the company and the retiring director and the element of remembrance of past services was there, but it is difficult to see how it helps in the case before us where, as we shall presently discuss, there are express and explicit words recording the purpose or object of the voluntary payment which go to negative the contention.

The question of voluntary gifts in tax cases is a well-worn subject. The crux of the matter and the differentia to be applied is: is it a personal gift given on personal grounds other than for services rendered or is it a remuneration? The matter is not to be viewed in segments or by segregating some facets of the transaction from the whole of it. We have to examine the whole order (३२११) of December 27, 1950, of course, in the light of its background. It is a single question to be answered after all the relevant facts have been taken into account and particularly the express intention of the employer when such intention is manifest. The transaction cannot be considered as if it were a series of separate compartments. Now, this is precisely what Mr. Kolah in effect is asking us to do. Counsel lays all the stress possible on the word "gift" and none on the words "in consideration of... having rendered loyal and meritorious services". The matter, after all is said, lies in a narrow compass. The principle is well-defined and the difficulty, when it arises, is not in ascertaining the law, but its application to facts which are at times complex and sometimes vague and inadequate. At times the statement of the case itself is bald and meagre. Such, however, is not the position in the case before us in which the matter of the order (३२११) dated December 27, 1950, does not leave the object of the voluntary payment described as a "gift" to be gathered from implications of language used, or surrounding circumstances or mere inferences. We find no difficulty in applying the law to the facts of this case. We have the explicit and express words of the employer which leave no doubt about the dominant intention of the Maharaja as to the object and purpose of the payment. One case on the subject goes to this length that even where the employer for the purpose of assisting his employee, whom he does in fact remunerate for his services, attempts to relieve his employee from his obligation to pay income-tax by saying "I do not intend it to be a remuneration" the receipt becomes a taxable receipt if on all the facts of the case the voluntary payment was connected with and related to the factum of service or employment.

Mr. Joshi, learned counsel for the Revenue, has naturally relied very strongly on the initial words of the order of December 27, 1950. Counsel stated that there are artificial conceptions evolved by the section and the Explanation. It is also said by Mr. Joshi that this payment to the assessee cannot be regarded as a testimonial even when the matter is examined in the light of all the circumstances attending it. The argument has proceeded that here is a contemporaneous writing to which full effect should be given by the Court. Mr. Kolah in the course of his argument had referred to this order of December 27, 1950, as no more than a mere direction given by the Maharaja to his accountant. The writing does not contain mere directions but is a formal document incorporated in what is described as an Order (३२११). It is also urged that the letter of March 10, 1953, had no significance. We accept Mr. Joshi's submission that that letter must be disregarded.

It is not possible for us to regard this receipt by the assessee as a "windfall" nor is it possible to accept the contention of the assessee that it was a personal

gift of the nature of a testimonial. We are unable to equate the case of the assessee in principle with that of the *beneficiare* cricketer. Here the gift was not made in appreciation of the personality or character of the assessee nor was it symbolical of appreciation of the personal qualities of the assessee. Here a sum of money was given to recompensate or remunerate past services, which were obviously very highly appreciated. It is not as if this voluntary payment was in any manner differentiated by any personal qualities of the assessee. The consideration for the gift was in terms stated to be past services. The appreciation was of loyal and meritorious services. Therefore, even though we would be slow in treating a mere gift by an employer to an employee as if it were remuneration for past services when we do not know what motivated it, on the facts of the case before us, we must reach the conclusion that the case falls within the ambit of the section. We do so not without some reluctance.

There remains for consideration the contention of the assessee that this was a casual and non-recurring receipt and, therefore, not liable to tax. Mr. Kolah rightly stated that if we take the view that the case is hit by s. 7(1) read with *Explanation 2*, then there is little scope for this contention, and that even a single voluntary payment, if it falls within the ambit of that section, the receipt would be liable to tax and cannot be exempted from tax on the ground that it was merely a casual or non-recurring receipt. Once connection with the employment is established, there is no question of considering the recurring or the casual nature of the receipt. This contention of the assessee must also fail.

Before we part with the matter, we may observe that the case before us has been argued by Mr. Kolah on the footing that the relationship of an employer and employee subsisted between the Maharaja and the assessee. Before the Tribunal the first contention urged by Mr. Tricumdas, who appeared for the assessee, was that the amount of rupees 5 lacs was not received from the former employer inasmuch as the assessee was an employee of the Bhavnagar State and not in the personal private employment of the Maharaja who made the payment of rupees five lacs. The other contention urged by Mr. Tricumdas before the Tribunal was that it was a completely voluntary payment made by the Maharaja out of his private and personal property and was in the nature of a personal gift in token of affection and regard for the assessee and his family. The second contention obviously rested substantially on the letter of March 10, 1953, addressed by the Maharaja to the assessee. In view of the facts including the Order (३११) dated January 22, 1948, in which the Maharaja while granting pension to the assessee stated that the assessee had rendered valuable services sincerely to the Maharaja and to the State it was difficult for Mr. Kolah to argue before us that the assessee could not be regarded as in the employment of the Maharaja. But that is not all. The order dated December 27, 1950, in terms proceeds on the footing that the Maharaja was the employer and the assessee was his employee. We do not think we would be in error in accepting for the purpose of this case the equation or equivalence which the Maharaja established between himself and his State. It is not necessary to draw on one's general knowledge in this case because the writings dated January 22, 1948, and December 27, 1950, do show that the Maharaja regarded himself as the State. Therefore, Mr. Kolah in our judgment very rightly did not seek to rely on that contention. In fairness to Mr. Kolah, we must add that the point has not been conceded by him.

Our answer to the question will be in the affirmative.

Assessee to pay the costs.

Solicitors for the applicants: *Kanga & Co.*

Solicitor for the respondent: *A. S. Parikh.*

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

**M/S. F. E. DINSHAW LTD. v. THE COMMISSIONER OF INCOME-TAX,
BOMBAY CITY.***

Indian Income-tax Act (XI of 1922), Sec. 10(2)(xv)—Allowances permissible on ground that expenditure laid out for purpose of assessee's business—Principle governing such allowances—Expenditure of nature of compensation for termination of employee's services whether a permissible deduction—Applicability of test of commercial expediency where such deduction claimed—Whether income-tax Department can frame its own standard of commercial prudence where amount of compensation claimed as permissible deduction.

For claiming a deduction under s. 10(2)(xv) of the Indian Income-tax Act, 1922, what is required is that the expenditure must be germane to the business of the assessee and not something which is *de hors* the business of the assessee. If it is an expenditure of the nature of compensation for termination of the services of an employee, the closer test would be that of commercial expediency. If the payment is made under the honest belief that the claim by the employee for compensation or damages is justified and the assessee has acted in the matter of the settlement of the claim as an ordinary prudent businessman would act, it would not be for the income-tax department to say that the claim would not have succeeded in its entirety or even partly in a Court of law. In such a case the Department cannot insist on framing its own standard of reasonableness or prudence. It cannot claim the right or discretion to look at the matter subjectively but must examine it objectively. If the Department reaches the conclusion that the payment does not reflect a genuine transaction, it can object to it, or if the payment appears to have been made for a collateral purpose, it may not accept the claim for allowance. So also if the payment is made with an indirect or improper motive or for some consideration *attunde* the business or out of sheer generosity. The test, in fine, must be of commercial expediency.

*Jethabhai Hirji & Co. v. Com. I.T.,*¹ referred to.

*Newton Studios Ltd. v. Commr. of Inc.-tax,*² agreed with.

*Eastern Investments Ltd. v. The Commr. of Inc.-tax,*³ referred to.

THE facts appear in the judgment.

R. J. Kolah, with *Dilip Dwarkadas*, for the assessee.

G. N. Joshi, with *B. J. Joshi*, for the Commissioner of Income-tax.

S. T. DESAI J. A short but interesting question arises for our determination on this reference under s. 66(2). The assessee Messrs. F. E. Dinshaw Ltd. and three others formed the Cement Agencies Ltd. a company which was appointed the Managing Agents of the Associated Cement Companies Ltd. The Associated Cement Companies Ltd. is a public company and was incorporated in 1936 and in the same year the Cement Agencies Ltd. were appointed its Managing Agents. There were three other principal shareholders along with F. E. Dinshaw Ltd. in the Cement Agencies Ltd. In order to look after the day to day management of the parent company, the four principal shareholders appointed four persons to act as managing directors of Cement Agencies Ltd. These persons were to devote all their time and attention to the business and management of Associated Cement Companies Ltd. The remuneration of these managing directors was, however, not to be paid by Cement Agencies Ltd. but by the four principal shareholders. The assessee company appointed Mr. H. S. Captain as one of the managing directors on its behalf and the remuneration payable to Mr. Captain was recorded in a letter addressed by Mr. F. E. Dinshaw to him on October 29, 1935. The remuneration was payable to him on a percentage basis relative to dividends declared by Cement Agencies Ltd.;

*Decided, October 7/8 1958. Income-tax 2 (1955) 28 I. T. B. 378.
Reference No. 20 of 1958. 3 (1951) 20 I. T. B. 1.

1 (1949) 51 Bom. L. R. 708.

but the minimum remuneration was to be Rs. 60,000 per year. That arrangement continued till September 30, 1951. On September 30, 1951, the assessee company terminated the services of Mr. Captain. The arrangement between the four principal shareholders and the Cement Agencies Ltd. operative from October 1, 1951, was that the salary of the four managing directors was to be paid thereafter not by the four principal shareholders but by Cement Agencies Ltd. itself. The salary in case of Mr. Captain was to be Rs. 3,600 per month with certain allowances. Under the agreement recorded in the letter of October 29, 1935, Mr. Captain had in the meantime been getting remuneration varying between Rs. 86,000 and Rs. 1,25,000 every year. Mr. Captain continued to work for the Cement Agencies Ltd. in accordance with the variations in the arrangement already referred to and was remunerated at Rs. 36,000 per year. There was a resolution by the board of directors of Cement Agencies Ltd. recording the fact that the services of Mr. Captain had been taken up by the Cement Agencies Ltd.

The Cement Agencies Ltd. had not declared any dividend before October 1, 1951, in respect of the then current accounting year of the company. That dividend was declared about six months later and a sum of Rs. 1,34,400 was paid to Mr. Captain on account of his salary for the period ending September 30, 1951, till which date he had been in the employment of F. E. Dinshaw Ltd. Over and above that a sum of Rs. 1 lakh was paid by F. E. Dinshaw Ltd. to Mr. Captain. A few days after the resolution passed by Cement Agencies Ltd. of which we have made mention, Mr. Captain wrote to the assessee recording certain facts and claiming a sum of Rs. 3 lacs as compensation for termination of his services. In that letter he stated that he had made a claim for compensation in view of the termination of his employment. In the penultimate para of that letter he stated:

"I further pointed out that my remuneration at present amounted to nearly Rs. 11,000/- a month and it would probably go on increasing every year in the circumstances of the case. I therefore claimed compensation of not less than Rs. 3 lakhs, even allowing for the fact of your having secured me a job with Cement Agencies Ltd.

After discussion at several meetings it has been agreed between you and me that you should pay me the sum of Rs. 1 lakh as compensation for termination of my employment." The assessee acknowledged receipt of that letter on December 28, 1951, and confirmed the agreement relating to payment of Rs. 1 lakh to Mr. Captain as compensation for termination of his employment. Along with that letter was sent to him a cheque for Rs. 1 lakh. This amount of Rs. 1 lakh was claimed by the assessee company as a revenue deduction. In this reference we are not concerned with the payment of Rs. 1,34,400 made by the assessee company to Mr. Captain. The Income-tax Officer disallowed the assessee's claim for this deduction. The Appellate Assistant Commissioner, however, allowed the assessee company a deduction of Rs. 33,600. The view he took of the matter was that in the absence of any specific period of service agreed to between the parties concerned, Mr. Captain was entitled to only a reasonable notice and the damages or compensation payable to him should be the salary that he would have earned during that period of notice. He took the view that three months' notice would be reasonable in the circumstances of the case and fixed the permissible deduction at Rs. 33,600. In appeal both the President and the Accountant Member gave different reasons for the conclusion reached by the Tribunal. The President was of the opinion that Mr. Captain was entitled to a reasonable notice and held that the amount allowed by the Appellate Assistant Commissioner was reasonable compensation for terminating Mr. Captain's services. The Accountant Member on the other hand took a different view of the matter, and in his opinion the claim for deduction relating to Rs. 1 lakh stood on the same footing as the claim relating to payment of Rs. 1,34,400 as remuneration to Mr. Captain. In his order, he referred to the letter of December 27, 1951, addressed by Mr. Captain to the assessee company and observed:

"Dealing with the second item of Rs. 1 lac the nature of the payment appears to be

the same as the first item. The letter dated the 27th December 1951 written by Mr. Captain to the assessee is all a made up affair."

He did not base his decision on that inference of his. He agreed with the President that the amount of Rs. 33,600 allowed as deduction was reasonable. The question we are asked to determine on this reference is:

"Whether on the facts and in the circumstances of the case the assessee company was entitled to claim as an allowable deduction the whole sum of Rs. 1,00,000/- (Rupees One lac) paid as compensation to H. S. Captain?"

The deduction was claimed by the assessee under s. 10(2)(xv) and the question which the Tribunal had to consider was whether the amount of Rs. 1 lac represented an expenditure laid out or expended wholly and exclusively for the purpose of the business of the assessee. We have very carefully looked into what has been said both by the President and the Accountant Member but we do not find anything there on this point. Both the President and the Accountant Member have approached the matter from the point of view of reasonable period of notice in case of an agreement of wrongful termination of services. There is reference to s. 10(2)(xv) in the order of the Accountant Member, but nothing is said there as to whether in his opinion this was or was not an expenditure laid out wholly or exclusively for the purpose of the assessee's business.

Mr. Joshi has, however, argued before us that that must be taken to be implicit in the order. We shall take it that it is implicit in the order that such was the conclusion of the President and the Accountant Member.

It has been argued before us by Mr. Kolah, learned counsel for the assessee, that all the facts show that this amount was paid in the circumstances recorded in the two letters. It is said that the genuineness of the two letters and the transaction recorded there has never been questioned by the Department. It is also said that, although the Accountant Member threw a doubt on the letter of December 27, 1951, in his judgment, there is no finding by the Tribunal that the letter was a made up affair. There is nothing in the statement of the case either which may suggest that the Tribunal looked upon the two letters with any doubt or suspicion. The reasoning of the President proceeds on the footing that the letters recorded the true state of affairs. The only question decided is that the sum of a lac of rupees was excessive compensation paid by the assessee and that compensation commensurate with three months' salary would have been adequate in the circumstances of the case. It is further argued that there is not a single factor in this case which may be said as suggesting or showing that the payment was not laid out wholly or exclusively for the purpose of the business of the assessee company. The argument ran that the assessee was bound to make a compensation for termination of Mr. Captain's services without giving a proper legal notice, and if it made compensation to the discharged employee bona fide and solely as a matter of business expediency, there was no reason why the Department should not have accepted that payment as permissible revenue deduction.

Now, the general principle underlying the subject of allowances of deductions permissible on the ground that the expenditure is laid out wholly or exclusively for the purpose of an assessee's business is firmly established. The prime consideration in case of a claim for any such deduction must be that the expenditure was incurred wholly and exclusively for the purpose of such business. An expenditure can be for the purpose of the business even though it may not be incurred with a view to making profits. In *Eastern Investments Ltd. v. The Commr. of Inc.-tax*,¹ the Supreme Court laid down that in the absence of fraud, the questions whether the transaction had the effect of diminishing the assessee's taxable income and whether it was necessary for the assessee to enter into that transaction are irrelevant in determining whether expenditure relating to that transaction should be allowed under s. 12(2). The principle on which that decision rested is the same and raises the same considerations as are applicable under the present s. 10(2)(xv). The matter has to

be viewed in the light of principles of commercial trading and commercial expediency. What is required is that the expenditure must be germane to the business of the assessee and not something which is *de hors* the business of the assessee. If it is an expenditure of the nature of compensation for termination of the services of an employee, the closer test would seem to us to be that of commercial expediency. This test was approved of by the Supreme Court in the decision referred to above. If the payment is made under the honest belief that the claim by the employee for compensation or damages is justified and the assessee has acted in the matter of the settlement of the claim as an ordinary prudent businessman would act, it would not be for the Department to say that the claim would not have succeeded in its entirety or even partly in a Court of law. In such a case the Department cannot insist on framing its own standard of reasonableness or prudence. It cannot claim the right or discretion to look at the matter subjectively but must examine it objectively. Of course, if the payment is not made wholly or exclusively for the purpose of the business, very little would remain to be said or done. If the Department reaches the conclusion that the payment does not reflect a genuine transaction, it can certainly object to it, or if the payment appears to have been made for a collateral purpose, it may not accept the claim for allowance. So also if the payment is made with an indirect or improper motive or for some consideration *aliunde* the business or out of sheer generosity. The test, in fine, must be of commercial expediency. The indisputable starting point in matters of this kind should be an objective approach and there should be no setting up of any subjective standards. The foremost consideration, as we have mentioned, is the one laid down by the Legislature itself and it is that the expenditure must have been wholly and exclusively laid out for the purpose of the business.

Mr. Kolah, learned counsel for the assessee, has relied on a decision of the Madras High Court in *Newtone Studios Ltd. v. Commr. of Inc.-tax*.² That case related to payment of remuneration to a member of the staff of the assessee but the principle is the same. Mr. Kolah has particularly relied on the following observations of the Court (p. 385):

"Under our taxing system, it is for the assessee to conduct his business, and in his wisdom or otherwise to fix the remuneration to his staff. The Income-tax Act does not clothe the taxing authority with any power or jurisdiction to determine the reasonableness of the amount so fixed and paid by the assessee. The only test for the deductibility of such remuneration is whether the expenditure has been incurred solely and exclusively for the purpose of the business. If the reality of the payment is challenged or is in dispute different considerations arise; so also in cases where the tax authorities are able to point to some consideration other than the purpose of the business as accounting for any portion of the payment made. In such cases, of course, such portion of the amount claimed, which is either not held to have been paid or is held to have been paid for reasons other than business expediency, could and should be disallowed; but the reason for the disallowance is because either the portion disallowed is not paid, or because the expenditure is not solely and exclusively for the business, and not on the ground that in the opinion of the Income-tax Officer or other taxing authority the remuneration is "unreasonably" high—either because the employee does not, in the authority's opinion, deserve so much, or because the assessee could have secured other employees on more favourable terms."

We are in respectful agreement with the view expressed by the learned Judge, but would prefer to follow a decision of this High Court where also the same principle came up for consideration and in which case there are observations of the learned Chief Justice, which throw light on some further aspects of the matter. They may be said, with respect, to be of the nature of a corollary to the broad general principle enunciated in the judgment of the Madras High Court. Mr. G. N. Joshi, learned counsel for the Department, has relied on

those observations in *Jethabhai Hirji & Co. v. Com. I.T.*³ It was there observed (p. 712):

"...Although the payment might have been made and although there might be an agreement in existence, it would be open to the Income-tax Officer to take into consideration various factors which would go to show whether the amount was paid as required by the section. For instance, the Income-tax Officer may take into consideration whether the moneys were paid to a near relation of the employer. He may take into consideration the extent of the business and the particular services rendered by the employee which called for a special remuneration at the hands of his employer. He may take into consideration the quantum of the payment made with a view to decide whether the payment was or was not grossly out of proportion to the work done by the employee. If after taking these factors into consideration he comes to the conclusion that the payment was not made wholly and exclusively for the purpose of the business of the assessee, it would be open to him to either disallow the whole sum or a part of the sum paid. The question whether a particular sum was expended wholly and exclusively for the purposes of such business must essentially be a question of fact to be determined by the Income-tax Officer. But it would be open to the assessee to contend, as it has been contended in this case, that the decision arrived at by the Income-tax Officer was based on no evidence at all. If the assessee satisfies the Court that apart from the actual payment and existence of the agreement there were no other factors which were taken into consideration by the Income-tax Officer, then perhaps the Court would say that the Income-tax Officer was not justified in coming to the conclusion that he did."

It was urged by Mr. Joshi that these observations do not wholly accord with what was laid down in the Madras decision. For our part we read these observations as affirming the identical principle and stating matters which would be of the nature of a corollary to the same principle. We read nothing in these observations which can in any manner be said to qualify or modify the broad general principle and as we have already pointed out the broad general principle is as laid down by the Supreme Court in the decision to which we have already made reference. We may also add that there is nothing in these observations to suggest that it is open to the Department in any such case to look at the matter subjectively and not objectively. The reason of the rule is not far to seek. It is not difficult to conceive of cases where the legal liability of the employer may be a debatable question. When faced with a claim for compensation or damages by a servant whose services have been wrongfully terminated, is the employer to view the matter as one of commercial expediency or strictly as a matter of legal rights as may be ultimately decided by the Court? It would surely be open to the employer in such a case to use his own judgment and act as a prudent businessman would act. If he finds that the claim is justified and does not allow any collateral consideration to colour his judgment, it would certainly be open to him to settle the claim for a reasonable amount and it is difficult for us to see how in such a case it should be competent to the Department to set up its own views of the matter and say that the claim of the employee was not legally very sound.

To turn to the arguments of Mr. Joshi. It is said that in a case of this kind, even assuming that there was justification in the claim for compensation by the employee, the quantum of compensation could not reasonably have been fixed at anything higher than three months' remuneration. Mr. Joshi has based his argument on the premise that the employee would in such a case be only entitled to a reasonable notice, and if no notice is given, he would be entitled to claim such damages as would be awarded by a Court of law. We have already discussed the principle of the matter and need not rehearse the same. But we shall proceed to examine Mr. Joshi's argument on the footing that in such a case the consideration would be what was the period of reasonable notice that should have been given by the employer to the employee before terminating his services. Now, this question of reasonable notice has never been one

easy for the Court to decide. There is no yardstick applicable to claims of this type which from their very nature and from the nature of different employments must necessarily vary. It would not be proper in a case of this nature to expect the employer to settle the claim in a manner which would meet with the approval of the Department since from the very nature of things it would be impossible for the employer to deal with the claim with plumb-line precision. Difficulty sometimes arises even when the Court has to determine the period of reasonable notice. An instance in point which immediately strikes one is the wellknown case of the Insurance Agent who had built up a business of an insurance company for many years. The decisions of the trial Court and in appeal and the Privy Council illustrate the difficulties that face the Court in some cases where the employment is not of an ordinary nature but involves complex facts. In case of an employee who does clerical work or of a stenographer, the position would not present any difficulty. But there are employments in which various considerations are bound to arise and do arise for the determination of the Court and the present one certainly is one of those cases in which it would not be easy for the Court to determine the precise period of reasonable notice. Managing directorships in large concerns are not very common. Remuneration in different concerns would depend on various factors, which it is not simple to state. This question of reasonable notice was canvassed before us by Mr. Joshi in the reference decided by us immediately before the present reference. That arose out of a claim made by Mr. Captain, the employee. In the course of his argument, Mr. Joshi had there stressed a further aspect of the matter which arose for our determination and submitted that we should take into consideration whether the amount of Rs. 1 lac could be said to be a reasonable amount of damages in the facts and circumstances of the case. In that matter our opinion was in favour of the claim made by the employee who was the assessee. We pointed out in that case that the letter of employment showed that the emolument was payable annually to Mr. Captain and we said in our judgment that if we had to consider the question of reasonable notice it would certainly have been a period of more than six months. We also said in our judgment that we were not prepared to consider the amount of Rs. 1 lac as in any sense an inordinate payment. Therefore, even if we have to view the matter solely from the point of view of the period of reasonable notice, we would reach the conclusion that in case of an employee whose services were of the nature of the managing directorship in this case and whose emoluments varied between Rs. 72,000 and Rs. 1,25,000 per year compensation of Rs. 1 lac would be reasonable. We may mention that a statement showing the emoluments paid to the employee is part of the record and marked as Annexure "B". That statement also shows that the amount of dividend which the Cement Agencies Ltd. received for the year ending December 31, 1952, was Rs. 6,04,800 and had Mr. Captain continued in the employment of F. E. Dinshaw Ltd. his remuneration would have been Rs. 1,68,960.

For the reasons already indicated, our answer to the question will be in the affirmative.

Commissioner to pay the costs.

Solicitors for the applicant: *Kanga & Co.*

Solicitor for the respondent: *A. S. Parikh.*

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY
v.

AMARCHAND N. SHROFF.*

Indian Income-tax Act (XI of 1922), Sec. 24B—Death of partner in firm of attorneys and his son joining partnership—Arrangement between son of deceased partner and continuing partners that realisation of work done prior to death of partner to be divided between previous partners—Sums of moneys realised after death of partner and certain amount paid to estate of deceased partner—Whether such amounts liable to tax under s. 24B in hands of the deceased by his legal heirs and representatives.

One Amarchand N. Shroff, who was a partner in a firm of attorneys, died and his son joined the firm as a partner. An arrangement was arrived at between him and the continuing partners that in respect of the work done prior to the death of his father, the realisation was to be divided between the three previous partners. Certain sums of moneys were realised during the subsequent five years after the death of the aforesaid partner and five amounts were paid to his estate. The Income-tax Department initiated proceedings under s. 34 of the Indian Income-tax Act, 1922, in respect of these realisations as income in the hands of an entity styled as "Shri Amarchand N. Shroff by his legal heirs and representatives" and the status of that entity was given to be that of an individual. On the question whether these realisations were assessable to income-tax in the hands of the assessee "Amarchand N. Shroff by his legal heirs and representatives", the Department contended that the case fell within the ambit of s. 24B of the Act:—

Held, that the receipt of the realisations could not be equated with income but could be regarded as a capital receipt and, therefore, s. 24B was not applicable to the present case.

Allen and Murray v. Trehearne, *Sreemati Usharani Roy Choudharani*, *In re*,² *Comr., I-T. v. Anderson*³ and *Kamdar*, *In re*,⁴ referred to.

THE facts appear in the judgment.

G. N. Joshi, with R. J. Joshi, for the Commissioner of Income Tax.

R. J. Kolah, with N. A. Palkhivala, for the assessee.

S. T. DESAI J. Mr. Amarchand Shroff, who was an attorney of this Court and a partner in the firm of attorneys Messrs. Amarchand and Mangaldas, died on July 7, 1949. There were three partners in the firm, Mr. Amarchand, Mr. Mangaldas and Mr. Hiralal. Mr. Ramesh, son of Mr. Amarchand, joined the firm as a partner on December 1, 1949, and an arrangement was arrived at between him and the continuing partners after the death of Mr. Amarchand. In respect of work done prior to July 7, 1949, the realisation was to be divided between all the three previous partners; in respect of work done between July 8, 1949 and November 30, 1949, it was to be divided between Mr. Mangaldas and Mr. Hiralal and realisation made in respect of work done after December 1, 1949, was to be divided between the two old partners and the new partner Mr. Ramesh. Mr. Amarchand was being taxed on cash basis. Large sums of moneys were realised during the subsequent five years after Mr. Amarchand's death and the amounts paid to his estate were Rs. 37,847, Rs. 43,162, Rs. 34,899, Rs. 13,402 and Rs. 32,523. The Department sought to tax these realisations as income in respect of the work done by Mr. Amarchand prior to his death. These amounts were assessed in the hands of an entity styled as "the heirs and legal representatives of late Mr. Amarchand N. Shroff" and the status of that entity was described to be that of a Hindu undivided family.

The matter was carried to the Tribunal and the two members of the Tribunal took divergent views on certain aspects of the same, but they were agreed that

*Decided, October 10, 1958. Income-tax
Reference No. 22 of 1958.

1 (1938) 6 I. T. R. 172.

2 (1942) 10 I. T. R. 199.

3 (1954) 57 Bom. L. R. 68.

4 (1945) 47 Bom. L. R. 742, F.B.

the income in question could not be assessed as income of the assessee i.e. "the heirs and legal representatives of late Mr. Amarchand Shroff". The Judicial Member took the view that it could not by any stretch of imagination be said that the receipts were the income of the heirs assessable as their income and he held that the amounts could not be assessed as income of the assessee-heirs and he concluded in favour of the assessee. The Accountant Member stated in his order that what the Department should have done was that they should have assessed the Hindu undivided family consisting of the two sons of Mr. Amarchand and his widow. He further held that the realisations which went to the share apportionable to Mr. Amarchand in respect of work done during his life-time could not be treated as the income of the Hindu undivided family. His view was that these outstandings would form part of the estate of the deceased as at the time of his death as they were outstandings due to the estate of the deceased. He also expressed the view that the realisations received by the Hindu undivided family were in their hands realisations of capital and not of income. The matter at that time rested with the decision of the Tribunal.

Sometime later the Income-tax Department initiated proceedings under s. 34 in respect of the same income in the hands of an entity styled as "Shri Amarchand N. Shroff by his legal heirs and representatives." The status of that entity was given to be that of an individual and not of an Hindu undivided family. The attitude taken up by the Department, somewhat curious, was that the assessment was being made on the deceased himself, although that was contrary to the recognised principle that there can be no assessment on a dead man, he having gone beyond the jurisdiction of the Department.

The Appellate Assistant Commissioner set aside the assessment which was made by the Income-tax Officer after adopting proceedings under s. 34. He decided the matter on the ground that the notices under s. 34 were invalid. The matter this time also was carried to the Tribunal. Some of the contentions of the assessee were negatived by the Tribunal, but we are not concerned with them. In deciding the matter in favour of the assessee the Tribunal observed that they were unable to understand how any assessment could be made on a dead person. Reliance was placed before the Tribunal on s. 24B. We shall presently set out the relevant part of that section. For the present purpose, it will suffice to observe that s. 24B deals with tax on income of a deceased person payable by his representatives. It has always been taken as firmly established that s. 24B only deals with income which had accrued to or had been received by a person who died, but who had not been assessed and tax had not been recovered in respect of that income. The Tribunal took the view that s. 24B had no application to the matter. As to the proper and correct entity to be taxed, the Tribunal accepted the contention of the assessee, and according to the Tribunal that entity was the Hindu undivided family consisting of the two brothers and their mother. It was observed by the Tribunal that it was the Hindu undivided family who had received the outstandings from the partnership firm of solicitors. The Tribunal also reiterated what had been stated in the earlier appeal that in the hands of the Hindu undivided family the income could not be brought to tax, being of a capital nature.

The matter comes before us on this reference at the instance of the Commissioner and the question that we are called upon to determine is:

"Whether on the facts and in the circumstances of the case, the sums of Rs. 37,478/-, Rs. 43,162/-, Rs. 34,899/- Rs. 13,402/- and Rs. 32,523/- were assessable to income tax in the hands of the assessee "Amarchand N. Shroff by his legal heirs and representatives" in the five respective years under reference?"

The matter has been argued before us by Mr. Joshi with his usual fairness. Although Mr. Joshi has not conceded any point, he has very fairly stated that the task of the Revenue would be difficult if the case cannot be brought within the language and ambit of s. 24B. In our judgment, the only contention that can possibly be raised by the Revenue in a case of this nature would be that

the case falls within the ambit of s. 24B. Therefore, it will be convenient if we first dispose of the other submission of Mr. Joshi. It is stated that even if the case does not fall under s. 24B the receipts were of the nature of income and that in the hands of the assessee, who are the heirs of the deceased, the character of the receipts would not change. It would be income in their hands. Now, this contention is obviously untenable. If it was not the income of the deceased, it must be the income of the heirs if it is to be liable to be taxed. It is difficult to see how these realisations can be described as the income of the heirs. The nature of these realisations in the hands of the assessee would evidently be part of the estate of the deceased and would be capital receipts.

To turn to the principal contention urged before us by Mr. Joshi. It will be convenient before examining the argument of learned counsel to set out the relevant parts of s. 24B. Sub-sections (1) and (2) of s. 24B run as follows:—

"24B. (1) When a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died.

(2) Where a person dies before the publication of the notice referred to in sub-section (1) of section 22 or before he is served with a notice under sub-section (2) of section 22 or section 34, as the case may be, his executor, administrator or other legal representative shall, on the serving of the notice under sub-section (2) of section 22 or under section 34, as the case may be, comply therewith, and the Income Tax Officer may proceed to assess the total income of the deceased person as if such executor, administrator or other legal representative were the assessee."

It is stated that although sub-s. (1) speaks of the tax assessed as payable and the marginal note speaks of tax of deceased person payable by representative, it is implicit in the word "tax" that it is a tax on the income of the deceased person. So far, we are in agreement with Mr. Joshi. The tax, of course, is income-tax and it can only be on the income of the deceased person. But the difficulty of Mr. Joshi starts immediately one begins to proceed henceforth. The plain meaning of the expression used in sub-s. (1) viz. "tax of deceased person" which we must read as "tax on the income of a deceased person" postulates that the income was the income of the deceased person. Therefore, what cannot be said to be the income of a deceased person is outside the purview of this section, which is the only provision in the Income-tax Act which deals with the income of a person who dies without paying income-tax in respect of the same.

Faced with this difficulty, learned counsel sought to derive support from the words at the end of the section viz. "or any tax which would have been payable by him under this Act if he had not died". Now, these words have to be read in their own context and the context clearly is of the income of a deceased person earned before his death. Therefore, here again the argument has to be thrown back from where it started. But the language of sub-s. (1) is not the only difficulty in the way of Mr. Joshi. Sub-section (2) which deals with the same subject has to be examined in order that the entire section is read in harmony and as one enactment. The words towards the end of that sub-section "the Income-tax Officer may proceed to assess the total income of the deceased person" are clearly and only referable to the income of the deceased person during his life-time. It is that income in the context of which reference is made in sub-s. (2) to the notices under s. 22 and s. 34. There is another aspect also of the language of sub-s. (2) and that is in the words "as if such executor, administrator or other legal representative were the assessee". These words do no more than emphasize the basic concept that the assessee must be a person in existence. The concept of the assessee as a juristic person in income-tax law is of a person in existence though a person may become an assessee by fiction of law. The assessee, where the income of the deceased person is to be taxed, is not his estate, but his executor, administrator or other

legal representative of the deceased person as if he himself was the assessee. The income, therefore, which can be assessed is either the income of the deceased assessee before his death or the income of the executor, administrator or other legal representative received by him in that capacity and the latter is to be regarded for all purposes of income-tax law as the assessee. It is suggested by learned counsel that it could not have been the intention of the Legislature to allow income of the type before us to escape assessment. But we are not concerned with the supposed intention of the Legislature, which is at times extremely difficult to ascertain and particularly in case of some provisions of the Income-tax Act. We are concerned with what the Legislature has said it meant. Ordinarily, what would have been the income of a deceased person, when received by an executor, administrator or other legal representative would be 'income' in his hands also, for instance, income of dividends, interest on securities, rents and similar categories of income. But there can be and there are categories, for instance realisations of the nature before us, where it would be impossible to equate the receipt with 'income' when clearly it would have to be regarded as a capital receipt. Therefore, on a plain reading of s. 24B, we see nothing in its language which permits of that section being invoked in favour of the Revenue.

We shall now turn to the authorities on the subject which have been cited before us by Mr. Joshi and see if there is anything in these decisions which supports a contrary view. In *Allen and Murray v. Trehearne (Insp. of Taxes)*¹ a sum of money was payable under a service agreement on the final termination of service of the employee and in lieu of a pension a sum was payable. A sum of £10,000 was paid to the executors of the will of the deceased employee who died while holding his office. It was held that the amount was properly chargeable to the executors to the same extent as it would have been chargeable to the deceased if he had been alive. Now, there is one observation in the judgment of Lawrence J. in that case on which counsel has tried to rely and that observation is (p. 175):

"...They might suppose anything and the sub-section only refers to the one supposition—namely, that the deceased had not died—and gives no other guidance."

That concept is present in our s. 24B in express terms. But there is no warrant for reading that observation as suggesting that what could not be the income of the deceased was to be treated as income of the deceased. Moreover, the case turned on the language of the relevant sections of the Finance Act, 1927.

The next decision to which Mr. Joshi has drawn our attention is *In re Sreemati Usharani Roy Choudhurani*². In that case the managing agent of a limited company died on May 12, 1938. At the time of his death a sum of Rs. 18,184 stood to his credit with the company and that was in respect of commission earned by him prior to the date of his death. That sum was paid to his widow and legal representative after his death, and the question arose whether it could be assessed to income-tax under the provisions of s. 24B. It was held that under s. 7 of the Act commission was assessable in the hands of the managing agent at the time of his death as salary due to him and as his widow had received the commission without any deduction of income-tax she was rightly assessed under s. 24B. It will be noticed that that was a case of an amount which had already been due to the deceased. It was not the case of any receipt which was not the income accrued to or received by the deceased person.

Learned counsel has also drawn our attention to the case of *Commissioner of Income-tax, Bombay City v. James Anderson*³. In that case there are some observations which relate to s. 24B. The observations relied upon are these (p. 72):

"...It is said that an administrator or an executor is only liable to pay tax which the

¹ (1938) 6 I. T. R. 172.

³ (1954) 57 Bom. L. R. 68.

² (1943) 10 I. T. R. 199.

testator would have been liable to pay, and as these capital assets were not sold by the testator it is suggested that there is no liability upon the executor or the administrator. Now, that contention is obviously untenable. Section 24B casts a liability upon the executor or the administrator to pay tax which the testator would have been liable to pay if he had not done so. But s. 24B does not limit the liability of the administrator or the executor only to the cases referred to in s. 24B. An administrator or an executor is as much an assessee under the Act as any other individual, and if he carries on business or makes profit or receives dividends or makes capital gains, he is as much liable to pay tax as any other individual."

These observations do not carry the case of Mr. Joshi any further.

One more decision cited by Mr. Joshi is *In re Kamdar*.⁴ In that case nothing turned on s. 24B. Mr. Joshi has relied on certain general observations made in the judgment in that case and which relate to the nature of income. Now, we are in respectful agreement with the observations of Kania J. and Chagla J. as they then were, but the observations have little bearing on the issue before us and it is not necessary for us to discuss in this judgment the general nature and incidents of income in the context of tax law. Another aspect of this matter presented by learned counsel for the Revenue is founded on the concept that receipts after death did not change the character of the income. We have already made reference to this point and it is not necessary for us to discuss the same. We only mention it to note the argument sought to be founded on this concept. In the view we take of the matter, it is not necessary to discuss the question about the Hindu undivided family which was argued before the Tribunal. The whole argument turns principally on the application of s. 24B and the view we take of the matter is in favour of the assessee.

Our answer to the question will be in the negative.

Commissioner to pay the costs:

Solicitor for the applicant: A. S. Parikh.

Solicitors for the respondent: Amarchand & Mangaldas.

APPELLATE CIVIL.

Before Mr. Justice Vyas and Mr. Justice Tambe.

Y. S. PARIHAR v. CHINTAMAN MADHAVSA KHATRI.*

Bombay District Municipal Act (Bom. III of 1901), Secs. 154(3), 60(b), 48(2)—Publication of notice—Whether open to municipality to prove publication of notice otherwise than by framing by-law prescribing procedure in matter of publication and compliance therewith.

Section 154(3) of the Bombay District Municipal Act, 1901, is not mandatory regarding the framing of a by-law by a municipality; it is mandatory only in respect of a presumption to be drawn regarding publication of a notice in case a by-law has been framed. Therefore, if no such by-law is framed by a municipality, it is still open to the municipality to prove sufficient publication of the notice in other ways.

*The Dharangaon Municipality v. The Purva Khandesh Zilla Audyogik Sahakari Mandal Ltd.*¹ disapproved.

THE facts appear in the judgment.

B. B. Kotval, for the applicants.

G. N. Vaidya, for the opponents.

VYAS J. These three revisional applications raise a common question of law, for the understanding of which it is necessary to state the facts of only

⁴ (1945) 47 Bom. L. R. 742, F.N.

*Decided, June 20, 1958. Civil Revision Application No. 1400 of 1956 (with Civil Revision Applications Nos. 108 and 109 of 1957), against the decision of M. N. Kulkarni, Joint

Civil Judge, J. D., Erandol, in Small Cause Civil Suit No. 42 of 1956.

¹ (1953) Second Appeal No. 121 of 1953, decided by Dixit J., on September 25, 1953, (Unrep.).

one of the applications, namely, Civil Revision Application No. 1400 of 1956. This application arises out of a judgment and decree passed by the learned Joint Civil Judge, J. D., at Erandol, in Civil Suit No. 42 of 1956. The plaintiff who is the opponent in this application filed this suit for recovering the amount of Rs. 100 from the defendant Municipality of Dharangaon, the present applicant, upon the contention that the municipality had recovered the said amount from him illegally by way of octroi on yarn brought by him within the municipal limits during the period March 25, 1953, to July 21, 1955. The plaintiff contended that the municipality did not conform to the procedure required by law to be followed before the imposition of a tax. His case was that there was no sufficient publication of the rules and notice in the matter of the levy of this tax, and this had resulted in the loss of an opportunity to him to make a representation against the levy of the tax. The municipality resisted the suit and contended that the levy of the tax was according to law, that the necessary procedure was followed before the imposition of the tax and further that the plaintiff's suit was barred by limitation. The learned Judge framed an issue whether the tax levied upon the plaintiff and the recovery thereof made from the plaintiff were legal and valid. The learned Judge framed another issue also, viz., whether the suit was barred by limitation. On the first issue the learned Judge held that the tax was not legally levied and upon the second issue, he came to the conclusion that so far as the amount of Rs. 97-12-3 out of the amount of Rs. 100 was concerned, the suit was not barred by limitation, but that it was barred only in respect of a small amount of Rs. 2 and odd. Consistently with the view which the learned Judge took on the point of the legality of the levy of the tax, he passed a decree directing that the defendant Municipality of Dharangaon do pay to the plaintiff an amount of Rs. 97-12-3 together with future interest thereon at 4 per cent. per annum from the date of the suit till the date of realisation. It is from this decree that the Civil Revision Application No. 1400 of 1956 is filed by the Dharangaon Municipality.

It would be convenient at this stage to set out the provisions of the Bombay District Municipal Act, 1901, relating to the levy of a tax. It may be noted that the tax in this case was levied under the provisions of s. 59, sub-s. (1), cl. (b), sub-cl. (iv). Sub-clause (iv) provides that subject to any general or special orders which the State Government may make in this particular behalf, any municipality may impose an octroi on animals or goods, or both, brought within its octroi limits for consumption, use or sale therein. Then there is s. 60. Clause (a) of s. 60 provides that a municipality before imposing a tax shall by a resolution passed at a general meeting select for the purpose one or other of the taxes specified in s. 59 and shall prepare rules for the purposes of cl. (i) of s. 46 prescribing the tax selected. Then, there is cl. (b) of s. 60 which provides that when a resolution as required by cl. (a) has been passed and rules prepared, the municipality shall publish the form of rules with a notice in the form of Schedule A. Then there is cl. (c) of s. 60 which provides for objections to the tax by the inhabitants of the municipal district concerned. It would be convenient to set out the text of cl. (c) which says:

"Any inhabitant of the municipal district objecting to the imposition of the said tax, or to the amount or rate proposed, or to the class or persons or property to be made liable thereto, or to any exemptions proposed, may within one month from the publication of the said notice send his objections in writing to the municipality, and the municipality shall take all such objections into consideration, or shall authorise a committee to consider the same and report thereon, and, unless they decide to abandon the proposed tax in accordance with such objections, shall submit the same with their opinion thereon, and any modifications proposed in accordance therewith, together with the notice and rules aforesaid, in the case of a City Municipality to the State Government and in the case of any other municipality to the Commissioner."

Section 61 says that the State Government or the Commissioner as the case may be may either refuse to sanction the rules submitted or may return them to the municipality for further consideration. This section says that the

Government or the Commissioner may sanction the rules either without modification or subject to such modifications as are considered necessary. Section 62 refers to the publication of the rules after the sanction thereof and also to the publication of the notice. Now, on the point of publication, the relevant section is s. 154, sub-s. (3). Sub-section (3) provides:

“Every notice which this Act requires or empowers a municipality to give or to serve either as a public notice, or generally, or by provisions which do not expressly require notice to be given to individuals therein specified, shall be deemed to have been sufficiently given or served if a copy thereof is put up in such conspicuous part of the municipal office during such period and in such other public buildings and places, or is published in such local papers or in such other manner, as the municipality in by-laws in this behalf prescribes.”

While dealing with the point of publication, the learned Judge has observed in the course of his judgment that it is the duty of a municipality to frame a by-law describing the particulars about the publication of notices and that the notices which are published according to a by-law so framed are the only valid publications. He has then pointed out that in this case admittedly the municipality has not framed a by-law as required by sub-s. (3) of s. 154 of the Bombay District Municipal Act. As the defendant municipality has not framed such a by-law, the learned Judge has held that the publication of rules and notices by it has not been in accordance with law. The learned Judge has summed up the position thus:

“If the municipality has not made a valid and effective publication of the rules and the notice according to law, then it has failed to observe a condition precedent to the levying of a tax and hence any tax imposed by the municipality without observing the condition precedent is illegal and invalid and *ultra vires* its powers.”

It is this view of the learned Judge which is challenged by Mr. Kotval, the learned advocate of the applicant municipality in this revisional application.

It would appear that a similar point arose in *The Dharangaon Municipality v. The Purva Khandesh Zilla Audyogik Sahakari Mandal Ltd.*,¹ wherein Mr. Justice Dixit took the view that s. 154, sub-s. (3), required a municipality to frame a by-law and that it was not open to the municipality to publish notices in any other way. With great respect, we are unable to agree with the view expressed by Mr. Justice Dixit. If we turn to the language of sub-s. (3) of s. 154, it would appear that the Legislature has not made it incumbent upon a municipality to frame a by-law. All that the Legislature has laid down by enacting the sub-section is that if a presumption regarding publication has to be drawn, certain conditions must be fulfilled, viz., that a by-law must be framed prescribing a certain procedure in the matter of publication. In other words, the framing of a by-law is a condition precedent to the drawing of a presumption. If in a given case no by-law is framed by the municipality in this behalf, no presumption such as is referred to in sub-s. (3) of s. 154 would be permissible; or if a by-law is framed by a municipality but the provisions thereof are not complied with, even then no presumption such as the one which is referred to in sub-s. (3) of s. 154 would be permissible. Sub-section (3) does not say that even if there is other evidence regarding publication, such evidence would not be sufficient, in the absence of a by-law, to justify the conclusion that there was sufficient publication. The language of sub-s. (3) of s. 154 is not mandatory regarding the framing of a by-law. It is mandatory only in respect of a presumption to be drawn in case a by-law has been framed. Upon a careful consideration of the provisions of sub-s. (3) of s. 154, we are satisfied that the Legislature has not intended to lay down that there can be no publication apart from or irrespective of a by-law which is referred to in the sub-section. The sub-section speaks only of a presumption as I have just said, and it is unnecessary to point out that presumption is not the only kind of proof.

¹ (1953) Second Appeal No. 121 of 1953, (Unrep.), decided by Dixit J., on September 25, 1953.

The sub-section does not debar other kinds of proof on the point of publication. In this connection, the important words in the sub-section are: "shall be deemed to have been sufficiently given or served". These words would clearly show that the Legislature did not intend to lay down that the framing of a by-law and compliance with the provisions of the said by-law were the only ways in which sufficient publication could be given to the notice and the rules. It is clear that the Legislature intended that even if no by-law was framed by the municipality, it was still open to the municipality to prove sufficient publication in other ways. When something is deemed to have been done, it means that in fact it may not have been done or is not done. In this connection, we can do no better than refer to a decision of the Privy Council in the case of *Income-tax Commissioner, Bombay Presidency v. Bombay Trust Corporation*.² Their Lordships observed in that case (p. 55):

"...Now when a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were. It follows that although the High Court was perfectly right in holding that if s. 42 stood alone 'agent' in that section would mean an agent in actual receipt of the profits or gains which were to be assessed, they failed to appreciate that s. 43 puts the person who comes within its term artificially into the position of the agent and of assessee under s. 42."

It is clear, therefore, that the words "every notice which this Act requires or empowers a Municipality to give or to serve...shall be deemed to have been sufficiently given or served" mean that although in reality there might not have been sufficient publication of the notice, sufficient publication would nevertheless be presumed in case the municipality had framed a by-law and the provisions of the said by-law had been complied with. Now, in this case, there is no dispute that no by-law was framed by the municipality. No question, therefore, arises of compliance with the provisions of the by-law. But Mr. Kotval contends, and for the reasons stated above we are of the view that the contention is right, that merely because no by-law was framed by the municipality, it would not preclude the municipality from proving sufficient publication of the rules and notices in other ways. Now, if we turn to the plaint, we find a clear recital made therein by the plaintiff that no sufficient publication was given to the rules and notices. It is no doubt true that this averment made by the plaintiff in his plaint was denied by the defendant municipality in the written statement. It is to be noted, however, that it is often times difficult to prove a negative. The plaintiff's case being that there was no sufficient publication made by the municipality in respect of the rules and notices in the matter of levy of taxes, all that the plaintiff could do in his plaint was to deny the fact of sufficient publication. The manner in which the alleged publication was made by the municipality was within the special knowledge of the municipality. Therefore, it would not be sufficient in this case for the municipality merely to deny the averment made by the plaintiff regarding absence of sufficient publication. It would be necessary for the municipality to show how the publication was made. The plaintiff, by denying the alleged sufficient publication in the plaint, put the defendant to the proof of publication and it is impossible to accept Mr. Kotval's contention that simply because the municipality denied the plaintiff's averment in its written statement, we should take it that there was sufficient publication. When we are dealing with a fiscal statute which requires a subject to pay certain taxes, it is necessary that the provisions of the law should be strictly construed. It is perfectly clear from the provisions of ss. 60, 61 and 62 that there should be sufficient publication of the notices, so that the persons concerned might have an adequate opportunity to make representations either to the State Government or to the Commissioner protesting against the levy of the taxes. These are important provisions of law and it is necessary that they must be strictly complied with. In those circum-

stances, we have felt it necessary to remand the case to the Court below with the issue:

"Whether it is proved by the defendant Municipality that there was sufficient publication of the rules and the notices?"

The learned Judge should give opportunity to both the parties to lead such evidence as they may wish to, and upon a consideration of that evidence the learned Judge should give his finding whether there was sufficient publication of the rules, notices, etc. by the defendant municipality. Consistently with the finding which he might record on this point, he should decide whether the levy of the tax from the plaintiff was a lawful levy or not.

The learned advocate Mr. Vaidya appearing for the plaintiff-opponent has invited our attention to cl. (b) of s. 60 which says:

"When such resolution has been passed, the municipality shall publish the form of rules so prepared with a notice in the form of Schedule A prefixed thereto."

If we turn to Sch. A, it speaks of a notice to all inhabitants. From this Mr. Vaidya argues that a notice to all the inhabitants cannot be given unless there is a by-law framed by the municipality and unless the provisions of that by-law are complied with. We have considered this submission of Mr. Vaidya, but we have felt ourselves unable to accept it. If we turn to sub-s. (2) of s. 48, this is what it lays down:

"Every municipality shall, before making any by-law under this section, publish in such manner as shall in their opinion be sufficient, for the information of the persons likely to be affected thereby, a draft of the proposed by-law, together with a notice specifying a date etc., etc."

It is clear that under sub-s. (2) of s. 48 also, information is to be conveyed to all the persons likely to be affected by the by-law concerned and yet the Legislature has left it to the discretion of the municipality to adopt such mode as may appear best and sufficient in their opinion to give information of the by-law to the persons likely to be affected thereby. It is clear, therefore, that for the purpose of sub-s. (3) of s. 154, the framing of a by-law and observing the provisions of the said by-law could not have been intended by the Legislature to be the only way in which all the inhabitants could be given sufficient notice. It is important to bear in mind that sub-ss. (1) and (2) of s. 154 prescribe the mode of service of the notice. That is not the case with sub-s. (3) of s. 154. Sub-section (3), as I have said above, refers only to a presumption, and presumption is a rule of evidence. The scope, therefore, of sub-s. (3) of s. 154 is entirely different from the scope of sub-ss. (1) and (2). For these reasons, we are unable to accept Mr. Vaidya's contention that unless there is a by-law and unless there is compliance with the provisions of the said by-law, there could be no sufficient publication of the notice.

The second point, which is the point of limitation in this case, in other words the point whether the plaintiff's suit is barred by the provisions of s. 167 of the Act would depend upon whether the levy of the tax was a lawful levy or not. If, upon the evidence led before the learned Judge by the parties, the learned Judge comes to the conclusion that there was no sufficient publication of the rules, notices etc. by the defendant municipality with the result that the plaintiff did not have sufficient opportunity to make a representation against the proposed tax to the State Government or the Commissioner, the municipality could hardly be deemed to have purported to act in pursuance of the provisions of the law. If the municipality did not purport to act in accordance with the provisions of the law, it is obvious that the provisions of s. 167 would not be attracted. The learned Judge, to whom we are remanding the case, would no doubt examine this position and would decide the question of limitation also.

The result is that we set aside the judgment and decree passed by the learned Civil Judge in this case, remand the case to the learned Judge for decision of

the issue suggested by us and for disposal according to law. Costs costs in the case.

The Civil Revision Applications Nos. 108 and 109 of 1957 would be governed by this judgment.

Order accordingly.

Before Mr. Justice Vyas and Mr. Justice Tambe.

BAI RUKHI v. VRAJLAL JECHAND BHAVSAR.*

Bombay Tenancy Act (XXIX of 1939), Secs. 28, 24(2)(3)(4)(5), 2(13)—Bombay Land Revenue Code (Bom. V of 1879), Secs. 212, 211—Order made by Mamlatdar under s. 24(2) or by Collector under s. 24(3)—Whether Government had jurisdiction to revise such orders—Jurisdiction conferred upon Government under s. 28 whether jurisdiction of a revisional character.

Under s. 28 of the Bombay Tenancy Act, 1939, the Provincial Government had power to revise an order made by the Mamlatdar under s. 24(2) or by the Collector in appeal under s. 24(3) of the Act.

The jurisdiction conferred upon the Government under s. 28 of the Act was jurisdiction of a revisional character and not a mere administrative or executive jurisdiction.

*Ratanchand Onkardas Meher v. Hari Jayaram Khadke*¹ and *Purshottam Nathu Mali v. The State of Bombay*,² differed from.

Parvatibai Utamlal v. Rupa Keshav,³ referred to.

The facts appear in the judgment.

V. M. Limaye, for the petitioners.

M. H. Chhatrapati, for respondent No. 1.

Y. V. Chandrachud, Government Pleader, for respondent No. 5.

VIAS J. This is an application made under art. 227 of the Constitution of India by three petitioners wherein the petitioners have prayed for the setting aside of an order made by the Government of Bombay on February 5, 1958. By the said order, the Government reversed the order of the Prant Officer dated April 24, 1953. By his order dated April 24, 1953, the Prant Officer held that the application made by the present opponent No. 1 on November 4, 1947, for the restoration to him of the lands from which he was ejected was barred by limitation and he ordered that the said application do stand dismissed. By an order dated February 5, 1958, made by the Government of Bombay, the Government allowed the aforesaid application of opponent No. 1 and directed that the possession of the lands which are the subject-matter of the present application be restored to him. It is from this order of Government dated February 5, 1958, that the present application under art. 227 of the Constitution has been made by the petitioners.

This application raises a point under s. 28 of the Bombay Tenancy Act of 1939 and the point is whether under s. 28 Government had power to revise an order made by the Mamlatdar under s. 24(2), or by the Collector in appeal under s. 24(3), of the Act. This point arises upon the following facts and circumstances:

It would appear that opponent No. 1 Bhavsar Vrajlal Jechand was evicted from the lands comprising 22 survey numbers of village Vataman by opponent No. 3 Thakorsaheb of Sanand on May 20, 1944. The Bombay Tenancy Act

*Decided, July 25/29, 1968. Special Civil Application No. 1324 of 1958.

¹ (1952) Special Civil Application No. 1651 of 1952, decided by Chagla C. J. and Dixit J., on November 17, 1952 (Unrep.).

² (1951) Special Civil Application No. 274 of 1951, decided by Chagla C. J. and Gajendragadkar J., on December 6, 1951 (Unrep.).

³ (1947) 49 Bom. L. R. 658.

of 1939 was applied to this area on April 11, 1946. Under sub-s. (2) of s. 4 of the said Act, opponent No. 1 gave two notices to opponent No. 3, contending that he (opponent No. 1) was wrongfully evicted from the above-mentioned lands and that, therefore, possession of these lands should be restored to him. After giving these notices, opponent No. 1, on November 4, 1947, made an application under s. 24 of the Tenancy Act of 1939 to the Mamlatdar for restoration of possession of the 22 survey numbers to him. By an order made on September 22, 1952, the Mamlatdar held that opponent No. 1 had been wrongfully evicted from 10 out of the 22 survey numbers. It may be noted that amongst those 10 survey numbers, the survey numbers with which we are concerned in this application were not included. In other words, opponent No. 1's application for restoration of possession of the lands with which we are concerned in this application was rejected by the Mamlatdar by his order dated September 22, 1952. It may be necessary to note what are the survey numbers with which we are concerned in this application. Petitioner No. 1's grievance is in respect of S. No. 333 of village Vataman. Petitioner No. 2's grievance is in respect of S. No. 217/1 of the same village and petitioner No. 3's complaint is in the matter of S. No. 335 of the same village. It is the petitioners' case that these lands were held by them under the various mortgages which were effected in their favour by opponent No. 1. To resume the narrative, opponent No. 1 feeling aggrieved by the order made by the Mamlatdar on September 22, 1952, went in appeal against it to the Prant Officer. Opponent No. 3, Thakorsaheb of Sanand, also appealed from the said order of the Mamlatdar, since the Mamlatdar had decided against him in respect of 10 survey numbers out of the 22 survey numbers. By an order made by him on April 24, 1953, the Prant Officer held that opponent No. 1's application dated November 4, 1947, for restoration to him of the lands from which he was ejected by opponent No. 3 was time-barred, and accordingly he dismissed the appeal of opponent No. 1. While dismissing the appeal of opponent No. 1, the Prant Officer allowed the appeal of opponent No. 3. The effect of the Prant Officer's order, therefore, was that the order of restoration of 10 survey numbers, which was made in favour of opponent No. 1 by the Mamlatdar, was reversed. From the aforesaid order of the Prant Officer, opponent No. 1 made an application to the Government of the State of Bombay and the Government, acting under s. 28 of the Tenancy Act of 1939, passed an order on February 5, 1958, allowing the application of opponent No. 1, reversing the order of the Prant Officer and directing that the possession of the three lands, with which we are concerned in this application, be restored to opponent No. 1. It is from this order, as I have mentioned in the earlier part of this judgment, that the petitioners have come to this Court under art. 227 of the Constitution.

Now, the learned advocate Mr. Limaye, appearing for the petitioners, has raised only one point in this application, and the point is an important point. Mr. Limaye contends that Government had no jurisdiction under s. 28 of the Bombay Tenancy Act of 1939 to revise an order made by the Mamlatdar under sub-s. (2), or by the Collector in appeal under sub-s. (3), of s. 24 of the Act. Mr. Limaye says that upon a proper construction of s. 28 of the Tenancy Act of 1939, it would appear that the jurisdiction which the Legislature conferred upon the Government under that section was of an entirely administrative or executive character. Now s. 28 of the Tenancy Act of 1939 provides:—

"Except in cases provided in section 12, in all matters connected with this Act, the Provincial Government shall have and exercise the same authority and control over the Collectors and Mamlatdars as they have and exercise over them in the general and revenue administration."

Mr. Limaye contends that this language of s. 28, which is plain and admits of no ambiguity, clearly shows that the control, which the Legislature intended the Government to exercise over the Collectors and Mamlatdars, was of the same character as the control, which the Government exercises over these officers in matters of general and revenue administration. Mr. Limaye says

that the distinction between the judicial administration on the one hand and the general and revenue administration on the other hand is patently clear and, therefore, when s. 28 expressly referred to the exercise by the Provincial Government of the same control and authority over the Collectors and Mamlatdars, which the Government exercises in general and revenue administration, the Legislature intended to lay down that in matters affecting judicial administration the Government shall not interfere with the orders made by the Collectors and Mamlatdars. In support of this contention, Mr. Limaye has referred us to a decision of a division bench of this Court in *Batanchand Onkardas Meher v. Hari Jayaram Khadke*.¹ In that application also an order made by the Government of Bombay, which was purported to have been made under s. 28 of the Tenancy Act of 1939, was challenged. In that case, the landlord made an application on December 9, 1948, to eject his tenant. While that application, which was made under the Act of 1939, was pending, the Act of 1948 came into force. The Mamlatdar directed the tenant to restore possession of the land to the landlord. From that order of the Mamlatdar the tenant went in appeal to the Collector. The Collector confirmed the order of the Mamlatdar. Thereupon the tenant went in revision before the Revenue Tribunal and the Revenue Tribunal held that it had no jurisdiction to entertain the application and expressed an opinion that the Government of the State was empowered under s. 28 of the Tenancy Act of 1939 to revise the orders of the Courts below. It may be noted that in the present case also the Bombay Revenue Tribunal, by an order passed by them on July 15, 1955, held that they had no jurisdiction under the Act of 1939 to interfere with the order made by the Prant Officer in appeal under sub-s. (3) of s. 24 of the said Act. To revert to the case which was considered in *Batanchand Onkardas Meher v. Hari Jayaram Khadke*, the tenant feeling aggrieved by the order of the Revenue Tribunal made an application to the Government, requesting the Government to set aside the order of the Mamlatdar, which was confirmed in appeal by the Collector. In that case, the learned Chief Justice delivering the judgment of the Bench observed:—

"...No judicial order can be interfered with administratively or by an executive fiat. The decision of the Collector in appeal was a judicial order and that order can only be corrected judicially. We do not read s. 28 to confer upon the Government a power to correct a decision of the Collector judicially. That section only empowers the Government administratively and the present order of the Government is not in the exercise of their power to control the Collector or the Mamlatdar administratively but is in the exercise of their power to correct the Mamlatdar and the Collector judicially and no such power exists under the old Tenancy Act."

Relying upon these observations, Mr. Limaye for the petitioners contends that in the present case also the Government of the State of Bombay had no power of judicial revision to correct the orders of the Mamlatdar and the Collector, which orders had the character of judicial orders. It may be noted that while deciding *Batanchand Onkardas v. Hari Jayaram*, the High Court had referred to its earlier decision in *Purshottam Nathu Mali v. The State of Bombay*.² In that case also the Tribunal had held that it had no jurisdiction to entertain the revisional application and thereafter the Government had passed an order setting aside the appellate order of the Collector. In that case also it was held by the High Court that Government could not by an executive fiat interfere with the judicial decision arrived at by the Tribunal. Mr. Limaye relies upon that decision also, namely, the decision of this Court in *Purshottam Nathu Mali v. The State of Bombay*.

We have given an anxious thought to the above contention of Mr. Limaye, but we have felt constrained to reject the contention. The important section which falls to be considered and construed, while considering s. 28 of the Act

¹ (1952) Special Civil Application No. 1561 of 1952, decided by Chagla C. J. and Dixit J., on November 17, 1952 (Unrep.).

² (1951) Special Civil Application No. 274 of 1951, decided by Chagla C. J. and Gajendragadkar J., on December 6, 1951. (Unrep.).

of 1939, is s. 24(4) of the said Act. Now, if we turn to s. 24(4) this is what the sub-section provides:—

“Subject to the provisions of section 28, every order passed by the Mamlatdar under sub-section (2), unless modified or revised by the Collector on appeal under sub-section (3), and every order passed by the Collector under sub-section (3), shall be final.”

The language of this sub-section is perfectly clear. There is no ambiguity about it. By enacting sub-s. (4) of s. 24 the Legislature expressly made every order of the Mamlatdar made under sub-s. (2) of s. 24 and every appellate order of the Collector made under sub-s. (3) of the same section subject to the power of revision by Government under s. 28 of the Act. It is clear, in our view, that the power which the Legislature conferred upon Government under s. 28 was a power to modify, annul and reverse any order made by the Mamlatdar under sub-s. (2) of s. 24 or any order made by the Collector under sub-s. (3) of s. 24. Unless power of judicial revision was conferred upon the State Government by s. 28 there could possibly arise no question of an order of Government made under s. 28 affecting the finality of the orders of the Mamlatdars and the Collectors passed under sub-ss. (2) and (3) respectively of s. 24. Sub-section (4) of s. 24 expressly speaks of the finality of the orders of the Mamlatdars and the Collectors subject to the provisions of s. 28. The important words in sub-s. (4) are “subject to the provisions of s. 28, every order passed by the Mamlatdar...and every order passed by the Collector... shall be final.” Now, the word ‘final’ is not defined in the Tenancy Act of 1939. Therefore, in order to ascertain what the Legislature meant when they used the word ‘final’ in sub-s. (4) of s. 24, we must turn to the provisions of s. 2(13) of the Tenancy Act of 1939. Section 2(13) provides:—

“Words and expressions used in this Act but not defined shall have the meaning assigned to them in the Bombay Land Revenue Code, 1879.”

It is clear, therefore, that in order to understand what the Legislature meant when they used the word ‘final’ in s. 24(4), the finality being subject to the provisions of s. 28, we must turn to the provisions of ss. 212 and 211 of the Bombay Land Revenue Code. Section 212 provides:—

“Whenever in this Act it is declared that a decision or order shall be final, such expression shall be deemed to mean that no appeal lies from such decision or order.

The State Government alone shall be competent to modify, annul or reverse any such decision or order under the provisions of the last preceding section.”

It is clear, therefore, upon the reading of s. 212 of the Bombay Land Revenue Code and s. 24(4) of the Tenancy Act of 1939 that the orders passed by the Mamlatdars and Collectors under sub-ss. (2) and (3) respectively of s. 24 shall be final subject to the power of Government to modify them, annul them or reverse them. Now, under what circumstances the Government will exercise its power to modify, annul or reverse the orders of the Mamlatdars and Collectors is made clear by s. 211 of the Bombay Land Revenue Code. Section 211 provides:—

“The State Government and any revenue officer, not inferior in rank to an Assistant or Deputy Collector or a Superintendent of Survey, in their respective departments, may call for and examine the record of any inquiry or the proceedings of any subordinate revenue officer, for the purpose of satisfying itself or himself, as the case may be, as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer.”

There is, therefore, no doubt upon the reading together of ss. 211 and 212 of the Bombay Land Revenue Code that the Legislature has conferred power upon the Government to examine the legality or the propriety or the regularity of the proceedings of any revenue officer not inferior in rank to an Assistant or Deputy Collector. In this particular case, the Government examined the propriety and regularity of the order of the Prant Officer, an officer not below the rank of an Assistant or Deputy Collector. In our view, reading ss. 211

and 212 of the Bombay Land Revenue Code with s. 24(4) and s. 28 of the Tenancy Act, it was competent to Government to do so.

It is true that in *Ratanchand Onkardas Meher v. Hari Jayaram Khadke* and in *Purshottam Nathu Mali v. The State of Bombay* the view taken by this Court was that the decision of the Collector in appeal under sub-s. (3) of s. 24 of the Act of 1939 was a judicial order and it could not be interfered with administratively or by an executive fiat by Government under s. 28 of the Act. With very great respect, it may be stated that the provisions of s. 24(4) of the Tenancy Act of 1939 do not appear to have been brought to the notice of the Court in those Special Civil Applications. It is sub-s. (4) of s. 24 which makes the Mamlatdar's orders and the Collector's orders, passed under sub-ss. (2) and (3) respectively of that section, subject to the provisions of s. 28. Sub-section (4) of s. 24 does not confer absolute finality upon those orders. The finality of these orders depends upon what Government might do in the exercise of the power conferred upon them under s. 28. This aspect of the case, with great respect, does not appear to have been brought to the notice of the Court in *Ratanchand Onkardas Meher v. Hari Jayaram Khadke* and *Purshottam Nathu Mali v. The State of Bombay*.

At this stage it might be pointed out that in the case of *Parvatibai Utamlal v. Rupa Keshav*³ also it was observed by a Division Bench of this Court (p. 664):—

"...Taking now the provisions of the Bombay Tenancy Act relevant to the question referred to us, the provision in section 28 that 'in all matters connected with the Act, the Provincial Government shall have and exercise the same authority and control over the Collectors and Mamlatdars as they have and exercise over them in the general and revenue administration' clearly indicates, in my opinion, that an order made by the Collector under s. 24 of the said Act is subject to the revisional jurisdiction not of this Court, but of the Provincial Government."

These observations also do not appear to have been brought to the notice of this Court in *Ratanchand Onkardas Meher v. Hari Jayaram Khadke* and *Purshottam Nathu Mali v. The State of Bombay*.

Again with great respect, the scheme of the Tenancy Act of 1939 does not appear to have been brought to the notice of the Court in those Special Civil Applications. There are several sections in the Act of 1939 which lead us to the conclusion that the jurisdiction, which was conferred by the Legislature upon the Government under s. 28, was jurisdiction of a revisional character and not a mere administrative or executive jurisdiction. Section 2A(2) provides that where an application under sub-s. (1) of that section has been made and the Mamlatdar refuses to make a declaration which is prayed for and where the Mamlatdar's decision is not set aside by the Collector in appeal under sub-s. (3) of s. 13 or by the Provincial Government under s. 28, the person concerned shall be deemed to be a tenant for the purposes of the Act. When the Legislature enacted s. 2A, it clearly intended that the Mamlatdar's decision under sub-s. (1) of that section could be judicially revised either by the Collector in appeal under s. 13(3) or by the Provincial Government under s. 28. Then again, s. 3A(2) provides that where an application under sub-s. (1) of that section has been made by the person concerned and where the Mamlatdar refuses to make a declaration sought by him and where the Mamlatdar's decision is not set aside by the Collector in appeal under sub-s. (3) of s. 13 or by the Provincial Government under s. 28, the said person shall be deemed to be a protected tenant for the purposes of the Act and his rights as such protected tenant shall be recorded in the Record of Rights. Here again, the language used by the Legislature in sub-s. (2) of s. 3A would show that the decision of a Mamlatdar under sub-s. (1) of that section, which decision has undoubtedly a judicial character about it, could be revised either by the Collector in appeal under s. 13(3) or by the Provincial Government under s. 28. Sub-section (2) of s. 3A deals with an important question of the rights

of a protected tenant and it is clear that the Legislature intended by this sub-section that in pursuance of the power conferred by the Legislature upon Government under s. 28 the Government could interfere with the decision of the Mamlatdar even upon such an important point as the point affecting the tenancy rights: Then again, there is sub-s. (4) of s. 13 which provides that the order of the Mamlatdar made under sub-s. (2) of that section shall, subject to an appeal to the Collector under sub-s. (3) of the same section and the provisions of s. 28, be final. The order of the Collector also shall, subject to the provisions of s. 28, be final. It is not disputed, and indeed it cannot be disputed, that the order made by the Mamlatdar under sub-s. (2) of s. 13 and the order made by the Collector under sub-s. (3) of s. 13 possess judicial character and, therefore, when the Legislature provided by sub-s. (4) of s. 13 that these orders could be interfered with by the Government under s. 28, it is clear that the Legislature intended to confer upon the Government powers of judicial revision of the orders of the Mamlatdar and the Collector. It is no doubt true that in *Ratanchand Onkardas Meher v. Hari Jayaram Khadke* a reference to s. 13(4) of the Act of 1939 was made. But the attention of the Court does not appear to have been invited to the effect of s. 28 upon the subject of the finality of the orders of the Mamlatdar and Collector. The relevant observation which was made by this Court in that case was this:—

"When we turn to the old Tenancy Act, 1939, an appeal was provided by sub-s. (3) of s. 13 to the Collector from a decision of the Mamlatdar and that decision became final under sub-s. (4)."

It is true that sub-s. (4) conferred finality upon the Collector's decision, but the Court's attention does not seem to have been invited to the fact that the said finality was subject to the provisions of s. 28.

Then, again, if we turn to sub-s. (3) of s. 18, the sub-section provides that if within the specified period of three months the tenant gives a written intimation to his landlord that he is willing to purchase the site, the landlord shall apply to the Mamlatdar for the determination of the value of the site. Upon receipt of the said application from the landlord, the Mamlatdar shall give a notice to the tenant and shall hold a formal enquiry for the purpose of determining the value of the site. The sub-section provides that the determination so made by the Mamlatdar of the amount of the value of the site shall be final, subject to the provisions of s. 28. Then, there is sub-s. (4) of s. 18 and this sub-section provides that if the tenant fails to intimate his willingness to purchase the site within the specified time to his landlord or if he fails to deposit the amount of the value of the site as determined by the Mamlatdar, the tenant shall be deemed to have relinquished his right of first option to purchase the site and the landlord shall, in that event, be entitled to evict the tenant on payment of such compensation for the value of the structure of such dwelling house as may be determined by the Mamlatdar after holding an enquiry in the manner provided in sub-s. (3). Once, again, the Legislature provided by enacting sub-s. (4) of s. 18, that the decision of the Mamlatdar as regards the amount of compensation payable by the landlord under sub-s. (3) shall be final, subject to the provisions of s. 28. It is, therefore, clear that the Legislature, while enacting sub-ss. (3) and (4) of s. 18, conferred upon the Government a power of judicial revision under s. 28 over the orders made by the Mamlatdar under sub-ss. (3) and (4) of s. 18. Then there is sub-s. (3) of s. 19, which provides that the order made by the Mamlatdar under sub-s. (1) of s. 19 shall be final subject to an appeal to the Collector under sub-s. (2) of that section and also subject to the provisions of s. 28. Now, sub-s. (1) of s. 19 provides that if a protected tenant or any other tenant has planted trees on the land, he shall be entitled to the produce and the wood of those trees during the continuance of his tenancy and shall on the termination of such tenancy be entitled to such compensation for those trees as may be determined by the Mamlatdar after holding an enquiry. Sub-section (3) of s. 19 says that the order made by the Mamlatdar under sub-s. (1) shall, subject to an appeal to the Collector under

sub-s. (2) and the provisions of s. 28, be final. Then there is sub-s. (4) of s. 19, which provides that the order of the Collector made under sub-s. (2) of s. 19, namely, the appellate order, shall, subject to the provisions of s. 28, be also final. All these provisions which are enacted by the Legislature in the Act of 1939 furnish clear evidence that the intention of the Legislature was to confer powers of judicial revision upon the Government under s. 28, pursuant to which the Government could modify, annul or reverse an order made by the Mamlatdar initially or by the Collector in appeal.

Even upon the assumption that the powers conferred upon the Government under s. 28 are merely administrative or executive powers and not powers of judicial revision of the orders of the Mamlatdars and the Collectors, even so the Legislature in terms has made the Mamlatdars' orders and the Collectors' orders subject to the power of revision conferred upon the Government to modify those orders, annul them or reverse them. The word 'final' which occurs in sub-s. (4) of s. 24 has the same meaning as is assigned to the word 'final' in the Land Revenue Code, as this word is not defined in the Tenancy Act itself. There is no doubt that under the provisions of the Land Revenue Code the State Government has power to examine the legality or the propriety or the regularity of the proceedings held by an officer subordinate to the Government and in the exercise of that power the Government has jurisdiction to modify, annul or reverse the orders made by its subordinate officers. Therefore, there is no doubt that by enacting s. 28 of the Tenancy Act of 1939, the Legislature conferred powers upon Government, pursuant to which powers the Government could revise the orders made by the Mamlatdars and the Collectors under sub-ss. (2) and (3) respectively of s. 24.

The learned advocate, Mr. Limaye, appearing for the petitioners has invited our attention to the provisions of sub-s. (5) of s. 24. This sub-section says:—

"Every order passed by the Mamlatdar under sub-section (2) and every order passed by the Collector under sub-section (3) shall be deemed to be a decree of a civil Court and shall be executable as such."

Mr. Limaye says that the order passed by the Prant Officer under sub-s. (3) of s. 24 having the effect of a decree, it would not be competent to Government under s. 28 to modify or set aside that order. We are unable to accept this contention of Mr. Limaye. All that sub-s. (5) of s. 24 does is to create a legal fiction for the purpose of execution of an order made by the Mamlatdar under sub-s. (2) of s. 24 or by the Collector under sub-s. (3) of s. 24. The legal fiction created is that for the purpose of execution, and for no other purpose, the order made by the Mamlatdar under sub-s. (2) and the order made by the Collector under sub-s. (3) of s. 24 shall be treated as though such orders were decrees of a civil Court. In any view of the matter, the language of sub-s. (4) of s. 24, which is absolutely clear, leaves no doubt that the Mamlatdar's order under sub-s. (2), and the Collector's order in appeal under sub-s. (3), of s. 24 are given finality, subject to the power of Government to revise them under s. 28. That being so, we see no substance in the contention of Mr. Limaye that because the Mamlatdar's order and the Prant Officer's order are to be treated as decrees for the purpose of execution, Government would have no power to set them aside or modify them under s. 28.

It may be noted that in this case no challenge on merits is made by the petitioners to the order made by the Prant Officer. So far as the point of law is concerned, for the reasons stated above, we are unable to accept Mr. Limaye's contention.

The result, therefore, is that the application fails and is rejected. We make no order as to costs.

Application rejected.

Before Mr. Justice Vyas and Mr. Justice Tamba.

HASANBHAI ADAMBHAI MALVAT v. ADAMBHAI MALKA TALAT.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 31A(b), 31B(1),

34(1) and (5)—Land cultivated by landlord less than ceiling area prescribed under Act—Whether landlord to make up his ceiling area, can recover possession of more than half area of land leased to his tenant—Applicability of s. 31B(1) where landlord bases his claim under s. 34(1).

Section 31B(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, is an independent provision which stands by itself and controls s. 31A(b) of the Act; it is not subject to the provisions of s. 31A(b). Therefore, if the land cultivated by the landlord personally is less than the ceiling area prescribed for that land under the Act, the landlord cannot, in order to make up his ceiling area, recover possession of more than half the area of the land leased out to his tenant.

Section 31 of the Bombay Tenancy and Agricultural Lands Act, 1948, has nothing to do with a case where a landlord claims to recover possession of his land from the tenant upon the ground that the tenant has got in his possession lands in excess of the ceiling area. Therefore, where a landlord bases his claim upon the ground stated in s. 34(1) of the Act, the provisions of s. 31B(1) will not apply.

THE facts appear in the judgment.

V. M. Limaye, for the petitioner.

M. Omar and B. G. Pradhan, for opponent No. 1.

VYAS J. This is an application under art. 227 of the Constitution of India and it raises a question of construction of s. 31A(b), s. 31B(1) and s. 34(1) and (5) of the Tenancy Act. The petitioner Hasanbhai Adambhai Malvat has prayed for the setting aside of an order made by the Bombay Revenue Tribunal on March 25, 1958, by which order the Tribunal confirmed an order made by the Assistant Collector on December 9, 1957. By the aforesaid order dated December 9, 1957, the Assistant Collector dismissed the appeal of the present petitioner from an order made by the Tenancy Mahalkari on August 5, 1957. The circumstances which have given rise to this application may now be briefly stated.

The petitioner is the landlord. He is the owner of S. No. 2038 of Dhanduka, District Ahmedabad. The land comprising S. No. 2038 admeasures 40 acres. Out of this land, the petitioner himself is personally cultivating 20 acres and the remaining 20 acres of land has been leased out by the petitioner to opponent No. 1. The petitioner contends that he is not holding any other land except the above land. Now, under the provisions of s. 5(1)(a) of the Bombay Tenancy and Agricultural Lands Act, 1948, the ceiling area of Jirayat land is 48 acres. The petitioner says that as he is personally cultivating only 20 acres of land, he is in possession of land which is less than the ceiling area. The petitioner also says that opponent No. 1 is in possession of not only 20 acres of land leased out to him by the petitioner, but he is also in possession of other lands which have been leased out to him by other landlords. It is the petitioner's case that opponent No. 1 is cultivating 64 acres and 27 gunthas of land and, therefore, he is in possession of land in excess of the ceiling area. I have already mentioned above that the ceiling area of Jirayat land is 48 acres. The petitioner-landlord, in the above-mentioned circumstances, filed Tenancy Suit No. 3 of 1957 in the Court of the Tenancy Mahalkari, Dhanduka, to recover possession of 20 acres of his land from opponent No. 1 upon the ground that he required it *bona fide* for personal cultivation and also upon the ground that the tenant was in possession of 64 acres and 27 gunthas of land which was in excess of the ceiling area. So far as the petitioner's case that he required 20 acres of his land from opponent No. 1 *bona fide* for personal cultivation is concerned, his contention is that his income from the 20 acres of land of which

*Decided, July 31, 1958. Special Civil Application No. 1524 of 1958.

he is in possession and which he is personally cultivating is about Rs. 1,400 to Rs. 1,600 per year. His case is that the probable income of the other 20 acres of his land which is in possession of opponent No. 1 is about Rs. 2,000 to Rs. 2,500 per year. So far as the petitioner's requirement of the 20 acres of his land which is in possession of opponent No. 1 upon the ground of *bona fide* need for personal cultivation is concerned, he contends that he is entitled to recover possession of all the 20 acres of his land which is being cultivated by opponent No. 1. He next says that the income of the said 20 acres of land, which is being cultivated by opponent No. 1, being the principal source of income for his maintenance, he is entitled to recover possession of all the 20 acres of land from opponent No. 1.

In the Tenancy Case No. 3 of 1957 filed by the petitioner the Mahalkari held by an order made by him on August 5, 1957, that so far as the petitioner's case of *bona fide* requirement of the land for personal cultivation was concerned, he was entitled to recover possession, not of all the 20 acres of his land which was being cultivated by opponent No. 1, but only half of the said 20 acres, namely, only 10 acres of that land. The Mahalkari next held that the income from the said 10 acres of land, to the possession of which the petitioner-landlord would be entitled, was only about Rs. 1,000 to Rs. 1,200 per year. That being so, said the Mahalkari, that income was not the principal source of the petitioner's income for his maintenance. Consistently with this view of the matter which the Mahalkari took, he rejected the petitioner's application No. 3 of 1957 for recovering possession of the lands leased out by him to opponent No. 1. It may be noted that although the petitioner's application for recovering possession of the land from opponent No. 1 was based upon two grounds: (1) that he *bona fide* required possession of this land for personal cultivation, and (2) that the total land in possession of the tenant was in excess of the ceiling area, the Mahalkari decided the application, having regard to the first ground only and did not deal with the second ground at all. In other words, the Mahalkari did not go into the question whether the petitioner was entitled to recover possession of the 20 acres of land from his tenant upon the ground that the tenant had got in his possession 64 acres and 27 gunthas, which was more than the ceiling area.

From the aforesaid order of the Mahalkari made by him on August 5, 1957, the petitioner-landlord went in appeal to the Assistant Collector, Dholka Prant. By an order dated December 9, 1957, the Assistant Collector dismissed the appeal. He accepted the finding of the Mahalkari that so far as the petitioner's case of *bona fide* requirement of this land for personal cultivation was concerned, he was entitled only to recover possession of 10 out of the 20 acres, provided the income from the said 10 acres was the landlord's principal source of income for his maintenance. The Assistant Collector further accepted the finding of the Mahalkari that the income from the 10 out of the 20 acres of land which was in possession of the tenant would not be the landlord's principal source of income for his maintenance. So far as the landlord's case under s. 34 of the Act was concerned, namely, the case that he was entitled to recover possession of 20 acres of his land from the tenant upon the ground that the tenant had got in his possession in all 64 acres and 27 gunthas, i.e., more than the ceiling area, the Assistant Collector took the view that it was irrelevant to go into that aspect of the case. According to the Assistant Collector, it did not matter whether the tenant was in possession of land less than the ceiling area or more than the ceiling area. The Assistant Collector took the view that even if the tenant had got in his possession land much more than the ceiling area, even so the landlord would be entitled to recover possession of only half the lands leased out by him to the tenant. In other words, the view which the Assistant Collector took was that s. 31B(1) governed s. 31A(b) and s. 34(1) of the Act. Consistently with this view of the matter which the Assistant Collector took, he dismissed the landlord's appeal and confirmed the Mahalkari's order. Upon the landlord going in revision before the Revenue Tribunal, the

Tribunal, on March 25, 1958, rejected the revisional application. The Tribunal accepted the view of the Assistant Collector that s. 31B(1) controlled s. 31A(b). In other words, the Tribunal also took the view that even if the land cultivated by the landlord personally was less than the ceiling area, the landlord would, in no case, where he claimed to recover possession of the land from the tenant upon the ground of *bona fide* requirement of the land for personal cultivation, be entitled to recover possession of more than half the area of the land leased out to the tenant. Although the Tribunal concurred with the view of the Assistant Collector that s. 31B(1) controlled s. 31A(b), it disagreed with the view of the Assistant Collector that s. 31B(1) also controlled s. 34, sub-ss. (1) and (5). The view which the Tribunal took was that the right to recover possession of the land leased out to the tenant which the landlord has under s. 34 of the Act is quite independent of the right which he has in a case in which the claim to recover possession is made upon the ground of *bona fide* requirement of the land for personal cultivation. As the matter had not been investigated by the Mahalkari in the light of the remedy available to the landlord under s. 34, sub-ss. (1) and (5), the Tribunal ordered the case to be remanded back to the Mahalkari. The pertinent observations of the Tribunal in this context are:

"We have, therefore, to say that unless the first question of fact is settled (the Tribunal was referring to the question whether in point of fact the tenant was in possession of land in excess of the ceiling area) it would not be proper to settle the question which arises about the interpretation and effect of sub-s. (5) of s. 34. We are, therefore, constrained to remand the case back to the Tenancy Court to consider the question whether the applicant proved that the tenant held lands in excess of the ceiling area and then to consider the question whether the applicant landlord got an absolute right by virtue of s. 34."

In other words, the case was remanded to the Tenancy Court for deciding the question of fact whether the tenant was in possession of lands in excess of the ceiling area and then to dispose of the case in accordance with law. It is from this order of the Tribunal dated March 25, 1958, that the landlord has come to this Court under art. 227 of the Constitution.

Now, the point which Mr. Limaye for the petitioner-landlord has raised before us is whether s. 31B(1) of the Tenancy Act controls or is subject to s. 31A(b) of the Act. Mr. Limaye says that when a landlord claims to recover possession of his land leased out to the tenant upon the ground that he *bona fide* requires the land for personal cultivation, if he proves that the land cultivated by him personally is less than the ceiling area, he shall be entitled to recover possession of so much of his land leased to the tenant as will be sufficient to enlarge the area in his possession to the extent of a ceiling area. In other words, Mr. Limaye's contention is that the provisions of s. 31A(b) control the provisions of s. 31B(1). We have considered Mr. Limaye's contention, but are unable to accept it. In our view, the position which Mr. Limaye is contending for is opposed to the language of s. 31B(1) which is clear and admits of no equivocation. Section 31B(1) deals with the right, which a landlord has under the Act, to recover possession of his land leased out to the tenant in a case where he bases the claim to recover possession upon the ground of his *bona fide* requirement of the said land for personal cultivation. If we turn to s. 29(2), the sub-section provides:

"No landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar. For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land or dwelling house, as the case may be, is deemed to have accrued to him."

Then there is sub-s. (3) of s. 29, which provides:

"On receipt of application under sub-section (1) or (2) the Mamlatdar shall, after holding an inquiry, pass such order thereon as he deems fit."

At the foot of sub-s. (3) there is a proviso and the proviso says:

"Provided that where an application under sub-section (2) is made by a landlord in pursuance of the right conferred on him under section 31, the Mamlatdar shall first decide, as preliminary issues, whether the conditions specified in clauses (c) and (d) of section 31A and sub-sections (2) and (3) of section 31B are satisfied. If the Mamlatdar finds that any of the said conditions is not satisfied, he shall reject the application forthwith."

It is, therefore, clear that where a landlord claims to recover possession of the land leased by him to the tenant upon the ground of *bona fide* requirement of the said land for cultivating it personally, the statute has conferred a right upon him under sub-s. (2) of s. 29 to make an application to the Mamlatdar to recover possession of the land, and if he does make such an application, then a question arises under cls. (c) and (d) of s. 31A for consideration whether the income by the cultivation of the land, of which the landlord is entitled to take possession, would be the principal source of income for his maintenance and whether the land leased out stands in the Record of Rights or any public record or similar revenue record on January 1, 1952, and thereafter during the period between the said date and the appointed day in the name of the landlord himself, or in the name of his ancestors, or if the landlord is a member of a joint family, in the name of a member of such family. Section 31B(1) clearly provides that in no case where a tenancy is terminated upon the ground that a landlord claiming to recover possession of his land requires the possession of his land back from his tenant for *bona fide* personal cultivation, shall the landlord be entitled to recover more than half the area of the land leased out to the tenant. In our view, s. 31B(1) is an independent provision which stands by itself and controls s. 31A(b). It is not subject to the provisions of s. 31A(b). The Courts below were, therefore, right in holding that the petitioner-landlord, in so far as he claimed to recover possession of the land leased out by him to the tenant on the ground of *bona fide* requirement of the land for personal cultivation, was not entitled to obtain possession of anything more than 10 acres out of the 20 acres of land leased out by him to his tenant, opponent No. 1. Under cl. (c) of s. 31A, the right of a landlord to terminate the tenancy on the ground of cultivating the land personally under s. 31 is subject to a condition that the income by the cultivation of the land, of which the landlord is entitled to take possession, is the principal source of income for his maintenance. Therefore, in this case it became necessary to determine whether the income from 10 out of the 20 acres of land leased out by the petitioner to opponent No. 1, of which the petitioner would be entitled to take possession under sub-s. (1) of s. 31B, was the principal source of the landlord's income for his maintenance. On this point the finding of the Courts below is that the income from the 10 acres of land, which the landlord is entitled to recover back from his tenant, is not the principal source of his income for his maintenance. The finding is that the income from the aforesaid 10 acres of land is below Rs. 1,400 per year, whereas the income from the 20 acres of land which are now in the possession of the landlord is Rs. 1,400 to Rs. 1,600 per year. In view of this finding of fact the Courts below were right in coming to the conclusion that the landlord would not be entitled to recover possession of 10 out of 20 acres of land leased out by him to his tenant upon the ground that he *bona fide* required that land for personal cultivation.

The next point which arises in this case is whether the provisions of s. 34, sub-ss. (1) and (5), of the Act are subject to the provisions of s. 31B(1). In this connection, the Tribunal was right in holding that the remedy which a landlord has to recover possession of his land under sub-ss. (1) and (5) of s. 34 is a remedy independent of the remedy which he has if he wishes to terminate the tenancy of his tenant upon the ground that he requires the possession of the land for *bona fide* personal cultivation. The opening words of s. 31B, namely, the words "In no case" are to be read with the words "a

tenancy shall be terminated under s. 31" and there is no doubt that the question of termination of tenancy under s. 31 would only arise where a landlord requires possession of his land for *bona fide* personal cultivation or for any non-agricultural purpose. Section 31 has nothing to do with a case where a landlord claims to recover possession of his land from the tenant upon the ground that the tenant has got in his possession lands in excess of the ceiling area. Therefore, where a landlord bases his claim upon the ground stated in sub-s. (1) of s. 34, the provisions of s. 31B(1) would have no application. Now, if we turn to the application made by the landlord in this case it would appear that he made his claim to recover possession of the land from his tenant on two grounds, one under sub-s. (1) of s. 31 and the next under sub-s. (1) of s. 34. The landlord stated in that application that he wanted the possession of his land, because he *bona fide* required it for personal cultivation and he also mentioned in terms that he wanted the land back from his tenant, because the tenant had got in his possession land in excess of the ceiling area. When a landlord claims to recover possession of his land from his tenant under sub-s. (1) of s. 34, the question whether the income of the land, whose possession is required by the landlord, is or is not the principal source of income for his maintenance does not arise, and the only question of fact which would fall to be determined in that case would be whether the tenant was in possession of land in excess of the ceiling area. That being so, the Tribunal was right, in our view, in remanding the case to the Tenancy Court for recording a finding upon the point covered by sub-s. (1) of s. 34 of the Act. After the Mahalkari records his finding, if any party has a grievance against it, the remedy of such party is to go by way of an appeal to the Prant Officer against that finding; and if against the finding of the Prant Officer any party has got a grievance, the remedy of the said party is to approach the Revenue Tribunal by way of revision. If by the order of the Tribunal any party feels aggrieved, the remedy open to him would be a remedy under art. 227 of the Constitution. At the present moment, we do not know what the Mahalkari's finding on the question covered by sub-s. (1) of s. 34 would be and we do not know what attitude the aggrieved party would adopt in respect of that finding. When the landlord's claim under sub-s. (5) of s. 34 is finally decided, it would be open to the aggrieved party concerned to make a fresh application to this Court under art. 227 of the Constitution.

In the result, we reject this application with costs.

Application dismissed.

Before Mr. Justice Vyas and Mr. Justice Tamba.

BAI JAMNA v. BAI DHANI.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 5(1), 4, 29, 34, 40, 30, 3—Bombay Tenancy Act (Bom. XXIX of 1939), Sec. 23(1)(a) and (b)—Rights conferred on tenant under s. 5 as it stood before amending Act of 1956—Contractual tenancy for a period less than ten years whether under s. 5(1) extended to contractual tenancy of ten years—Tenancy rights of statutory tenant whether heritable—Applicability of s. 29 where person in possession a trespasser.

Section 5(1) of the Bombay Tenancy and Agricultural Lands Act, 1948 (as it stood before the amending Act XIII of 1956 came into force) prohibited tenancies of a period less than ten years and created a statutory tenancy whose period could not be less than ten years. The section did not create an artificial fiction extending the contractual character of the tenancy from a period of less than ten years to a period of ten years.

The tenancy rights of a statutory tenant under s. 5(1) of the Act are not heritable rights.

*Decided, August 6/7, 1958. Special Civil Application No. 1367 of 1958.

*Eruch Bapasola v. Mirchandani*¹, *State of Bombay v. Virendra Motabhai*² and *Dattu Narayan Patil v. Kulkul Popat Chaudhari*³, referred to.

Section 29 of the Act has no application to a case where a person is unauthorisedly in possession of land.

THE facts appear in the judgment.

Rajani Patel, with *I. C. Bhatt*, for the petitioners.

N. R. Oza, for respondent No. 1.

VYAS J. This application which is made under art. 227 of the Constitution of India by the petitioners raises questions under s. 5 of the Bombay Tenancy and Agricultural Lands Act, 1948, as it stood before the amending Act XIII of 1956 came into force on August 1, 1956. What are the rights conferred on a tenant under s. 5? Is he a statutory tenant or a contractual tenant? Are these rights (tenancy rights under s. 5) heritable? These are the questions which fall to be determined in this application and they arise in the following circumstances.

The petitioners are the landlords of S. Nos. 108/3 and 193/3 situated at village Katargam, district Surat. Respondent No. 1, Bai Dhani, is the daughter of one Hari Lala. Hari Lala came on these lands as a tenant in the year 1954-55. It was a one year's lease under which he came into occupation of the lands. Hari Lala died on September 14, 1955. Thereafter, the present petitioners made an application, being Tenancy Application No. 439 of 1955, under s. 29 of the Act for obtaining possession of the lands from Bai Dhani. The Mamlatdar who heard the application came to the conclusion that Bai Dhani was a trespasser and he awarded possession of these lands to the present petitioners. On an appeal being made by Bai Dhani to the Prant Officer, the Prant Officer by an order made by him on April 15, 1956, held that the Mamlatdar had no jurisdiction to hear and decide the application No. 439 of 1955 which was made by the present petitioners, as the proper remedy which the petitioners ought to have pursued was a remedy not under s. 29 of the Act, but under s. 84 of the Act. Consistently with this view of the matter which the Prant Officer took, he reversed the order of the Mamlatdar. Thereafter, on May 5, 1956, these petitioners made an application under s. 84 of the Act before the Assistant Collector, Surat. By an order made by her on June 8, 1956, the Assistant Collector held that Bai Dhani was a trespasser and she also awarded possession of these lands to the petitioners. From the order of the Assistant Collector, Bai Dhani went in revision before the Bombay Revenue Tribunal. The Revenue Tribunal by an order dated September 5, 1956, remanded the case to the Assistant Collector with a direction that the terms of tenancy of Hari Lala should be determined and further that it should be decided what rights did Hari Lala possess as a tenant and whether Bai Dhani, as the daughter of Hari Lala, was entitled to inherit the rights which Hari Lala had as a tenant. On remand the Assistant Collector by an order made by her on August 30, 1957, held that Hari Lala was a statutory tenant of these lands and that Bai Dhani, the daughter of Hari Lala, could not inherit the tenancy rights of her father. From this decision of the Assistant Collector, Bai Dhani went in revision before the Bombay Revenue Tribunal and the Revenue Tribunal, by an order made by it on January 20, 1958, allowed the revisional application of Bai Dhani. The Tribunal held that under s. 5 of the Act of 1948, as it stood before the amending Act XIII of 1956 came into force, the tenancy which Hari Lala enjoyed was a statutory tenancy, but the Tribunal held further that the rights of a statutory tenant were heritable rights and therefore Bai Dhani was entitled to continue to remain in possession of these lands. It is this view of the Bombay Revenue Tribunal which is challenged by the petitioners-

1 (1953) 55 Bom. L. R. 532.

2 (1950) 52 Bom. L. R. 627.

3 (1956) Special Civil Application No. 358

of 1956, decided by Shah and Vyas JJ., on June 20, 1956 (Unrep.).

landlords in this application under art. 227 of the Constitution, their contention substantially being that the rights which a statutory tenant has in respect of the lands enjoyed by him are not heritable rights.

Now, it may be remembered that Hari Lala, the father of respondent No. 1 Bai Dhani, entered upon these lands in the year 1954-55 upon a lease which was a one year's lease. That being so, the Act that would govern this case would be the Act of 1948, as it stood before its amendment. The Amending Act XIII of 1956 came into force on August 1, 1956. Now the relevant section of the Act of 1948 which would apply to the facts of the present case would be s. 5, sub-s. (1). Sub-section (1) provides:

"No tenancy of any land shall be for a period of less than ten years:

Provided that at the end of the said period and thereafter at the end of each period of ten years in succession, the tenancy shall, subject to the provisions of sub-sections (2) and (3), be deemed to be renewed for a further period of 10 years on the same terms and conditions notwithstanding any agreement to the contrary."

It is clear that the statute, the language of which admits of no ambiguity, created a tenancy whose period was not less than ten years. Whatever might be the terms of the contract of lease, the Act of 1948 which came into force on December 28, 1948, created a law that with effect from December 28, 1948, there shall not be any tenancy for less than ten years. The statute did not say that if a contractual tenancy was for a period less than ten years, the said contractual period would be deemed to be extended to ten years. It prohibited the creation of a tenancy for a period less than ten years. Clearly, therefore, by virtue of the statute, Hari Lala's tenancy which was one year's tenancy under the contract became a tenancy for ten years in conformity with the statute that was enacted with effect from December 28, 1948. Accordingly, in our view, the Courts below were right in recording a finding of fact that Hari Lala was a statutory tenant. It is this concurrent finding of fact which the learned advocate Mr. Rajani Patel for the petitioners seeks to support and he contends further that the rights of a statutory tenant are not heritable rights and, therefore, the landlords would be entitled to recover possession of these lands from Bai Dhani, the daughter of Hari Lala. It is the above-mentioned concurrent finding of fact of the Courts below which the learned advocate Mr. Oza, for respondent No. 1, seeks to challenge and he contends that Hari Lala was not a statutory tenant, but was a contractual tenant, and that the rights of contractual tenancy being heritable rights, Bai Dhani, the daughter of Hari Lala, would be entitled to continue to remain in possession of these lands.

Now, upon a question whether the tenancy rights of a statutory tenant are heritable or not, it was held in *Eruck Bapasola v. Mirchandani*¹ that a statutory tenancy does not create a right in property. The learned Chief Justice delivering the judgment of the Bench in that case observed that a statutory tenancy was merely a personal right given by the statute. There is no doubt that although a statutory tenant remains in possession of the land and enjoys the land so long as he complies with the provisions of the statute, he has no estate or interest in the land as an ordinary tenant has. It is undeniable that his right is purely a personal one, and, that being so, unless the statute expressly authorises him to pass on that right to another person, the right must cease the moment he (the statutory tenant) parts with possession of the land or dies. Also in *The State of Bombay v. Virendra Motabhai*² it was held by this Court that a tenant, protected by a statute in the possession of demised premises, is a statutory tenant. It was observed that the right of such a tenant to remain in possession of the premises was a personal right, and not a right which the tenant could assign or deal with. The learned advocate Mr. Oza, appearing for respondent No. 1 Bai Dhani, contends that Hari Lala, the father of Bai Dhani, had a dual capacity: firstly, the capacity of a statutory tenant, the period of the statutory tenancy being not less than ten years, and, secondly,

1 (1953) 55 Bom. L. R. 532.

2 (1950) 52 Bom. L. R. 627.

the capacity of a contractual tenant, the period of which tenancy, though the lease was initially a one year's lease, was deemed to have been extended to ten years by virtue of a legal fiction. Mr. Oza says that the contractual tenancy rights being heritable rights, Bai Dhani was entitled to continue to remain in possession of the lands. We are unable to accept the contention of Mr. Oza. In our view, the extension of the period of contractual tenancy which would have been available under s. 23(1)(b) of the Act of 1939 is not available under s. 5(1) of the Act of 1948. The legal fiction of extension of the period of contractual tenancy was done away with when the Legislature enacted the Tenancy Act of 1948. Mr. Oza has invited our attention to a decision of this Court in *Dattu Narayan Patil v. Kittul Popat Chaudhari*³ in support of his contention that the period of the contractual tenancy, which initially was a one year's period in this case, must be deemed to have been extended to ten years. Now, it is to be remembered that the case which came up for consideration in *Dattu Narayan Patil v. Kittul Popat Chaudhari* was a case under the Tenancy Act of 1939. In that case, the original period of the contractual tenancy was five years, and this Court held that by virtue of the legal fiction created by cl. (b) of s. 23(1) the period of the contractual tenancy was deemed to have been extended to ten years. Section 5(1) of the Act of 1948 does not create an artificial fiction extending the contractual character of the tenancy from a period of less than ten years to a period of ten years. Section 5(1) prohibits tenancies of period less than ten years and creates a statutory tenancy whose period shall not be less than ten years. Mr. Oza contends that s. 5(1), by providing that no tenancy of any land shall be for a period less than ten years, extends the contractual character of a tenancy from a period less than ten years to a period of ten years. We have considered s. 23(1), cls. (a) and (b), of the Act of 1939 and have also given an anxious thought to the provisions of s. 5(1) of the Act of 1948. In our view, the provisions of s. 23(1), cl. (a), of the Act of 1939 conferred upon every tenancy a statutory character of ten years' tenancy and, be it noted, this provision was kept intact by s. 5(1) of the Act of 1948. The provisions of cl. (b) of s. 23(1) of the Act of 1939 which, by a legal fiction, extended the period of contractual tenancy to ten years were dropped—and doubtless purposely dropped—when the Act of 1948 was enacted. In other words, the Act of 1948 did away with the artificial fiction that was created by cl. (b) of sub-s. (1) of s. 23 of the Act of 1939. Had the intention of the Legislature, while enacting the Tenancy Act of 1948, been to preserve the legal fiction incorporated in cl. (b) of sub-s. (1) of s. 23 of the Act of 1939 and had the Legislature intended to provide that a contractual tenancy, though in fact not for ten years, would be deemed to be one for ten years, they would have enacted, in s. 5 of the Act of 1948, a provision similar to the provision of cl. (b) of sub-s. (1) of s. 23 of the Act of 1939. But they did not do so. We must, therefore, reject Mr. Oza's contention that s. 5(1) of the Act of 1948 extends the contractual character of a tenancy from a period less than ten years to a period of ten years.

Mr. Oza has next invited our attention to s. 4 of the Act of 1948. Now s. 4 provides:

"A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not—

- (a) a member of the owner's family, or
- (b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family, or
- (c) a mortgagee in possession."

Mr. Oza contends that under the above-mentioned provisions of s. 4 of the Act his client Bai Dhani must be deemed to be a tenant, apart from being a

³ (1956) Special Civil Application No. 358 June 20, 1956 (Unrep.).
of 1956, decided by Shah and Vyas JJ., on

statutory tenant under s. 5(1) of the Act. We have considered Mr. Oza's contention, but we are not impressed by it. It is no doubt true that s. 4 does contain the expression "shall be deemed to be a tenant", but the section does not say that a person lawfully cultivating any land belonging to another person shall be deemed to be a contractual tenant. When a person is *deemed to possess* a certain character, it is clear that he in fact does not possess that character, but by a legal fiction that character is conferred upon him. In the present case, no question arises of Hari Lala being deemed to be a tenant, since, in fact, he was a statutory tenant under the provisions of sub-s. (1) of s. 5 of the Act. In these circumstances, a recourse to s. 4 of the Act would not assist Mr. Oza's client.

The next contention of Mr. Oza is that the landlords' application, which in this case was an application under s. 84 of the Act, was not maintainable. Mr. Oza contends that the proper procedure for the landlords to follow was a procedure under s. 29 of the Act and he says that the landlords should have applied before the Mamlatdar and not before the Assistant Collector. There is no force in the above contention of Mr. Oza. In a case where a person is a trespasser and is sought to be evicted, the only section in the Tenancy Act which could be invoked is s. 84. Section 29 has no application to a case where a person is unauthorisedly in possession of land. Now, in this case, as I have stated above, there is no question of a contractual tenancy for ten years in favour of Hari Lala. Hari Lala's rights under the *contractual* tenancy under which he entered upon these lands came to an end upon the expiry of one year from the date upon which he went into occupation of the lands. Under sub-s. (1) of s. 5 of the Act of 1948 Hari Lala became a statutory tenant, the period of such statutory tenancy being ten years. But it is to be noted, and I have already stated the reasons for this conclusion, that the rights of a tenant who is a statutory tenant are not heritable rights. The right of a statutory tenant to remain in possession of the land is merely a personal right. It is a right conferred upon him by a statute; it is not a right in property and therefore such right does not devolve upon his heirs after his death. In view of these circumstances, Bai Dhani's possession of the lands which are the subject-matter of this application, being possession as a trespasser, the only remedy which was available to the landlords for evicting Bai Dhani from the lands was the remedy under s. 84 of the Act. Apart from the fact that this contention of Mr. Oza has no substance on merits, it may be remembered that this point, viz., that s. 84 of the Act would not be attracted in this case, was not taken by Mr. Oza's client before the Assistant Collector or even before the Revenue Tribunal. That being so, the landlords had no opportunity to meet this point. Upon this ground also this particular point raised by Mr. Oza deserves to fail. However, as I have just stated, it fails even on merits.

Next, Mr. Oza has invited our attention to s. 40 which was introduced into the statute book by the Amending Act XIII of 1956. Section 40, sub-s. (1) provides:

"Where a tenant (other than a permanent tenant) dies, the landlord shall be deemed to have continued the tenant on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy."

Relying upon this section, Mr. Oza contends that the petitioners-landlords shall be deemed to have continued the tenancy in favour of Bai Dhani, the heir of Hari Lala, on the same terms and conditions upon which Hari Lala was holding the lands at the time of his death. We have carefully considered this contention also, but we have felt constrained to reject it. It is to be noted that s. 40 on which reliance is placed by Mr. Oza was not on the statute book when Hari Lala died. Hari Lala died on September 14, 1955, and the section was introduced into the statute book on August 1, 1956. That being so, the provisions of this section would not be applicable to the facts of the present case. Mr. Oza

contends, however, that the provisions of s. 40 of the Act must be given a retrospective effect and, says Mr. Oza, if the provisions are retrospectively applied, Bai Dhani must get the benefit thereof. In support of the contention that the provisions of s. 40 must be retrospectively applied, Mr. Oza has invited our attention to a decision of this Court in *Parvatibai Vasudeo v. Shridhar*.⁴ The question which came up for consideration in that case was about the effect of the Amending Act LXI of 1953 upon the Explanation below sub-s. (2) of s. 18 of the Rent Control Act. This Court came to the conclusion that the Amending Act introduced a change in the provisions of sub-s. (2) of s. 18 and the Court held that as soon as the change was introduced the Amending Act finished itself and its purpose was served out. The Court observed in that case that the Amending Act had no independent existence and therefore what was done by it must relate back to the date when the original Act was passed. It pointed out that after the Amending Act came into force, the earlier Act must be read and construed, except where it would lead to repugnancy, inconsistency or absurdity, as if the altered words were written in the earlier Act with the same pen and ink and the old words scored out, so that thereafter there was no need to refer to the Amending Act at all. Now, it is to be noted that in this case there was an inconsistency between the rights conferred upon the tenant under s. 5(1) of the Act of 1948 and the rights conferred by s. 40 which was introduced into the statute book by the Amending Act XIII of 1956. Before the Amending Act XIII of 1956 came into force, the tenant had certain rights under sub-s. (1) of s. 5. The provisions of sub-s. (1) of s. 5 did not find place in the Amending Act which came into force with effect from August 1, 1956. That being so, this would clearly be a case of inconsistency between the provisions of the earlier Act, which provisions are to be found in sub-s. (1) of s. 5 of that Act, and the provisions of s. 40 which was for the first time introduced into the statute book with effect from August 1, 1956. Accordingly the decision of this Court in *Parvatibai Vasudeo v. Shridhar* would not assist Mr. Oza's client.

Decision in *Parvatibai Vasudeo v. Shridhar* was based upon a decision of the Supreme Court in *Shamarao V. Parulekar v. The District Magistrate, Thana*.⁵ It was held by the Supreme Court in this case that when a subsequent Act amended an earlier one in such a way as to incorporate itself or a part of itself into the earlier one, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with the same pen and ink and the old words scored out, so that there was no need to refer to the Amending Act at all. Now, the case with which we are dealing in this application is not a case of incorporation of s. 40 or any part of the provisions of s. 40 into the old s. 5(1). As I have pointed out above, s. 5(1) does not find any place at all in the Act as amended by the Amending Act XIII of 1956. In other words, this is not a case of the amendment of s. 5(1). This is a case where the old s. 5(1) was removed completely from the statute book and an altogether new section, being s. 40, was introduced for the first time with effect from August 1, 1956. That being so, recourse to the case of *Shamarao V. Parulekar v. The District Magistrate, Thana*, would not assist Mr. Oza's client.

The next case to which our attention is invited by Mr. Oza is *B. G. Chavan v. State of Bombay*.⁶ In that case, what the Court had to consider was the true effect of Act XXXV of 1954, substituting "four years" for "three years" in s. 25(1) of the Act. Following the decision of the Supreme Court in *Shamarao V. Parulekar v. The District Magistrate, Thana*, this Court held that where the words "four years" were substituted in place of the original words "three years", the altered words must be read and construed as if they had existed in the original Act. This decision again would be of little assistance to respondent No. 1 in this case. This is not a case of removal of

⁴ (1957) 60 Bom. L. R. 1175.

⁵ (1955) 57 Bom. L. R. 421.

⁶ [1952] S.O.R. 683, s.c. 54 Bom. L.R. 877.

certain words from the old s. 5(1) and substitution of new words in their place. As I have just stated, this is a case where the provisions of s. 5(1) of the Act of 1948 were not incorporated in the Act as amended by Act XIII of 1956.

Mr. Oza has next referred us to an English decision in *Hutchinson v. Jauncey*.⁷ Now, this was a case in which in October 1945 the tenant of a house within the protection of the Rent Restriction Acts sub-let two rooms in it, sharing the use of the scullery for cooking with the sub-tenant. The sub-tenant subsequently bought the house subject to the tenancy, and in his capacity as landlord he served a valid notice to quit on the tenant expiring on April 25, 1949, and, on the tenant's refusing to comply with it, on May 25 he issued a plaint claiming possession. On that date as the law then stood, the tenancy was not within the protection of the Rent Restriction Acts owing to the sharing of the use of the scullery. On June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, came into force, which by ss. 7, 8 and 9 extended the protection of the Rent Restriction Acts to the various cases where the tenant shared accommodation with others. Section 10 provided that the three sections (ss. 7, 8 and 9)

"shall apply whether the letting in question began before or after the commencement of this Act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period."

It was held by the learned Judges that on the true construction of s. 10 of the Landlord and Tenant (Rent Control) Act, 1949, the relevant provisions of the Act applied to pending matters. Mr. Oza relies upon this decision in order to contend that the provisions of s. 40 which were introduced into the statute book by the Amending Act XIII of 1956 should be given retrospective effect. This decision also will not help respondent No. 1 for the simple reason that by the language of s. 10 of the Landlord and Tenant (Rent Control) Act, 1949, itself, retrospective effect was given to the provisions of ss. 7, 8 and 9. Section 10 provided:

"The three last foregoing sections shall apply whether the letting in question began before or after the commencement of Act etc., etc."

The English case, therefore, was a case in which the statute itself retrospectively applied the provisions of certain sections thereof. That is not the case with s. 40 of the Act, which was introduced into the statute book by Act XIII of 1956. Accordingly the provisions of s. 40 cannot be given a retrospective effect and Mr. Oza's contention based upon s. 40 must fail. Whatever rights Hari Lala had in these lands as a contractual tenant came to an end upon the expiry of one year from the commencement of his contractual tenancy and thereafter the lands vested in the petitioners-landlords. The provisions of s. 40 cannot be construed retrospectively so as to take away the vested rights of the petitioners-landlords.

The last contention of Mr. Oza is that apart from the rights of a statutory tenant which Hari Lala had by virtue of sub-s. (1) of s. 5 of the Act of 1948, he had contractual rights also in respect of the lands, whose possession was enjoyed by him, by virtue of the provisions of the Transfer of Property Act. Mr. Oza has invited our attention to ss. 30 and 8 of the Tenancy Act of 1948 and has argued that in deciding the present application, due regard must be had to the law as contained in the Transfer of Property Act. Now, s. 30 of the Tenancy Act of 1948 provides:

"Save as otherwise provided in sub-section (3) of section 6 and sub-section (1) of section 27, no other provision contained in this Act shall be construed to limit or abridge the rights or privileges of any tenant under any usage or law for the time being in force or arising out of any contract, grant, decree or order of a Court or otherwise howsoever." Relying upon this section, Mr. Oza contends that the law in respect of contractual rights under the Transfer of Property Act must be taken into consi-

deration while deciding this application. If we turn to s. 3 of the Act of 1948, the section provides:

"The provisions of Chapter V of the Transfer of Property Act, 1882, shall, in so far as they are not inconsistent with the provisions of this Act, apply to the tenancies and leases of lands to which this Act applies."

It is in this manner that Mr. Oza relying upon ss. 3 and 30 of the Tenancy Act of 1948 contends that due effect must be given to the contractual rights which Hari Lala had enjoyed in respect of these lands under the Transfer of Property Act. We have given an anxious thought to this submission of Mr. Oza, but we are of the view that the submission cannot prevail. Clause (a) of s. 111 of the Transfer of Property Act, which falls under Chapter V of the Act, provides: "A lease of immoveable property determines by the efflux of time limited thereby." I have already stated above that the period of the contractual tenancy of Hari Lala was a one year's period. Clearly, therefore, the contractual tenancy of Hari Lala was determined by the efflux of time and it was determined upon the expiry of one year from the date upon which Hari Lala entered upon these lands by virtue of his contractual tenancy. It is true that even upon the expiry of one year from the date of commencement of the contractual tenancy of Hari Lala, he continued to remain in possession of the lands. It is to be remembered, however, that even after the expiry of one year the petitioners-landlords accepted rent from Hari Lala under the provisions of the Tenancy Act. By accepting rent from Hari Lala the landlords did not assent to Hari Lala holding over, or Bai Dhani holding over, as a tenant within the meaning of s. 116 of the Transfer of Property Act. The point which we wish to emphasise is that although the possession of these lands continued with Hari Lala after the determination of his contractual tenancy, the possession continued because Hari Lala was a statutory tenant by virtue of s. 5(1) of the Act of 1948. Hari Lala did not hold over and, after his death, his daughter Bai Dhani did not hold over as a tenant by virtue of the provisions of the Transfer of Property Act. In our view, after the expiry of one year from the date of commencement of the contractual tenancy of Hari Lala, Hari Lala had no right under the Transfer of Property Act in respect of these lands. That being so, this particular contention of Mr. Oza based upon ss. 3 and 30 of the Act of 1948 must also fail.

The result, therefore, is that this application made by the petitioners-landlords is allowed, the order made by the Bombay Revenue Tribunal on January 20, 1958, is reversed and the order made by the Assistant Collector on August 30, 1957, is restored. There will be no order as to costs of this application.

Application allowed.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice V. S. Desai.

JETHALAL LAKHAMSI DAWADA v. JANKIBAI BHAGWANDIN.*

C.P. and Berar Letting of Houses and Rent Control Order, 1949, Cls. 13(3)(vii), 13(7), 28(1)†—Landlord granted permission to terminate tenancy on ground specified in cl. 13(3)(vii)—Tenant vacating premises—Application made by tenant to Additional Deputy Commissioner, after premises repaired, for reinstatement under cl. 13(7)—Whether Additional Deputy Commissioner has jurisdiction to grant relief to tenant—Jurisdiction conferred under s. 28(1) upon Deputy Commissioner whether restricted to orders made by Rent Control authorities under Order.

Where the tenant, as a result of the permission granted to his landlord to terminate his tenancy under cl. 13(3)(vii) of the C.P. and Berar Letting of Houses and Rent Control Order, 1949, has vacated the premises, the Additional Deputy Commissioner on an application made to him by the tenant under cl. 13(7) of the Order for reinstatement, after the premises are repaired, has jurisdiction under s. 28(1) of the Order to put the tenant in possession of the premises.

The jurisdiction conferred upon the Deputy Commissioner under s. 28(1) of the Order is to secure compliance with the provisions of the Order itself or to prevent contravention of the Order itself and is not restricted to the orders made by the Rent Control authorities under the Order.

THE facts appear in the judgment.

D. V. Bhalerao and N. S. Munshi, for the petitioner.

G. C. Banerjee, for respondents Nos. 1 and 2.

TAMBE J. This application is made under arts. 226 and 227 of the Constitution of India wherein the petitioner prays that the order made by the Additional Deputy Commissioner, respondent No. 3 hereto, on January 8, 1958, be set aside. The petitioner also prays that consequent on the setting aside

*Decided, September 18, 1958. Special Civil Application No. 148 of 1958.

†The relevant clauses are as under:—

Cl. 13 (1) No landlord shall, except with the previous written permission of the Controller:—

(a) give notice to a tenant determining the lease or determine the lease if the lease is expressed to be determinable at his option; or

(b) where the lease is determinable by efflux of the time limited thereby, require the tenant to vacate the house by process of law or otherwise if the tenant is willing to continue the lease on the same terms and conditions.

(3). If after hearing the parties the Controller is satisfied:—

(vi) that the landlord needs the house or a portion thereof for the purpose of his bona-fide residence, provided he is not occupying any other residential house of his own in the city or town concerned; or

(vii) that the landlord desires to make essential repairs or alterations which cannot be made without the tenant vacating the house; or...

(4). Where the landlord, who has obtained possession of a house or a portion thereof in pursuance of permission granted by the Controller under sub-clause (1) on the ground specified in item (vi) of sub-clause (3), does not himself occupy it without good cause, for the purpose specified in such ground, within one month of the date of obtaining possession, the

tenant who has been evicted may apply to the Controller for an order directing that he shall be restored possession of the house or a portion thereof and the Controller shall make an order accordingly.

(5). Where the landlord has obtained possession of a house or a portion thereof in pursuance of the permission granted by the Controller under sub-clause (1) on the ground specified in item (vi) of sub-clause (3), he shall not let the said house or portion thereof to any person other than the evicted tenant except with the previous approval in writing of the Controller in that behalf.

(7). Where the landlord has obtained possession of a house or portion thereof in pursuance of the permission granted by the Controller under sub-clause (1) on the ground specified in item (vi) of sub-clause (3), he shall, after the repairs or alterations have been made, restore possession of the house or portion thereof on the same conditions as before to the tenant who vacated it and shall not let the same to any other person or occupy it himself unless such tenant has waived in writing his claim to have such possession restored to him.

Cl. 28 (1). The Deputy Commissioner may take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be reasonably necessary for the purpose of securing compliance with, or for preventing or rectifying any contravention of this Order or for the effective exercise of such power

of the aforesaid order of the Additional Deputy Commissioner, he be restored to the possession of the house in question.

The facts giving rise to this petition in short are: The petitioner was the tenant of respondents Nos. 1 and 2. They were granted permission on November 15, 1956, to terminate the tenancy of the petitioner under cl. 13(3)(vi) of the C.P. and Berar Letting of Houses and Rent Control Order, 1949, hereinafter referred to as the Rent Control Order. The petitioner then vacated the house on February 28, 1957. According to the petitioner, the house was repaired by respondents Nos. 1 and 2 and the repairs were completed in July 1957 and the premises became fit for occupation by the petitioner. The petitioner then approached respondents Nos. 1 and 2 to reinstate him in the said premises, but they did not put him in possession. He then served a notice on the respondents on July 30, 1957, but to no effect. He then made an application to the Rent Controller under sub-cl. (7) of cl. 13 of the Rent Control Order praying therein that he be reinstated in possession of the house. The Rent Controller held that he had no jurisdiction to grant the relief claimed by the petitioner. He, therefore, dismissed the application. The petitioner then made another application to the Additional Deputy Commissioner under sub-cl. (7) of cl. 13 of the Rent Control Order again praying therein that he be reinstated in possession of the house.

Respondents Nos. 1 and 2 resisted this application on two grounds among others. The first ground was that it was not open to the Additional Deputy Commissioner to order reinstatement of the petitioner under sub-cl. (7) of cl. 13 of the Order and secondly that the repairs of the house have not as yet been completed. Both the contention of respondents Nos. 1 and 2 were upheld by the Additional Deputy Commissioner. The petitioner has, therefore, come up to this Court.

Shri Bhalerao, learned counsel for the petitioner, in the first instance, contends that the Additional Deputy Commissioner was in error in holding that he had no jurisdiction to put the petitioner in possession of the house. In our view, this contention is well-founded.

Now, it is not in dispute that the permission which was granted to respondents Nos. 1 and 2 to serve a quit notice on the petitioner was under cl. 13(3)(vi). Sub-clause (7) of cl. 13 of the Order provides that where the landlord has obtained possession of a house or portion thereof in pursuance of the permission granted by the Controller under sub-cl. (1) on the ground specified in item (vi) of sub-cl. (3), he shall, after the repairs or alterations have been made, restore possession of the house or portion thereof on the same conditions as before to the tenant who vacated it and shall not let the same to any other person or occupy it himself unless such tenant has waived in writing his claim to have such possession restored to him. It is clear that in the instant case permission having been granted under item (vi) of sub-cl. (3) of cl. 13 of the Order, the petitioner would be entitled to obtain possession on completion of the repairs or alterations to the house. The learned Additional Deputy Commissioner, however, has found it difficult to grant the relief claimed by the petitioner, as, according to him, there are no provisions in the Rent Control Order for enforcing the claim made by the tenant under sub-cl. (7) of cl. 13 of the Order. In our opinion, the Additional Deputy Commissioner has fallen in error in holding that there are no provisions in the Rent Control Order to grant such a relief.

It appears that the provisions of cl. 28 of the Rent Control Order had not been brought to the notice of the Additional Deputy Commissioner. Sub-clause (1) of cl. 28 provides that the Deputy Commissioner may take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be reasonably necessary for the purpose of securing compliance with, or for preventing or rectifying any contravention of this Order or for the effective exercise of such power. The provisions of sub-cl. (1) of cl. 28, in our opinion, are wide enough to confer jurisdiction on the Deputy Commis-

sioner to entertain the claim made by the petitioner in the instant case. The jurisdiction conferred on the Deputy Commissioner is of the following nature to take steps and use and cause to be used such force (i) for the purpose of securing compliance with the Rent Control Order, (ii) for preventing or rectifying any contravention of this Order, and (iii) for effective exercise of the powers conferred by the Rent Control Order. It cannot be disputed that sub-cl. (2) of cl. 13 provides that after the completion of the repairs or alterations the landlord must put back the tenant in possession unless he in writing has consented to the premises being let out to others. If the landlord does not do so, then the Deputy Commissioner is empowered to take necessary steps for the purpose of securing compliance with the provisions of the Rent Control Order. Looked at from another point of view, what the tenant is claiming is that the landlord be prevented from contravening the provisions of this Order. That being the case, the Deputy Commissioner clearly had jurisdiction to deal with such a claim under cl. 28 of the Rent Control Order.

Shri Banerjee, learned counsel for respondents Nos. 1 and 2, contends that the provisions of sub-cl. (1) of cl. 28 are intended to secure compliance with or prevent contravention of the orders made by the Rent Control authorities under the Rent Control Order and is not intended for the purpose of securing compliance with or preventing or rectifying any contravention of the Rent Control Order itself. It is not possible for us to accept this contention of Shri Banerjee. The word used in this sub-cl. (1) of cl. 28 is 'Order' and not "an order made under this Order". It is, therefore, in our opinion, clear that the jurisdiction conferred under sub-cl. (1) of cl. 28 of the Rent Control Order is to secure compliance with the provisions of the Rent Control Order itself or to prevent contravention of the Rent Control Order itself.

Shri Banerjee next argued that the authorities concerned have made specific provisions wherever they thought it proper that any contravention of the provisions of the Rent Control Order should be dealt with by the Rent Control authorities and in this connection Shri Banerjee referred us to sub-cl. (4) and (5) of cl. 13 of the Rent Control Order.

Turning to sub-cl. (4) of cl. 13, it provides that where the landlord who has obtained possession of a house or a portion thereof in pursuance of the permission granted by the Controller under sub-cl. (1) on the ground specified in item (vi) of sub-cl. (3), does not himself occupy it without good cause, for the purpose specified in such ground, within one month of the date of obtaining possession, the tenant who has been evicted may apply to the Controller for an order directing that he shall be restored possession of the house or a portion thereof and the Controller shall make an order accordingly. Now, it would be seen that by sub-cl. (4) jurisdiction is conferred on the Rent Controller to deal with a claim relating to the contravention of item (vi) of sub-cl. (3) of cl. 13 of the Rent Control Order. This only shows that wherever the authority is of opinion that the matter be dealt with not by the Deputy Commissioner but by the Rent Controller himself it has so specifically provided. It does not follow that in other cases the framers of the Order had no intention to confer jurisdiction on the Deputy Commissioner. Similarly is the case with sub-cl. (5) of cl. 13 of the Rent Control Order. Sub-clause (5) provides that where the landlord has obtained possession of a house or a portion thereof in pursuance of the permission granted by the Controller under sub-cl. (1) on the ground specified in item (vi) of sub-cl. (3), he shall not let the said house or portion thereof to any person other than the evicted tenant except with the previous approval in writing of the Controller in that behalf. This again is another side of sub-cl. (4). It would be seen that sub-cl. (4) gives a right to the tenant to claim back possession of the premises in the event the landlord does not occupy it himself, while sub-cl. (5) prohibits the landlord from letting out the premises to anybody else without the consent of the evicted tenant and the jurisdiction to deal with this particular subject-matter has been conferred on the Rent Controller himself under the Rent Control Order.

Lastly, Shri Banerjee contends that the construction placed by us would lead to heavy accumulation of work before the Deputy Commissioner and each and every contravention of the Rent Control Order would become the subject-matter of a complaint before him and that would result in burdening the file of the Deputy Commissioner with heavy work. We are not concerned with this aspect of the case. We are concerned only with construction of the provisions of the Rent Control Order. As to how the work is to be disposed of is a matter which has to be considered by the authorities concerned. Apart from it, we find it difficult to accept the contention of Shri Banerjee. If we accept his contention then it would mean that though sub-cl. (7) of cl. 13 of the Rent Control Order confers a right on the evicted tenant to claim back possession of the premises on completion of the alterations or repairs, the landlord could with impunity go on denying his right and the evicted tenant would have no remedy to get the wrong done to him redressed by the Rent Control authorities. It is difficult to assume that the authors of the Rent Control Order after conferring this right on the evicted tenant provided no remedy for its enforcement. We have already stated that there are no clear words in sub-cl. (1) of cl. 28 of the Rent Control Order to restrict its operation to the orders made under the Rent Control Order. In these circumstances, we see no reason why we should so construe cl. 28(1) of the Rent Control Order as would render enforcement of the right conferred by it difficult. It is, therefore, not possible for us to accept the contention of Shri Banerjee. We, therefore, hold that the Additional Deputy Commissioner was in error in holding that he had no jurisdiction to deal with the application to grant the relief prayed for by the petitioner in the event of his establishing other facts which entitled him to that relief. This conclusion, however, is not sufficient for the purpose of granting any relief to the petitioner. As already stated, the petitioner would be entitled to claim back possession of the premises after the completion of the repairs or alterations.

The fact found in the instant case by the Additional Deputy Commissioner is that the repairs to the house have not been completed as yet and the house is not ready for occupation. This is a finding of fact and that being the case the application of the petitioner wherein he claimed reinstatement was premature and was not well-founded and in this view of the matter it cannot be said that the dismissal of the application by the Additional Deputy Commissioner was erroneous.

In the result, therefore, the petition fails and is dismissed. However in view of the facts and circumstances of the case we direct that the costs shall be borne as incurred.

Petition dismissed.

Before Mr. Justice Gokhale and Mr. Justice Patel.

MRS. SUSHILA MAHENDRA NANAVATI v. MAHENDRA MANILAL
NANAVATI.*

Hindu Marriage Act (XXV of 1955), Sec. 12—Proceeding instituted under s. 12(1)(d) for decree of nullity of marriage—Respondent alleging in written statement that she was pregnant by petitioner—Burden of proof—Whether petitioner must prove beyond reasonable doubt that respondent was pregnant at time of marriage by some one other than petitioner.

In proceedings instituted under s. 12(1)(d) of the Hindu Marriage Act, 1955, the petitioner must prove beyond reasonable doubt that the respondent was pregnant at the time of marriage and that she was pregnant by some one other than the petitioner.

*Ginasi v. Ginasi,*¹ *Preston-Jones v. Preston-Jones,*² *Batter v. Batter,*³ *Galler v. Galler,*⁴ *Gower v. Gower,*⁵ *Over v. Over*⁶ and *Gaskil v. Gaskil,*⁷ referred to.

ONE Mahendra (petitioner), who was a resident of Bombay, was betrothed to Sushila (respondent), who was a resident of Prantij in North Gujerat, in June or the beginning of July 1945. Their marriage took place on March 10, 1947. From March 10, 1947, to about the end of March 1947, the respondent stayed with the petitioner in Bombay. In about the beginning of April 1947 she went to her parents' place and stayed there upto about 22nd or 23rd of April. After going to Prantij, the respondent did not keep good health and she got herself examined and she was told by the doctor that she was carrying. She came to Bombay on April 23, 1947. The husband and wife during the short period that was available to them before the husband's departure for the United States of America, had marital relations, according to the respondent more than once and according to the petitioner only once. After the petitioner left for the United States of America, the respondent stayed with the father of the petitioner for a few days and thereafter went to Gandevi where the petitioner's sister Sharada and her husband were staying and stayed there for about 26 days and returned to Vile Parle in Bombay where the petitioner's father and mother were residing. The relations between the respondent and the petitioner's mother were not very cordial and on the petitioner's advice the respondent went to Prantij to reside with her parents. On August 27, 1947, the respondent gave birth to a female child at Prantij and due information of it was given to the petitioner by a telegram as well as by a letter. Information was also given to the petitioner's father at Bombay. The petitioner alleged that he was shocked to hear this news and suspected that the child was not his.

The petitioner returned to Bombay in about the middle or end of November 1947, and made an application in the Shahar Nyayadhi Court at Baroda under Lagna Vichhed Niband, the divorce law prevalent in the Baroda State. It was applicable to people who belonged to the Baroda State and who had a minimum residence of one year in Baroda. The respondent contended that the child was born of the wedlock and that the child was of the petitioner. The Baroda Court dismissed the suit of the petitioner on the ground that the petitioner was not domiciled in Baroda.

On April 20, 1956, the petitioner presented the present petition under s. 12(1)(d) of the Hindu Marriage Act, 1955, for a declaration that the marriage between the petitioner and the respondent was null and void on the ground that the respondent was pregnant by some one other than the petitioner, alleging that he was not aware of that at the time of the marriage and that when he came to know of the fact that the respondent was pregnant by some one other than the petitioner he had not lived or co-habited with the respondent.

*Decided, October 3, 1958. First Appeal No. 135 of 1958, against the decision of G. A. Thakker, Judge, City Civil Court, Bombay, in M. J. Petition No. 1026 of 1956.

1 [1948] 1 All E.R. 373.

2 [1951] A.C. 391; [1951] 1 All E.R. 124.

3 [1950] 2 All E.R. 458.

4 [1954] 1 All E.R. 536.

5 [1950] 1 All E.R. 804, 805, 806.

6 [1924] 27 Bom. L.R. 251.

7 [1921] P. 425.

ent. The respondent by her written statement contended that she submitted to the petitioner's demands for sex relations after the betrothal as per his entreaties and representations made to the respondent, that amongst their community and according to their religion, betrothal was as good as marriage and that marriage was a mere formality for the legalization of children and as such even if intercourse resulted in conception, the marriage would set things right and she alleged that it was on these representations that the respondent submitted to the petitioner and there were sex relations between the petitioner and the respondent before marriage and as a result the respondent conceived through the petitioner. She further alleged that of these relations the petitioner's parents as well as his sister were well aware prior to the marriage and she denied that she had sex relations with any one else except the petitioner.

The trial Court passed a decree of nullity in favour of the petitioner.

The respondent appealed.

S. D. Vimadalal and *M. H. Chhatrapati*, with *C. S. Trivedi*, for the appellant.
M. P. Amin and *K. K. Sanghavi*, with *N. B. Pandit*, for the respondent.

PATEL J. [His Lordship after stating the facts, proceeded.] Section 12 of the Act so far as is material to the present case is as follows:—

"12. (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable; and may be annulled by a decree of nullity on any of the following grounds, namely:—

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—...

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied—

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;...

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree."

Section 23 so far as relevant provides:—

"23. (1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief;...

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the Court shall decree such relief accordingly."

The issues that would arise would be:—

(1) Whether the respondent was pregnant at the date of marriage.

(2) If she was, whether she was pregnant by some one other than the petitioner.

(3) Whether the petitioner was at the time of marriage ignorant of the facts alleged.

(4) Whether the marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

Mr. Vimadalal has argued that in matrimonial suits, the Court must be satisfied that the petitioner has proved his case beyond reasonable doubt. He has relied upon a passage in the treatise on Divorce by Rayden (7th edn.) at p. 203 under the heading "Standard of Proof". The observations are:

"...Adultery, desertion and cruelty must be proved beyond reasonable doubt when

they operate by way of a bar to relief, just as much as when they are relied on to found a right to relief;..."

He also relied on the observations in Vol. XII, Halsbury's Laws of England, at para. 445. He has also relied upon the case of *Ginesi v. Ginesi*¹. The ratio is:

"In a matrimonial case the same strict proof is required of adultery (which was regarded by the ecclesiastical courts as a "quasi-criminal offence") as is required in a criminal case of a criminal offence properly so-called, namely, that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact."

He has also relied upon *Preston-Jones v. Preston-Jones*², *Batter v. Batter*³ and *Galler v. Galler*⁴, cases which have accepted the standard therein laid down. The observations in *Ginesi v. Ginesi* received some criticism on the ground that these actions are civil actions in their nature and the standard of proof required was unduly hard. See *Gower v. Gower*.⁵ At that time *Preston-Jones v. Preston-Jones* was not decided by the House of Lords. In the case of *Galler v. Galler*, the question of standard of proof in matrimonial cases has been considered and the law discussed. The following observations in the leading judgment of Hodson L.J. at p. 540 are pertinent:—

"I have used the language which I have because, since *Fairman v. Fairman*⁶ was decided, the much debated question whether the standard of proof in a divorce suit, which is a kind of civil action, is the same as that in a criminal case, and whether the same rules apply, has been considered by the House of Lords in *Preston-Jones v. Preston-Jones*. Lord Mac Dermott said:

"I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word 'satisfied' is capable of connoting something less than proof beyond reasonable doubt'.

Lord Simonds expressly assented to and adopted the language of Lord Mac Dermott, who continued:—

"The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be "satisfied", in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate, since the decision of this house in *Moudaunt v. Moncreiffe*⁷, that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned'.

It might appear from the passages which I have read from the judgment in *Fairman v. Fairman*, that the analogy of criminal law was the ratio of that decision, but I think the result is the same by whichever road one travels. In divorce, as in crime, the court has to be satisfied beyond reasonable doubt."

The cases referred to above do take the view that there is no distinction to be drawn between the word "satisfied" standing alone and the word "satisfied" accompanied by the words "beyond reasonable doubt".

I may also refer to the case of *Over v. Over*⁸ where Sir Lallubhai Shah observed (p. 256):—

"...I desire to make it clear that in divorce cases great care and caution are necessary in dealing with the admissions of parties and it is only the exceptional circumstances of a given case that could justify the Court in acting upon the admissions of a party as to adultery without any corroboration. Generally speaking, as a matter of prudence it is desirable to insist upon evidence corroborative of the admissions."

1 [1948] 1 All E.R. 373.

2 [1951] A.C. 391; [1951] 1 All E.R. 124.

3 [1950] 2 All E.R. 458.

4 [1954] 1 All E.R. 536.

5 [1950] 1 All E.R. 804, 805, 806.

6 [1949] 1 All E.R. 938.

7 (1874) L. R. 2 Sc. & Div. 374.

8 (1924) 27 Bom. L.R. 251.

Martin J., as he then was, observes at p. 259:—

"...No doubt s. 45 provides that 'subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure'. But that provision, in my opinion, does not override the express directions in ss. 7, 12, 13 and 14 to which I have already alluded."

This was under the Indian Divorce Act, 1869.

The reason of the rule is equally applicable here where the consequences to the woman are very serious. The words in the present Act (Hindu Marriage Act, 1955) and the English Acts are practically similar. Of course these cases laid down the standard of proof in cases of adultery. I think, however, that the same strict standard of proof must be required in cases like the present.

Relying on this rule of strict proof Mr. Vimadalal argues that the burden of the issue "whether the respondent at the time of marriage was pregnant by some one other than the petitioner" is on the petitioner and in spite of the so-called admissions in the written statements, the petitioner was bound to prove it beyond reasonable doubt. According to him, he is bound to prove to the satisfaction of the Court that the respondent was pregnant at the time of marriage and secondly, that she was pregnant by some one other than the petitioner. Mr. Amin, on the other hand, contends very emphatically, relying on para. 9 of the judgment of the lower Court and paras. 7, 8, 9, 10 and 11 of her written statement and her statement in Court in her cross-examination that it is not open now to the respondent to urge that the petitioner was bound to prove that she was pregnant at the date of the marriage. He has contended that no party can be allowed to make out a case at variance with the pleadings. The party must be bound to its pleadings for good or bad and has no right in appeal to make a case different and inconsistent from the one made out either in the plaint or in the statement. This principle, no doubt, is a correct principle and no exception can be taken to the same. But these proceedings are matrimonial proceedings, and in matrimonial proceedings there can be no judgment by default or admission. I may refer to Raydon on Divorce at p. 202 wherein the learned author states as follows:—

"A decree must be refused, even if the suit be not defended, where there is no jurisdiction to make it, or in the absence of sufficient proof of the allegations put forward, for judgment by default is unknown in matrimonial causes: the jurisdiction of the Court is not affected by consent, the public interest does not allow it, and no admission binds the court; the analogy of ordinary actions cannot be applied. The Court is obliged by statute to inquire into the existence of the bars to relief."

Mr. Amin has pointed out that the cases referred to by the author were cases apparently of collusion or connivance. In the present case, he points out, the respondent's written statement, by distinct implication, admits the state of her being pregnant before the date of marriage and he says, she must be bound by these admissions contained in her written statement. I may refer in this regard to the case of *Preston-Jones v. Preston-Jones*, wherein the case was somewhat peculiar. The husband was absent from the United Kingdom from August 17, 1945, to February 9, 1946. On August 13, 1946, the wife gave birth to a normal child. The husband, therefore, brought a petition for the dissolution of the marriage on the ground of her adultery, the charge being based on the fact that a period of three hundred and sixty days elapsed between August 17, 1945, and August 13, 1946, from which it was alleged it followed that the child must have been conceived in adultery. The wife, it appears, adduced witnesses to speak to the visits paid to her by her husband in the late Autumn 1945, and there appears to be no doubt that the purpose in adducing them was to show that the husband and the wife were or might have been together on dates which would naturally account for the child's birth on August 13, 1946, and this evidence was disbelieved by the Commissioner. The argument advanced was that since the case had been conducted by the wife on the footing that the only question was whether the wife and the husband might

have been together in October-November, 1945, the other question should not be open to the wife. Lord Normand observes at p. 181 as follows:—

"In divorce proceedings it is for the petitioner to prove the case whether the action is defended or not, and though the putting forward of a false defence may destroy the respondent's credibility, that in itself does not establish the truth of the petitioner's case. Apart from that objection of principle, it would in the circumstances of this case be unjust to the wife to infer or assume that the false defence is tantamount to an admission of guilt. If it is possible that a child may be born three hundred and sixty days after coitus and if that was what had, indeed, happened, the departure from the normal course of things is so extraordinary that the mother, conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth, and might induce others closely connected with her to lend themselves to prevarication or worse."

Their Lordships then considered the other materials on record for the purpose of arriving at a decision as to whether the husband had proved his case beyond reasonable doubt. I may also mention that at the time when the respondent was in the witness-box, an attempt was made to have the written statement amended to include the alternative case that she was not pregnant at the time of marriage. The learned Judge in exercise of his discretion refused to allow the amendment. He has taken a very strict view which, indeed, would be justified in any civil suit; but it cannot be justified in matrimonial suits. Mr. Amin has urged that the Court below was right in refusing any amendment of the written statement and we ought not to interfere with that discretion. I think the case does not depend on the amendment of the written statement. We must be satisfied about the proof of the petitioner's case beyond any reasonable doubt and where a child has lived, we are of the view that s. 112 of the Indian Evidence Act also cannot be disregarded. Mr. Amin has argued that s. 112 of the Evidence Act can apply to a case where the legitimacy of the child is directly in issue and not to a case like the present where the proceedings are between the husband and the wife. A similar argument was advanced in the case of *Gaskill v. Gaskill*⁹. Viscount Birkenhead, L.C. considered the question of the burden and the presumption of law. He observed (p. 434):

"...It is true that the observations were made in reference to a legitimacy suit, but I cannot conceive that in the present case any different principle can apply; otherwise it might happen that the mother would be condemned for adultery on evidence which would not disentitle the child to be declared to be the legitimate issue of her husband."

We are, therefore, of the view that though the defendant has, in her written statement, stated that she was pregnant by the petitioner, we must require the petitioner to prove beyond reasonable doubt that she was so pregnant and that she was pregnant by some one other than the petitioner. We have, therefore, considered the evidence from that aspect also.

[His Lordship after dealing with points not material to this report, proceeded.]

It would appear from Mody's treatise on Medical Jurisprudence and Toxicology, 12th edn., p. 305, where he observes as follows:—

"...It has been observed that in women whose intermenstrual period is shorter than the usual time, pregnancy has terminated at the eighth or ninth lunar month or even earlier, the child having attained full development. Sidney H. Waddy describes a case in which a woman, aged 30 years, gave birth to a full-time daughter after gestation of 210 days—ten times three weeks—which was her normal intermenstrual period. The child cried lustily at birth, had a good crop of hair, was well coated with vernix caseosa, measured twenty inches in length, and weighed seven pounds. The finger and toe nails were fully developed and the child sucked vigorously on being put to the breast."

In the same volume at p. 307 we find the following observations:—

"...Hubbard records a case where an infant born at the beginning of the seventh month of pregnancy weighed only 15 ounces, and at the age of six weeks was in good health and weighed 32½ ounces."

He has given several illustrations where children were born after 6½ months of gestation period and have lived. One cannot overlook also the case of *Clark v. Clark*¹⁰ where a child was born after a period of gestation which could not have exceeded 174 days on the assumption that the husband was the father of the child. The child lived and at the date of the hearing, it was about 8 years old. The medical evidence was to the effect that a child of so short a period of foetal life would not survive for more than a day or two. It was held:

"Where the date of conception can be fixed, and the actual period of gestation is ascertained, this ascertained period is comparable to the longer notional period, and for this reason what is in fact a six month' child may be comparable to what is called a seventh-month's child. Therefore, when one reduces the actual facts of this case to the same terms as those upon which the theories and the tables are based, it is utterly impossible to say, that there is anything extravagantly improbable about this being a viable child."

These remarks are equally applicable to the present case. We are, therefore, *prima facie* not satisfied that the petitioner has proved to our satisfaction that the respondent was pregnant by some one other than the petitioner and that the petitioner was not the father of the child which was born.

[The rest of the judgment is not material to this report.]

GOKHALE J. [His Lordship after stating the facts and dealing with points not material to this report, proceeded.] But the question is whether the finding that there was no pre-marital sex relations between the parties, as alleged by the respondent, would be decisive of the suit. Mr. Vimadalal's argument was that it could not be decisive of the suit because the Court must be satisfied that the petitioner had established that the respondent was pregnant at the time of marriage by someone other than the petitioner and he contends that this being a matrimonial action, the Court's conscience must be satisfied on this issue and, if there is any doubt, its benefit must go to the respondent. In this connection, Mr. Vimadalal pointed out that in certain English cases adultery has been described in the Divorce Division as a "quasi-criminal offence", as for instance in *Ginesi v. Ginesi*¹. It was conceded that this description was condemned in later English cases, such as in *Gower v. Gower*.² In Halsbury's Laws of England, third edn., Vol. XII, at p. 233, it is stated that a petition for divorce is a civil and not a criminal proceeding. At page 237, para. 445, it is also stated that:

"The onus of proof is on the person who alleges adultery, for there is a presumption of innocence.

Adultery must be proved to the satisfaction of the Court, that is, beyond reasonable doubt; the evidence need not reach certainty, but it must carry a high degree of probability."

In Rayden on Divorce, seventh edn., to which also our attention was drawn, at p. 133 it is stated that:

"The burden of proof is throughout on the person alleging adultery, there being a presumption of innocence. A suit for divorce is a civil and not a criminal proceeding, but the same strict proof is required of adultery as is required in a criminal case before an accused person is found guilty; that is, the tribunal must be satisfied on proof beyond all reasonable doubt."

Reliance was also placed on a passage at p. 202 of the same book where it is stated:

"A decree must be refused, even if the suit be not defended, where there is no jurisdiction to make it, or in the absence of sufficient proof of the allegations put forward, for judgment by default is unknown in matrimonial causes: the jurisdiction of the Court is not affected by consent, the public interest does not allow it, and no admission binds the Court; the analogy of ordinary actions cannot be applied."

¹⁰ [1939] 2 All E.R. 59.

² [1950] 1 All E.R. 804.

¹ (1948) P. 179 O.A., at p. 179.

Mr. Amin, however, argues that this is not a case of collusion or connivance. The respondent admitted conception at the time of marriage and set up a false case of pre-marital sexual relations, which in the face of her discrepant testimony and the correspondence, cannot be accepted by any Court of law; and he contends that once her case as set out in the written statement is held not proved, a decree in favour of the petitioner must follow and was rightly granted by the trial Court. In this connection, he strongly relied on the fact that in her written statement, in para. 7, the respondent had made out a case that she had submitted to the petitioner's demands for sex relations after the betrothal on certain representations made by the petitioner and that there were sex relations between them before marriage as a result of which relations the respondent conceived through the petitioner. Mr. Amin pointed out that this statement has been repeated several times in the written statement and on the basis of this written statement and the particulars furnished by the respondent on September 10, 1956, the parties went to trial and the learned trial Judge, in para. 9 of his judgment, has clearly pointed out how the controversy between the parties narrowed down to the question whether the petitioner had pre-marital sex relations with the respondent and whether the latter conceived as a result of those relations.

In this connection, it may be mentioned that while the respondent was giving evidence an application was made to the trial Judge for an amendment of the written statement, in which an alternative case was sought to be introduced, viz., that the respondent conceived through the petitioner after the marriage. This application for amendment was refused by the learned trial Judge on two grounds: firstly, that the respondent was trying to make out a new defence which was totally inconsistent with the defence which she had taken in her written statement, and secondly, if this case had been pleaded by the respondent originally the petitioner would have led evidence of expert witnesses such as doctors to prove that the conception could not have taken place after marriage, having regard to the date of birth of the child and the other circumstances of the case. Mr. Vimadalal contends that this amendment was wrongly refused by the learned trial Judge and should be allowed, if necessary, by this Court at the appellate stage.

In this connection, reliance was placed on *Over v. Over*³, where it was held that the Court will not grant a decree on the petition by a husband on the ground of the wife's adultery, where the allegation of adultery rests only on the admission made by the wife in her letters, unless it is satisfied that "all reasonable ground for suspicion is removed" and that there is no collusion between the husband and the wife. In this case, Sir Lallubhai Shah, Acting Chief Justice, observed that the question whether in a given case the Court should consider the admissions of the wife as to adultery sufficient must necessarily depend upon the circumstances of that case, and the fact that admissions are accepted as sufficient in one case can afford no reason whatever for accepting them in another case. The learned Judge pointed out that the general considerations which would and should guide the Court in this matter are indicated in the judgment of Cockburn C.J. in *Robinson v. Robinson and Lane*.⁴ In that case, Cockburn C.J. pointed out that though the admissions of a wife, unsupported by corroborative proof, should be received with the utmost circumspection and caution because of danger of collusion and other sinister motives which might lead to the making of such admissions, nevertheless, if after looking at the evidence with all the distrust and vigilance with which it ought to be regarded the Court comes to the conclusion that the evidence is trustworthy and amounts to a clear, distinct and unequivocal admission of adultery, the Court should have no hesitation to act upon such evidence and afford the injured party the redress sought for.

³ (1925) 27 Bom. L.R. 251.

⁴ (1858) 1 Sw. & Tr. 862.

In *Preston-Jones v. Preston-Jones*⁶, it was observed by Lord MacDermott (p. 138) :—

"...I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word "satisfied" is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the Court might be "satisfied", in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt v. Moncreiffe*,⁷ that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."

In this case, Lord Normand in his judgment (p. 131) also observed that in divorce proceedings it was for the petitioner to prove the case whether the action was defended or not, and though the putting forward of a false defence may destroy the respondent's credibility, that in itself did not establish the truth of the petitioner's case. In this case, the House of Lords was concerned with the interpretation of the word "satisfied" in s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937, (now s. 4(1) of the Matrimonial Causes Act, 1950). In a later English case, *Galler v. Galler*⁷ Hodson L.J., who delivered the judgment of the Court of Appeal, observed that the English Courts have taken the view that there was no distinction to be drawn between the word "satisfied" standing alone and the word "satisfied" accompanied by the words "beyond reasonable doubt", and stated that in divorce, as in crime, the Court has to be satisfied beyond reasonable doubt.

These principles, in my opinion, would apply with all the greater force to cases under the Hindu Marriage Act, 1955. Section 12 of this Act refers to voidable marriages and provides, in so far as it is material:

"(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable; and may be annulled by a decree of nullity on any of the following grounds, namely:—

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner."

Under sub-s. (2)(b) of s. 12—

"Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied—

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of grounds for a decree."

Now, this Act has repealed the Bombay Hindu Divorce Act (XXII of 1947). The Act came into force on May 18, 1955, and under s. 12(2)(b)(iii) both marriages solemnized before the commencement of the Act as well as after the commencement of the Act are affected. As regards marriages solemnized after the

⁶ [1951] 1 All E.R. 124.

⁷ [1954] 1 All E. R. 536.

⁸ (1874) L. R. 2 Sc. 374.

commencement of the Act, the proceedings have to be instituted within one year from the date of the marriage, so that in the case of marriages solemnized after May 18, 1955, the marriages cannot be challenged under this section, after the expiry of one year from the date of the marriage. In the case of marriages solemnized before the Act, however, all the marriages would seem to be open to challenge, the only limitation provided being that the proceedings have to be instituted in these cases within one year of May 18, 1955. In my opinion, there can be no doubt in view of these provisions and the effect it was intended to have on marriages solemnised before the commencement of the Act, a very grave and serious onus would lie on the person instituting proceedings with a view to having a decree of nullity of marriage under s. 12 of the Act.

Under s. 23 of this Act, in so far as it is material, it is provided:

"(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and...

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly."

In my judgment, the satisfaction which the Court has to arrive at in proceedings under this Act must be satisfaction beyond all reasonable doubt. It is necessary, therefore, to state some of the circumstances under which this petition came to be filed.

As I have already stated, the petitioner filed on March 13, 1948, Suit No. 34 of 1947-48 under the Baroda Hindu Marriage and Divorce Act on the ground that the respondent had become pregnant before his marriage with her and that he was not aware of it and the respondent had concealed the fact of her being so pregnant from him and his parents. That suit was resisted by the respondent on the ground that she had become pregnant as a result of sexual intercourse that she had with the petitioner after her marriage with him in March 1947. That suit came to be dismissed, as already stated, on the ground that the petitioner was not domiciled in Baroda and, therefore, the Court had no jurisdiction to entertain the suit and the Baroda Hindu Code was not applicable to the parties. Nothing was done, and perhaps nothing could be done by the petitioner till the Hindu Marriage Act, 1955, came into force. But even then the petitioner waited till April 18, 1956, that is to say, 11 months after the commencement of this Act, before he filed the present petition. The petition contains not a few untruthful statements. It was stated by the petitioner in para. 3 of the petition that the parties were betrothed some time in the beginning of 1946. But there is no dispute now that the betrothal took place some time in June or July 1945. He further stated in the same paragraph that it was at the request of the respondent's father that the marriage was performed in Bombay on March 10, 1947, contrary to the convention of the community that the marriage should be performed at Prantij, whereas the correspondence clearly discloses that the bride's family was anxious to have the marriage performed at Prantij but it was the desire of the petitioner's family that it should be performed at Bombay. In para. 4 it is stated that within 5 or 6 days of the marriage the respondent insisted on going back to her parents' place at Prantij on the pretext that she had to perform certain religious ceremonies and to offer *pooja* to the family deity at Prantij. There is no evidence on this point and this has not been even put to the respondent in her evidence. In para. 5 it is stated that the respondent had shown marked unwillingness to stay at Gandevi where the petitioner's married sister Sharda-ben lived with her husband one Dr. Champaklal and that the petitioner's father had made an appointment in Bombay with Dr. Purandare for consultation after the respondent's return from Gandevi, but the respondent suc-

cessfully evaded the appointment by suddenly coming down to Vile Parle and leaving for Prantij. No evidence has been produced in support of this statement. The petitioner has denied in his evidence that he knew that the respondent was pregnant at the time of marriage. In her evidence in examination-in-chief the respondent has also stated that she did not know at the time of marriage that she was pregnant. No objection was taken to this statement, but what is more, cross-examination was pursued on this point and she repeated in her cross-examination that she did not know prior to her marriage that she was pregnant though she stated that the statements contained in the written statement were true and that she had given instructions to her legal advisers for preparing the written statement. In my view, the respondent's written statement does not contain an unqualified admission that she was pregnant at the time of her marriage. It is well settled that admissions must be read as a whole. In *Motabhoj Mulla Essabhoj v. Mulji Haridas*⁸ it was held by the Privy Council that though it was permissible to accept part and to reject part of a witness's testimony, an admission in a pleading cannot be so dissected; if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all. Mr. Amin contended that in para. 7 and the other paragraphs of the written statement there is an unequivocal admission by the respondent that she was pregnant at the time of marriage. I am not prepared to accept that contention. The defence set up by the respondent was that on entreaties and representations made to the respondent by the petitioner there were sex relations between the petitioner and the respondent before marriage and as a result of such sex relations the respondent conceived through the petitioner, and that statement cannot, in my opinion, be dissected so as to establish an unequivocal admission on the part of the respondent that she was pregnant at the time of marriage. It is nobody's case that there were signs of pregnancy at the time of marriage. The petitioner has denied any knowledge of respondent's pregnancy at the time of marriage and the respondent has also stated that she did not know that she was pregnant at the time of marriage. It is undisputed that Dr. Champaklal, the husband of Shardaben, had examined the respondent in the month of May 1947. He was not examined by the petitioner and a grievance was made about that in the trial Court on behalf of the respondent; but the learned trial Judge was of the view that because of the admission made by the respondent in her written statement there was no necessity for the petitioner to examine any medical expert to prove the fact that she was carrying at the time of marriage. But it has to be remembered that the frame of issue No. 1 was in accordance with the provisions of s. 12 of the Hindu Marriage Act, 1955, namely, "whether the respondent was at the time of the marriage pregnant by someone other than the petitioner, as alleged in para. 9 of the petition". The wording of the issue was not changed in spite of the so-called admission made by the respondent in her written statement and despite the particulars furnished by her. An application for amendment of the written statement to enable the respondent to set up an alternative case that the respondent conceived through the petitioner after marriage was rejected. But Mr. Amin contends that that was rightly rejected because the respondent could not be allowed to make a new case inconsistent with her admissions in the written statement. Mr. Amin argues that under O. VIII, r. 5, of the Civil Procedure Code, it is well settled that both the plaintiff as well as the defendant must be held bound by the statement of facts in their respective pleadings. That undoubtedly is so. But under the proviso to O. VIII, r. 5, the Court may, in its discretion, require any fact admitted to be proved otherwise than by such admission. The proviso to s. 58 of the Evidence Act is also to the same effect and in *Over v. Over*, which has been already referred to above, Mr. Justice Marten (as he then was) held that s. 58 of the Evidence Act has in general no application to divorce cases.

Mr. Amin argued that we should not allow any amendment at the stage of this appeal because his client would be placed at a great disadvantage if the case were to be sent down now. Now, it is to be remembered that the petition itself has been filed nine years after the marriage, though undoubtedly the petitioner was entitled to file it before May 18, 1956, under s. 12(2)(b)(ii) of the Hindu Marriage Act. It appears from the evidence that the father of the respondent as well as the doctor who treated her at Prantij are dead. Therefore, the hardship, if any, would not be only on the petitioner but also on the respondent. Mr. Amin further contended that the Court must take into consideration the fact that the child was born to the respondent 170 days after the marriage and he argued that medically it would be improbable that the child would live if it was born within such a short period after conception, if the conception took place after marriage. He also drew our attention to the fact that a notice of motion was taken out by the petitioner offering to have a blood-test taken with a view to ascertaining whether the child was a legitimate child, but the same was refused on behalf of the respondent. As against this, our attention was drawn to the case of *Clerk v. Clerk*,⁹ in which the husband claimed divorce on the ground of wife's adultery, the only evidence of adultery being the fact of the birth of the child, the period of gestation of which could not have exceeded 174 days, if the husband was assumed to be the father. In that case, the child lived, and, at the date of the hearing, was about 3 years old and it was held, on the basis of the medical evidence on the record, that the husband had not discharged the burden of proof in respect of the adultery, and it was sufficiently proved that the child was conceived in wedlock. Reliance was also placed on Dr. Modi's Medical Jurisprudence and Toxicology, twelfth edition, page 307, and Taylor's Principles and Practice of Medical Jurisprudence, eleventh edition, Volume II, page 34, in both of which cases have been given as to the earliest period at which a child may be born. It is the case of the respondent that the child born to her was prematurely born. It is not necessary at this stage to go into this question since no expert evidence was led on this point.

I, therefore, agree that the case should be sent down to the trial Court to record a finding as to whether it was proved that the respondent was pregnant at the time of marriage. It would be open to both the sides to lead such oral and other evidence including expert evidence as they think fit. In the view we have taken, it is not necessary, I think, to grant any formal amendment of the written statement.

It is also somewhat unfortunate that no specific issue was framed in the trial Court under s. 12(2)(b)(ii) of the Hindu Marriage Act requiring the petitioner to prove that there was no marital intercourse with his consent since the discovery by him of the existence of the ground for a decree of nullity, as alleged by him. It appears that the learned trial Judge allowed the respondent's learned advocate to argue that the petitioner as a reasonable man should have known that the wife must have been pregnant by some other person as soon as he came to know from the respondent's letter in April 1947 that she was pregnant, as is apparent from his letter dated April 5, 1947, which advised her an abortion, and the petitioner should not have had sexual intercourse with her at the end of April 1947 before his departure for America, about which intercourse there is no dispute though there is a dispute as to the number of days they lived as husband and wife. This argument was allowed under the general issue No. 5 framed by the trial Court, which was whether the petitioner was entitled to have the marriage declared null and void. In our judgment, a specific issue as contemplated under s. 12(2)(b)(ii) should have been framed, and if that had been framed, the non-examination of Dr. Champaklal, the petitioner's sister's husband, who seems to have examined the respondent in May 1947 at Gandevi would have assumed some significance. Similarly, the non-production of respondent's letters referred to in the petitioner's letters

dated April 5 and 8, 1947, would have some relevance in case this issue had been framed. It is not necessary, however, for us to express any opinion on this question at this stage, as we propose to remit to the trial Court that issue also for a finding. On that issue also both the parties will be allowed to lead such evidence as they wish to produce.

I agree, therefore, with the order proposed by my learned brother.

Before Mr. Justice J. C. Shah and Mr. Justice V. S. Desai.

GANGADHAR RAKHAMAJI JADHAV v. MANJULA GANGADHAR JADHAV^c

Hindu Marriage Act (XXV of 1955), Secs. 28, 3(b)—Bombay Civil Courts Act (Bom. XIV of 1869), Sec. 8—Civil Judge, Senior Division, notified as having jurisdiction in matters dealt with in Act—Decree passed by such Judge in petition for divorce or judicial separation—Appeal against such decree whether lies to District Court or High Court.

When a Court of Civil Judge, Senior Division, notified by the State Government as having jurisdiction in respect of matters dealt with in the Hindu Marriage Act, 1955, passes a decree in a petition under the Act, an appeal against the decree lies to the District Court of the district and not to the High Court.

S. B. Bhasme, for the appellant.

V. D. Malpani and *V. J. Thaveri*, for the respondent.

V. S. DESAI J. This petition for a decree for divorce or judicial separation under the provisions of the Hindu Marriage Act of 1955 was filed by the petitioner Gangadhar Rakhmajji Jadhav in the Court of the Civil Judge, Senior Division, at Ahmednagar. The petitioner alleged that he married the opponent in the year 1943 but that the opponent after having lived with him for four years had deliberately deserted him since 1948 and was living in adultery. The petition was opposed by the opponent. She denied desertion on her part and denied that she was living in adultery as alleged by the petitioner. She contended that she was living peacefully with the petitioner till 1953, but that some time about November 11, 1954, it was the husband who beat her and drove her out of the house. The petition was dismissed by the learned Civil Judge, Senior Division, Ahmednagar, on December 31, 1957, holding that the allegations on which the petition was founded were not proved. The petitioner has, therefore, filed the present appeal from this decision and decree passed by the lower Court, under s. 28 of the Hindu Marriage Act.

The first question to be considered is whether the appeal to this Court is competent. As has already been stated, the petition was filed in the Court of the Civil Judge, Senior Division, at Ahmednagar, and the decision and decree appealed from is of the Court of the Civil Judge, Senior Division. Section 28 of the Hindu Marriage Act, which provides for the appeals to be filed, states:

"All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force."

Now, the "law for the time being in force" for determining the forum of appeal is the Bombay Civil Courts Act. Under s. 8 of that Act an appeal from the decree or order of a Civil Judge, Senior Division, lies to the District Court except in the case of decisions in suits where the amount or value of the subject-matter exceeds ten thousand rupees. Under the Bombay Civil Courts

^c*Decided, October 29, 1958. First Appeal No. Civil Judge, Senior Division, Ahmednagar, in 234 of 1958, against the decision of P. K. Kute, Miscellaneous Application No. 101 of 1956.*

Act, a District Court is presided over by a District Judge and is the principal Court of original civil jurisdiction in the district within the meaning of the Code of Civil Procedure. In the present case, the decree having been passed by the Court of the Civil Judge, Senior Division, of Ahmednagar, in a petition under the Hindu Marriage Act, the appeal should lie to the District Court of Ahmednagar.

Mr. Bhasme, who appears for the appellant, however, contends that under the provisions of the Hindu Marriage Act the Court of a Civil Judge, Senior Division, having jurisdiction in respect of matters dealt with in the Hindu Marriage Act is a "District Court" as defined in s. 3(b) of the Act and in view of the meaning which the definition in s. 3(b) gives to the expression "District Court" an appeal from an order or decree of the Court must lie to the High Court. A petition for judicial separation lies to the District Court under s. 10 of the Act and a petition for divorce as provided by s. 13 of the Act also lies to the District Court. The expression "District Court" is defined in s. 3(b) of the Hindu Marriage Act as meaning

"in any area for which there is a City Civil Court that Court, and in any other area the principal civil Court of original jurisdiction" and as including

"any other civil Court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of matters dealt with in the Act."

By a notification No. HMA-1055/52067 published in the Official Gazette on September 1, 1955, the Courts of Civil Judges, Senior Division, in the State have been notified as having jurisdiction in respect of matters dealt with in the Hindu Marriage Act within their respective jurisdictions. Mr. Bhasme argues that under the definition given in s. 3(b) of the Hindu Marriage Act the District Court means the principal civil Court of original jurisdiction in any given area; thus in areas where there is a City Civil Court it is that Court, and in any other area it is the District Court as understood under the Civil Procedure Code as also under the Bombay Civil Courts Act. By reason of the inclusive part of the definition in s. 3(b), says Mr. Bhasme, an inferior civil Court when notified by the State Government as having jurisdiction in respect of matters dealt with in the Act comes to be included within the meaning of the term "district court" as defined by the earlier part of the definition. Mr. Bhasme, therefore, argues that when a Court of Civil Judge, Senior Division, having jurisdiction under the Hindu Marriage Act, decides a petition for judicial separation or divorce, its decree must be regarded as that of a District Court, i.e., of a principal civil Court of original jurisdiction in the district, and since under the Bombay Civil Courts Act the appeal from the District Court, which is the principal civil Court of original jurisdiction, lies to the High Court, the appeal from the Court of the Civil Judge, Senior Division, must also lie to the High Court. We cannot accept this argument of Mr. Bhasme. The definition of the expression "district court" given in s. 3(b) of the Hindu Marriage Act says which Courts are meant and included within that expression as used in the Act. It says that by the expression "district court" are meant in the first place a City Civil Court in the area in which there is such a Court and in any other area the principal civil Court of original jurisdiction. The principal civil Court of original jurisdiction in the areas which are districts is the Court of the District Judge of the District. Thus under this part of the definition all City Civil Courts and all Courts of the District Judges have jurisdiction to deal with matters under the Hindu Marriage Act. The definition then proceeds to say that in addition to these Courts other civil Courts will also be included in the expression "district court" if such other civil Courts are notified by the State Government in the Official Gazette as having jurisdiction in respect of matters dealt with in the Act. Thus under the expression "district court" as used in the Hindu Marriage Act come all City Civil Courts, all Courts of District Judges of the districts and also other civil

Courts notified by the State Government in the manner provided. It is not correct to say, as contended by Mr. Bhasme, that any civil Court in the district other than the principal civil Court of original jurisdiction, when notified by the State Government as having jurisdiction in matters dealt with under the Hindu Marriage Act, becomes a "district court" as meaning the principal civil Court of original jurisdiction for the purposes of the Hindu Marriage Act by virtue of the definition given in s. 3(b). It is the Court to which petitions under the Hindu Marriage Act lie and which has jurisdiction in respect of matters dealt with in the Act. Since in the various provisions of the Act the Court which has jurisdiction in matters dealt with in the said provisions is referred to as the "district court" the inclusive part of the definition says that civil Courts other than the principal civil Court of original jurisdiction when notified by the Government will be included within the expression "district court" as used in the Act. The Court of the Civil Judge, Senior Division, therefore, which is notified by the State Government as having jurisdiction in matters dealt with under the Hindu Marriage Act, is a "district court" within the definition of s. 3(b) of the Hindu Marriage Act, but it is not the principal civil Court of original jurisdiction, nor does it exercise its jurisdiction as such principal civil Court of original jurisdiction. Section 28 of the Hindu Marriage Act leaves the forum of appeal to be determined under the law for the time being in force which, in the present case, is the Bombay Civil Courts Act. The forum of appeal from the order or decree of the Court of the Civil Judge, Senior Division, under the Bombay Civil Courts Act is the Court of the District Judge of the District. In the present case, therefore, which was decided by the Civil Judge, Senior Division, the appeal lies to the Court of the District Judge and not to the High Court.

We, therefore, hold that the appeal filed in this Court is not maintainable and direct that the appeal memo and the papers filed with it be returned to the appellant for presentation to the proper Court. The appellant will pay the costs of the respondent in this Court.

[The rest of the judgment is not material to this report.]

Order accordingly.

CRIMINAL REVISION.

Before Mr. Justice Mudholkar.

BUDHMAL FOJMAL MARWADI v. THE STATE.*

Prevention of Food Adulteration Act (Bom. XXXVIII of 1954), Secs. 7, 16(1)(a), 2(1)(a), 25(2)—Servant selling adulterated article of food in absence of master—Whether master can be convicted of offence under s. 16(1)(a).

Under s. 7 of the Prevention of Food Adulteration Act, 1954, the master is liable for the acts of his servant committed by him in the course of his ordinary duties, and when a servant sells any commodity or any article of food stocked for sale by the master of the shop, the master is deemed to have authorised the sale of such article by the servant. Therefore if the servant sells any such article of food which is adulterated within the meaning of s. 2(1)(a) of the Act, the master, though not present when the sale is made, can be convicted of an offence under s. 16(1)(a) of the Act.

THE facts appear in the judgment.

G. A. Sabnis, with *Y. B. Gupte*, for the applicant.

M. A. Rane, Assistant Government Pleader, for the State.

K. P. Karnik, for *V. B. Rege*, for the complainant.

*Decided, November 4, 1958. Criminal Revision Application No. 1192 of 1958, from the orders of D. G. Gagne, Additional Sessions Judge, Thana, in Criminal Appeal No. 100 of

1958, confirming the order of conviction and sentence passed by M. A. Shaikh, Judicial Magistrate, First Class, III Court, Thana, in Criminal Case No. 2052 of 1956.

MUDHOLKAR J. The applicant has been convicted by the Judicial Magistrate, First Class, Third Court, Thana, of an offence under s. 16(1)(a) of the Prevention of Food Adulteration Act, 1954, and sentenced to pay a fine of Rs. 200. His appeal from the conviction and sentence was dismissed by the Additional Sessions Judge, Thana.

It is common ground that Food Inspector Shimpi of Thana went to the shop of the applicant on July 12, 1956, and purchased 3/8th seer of Belgaum ghee for Re. 1-4-0 after informing the applicant's servant Fulchand Faujmal, who was on duty in the shop at the time, that he intended to send a sample of the ghee for analysis to the Public Analyst. He then divided the ghee into three samples, one of which was given to Fulchand, one was sent to the Public Analyst and the third was kept by the Inspector himself. The report of the Public Analyst showed that the sample of ghee contained 21.86 per cent. foreign fat. After obtaining the requisite sanction of the Administrator of the Thana Borough Municipality, the Inspector filed the complaint in question.

It is contended on behalf of the applicant that the complaint as it was originally filed is bad in law because it was based upon a sanction which stated that the name of the accused was Budhmal Kantilal. Now it may be mentioned that the applicant trades in the name of Budhmal Kantilal and that is how the mistake had occurred. Later when the mistake that the applicant's name was not Budhmal Kantilal but Budhmal Foujmal was discovered, the complainant had the name corrected. It is contended, however, on the applicant's behalf that the original sanction was in the name of a wrong person and therefore it could not be rectified, nor could a complaint filed on the basis of such a sanction be held to be in proper form. In my opinion, there is no substance in this contention. There was merely an error in specifying the name of the applicant and that is all. At no time was Shimpi in doubt as to whom he wanted to prosecute.

It is then contended that the applicant not being present at the time of the actual sale of the ghee, he was not liable to be prosecuted. The learned counsel for the applicant, referring to the decision of the Privy Council in *Shrinivas Mall Bairoliya v. Emperor*¹ and three other decisions following this decision, contended that an offence under the Prevention of Food Adulteration Act being of a serious nature and being liable to be punished by a substantial sentence of imprisonment, it is necessary for the prosecution to establish *mens rea* and he says that as the applicant admittedly was not present when the sale was made, he cannot be convicted under s. 16(1)(a) of the Act. It is, no doubt, true that in offences which are punishable with substantial sentences of imprisonment, *mens rea* would have ordinarily to be established by the prosecution. But that does not mean that the Legislature is incompetent to make a law whereunder an offender will be liable to suffer even a long term of imprisonment though *mens rea* is not established. Now, s. 7 of the Act is in the following terms:—

“Prohibition of manufacture, sale etc., of certain articles of food:

No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute:—

(1) any adulterated food;...”

Upon a plain reading of this section, it appears that the master is liable even for the acts of his servant, i.e. he is vicariously liable. It is, however, contended on behalf of the applicant that this section has to be read along with s. 16 and that the two sections should be construed in a harmonious way. If they are construed according to the learned counsel, it would mean that for the master to be liable for the act of the servant, it would have to be established that the Act was done by the servant in the presence of the master. It seems to me that this would be importing something in the section which is quite foreign to the object of the section. Apart from that, I am of the opinion that under

s. 7 the master would be liable for the acts of his servant committed by him in the course of his ordinary duties, and that when a servant sells any commodity or any article of food stocked for sale by the master of the shop, the master will be deemed to have authorised the sale of such article by the servant, and if it turns out that that article is adulterated within the meaning of s. 2(i) (a) of the Act, the master will also be liable.

Lastly, it was contended that ghee or pure ghee was not defined by the rules which were promulgated in the year 1955 under the provisions of the Prevention of Food Adulteration Act, and that the mere fact that the ghee purchased by Shimpi was found to contain 21 per cent. of foreign fat would not render the applicant liable under s. 16(1) (a) of the Act. Now, the word "adulterated" has been defined in s. 2(i) of the Act. It will not be necessary to refer to the entire definition, but it will suffice to refer to cl. (a) thereof, which is as under:—

"(i) "adulterated"—an article of food shall be deemed to be adulterated—

(a) if the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice, or is not of the nature, substance or quality which it purports or is represented to be;"

Now, here what was intended to be purchased was pure ghee. But what has been sold was ghee which contained 21 per cent. of foreign fat. It is true that ghee has not been defined, but pure ghee must on the face of it be deemed to exclude foreign fat. It is, however, said that the Food Inspector only asked for Belgaum ghee and it is possible that Belgaum ghee may usually contain foreign fat. The tin out of which the sample was taken bears a label which says that it contains "pure ghee". From this it would follow that what was intended to be sold and intended to be purchased was pure ghee, though in fact it was not pure ghee but adulterated ghee. Section 7 of the Act prohibits the sale of any adulterated food. Section 16 makes the sale of adulterated food punishable at law. Therefore, apart from the reasons given by the learned Additional Sessions Judge, it must be held that the applicant is liable to be punished under s. 16 of the Act for the sale of adulterated ghee by his servant.

The learned Additional Sessions Judge has held that, though the expression "ghee" has not been defined under the rules made under the present Act, the definition contained in the rules made under the Act of 1925 still holds good. According to the learned counsel for the applicant, by virtue of the provisions of s. 25 of the Prevention of Food Adulteration Act, 1954, the rules framed under the Act of 1925 stood repealed immediately after the promulgation of the rules made under the present Act. These rules were promulgated in September 1955 before the alleged offence was committed. Therefore, according to the learned counsel, the definition contained in the rules framed under the old Act cannot be looked into. Now, sub-s. (2) of s. 25 of the new Act is in the following terms:—

"Notwithstanding the repeal by this Act of any corresponding law all rules, regulations and bye-laws relating to the prevention of adulteration of food, made under such corresponding law and in force immediately before the commencement of this Act shall, except where and so far as they are inconsistent with or repugnant to the provisions of this Act, continue in force until altered, amended or repealed by rules made under this Act."

From this it would follow that only such rules made under the old Act will cease to be in force as are inconsistent with or are repugnant with the provisions of the rules framed in 1955 or have been altered, amended or repealed by the rules made under the present Act. As a matter of fact, in the rules promulgated in September 1955 "ghee" was not defined. Therefore, it is correct to say that the rule made under the old Act in respect of this matter was not altered by rules made under the repealed Act. Therefore, it continued to be in force even subsequent to 1955. I am informed by counsel that "ghee" has now been defined by a rule made by the rule-making authority. If that is so, after the coming into force of that rule, the definition contained in the rule

made under the Act of 1925 will cease to be operative. "Ghee" is defined in r. 2(ix) of the rules framed under the Act of 1925 as follows:—

"'Ghee' means ghee prepared exclusively from the milk fat of the cow or buffalo or both."

Now admittedly the ghee which was sold by the applicant's servant could not be said to be "pure ghee" under this definition inasmuch as it contained 21 per cent. of foreign fat.

There is thus no substance in the application and it is accordingly dismissed. The rule is discharged.

Rule discharged.

CRIMINAL APPELLATE.

Before the Hon'ble Mr. H. K. Chainani, Acting Chief Justice, and Mr. Justice Shelat.

NARAYAN GANPATI PATIL v. THE STATE.*

Indian Evidence Act (1 of 1872), Secs. 157—Criminal Procedure Code (Act V of 1898), Sec. 288—Evidence of witness given in committing Magistrate's Court brought on record in Sessions Court under s. 288 of Code—Whether such evidence "testimony" within s. 157 of Indian Evidence Act—Corroboration of such evidence.

The evidence of a witness given in the committing Magistrate's Court which is brought on record in the Sessions Court under s. 288 of the Criminal Procedure Code, 1898, stands on exactly the same footing as evidence given in the Sessions Court and it would be "testimony" within the meaning of s. 157 of the Indian Evidence Act, 1872, which could be corroborated under s. 157.

Manar Ali v. Emperor,¹ agreed with.

*Tara Singh v. The State*² and *Emperor v. Akbar Badoo*,³ referred to.

M. V. Paranjape, for the appellants.

Y. V. Chandrachud, Government Pleader, for the State.

THE facts are stated in the judgment.

CHAINANI Actg. C.J. This is an appeal by accused Nos. 8 and 9 against their convictions under ss. 148 and 307 read with s. 149 of the Indian Penal Code and s. 19(e) of the Indian Arms Act and the sentences passed upon them for these offences. These accused as well as the other eight accused, who were tried along with them, are residents of Kavathe Piran. Witness Tukaram also belonged to this village. About 7-8 years ago there was a quarrel between Tukaram and father of accused No. 5. Since then there was enmity between Tukaram and the accused. Tukaram was also beaten on two occasions. As Tukaram was afraid of living in the village thereafter, he left Kavathe Piran and went to reside at Bhadule in Kolhapur district. On May 5, 1957, Tukaram returned to his village as he had some work in connection with his lands with the Talathi. In the afternoon of that day, Tukaram went to a cloth shop known as Patil Cloth Stores. The prosecution story is that, while he was sitting on a chair in that shop, the ten accused went there. Some of the accused dragged Tukaram outside the shop and he was then assaulted with a scythe by accused Nos. 1, 2 and 5. Accused Nos. 3, 8 and 9 were armed with rifles. They pointed these rifles at the crowd, which had gathered there and prevented anybody from going to the rescue of Tukaram. After Tukaram fell down on the ground, the accused ran away. In the meantime the manager of the cloth

*Decided, November 4/5, 1958. Criminal Appeal No. 692 of 1958, against the order of convictions and sentences passed by S. M. Khatavkar, Additional Sessions Judge, South Satara, at Sangli, in Sessions Case No. 45

of 1957.

1 (1933) I. L. R. 60 Cal. 1239.

2 [1951] S. C. R. 729.

3 (1910) I. L. R. 34 Bom. 599, s.o. 12 Bom. L. R. 663.

shop telephoned to the police station that a 'maramari' was going on in front of his shop and that Tukaram was being beaten with a scythe. A police party was immediately sent to the scene of offence. They found Tukaram lying injured on the ground. Tukaram was then removed to the Civil Hospital. Another police party was returning from a raid about the same time. They saw accused Nos. 1 to 7 running away. Immediately afterwards shouts were heard from the crowd that the persons, who were running away, had committed a murder. Sub-Inspector Bhosale, who was in charge of this party, rounded up these accused and put them in a police van and took them to the police station. As Tukaram's condition was considered to be serious, arrangements were made for his dying declaration being recorded. It was recorded by witness Thorat, Special Executive Magistrate, Sangli. In that statement Tukaram implicated accused Nos. 1 to 4, 8 and 9. He stated that three of them, accused Nos. 3, 8 and 9, were armed with rifles. Thereafter the Sub-Inspector recorded Tukaram's statement (exh. 6-B), which has been treated as the first information of the offence. In that statement also Tukaram implicated the same accused and accused No. 10. Attempts were then made to trace the two appellants, accused Nos. 8 and 9. They could not be found in the village until May 17, 1957, on which date they were arrested. Accused No. 10 was arrested subsequently. Thereafter all the accused were sent up for trial for committing offences punishable under ss. 147, 148 and 307 read with s. 149 of the Indian Penal Code. The appellants and accused No. 3 were also charged under s. 19(e) of the Indian Arms Act. All the accused pleaded not guilty to these charges. The appellants denied their presence at the scene of offence and stated that they had been falsely involved. The learned trial Judge came to the conclusion that the charges had been satisfactorily proved against the two appellants and accused Nos. 1 to 5. He, therefore, convicted these accused under ss. 148 and 307 read with s. 149 of the Penal Code. The two appellants were also convicted under s. 19(e) of the Indian Arms Act. The other three accused Nos. 6, 7 and 10 were acquitted by him.

[His Lordship, after dealing with some evidence in this case, proceeded.] The next and the most important question to be considered is whether the two appellants, accused Nos. 8 and 9, were members of this unlawful assembly and whether they were armed with rifles at that time. Practically all the material witnesses, including Tukaram himself, turned hostile in the Sessions Court. The prosecution, therefore, brought on record the evidence of Tukaram given in the Committing Magistrate's Court under s. 288 of the Criminal Procedure Code. In his evidence in that Court Tukaram has stated that accused Nos. 8 and 9 and accused No. 3 were armed with rifles at the time of the offence and that they were intimidating the other persons and preventing them from rescuing him. He has also stated that witness Baburao had gone to his rescue but that he had been pushed aside by these accused. Tukaram resiled from this evidence in the Sessions Court. In his evidence in the Sessions Court he stated that he had been beaten by some unknown persons and that accused Nos. 1 to 5 and the two appellants had gone to his rescue. Even in his evidence in the Sessions Court, therefore, he stated that the appellants were present at the time of the offence, but his story was that they had gone to rescue him and not in order to assault him. The learned trial Judge did not accept the evidence given by Tukaram in the Sessions Court. He believed the evidence given by him in the Committing Magistrate's Court, which, according to him, was corroborated by the first information and the statement of Tukaram recorded by the Executive Magistrate and the evidence of two witnesses Shankerlal and Mangilal.

[His Lordship then dealt with points not material to this report and proceeded.]

As I have mentioned, Tukaram's dying declaration was recorded by the Magistrate, as his condition was considered to be very serious. In this statement (exh. 34A) Tukaram stated that the two appellants and accused No. 8

were armed with guns and that they had pointed these guns at the crowd and stopped all traffic on the road. This statement is not admissible in evidence as a dying declaration, as Tukaram has survived the injuries received by him. The learned Government Pleader has urged that this statement is admissible under s. 157 of the Indian Evidence Act in order to corroborate the evidence given by Tukaram in the Committing Magistrate's Court. Section 157 provides that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place may be proved. This section is contained in Chapter X, the heading of which is "Of the examination of witnesses". Section 135, which is the first section in this Chapter, deals with the order in which witnesses may be examined. Sections 137 and 138 provide for the manner in which a witness may be examined. Sections 141 to 143 relate to questions, which may be put to witnesses, when they are being examined. Section 145 provides for the manner in which a witness's evidence may be contradicted by reference to his previous statements. These and other provisions in this Chapter, which also contains s. 157, have been relied upon by Mr. Paranjape in support of his argument that the words "testimony of a witness" in s. 157 mean the evidence of the witness given at the trial of the case, in which he is examined as a witness and not any statement made by him before the trial. We might perhaps have been inclined to accept this argument, if the question had to be decided by reference to s. 157 only. In this case, however, it is also necessary to consider s. 288 of the Criminal Procedure Code. This section provides that the evidence of a witness duly recorded in the presence of the accused under Chap. XVIII, i.e. in committal proceedings, may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872. As observed by the Supreme Court in *Tara Singh v. The State*,¹ this section imports into the law of evidence something which is not to be found in the Evidence Act, viz. to make a statement of this kind substantive evidence. Consequently the evidence of a witness given in the Committing Magistrate's Court is, if it is brought on record in the Sessions Court under s. 288, to be treated as if it was evidence given in the Sessions Court. It stands on exactly the same footing as evidence given in the Sessions Court. It would, therefore, be "testimony" within the meaning of s. 157 of the Indian Evidence Act.

Mr. Paranjape has relied on the decision of this Court in *Emperor v. Akbar Badoo*.² In that case at p. 602 it was observed that only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by s. 157 of the Indian Evidence Act and that previous statements could be used to corroborate or contradict statements made at the trial, but not to corroborate statements made prior to the trial. The judgment contains no reasons for so limiting the meaning of the word "testimony" in s. 157. This case was decided in 1910. Since then s. 288 has been amended and the words "for all purposes subject to the provisions of the Indian Evidence Act, 1872" were added in 1923. Under the section as amended, the deposition of a witness given in the Committing Magistrate's Court is, after its admission under s. 288, to be treated as evidence for all purposes, that is as if it was evidence given in the trial Court. It is therefore also evidence, which can be corroborated under s. 157 of the Indian Evidence Act. This is also the view, which has been taken by the Calcutta High Court in *Manar Ali v. Emperor*.³ In that case it was held that the object of s. 288 is to place a deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court, that the deposition before the Committing Magistrate put in under s. 288 is substantive evidence in a case, that the credibility of the statement before the Committing Magistrate's Court must be considered and test-

1 [1951] S. C. R. 729, at p. 744.

L. R. 603.

2 (1910) I. L. R. 34 Bom. 599, s.c. 12 Bom.

3 (1933) I. L. R. 60 Cal. 1359.

ed in the same way as the one made in the Sessions Court and that consequently the statement made by a witness before a Magistrate under s. 164 of the Code is admissible in evidence to corroborate the statement put in under s. 288. With respect, we agree with the view taken by the Calcutta High Court.

The statement of Tukaram, exh. 34-A, recorded by the Executive Magistrate, is, therefore, admissible in evidence for the purpose of corroborating the evidence given by him before the Committing Magistrate's Court.

[The rest of the judgment is not material to this report.]

CRIMINAL REVISION.

Before Mr. Justice Gokhale and Mr. Justice Miahboy.

C. M. TRIVEDI v. C. B. L. BHATNAGAR.*

Criminal Procedure Code (Act V of 1898), Secs. 198-B, 198—Complaint filed by Public Prosecutor alone under s. 198-B in Court of Session—Validity of such complaint—Jurisdiction of Court to take cognizance of complaint—Effect of s. 198-B(13).

A Court of Session can take cognizance of a complaint filed by the Public Prosecutor under s. 198-B of the Criminal Procedure Code, 1898, notwithstanding the fact that the public servant aggrieved by the alleged defamation has not joined in the complaint.

The effect of s. 198-B(13) of the Criminal Procedure Code, 1898, is that the right of any public servant to file a complaint about an offence of defamation under s. 198 of the Code is not taken away by virtue of s. 198-B of the Code.

Bhatnagar v. State of Bombay,¹ referred to, and the view therein expressed that a complaint under s. 198-B should be a complaint made both by the person aggrieved and the Public Prosecutor, disapproved.

THE facts appear in the judgment.

C. C. Vaidya, Assistant Government Pleader, for the petitioner.
Opponent in person.

GOKHALE J. A question as to the interpretation to be placed on the provisions of sub-s. (13) of s. 198B of the Code of Criminal Procedure has been raised in this revision application on behalf of the Public Prosecutor for Greater Bombay, who is the petitioner in this application. The revision has come to be filed in the following circumstances:

On March 20, 1958, the Public Prosecutor for Greater Bombay, Mr. C. M. Trivedi, filed a complaint against the opponent under s. 198B of the Code of Criminal Procedure, alleging that the opponent had published a defamatory article in the issue of a weekly, named "Congress" dated September 23, 1957, and thereby committed an offence of defamation against a public servant by name J. B. Contractor, who is a Selection Grade Sub-Inspector of Police. The complaint bears an endorsement of the same date to the effect that it was filed before the Registrar, City Sessions Court, Bombay. On March 31, 1958, the Court of the Additional Sessions Judge for Greater Bombay ordered the issue of a bailable warrant against the opponent in the sum of Rs. 1,000 with one surety for a like amount, the returnable date given being April 23, 1958. The opponent applied for and obtained copies of the complaint, as also of the orders passed by the Additional Sessions Judge, the Government sanction and the warrant of arrest, on April 5, 1958. On April 7, 1958, he gave a notice to the Public Prosecutor that he proposed to move the Sessions Court on April 23, 1958, for the dismissal of the said complaint as the Court of Session had no

*Decided, November 16, 1958. Criminal Revision Application No. 1055 of 1956, against the order of dismissal passed by B.C. Vakil,

Additional Sessions Judge, Greater Bombay, in Case No. 69 II Sessions 1958. 1 (1957) 59 Bom. L.R. 364.

jurisdiction to entertain it. On April 18, 1958, he filed a statement in Court raising several grounds which, according to him, would not entitle the Court to entertain the complaint made by the Public Prosecutor. In the first instance, he contended that the Public Prosecutor had not personally appeared before the Sessions Judge and verified the complaint. It was next contended that the copy of the complaint should have been served upon him with the warrant of arrest, which was not done. He also complained that no list of prosecution witnesses was filed by the prosecution along with the complaint, as required by s. 204(1A) of the Criminal Procedure Code. But his principal grievance was that the complaint had been made by the Public Prosecutor alone and the person aggrieved by the alleged defamation, namely, J. B. Contractor, the Selection Grade Sub-Inspector of Police, had not joined him in filing the complaint, and as such the Sessions Court had no jurisdiction to take cognizance of the complaint under the special provisions of s. 198B of the Criminal Procedure Code without commitment.

All the first three objections raised by the opponent were negatived by the learned Additional Sessions Judge, but he upheld the objection of the opponent as regards the non-joinder of the aggrieved party in the complaint and following a decision of this Court in Criminal Revision Application No. 1542 of 1956 decided by Mr. Justice Bavdekar on March 29, 1957, which is subsequently reported in *Bhatnagar v. State of Bombay*,¹ the trial Court dismissed the complaint on the ground that it had no jurisdiction to take cognizance of the complaint, to entertain it and try it. It was further directed that the opponent should be discharged and his bail bond cancelled. It is against this decision that the present revision application has been filed by the Public Prosecutor for Greater Bombay.

It may be mentioned that on behalf of the opponent the points which have been decided against him by the learned Additional Sessions Judge have not been argued before us, and the only point that has been agitated in this revision is whether the Additional Sessions Judge could not take cognizance of the complaint filed by the petitioner under s. 198B of the Code of Criminal Procedure, since the aggrieved person against whom the alleged defamatory article was said to have been published had not joined in the complaint. For examining this argument which has been urged before us, it would be necessary to consider briefly the relevant provisions of s. 198B of the Code. But before I deal with the provisions of that section, I may refer to the provisions of s. 198 of the Code, which provides that no Court can take cognizance of an offence falling under Chap. XIX or Chapter XXI of the Indian Penal Code or under ss. 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence. It is not necessary to refer to the two provisos to this section for the purpose of this revision application. Now, s. 198B(1) runs as follows:

"Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code (other than the offence of defamation by spoken words) is alleged to have been committed against the President, or the Vice-President, or the Governor or Rajpramukh of a State, or a Minister, or any other public servant employed in connection with the affairs of the Union or of a State, in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence, without the accused being committed to it for trial, upon a complaint in writing made by the Public Prosecutor."

Section 198B was inserted in the Criminal Procedure Code by the amending Act XXVI of 1955. Sub-section (1) of s. 198B deals with the subject of prosecution for defamation against public servants in respect of their conduct in the discharge of public functions. It excludes from its ambit the offence of defamation by spoken words, but as regards other kinds of defamation it provides that when such an offence is alleged to have been committed against the President, or the Vice-President, or the Governor or Rajpramukh of a State,

or a Minister, or any other public servant employed in connection with the affairs of the Union or of a State, in respect of his conduct in the discharge of public functions, the Court of Session is empowered to take cognizance of such offence, upon a complaint in writing by the Public Prosecutor without the necessity of the accused being committed to that Court. Under s. 193(1) of the Code, except as otherwise expressly provided by the Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf. Section 198B(1) would, therefore, appear to provide an exception to s. 193 of the Code, because it enables the Court of Session to take cognizance of the offence of defamation against public servants upon a complaint in writing made by the Public Prosecutor without the accused being required to face committal proceedings. Under s. 198, as we have already seen, before a Court can take cognizance of an offence of defamation or other offences mentioned in that section, a complaint must be made by some person aggrieved by such offence. But s. 198B(1) provides that the Court of Session may take cognizance of an offence of defamation other than by spoken words upon a complaint in writing made by the Public Prosecutor. The question for consideration in this case is whether in spite of the provisions of s. 198B(1), the Court of Session would not be competent to take cognizance of such offence upon a complaint made in writing by the Public Prosecutor alone, if the public servant aggrieved by the alleged defamation does not join in the complaint.

The argument urged on behalf of the petitioner is that sub-s. (1) of s. 198B starts with the non-obstante clause "Notwithstanding anything contained in this Code" and, therefore, this sub-section is an exception also to s. 198, but in view of sub-s. (13), the aggrieved party is not deprived of his right to file a complaint under s. 198. As against this, it is urged on behalf of the opponent that under sub-s. (13) of s. 198B it is provided that the provisions of this section shall be in addition to, and not in derogation of those of s. 198; and, therefore, it is urged that though no doubt a Court of Session may take cognizance of a complaint under s. 198B without the necessity of any prior committal proceedings, a complaint made in writing by the Public Prosecutor alone would not be sufficient to invest the Court of Session with jurisdiction, but the aggrieved party must also join in such a complaint so as to make it his complaint also as required by s. 198 of the Code. As I have already stated, the objection urged on behalf of the opponent was accepted by the trial Court, reliance being placed on the ruling of this Court in *Bhatnagar v. State of Bombay*. Now, the facts in that case were that a criminal complaint was filed by the State of Bombay at the instance of one M. S. Prasad, an Income-tax Officer, against Bhatnagar, the present opponent, in respect of an article published by the latter in a weekly magazine known as "Bombay City". That complaint was filed under s. 500 of the Indian Penal Code read with s. 198B of the Criminal Procedure Code and was solemnly affirmed by M. S. Prasad, and at the foot of the affirmation were two unsigned remarks, viz., that the complaint was drawn by the Public Prosecutor for Greater Bombay and that M. S. Prasad, Income-tax Officer, would be the witness in respect of this complaint. An objection was raised to the competence of this complaint on behalf of the opponent on the ground that it was not a complaint in writing made by the Public Prosecutor as required by s. 198B of the Code and, therefore, the Sessions Court would have no jurisdiction to take cognizance of the offence without the necessary committal proceedings. That objection was rejected by the Sessions Court. The opponent came in revision and Mr. Justice Bavdekar held that in the circumstances of the case the act of making the complaint was not the act of the Public Prosecutor and, therefore, as the complaint was not made by the Public Prosecutor as required under s. 198B of the Code, the Sessions Judge could not take cognizance of the offence. In arriving at this decision, the learned Judge made certain observations which are principally

relied upon by the opponent in this case in support of his contention that the present complaint is also incompetent. Those observations are as follows (p. 366) :—

"...What s. 198B(13) consequently means, when it says that the provisions of s. 198-B shall be in addition to, and not in derogation of the provisions of s. 198, is that any complaint which may be made under s. 198B must also satisfy the provisions of s. 198, that is, the complaint will have to be made both by the person aggrieved and by the Public Prosecutor. I do not think that the language that the provisions of s. 198B shall be in addition to, and not in derogation of those of s. 198 would be the correct language to use, if all that was intended was that it was not to be regarded that s. 198B so to speak repeals s. 198, or that a complaint for defamation could not be made even to a Magistrate by the person aggrieved without the intervention of the Public Prosecutor."

Relying on these observations, it is contended before us by the opponent that in view of Mr. Justice Baydekar's decision in that case that by reason of the provisions of sub-s. (13) of s. 198B the complaint will have to be made both by the person aggrieved as well as by the Public Prosecutor if the Sessions Court is to be competent to take cognizance of the offence of defamation under s. 198B(1), the trial Court was justified in dismissing the present complaint. Now, as I have already stated, the facts in the case before Mr. Justice Baydekar were different. In that case, the complaint was solemnly affirmed by the aggrieved party, but it was not the complaint in writing made by the Public Prosecutor because all that was stated in the endorsement was that the complaint was drawn by the Public Prosecutor for Greater Bombay and that endorsement was an unsigned endorsement. With respect, therefore, in our opinion, Mr. Justice Baydekar was right when he held that it was not a complaint filed within s. 198B(1) as it was not a complaint in writing made by the Public Prosecutor. The question whether in view of the provisions of sub-s. (13) of s. 198B such a complaint will have to be made by both the person aggrieved as well as by the Public Prosecutor did not really fall to be considered in that case. But since the learned Judge has made an observation that in view of the provisions of sub-s. (13) of s. 198B the complaint must be made by the person aggrieved as well as by the Public Prosecutor, before the Court of Session can take cognizance of the complaint, and since this point has directly arisen in this revision, we must examine the correctness of this view.

Now, there can be no dispute that s. 198B was inserted in the Code of Criminal Procedure in 1955 by Parliament providing for special procedure with regard to prosecutions for defamation against public servants. Under sub-s. (1) of that section, as already stated, the Court of Session can take cognizance of such offence without prior committal proceedings, as required under s. 193 of the Code. Sub-section (1) of s. 198B itself provides for an exception in case of defamation by spoken words, the complaint in respect of which would, therefore, be governed by s. 198. Further, the alleged defamation must be in respect of the conduct of a public servant in the discharge of his public functions. Under sub-s. (3), a complaint made by the Public Prosecutor under sub-s. (1) must be made with the previous sanction of the authorities mentioned in that sub-section. Where the alleged defamation is in the case of the President or the Vice-President or the Governor of a State, the previous sanction of the Secretary to the Government authorised by the persons concerned will have to be obtained under cl. (a) of sub-s. (3). Under cl. (b), in the case of a Minister of the Central Government or of a State Government, the previous sanction is to be obtained of the Secretary to the Council of Ministers, if any, or of any Secretary to the Government authorised in this behalf by the Government concerned. Under cl. (c), in the case of any other public servant employed in connection with the affairs of the Union or of a State, the previous sanction of the Government concerned has to be obtained. Sub-section (4) of s. 198B provides a period of limitation within which a complaint contemplated by s. 198B has to be made and it is provided that no

Court of Session shall take cognizance of an offence under sub-s. (1) unless the complaint is made within six months from the date on which the offence is alleged to have been committed. Under sub-s. (5), it is further provided that notwithstanding anything contained in the Code, the Court of Session shall try the case without a jury and in trying the case, shall follow the procedure prescribed for the trial by Magistrates of warrant cases instituted otherwise than on a police report and the person against whom the offence is alleged to have been committed shall, unless the Court of Session, for reasons to be recorded otherwise directs, be examined as a witness for the prosecution. So that the accused in every case can test the correctness of the accusations made against him by cross-examining the aggrieved party. Regarding the provisions for awarding compensation, exception is made in the case of very high dignitaries of the State like the President, Vice-President or the Governor or Rajpramukh of a State; but as regards other public servants, if the accusation is found to be false and either frivolous or vexatious, then compensation can be granted. It would appear, therefore, from these provisions that though the complaint itself is made by the Public Prosecutor, in case it is found to be false and either frivolous or vexatious, the accused when discharged will be able to get compensation from the person aggrieved, at whose instance possibly the complaint may have come to be made. The complaint made by the Public Prosecutor under s. 198B would not be a complaint of the aggrieved party though it may be a complaint at the instance of the aggrieved party. In inserting this section, the Legislature apparently seems to have been inspired with the object of enabling the State to maintain and uphold the purity of public administration by prescribing a special and speedier procedure for high dignitaries of the State and other public servants to have their conduct cleared when defamatory statements are made in respect of their conduct in the discharge of public functions. The question is whether this object is likely to be fulfilled if it is further required that in such a complaint made by the Public Prosecutor the party aggrieved must also join. It is true that under sub-s. (13) of s. 198B, the provisions of s. 198B are to be in addition to, and not in derogation of, those of s. 198. In our opinion, the Legislature seems to have made it clear by enacting sub-s. (13) that the provisions of s. 198B would be an alternative provision to s. 198, so that the right of any public servant to file a complaint about an offence of defamation under s. 198 is not taken away by virtue of s. 198B. That, in our opinion, was to some extent necessary because of the non-obstante clause with which sub-s. (1) of s. 198B starts.

Now, against this construction it is urged by the opponent that when the amending Bill was introduced in the Lok Sabha, sub-s. (11) of cl. (25) of the amending Bill stood as follows: "Nothing in this section shall be deemed to be in derogation of the right of the person aggrieved under section 198". But ultimately, instead of accepting the wording of this sub-section, sub-s. (13) came to be worded as it stands at present, namely, "the provisions of this section shall be in addition to, and not in derogation of, those of section 198", and it is contended before us that we must give some meaning to the expression "in addition to". In our opinion, there is no substance in this contention. As I have already indicated, in view of the non-obstante clause with which sub-s. (1) of s. 198B starts, it would have been possible to argue that in the case of public servants who are defamed otherwise than by spoken words, in respect of their conduct in the discharge of public functions recourse can only be had to sub-s. (1) of s. 198B. In order to guard against such a possible construction, Parliament, in our judgment, made it clear by providing in sub-s. (13) that the provisions of s. 198B are to be in addition to, and not in derogation of, those of s. 198, with the result that even a public servant, though he may be defamed in respect of his conduct in the discharge of public functions, can still avail himself of the remedy provided under s. 198.

Then it was contended by the opponent that in case the Court of Session does not examine the aggrieved party as a witness under sub-s. (5) of s. 198B,

as it is competent for the Sessions Court to do for reasons to be recorded, the accused person will have no remedy and will be considerably handicapped in proceeding against the party at whose instance the complaint was made in any civil or criminal proceedings launched against him. We are not prepared to accept this argument either. As I have already stated, under sub-s. (5), the aggrieved party has to be examined as a witness for the prosecution, though it would be open to the Court not to do so for reasons to be recorded. But as soon as the Court of Session comes to the conclusion that the accusation made against the accused is false and either frivolous or vexatious, then it has the power to direct the aggrieved person to show cause why he should not pay compensation to the accused, the only exceptions provided being the President, the Vice-President or the Governor or Rajpramukh of a State. In our opinion, under sub-s. (7), it would be open to the accused when discharged to cross-examine the person against whom such notice comes to be issued, when he shows cause against the notice.

Then it is also urged that under s. 345 of the Criminal Procedure Code the offence of defamation under s. 501 of the Indian Penal Code is compoundable and it can be compounded by the person defamed; and it is urged that if the real complainant does not join in the complaint at all, then it would be difficult for the Court of Session to permit the offence to be compounded because on our construction the person aggrieved would not be the complainant. In our opinion, there is no substance in this contention also. As against this it may be argued that though the complaint under s. 198B would be a complaint made by the Public Prosecutor, the aggrieved party, who will be examined as a witness, will be the person defamed and there is no reason why the provisions of s. 345 of the Criminal Procedure Code should not apply to a case tried by the Sessions Court under s. 198B of the Code, and why that Court cannot permit the offence to be compounded. We do not propose to express any opinion on this point because it does not affect the construction of s. 198B.

Then it is also argued that the prosecution in the present case should have applied to the learned Additional Sessions Judge to make a reference to this Court if it was not satisfied with the decision of Mr. Justice Baydekar in *Bhatnagar v. State of Bombay* and that in fact the present petition is an attempt to have that decision revised by this Court. There is no substance in this argument. As already pointed out, the case decided by Mr. Justice Baydekar was on different facts in respect of a different complaint, though against the present opponent, and it is contended before us on behalf of the petitioner that the view of Mr. Justice Baydekar in so far as it contemplates that a complaint under s. 198B should be a complaint made both by the person aggrieved and the Public Prosecutor would require reconsideration. In our judgment, with respect to the learned Judge, the provisions of sub-s. (13) of s. 198B of the Criminal Procedure Code cannot be interpreted to mean that a complaint under s. 198B(1) should also satisfy the provisions of s. 198 of the Code, with the result that it must be made not only by the Public Prosecutor but also by the person aggrieved by the alleged offence. The complaint contemplated under s. 198B is a complaint in writing only by the Public Prosecutor. But the provisions of sub-s. (13) of s. 198B make it clear that the public servant defamed is not deprived of his remedy to file a complaint under s. 198 of the Code. Any other construction is likely to defeat, in our judgment, the object of Parliament in enacting s. 198B. In inserting this section it appears not merely to have been intended to provide a special and speedier procedure enabling the Court of Session to take cognizance of an offence of defamation, other than by spoken words, against public servants without committal proceedings, upon a complaint made by the Public Prosecutor. The provisions of sub-s. (3) of s. 198B, referred to already, regarding according of the sanction would appear also to indicate that in case of the holders of the highest offices in the State, such as the President, the Vice-President and the Governor of a State, their authorization to the sanctioning authority would be

necessary, but in case of other public servants it is the Government whether of the Union or of the State, that would be primarily concerned in giving the sanction. This is undoubtedly a salutary provision as, in our view, the Government concerned might in suitable cases insist on the filing of a complaint in the larger interests of public administration itself, even though the public servant, who might be defamed in the discharge of his public functions, might not desire it. This object is not likely to be achieved in case the public servant is also required to join the Public Prosecutor in a complaint under s. 198B.

The result is that we must hold that the present complaint filed by the Public Prosecutor, though it is not a complaint in which the person defamed has joined, is a valid complaint and the Court of Session would have jurisdiction to take cognizance of the complaint, to entertain it and try it. We, therefore, allow the revision application and set aside the order of the learned Additional Sessions Judge dismissing the complaint and discharging the accused. The complaint will be restored and the Sessions Court will entertain it and try it in accordance with law. Rule made absolute.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Vyas and Mr. Justice Tambe.

N. M. NAIK v. COLABA LAND MILLS, COLABA, BOMBAY.*

Bombay Industrial Relations Act (Bom. XI of 1947), Secs. 78(1)A(c), 79, 27A, 32, 33, 115A, 114—Whether employee can initiate proceedings under s. 78(1)A(c) where there is in existence a representative union of industry wherein employee employed—Right of employee to appear and conduct proceedings initiated by him—Agreement referred to in s. 115A whether agreement arrived at when no industrial dispute pending before relevant authority.

Section 79 of the Bombay Industrial Relations Act, 1946, confers a right to initiate proceedings under s. 78(1)A(c) of the Act on the employee directly affected, notwithstanding the fact that in the particular industry where the employee is employed there is in existence a representative union.

Under ss. 27A, 32 and 33 of the Bombay Industrial Relations Act, 1946, the right of an individual employee to appear and conduct the proceedings initiated by him is not destroyed unless and until the representative union appears in the case on behalf of that employee whose grievance is being ventilated before the authorities concerned. Section 27A of the Act does not contemplate an appearance of the representative of the employees which might be contrary to the interests of the individual employees who might have initiated a proceeding under the Act.

Gambhirji Odhraj v. Bind Basni Prasad and *Raja Kulkarni v. State of Bombay*, referred to.

The agreement referred to in s. 115A of the Bombay Industrial Relations Act, 1946, is an agreement arrived at between the employer and the representative Union reached after the commencement of the industrial dispute before an Arbitrator, Wage Board, Labour Court or Industrial Court. Therefore, an agreement which is arrived at at a time when no such dispute is pending before any of these authorities will not fall under the terms of s. 115A of the Act.

THE facts appear in the judgments.

S. S. Kavlekar and G. G. Kulkarni, with *A. N. Shirodkar*, for the petitioners.
B. A. Pandya, instructed by *Matubhai Jamietram and Madan*, for opponent No. 1.

D. H. Buch and A. A. Ravi, for opponent No. 2.

*Decided, August 5, 1958. Special Civil 1 (1958) 57 Bom. L.R. 456.

Application No. 1064 of 1958.

2 [1954] S.C.R. 384, s.c. 56 Bom. L.R. 450.

TAMBH J. This is an application under art. 227 of the Constitution of India wherein the petitioners pray for quashing the orders made on February 6, 1958, by the Industrial Court, Bombay, (opponent No. 3 herein) dismissing the petitioners' appeal, as well as for setting aside the order made by the Labour Court on December 11, 1957.

The facts and circumstances giving rise to this petition, in brief, are: The petitioners claim to be working as Foremen in the Colaba Land Mills, opponent No. 1 hereto (hereinafter referred to as "the mills"). They say that there was an award made by the Industrial Court on May 26, 1956, in the matter of pay-scales for the technical and supervisory staff in the cotton textile mills in Bombay. The parties to this award were Rashtriya Mill Mazdoor Sangh representing the employees in the Textile Mills of Bombay (hereinafter referred to as "the Sangh") and the Mill-owners Association, Bombay, representing the mill-owners. According to the petitioners, this award is binding on opponent No. 1 mills. They further claim that according to this award they are entitled to a pay-scale per month of Rs. 215-15-260-20-340 as and from May 1, 1955. They further say that cl. 1 of the award specifically provided that the existing Technical and Supervisory Staff, including Assistant Engineering, shall be classified in the categories of (a) Assistant Masters, (b) Department Assistants, (c) Departmental Assistants who are Technical and Engineering Graduates, (d) Foremen and Assistant Foremen, and (e) Apprentices. They further say that this award, in terms, provides that it would not be open to the management to create a new category or a new cadre or a scale not envisaged by the agreement. According to the workmen, they were working as Foremen in opponent No. 1 mills since 1948 and that it was not open to opponent No. 1 mills to designate them as Electricians. It was also, on account of the terms of the award, not open to the Sangh, the representative Union of opponent No. 1 mills, or opponent No. 1 mills, to change their designation and create a new cadre or a new grade not envisaged in the award. They, therefore, submit that the action taken by opponent No. 1 mills and the Sangh in changing their designation to "Electricians" is mala fide and against the terms of the award. Therefore, opponent No. 1 mills were not justified in designating them as "Electricians" and paying them at the rate of Rs. 78 per month. The petitioners, therefore, made an approach under s. 42 of the Bombay Industrial Relations Act, 1946, on February 6, 1957, claiming that they should be paid the difference from May 1, 1955, to the date of the notice. A reply thereto was sent by opponent No. 1 mills on February 18, 1957, denying their liability to pay the same. Another approach was made by the petitioners under s. 42 of the said Act on May 13, 1957. But as opponent No. 1 mills did not agree to the claim made by the petitioners, the petitioners, ultimately, on August 2, 1957, made an application under s. 78 (1) A (c) of the Act, complaining against the illegal change effected by opponent No. 1 mills in not paying them the aforesaid pay scale of a Foreman awarded to them by the aforesaid award. In this application under s. 78 (1) A (c) the petitioners prayed that they be designated as Foremen and it be declared that they are entitled to the Foremen's grade and pay-scale prescribed by the aforesaid award. They further prayed that opponent No. 1 mills be directed to pay them the difference.

It appears that during the pendency of this application opponent No. 1 mills made an application to the Labour Court that the Sangh, which was the representative Union of that particular mills, be joined as a party to the application. It further appears that, in pursuance of the notice issued by the Labour Court, the Sangh appeared before the Labour Court on November 27, 1957, and made an application to the Labour Court that it had no desire to join as a party to the above application, but it showed its willingness to appear in its representative capacity under s. 27A of the Act. It, therefore, prayed that the necessary orders may be passed. The Labour Court thereupon made

an order and permitted the Sangh to appear in its representative capacity under s. 27A.

Thereafter on December 11, 1957, Shri N. S. Deshpande, Secretary of the Sangh, made an application (exh. 16 on the record of the Labour Court file) to the Labour Court, the material part whereof is as under:—

"After the award for Technical and Supervisory Staff, certain disputes of employees of the opponent mill including those of Narayan Mukund Naik and Sayad Hussain were taken up for negotiation with the mill through the intervention of the Millowners' Association, Bombay, and the disputes including those of Narayan Mukund Naik and Sayad Hussain Sayad were settled and the settlements were also implemented by the opponent mill. The dispute, therefore, does not survive. In view of this, the Sangh prays that the Hon'ble Court may be pleased to dispose of the application."

On the same day the Labour Court made an order under s. 115A of the Act, the material part whereof is as under:—

"At the time of hearing to-day, the representative Union and the opponent mill stated that the order should be passed in terms of the Memorandum Ex. 16 filed in the Court. Under section 115A of the B.L.R. Act, I pass the order in terms of the Memorandum Ex. 16, a copy of which is annexed herewith as Annexure 'A' and direct that the parties should abide by the terms of the same."

The petitioners feeling aggrieved by this order, made by the Labour Court on December 11, 1957, took an appeal therefrom to the Industrial Court, Bombay.

The Appellate Court took the view that as the decision of the Labour Court was in accordance with the agreement between the representative union and the mills, it was not open to the petitioners to appeal against a consent order. It, therefore, dismissed the appeal summarily as not maintainable.

It is against the orders of the Industrial Court and the Labour Court that the petitioners have come to this Court by a petition under art. 227 of the Constitution.

Shri Kavlekar, learned advocate for the petitioners, has raised before us two contentions. He contends that there was no agreement arrived at on December 11, 1957, between the Sangh and the mill-owners. The agreement, which was arrived at was some time prior to August 2, 1957, the date on which the petitioners made an application to the Labour Court under s. 78 (1) A (c) of the Act. Such an agreement, even if made, was not an agreement falling under s. 115A of the Act. The Labour Court was, therefore, in error in holding that there was a binding agreement under s. 115A of the Act and on that view of the matter disposing of the case in terms of the agreement. Shri Kavlekar, secondly, contends that the real question which was raised in the petition by his clients, namely, the validity and legality of the agreement between the Sangh on the one hand and opponent No. 1 mills on the other changing the designation of the petitioners from Foreman to Electricians, has been completely lost sight of by the authorities below and, therefore, the petitioners' real grievance has not been investigated into at all.

In our opinion, both the contentions of the petitioners are well-founded. As regards the first contention, namely, as to whether there was any agreement between the Sangh on the one hand and opponent No. 1 mills on the other within the meaning of s. 115A of the Act on December 11, 1957, we have already reproduced above the material part of the application made by the Sangh on December 11, 1957. From that portion it is clear that there was really in fact no agreement at all on December 11, 1957, between the Sangh on the one hand and opponent No. 1 mills on the other. On the contrary, this application, in terms, refers to some prior agreement. And it is the case of the Sangh that, on account of this prior agreement between the Sangh on the one hand and the Mill-owners' Association on the other, it was not open to the petitioners to raise any dispute as against opponent No. 1 mills and, therefore, the application should be dismissed as no dispute survived. This prior agreement has not been

placed on record. We, however, are informed by the learned counsel for opponent No. 1 mills, as well as for the Sangh, that an agreement was arrived at sometime on or about January 16, 1957. It is thus clear that this agreement, on the strength of which dismissal of the petitioners' application was claimed, was an agreement reached prior to the initiation of the proceedings before the Labour Court. As already stated, proceedings before the Labour Court were initiated by the petitioners on August 2, 1957. The question that falls for consideration is whether an agreement, which is arrived at at a time when no dispute is pending before an Arbitrator, Wage Board, Labour Court or Industrial Court, would fall under the terms of s. 115A of the Act.

Shri Pandya, learned counsel for opponent No. 1 Mills, contends that even though an agreement was arrived at at a date prior to the initiation of proceedings before any of the authorities mentioned above, such an agreement would fall under the terms of s. 115A of the Act.

It is not possible for us to accept the contention of Mr. Pandya. Section 115A reads as follows:—

"If any agreement is arrived at between an employer and a representative Union who are parties to any industrial dispute pending before an Arbitrator, Wage Board, Labour Court or Industrial Court, the order, decision or award in such proceeding shall be made in terms of such agreement, unless the Arbitrator, Wage Board, Labour Court or Industrial Court is satisfied that the agreement was in contravention of any of the provisions of this Act or the consent of either party to it was caused by mistake, misrepresentation, fraud, undue influence, coercion or threat."

Now, it will be seen that the material words are "If any agreement is arrived at... who are parties to any industrial dispute..." This shows that the section refers to an agreement arrived at between the persons who are already parties to a dispute before an Arbitrator, Wage Board, Labour Court or Industrial Court and not an agreement which was arrived at at a prior stage between the persons who now are parties to the dispute. If really the intention of the Legislature in framing s. 115A had been to include an agreement reached between the employer and the representative union at a stage prior to the commencement of a dispute before an Arbitrator, Wage Board, Labour Court or Industrial Court, then, in our view, the phraseology used would have been "If any agreement had already been arrived at or is arrived at between an employer and a Representative Union". That is not the phraseology used and, in our opinion, it would not be open for us without any adequate grounds to substitute words not used by the Legislature in the section. In our view, therefore, the agreement referred to in s. 115A is an agreement arrived at between the employer and the representative Union reached after the commencement of the Industrial dispute before an Arbitrator, Wage Board, Labour Court or Industrial Court.

The view taken by us finds support in other provisions of the Act, namely, s. 114. Section 114 refers to a registered agreement or a settlement or submission or award arrived at otherwise than in an industrial dispute before an Arbitrator, Wage Board, Labour Court or Industrial Court. We are, therefore, of opinion that this clearly shows that in s. 115A such an agreement is not included.

Shri Buch, who appears for the Sangh also, does not support the contention of Shri Pandya.

Coming to the next contention which is raised by Shri Kavlekar, the real dispute, which is raised by the petitioners, is as regards the validity or legality of the agreement reached between the Mill-owners' Association and the Sangh whereunder the designation of the petitioners was changed from that of Foremen to Electricians. This contention, we find, has been nowhere referred to either by the Labour Court or the Appellate Court, namely, the Industrial Court. It appears that this contention, which is the principal contention raised on behalf of the petitioners, has been completely lost sight of by the two authorities, namely, the Labour Court and the Industrial Court.

Shri Pandya, the learned counsel for opponent No. 1 mills, contends that the petitioners have no *locus standi* at all under the Act to challenge the validity or legality of the aforesaid agreement reached on January 16, 1957. He says that in this industry there is a representative Union and on true construction of ss. 78, 79 and 27A it is only the representative union, namely, the Sangh, which can agitate any matter before a Labour Court on behalf of the petitioners.

It is not possible for us to accept this contention of Mr. Pandya also. As already stated, the petition is made under s. 78 (1) A (c). Section 78 (1) A (c) provides:

"A Labour Court shall have power to—

A. decide—

(a) ...

(b) ...

(c) whether...any change is illegal under this Act."

The material part of s. 79 provides:—

"(1) Proceedings before a Labour Court in respect of disputes falling under clause (a) of paragraph A of sub-section (1) of section 78 shall be commenced on an application made by any of the parties to the dispute, a special application under sub-section (3) of section 52 or an application by the Labour Officer or a representative union and proceedings in respect of a matter falling under clause (c) of the said paragraph A on an application made by any employer or employee directly affected or the Labour Officer or a representative Union."

It is not in dispute that the application made by the petitioners is under s. 78 (1) A (c) of the Act. Section 79, in terms, confers a right to initiate proceedings under s. 78 (1) A (c) on the employee directly affected. The petitioners, if their grievance is really correct, undoubtedly are the employees directly affected by the alleged change. True, that the section confers a right on the Labour Officer or a representative Union also to initiate proceedings under s. 78 (1) A (c). But the section nowhere says that where in any industry there is a representative union, then in that event the representative union alone has a right to initiate proceedings and not the employees directly affected by the alleged change. To accept the contention of Shri Pandya, we will have to read into the section the following words "Where there is no representative union" after the words "employees directly affected". It is well settled that unless it is absolutely necessary the Courts would not read into the statutes words which are not used by the Legislature.

Shri Pandya next contends that even though the words "employees directly affected" are not qualified by a clause "where there is no representative union", the same results would follow on reading s. 27A of the Act, which confers on the representative union alone the right to appear and act on behalf of the employees.

Section 27A reads as follows:—

"Save as provided in sections 32 and 33, no employee shall be allowed to appear or act in any proceeding under this Act except through the representative of employees."

Now, "representative of employees" has been defined in s. 3, cl. (32). It reads:—

"Representative Union' means a representative of employees entitled to appear or act as such under section 30."

This brings us to the provisions of s. 30, and when we look to the provisions of s. 30, a representative union for such industry is first in order of preference entitled to act as a representative of employees in that industry.

Reading the provisions of s. 27A, s. 3(32) and s. 30, undoubtedly, a representative union in an industry is the representative of the employees within the meaning of s. 27A. But the question is whether a representative union alone would have a right to appear and act on behalf of an employee to his exclusion. It is not possible for us to so hold on reading these three sections.

It will be seen that the provisions of s. 27A are made subject to the provisions of ss. 32 and 33. Section 32 provides:—

"A Conciliator, a Board, an Arbitrator, a Wage Board, a Labour Court and the Industrial Court may, if he or it considers it expedient for the ends of justice, permit an individual, whether an employee or not, to appear in any proceeding before him or it."

The provisions of s. 32 would show that it would be a matter of exercising discretion on the facts of each case for the various authorities mentioned therein to decide whether it would permit an individual employee to appear in any proceeding before that authority, and that would depend upon the facts of a particular case. Shri Pandya, however, contends that no such discretion exists where a representative union has appeared in the case. He relies on the proviso to s. 32. The proviso reads:—

"Provided that no such individual shall be permitted to appear in any proceedings in which a Representative Union has appeared as the representative of the employees."

The proviso no doubt indicates that where a representative union has chosen to appear as a representative of the employees, the employee would not have a right to appear in the proceedings. But the mere appearance of a representative union in a case would not necessarily amount to an appearance of the representative union as a representative of that particular employee in that particular dispute. It again will have to be seen as to whether in fact the representative union is choosing to appear, as undoubtedly it has a right to do so, as a representative of that particular employee, or employees whose grievance is being ventilated before the authorities concerned.

We have already pointed out that in the instant case the application was made under s. 78 (1) A (c). Section 79, in terms, confers a right on an employee directly affected to initiate proceedings. It has to be seen whether the right conferred on the petitioners under s. 79 is in the instant case taken away on account of the appearance of the representative union in the case. In other words, it is to be seen whether the representative union, namely, the Sangh, has chosen to appear in the instant case as a representative of the employees, namely, the petitioners. Shri Buch, learned counsel for the Sangh, frankly concedes that the Sangh has not chosen to appear as a representative of the present petitioners. What he says is that the Sangh has chosen to appear in this case as a representative of the employees in the industry in general and to support the agreement which they have entered into with the Mill-owners' Association on or about January 16, 1957. According to Shri Buch that agreement is a valid and legal agreement and under the provisions of s. 114 of the Act that agreement is binding on the petitioners.

Now, the contention raised, as already stated, by the petitioners is that that agreement entered into by the Sangh on the one hand and the Mill-owners' Association on the other, on or about January 16, 1957, is not a legal and valid agreement binding on them. From the nature of the dispute raised the Sangh cannot represent the present petitioners in this dispute. The position then that emerges is that the petitioners, who claim to have a grievance and who have a right under s. 79 of the Act to ventilate that grievance before the Labour Court, are not being represented by the representative union, as the representative union does not claim to represent them. The petitioners must, therefore, have an opportunity to establish their grievance before the Labour Court and opponent No. 1 cannot be heard to say that they have no *locus standi* at all in the case to conduct their case and ventilate their grievance on account of the provisions of s. 27A of the Act.

Shri Pandya also referred us to the following observations of the learned Chief Justice reported in *Gambhirji Odharaj v. Bind Basni Prasad*,¹ (p. 462):—

"... Reading ss. 27A, 32 and 33 together, the scheme is that whenever a representative Union appears in any proceedings, that Union alone can be heard by any Labour

¹ (1955) 57 Bom. L.R. 456.

Tribunal. But if a representative Union does not appear, there is nothing to prevent an employee from appearing or from authorising any person to appear for him. Therefore it is perfectly true that even when an application is made by an employee under s. 42(4), if the representative Union puts in an appearance, then the representative Union alone can appear or act for the employee. It is therefore pointed out that no useful purpose would be served if the Labour Court is asked to consider the application of the employee under s. 42(4) when only the representative Union can be heard on behalf of the employee. In the first place, it is not necessary to assume that the representative Union will appear when this application is considered by the Labour Court. In the second place, even assuming the representative Union does appear, the representative Union will appear on behalf of the individual employees, and the application that will be considered and decided by the Labour Court would be the application of the employee and not the application of the representative Union."

In our opinion, these observations are not of much assistance to opponent No. 1 mills. But, on the contrary, these observations lend support to the view taken by us. The rule deducible from the aforesaid observations, in our opinion, is that on a true construction of ss. 27A, 32 and 33 the right of an individual employee to appear and conduct the proceedings initiated by him is not destroyed unless and until the representative union appears in the case on behalf of that employee. As already stated, such is not the case here. On the other hand, Shri Buch has made the position clear that the Sangh is not appearing as a representative of the two petitioners in this case.

A reference was also made by Shri Pandya to a decision reported in *Raja Kulkarni v. The State of Bombay*.² In our view, that judgment has hardly any relevance to the question which we have to consider in this case.

As already stated, in our view, there was no agreement reached between the Sangh and opponent No. 1 mills on December 11, 1957. The agreement reached, according to the Sangh, was one between the mills and/or Mill-owners' Association on the one hand and the Sangh on the other some time on or about January 16, 1957. This agreement was arrived at prior to the commencement of the proceedings before the Labour Court which were in fact commenced on August 2, 1957. The agreement, therefore, was not one falling under s. 115A of the Act.

The order of the Labour Court disposing of the application under s. 115A is clearly erroneous in law on the face of the record.

We have already stated that, in our view, on the facts and circumstances of the case, it cannot be said that the petitioners have no right to appear and conduct their case, inasmuch as the union does not claim to represent them. The application made by the petitioners was under s. 78 (1) A (c). That application was dismissed by the Labour Court. Section 84(1)(c) confers a right of appeal against the decision of a Labour Court in respect of matters falling under cl. (a) or cl. (c) of para. A of sub-s. (1) of s. 78. The petitioners, therefore, clearly had a right of appeal under s. 84. The appeal Court was, therefore, clearly in error in not entertaining the appeal.

Normally, we would have remanded the matter to the appellate Court for a fresh decision of the appeal. But, in our view, no useful purpose will be served by remanding this case to the appellate Court, inasmuch as the principal dispute raised by the petitioners, namely, the validity and the legality of the agreement of January 16, 1957, has not been considered by the Labour Court and that is the principal contention which ought to have been considered and decided by the Labour Court. It will, therefore, in our opinion, be necessary to remand this case back to the Labour Court to have a fresh decision with advertence to the observations made herein.

In the result, for the reasons stated above, this petition is allowed, the order made by the Industrial Court, Bombay, on February 6, 1958, and the order made by the Labour Court on December 11, 1957, are quashed, and it is ordered that the case be sent back to the Labour Court for a fresh decision with

advertence to the aforesaid remarks. Costs of this petition will abide the result.

.VYAS J. I agree entirely with the conclusions reached by my learned Brother.

This application raises two important questions. The first question raised is this: Where there is a representative union, is there a right available under the Act to individual employees to complain before the Labour Court that a certain change is an illegal change? This question, in its turn, raises a question of construction of ss. 27A, 32, 33 and 78 (1) A (c) of the Act. The next question raised is as to the construction of s. 115A. Section 115A speaks of an agreement and the question is: Must it be an agreement reached during the pendency of a dispute or might it also be an agreement which might precede the dispute? These questions have arisen in this way:—

The petitioners' case is that they were working as Foremen in the Colaba Land and Mills Company Limited. They filed an application, being Application No. 468 of 1957, before the First Labour Court at Bombay, contending that they were entitled to the wages fixed for Foremen in the award of the Industrial Court made in Reference No. 91 of 1954. This award was passed on May 26, 1956. Thereafter, it would appear that on January 16, 1957, an agreement took place between the Colaba Land and Mills Co. Ltd. and the Rashtriya Mill Mazdoor Sangh, Bombay, pursuant to which, say the petitioners, their category was changed from that of Foremen to that of Electricians and their wages were fixed at Rs. 78 per month. After the award was passed, the petitioners made an application to the manager of the mills, requesting the manager that they should be paid according to the revised pay-scales and grades. It may be noted that the revision of the pay-scales and grades was ordered by this award. To the aforesaid application of the petitioners the manager of the mills gave no reply. The petitioners learnt later on that the manager, contrary to the terms of the award, had altered their category from that of Foremen to that of Electricians. It may be noted that during the pendency of application No. 468 of 1957, which was made by the petitioners before the First Labour Court at Bombay, the mills made an application to the Court, and pursuant to that application a notice was issued to the Rashtriya Mill Mazdoor Sangh. In response to that notice, the Rashtriya Mill Mazdoor Sangh, to whom I shall hereafter refer as "the Sangh", remained present in Court. The Sangh stated to the Court that it wanted to appear in its representative capacity under s. 27A of the Act. It was allowed to do so. When the matter came up for hearing, the representative union and the mills both submitted to the Court that an order should be passed in terms of the agreement dated January 16, 1957. The learned Judge of the First Labour Court accordingly passed an order in terms of the said agreement and the order was passed by him under s. 116A of the Act. From that order of the First Labour Court the petitioners filed an appeal before the Industrial Court at Bombay. The Industrial Court observed:—

"Now, the position is that the representative Union having appeared in the lower Court and as an appeal is a continuation of the proceeding of the Original Court, only the representative Union can file an appeal... It is not open to individual employees to appeal against such a consent order."

Consistently with this view of the matter, the learned President of the Industrial Court dismissed the appeal of the petitioners. It is from the aforesaid orders of the President of the Industrial Court and the Judge of the First Labour Court that this application has been filed by the petitioners under art. 227 of the Constitution of India.

It is the petitioners' case that the change which was brought about in consequence of the agreement dated January 16, 1957, in their category was an illegal change. The petitioners contend that once an award was made by the Industrial Court, it was not open to the employers or the Rashtriya Mill Maz-

door Sangh to alter the categories which were fixed under the award. The petitioners, feeling aggrieved by the change, which they considered was an illegal change, made an application before the First Labour Court and there is no doubt that under s. 78 of the Act the Labour Court had jurisdiction to entertain and decide that application. The application clearly fell within the purview of cl. (c) of s. 78, sub-s. (1) A. Section 78 (1) A (c) provides that the Labour Court shall have power to decide whether a strike, lock-out, closure, stoppage, or any change is illegal under the Act. As I have mentioned above, it was the petitioners who commenced a proceeding under the Act to ventilate their grievance against the illegal change—illegal according to the contention of the petitioners—introduced as a result of the agreement dated January 16, 1957. The proceeding was commenced under sub-s. (1) of s. 79. This sub-section provides:—

“Proceedings before a Labour Court in respect of disputes falling under clause (a) of Paragraph A of sub-section (1) of section 78 shall be commenced on an application made by any of the parties to the dispute, a special application under sub-section (3) of section 52 or an application by the Labour Officer or a representative union and proceedings in respect of a matter falling under clause (c) of the said Paragraph A on an application made by any employer or employee directly affected or the Labour Officer or a representative Union.”

The petitioners, who were employees directly affected by the change that was introduced as a result of the agreement dated January 16, 1957, commenced a proceeding in respect of a matter falling under cl. (c) of s. 78 (1) A and this they did under s. 79 (1) of the Act.

As I have stated above, at a certain stage the mills made an application to the Labour Court to the effect that the Rashtriya Mill Mazdoor Sangh be made a party to the application made by the petitioners. Upon that application, a notice was issued by the Labour Court to the Sangh and the Sangh put in an appearance in the Court.

Mr. Pandya, the learned advocate appearing for the mills, contends that once the union came on the scene of the dispute, the existence of the individual employees, for the purposes of the proceeding under the Act, came to an end and the petitioners in their character of individual employees were effaced from the scene. Mr. Pandya says that after the union came on the scene, it was not open to the petitioners under the Act to appear or act in any proceeding under the Act.

Mr. Pandya has invited our attention to s. 27A of the Act and he says that the word “act” occurring in this section would include “even the initiation of a proceeding under sub-section (1) of section 79”. In other words, Mr. Pandya’s contention is that it is not open to the petitioners, in a case where a representative union is in existence, to even initiate a proceeding in respect of any of the matters referred to in s. 78 (1) A of the Act.

Mr. Pandya has next invited our attention to the provisions of ss. 32 and 33. It may be noted that the provisions of s. 27A have been made subject to the provisions of ss. 32 and 33. Section 27A provides:

“Save as provided in sections 32 and 33, no employee shall be allowed to appear or act in any proceeding under this Act except through the representative of employees.” Thus the provisions of s. 27A are to be read subject to the provisions of ss. 32 and 33.

Section 32 provides:—

“A Conciliator, a Board, an Arbitrator, a Wage Board, a Labour Court and the Industrial Court may, if he or it considers it expedient for the ends of justice, permit an individual, whether an employee or not, to appear in any proceeding before him or it:

Provided that no such individual shall be permitted to appear in any proceeding in which a representative Union has appeared as the representative of employees.”

Then, there is s. 33 and I shall quote the material portion of that section. It provides:—

"Notwithstanding anything contained in any other provision of this Act, an employee or a representative Union shall be entitled to appear through any person,

(a) ...

(c) ...

Provided that...

Provided further that no employee shall be entitled to appear through any person in any proceeding under this Act in which a Representative Union has appeared as the representative of the employees."

Mr. Pandya relies upon the abovementioned provisions of ss. 27A, 32 and 33 in support of his contention that once the representative union had put in its appearance in this case, it was not open to the petitioners as individual employees either to appear in the case or act in the case. An appeal from an order of the Labour Court being a continuation of the application itself, Mr. Pandya says that the view taken by the President of the Industrial Court that the petitioners had no right to file an appeal from the order of the First Labour Court was a correct view.

We have carefully considered the provisions of ss. 27A, 32 and 33, but we find ourselves unable to accept the contention which Mr. Pandya has made upon the basis of these sections. Section 27A provides that subject to the provisions of ss. 32 and 33 no employee shall be allowed to appear or act in any proceeding under the Act except through the representative of employees. It is perfectly true that under this section no employee shall be allowed to appear in any proceeding under the Act or act in any proceeding under the Act, except through the representative of employees. But there is no doubt, in our view, that the representative of the employees must appear and act for the individual employees who might have initiated a proceeding under s. 79 (1) read with s. 78 (1) A (c), but who might themselves not be allowed to appear or act pursuant to s. 27A. The appearance has to be made through the representative of employees. But it must be the appearance for and on behalf of individual employees. Section 27A does not contemplate an appearance of the representative of employees which might be contrary to the interests of the individual employees who might have initiated a proceeding under the Act. All that the section (s. 27A) lays down is that although a proceeding might have been initiated by the individual employees directly concerned by the change which the said employees might consider an illegal change, they would not be permitted to appear in the proceeding or act in the proceeding. The appearance or acting in the proceeding would have to be done for them and on their behalf by the representative of the employees. This, in our view, is the natural construction of s. 27A of the Act.

If we turn to s. 32, the proviso to the section says that no individual shall be permitted to appear in any proceeding in which a representative union has appeared as the representative of employees. It has to be remembered, however, that the Union must appear for the individual employees. It is true that an individual employee is not permitted to appear in any proceeding in which a representative union has put in its appearance. But then the point to be noted is that while appearing as a representative union, the union must appear for and on behalf of the individual employees who might have commenced a proceeding in respect of a matter covered by sub-s. (1) of s. 79 read with cl. (c) of s. 78 (1) A.

Then, there is s. 33, which is subject to two provisos. In this case we are concerned with the second proviso and the second proviso says that no employee shall be entitled to appear through any person in any proceeding under this Act in which a representative union has appeared as the representative of the employees. The language of this proviso is perfectly clear. It admits of no ambiguity. By enacting this proviso the Legislature has laid down that so far as the appearance in the Court is concerned, the appearance

shall be the appearance of the representative union. But the said appearance must be an appearance for individual employees. When the Legislature says that no employee shall be entitled to appear himself, but that he shall appear through a representative union, we cannot possibly attach any other intention to the Legislature except the intention that the Union shall put in its appearance on behalf of the employee and not in a manner contrary to or subversive of the interest of the employee. In other words, if the union puts in its appearance in a proceeding initiated by the individual employees, it will be the duty, in our opinion, of the union to press the contentions which might have been put forward by the individual employees in an application made by them under sub-s. (1) of s. 79 read with s. 78 (1) A (c).

Mr. Pandya says that the intention of the Legislature in enacting s. 79(1) was to provide that where there is no representative union, then only an application may be made by an employee directly concerned. We regret we are unable to agree with Mr. Pandya. If the Legislature had any such intention as is contended for by Mr. Pandya, it would have used the words to that effect. It would in that case have said "on an application made by any employee or employees directly affected where there is no representative union". The Legislature always uses appropriate words to express its intention. In order to make its intention clear, the Legislature has in the body of the Act enacted several provisos to several sections and sub-sections. For instance, if we turn to s. 27, sub-s. (1), cl. (a) and (b), there is a proviso to those clauses. If we turn to s. 32, we find a proviso to that section. Similar is the case with s. 33. Indeed to s. 33 there are two provisos enacted by the Legislature. If we turn to sub-s. (1) of s. 35, we find that that section is subject to a proviso. Sub-section (1) of s. 36 and sub-s. (1) of s. 37 are also made subject to the provisos. Similarly sub-s. (4) of s. 42 and sub-s. (1) of s. 44 are also made subject to the provisos. Clearly, therefore, whenever the Legislature has intended to make the provisions of certain sections subject to certain provisos or subject to the provisions of another section, it has always found appropriate language to give effect to that intention. For instance, the Legislature intended to make the provisions of s. 27A subject to ss. 32 and 33 and they clearly stated so in the body of s. 27A. Therefore, if the Legislature had intended that an employee directly concerned would have a right to apply under s. 79, sub-s. (1) only when there is no representative union, it would have doubtless said "on an application made by any employee or employees directly affected where there is no representative union". But we do not find any such words in s. 79, sub-s. (1). In these circumstances we must hold that the petitioners have a right to initiate proceedings in respect of matters referred to in sub-s. (1) of s. 79 read with s. 78 (1) A (c).

While on the point of ss. 27A and 79(1) Mr. Pandya has contended that the provisions of s. 79(1) must be read subject to s. 27A. Mr. Pandya says that by reading s. 79, sub-s. (1) subject to s. 27A, it would follow that an individual employee has no right even to initiate a proceeding under the Act. For making this contention, Mr. Pandya relies upon the word "act" in s. 27A. In our view, the construction which Mr. Pandya seeks to put upon s. 79, sub-s. (1), is clearly opposed to the language of s. 79, sub-s. (1). Section 79, sub-s. (1), expressly confers a right upon an employer or an employee or the Labour Officer or a representative union to make an application in respect of matters falling under cl. (c) of s. 78 (1) A. It is clear, therefore, that if a representative union does not choose to initiate a proceeding in respect of a matter falling under cl. (c) of s. 78 (1) A, the employee directly concerned could do so. Once the employee directly concerned does so, his cause is to be taken up by the union and the union has to appear and act for him in the application made by him (individual employee directly concerned), and it is but clear and natural that when the union appears and acts for and on behalf of the individual employee who is directly concerned in an application made by the latter, it must

fight the battle for the said employee. If the union does not do so, it cannot be said to represent the employee whom it purports to represent.

In this connection it would be appropriate to refer to *Ganbhirji Odharaj v. Bind Bansi Prasad*,¹ to which my learned Brother has also referred in the course of his judgment. In this case the learned Chief Justice, who delivered the judgment of the Bench, observed (p. 462):—

“...even assuming the Representative Union does appear, the Representative Union will appear on behalf of the individual employees, and the application that will be considered and decided by the Labour Court would be the application of the employee and not the application of the representative Union.”

Thus, we are fortified in the view which we have taken in this application, namely, that once the union puts in its appearance in a case where a proceeding is initiated by an individual employee directly concerned, the union must fight the battle for the employee.

I now proceed to deal with the next important question which has arisen in this case and that question is one of construction of s. 115A. Section 115A provides:—

“If any agreement is arrived at between an employer and a Representative Union who are parties to any industrial dispute pending before an Arbitrator, Wage Board, Labour Court or Industrial Court, the order, decision or award in such proceeding shall be made in terms of such agreement, unless the Arbitrator, Wage Board, Labour Court or Industrial Court is satisfied that the agreement was in contravention of any of the provisions of this Act or the consent of either party to it was caused by mistake, misrepresentation, fraud, undue influence, coercion or threat.”

Now, a point has arisen whether the agreement referred to in this section must be an agreement arrived at during the pendency of the dispute or whether it might also be an agreement which might have preceded the dispute. Mr. Kavlekar contends that the agreement, to be enforceable under s. 115A, must be an agreement which takes place during the pendency of the dispute. Mr. Pandya, on the other hand, contends that the agreement might also be an agreement which might have preceded the dispute. In our view, Mr. Kavlekar's contention is right. It is clear that there can be no question of an agreement unless there is a dispute in the first place. An agreement pre-supposes a state of affairs, where but for the agreement or settlement, the matters settled by an agreement would not be settled and the dispute would continue. Therefore, in our view, an agreement to be enforceable under s. 115A must be an agreement arrived at between the parties during the pendency of the dispute.

We are fortified in this construction by the fact that the Legislature has used the word “is” in the opening portion of s. 115A. The section opens with the words “If any agreement is arrived at between an employer and a representative union...”. The intention of the Legislature is always to be gathered from the language used by the Legislature. When the Legislature intends to convey a certain thing, it chooses words appropriate for the purpose. If the intention of the Legislature had been to lay down a law that a dispute subsequently arising between the parties shall be settled in terms of the prior agreement, it would have used the words “If any agreement *has been* arrived at between an employer and a representative union”. But it is significant to note that the word used in this context by the Legislature is “is” and the words are not “has been”.

Then, again, the important words in this section on the point of construction of the section are “who are parties to any industrial dispute pending before an Arbitrator, Wage Board, Labour Court or Industrial Court”. If the Legislature had intended that an agreement spoken of by s. 115A might precede a dispute, it would have used the words “*who might be* parties to any industrial dispute”.

¹ (1955) 57 Bom. L. R. 456.

Then, again, if we turn to sub-s. (3) of s. 114 of the Act, the sub-section provides:—

"A registered agreement entered into by the representative of the majority of the employees affected or deemed to be affected under section 43 by a change shall bind all the employees so affected or deemed to be affected."

It is, therefore, clear that the agreement referred to in s. 114, sub-s. (3) and s. 115A postulates a change and the representative of the majority of the employees being affected by that change. In other words, it postulates the existence of a dispute. It is clear, therefore, that the agreement contemplated by s. 115A of the Act is an agreement arrived at between the parties during the pendency of the dispute between them.

In the result, I agree with the order of remand proposed by my learned Brother.

Case remanded.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice V. S. Desai.

NAGPUR KSHATRIYA KATHIK SAMAJ v. CORPORATION OF THE CITY OF NAGPUR.*

City of Nagpur Corporation Act (C. P. & Berar Act II of 1950), Secs. 57(1)(m), 115(35)(b), 3(2)—Central Provinces and Berar Municipalities Act (II of 1922), Secs. 179(1)(b-1), (d), (cc), 180(a)(b)(c)(d)(g), 178(5)—Constitution of India, art. 19—Whether Corporation can regulate markets by merely passing a resolution to that effect—Amount Corporation authorised to demand for occupation of its stalls whether a fee or rent—Constitutionality of bye-laws 1 and 14(1) & (11).

Section 57(1)(m) of the City of Nagpur Corporation Act, 1948, confers a power on the Corporation to regulate markets by making bye-laws in that respect and not by merely passing a resolution. Therefore, where the Corporation sought to regulate meat markets and prohibit the sale of meat in weekly markets by merely passing a resolution, held that the action of the Corporation in prohibiting the sale of meat in weekly markets could not be upheld under s. 57(1)(m) of the Act.

The Corporation of the City of Nagpur is empowered under the City of Nagpur Corporation Act, 1948, and bye-law 3† to charge an amount for use and occupation of its property and not fees in the legal sense i.e. charges for the service which is rendered by the Corporation to the occupiers of that property. It is not open to the Corporation to charge or claim any amount it likes as rent for the occupation of its property like markets, stalls etc. but the charges must be reasonable.

Bye-law No. 1 and clauses (1) and (4) of bye-law No. 14†† are not *ultra vires* of the Constitution of India.

C. R. H. Readymoney Ltd. v. State of Bombay,† referred to.

The facts appear in the judgment.

M. B. Bobde, D. L. Jayawant and S. G. Kutde, for the petitioners.

M. N. Phadke and S. M. Hazarnavis, for the respondent.

TAMBE J. The aforesaid applications will be disposed of by this judgment. In our opinion, it would be convenient to dispose of all these applications by this common judgment, as they arise out of the same set of facts culminating in the passing of resolution No. 77 on March 28, 1958, and the action taken by the Corporation thereafter. The respondent in all the aforesaid applications

*Decided, October 10, 1958. Special Civil Application No. 198 of 1958 (with Special Civil Applications Nos. 286, 222 and 243 of 1958). framed by the Nagpur Municipal Committee. Part III, p. 64.

†† Part III, p. 91, in the above book.

† Corporation of the City of Nagpur Byelaws 1 (1957) 59 Bom. L. R. 786.

is the Corporation of the City of Nagpur, hereinafter referred to as the Corporation.

Facts giving rise to these applications are: The Corporation was constituted on March 2, 1951, under the City of Nagpur Corporation Act, 1948 (Central Provinces and Berar Act No. II of 1950) hereinafter referred to as the Act. Since that date, i.e. March 2, 1951, civil administration of the City of Nagpur is conducted and managed by the Corporation under the provisions of the Act. Prior to that date, civil administration of the City of Nagpur was conducted and managed by the Municipal Committee of Nagpur under various Municipal Acts passed from time to time, the first one was passed in the year 1864 and the last one being the Central Provinces and Berar Municipalities Act II of 1922, hereinafter referred to as the Municipalities Act.

For the purpose of administration, the municipality of Nagpur had divided itself into two committees, the City municipal committee and the Civil Station Sub-Committee. Each of the two committees exercised jurisdiction over certain defined areas and each of them had made its own byelaws. The byelaws with which we are concerned however are very similar and we would be referring to the byelaws framed by the City Municipal Committee of Nagpur.

It is not in dispute that in the City of Nagpur sale of meat and the markets in which meat was sold were under the control of and were regulated by the aforesaid municipal committees in accordance with the provisions of the Municipalities Act and the byelaws made thereunder. The provisions of the Municipalities Act under which the byelaws were made for the inspection of meat markets as well as stalls and for regulating the sale or exposure for sale of meat within the municipal area of Nagpur were s. 179(1)(b-1), (d) and (cc), s. 180(a),(b),(c),(d) and (g) and s. 178(5) of the Municipalities Act. The byelaws which were in force on the date the Corporation was constituted were those made by the Civil Station Sub-Committee under the aforesaid sections on August 3, 1932 and those made by the City Municipal Committee under the aforesaid sections on July 25, 1939. Sub-section (2) of s. 8 of the Corporation Act provides that every byelaw made under the Central Provinces and Berar Municipalities Act, 1922, shall, so far as it relates to the Municipality of Nagpur and so far as it is in force at the commencement of, and is not inconsistent with, this Act, be deemed to have been made and issued under the provisions of this Act, and shall, unless previously altered, modified, cancelled or suspended, as the case may be, under this Act, remain in force for the period, if any, for which it was so made. The aforesaid byelaws thus became byelaws under the Corporation Act and were in force at the material time.

As already stated the byelaws of both the committees are similar and we would be referring only to the byelaws of the City Municipal Committee. These byelaws are at page 91 of Part III of the Book styled as "Corporation of the City of Nagpur Byelaws framed by the Nagpur Municipal Committee", and in the preface to this book the Chief Executive Officer has announced that these byelaws, unless they are repugnant to the present Act, will continue in force till new byelaws are framed under the City of Nagpur Corporation Act, 1948 (II of 1950).

It would be convenient to refer to some of the byelaws which are material for the purpose of these cases. Byelaw No. 1 provides that the committee shall, with the sanction of the Deputy Commissioner, from time to time, fix a place or places to be used as meat markets or meat stalls and no meat shall be stored, sold, hawked or exhibited for sale at any place other than markets or stalls so fixed. Byelaw No. 3 provides that meat markets with the stalls therein shall remain open daily from sunrise to sunset. Clause (2) of byelaw No. 9 provides that no meat shall be sold or exposed for sale except the flesh of animals slaughtered at the places fixed for this purpose under s. 140 of the Central Provinces and Berar Municipalities Act, 1922. Clause (3) thereof provides that all meat intended for sale shall be produced before the slaughter-house inspector appointed by the committee, who shall examine it, and if he passes it as fit for

human consumption, shall stamp it in ink as class I, II or III with meat stamps approved by the committee. No meat shall be sold unless it has been so passed and stamped. Clause (4) of the said byelaw provides that meat not sold on the day on which it was passed and stamped shall not be sold, unless it is re-examined and passed in accordance with cl. (2) of this byelaw. Byelaw No. 10 provides that if, during the course of the day, meat which has been passed and stamped deteriorates and becomes unfit for human consumption, it shall no longer be exposed or sold. Byelaw No. 12 provides that no person shall sell meat or expose it for sale to the public within the limits of the municipality without a licence which shall be issued and renewed by the secretary or any officer of the committee specially empowered in this behalf. Byelaw No. 13(1) provides that a fee of As. 8 shall be charged for such a licence. It further provides that the licence issued would remain in force till March 31 of next following. Byelaw No. 14 enumerates grounds on which the licence could be refused. Byelaw No. 15 empowers the municipal authorities to suspend or cancel a licence in case the licence-holder commits a breach of the conditions of the licence or the byelaws. Byelaw No. 17 enumerates the steps which the licence-holder has to take to secure cleanliness. Byelaw No. 21 provides that every occupier of a stall shall keep all his meat exposed to light and air and shall not place it in any box or closed receptacle. Byelaw No. 30 relates to penalties for a breach of the byelaws.

On pleadings of the parties it is common ground that the places fixed for being used as meat markets and meat stalls under the aforesaid byelaw No. 1 were weekly markets, meat markets and *nakas* owned by the Corporation.

As regards the first place, viz. the weekly markets, since a long time in the City of Nagpur for six days in a week markets are being held in different parts of the City at fixed places. On Mondays and Thursdays, however, markets are held in Sitabuldi. In these markets, sellers and buyers gather to transact business in various types of goods, and commodities such as grain, cloth, vegetable, fruits, fish, flesh, poultry etc. In these markets a portion of land is set apart for the sale of meat and there the holders of licences for the sale of meat go to sell meat and every day they have to go to different places to sell meat, except on Mondays and Thursdays when they go to the Sitabuldi market. We are informed that except in one or two markets there are no *chabutras* built for these meat sellers to sit for the purpose of selling meat and they have to squat on the ground and for the occupation of the ground they have to pay two annas every day.

As regards other places fixed, viz. municipal meat markets, there are 11 meat markets constructed by the municipal committees (Corporation) and they are spread over different parts of the City. These markets are well-built structures consisting of 141 stalls, both big and small, the bigger ones are called stalls, while the smaller ones are known as *kenas* and the occupiers of the *kenas* are known as *kenawalas*. These *kenawalas* sell heads, hoofs, liver etc. of goats. Besides the aforesaid 141 stalls, there are also 12 single stalls built either by the municipal committee or the Corporation in different parts of the city. They are known as *nakas* and are also included in the term 'Municipal meat markets'. We are informed that some of the meat markets and *nakas* are very near the weekly markets. Licenced meat sellers occupying stalls, *kenas* or *nakas* in the municipal markets have to pay certain fees either on monthly or yearly basis. These fees are settled either by auction or otherwise by the municipal officers. It is common ground that last time when auction was held was in the year 1948. Thereafter an attempt was made to hold auction in the year 1952 but it was of no avail. The stall holders are exempt from paying two annas every day as are required to be paid by meat sellers in the weekly markets.

It appears that besides the aforesaid weekly markets and municipal meat markets, meat was also allowed to be sold in eight private stalls and to them two types of licences were issued; one licence was for selling meat and the other was for selling meat in that particular place. It is not clear whether

these places were fixed as places to be used for selling meat under byelaw No. 1. It is a matter of regret that the Corporation was not in a position to produce before us the order or notification which must have been issued by it under byelaw No. 1. Shri Phadke contends that these places must have been fixed as places for selling meat under byelaw No. 1. He further contends that, at any rate, the Corporation had power under s. 348 of the Corporation Act to grant licences to those eight persons. We, however, need not concern ourselves with these eight persons as they are not petitioners before us.

On March 28, 1958, the Corporation passed a resolution bearing resolution No. 77. The translation of the material part of this resolution as admitted by all the parties is contained in exh. A-1 in Petition No. 222 of 1958. It reads as follows:

"No 77. The House took into consideration the question of deciding what should be the policy of the Corporation regarding the rent of shops and sites given on behalf of the market department from 1-4-58.

After this the House after taking into consideration the office proposal given in Schedule B and considering the amendment shown in Schedule C unanimously sanctioned the rent of shops and sites in accordance with Schedule D. The House directed that this enhancement of rent shall remain in force only for three years i.e. from 1-4-58 to 31-3-61.

SCHEDULE D.

S. No.	Name of Market	Shop No.	Fees payable after 1-4-58.
55.	Hansapuri Mutton Market	1	480.00 Annual
		2	412.00 "
		3	440.00 "
		4	480.00 "
		5	412.00 "
		6	360.00 "
		7	360.00 "
		8	480.00 "
		9	480.00 "
		10	480.00 "
56.	Hansapuri Boti Market	1-8	6.00 Each monthly
69.	Machhisath Meat Stall	1	300.00 Annual
		2, 7, 9, 12, 13, 15, 16, 18, 20, 21, 25, 26, 28	940.00 Each annual.
		3, 10, 17, 24, 27	260.00 " "
		11	285.00 " "
		14	275.00 " "
		19	265.00 " "
		22	255.00 " "
		23	270.00 " "

Note

Since many complaints are received against the shop keepers of private meat shops, licenses to run private meat shops should not be given and Corporation should build shops owned by it wherever necessity for meat shops exists. Similarly, licenses should not be given to those licensees who sell meat after giving 0-8-0 as license fee. But license should be given to those who sell meat in shops licensed by the Corporation.

Those licensees who are in arrears of rent on 1-4-58 should not be given the concession of renewing the leases."

Acting in pursuance of the decision taken in this resolution the Market Superintendent, in the first instance, served a notice on March 30, 1958, on all the stall holders in Hansapuri and Machhisath municipal markets. The translation of that notice, as admitted by all the parties, is as given in exh. A-2 in Special Civil Application No. 222 of 1958. It reads:

"Mr. _____ is hereby given notice that you took the license (parvana) for 1957-58 of the Corporation shop No. _____ in your possession in the _____ mutton market at _____ for Rs. _____ per year. Its period ended on 31-3-58.

The Corporation has by its resolution No. 77 dated 28-3-1958 determined the fee (shulk) for the shop in your possession to be Rs. _____ per year. If you want to take the license from 1-4-58 at this rate, three months fee in advance and the current license fee for April at the rate of Rs. _____ per year should be deposited in eight days and agreement should also be given in writing. If taking into consideration the above matter you can not afford to take the license, the shop in your possession should be immediately vacated and handed over to the Market Superintendent of the Corporation. In default, the Corporation will take legal proceedings against you and will not at all be responsible for the loss incurred by you.

Date 30-3-58.

Sd/- Illegible,
Market Superintendent,
Corporation of the City of Nagpur,
Nagpur."

In the second instance, the Market Superintendent of the Corporation of the City of Nagpur, put up a similarly worded intimation dated May 29, 1958, on all the municipal slaughter-houses. The translation of the said intimation, as admitted by all the parties, is contained in 'exh. A-2' in Special Civil Application No. 198 of 1958. It reads:

"Intimation.

All Khatiks and butchers are informed that sale of mutton has been stopped in the weekly markets in accordance with resolution No. 77 dated 28-3-58. Proper proceedings will be taken against any person who puts up a shop in the market and sells mutton. And Corporation will not be responsible for your damage.

Sd/- Illegible,
Market Superintendent."

It would be noticed that the combined effect of the aforesaid resolution dated March 28, 1958, and the intimation dated May 29, 1958, was that the sale of meat in the weekly markets and in private stalls was prohibited. The sale of meat was permitted only in the municipal meat markets. But the meat sellers, who had been carrying on their business in the stalls or *kenas* in Hansapuri and Machhisath municipal meat markets, were required to pay higher fees. It is not in dispute that the approximate increase effected by the aforesaid resolution was from Rs. 5 and Rs. 9 to Rs. 20 and Rs. 25 per month per stall and from Rs. 3 to Rs. 6 per *kana* per month.

Feeling aggrieved by the aforesaid action of the Corporation, 159 persons (petitioners in Special Civil Applications Nos. 198/58 and 286/58) who claim to be doing business of selling meat in weekly markets; 42 persons (petitioners in Special Civil Application No. 222 of 1958) who claim to be the stall holders or the *kenawallas* in Hansapuri and Machhisath municipal meat markets and 5 persons (petitioners in Special Civil Application No. 243 of 1958), who say that they want to do business of selling meat in private stalls have approached this Court under arts. 226 and 227 of the Constitution.

Though a large number of allegations were made and various reliefs were asked in these applications, at the stage of arguments reference was not made to all of them. We, therefore, do not consider it necessary to reproduce in detail the pleas raised and the reliefs asked. It will be convenient to refer to the material pleas raised when we deal with the applications specifically.

Turning now to Special Civil Applications Nos. 198 of 1958 and 286 of 1958, as already stated the petitioners in these applications claim that they had been doing the business of selling meat in the weekly markets. We have already referred above to the manner in which this business was conducted. According to the petitioners weekly markets are being held from time immemorial and meat is also being sold therein from time immemorial and they claim that

the business of selling meat in weekly markets has been their ancestral business. The Corporation admits that weekly markets are being held and meat is being sold in these markets from time immemorial. It, however, does not admit that all the petitioners had been doing the business of selling meat in weekly markets as their ancestral business. It, however, admits that some of them have been doing this business. Common law right of a person who intends to sell his goods in the markets in the words of the well renowned and learned author Lord Halsbury is as follows:

"General rights of the public.

"At all times when a market ought lawfully to be held every member of the public has, of common right, the liberty to enter and frequent the market-place for the purpose of bringing thither and there exposing for sale and selling, or of buying, such commodities as are vendible in the market." (Halsbury's Laws of England, 2nd Edition, Volume XXII, Paragraph 65 at page 47).

The right available to an intending seller in a public market in India was also the same though it could be curtailed by a statute and such was the position till the advent of the Constitution. The aforesaid right of a seller available to him in Common law, in our opinion, is now enshrined in and is guaranteed to him under art. 19(1)(g) of the Constitution. The learned Chief Justice of the Supreme Court (Das J. as he then was) delivering the judgment of the Supreme Court in *Mohd. Yasin v. Town Area Committee, Jalalabad*¹ observed (p. 117):

"...Under Article 19(1)(g) the citizen has the right to carry on any occupation, trade or business which right under that clause is apparently to be unfettered. The only restriction to this unfettered right is the authority of the State to make a law relating to the carrying on of such occupation, trade or business as mentioned in clause (6) of that article..."

Turning to cl. (6) of art. 19 of the Constitution, it would be noted that there are two limitations imposed on the power of the State to make a law relating to restrictions on the carrying on of a trade or occupation or business and those restrictions are that the law must be in the interests of the general public and the restrictions must be reasonable.

In the instant cases it cannot be doubted that the petitioners were, at any rate, some of them had been carrying on the business of selling meat in weekly markets and as a result of the aforesaid resolution and the intimation posted on the slaughter houses they have now been prohibited from selling meat in weekly markets. This has resulted in imposing restriction on their freedom to do their business in weekly markets. It has, therefore, to be first seen whether there is any valid law under which this restriction has been imposed, and if there is any valid law to sustain this restriction, then it would be necessary to see whether the restriction imposed was in the interests of the general public and whether it is reasonable.

Shri Bobde, learned counsel for the petitioners in these two petitions, in the first instance, contends that the action taken by the Corporation in prohibiting the petitioners from selling meat in weekly markets by merely passing a resolution and fixing an intimation on the slaughter houses was not within the competence of the Corporation as it is not authorised by any provision of the law. He says that these markets are of very ancient origin and to prohibit the sale of meat in these markets it is necessary for the Corporation to have a byelaw to that effect made. At any rate, he further contends that as byelaw No. 1 provides that the places where meat is to be sold are to be fixed with the previous sanction of the Deputy Commissioner—weekly markets being places so fixed for the sale of meat—it was necessary for the Corporation to have obtained sanction of the Deputy Commissioner before prohibiting the sale of meat in weekly markets. The Corporation not having done so, the action taken by it was illegal. In this connection reference was made to s. 20 of the O. P. and

1 [1952] A. I. R. S. C. 115, s.c. [1952] S. C. R. 572, 578.

Berar General Clauses Act. In the second instance, Shri Bobde contends that even if it is assumed that the action taken was under any provision of law, it was not taken in the interests of the general public but was taken purely for securing a financial gain to the Corporation. The Corporation has raised rents of meat stalls in two municipal meat markets and to secure customers for the stalls therein it is prohibiting sale of meat in weekly markets. In short, Shri Bobde's contention is that the action taken by the Corporation in prohibiting the sale of meat is *mala fide*. In the third instance, Shri Bobde contends that, at any rate, the restrictions imposed are not reasonable but are excessive. According to the Corporation authorities the sale of meat in weekly markets was prohibited to secure hygienic conditions for the sale of meat. The Corporation has contended that in weekly markets meat offered for sale was exposed to sun and rain, it was coming in contact with mud in the rainy season and thus caused its deterioration and to prevent this this action was taken. According to Shri Bobde, if that was the object in prohibiting sale of meat then the same thing could have been achieved by imposing a condition on the meat sellers in weekly markets that meat offered for sale should be stored in boxes covered on the top so as to prevent exposure of meat to sun and rain with a wire netting to the side to secure passage of free air and light to the meat. This could have been achieved without putting meat sellers to unnecessary expense. Now, if meat sellers have to carry on the business they would be required to hire six different stalls in six different markets. These stalls they could use only once or twice in a week and yet they would be required to pay Rs. 50 per stall per month. Even if they build their own stalls they would be required to build six stalls in six different markets and each stall might easily cost about Rs. 1,500. Thus the cost involved either in hiring stalls in six weekly markets or in building private stalls being exorbitant the meat sellers would be forced to stop their business. The restrictions, thus Shri Bobde contends, are not reasonable but are excessive.

Shri Phadke, learned counsel for the Corporation, on the other hand contends that the Corporation is authorised to prohibit sale of meat in weekly markets by passing a resolution under the provisions of s. 57(1)(m) of the City of Nagpur Corporation Act. He further contends that byelaw No. 1 only fixes the outer boundary of the market within the limits of which meat can be allowed to be sold. It does not fix the place within those limits where meat is to be allowed to be sold. The power to fix that place is contained in the byelaws framed under s. 179, sub-s. (1), cl. (b), of the C. P. Municipalities Act which are reproduced at page 64 of Part III of the Book styled as "Corporation of the City of Nagpur Byelaws framed by the Nagpur Municipal Committee." He contends that this place is fixed under byelaw No. 1 appearing at page 64 of the Book. For fixing such a place no sanction of the Deputy Commissioner is required. It was, therefore, not necessary for the Corporation to have obtained the sanction of the Deputy Commissioner to prohibit the sale of meat in weekly markets and it is under the provisions of byelaw No. 1 of the byelaws appearing at page 64 that the Corporation has prohibited the sale of meat in weekly markets. He further contends that even assuming that byelaw No. 1 at page 91 governed this case the provisions of s. 20 of the General Clauses Act had no application to the facts of the present cases as the byelaws framed under the Municipal Act is not a law. Therefore, though sanction of the Deputy Commissioner is required for fixing a place for the sale of meat, under the aforesaid byelaw No. 1, his permission is not required for its discontinuance. Shri Phadke faintly argued that what the Corporation has done is not to prohibit the sale of meat in weekly markets for all the time but the sale is only prohibited temporarily till such time as the Corporation is in a position to make adequate arrangements by building stalls therein for the sale of meat.

As regards the second contention of Shri Bobde, Shri Phadke says that the Corporation has not prohibited the sale of meat in weekly markets with a view

to achieve any financial gain. The conditions under which meat was sold in weekly markets were very unhygienic and it was only in the interests of the public health that the Corporation had prohibited the sale of meat in weekly markets. As regards the third contention Shri Phadke says that the restrictions imposed are not unreasonable, but, on the other hand, that is the only alternative to secure sale of meat in hygienic conditions.

The byelaws made for regulating the sale of meat appearing at page 91 of the book are made under the provisions of ss. 179(1), (b-1), (d) and (c), s. 180(a), (b), (c), (d) and (g) and s. 178(5) of the C. P. and Berar Municipalities Act.

It is common ground that there is no section in the Municipalities Act authorising municipal committees to regulate markets save and except by making byelaws and these byelaws could be made under the provisions referred to above. Section 57(1)(m) of the Corporation Act provides that the Corporation shall make adequate provision, by any means or measures which it may lawfully use or take, for each of the following matters, namely:

“(m) the construction and maintenance of public markets and slaughter-houses and the regulation of all markets and slaughter-houses.”

On the strength of this clause, the first contention of Shri Phadke is based. According to him, though under the Municipalities Act there was no provision empowering a municipal committee to regulate markets, apart from the provisions made in the byelaws, now under the Corporation Act itself cl. (m) of sub-s. (1) of s. 57 specifically confers a power to regulate markets on a municipal committee. The action of the Corporation in prohibiting sale of meat by passing a resolution was, therefore, an action authorised by law. It is not possible for us to accept the contention of Shri Phadke that s. 57(1)(m) confers a power on the Corporation to regulate markets merely by passing a resolution. What sub-s. (1) provides is that it empowers the Corporation to make adequate provision by any means or measures which it may lawfully use or take to regulate. What is intended by the Legislature in saying “by any means or measures which it may lawfully use or take”? To find an answer to this question it is necessary to turn to other provisions of law, and when we turn to s. 415(35) of the Corporation Act in general and to item (b) in particular, we find that it provides that the Corporation may, and if so required by the State Government shall, make byelaws in certain respects and cl. (35) relates to the management of municipal markets and the supervision of the manufacture, storage and sale of food and item (b) thereof specifically relates to the sale of meat. In our opinion, therefore, so far as it relates to regulating meat markets the means and measures which the Corporation can lawfully take in making adequate provisions for regulating it is by making byelaws in that respect and not by merely passing a resolution. It is a well-known rule of construction that where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention is considered an exception to the general one: (Maxwell on Interpretation of Statutes, 10th Ed., p. 172). No doubt, in s. 57(1)(m), general intention expressed is that the Corporation should make adequate provisions by any means or measures which it may lawfully use or take for regulating markets, but the particular intention of the Legislature as disclosed in s. 415, cl. (35), in general and in cl. (b) in particular makes it abundantly clear that the intention of the Legislature so far as it relates to the sale of meat is that it should be regulated by making byelaws, and this particular intention of the Legislature has to be construed as an exception to the provisions of s. 57(1)(m). Even assuming that s. 57(1)(m) conferred a power on the Corporation to regulate meat markets merely by passing resolutions and it was not obligatory upon the Corporation to make byelaws in that respect, it cannot be doubted that s. 415(35)(b) gave an option to the Corporation to make byelaws in that respect. The municipal committees had made byelaws regulating meat markets as appear at page 91 of the Book. Under sub-s. (2) of s. 3 of the Corporation Act these byelaws would be deemed

to be the byelaws made under the Corporation Act. That sub-section gave an option to the Corporation to alter, modify, cancel or suspend a byelaw. The Corporation has not chosen to do so. In these circumstances it will have to be assumed that though the Corporation had a right to regulate meat markets by making resolutions, it has by its own action circumscribed its alleged power under s. 57(1)(m) by making the byelaws and, therefore, the action which the Corporation could lawfully take in regulating meat markets could only be by acting under the byelaws and not by passing a resolution.

Looking at the case from another aspect, by allowing these byelaws to remain in force the Corporation has represented to the general public that it would regulate meat markets in accordance with those byelaws. It would not, therefore, be open to the Corporation to act in excess of the byelaws in regulating meat markets.

There is also another aspect to this case. Looking to the provisions of s. 415 it would be noticed that in respect of the items enumerated therein the State Government had a right to compel the Corporation to make byelaws in respect of any or more items contained in that section; sale of meat was one of such items. Had there been no byelaws in existence regarding the regulation of sale of meat, may be, that the State Government would have compelled the Corporation to make byelaws in that respect. It would be seen that the procedure for making byelaws is elaborate and consent of the Government to make byelaws is required. This in its turn affords a check on the action of the Corporation. By allowing the byelaws to remain in force the Corporation, so to say, has represented to the Government that it has made byelaws for regulating the sale of meat. On account of this the Government might not have called upon the Corporation to make byelaws relating to the sale of meat. The Corporation cannot now turn round and say that it would regulate meat markets irrespective of the provisions of the byelaws. In our opinion, therefore, it is not possible for us to concede in the instant case that the Corporation had any authority of law to regulate meat markets and prohibit the sale of meat in weekly markets by merely passing a resolution. The action of the Corporation in prohibiting the sale of meat in weekly markets cannot be therefore upheld under the provisions of s. 57(1)(m) of the Act.

The other ground on which Shri Phadke claims to sustain the action of the Corporation is the alleged power of the Corporation under byelaw No. 1 appearing at page 64 of the Book. Turning to the byelaws at page 64 it would be seen that they were made under s. 179, sub-s. (1), cl. (b) and s. 178(5) of the C. P. Municipalities Act II of 1922. It would be seen that the word 'markets' had been omitted from cl. (b) of s. 179(1) by the Amending Act of 1934 (the Central Provinces and Berar Act IV of 1934) and for the purpose of regulating markets a separate clause (b-1) was added by the same Amending Act. It, therefore, necessarily follows that it was not competent to the Municipal Committee to make byelaws regulating meat markets under cl. (b) of s. 179(1) of the Municipalities Act after the year 1934 and the byelaws which were made prior to the year 1934 for regulating markets would become redundant by the passing of the Amending Act of 1934. Byelaw No. 1 appearing at page 64 appears to be a byelaw made prior to 1934. It cannot, therefore, be relied on for regulating the sale of meat in meat markets. Byelaws appearing at page 91 are made in July 1939 and are specifically made under s. 179(1)(b-1) and it would, therefore, be these byelaws which would govern the regulation of meat markets. Further, even assuming that byelaw No. 1 appearing at page 64 is a valid byelaw, it is a byelaw in the nature of a general provision while byelaw No. 1 appearing at page 91 specifically deals with the regulation of the sale of meat and when there is a specific provision relating to a particular topic so far as that topic is concerned it would be that specific provision alone that would govern that topic and not a general provision. It is, therefore, not possible for us to uphold the action of the Corporation prohibiting the sale of meat on the strength of byelaws appearing at page 64.

of the book. It is also not possible for us to accept the contention of Shri Phadke that byelaw No. 1 appearing at page 91 fixes the outer limits of the market and not the place within that limit where meat is allowed to be sold. A mere reading of byelaw No. 1 repels this argument of Shri Phadke.

It is also not possible for us to accept the argument of Shri Phadke that it was not necessary for the Corporation to have obtained the sanction of the Deputy Commissioner for prohibiting the sale of meat in weekly markets. It would be seen that s. 419 of the Corporation Act provides that all byelaws and rules made by the Corporation shall have effect as if enacted in the Corporation Act. As already stated, the byelaws made by the municipalities have by virtue of the provisions of sub-s. (2) of s. 3 become byelaws made under the Corporation Act. They must, therefore, have the effect as if enacted in the Corporation Act. That being the position in law s. 20 of the General Clauses Act would in terms be attracted. Therefore, in the event the Corporation wants to discontinue sale of meat in weekly markets by issuing an order under byelaw No. 1 appearing at page 91, it will have to obtain a prior sanction of the Deputy Commissioner for issue of such an order. It is not the case of the Corporation that it had discontinued the sale of meat in weekly markets by issuing an order under byelaw No. 1 appearing at page 91; it is, therefore, not necessary to consider whether it would be within the powers of the Corporation to make such an order with the previous sanction of the Deputy Commissioner. It is also not possible for us to accept the contention of Shri Phadke that the sale of meat is only temporarily suspended in weekly markets till the Corporation is in a position to make adequate arrangements for the accommodation of meat sellers. This contention is not based on any plea raised in any of the returns filed by the Corporation and further the statement is too vague. We asked Shri Phadke as to the approximate time within which the Corporation expects to make necessary arrangements but we could get no definite answer from him. In these circumstances it is not possible for us to hold that the Corporation has not prohibited the sale of meat in weekly markets but has only suspended the sale in weekly markets.

It is also necessary to deal with one more contention raised by the Corporation in the pleadings and in arguments which is that it was not the intention of the Corporation to prohibit the sale absolutely in weekly markets and that was not the object with which the resolution dated March 28, 1958, was passed or intimation dated May 29, 1958, was posted on the slaughter houses. The intention of the Corporation was that meat should not be sold in weekly markets on the open ground as it was being done before, that it should be sold in built stalls which would afford protection to the meat against sun, rain, mud and flies, that the Corporation is ready and willing to grant licenses to those persons who are ready to build stalls in weekly markets and negotiations on this basis were carried on with the meat sellers but they were not willing to accept this condition and, therefore, the Corporation had to prohibit the sale of meat. Now, on the byelaws as they stand today, refusal to build stalls for selling meat is not one of the grounds on which licenses to sell meat could be refused. The Corporation, therefore, as the matters stand today, had no authority in law to put such a condition for the granting of licenses to meat sellers to sell meat in weekly markets.

For the reasons stated above, in our opinion, the first contention of Shri Bobde must succeed. The action of the Corporation in prohibiting the sale of meat in weekly markets not being authorised by law has to be struck down.

In view of our finding on the first question it is not necessary to express ourselves on the second and third question. However, we find that the *bona fides* of a public body, the Corporation, are challenged and therefore we think it necessary to express ourselves on the second question raised by Shri Bobde relating to the *bona fides* of the Corporation. As already stated the contention of Shri Bobde is that the action of the Corporation was with a view to secure

a financial gain and was not in the public interests, while, according to Shri Phadke, the action taken was to secure sale of meat under hygienic conditions. The contention raised by Shri Bobde in arguments has no foundation in the pleas raised by the petitioners. On the other hand the plea in the words of the petitioners is:

"In confining the sale of meat to the markets owned by the Corporation the Corporation is using *mala fide* the powers given to it by byelaws for maintaining sanitary conditions in the market for the purpose of its own enrichment by creating in its favour a monopoly of meat markets. At these meat markets the Corporation adopts a policy of getting maximum revenue from persons desiring to have stalls by putting the stalls to auction or by fixing a so-called license fee for the use of the stalls on the basis of the estimated profit that the stall holder is able to make from the stall. These stalls are beyond the capacity of an ordinary meat seller to take and the policy of the Corporation serves to enhance the price of meat to the detriment of public interest." (Para. 13 of Sp. C.A. No. 196 of 1958).

It is therefore clear that it was known to the petitioners that the Corporation was claiming that the action taken by it was for maintaining sanitary conditions in the markets and it is the case of the petitioners that that stand of the Corporation was *mala fide*. Now, the plea raised by the Corporation was that the sale of meat in weekly markets was carried on in very insanitary conditions and it is for this reason that this action was taken. The plea raised by the Corporation finds support in the pleas raised by the petitioners themselves. The conditions prevailing in weekly meat markets in the words of the petitioners are:

"The market is held on open plots of land without any construction of pavement, platforms, flooring, roof or any protection from sun, rain, mud, flies or encroaching dogs. Meat is exhibited for sale on ground which becomes muddy whenever rain falls and people are required to purchase meat in that condition. When any considerable rain falls selling becomes impossible and the sellers are put to great losses because much meat remains unsold and becomes unfit for sale unless heavy costs are incurred for its preservation. The only exceptions to this are that in Budhwari Market platforms for sale are constructed, floor is paved and the place is screened by old iron sheets. In Mangalwari market platforms are constructed for sale though their number is not adequate." (Para. 13 of Sp. C.A. No. 286 of 1958).

If these be really the conditions, and on admission of the petitioners they are the conditions prevailing in the markets, it cannot be said that the action of the Corporation in prohibiting the sale of meat was *mala fide*. True, we have held that the action taken by the Corporation in prohibiting the sale of meat in the instant cases has to be set aside but that is only because the action impugned in these petitions was taken merely by passing a resolution and by posting an intimation on the slaughter-houses which was not authorised by law. It should not be understood that we are of view that the present insanitary conditions should continue. It will be open to the Corporation to take adequate steps to remove the present insanitary conditions under due authority of law.

Turning now to Special Civil Application No. 222 of 1958, as already stated, this is an application by 42 persons who had been selling meat in stalls in Hansapuri and Machhisath markets. Their only grievance is against the increased rent. The increase is from Rs. 5 and Rs. 9 to Rs. 20 and Rs. 25 per stall per month and from Rs. 3 to Rs. 6 per *kona* per month. Relying on the provisions of byelaw No. 3 of the byelaws appearing at page 64, it is contended by Shri Bobde that under this byelaw the Corporation was entitled to charge only a fee for the use and occupation of the stalls. Under law the fees have to be commensurate with the services rendered by the Corporation to the stall holders. No additional service is rendered by the Corporation or was proposed to be rendered to the stall holders when it increased the fees, by the resolution dated March 28, 1958. Reliance is placed by Shri Bobde on the decision of the Supreme Court reported in *The Commissioner, Hindu Religious*

*Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*² Shri Bobde contends that if we look to the resolution dated March 28, 1958, it is clear that it was passed only with a view to augment the finances and it was never in contemplation of the Corporation to render any additional service. It is, therefore, not open to the Corporation to say that the fees have been raised as the former fees were not commensurate with the services rendered or that the Corporation had intended to render some additional service to the meat sellers. Shri Bobde further contends that the defence raised by the Corporation that the fees fixed by the resolution dated March 28, 1958, were commensurate with the services rendered is *mala fide*. Shri Phadke, on the other hand, contends that though the word used in byelaw No. 8 is fees it is not a fee in the legal sense. It is in reality a rent. The Corporation is, therefore, free to charge by way of rent any amount as it likes to the stall holders. Shri Phadke further contends that though this is the right of the Corporation it, in fact, does not charge anything more than that which is commensurate with the services rendered by the Corporation to the stall holders. In support of this contention, Shri Phadke referred us to various facts and figures appearing in the returns as well as schedules which he filed before us. It is first necessary to see whether the amount which the Corporation is authorised to demand for the occupation of its stalls is, in law, a fee, or rent.

It is common ground that the fees fixed by the resolution of March 28, 1958, were under the powers conferred on the Corporation by byelaw No. 8 appearing at page 64. That byelaw reads thus:

"3. (a) Fees shall be charged for the use of shops and stalls in any market, such fees being determined in the manner following.

(b) Every year in the month of March, the shops and stalls in any market shall be leased out for one year beginning with the 1st of April next following.

(c) The fees payable for the lease shall be settled by public auction or in such other manner as may be determined by the market sub-committee."

Reading these three clauses of byelaw No. 3 together it would be noticed that the so-called fees is only a charge for the use and occupation of the stalls that are leased by the Corporation to the occupiers and one of the modes by which the fees are fixed is by auction. These factors clearly indicate that what the Corporation is authorised to charge is a sum for the use and occupation of its property under the byelaw and the word fees is used in that sense and not in the legal sense as a charge for any special service rendered to an individual by some governmental agency or public body.

Turning to the provisions of the Municipal Act, s. 87 thereof provides for the incorporation of the municipal committee and confers powers on the municipal committee to acquire and hold property both, movable and immovable. Section 38 enumerates the items of properties that vest in the municipal committee and cl. (a) of sub-s. (1) of s. 38 shows that 'market' is one of the items of properties that vest in the municipal committee. Section 42 confers absolute power on the municipal committee to lease its immovable property for a period of three years. Sub-section (2) of s. 70 empowers the municipal committee to charge such fees as will be fixed by byelaws for the use of any building or land belonging to, or under the control of, the committee. Looking to all these provisions it appears that the word 'fees' is used in connection with occupational charges for the occupation of the municipal property and not in connection with any services that the municipality may render to the occupiers of its property.

Turning now to the provisions of the Corporation Act, s. 8 thereof empowers the Corporation to hold property both movable and immovable. Section 73 enumerates the property that vests in the Corporation and municipal markets is one of the items of property that vests in the Corporation. Section 70(2)(a) empowers the Chief Executive Officer of the Corporation to grant leases of immovable property belonging to the Corporation subject to certain restrictions

which are contained in sub-a. (1) of that section. Section 78 enumerates the items that are credited to the municipal fund and rent accruing from the property of the Corporation is one of the items going towards the constitution of the municipal fund. Considering all these provisions of the statute and the aforesaid byelaws, in our opinion, what the Corporation is empowered under the Act and the byelaw is to charge an amount for use and occupation of its property and not fees in the legal sense, i.e. charges for the service which is rendered by the Corporation to the occupiers of that property. This, however, does not mean that it is open to the Corporation to charge or claim any amount it likes as rent for the occupation of its property like markets, stalls etc. It is an accepted principle in the American law that though municipalities may require the payment of fees from those occupying stands or stalls in a public market the charge has to be reasonable. In 64 *Corpus Juris Secundum*, page 316, paragraph 1829 under the heading "Permits and Licenses" it is observed:

"...Municipalities may require the payment of a reasonable amount as a license fee from those occupying stands or stalls in a public market, even under the general power of regulation and control, unless restricted by statute. Charges for licenses or market privileges must, however, be reasonable and without discrimination, and cannot be imposed as a means of raising revenue; but the requirement of a reasonable license fee is not objectionable as a tax for revenue...."

There can be no doubt that this principle, at any rate, would come into play when the Corporation is seeking to have a monopoly of the markets as in the instant case. As already stated, the combined effect of the resolution of March 28, 1958, and the intimation issued is that meat sellers are now left with no option but to go to the stalls erected by the Corporation. Whether this was intended or not, the action taken by the Corporation had resulted in creating a monopoly in its own favour. The Corporation, therefore, could not have claimed any fees it liked for the use and occupation of its stalls but the charges must be reasonable.

It is indeed true that the complaint of the petitioners is that the fees demanded by the Corporation for the occupation of the stalls in Hansapuri and Machhisath are exorbitant, but these allegations of the petitioners are denied by the Corporation and it is the claim of the Corporation that it is not charging anything more than what is required for providing various amenities and services which are required to be maintained for maintaining the meat markets. It says that it requires the services of the various departments like, the Construction Department, Sanitary Department, Public Health Department, etc. for regulating the markets and it is to meet these expenses and to find finance for improving the markets that the charges are increased. It is also a contention of the Corporation that the increase in the charges made for Hansapuri and Machhisath markets was made only with the intent to bring the fees on par with those on other markets. The fees are not in any manner exorbitant. This aspect of the case, in our opinion, can only be decided on recording elaborate evidence on this question. An opportunity will have to be given to the parties to substantiate their respective cases if so desired by them. It will not, therefore, be possible to decide this question in these proceedings. We, therefore, do not decide this question here. It will be open to the petitioners to institute a suit, if they so desire and if they are so advised, to get redress against this alleged grievance. In this view of the matter, Special Civil Application No. 222 of 1958 must fail.

As regards Special Civil Application No. 243 of 1958, as already stated, this application is by five persons who want to do business of selling meat outside the places fixed by the Corporation. As already stated, those places are weekly markets, municipal meat markets and municipal *nakas*. It is the case of the petitioners that they had applied for licences to sell meat and in their applications had stated their preference of the places where they wanted to do the business. The applications of petitioners Nos. 2 to 5 were rejected on the ground

that no space was available to them. The application of petitioner No. 1 Yadavrao, however, has not been disposed of. Shri Jayawant, learned counsel for the petitioners, contends that it is not open to the Corporation to refuse a licence on the ground that there is no place for the petitioners to do their business. He says that it is the bounden duty of the Corporation to provide market places. The Corporation must therefore provide places for all those who desire to do business of selling meat. The Corporation in refusing to grant licences has failed to perform its duty. He further contends that byelaw No. 1 and cls. (i) and (ii) of byelaw 14, are *ultra vires* of the Constitution inasmuch as they are unreasonable restrictions on the right guaranteed to a citizen to do his business by art. 19(1)(g) of the Constitution. It is not possible for us to accept any of these contentions raised by Shri Jayawant. We have already summarized the position in law relating to the right conferred on a citizen under art. 19(1)(g) of the Constitution and we have stated that that right could be restricted by a valid legislation provided that legislation is in the public interest and the restrictions imposed are reasonable. Here, the restrictions impugned are imposed under the byelaws appearing at page 91 of the book. As already stated, these byelaws under the provisions of s. 419 of the Corporation Act have to be taken as part of the Act itself. The restrictions imposed by the byelaws would therefore be restrictions imposed by law. It cannot be denied that the regulation of the sale of meat is in the interest of general public. Meat is a commodity which easily degenerates and therefore special care and supervision have to be exercised over its sale. It is, therefore, beyond doubt that the regulation of the sale of meat by confining it to certain fixed places is in the public interest, otherwise there is a likelihood of stale and unwholesome meat being sold to the meat-eating public and thereby adversely affecting their health. Byelaw No. 1 restricts the sale of meat to the places fixed under that byelaw and, in our opinion, it is necessary to so fix such places as it is necessary to examine meat before it is offered for sale and see that unwholesome meat is not sold. Further, a check has also to be kept throughout the day that the meat which gets deteriorated during the course of the day is not thereafter offered for sale. Unless sale is confined to certain places such a check cannot be effectively exercised.

We may here usefully reproduce relevant observations in 64 *Corpus Juris Secundum* at pages 317 to 319:

"...The municipality may enact any reasonable regulation necessary to preserve the cleanliness of market places, may confine the sale of particular articles to certain designated stands or portions of the market and prevent their sale elsewhere..."

"As a general rule a municipal corporation may prohibit by ordinance or by byelaw the sale of marketable articles within certain limits or during certain hours except at the established market, and it is within the power of the Legislature to authorise municipal corporations to do so..."

"It seems to be uniformly held that under a power to regulate the vending of meats, etc., a municipality may prevent their being retailed outside the public markets."

The claim of the petitioners is that they must be allowed to do business at places outside the places fixed for the sale of meat. This demand of the petitioners cannot be conceded. It would be very difficult for the Corporation to keep a check over such persons who would be scattered all over the City of Nagpur which in its turn would result in the possibility of a danger to the health of the meat-eating population of the city. Now, when the sale of meat has to be confined to certain places, it would necessarily follow that the accommodation available in those fixed places would be limited. Clause (ii) of byelaw 14 which empowers the Corporation to refuse a licence on the ground that there is no place or stall in the meat market available for the applicant cannot by itself be said to be an unreasonable restriction on the right of the petitioners to do business. It is true that the Corporation must make adequate provision to meet the demands of the city relating to the sale of meat. Whether the arrangements made are adequate or not must be judged in the light

of the demand both of the sellers and that of the consumers of meat in the City of Nagpur. If these arrangements are not correlated to the demand and the places for the sale of meat are fixed in excess of the demand of the consumers to please the sellers, the possible result that would follow would be that the meat brought to the market would not get sold at the end of the day and this would naturally result in stale meat being clandestinely sold to the consumers. It is next to impossible to keep a watch over each and every seller of meat if selling of meat is allowed at places chosen by the sellers. It is true that it is the case of the petitioners that the places provided by the Corporation for the sale of meat are not even adequate considering the demand of the consumers. The allegation of the petitioners has been denied by the Corporation. It is, therefore, not possible for us to place absolute reliance on the allegation of the petitioners. It has not been shown to us that there has been any general agitation by the consumers or even by the sellers that the places which had been so far fixed for sale of meat had not been adequate to meet the demand of the consumers of the city. The challenge of the petitioners to the *vires* of the byelaw No. 1 and cl. (i) of byelaw No. 14 on the ground of the alleged restrictions on the petitioners' right to do business must, therefore, fail.

As regards cl. (i) of the byelaw No. 14, Shri Jayawant contends that in that clause very arbitrary powers have been conferred on the officers concerned which are likely to be abused by them. Clause (i) of that byelaw provides that a licence could be refused to an applicant on the ground that he is a bad character or suffering from any contagious or infectious disease. Nowhere in the byelaws, it has been defined what "bad character" means or what is meant by a contagious or infectious disease. The officer concerned may even call cold a contagious disease and may refuse licence on that ground of cold. This clause is, therefore, bad in law.

It is true that the terms "bad character" and "contagious or infectious disease" are not defined in the byelaws but then it must be assumed that the officer concerned would understand these terms as they are generally understood by any reasonable person and that he would not be capricious and arbitrary in deciding the application for the grant of a licence. It is to be noticed that the Act makes a provision for an appeal against the decision of a subordinate officer of the Corporation. Maybe, that some officers in certain cases may act capriciously or arbitrarily but then there is an adequate provision made in the Act to get their orders set aside by way of an appeal. In these circumstances this contention of Shri Jayawant also must fail.

The test to be applied in considering whether the restrictions imposed by law are reasonable or not within the meaning of cl. (6) of art. 19 of the Constitution is laid down by a Division Bench of this Court in *C. B. H. Ready-money Ltd. v. State of Bombay*.³ In our opinion, it is well summarised in the first placitum of the report:

"When a Legislature imposes restrictions upon the fundamental rights of a citizen, the Court must not judge these restrictions by any absolute standard. Whether the restrictions are reasonable or not must largely depend upon what is the object the Legislature is seeking to achieve by legislation and what is the mischief it is aiming at. If the restrictions are necessary and essential in order to achieve the object and to remove the mischief, then ordinarily the Court must uphold those restrictions. To the extent that the restrictions go beyond the necessity for achieving the object or removing the mischief, the restrictions would be unreasonable. Only those restrictions are permissible which are in the interests of general public. If the law which is passed and the policy which is sought to be enforced is in the interests of the general public, then any restriction which makes it possible to enforce the law must equally be in the interests of the policy. It would be erroneous to consider every restriction from the point of view of some vague and indefinite standard which might be set up as to personal liberty and individual rights. Personal freedom and the rights of the individual must be cir-

cumscripted by what the Legislature considers to be in the interests of the general public."

Applying this test to the facts of this case for reasons above, in our view, the restrictions imposed by byelaw No. 1 and cls. (i) and (ii) of byelaw 14 are not liable to be struck down on the ground of unreasonableness. We are aware that when the applications of petitioners Nos. 2 to 5 for the grant of licences were refused the Corporation was not intending to grant licences to sell meat in the weekly markets. We are also aware that the application of petitioner No. 1 has not yet been decided. As a result of our decision it would be now open to the sellers who are desirous of selling meat in the weekly markets to apply for licences. We, therefore, asked the petitioners whether they would like to apply for licences to sell meat either in the weekly markets or in the stalls in the municipal markets. Shri Jayawant states before us that the petitioners are not desirous of doing business of selling meat in the weekly markets as the conditions under which meat is sold there are not suitable to them. He also stated that the fees demanded by the Corporation for selling meat in the municipal stalls in the municipal markets are beyond the means of the petitioners. Their demand is that they should be granted licences to sell meat at places of their choice or otherwise but outside the places fixed by the Corporation. In these circumstances and for the reasons stated above it is not possible for us to concede to this demand of the petitioners and the petition must, therefore, fail.

In the result Special Civil Applications Nos. 198/58 and 286/58 succeed. Intimation dated May 29, 1958, issued by the Corporation under the signature of the Market Superintendent and posted on the slaughter-houses is hereby quashed. The Corporation is directed not to give effect to the resolution made on March 28, 1958, so far as it relates to the prohibition of grant of licences to the persons desirous of selling meat in the weekly markets. The Corporation is further directed to consider and dispose of the applications, if any already made, or such as may be made hereafter, for licences for the sale of meat in the weekly markets in accordance with law. Costs of these petitions shall be paid by the Corporation. Only one set of counsel's fee is allowed.

Special Civil Application No. 222 of 1958 fails and is dismissed. We, however, make no order as to costs as the question about the alleged exorbitant nature of the fees demanded by the Corporation for the occupation of the stalls is not decided by us.

As regards Special Civil Application No. 243 of 1958 it fails and is dismissed. Taking into consideration the alleged poor circumstances of the petitioners we make no order as to costs.

Order accordingly.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Tarkunde.

GULABCHAND NANHOOLAL PRAKASH v. FULCHAND HIRACHAND PARAKH.*

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 10(1)(2)(3), 11(2), 5(2)—Decree made without formal order of appointment of next friend where minor one of plaintiffs or appellants—Whether such decree a nullity—Applicability of O. XXXII, r. 10(1).

A decree made without a formal order of appointment of a next friend in a case where a minor was one of the plaintiffs or appellants, does not amount to a nullity merely on the ground of failure to appoint a next friend of the minor.

*Musammatt Bibi Wallan v. Banke Behari Persad Singh*¹, applied.

*Krishnappa v. Raju*², *Venkateswara v. Ravunni*³ and *Pulin Chandra v. Muzaffar*⁴ distinguished.

*Kamalakshi v. Ramasami Chetti*⁵, *Suleman v. Abdul Shakoor*⁶ and *Venkatrav Raje Ghorpade v. Madhavrav Ramchandra*⁷, referred to.

Order XXXII, r. 10(1), of the Civil Procedure Code, 1908, is attracted only when the fact of the death of the next friend is brought to the notice of the Court.

THE facts appear in the judgment.

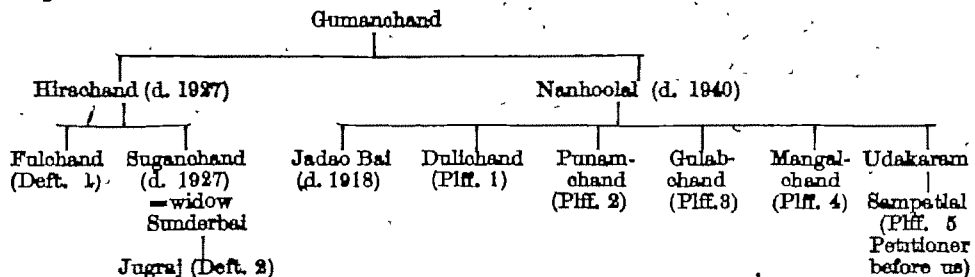
A. L. Halve, for the appellant.

A. D. Mande, for respondent No. 1.

K. A. Potey, for respondent No. 2.

TAMBE J. This application is made by Sampatlal under s. 151 of the Civil Procedure Code for the rehearing of First Appeal No. 39 of 1946 decided by a Division Bench of the then High Court at Nagpur on December 30, 1954. Though it is not so stated in the application Shri Halve, who appears before us for Sampatlal, contends that the decision of the Nagpur High Court and the decree made in that appeal were null and void on account of a procedural defect.

It is necessary to set out certain facts in detail. The suit out of which this appeal arises is between the members of two branches of the family which at one time were joint. The following family tree would disclose their relationship:



It would be seen that the present applicant was plaintiff No. 5 to the original suit. It is not disputed before us that Dulichand, Punamchand, Gulabchand, Mangalchand and Sampatlal formed a joint Hindu family of which Dulichand was the *karta* during his lifetime. These members of the joint family instituted a suit against the male members of the other branch for the recovery of certain property which was alleged to have been left behind by Jadao Bai. The plaintiffs' case was that after the death of Jadao Bai, Nanhoolal succeeded to that property. That property, however, was kept by Nanhoolal in deposit with Ful-

*Decided, October 25, 1958. Civil Application No. 306 of 1958.

1 (1903) L. R. 30 I.A. 182, a.c. 5 Bom. L.R. 823.

2 [1917] A.I.R. Mad. 969.

3 [1915] A.I.R. Mad. 461.

4 [1933] A.I.R. Cal. 508.

5 (1895) I.L.R. 19 Mad. 127.

6 [1941] Nag. 785.

7 (1886) I.L.R. 11 Bom. 58.

chand. After Nanhoolal's death, the plaintiffs succeeded to that property and demanded its return from Fulchand. But as Fulchand refused to hand over possession of the property they instituted this suit for obtaining possession thereof. In the suit Dulichand acted as a next friend of the present applicant Sampatlal. Sampatlal was at that time said to be about 7 years old. The suit was instituted in the year 1944. It failed in the trial Court and was dismissed on November 12, 1945. An appeal was preferred to the Nagpur High Court by the plaintiffs against the judgment and decree of the trial Court. Dulichand at that time was alive and acted as a next friend of Sampatlal in the appeal. It appears that both Dulichand and Punamchand, original plaintiffs Nos. 1 and 2, died some time prior to 1954. We should have mentioned earlier that the appeal was presented by Shri A. L. Halve on behalf of all the plaintiffs.

On January 4, 1954, an application was made to the Nagpur High Court by Shri Halve on behalf of the remaining appellants Gulabchand, Mangalchand and Sampatlal stating therein that Dulichand was dead and, therefore, his name be struck off. Shri Halve also made another application on March 17, 1954, stating that plaintiff No. 2 Punamchand was also dead and, therefore, his name should be struck off. Both these applications were dealt with in the Registry of the Court and the Registrar by his orders dated February 3, 1954, and July 21, 1954, ordered deletion of the names of Dulichand and Punamchand respectively.

The appeal came up for hearing before the Court on October 13, 1954, and was heard on that date and on subsequent dates, October 14, 1954, and October 15, 1954, and the judgment was delivered on December 30, 1954. This appeal was also argued by Shri Halve on behalf of all the appellants. It was not pointed out by him at the hearing that on account of the death of Dulichand and continuing minority of Sampatlal it was necessary to appoint a next friend of Sampatlal nor was it stated before the Court by Shri Halve that he was not appearing for Sampatlal. The appeal proceeded on the footing that Shri Halve was arguing the appeal for all the appellants. The appeal was dismissed by the Nagpur High Court and the decree was signed by Shri Halve on January 7, 1955. On March 30, 1955, an application for leave to appeal to the Supreme Court was made in the High Court by Gulabchand, Mangalchand and Sampatlal. On this date Sampatlal had not attained majority and Gulabchand in these proceedings acted as his next friend. Sampatlal attained majority on February 11, 1956, and then nearly after two years Sampatlal has made this application under s. 151 of the Civil Procedure Code for the rehearing of the appeal.

The contention of Shri Halve is that the decision of the appeal by the High Court and the decree made thereunder are null and void on account of non-appointment of a next friend of Sampatlal. According to Shri Halve, it was obligatory on the Court under O. XXXII, r. 10(1), of the Civil Procedure Code to have kept the appeal pending till the appointment of a next friend of Sampatlal was made. The Court not having done so its decision and the decree made are nullity. Reference is also made by Shri Halve to the decisions in *Venkatrav Raje Ghorpade v. Madhavrao Ramchandra*,¹ *Krishnayya v. Raju*,² *Pulin Chandra v. Musaffar*³ and *Venkateswara v. Ravunni*.⁴ We find it difficult to accept Shri Halve's contention.

It is indeed true that r. 10(1) of O. XXXII provides that on retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place; but this rule, in the case of death of next friend, would be attracted only when the fact of the death of the next friend is brought to the notice of the Court. As stated above, it was not brought to the notice of the Court, when the appeal came up before the Court on October 13, 1954, by Shri Halve that Sampatlal was still a minor; that his next friend Dulichand was dead and that, therefore, it was necessary

¹ (1886) I.L.R. 11 Bom. 33.

[1917] A.I.R. Mad. 969, 970.

² [1933] A.I.R. Cal. 508.

⁴ [1915] A.I.R. Mad. 461, 462.

to get another person appointed as a next friend in his place. The facts stated above clearly indicate that Shri Halve well knew that the next friend of Sampatlal was dead. In fact, he had even applied after the death of Dulichand, the next friend of Sampatlal, not only on behalf of Gulabchand and Mangalchand but also on behalf of Sampatlal that Dulichand's name should be removed. It was not stated in that application also that Sampatlal was then a minor and, therefore, it was necessary to get another person appointed as a next friend in place of Dulichand. Had Shri Halve stated this or in any other manner brought to the notice of the Court that Sampatlal was a minor on the date the appeal was heard, certainly the Court would have stayed the hearing of the appeal and awaited an application under O. XXXII, r. 10(2) for appointment of a next friend for minor Sampatlal. It would be seen from the provisions of that sub-rule that, in the first instance, the pleader of the minor is expected to make such an application.

We are not now concerned with the stay of the hearing of the appeal but with altogether a different question, and that question is whether the decree made in the appeal is a nullity. In our view there is a difference between a decree obtained against a minor without appointing a guardian for him and a decree made in a suit brought by a minor plaintiff, without he being represented by a next friend. Provisions of O. XXII, r. (3), and O. XXXII, r. 11(2), of the Civil Procedure Code impose a duty on the Court to make an order of appointment of a guardian for the minor defendant when the fact of his minority becomes known to the Court. This duty has to be performed by the Court irrespective of any application for appointment of a guardian of the minor defendant. There is no such duty imposed on the Court in a case of a minor plaintiff. On the other hand it appears that it is expected of the pleader or of the person who institutes a proceeding on behalf of the minor to see that the name of the minor's next friend is shown on the record; failure of which might render him liable in costs. The decree made in a suit against a minor defendant without appointing a guardian for him may, therefore, on account of failure to perform an imperative statutory duty on the part of the Court, amount as a general rule to a nullity, but such would not necessarily be the case when a suit instituted by or on behalf of a minor without mention of his next friend on record is decided by a Court. In our view, the provisions of O. XXXII, r. 2 make the position clear. Rule 2 of O. XXXII provides that where a suit is instituted by or on behalf of a minor without a next friend the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. In the event the defendant fails to raise this objection and the suit proceeds and a decree is made that decree is not a nullity; see *Kamalakshi v. Ramasami Chetti*⁵ and *Suleman v. Abdul Shakoor*.⁶

Sub-rule (2) of r. 5 of O. XXXII provides that every order made in a suit or on any application before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader. True that this sub-rule does not in terms apply to a decree but applies to an order made in a suit either on an application or otherwise. In our opinion, there is no reason why the principle underlying this sub-rule should not be applicable even where a decree has been made in a suit by a minor plaintiff, without a next friend. The principle is that every order made in a suit either on an application or otherwise in the absence of an appointment of a next friend or guardian of a minor is not necessarily a nullity. Undoubtedly, it is in the discretion of the Court to discharge such an order when a proper case is made out but it is not obligatory on the Court to do so. In our view, therefore, it is not possible for us to hold that the mere

⁵ (1895) I L.R. 19 Mad. 127.

⁶ [1941] I.L.R. Nag. 725.

failure to get a next friend appointed for the then minor Sampatlal appellant after the death of Dulichand would render the judgment delivered by the Nagpur High Court and the decree made thereunder null and void.

It is well settled that the Courts should take care of the interests of the minors and we are well aware of the principle. We would not have hesitated to set aside this decree on a proper case being made out, but in the instant case, it is not even alleged in the application that the interests of Sampatlal have in any manner suffered or that prejudice has been caused to him on account of the absence of an order by the Court appointing a next friend of Sampatlal. As already stated, Sampatlal was at the material time a member of a joint Hindu family and it is admitted before us that he is even now a member thereof. On the date of the hearing of the appeal, Gulabchand, being its eldest male member, was the *Karta* of the joint family and was his guardian. Gulabchand was on record and was actually prosecuting the appeal. Another adult member of the family, Mangalchand, was also on record and was prosecuting the appeal. Shri Halve was engaged as counsel to argue the appeal on behalf of all the appellants. Even Dulichand, when he was alive, had engaged Shri Halve to conduct the appeal not only on his own behalf but also on behalf of Sampatlal. The appeal was argued by Shri Halve on behalf of all the appellants on record. It has not been stated in the application before us nor has it been argued before us that had there been an appointment of a next friend of Sampatlal he would have engaged another counsel or that Shri Halve would have urged some other points than were urged by him in the appeal. In fact, we find that subsequent to the decision of the appeal an application was made to the Nagpur High Court for a certificate to enable the appellants to file an appeal to the Supreme Court and in that application Gulabchand was shown as the next friend of Sampatlal. In these facts and circumstances of the case we are satisfied that no prejudice at all has been caused to the minor Sampatlal on account of the absence of a formal order appointing a next friend for Sampatlal after the death of Dulichand. On the other hand, we are satisfied that his interests have been effectively represented and have been adequately safeguarded in this case by his guardian Gulabchand and the counsel Shri Halve appearing in the case. The principle underlying a minor plaintiff being represented by his next friend or appointment of a guardian of a minor defendant is that a minor being incapable of taking adequate steps to safeguard his interests some adult person should guard his interests. This object has been fully achieved in this case. Even in a case of a decree made against a minor defendant where it is found that the interests of a minor defendant have been adequately safeguarded by his guardian, though he was not formally appointed by the Court as his guardian, their Lordships of the Privy Council have refused to interfere with the decree made. In *Mussamat Bibi Walian v. Banko Behari Pershad Singh*⁷ their Lordships observed (p. 189):

"Their Lordships are unable to concur in the conclusion at which the learned judges arrived. The present plaintiffs were substantially sued in the former suit, and the alleged fraud has been negatived. It appears to their Lordships that they were effectively represented in that suit by their mother, and with the sanction of the Court; and for the reasons given by the First Court their Lordships attach no importance to the certificate of Durga Dutt. There is nothing to suggest that their interests were not duly protected. The only defects which can be pointed out are that no formal order appointing the mother of the now plaintiffs to be their guardian *ad litem* is shewn to have been drawn up; and that it is not definitely shewn that any attempt was made to serve the summons in the former suit upon the infants personally, or upon their mother..."

In our opinion, these observations would equally apply in the instant case. Here, the interests of minor Sampatlal are adequately safeguarded and effectively represented by his *de facto* and *de jure* guardian Gulabchand who had

engaged Shri Halve as counsel and who had also been engaged for the minor by his former next friend Dulichand. Shri Halve had not stated before the Court that he had ceased to appear for Sampatlal. It can be safely assumed that he continued to represent the then minor Sampatlal because he was so instructed by Gulabchand. No case is therefore made out of any prejudice having been caused to the minor. On the other hand, we feel that to allow such an application would be unjust to the respondents. It cannot be said that the decree is a nullity so far as the interests of Gulabchand and Mangalchand are concerned who were majors. But what has been asked for is setting aside of the entire decree on the ground that a next friend was not appointed for Sampatlal. In our opinion, it is not open to Sampatlal to ask such a relief.

Further, it was open to him to make an application for review if at all there was any substance in the contention raised by him and pray that the decree be set aside so far as his own interest was concerned in the suit property. Limitation for a review application is only 90 days. Admittedly two years prior to this application Sampatlal had attained majority. No reason is given why a review application was not filed on the ground of an alleged apparent mistake on the record; viz. non-representation of him by a next friend. The period prescribed for a review application has long since elapsed.

This brings us to the decisions referred to us by Shri Halve in the course of his argument.

Venkatrav Raje Ghorpade v. Madhavurav Ramchandra, in our opinion, has no relevance to the question raised. It relates to the validity or otherwise of the appointment of the person who had instituted the suit as an agent on behalf of the plaintiff.

Krishnayya v. Raju is distinguishable on facts. In that case reopening of the decree was not asked for by the minor by way of an application under s. 151 of the Civil Procedure Code, but a regular suit was filed for setting aside the previous decree passed against the minor in a former suit. The case of the minor was that in the former suit to which he was a defendant a decree was passed against him by the trial Court. He then appealed through his guardian *ad litem* to the appellate Court. During the pendency of the appeal his guardian *ad litem* died. No appointment of a guardian *ad litem* for the minor was thereafter made and the appeal was decided while he was unrepresented, and on this ground it was claimed that the decree made in the former suit against him was a nullity. The contention raised by the minor failed in the trial Court. The minor took an appeal against the decree of the trial Court to the Subordinate Court and the contention of the minor succeeded. An appeal was taken against the decision of the Subordinate Court to the High Court by the opposite party and it was contended that the omission to get a next friend appointed for the minors in the prior proceedings at the appellate stage was a mere irregularity. The argument advanced was founded on the difference between the appointment of a next friend of a minor plaintiff and the appointment of a guardian *ad litem* for the minor defendant. It was contended that in the former proceedings in the trial Court there was a guardian *ad litem* appointed for the minors who were defendants. In appeal they were properly represented by that guardian. It is only during the pendency of the appeal arising out of the former suit that the guardian *ad litem* had died and no fresh appointment was made. This according to the contention raised was on the same footing as no appointment of a next friend of the plaintiff and was therefore a mere irregularity. This contention, however, was negatived by the High Court. In negativing the contention Sadasiva Aiyar J. observed (p. 971):

"...It might also be conceded that minor defendants who are appellants stand in some aspects in the position of plaintiffs and the guardian *ad litem* of minor defendants-appellants is, in some respects, in the position of the next friend of minor plaintiffs:

Shapurji Hormasji v. Monasseh Jacob. But this is not so in all respects and for all purposes: see *Venkata Chandrasekhara Raz v. Alakaramba Maharani*, where it was held that the guardian ad litem for the defendant in the lower Court is alone entitled to appeal and nobody else could, on the analogy of the next friend of a plaintiff, prefer the appeal without a proper appointment of himself as guardian by the Court after the removal of the original guardian ad litem.

On the question we have now to consider, namely whether a decree passed in appeal against minor appellants (who were defendants) is valid without their having been legally represented, the above argument based on the difference in procedure in some respects between the cases of minor plaintiffs and minor defendants seems to me to be of no help."

In our opinion, the decision in this case would, therefore, be of no avail to the applicant Sampatlal before us inasmuch as he was a plaintiff in the original Court and also an appellant before the Nagpur High Court in appeal.

Venkateswara v. Ravunni is also distinguishable on facts. The facts in that case were that a suit was instituted in 1905 on behalf of the minor by his next friend. Some time thereafter the next friend of the minor died. On October 26, 1906, the Munsif declared that the suit abated in consequence of the death of the next friend. The minor on attaining majority moved the Munsif's Court in 1912 to set aside the order of abatement. This application was rejected by the Munsif. He, therefore, instituted a regular suit claiming therein the same reliefs which were prayed for in the first suit instituted by the next friend. This suit was dismissed on the ground that the previous order of abatement of the suit had precluded him from claiming the same reliefs on the same cause of action. Against this decision the matter came up before the High Court and it was held by Seshagiri Aiyar J. that the order of abatement passed by the Munsif was erroneous as there was no authority in law to make an order of abatement on the death of the next friend of the minor plaintiff. The fact of the death of the next friend of the minor plaintiff was known to the Munsif. Provisions of O. XXXII, r. 10(1) came into play. It was, therefore, held that the suit was tenable. It would be seen that the suit which was pending before the Munsif was not disposed of by the Munsif on merits; it in fact had not proceeded to trial at all. This decision, therefore, would be no authority for the proposition contended for before us that the decision given in a suit on merits is a nullity merely on the ground of absence of a formal order of appointment of a next friend.

Pulin Chandra v. Musaffar is similarly distinguishable on facts. The facts were that on behalf of a minor a suit for enforcement of a mortgage was filed by his next friend. A preliminary decree was passed in the suit on December 1, 1917, and the period of grace expired on June 1, 1918. In the meantime the next friend of the minor plaintiff died and no steps were taken thereafter by anybody to get a next friend appointed. The minor after attaining majority made an application for getting the preliminary decree made final. This application was within three years of his attaining majority but was beyond the period of limitation prescribed for making an application for a final decree and on this ground of limitation the application made by him was dismissed by the trial Court. The matter came up before the High Court and the High Court held that in the peculiar circumstances of the case the article of the Limitation Act that governed the case was art. 181 of the Act and the right to the decree-holder to make an application for a final decree would accrue to him on his attaining majority. This decision also, in our view, is not an authority for holding that the decree made without a formal order in a case where a minor was one of the plaintiffs or appellants would be a nullity merely on the ground of failure to appoint a next friend of the minor.

In the result, therefore, in our judgment, the application fails and is dismissed with costs.

Application dismissed.

INCOME-TAX REFERENCE.

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY

v.

EVANS MEDICAL SUPPLIES LIMITED.*

Indian Income-tax Act (XI of 1922), Sec. 42(1)—Indian company doing business of non-resident assessee company—Under terms of agreement between companies, Indian company appointed sole agents of assessee company and Indian company not to buy products of any other company—Commission, advertising and propaganda allowances to be paid by assessee company to Indian company in the latter's territory—No difference in rate at which goods sold by assessee company to Indian company or to an Indian constituent—Whether assessee company liable under s. 42(1) in respect of products supplied and shipped directly to Indian company by assessee company.

The assessee company which was registered in the United Kingdom was doing the business of manufacturing and selling pharmaceutical preparations and medicines. Prior to 1947 it had a branch in India which used to sell its goods in the taxable territories, but early in 1947 the business of the assessee company came to be carried on by an Indian company incorporated and registered under the Indian law. An agreement was arrived at between the two companies whereby *inter alia* it was provided that the assessee company appointed the Indian company their sole authorised agents in India; that the assessee company would allow the Indian company commission on all goods supplied to the Indian company's territory; that the assessee company would grant the Indian company an advertising and propaganda allowance on its supplies, calculated at 20 per cent. on the nett invoice value after deduction of commissions on such supplies; that all goods invoiced by the assessee company direct to the Indian company would be charged at normal prices, a separate credit note to be sent to the Indian company for commission and advertising and propaganda allowance; that on shipments made to customers in the Indian company's territory, a credit note covering commission and advertising allowance to be sent by the assessee company to the Indian company; that the assessee company would charge the Indian company for supplies shipped direct to the Indian company at current export prices; that the Indian company would undertake to effect an energetic advertising and propaganda campaign in connection with the products of the assessee company upto the extent of the total advertising allowances received by the Indian company from the assessee company and that the Indian company would undertake not to buy or interest itself in any products other than those obtained from the assessee company. The Income-tax Department contended that there was a business connection in regard to all the dealings of the assessee company in respect of the sale of its products in the taxable territories and relied on s. 42 of the Indian Income-tax Act, 1922. The assessee company did not dispute its liability in respect of goods sold directly to its customers in India nor did it raise any dispute in respect of goods invoiced by it to the Indian company, but it raised a dispute in respect of products supplied and shipped directly to the Indian company, alleging that the sales made by the assessee company which had taken place outside the taxable territories were between principal and principal and as such there was no business connection in the taxable territories within the meaning of s. 42(1) of the Act:—

Held, that, in the circumstances of the case, in regard to the goods in question there was a business connection within the meaning of s. 42(1) of the Act.

The facts appear in the judgment.

G. N. Joshi, with B. J. Joshi, for the Commissioner of Income-tax.
N. A. Palkhwala, for the assessee.

S. T. DESAI J. This reference raises the vexed question of 'business connection.' Income which accrues to an assessee directly or indirectly through

*Decided, October 27, 1958. Income-tax Reference No. 27 of 1958.

any business connection in the taxable territories is under s. 42 deemed to be his income arising in the taxable territories. Business connection is an expression which no Court has attempted to define. Tests have some times been suggested and criteria have been discussed but none of them offer the desired solution and for the obvious reason that in the ultimate analysis the determination of what is business connection must rest upon the facts of each particular case. The question that we have to answer on this Reference is a mixed question of law and fact and we shall take the facts as found by the Tribunal. The assessee is Evans Medical Supplies Ltd. a company registered in the United Kingdom. The assessment years are 1948-49 to 1951-52. The assessee has been treated as "non-resident" in the taxable territories in respect of each of the four assessment years. Its business is to manufacture and sell pharmaceutical preparations and medicines. Prior to 1947 it had a branch in India which used to sell its goods in the taxable territories. Early in 1947 The Evans Medical Supplies (India) Ltd. for brevity called 'Indco'—was incorporated and registered under the Indian law. The Tribunal has found that the business which was formerly carried on by the assessee came to be carried on thereafter by the Indian company. An agreement was arrived at between the two companies and it is dated April 1, 1947. The terms of that agreement, which have particular relevance to this Reference, are as under:

"(1) Evans (assessee) appoint Indco their sole authorised agents in India and Burma.
(2) Evans will allow Indco commissions on all goods supplied to Indco's territory as defined in...

(3) ...

(4) Evans reserve to themselves the right to reduce the rate of commission on any goods which may be sold at special low prices for exceptional quantities or under special circumstances. Such reduced rate of commission shall, however, never be less than 1½ per cent. except by mutual agreement.

(5) ...

(6) Evans will grant Indco an advertising and propaganda allowance on all supplies of Evans Medical Products and Evans Veterinary Speciality products supplied to Indco's territory and duly paid for, calculated at 20 per cent. on the nett invoice value after deduction of commissions on such supplies.

(7) All goods invoiced by Evans direct to Indco will be charged at normal prices, viz. Medical Products H List, a separate credit note being sent to Indco for commission and advertising and propaganda allowance.

(8) On shipments made to customers in Indco's territory, a credit note covering commission and advertising allowance will be sent by Evans to Indco.

(9) ...

(10) Evans will charge Indco for supplies shipped direct to Indco at current export prices, viz. Evans Medical Products H List; Evans Counter Adjuncts, H List minimum printed prices; Evans Pills, Tablets etc. H List Pink section, H List minimum printed prices; Evans Veterinary Products, E List, Green section, minimum printed prices less printed discounts. Drugs at the lowest H List price appropriate to the quantity supplied.

(11) ...

(12) ...

(13) Indco is authorised to appoint its own agents to represent Evans' interests in the territory of Burma.

(14) Such appointments and terms thereof must, however, be submitted to Evans for approval.

(15) ...

(16) Indco undertakes to effect an energetic advertising and propaganda campaign in connection with Evans Medical Products and Evans Veterinary Speciality Products up to the extent of the total advertising allowances Indco received from Evans.

(17) ...

(18) Indco undertakes not to buy or interest in any products other than itself those obtained from Evans."

It will be seen that under the agreement the assessee company was at liberty

to sell goods directly to Indian customers and it could also do so through the Indian company. On all such sales, the Indian company got its commission as well as the advertisement and propaganda allowance. It got commission as well as the advertisement and propaganda allowance in respect of all goods supplied to the Indian company directly under cl. 10 of the agreement; in respect of all the sales made to the Indian company by the assessee; in respect both of goods invoiced under cl. 7 by the assessee company direct to the Indian company as well as goods shipped direct to the Indian company under cl. 10 as also goods sold by the assessee directly to customers in India. The assessee did not dispute its liability in respect of goods sold directly to its customers in India nor did it raise any dispute in respect of goods invoiced by it to the Indian company under cl. 7 of the agreement. It, however, raised a dispute in respect of products supplied and shipped directly to the Indian company under cl. 10 of the agreement. It was common ground before the Income-tax authorities that the sales in respect of products supplied and shipped directly to the Indian company under cl. 10 had taken place outside the taxable territories. The objection raised by the assessee company before the authorities was that the sales made by the assessee to the Indian company under cl. 10 of the agreement were between principal and principal and as such there was no business connection in the taxable territories within the meaning of s. 42(1). The ground on which the objection was based was that those sales had taken place outside the taxable territories.

The Department, on the other hand, contended that there was a business connection in regard to all the dealings of the assessee company in respect of the sale of its products in the taxable territories and relied on s. 42 of the Act. The Income-tax Officer as well as the Appellant Assistant Commissioner decided against the assessee company who carried the matter in appeal to the Tribunal. The Tribunal reached the conclusion that in respect of goods sold and supplied by the assessee company to the Indian company directly, there was no business connection, although it found that in respect of the other dealings between the assessee and the Indian company there was a business connection. The Revenue has now come before us on this reference and the question we are asked to determine is:

"Whether there is any business connection in the taxable territories within the meaning of section 42(1) in regard to the goods sold outside the taxable territories by the Evans Medical Supplies Ltd., Liverpool, to Evans Medical Supplies (India) Ltd.?"

It has been argued before us by Mr. Joshi, learned counsel for the revenue, that on a proper reading of the agreement, the inference should have been that there was a business connection in respect of all goods invoiced by the assessee company directly to the Indian company under cl. 7 of the agreement as also in respect of goods directly supplied and shipped by the assessee company to the Indian company. Reliance has been placed on a number of clauses in the agreement and it is urged that there was only one agreement between the parties which covered all the operations of the Indian company within the taxable territories. It has been said that cl. 10, which, according to the Tribunal, created a separate category of transactions or separate capacity in the Indian company was an integral part of the whole arrangement under which the Indian company was appointed the sole authorised agents of the assessee company, and it is added that the place where offer and acceptance took place or where the sales can be said to have taken place has no relevance in determining the principal question relating to business connection. It has also been said that there was continuous activity between the assessee company and the Indian company. Now, this principle of the existence of continuous activity in dealings between an assessee and his business connection in the taxable territories has no particular bearing on the present case. The question before us is not whether business connection envisages a single transaction or requires continuous activity of dealings between an assessee and his business connection in the taxable territories. It is also urged that there was no restriction on the price which the Indian company could charge in respect of

goods invoiced by the assessee directly to the Indian company or products supplied by the assessee and shipped directly to the Indian company under cl. 10. Reliance is also placed by learned counsel on cl. 18 of the agreement, whereby the Indian company is prohibited from dealing with products of any other merchants.

On the other hand, it has been argued by Mr. Palkhivala that the findings of fact recorded by the Tribunal on certain points are in favour of the assessee. It will be necessary for us to ascertain what those findings are. Undoubtedly, as we have already said, we shall be deciding the matter solely on the findings recorded by the Tribunal. We put it to learned counsel that there was a clear finding recorded by the Tribunal that there was no difference in the rate at which goods were sold by the English company to the Indian company or to an Indian constituent. Mr. Palkhivala said that that was what the Tribunal had done. We put it to learned counsel that it was clear from the relevant terms of the agreement that commission as well as advertisement and propaganda allowance was to be paid by the assessee to the Indian company in respect of all its products whether under cl. 7 or cl. 10 or sold directly by it to any other merchant in India. The answer of learned counsel was that that may be so under the agreement but there was no finding that the sales in question were under the agreement between the parties. This was an extreme argument. It was nowhere the case of the assessee that the dealings between the parties were *de hors* the agreement between them. It is for the first time that we hear that those sales could have been outside the scope of the agreement between the parties. In fairness to Mr. Palkhivala we must add that he stated that he was not in a position to say that those sales were not under the agreement. It is next submitted by Mr. Palkhivala that the Tribunal was right in taking the view that there were two capacities in which the Indian company carried on its operations. It is said that there was nothing in law to prevent the Indian company to purchase goods directly on its own account from the assessee. We agree that there was nothing to prevent the Indian company from purchasing goods directly from the assessee, but that is not the question before us. The question before us is what was the nature of the dealings between the parties; what were the incidents; what was the effect in law of those dealings in the context of Income-tax law? What we have to determine is: Was there or was there not any business connection between the assessee and the Indian company.

Now, the contention of the Revenue must succeed if it is able to show that the income attributable to sale of goods by the assessee company to the Indian company accrued to it or arose directly or indirectly through a business connection. It is well-settled law that the expression "business connection" is different from, though undoubtedly related to, the expression "business" as defined in the Act. What is insisted by the language of the section is that there should be (i) a business in India (ii) a connection between the assessee and that business; and (iii) the assessee must have directly or indirectly earned income by virtue of or through that connection. It is not necessary that the profit or gain should directly flow from the business connection. It is to be deemed to be the income of the assessee, who may well be a non-resident, even if it has arisen indirectly through the business connection in the taxable territories.

Business connection is an expression of wide and indefinite import and the Legislature has avoided any attempt at definition of the same for it seems extremely difficult, if not impossible, to expect a definition exclusive or inclusive which will aptly meet with every mode or method of business dealings and not fail in some circumstances. Actions of business men are so diverse and infinite that any attempt at a comprehensive meaning would fail to serve its own purpose. The only safe guide, therefore, seems to us to be that it should be gathered from the context in which the expression finds place in the Act itself and the object of the Legislature in laying down this fiction of law—albeit to be gathered from the language of the enactment itself—whereby putative in-

come is to be treated as if it had accrued or arisen in the taxable territories.

The decided cases are no more than illustrative of the instances of business connection. It has been held *inter alia* that where the element of agency is shown to exist, the business connection would readily be established. On the other hand, the mere fact that the goods of a non-resident find way in the Indian market being sold directly to one or few selected merchants or through brokers in the taxable territories, cannot result in business connection of the nature contemplated by the section. These are cases which fall clearly on each side of the line of demarcation where a business connection must be said to have resulted. Difficulty arises where cases of this type lie close to border line and do not fall within any of the categories of business connection such as agency or instrumentality of a subsidiary company or a branch of the non-resident trader.

Now, in a case of the nature before us where there is no suggestion that there is a *modus operandi* which is an ingenious device or circuitous process deliberately adopted to avoid tax, we would be rather slow in holding that the non-resident trader has brought himself within the operation of the rule. But in the case before us we have elements and factors the importance of which cannot be ignored or minimised. The Tribunal has observed:

"Obviously having regard to the terms of the agreement dated 1-4-1947, there is a business connection but as already stated there is no dispute in regard to the profits that have been brought to tax in respect of such sales. There is another capacity in which Indco operates in India and that is to make purchases of Evans Medical products and other things at its own risk and to sell them in India as any other Indian merchant would do. The goods are supplied by the English company to Indco at the same rate as it would charge to any other Indian constituent except that commission is payable to Indco on the goods sold to a person in Indco's territory. The commission that Indco would get on sales made to another Indian constituent comes to it in the form of a reduction in the price charged to it. Otherwise, there is no difference in the rate at which goods are sold by the English company to the Indian company or to an Indian constituent."

It is of importance to notice in this context cls. 7 and 10 of the agreement. Clause 7 read in its proper context evidently refers to goods invoiced by the assessee directly to the Indian company but it is of considerable importance and significance to note that the price which the assessee is to get is what is mentioned in the invoice and nothing more. What the Indian company charges thereafter is not the concern of the assessee. Clause 10, as we have already mentioned, relates to products supplied by the assessee and shipped directly to the Indian company. The price to be charged is the current export price. Mr. Palkhivala sought to make a point relying on the wording of cls. 7 and 10, that there was some difference in the matter of the price charged by the assessee to the Indian company under cls. 7 and 10. The finding of the Tribunal clearly negatives that contention. The Tribunal has in terms found—that must have been on the entire evidence before the Tribunal—that the rate at which the assessee sold the goods to the Indian company or to its Indian constituents was the same, and if Mr. Palkhivala's contention were correct, that finding could not have been recorded. In any way that finding has not been challenged in this case. The conclusion of the Tribunal that no business connection can be said to have resulted rests principally on the purchases made by the Indian company of the products of the assessee at its own risk and its right to sell them as any other merchant would do. It will be seen that the Tribunal has drawn a distinction between two separate capacities or categories of business activities of the Indian company. In our judgment the approach of the Tribunal was erroneous. It should have first viewed the matter with the nature of the relevant activities and operations of the assessee as the starting point of enquiry rather than from the other end of the matter, even though some aspect of the matter may overlap and be common to both. Moreover the Tribunal has overlooked one vital factor and a crucial aspect of

the case which, when considered in the whole setting, carries the nature of the relationship clearly beyond the line of demarcation where business connection must be said to exist. Here is the case—taking all the facts as have been found by the Tribunal—of a business which was once carried on by the assessee company which came to be carried on by the Indian company in 1947 in the capacity of “the sole authorised agents of the assessee company”. The assessee company sells goods to customers in India either directly or through the Indian company and in respect of all those sales the Indian company gets commission as well as advertisement and propaganda allowance. When the assessee company sells goods to the Indian company under cl. 10, there is no difference in the rate, for they are sold at the same price. As found by the Tribunal the commission that the Indian company gets on sales made to another merchant in India comes to the Indian company even in respect of such direct sales in the form of reduction in the price charged to it. So that in respect of all the goods of the assessee company that find way in the Indian market, there is the same price received by the assessee company. In this context we may as well refer to cl. 2 which states that the assessee company will allow commissions on all goods supplied to Indco's territory. It is a blanket clause applicable to all the goods supplied or sold by the assessee company in Indco's territory no matter through what instrumentality and in what manner. It is stated in cl. 6 that the advertisement and propaganda allowance of 20 per cent. is to be paid by the assessee company to the Indian company in respect of all its products which find way in the Indian market no matter in what manner or mode those goods were sold or supplied. We need not examine all the terms of the agreement some of which raise points which are of minor importance, though those clauses also read along with the other clauses would lend some support to the case of the Revenue. The Indian company as required by cl. 16 undertook to effect the entire advertisement and propaganda campaign in connection with the products of the assessee in the taxable territories and it is of significance to note that the Indian company was bound to spend the whole amount calculated at 20 per cent. of the net invoice value paid to it regardless of the fact that that amount was paid in respect of sales made by the assessee company under cl. 7 or cl. 10 of the agreement. Then comes cl. 18 of the agreement, which, when considered in the light of the whole arrangement and the nature of dealings between the assessee company and the Indian company, definitely carries the matter in the region of business connection and particularly so when the matter is viewed—as indeed in our judgment it must be viewed—from the nature of the activities and operations of the assessee. The assessee has the Indian company as its sole authorised agent in India. In respect of the goods supplied by it to the Indian company's territories directly or through the Indian company or directly to the Indian merchants, it allows stipulated commission. In addition to that, in respect of such goods, it gives the Indian company advertisement and propaganda allowance. The Indian company, as we have already pointed out, is under an obligation to spend the whole of that allowance including that paid in respect of goods directly sold to it. Lastly the Indian company is under an obligation not to buy or even interest itself in any products other than those obtained from the assessee company. This last mentioned obligation raises a crucial consideration which the Tribunal has wholly failed to appreciate. Quod the assessee it has by agreement become the instrument or channel in the taxable territories designated as “sole authorised agents” of the assessee and can only deal in the products of the assessee company. In such a case having regard to the other terms of the agreement, no distinction can be drawn such as the Tribunal has done in the matter of products sold to the Indian company and no stress can be laid on “the two capacities of the Indian agents”. We do not agree that there was any confusion in the matter when the Department taxed the assessee also in respect of its sales. The profits that accrue or arise to the non-resident and are assessed in a case of this type would have at least indirectly flowed from the employment of the same channel or the same

APPELLATE CIVIL.

Before Mr. Justice Mudholkar.

ASSUDOMAL M. RAISINGHANI v. MANSINGH CHUHERMAL.*

Presidency Small Cause Courts Act (XV of 1882), Sec. 74—Application to sue as pauper before Court of Small Causes granted and application registered as suit—Whether such application itself becomes plaint in case—Civil Procedure Code (Act V of 1908), O. XXXIII, r. 8.

Section 74 of the Presidency Small Cause Courts Act, 1882, contemplates a single document which, besides containing a prayer for being allowed to sue as a poor person, also contains a statement of the claim. Therefore, where an application to sue as a pauper before the Court of Small Causes is granted and the application is registered as a suit, such application itself becomes the plaint in the case.

The facts appear in the judgment.

Assudomal M. Raisinghani (the petitioner), in person.

M. C. Bhagat, for the opponents.

MUDHOLKAR J. This is an application for revision of an order made by the Small Cause Court, Bombay, dismissing the applicant's suit on the ground that there is no plaint.

The applicant sought leave to sue as a pauper before the Court of Small Causes. The claim made by him against the opponents is for Rs. 3,000 or so. His application for leave to sue as a pauper was enquired into by the Deputy Registrar. The Deputy Registrar allowed the application and granted him leave to sue as a pauper. Thereupon the application was registered as a suit. During the pendency of the matter before the Small Cause Court, the applicant made an application for amendment of the plaint with a view to show that the claim was within time. This application was taken up by the learned Judge on July 19, 1957, when he passed the following order:—

"It is obvious that there is no plaint in this case. The leave to sue in *forma pauperis* has been treated as a plaint and there is no application even till now to amend the said application in such a manner as to convert it into a plaint. In these circumstances, there being no plaint, the suit must be dismissed..."

Order XXXIII, r. 8, Civil Procedure Code, provides that where an application to sue as a pauper is granted, that application itself is to be registered as a plaint. That is clearly because the Civil Procedure Code requires that an application to sue as a pauper should contain all the particulars which are required in a plaint. It is true that this provision is not applicable to proceedings in the Presidency Small Cause Court. The matter there is governed by ss. 41 and 74 of the Presidency Small Cause Courts Act. Section 74 of that Act provides that the Small Cause Court may, whenever it thinks fit, receive and register suits instituted by poor persons without payment of Court-fees. It thus contemplates a single document which, besides containing a prayer for being allowed to sue as a poor person, also contains a statement of the claim. No provision has been brought to my notice which requires that a pauper has to file two documents: (1) an application for leave to sue as a pauper, and (2) a plaint. Now, the language of s. 74 itself makes it clear that only one document is contemplated. It may be that in some respects the document filed in this case is deficient. But that is entirely a different matter. After the Deputy Registrar granted leave to the applicant to sue as a pauper and after the suit was ordered to be registered, it could not be said that there was no plaint. The only document before the Court was the application initially made by the applicant, and after leave was granted to him to sue as a pauper and the regis-

*Decided, November 3, 1958. Civil Revision Bombay, in Pauper Suit No. 1804/8556 of Application No. 2021 of 1957, from the decision of A. Sarnon, Judge, Court of Small Causes, 1956 (Pauper Application No. P/36 of 1955).

tration of the suit was ordered, that document became the plaint in the case. Therefore, the learned Judge was not right in saying that there was no plaint. Mr. Bhagat who appears for the opponents says that it is the practice in the Small Cause Court to require two documents to be filed. That may be so. But it does not appear that there is any basis in the Act for that practice. Indeed, the object in establishing Courts of Small Causes was to devise a summary procedure for dealing with a suit. Where in a regular suit only one document is contemplated, it cannot be said that the Legislature wanted two documents to be filed in the Court of Small Causes. The application for amendment has not been considered by the learned Judge on the merits. He will have to do so now.

For these reasons I allow this application with costs and direct the learned Judge to consider the application for amendment of the plaint on merits and proceed with the suit further according to law. The Rule is made absolute.

Application allowed.

CRIMINAL REVISION.

Before Mr. Justice Mudholkar.

VISHNOO RAMCHANDRA v. THE STATE.*

Bombay Police Act (Bom. XXII of 1951), Secs. 57, 157, 142—City of Bombay Police Act (Bom. IV of 1902), Sec. 27—Accused convicted under ss. 318 & 114 of Indian Penal Code in 1949—Order of externment made by Deputy Commissioner of Police against accused under s. 57 of Act XXII of 1951—Validity of order.

Before an order can be made under s. 57 of the Bombay Police Act, 1951, the person against whom the order is to be made must be convicted of an offence under Chapter XII, XVI or XVII of the Indian Penal Code, 1860, after the coming into force of s. 57 of the Act.

THE facts appear in the judgment.

G. P. Kini and Mrs. K. Pradhan, for the petitioner.

V. T. Gambhirwala, Assistant Government Pleader, for the State.

MUDHOLKAR J. The petitioner has been convicted by the Presidency Magistrate, Second Court, Mazagaon, under s. 142 of Act XXII of 1951 and sentenced to undergo rigorous imprisonment for six months.

It is common ground that the petitioner was convicted for an offence under s. 318 read with s. 114, Indian Penal Code, by the Presidency Magistrate, 13th Court, Bombay, on November 16, 1949, and sentenced to undergo rigorous imprisonment for one month. On October 15, 1957, the Deputy Commissioner of Police, Crime Branch, C.I.D., Greater Bombay, made an order under s. 57 of the Bombay Police Act, externing the petitioner. At that time the petitioner was facing a prosecution under s. 411, Indian Penal Code, or in the alternative under s. 124 of the Bombay Police Act. The externment order was, therefore, not executed on the petitioner and he was allowed to stay on within the limits of Greater Bombay. On July 10, 1958, the criminal case came to an end and the petitioner was acquitted. Immediately thereafter, he was taken by a police constable to Mumbra railway station and left there. According to the prosecution, the petitioner, instead of staying out of Greater Bombay, came into the city in breach of the aforesaid order and was arrested by a police constable near Pydhonie. The petitioner, on the other hand, contends that

*Decided, November 25, 1958. Criminal Revision Application No. 1393 of 1958, against the order of conviction and sentence passed by A. A. Shellim, Presidency Magistrate, II Court, Mazagaon, Bombay, in Cr. Case No. 1101/p/58.

though he was originally taken by a police constable to Mumbra, he was forcibly brought by him to Byculla and from there he was forced to go to Pydhonie. The learned Magistrate did not accept the version of the petitioner and convicted and sentenced him as already stated.

On behalf of the petitioner Mr. Kini has raised three points. The first point is that the Deputy Commissioner of Police did not apply his mind to the facts of the case before making the order of externment. The second point is that s. 57 of the Bombay Police Act is prospective in application, and that before an order could be made thereunder, it had to be established that the person against whom the order is made had been convicted of an offence falling under Chap. XII, XVI or XVII of the Indian Penal Code subsequent to the coming into force of the Act. The third ground is that the belief entertained by the Deputy Commissioner that the petitioner was likely to engage himself in the commission of an offence similar to that for which he was convicted was based on the fact that the petitioner was facing a prosecution before the Magistrate in Bombay, and that since the petitioner was ultimately acquitted in the case against him, the foundation for making the order had disappeared.

It is not necessary for me to deal with the first and the third points because, in my opinion, the second point is a good one and must succeed. Now, the relevant portion of section 57 of the Bombay Police Act, 1951, is as follows:—

“If a person has been convicted—

(a) of an offence under Chapter XII, XVI or XVII of the Indian Penal Code,... the Commissioner, the District Magistrate or the Sub-Divisional Magistrate specially empowered by the State Government in this behalf, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted, may direct such person to remove himself outside the area within the local limits of his jurisdiction by such route and within such time as the said officer may prescribe and not to enter or return to the area from which he was directed to remove himself.”

It has to be noted that the Legislature has used the present participle “has been” and not the past participle. It must, therefore, be inferred that s. 57 was intended to be utilised where a person was convicted subsequent to the coming into force of that section. Indeed, this section being a penal section, the presumption would be that it would not penalise anything that had taken place prior to its coming into force. Mr. Gambhirwala, the learned Assistant Government Pleader, however, said that s. 57 merely reproduced the provisions of s. 27 of the City of Bombay Police Act, 1902, and that any liability incurred by a person under that section is preserved by s. 157 of the Bombay Police Act, 1951. It seems to me, however, that this argument does not help the prosecution. The relevant portion of s. 27 of the City of Bombay Police Act, 1902, is as follows:—

“(1) Whenever it shall appear to the Commissioner of Police

(a) That the movements or acts of any person in the Greater Bombay are causing or calculated to cause alarm, danger or harm to person or property, or that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence, or an offence punishable under Chapters XII, XVI or XVII of the Indian Penal Code, or in the abetment of any such offence, and when in the opinion of the Commissioner witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property;”

Now, this provision does not make any reference to the conviction of a person for an offence under Chaps. XII, XVI or XVII of the Indian Penal Code, whereas s. 57(a) of the present Act does. If a person is convicted subsequent to the coming into force of the Bombay Police Act, 1951, for an offence under Chaps. XII, XVI or XVII of the Indian Penal Code, any of the authorities named in that section would be competent to make an order of externment against that person provided the authority is satisfied that that person was again likely to engage himself in the commission of an offence similar to the

one in respect of which he was convicted. Under s. 27(1)(a) of the Act of 1902, a person who has been convicted of an offence under Chaps. XII, XVI or XVII was not rendered liable for being proceeded against under that section. No doubt, the Commissioner of Police, who alone was authorised to make an order under that section, could make an order of externment against a person if there were reasonable grounds for believing that such person was engaging or was likely to engage in the commission of an offence involving force or violence or of an offence punishable under Chaps. XII, XVI or XVII of the Indian Penal Code. But the belief has to be entertained by the Commissioner of Police at the time of the making of the order. No belief of this kind was entertained by the Commissioner of Police with regard to the petitioner in the year 1949 when the petitioner was convicted of an offence falling under Ch. XVI of the Penal Code, or at any time prior to the coming into force of s. 57 of the present Police Act; and, therefore, no order could have been made against the petitioner under s. 27 of the now repealed Police Act of 1902. Since no liability was incurred by the petitioner under the repealed Act, s. 57 of the present Act affords no assistance to the prosecution.

Now, before an order of externment is made under s. 57, one of the conditions precedent which are set out in cls. (a), (b) and (c) of that section has to be fulfilled. There is no suggestion that cls. (b) and (c) have any application to the present case. Reliance was placed only upon cl. (a), which requires that a person against whom the order is to be made has been convicted of an offence under Chaps. XII, XVI or XVII, Indian Penal Code. As already stated, such a conviction should have been made after the coming into force of s. 57. A conviction made prior to that time is of no avail.

Upon this view, I allow this application in revision, set aside the order of conviction and sentence passed against the petitioner, and direct that the petitioner, who is in jail, shall be set at liberty. The rule is made absolute.

Rule made absolute: Conviction and sentence set aside.

APPELLATE CIVIL.

Before Mr. Justice Gokhale and Mr. Justice Patel.

SUDHIR LAXMAN HENDRE v. SHRIPAT AMRIT DANGE.*

Representation of the People Act (XLIII of 1951), Secs. 123(4), 100—False statement of fact in relation to conduct of a candidate when constitutes 'corrupt practice' under s. 123(4)—Adverse criticism in relation to political views, position, reputation or action of candidate whether comes within mischief of section—True nature of statement how to be ascertained—Legal aspect of agency in elections.

In order to come within the ambit of the term 'corrupt practice' under s. 123(4) of the Representation of the People Act, 1951, there must be a false statement of fact by a candidate or his agent which is made in relation to the personal character or conduct of any other candidate. Adverse criticism, however severe, however undignified or ill-mannered, however regrettable it might be in the interests of purity and decency of public life, in relation to the political views, position, reputation or action of a candidate, will not bring it within the mischief of the statute. The Court in such matters cannot judge these statements in the light of their decency or desirability in so far as they are political statements not calculated to attack the personal character or conduct of any rival candidate. What is objectionable is a false statement of fact, and not a false statement of opinion however unfounded or however unjustified. It is only when the person beneath the politician is sought to be assailed and his honour, integrity and veracity are challenged and such a statement is false that

*Decided, October 10/11, 1958. First Appeal No. 294 of 1958, from the decision of K.T. Mangalmurti, Member of the Election Tribunal, at Nagpur, in Election Petition No. 437 of 1957.

it can be said that a false statement of fact about his personal character and conduct is made; and once it is established that such a statement was made, the question whether there was malice or not is immaterial. In ascertaining the true nature of the statement made, the Court must take into consideration all the surrounding circumstances including the occasion when it was published or made, the person against whom it was made, the person publishing it or making it, the audience or readers to whom it is addressed as also the precautions or care taken by the publisher to verify the truth or otherwise of the statement challenged.

*The North Louth Case*¹, *The Borough of Sunderland Case*², *The Cockermouth Division Case*³, *Ellis v. The National Union of Conservative etc.*⁴, *Bayley v. Edmunds*⁵ and *Davies v. Ward*⁶, referred to.

The correct legal position regarding agency in elections is that the relation is not the common law one of principal and agent, but the candidate may be responsible for the acts of one acting on his behalf, though such acts are beyond the scope of the authority given, or in violation of express injunction.

*The Boston Case*⁷, referred to.

Describing a candidate, who is contesting an election as an independent candidate, as really not independent but as being supported by other parties or prominent persons of other parties will not amount to an attack on his personal character.

*Syed Hifazat Ali v. Mr. Mohammad Asghar*⁸, referred to.

ONE S. L. Hendre (petitioner) was a candidate for election to the House of the People from the Bombay City Central Constituency in the general elections which took place in 1957. In this constituency there were two seats and one of the seats was reserved for the scheduled castes. Including the petitioner, there were in all 7 candidates of whom one of the candidates Awati representing the Ram Rajya Parishad retired from the contest. The other candidates were S. A. Dange representing the Communist Party, G. K. Manay representing the Republican Party, G. D. Ambekar and N. S. Kajrolkar, who stood on the Congress ticket, while N. B. Parulekar and S. L. Hendre (petitioner), stood as independent candidates. The voting took place on March 11, 1957, but as some irregularity was discovered at one of the polling stations in connection with the placing of ballot boxes of the independent candidates, the Election Commission passed an order directing a repoll in that particular station which took place on March 21, 1957. As a result of the counting of votes, Dange and Manay were declared as successful candidates and they secured 3,23,526 and 3,03,875 votes respectively. The two Congress candidates G. D. Ambekar and N. S. Kajrolkar secured 1,87,941 and 2,09,769 votes respectively. The votes recorded in favour of N. B. Parulekar were 15,881 and those recorded in favour of the petitioner were 15,440.

The present petition was filed by the petitioner on May 1, 1957, in which he challenged the validity of the election on a number of grounds. The principal objections raised by the petitioner to the election were that the ballot boxes bearing the name and symbol of the petitioner were kept late, after 11-30 a.m., on March 11, 1957, at a number of polling stations and a repoll was ordered only at the polling station situated at the Victoria Memorial School for the Blind, 73, Tardeo Road; that the Returning Officer was in error in starting the counting of votes on March 14, 1957, though a repoll was ordered in respect of the polling station at Tardeo; that the Election Commission should have ordered a fresh election or at any rate a repoll in all the 53 stations where the ballot boxes of the petitioner came to be kept late; that respondents Nos. 1 and 2, i.e., Dange and Manay, along with P. K. Atre, who acted on behalf of these candidates, indulged in a deliberately misleading propaganda through written and spoken statements appealing to the voters to refrain from voting for the petitioner on the ground that he was a bogus candidate and did not

1 (1911) 6 O'M. & H. 103.

2 (1910) 5 O'M. & H. 53.

3 (1910) 5 O'M. & H. 155.

4 (1900) Sol. Journal 750.

5 (1895) 11 T. L. R. 537.

6 Times, January 18, 1910.

7 (1874) 2 O'M. & H. 161.

8 (1947) Doobla's Indian Election Cases, Vol. I, p. 276.

believe in the cause of Samyukta Maharashtra and was put up as a candidate by Mr. Y. B. Chavan, Chief Minister, Bombay State, and Mr. S. K. Patil, President of the Bombay Provincial Congress Committee and it was asserted that this propaganda was false to the knowledge of the respondents and Atre and they had no reason to believe it to be true and this propaganda prejudiced the chances of the petitioner's election and created a doubt about the genuineness of the petitioner's candidature and also reflected on the personal character and conduct of the petitioner and amounted to corrupt practice within the meaning of s. 123(4) of the Representation of the People Act, 1951; that propaganda was carried on in the *Maratha* paper owned by Atre which amounted to undue influence within the meaning of s. 123(2) of the Act; that respondents Nos. 1 and 2 supported by Atre and their election agents, canvassers, employees and supporters, indulged in intimidation and wholesale terrorisation and threats of physical violence, social ostracism, spiritual censure and divine displeasure against certain persons who were canvassing for the petitioner and other candidates who were collaborating with the petitioner and as such there was undue influence on a large scale practised throughout the constituency; that certain photographs came to be published in the *Maratha*, a daily newspaper edited by P. K. Atre, on March 11, 1957, and posters were issued on behalf of the Communist Party which made an appeal to the electors asking them to vote on grounds of community alone and as such came within the mischief of s. 123(3) of the Act; that Awati, the candidate put up by the Ram Rajya Parishad was given some gratification inducing him to retire from the contest, and, therefore, that amounted to a corrupt practice under s. 123(1) read with the Explanation to that section and that the petitioner having stood as a candidate and exercised his electoral right as such had also the right to carry on freely without any interference his election campaign and this right of the petitioner was seriously interfered with and on that account there was undue influence practised in the election so as to amount to a corrupt practice under s. 123(2) of the Act. These objections on which a good deal of evidence was led were negatived by the Election Tribunal which consequently dismissed the petition filed by the petitioner. The petitioner appealed under s. 116A of the Act.

S. W. Dhabe, for the appellant.

A. S. R. Chari, with *V. D. Mengde* and *L. R. Chari*, for respondent No. 1.

V. K. Pai, for respondent No. 5.

P. P. Tajane and *N. M. Kamble*, for respondent No. 2.

GOKHALE J. [His Lordship after stating the facts of the case proceeded.]

In connection with the order of the Election Commissioner ordering a repoll confined to one polling station, the argument of Mr. Dhabe is that such an action is not warranted by the provisions of the Representation of the People Act. According to Mr. Dhabe, in view of the defect that was brought to the notice of the polling officer as well as the returning officer and to the Election Commission the entire election to the parliamentary seats in this constituency should have been set aside and a fresh election held. Under s. 57 of the Act, provision is made for the adjournment of poll at an election in certain emergencies. It is not disputed that s. 57 would not apply to the facts of this case. Section 58 provides for a fresh poll being taken and it runs as follows:

"(1) If at any election, any ballot-box used at a polling station or at a place fixed for the poll is unlawfully taken out of the custody of the presiding officer or the returning officer, or is in any way tampered with, or is accidentally or intentionally destroyed, lost or damaged, and the returning officer is satisfied that in consequence thereof the result of the poll at that polling station or place cannot be ascertained, he shall—

(a) declare the polling at that polling station or place to be void;

(b) report the matter forthwith to the Election Commission and to the appropriate authority;

(c) with the previous approval of the Election Commission, appoint a day, and fix the hours for taking a fresh poll at the polling station or place; and

(d) notify the day so appointed and the hours so fixed by him in such manner as the Election Commission may direct.

(2) The provisions of this Act and of any rules or orders made thereunder shall apply to every such fresh poll as they apply to the original poll."

It cannot be denied that the failure of the polling officer to keep the ballot boxes of the petitioner at the polling station would not be in terms covered by this section. It is only when a ballot box of any candidate is unlawfully taken out of the custody of the presiding officer or is in any way tampered with or is accidentally or intentionally destroyed or lost or damaged and the returning officer is satisfied that in consequence thereof the result of the poll at that polling station cannot be ascertained, then a fresh poll may be taken under s. 58 after declaring the polling at that polling station to be void and with the previous approval of the Election Commission. But it does seem that even where there is a more serious interference with the ballot box of a candidate a fresh poll can be ordered only for that particular polling station where the ballot box is found to have been tampered with or destroyed. The Election Tribunal was of the view that the principle of this section could be applied in the present case where on account of the wrong information given to the polling officer the ballot boxes in the names of the two candidates were not kept till 11.30 a.m. at the polling booth and, therefore, the order of the Election Commission would be justified on the principles of equity, fair play and natural justice. There is undoubtedly a good deal to be said in favour of this view. Mr. Chari, learned counsel appearing on behalf of the respondents, also relied on art. 324(1) of the Constitution in support of the action of the Election Commission. Under that article,

"The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission)."

Undoubtedly under this article, the Constitution has created an Election Commission for the superintendence, direction and control and conduct of all elections to Parliament and the State Legislatures. But the Election Commission must act within the terms of the statute which Parliament may enact under art. 327 of the Constitution making provision with respect to all matters relating to elections. Under art. 329(b),

"No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

The Representation of the People Act, 1951, having been enacted by Parliament, the powers of the Election Commission must be exercised in accordance with the provisions of this Act and it does seem that the Act itself does not confer on the Election Commission any power to adjourn a poll or to take a fresh poll beyond what is provided under ss. 57 and 58 of the Act.

But even assuming that s. 58 does not in terms provide for a fresh election at a polling station, under circumstances which have arisen in the present case, the only section which empowers an Election Tribunal to declare an election to be void is s. 100 of the Act and Mr. Dhabe has, therefore, argued that what has happened amounts to a corrupt practice which must invalidate the election.

Now, s. 100(1), in so far as it is material, provides as follows:

"(1) Subject to the provisions of sub-section (2), if the Tribunal is of opinion—...

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or...

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—...

(ii) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his election agent or a person acting with the consent of such candidate or election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the Tribunal shall declare the election of the returned candidate to be void."

In the present case we are not concerned with the provisions of sub-s. (2) of s. 100. It is clear that there is a distinction between the provisions of cl. (b) and cl. (d)(ii) of sub-s. (1) of s. 100. If it is proved that a corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent, then the Tribunal has to declare the election of the returned candidate to be void. But if the responsibility of corrupt practice is not on the candidate or his election agent or any person acting with the consent of such candidate or his election agent, but the corrupt practice has been committed in the interests of a returned candidate by a person other than the persons mentioned in cl. (b) of sub-s. (1) of s. 100, then it must be shown that the result of the election in so far as it concerns the returned candidate has been materially affected, before the Tribunal is empowered to declare the election to be void. It may be observed that the law in England regarding irregularities in election is somewhat similar. In Halsbury's Laws of England, 3rd edn., Vol. XIV, para. 261, at p. 150, it is stated as follows:

"An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election if the tribunal is satisfied that the election was notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, was not and could not have been affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the tribunal sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether those transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the tribunal is then bound to declare the election void." (*The Islington Division Case*, (1901) 5 O'M. & H. 120, at p. 125.)

In the above case, it appears that at certain polling stations the polling continued even after 8 p.m., which was the closing hour, and a number of votes were recorded after this hour in the ballot box and a number of ballot papers came to be supplied after this hour; and Mr. Justice Kennedy, after stating his view of the law as quoted above, observed that:

"this is the view of the law which has generally been recognised, and acted upon, by the tribunals which have dealt with election matters."

According to Mr. Dhabe, the polling agents of the successful candidates were responsible for making a false statement of fact to the polling officer that the petitioner and Mr. Parulekar had withdrawn from candidature. That would be, therefore, a corrupt practice within the meaning of s. 123(4) of the Act, and Mr. Dhabe says that the evidence established that the polling agents of the successful candidates were present at the polling station and were responsible for the information given to Mr. Bharucha. It is contended further that at that polling station the polling agents of Messrs. Hendre and Parulekar were not present and only the agents of other candidates were present and, according to Mr. Bharucha, the polling agents had given him the information that both Messrs. Hendre and Parulekar had withdrawn and on that information he had not kept the ballot boxes of these two candidates in the polling compart-

ment. Now, there are several difficulties in the way of accepting this contention of Mr. Dhabe. In the first instance, exh. P-34, the report of Mr. Bharucha, shows that the majority of the polling agents gave him this information. In his evidence before the Tribunal, he said that the polling agents there gave him to understand that the two candidates had withdrawn. If the polling agents of Messrs. Hendre and Parulekar were not there, the polling agents of the Congress candidates as well as those of Messrs. Dange and Manay would be there and, according to Mr. Hendre's letters both to the Returning Officer as well as to the Election Commission written on the very day of the election, his complaint was that the polling agents of both the Congress as well as the Samyukta Maharashtra Samiti candidates had given this wrong information to the presiding officer. As already stated Mr. Manay's evidence shows, and there is no dispute on this point, that on that very day elections were also held for the State Legislative Assembly and there were polling agents of candidates standing for that Assembly and that election was held at the same polling station. It cannot, therefore, be said with certainty that the polling agents of the successful candidates Messrs. Dange and Manay were responsible for giving this false information to Mr. Bharucha. Nor is there any evidence whatever on the record to show that this was done with the consent of the returned candidates or their election agents. The petitioner has also stated in his evidence that owing to the illness of his son he had not been able properly to divide the supervision work of polling stations amongst his workers and it was difficult for him even to cooperate with his workers who were scattered over a wide area and who also believed that he had withdrawn. Mr. Dhabe has drawn our attention to the provisions of s. 46 of the Act under which polling agents are appointed by a contesting candidate or his election agent and to r. 13 of the Representation of the People (Conduct of Elections and Election Petitions), Rules, 1956, published in the Manual of Election Law, second edition, and Form 10 in connection with the appointment of polling agents, and Mr. Dhabe contends that as soon as a polling agent is appointed all his actions must be presumed to be binding on the returned candidate. We are not prepared to accept this argument. As I have already pointed out, when a corrupt practice is committed by a returned candidate or his election agent then the question of consent does not arise, but if it is committed by 'any other person' which expression would include a polling agent then it must be shown that the corrupt practice has been committed with the consent of the returned candidate or his election agent. There is no reliable evidence on the record to show that the polling agents of Messrs. Dange and Manay were responsible for giving this false information to Mr. Bharucha and there is no evidence also to show that this was done with the consent of either the returned candidates or their election agents and, therefore, in our opinion, this would not amount to corrupt practice under s. 100(1)(b) of the Act.

Even assuming that the matter falls under s. 100(1)(d)(ii), inasmuch as false information was given to Mr. Bharucha in the interests of the returned candidates by a person other than the candidate or his election agent or person acting with the consent of such candidate or election agent, then it has to be proved that the election, in so far as it concerns the returned candidates has been materially affected, before the Tribunal can declare the election to be void. Mr. Dhabe has frankly conceded that the view of the Tribunal that the defect in the election at this polling station could not have materially affected the result of the election of the returned candidates cannot be challenged, because as has been already indicated, each polling station was meant to record votes of about 1000 voters, and even assuming that all the votes in this polling station were cast in favour of the candidates other than the returned candidates or in favour of Mr. Hendre alone, it would not have materially affected the result of the election.

Mr. Dhabe has also alternatively contended that the defect pointed out, viz., the absence of the ballot boxes of the petitioner and of Mr. Parulekar at the

polling booth in question till 11-30 a.m. would amount to improper reception or refusal or rejection of any vote and would come within the mischief of s. 100(1)(d)(iii) of the Act and would also amount to non-compliance with the provisions of the Act and the rules and orders made under the Act and would thus come under s. 100(1)(d)(iv). But that again would be of no assistance to the petitioner, because even in that case it must be shown that the result of the election in so far as it concerns the election of the returned candidates has been materially affected.

That takes me to the principal and the second objection to the validity of the election urged on behalf of the petitioner. This objection may be summarised as follows: It is argued on behalf of the petitioner that a false propaganda was carried on on behalf of respondents Nos. 1 and 2, the returned candidates, and by their agent Mr. P. K. Atre in his newspaper *Maratha* and false statements were made which would amount to corrupt practice under s. 123(4) of the Act. Objection was principally taken to three kinds of statements which were made against the petitioner: (1) that the petitioner was a bogus candidate and was really set up by Mr. Y. B. Chavan, Chief Minister, and Mr. S. K. Patil, President of the Bombay Provincial Congress Committee; (2) that the candidature of the petitioner was financed by the Democratic Research Service which itself was dependent on American money; and (3) that the petitioner was on friendly terms with Mr. Y. B. Chavan before he became Chief Minister, but he left him because he failed to get contracts from Mr. Chavan and he, therefore, parted company from him but when the elections came he again stood up as a candidate supported and sponsored by Mr. Chavan. It is stated that not only were such false statements published but the candidates and their agents knew them to be false and the statements were in relation to the petitioner's personal character and conduct or at any rate in relation to his candidature and were reasonably calculated to prejudice the prospects of the petitioner's election and, therefore, the successful candidates were responsible for a corrupt practice which would invalidate the election as a whole.

Before I go to the statements to which our attention was drawn in this connection it is necessary to refer to the relevant provisions of both ss. 123 and 100 of the Act. Section 123, so far as material, provides as follows:—

"The following shall be deemed to be corrupt practices for the purposes of this Act:—...

(4) The publication by a candidate or his agent or by any other person, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, or retirement from contest, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election."

Now, in order to bring the case within the ambit of this provision, the petitioner must prove firstly, that there has been a publication by a candidate or his agent or by any other person of a statement of fact; secondly, the statement of fact must be false; thirdly, the publisher must either believe it to be false or must not believe it to be true; fourthly, the statement must be in relation to the personal character or conduct of the candidate or in relation to his candidature, withdrawal or retirement from contest; and, lastly, it must be a statement reasonably calculated to prejudice the prospects of the candidate's election. Now, it cannot be disputed that the onus to prove that a corrupt practice has been committed by a candidate or his agent lies on the person seeking to set aside election on that ground. What is open to objection is a false statement of fact, and such a statement must be with reference to the personal character or conduct of the candidate. In what has come to be known as *The North Lough Case*,¹ it was observed by Gibson J. (p. 163):

"...A politician for his public conduct may be criticised, held up to obloquy: for that the statute gives no redress; but when the man beneath the politician has his honour,

veracity, and purity assailed, he is entitled to demand that his constituents shall not be poisoned against him by false statements containing such unfounded imputations."

In *The Borough of Sunderland Case*,² a similar view was taken by Mr. Baron Pollock, who observed at p. 62 that any false statement, whether charging dishonesty or merely bringing a man into contempt, if it affects, or is calculated to affect, the election, comes within the election statute, and in such a case the Court has nothing whatever to do with the question which arises in cases of libel as to whether there was malice. And the two illustrations which he has given show how statements about what may be regarded as perfectly innocent acts, in England, which may be ascribed to candidates at the time of election may come within the mischief of the election statute. He observes (p. 62):

"...Supposing any gentlemen in a county constituency was to say of his adversary that he had shot a fox, and he said it for the purpose of working upon the minds of the constituency during an election, that would certainly come within the meaning of the Act. Again, if any person in a constituency, where one of the members was a temperance man, were to say that he had seen him drinking a glass of sherry—a perfectly innocent act—that would also bring him within the Act."

But then it is further stated that a greater difficulty arises when the question has to be considered as to what is a statement of fact and Mr. Baron Pollock stated:

"...a mere argumentative statement of the conduct of a public man, although it may be in respect of his private life, is not always, and in many cases certainly would not be, a false statement of fact."

In another case known as *The Cookermouth Division Case*,³ reported in the same volume, this is what Mr. Justice Darling stated (pp. 159-160):

"...Now, it must be noted that what the Act forbids is this: You shall not make or publish any false statement of fact in relation to the personal character or conduct of such candidate; if you do, it is an illegal practice. It is not an offence to say something which may be severe about another person, nor which may be unjustifiable, nor which may be derogatory, unless it amounts to a false statement of fact in relation to the personal character or conduct of such candidate; and I think the Act says that there is a great distinction to be drawn between a false statement of fact, which affects the personal character or conduct of the candidate, and a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind this statute would simply have prohibited at election times all sorts of criticism which was not strictly true, relating to the political behaviour and opinions of the candidate."

These remarks of Mr. Justice Darling were made in connection with the publication of a placard by the respondent in that case which was alleged to have infringed the provisions of the Corrupt and Illegal Practices Prevention Act, 1895. In *Ellis v. The National Union of Conservative etc.*,⁴ Justice Buckley was interpreting the expression 'false statement of fact' under the same Act, which conferred on the Court the power to restrain certain defamatory statements, and the learned Judge observed:

"...The language of the statute is 'false statement of fact', and that language must be used in contrast to a false statement of opinion. The language is not merely a 'false statement', but a 'false statement of fact'. Secondly, the statement must be in relation to the personal character or conduct of the candidate. It must, therefore, be a false statement of fact bearing on a candidate's character or conduct."

In that case, the Court was considering the question of restraining the publication of a poster in which the words "Radical Traitors" were used and Mr. Justice Buckley held that the wording of the poster constituted a statement of opinion rather than one of fact. In *Bayley v. Edmunds, Byron and Marshall*,⁵ a charge that the candidate "hypocritically feeling in his conscience that he was doing wrong for the purpose of making large profits for himself,

² (1910) 5 O'M. & H. 53.

³ (1910) 5 O'M. & H. 155.

⁴ (1900) Sol. Journal 750.

⁵ (1895) 11 T.L.R. 537.

locked his workmen for a certain length of time and that then, some time afterwards he found that his conscience reproved him, and resolved he would starve them no longer," was held to be a statement within the mischief of the statute. In *Davies v. Ward*² referred to in Halsbury a statement that a candidate would not pay his hotel bill or debts was placed on the same footing. See Halsbury's Laws of England, 3rd edn., Vol. XIV, p. 227, Note (a) which quotes these instances. See also Parliamentary Elections by Schofield, 2nd edn., pp. 435 to 438.

It is clear from these decisions that in order to come within the ambit of the term 'corrupt practice' under s. 123(4) of the Act, there must be a false statement of fact by a candidate or his agent which is made in relation to the personal character or conduct of any other candidate. Adverse criticism, however severe, however undignified or ill-mannered, however regrettable it might be in the interests of purity and decency of public life, in relation to the political views, position, reputation or action of a candidate, would not bring it within the mischief of the statute. The Court in such matters cannot judge these statements in the light of their decency or desirability in so far as they are political statements not calculated to attack the personal character or conduct of any rival candidate. Further what is objectionable is a false statement of fact, and not a false statement of opinion however unfounded or however unjustified. It is only when the person beneath the politician is sought to be assailed and his honour, integrity and veracity is challenged and such a statement is false that it could be said that a false statement of fact about his personal character and conduct has been made; and once it is established that such a statement was made, the question whether there was malice or not is immaterial. In ascertaining the true nature of the statement made, the Court will have to take into consideration all the surrounding circumstances including the occasion when it was published or made, the person against whom it was made, the person publishing it or making it, the audience or readers to whom it is addressed as also precautions or care taken by the publisher to verify the truth or otherwise of the statement challenged. It is in the light of these principles that we have to examine the statements which have been objected to by the petitioner as having been made by Mr. Atre in his paper the *Maratha* on behalf of respondents Nos. 1 and 2.

Taking these statements chronologically, our attention was invited to exh. P-2, which is a letter appearing in the *Maratha* of February 2, 1957. That letter is signed by one Smt. Vijaya Vinayak Parpatte of Dadar. In that letter, which is headed "S. K. Patil's Scheme (designs)", a portion of three lines was objected to by the petitioner. That portion which is exhibited as B-1 in exh. P-2 reads thus:

"One man had come to inform that he was standing as independent candidate for Lok Sabha from Bombay City Central constituency. This man's candidature is also Patil-sponsored."

With reference to this statement, it is to be observed in the first instance that there is no direct reference to the petitioner at all and it has to be remembered that Mr. Hendre was not the only independent candidate in that constituency, but Mr. Parulekar also was an independent candidate. Besides, it is urged by Mr. Chari that this statement is to be found in a letter written by a reader of the paper and, therefore, no responsibility could be attributed to Mr. Atre for the views expressed by a reader. I shall deal with this point a little later.

The next statement is exh. P-3 appearing in the *Maratha* dated February 3, 1957, headed "Traitor's Front—Front of the people trying to cause split in the Samyukta Maharashtra Samiti" and that statement seems to be from the columns in the *Maratha* containing comments on current events entitled 'Sword & Shield' (*Dhal Talwar*) and the passage objected to is:

"Really this united front of Hendre, Birje and Desai is living on the support (blessings) of S. K. Patil."

According to Mr. Dhabe, the sting in this passage is not in the description of the three independent candidates having a united front, but in the description of these candidates as having been set up by Mr. S. K. Patil. But this statement also would be in the nature of political criticism.

Then I come to exh. P-1 which is a letter appearing in the *Maratha* dated February 14, 1957, and signed by one, Sudhir Chavan, Bombay. The letter is given the title "History of Hendre's candidature" and the following passages including the one marked A-3 from that letter are relied upon;

"Hendre was the right hand man of Yeshwantrao Chavan in the movement of 1942, was the well-wisher and sympathiser of Yeshwantrao and used to help the latter when underground with money, means and shelter.... In 1951, Yeshwantrao started for his oath-taking ceremony after he became Minister with the cocoanut and garlands and felicitations from Hendre. After the oath-taking ceremony, Hendre gave Yeshwantrao a big dinner party on the night of the oath-taking ceremony. But Hendre did not get contracts from Yeshwantrao after the latter became a Minister. Therefore Hendre left the friendship, house and name of Yeshwantrao.

The elections came. The election front of S. M. Samiti came into being. Lists of candidates started getting ready. Hendre started efforts that Samiti should nominate him from anywhere in Bombay or elsewhere he wanted a seat to contest; when no seat was vacant he showed his willingness to contest against Jedhe. But after he came to know that S.M. Samiti was not willing to support him as its candidate he became disappointed (dissatisfied)."

Mr. Dhabe naturally laid emphasis on the wording contained in the portion marked A-3 in exh. P-1. He contends that though the writer wants to give the history of his client's candidature, in reality there is a veiled attack against his personal character and conduct, and stress is laid particularly on the passage A-3 where there is an insinuation that because Mr. Hendre did not get any contracts from Mr. Yeshwantrao Chavan after he became Minister therefore Mr. Hendre proved false to his friendship and parted company from Mr. Chavan. The question is whether the letter read as a whole is an attack on the political views and reputation of the candidate or is an attack on his personal character and conduct.

The petitioner has denied in his evidence the insinuations made in this letter. His evidence indicates that he came to Bombay in the beginning of 1945 and was interested in the business of Amortex Agency, Private Ltd., where his wife also was a director. That company was registered in April or May 1953. Before that, he was the accredited yarn purchaser of Bhiwandi Sari Manufacturers' Association. In 1946, he started an Import and Export Company called Sudhir and Co. and in the middle of 1946 he had established one silk mill called Lokmanya Silk Mills. It appears that an insolvency petition was filed in 1949 against him and he was adjudicated an insolvent in May 1949 and was discharged from insolvency in 1951. From 1951 to 1953 he ran the business of Jagdish & Co. manufacturing surgical dressings on behalf of his wife and, as already stated, Amortex Agency also appears to have been started on behalf of his wife. He admits that he had applied to the Samyukta Maharashtra Samiti for a ticket in or about the first week of January 1957. Therefore, the statement in the letter (exh. P-1) that Hendre had first made efforts to get the support of the Samyukta Maharashtra Samiti is not unfounded. He admits to have met Mr. Yeshwantrao Chavan on some occasions but there is nothing in his cross-examination which would justify us in holding that he was trying to secure contracts with the help of Mr. Chavan when he became a minister. Mr. P. K. Atre in his evidence before the Tribunal stated with regard to this letter that it was written by one Sudhir Chavan, but he was not able to say where he lived and he stated that his address would have to be searched. He further stated that he verified the contents of that letter. He was unable to give the time and place of the reception to Mr. Chavan held by Mr. Hendre in 1951, but even with reference to that he stated that he verified the information regarding the fact of reception. Then he further stated that he did not know

if Mr. Chavan refused to give contracts to Mr. Hendre, nor was he able to give the date or time of the visit of the mother of Mr. Chavan to the house of Mr. Hendre. He stated that he could only state about the fact itself and he did not know this personally and he could not give the names of the persons who gave the information to him. He also did not know personally if Mr. Y. B. Chavan set the petitioner as a candidate or gave him help.

Considering the circumstances under which this letter came to be published and the nature and the suggestions contained in the statement to which objection is taken, we are not prepared to hold that this letter contains merely statements of opinion or facts which Mr. Atre could be said to have believed to be true. A reference to Mr. Hendre not getting any contracts from Mr. Yeshwant-rao Chavan when he became a minister does not, in our opinion, constitute merely a statement of fact about the political reputation of the petitioner but, in our view, it is also an attack on the personal character of the petitioner. There are other statements in that letter which do not seem to be objectionable from that point of view.

Then the next statement to which objection is taken is exh. P-6, which appeared in the *Maratha* dated March 7, 1957, also in the same columns containing comments on current events, and there it was indicated that

"Dr. Naravane's lion of the Legislative Assembly will pounce upon the lion of Hendre, independent candidate for Lok Sabha, as the latter lion is intended to mislead the voters..."

This statement, in our opinion, would not amount to any criticism on the personal character of the petitioner.

Then we were referred to a statement (exh. P-31) made by Mr. Dange, respondent No. 1, which appeared in the *Maratha* dated March 16, 1957. It is true that this letter appeared after March 11, 1957, when the voting at all the polling stations had taken place. But the objection of the petitioner to this statement is that it was made before March 21, 1957, when a fresh poll was to take place in the Tardeo Polling Station. That statement undoubtedly contains a fling at the Election Commission which may not be fair or proper. But the objection of the petitioner is to the suggestion of Mr. Dange that Mr. Chavan and his followers were trying to get an application filed through Mr. Hendre in order to get the election set aside. That, in our view, would not be a statement which would come within the mischief of s. 123(4) of the Act.

Then the last statement to which our attention was invited is exh. P-5 appearing in the *Maratha* dated March 20, 1957, which suggested that Mr. Hendre, advised by Mr. Yeshwantrao Chavan and the Democratic Research Service—an institution financed by American money, was standing for Lok Sabha from the Bombay Central Constituency against Mr. Dange. This statement also is purely a political statement.

These are the only statements on which Mr. Dhabe relied in support of his contention that false propaganda intended to lower the personal character of the petitioner was made by the successful candidates. I have already indicated our view that so far as the letter written by Sudhir Chavan (exh. P-1) appearing in the *Maratha* of February 14, 1957, goes, the reference to Mr. Hendre seeking contracts from Mr. Chavan, after he became a minister, and his failure to get them does appear to be an attack on the personal character of the petitioner and the statement would, therefore, come within the mischief of s. 123(4). As regards the other statements, the grievance of the petitioner is that he has been described as having been set up by Mr. Chavan and by Mr. S. K. Patil and that his candidature is supported by the American Democratic Research service, but these statements would not, in our opinion, be open to similar objection.

Now, Mr. Chari on behalf of the respondents contended that we must make a distinction between editorial or semi-editorial comments contained in the *Maratha* and comments made by readers of the *Maratha*, whose letters are published by the editor. We are not prepared to accept this argument. If letters

are published in a newspaper containing statements which are derogatory to persons mentioned in those letters, we do not think that the editor can escape responsibility for what is contained in those letters. It may be that the letters might contain the views of the readers and, if it is made clear, as is generally done, that the views expressed in the readers' letters are not necessarily the views of the paper, then no doubt such letters may stand on a somewhat different footing. But if the letters contain statement of facts which are false, then we do not think it could be said that the editor would not be responsible for what is stated in those letters. Mr. Atre in fact in his evidence has stated that he took precautions to verify the facts contained in the letters and he stated that when letters are sent to his paper for publication, the facts are verified but not the opinion which is of the writer of the letter himself. Referring to the letter (exh. P-2) published in his paper, he stated that he himself and his reporters verified the information, though he was unable to give the names of his reporters, but stated that he himself collected some information. He further stated that he had a strong suspicion that Mr. S. K. Patil gave financial assistance to Mr. Hendre, though he was unable to say when Mr. S. K. Patil gave money to Mr. Hendre, before whom, at what time and on what date. He also stated that when he was in the Congress he had done Congress propaganda in 1945 in company with Mr. S. K. Patil and he personally knew that Mr. Patil financed the sabotaging of opposition candidates. He further stated that he had seen Mr. Hendre in the company of Mr. S. K. Patil at least twice, when he dined in his company in the Chetana Hotel in Bombay and secondly when the petitioner emerged out of the Congress House, Bombay, in company with Mr. S. K. Patil, and that he was justified from this in inferring that Mr. Hendre was hand in glove with Mr. Patil. As I already stated, the petitioner denied that he was set up either by Mr. Patil or by Mr. Chavan. Mr. S. K. Patil categorically denied that he had set up Mr. Hendre as a candidate for the Bombay City Central Parliamentary Constituency and asserted that he had never seen him before the election and did not in fact know the existence of Mr. Hendre. The other independent candidate Dr. Desai, who subsequently withdrew, also denied that he was set up as a candidate by Mr. Patil. It has to be mentioned that though the petitioner, Dr. Desai and Dr. Birje had a sort of understanding in these elections, the latter two having stood for seats to the State Legislative Assembly, Dr. Desai and Dr. Birje withdrew from the contest and the allegation against these candidates also was that they were set up by Mr. Patil. But, as already stated, Dr. Desai denied that his candidature was sponsored by Mr. Patil. Mr. Dange stated in his evidence that he did not believe that Mr. Hendre was put up by Mr. S. K. Patil or Mr. Y. B. Chavan, though he admitted that in his speeches at meetings he expressed his apprehension that the independent candidates would split up votes and thereby indirectly help the Congress and he made a general appeal that all candidates opposed to the Samiti should withdraw. Mr. Lalji Pendse, the election agent of Mr. Dange, admitted that he did not issue any statement repudiating the propaganda in the *Maratha* alleging that Mr. Hendre was put up by Mr. Patil and Mr. Chavan; and this gains partial support from the evidence of witness Mr. Wable, who was examined on behalf of the petitioner. Mr. Wable stated that he was the editor of the weekly paper *Shivner* and at a meeting at Shivaji Park on March 9, 1957, Mr. Dange had said that independent candidates like Shri Hendre should withdraw from the contest, and if they did not withdraw, it was well known what would happen next. Mr. Dange further said that Mr. Hendre was not an independent candidate and was set up by the Congress and so he could not be in favour of the Samyukta Maharashtra. But that itself shows that Mr. Dange never alleged in his speeches that Mr. Hendre was either sponsored or financed by Mr. Patil or Mr. Chavan. The evidence, however, shows that the statement that Mr. Hendre was sponsored by Mr. Patil or Mr. Chavan was a false statement. There is no reliable evidence to indicate that the petitioner received any financial support from the

Democratic Research Service alleged to be financed by American money. In his evidence, however, Mr. Hendre admitted that he knew that there was an organisation of the name of Democratic Research Service, and it has been brought out in his cross-examination that he had an admiration for the economic system of America. In our opinion, that would not justify any inference that the petitioner's candidature was financed by the Democratic Research Service or that this Service itself was financed by American money.

But even taking these statements to be false statements, it does appear that Mr. Atre tried to verify some of the statements contained in the letters published by him and believed that those statements were true. It cannot, therefore, be said that these false statements of facts were known to be false to Mr. Atre or that he did not believe them to be true. Apart from that, in our judgment, describing a candidate as really not independent but as being supported by other parties or prominent persons of other parties would not amount to an attack on his personal character. It is true that Mr. Hendre described himself as an independent candidate. It is also true that according to him, he sympathised with the cause of Samyukta Maharashtra and disagreed with the Congress on several political matters. But even then, if a belief was entertained by his opponents that he was set up by the Congress, that, in our opinion, would not amount to making an attack on his personal character or conduct. Mr. Dhabe contended that describing a candidate as other than what he was standing for would really be an attack on the honesty of his character. In this connection, he relied on *Syed Hifazat Ali v. Mr. Mohammad Asghar*,⁷ where a candidate set up by the Muslim League was depicted to be in league with the Congress, which was alleged to have paid him Rs. 10,000 and it was further alleged that he had promised to sign the Congress pledge after his success. That case stands on a different footing, because the allegation in that case was that not only was the candidate in league with a rival body but a traitor to the body which had adopted him as a candidate.

It is further contended that these statements, though they may not amount to an attack on the personal character of Mr. Hendre, would certainly be false statements made in relation to Mr. Hendre's candidature. Mr. Dhabe argued that the expression "in relation to the candidature" in s. 123(4) of the Act is an expression with a wide connotation and cannot be given the restricted meaning attributed to it by the Election Tribunal, viz., the bundle of rights and qualifications which entitle a person to stand as a candidate in a particular constituency as well as the factum of his being a candidate. Under s. 79(b) of the Act, a "candidate" is defined as

"...a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate;"

The first limb of this definition undoubtedly seems to refer to the qualifications of a person for being nominated as a candidate in any constituency and to the fact of his so nominated. The second part provides that that person will be deemed to get the status of a candidate with effect from the time he begins to hold out as a prospective candidate. But Mr. Dhabe's argument in effect amounts to this, that any false statement of fact made about a person, after he announced his candidature, must come within the ambit of the expression "in relation to the candidature". But that interpretation would not fit in with the subsequent terms used in s. 123(4) which refer to the withdrawal or retirement from contest of any candidate. According to the Concise Oxford Dictionary "candidature" means "standing for election, being candidate". Speaking for myself, in view of the use of the subsequent expression "withdrawal, or retirement from contest, of any candidate", in s. 123(4) of the Act, the term "candidature" must have reference to his qualifications for being nominated as a candidate in a constituency and to his being so nominated in

7 (1947) Doabia's Indian Election Cases, Vol. I, p. 276.

fact. But since we have held that Mr. Atre did not believe these statements of facts to be false, it is not necessary for us to go further into this question.

That takes me to the question whether the statement contained in the letter (exh. P-1) by one Sudhir Chavan, published in the *Maratha* of February 14, 1957, a portion of which we have held to be an attack on the personal character of Mr. Hendre, should justify us in holding that it is a false statement made by Mr. Atre as the agent of the successful candidates. In this connection, Mr. Dhabe strongly relies on Explanation (1) to s. 123 of the Act, which says that the expression "agent" in the section "includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate." Mr. Dhabe contends that the term "agent" in s. 123 cannot be interpreted in the sense it has under the Law of Contract, and that under the law applied to elections it must be held to have a wider connotation. According to him no authorisation or declaration in writing is necessary and the fact of agency will be established by circumstances arising out of the general features of the case, the conduct and connection of the parties, and the subsequent recognition of the acts of the supposed agent or at least an absence of disavowal of such acts, and that the doctrine of agency is carried by election law much farther than in civil and criminal cases. He drew our attention to the observations of Grave J. in *The Boston Case*⁸ quoted in Frazer's *The Law of Parliamentary Elections*, 3rd edn., p. 73, as follows:—

"...with regard to election law, the matter goes a great deal further, because a number of persons are employed for the purpose of promoting an election, who are not only not authorized to do corrupt acts, but who are expressly enjoined to abstain from doing so. Nevertheless, the law says that if a man chooses to allow a number of people to go about canvassing for him, to issue placards, to form a committee for his election, and to do things of the sort, he must, to use a colloquial expression, take the bad with the good. He cannot avail himself of these people's acts for the purpose of promoting his election and then turn his back or sit quietly by, and let them corrupt the constituency."

He also relied on Hammond's observation in his book "*The Indian Candidate and Returning Officer*", at page 57, to the following effect:—

"In the ordinary sense of the word, a man cannot easily make another his agent without having his eyes fully open to what he is doing. But he may create an agent in the election sense of the word without being conscious of what is being done and in fact, in such a manner that when the person is ultimately decided to be his agent nobody is more astonished than himself."

Mr. Dhabe further argued that in case this principle is accepted, then it must necessarily be held that newspapers which make special propaganda for the election of a particular candidate could, in certain circumstances, be treated as the candidate's agents for purposes of election law; and in this connection reliance was placed on the following observation of Blackburn J. quoted in Rogers on 'Elections' (p. 391):—

"A candidate is responsible generally, you may say, for the deeds of those who to his knowledge for the purpose of promoting his election, canvass and do such other acts as may tend to promote his election, provided that the candidate or his authorised agents have reasonable knowledge that those persons are so acting with that object." (*Wakefield*, (1874) 2 O'M. & H. 103.)

Parker in his "*Election Agent and Returning Officer*" has stated as follows (pp. 311-312):—

"It is not necessary, in order to prove agency, to show that the person was actually appointed by the candidate; it is sufficient to show the conduct or connection of the parties, the recognition by the candidate of the acts of the person alleged to be an agent, or the absence of any disavowal of such acts. The various acts proved to estab-

⁸ (1874) 2 O'M. & H. 161, at p. 167.

lish agency may each, taken singly, be insufficient, and yet, taken as a whole, may be held to prove agency conclusively. Where the agency cannot be distinctly proved, it may be inferred or implied from the acts of the candidate, and from other facts and circumstances."

"Every instance in which it is shown that, either with the knowledge of the candidate, or of his appointed agents, a person acts at all in furthering the election for him, or in trying to do so, is some evidence to show that he is an agent; and if a person assumes to act for a candidate, and the latter accepts his services, he makes such person his agent. To establish agency, therefore, it may be unnecessary to show that the election agent himself knew of and accepted services voluntarily tendered; knowledge and acceptance by other persons in control of the election may be sufficient."

These passages and the observations of English Judges on the legal aspect of agency in elections would appear to support Mr. Dhabe's contention. Reference may also be made to Schofield's Parliamentary Elections, 2nd edn., pp. 201 to 205, where, after quoting numerous passages from decisions in election cases, it is observed that though the law of agency as applied to election petitions has been differently expressed by different Judges, all agree that the relation is not the common law one of principal and agent, but the candidate may be responsible for the acts of one acting on his behalf, though such acts are beyond the scope of the authority given, or indeed in violation of express injunction (p. 205). In our opinion, this would represent the correct legal position regarding agency in elections.

Mr. Dhabe says that there is ample evidence on the record to establish that Mr. P. K. Atre was an agent, so far as election propaganda was concerned, of both the candidates Messrs. Dange and Manay, who stood on the Samyukta Maharashtra ticket. It is not disputed that Mr. Dange was the Chairman of the Samyukta Maharashtra Election Samiti and Mr. Atre was a member of that Election Samiti. The Samiti consisted of various political parties of Maharashtra and the Communist Party was one such constituent party of which Mr. Dange is a member. There is also no dispute that Mr. Manay was a member of the Scheduled Castes Federation, now known as the Republican Party, and stood for a reserved seat on behalf of that party in the same constituency. Mr. Atre admits that the Samiti had no single political symbol, as it is a joint front of different political parties. The Samyukta Maharashtra Samiti had given badges to its workers and volunteers. There was no particular propaganda in favour of a particular candidate. There was general propaganda. Such of the workers who were carrying on active work were wearing the badges of the Samiti. It was also admitted by Mr. Dange that he and Mr. Atre jointly addressed some election meetings. He stated that when his candidature was accepted by the Parliamentary Board of the Samyukta Maharashtra Samiti, Mr. Atre was not present. He explained that there were two types of members of the Board, regular members and invitees, and Mr. Atre was only an invitee member. He also admitted that one Vinayak Bhawe was a member of the Communist Party and at the time of the election he was doing voluntary service in the office of the *Maratha* newspaper. He also stated that the Samyukta Maharashtra Samiti had nothing to do with the *Maratha* which was Mr. Atre's proprietary concern. Mr. Atre also stated in his evidence that the *Maratha* was his sole proprietary concern, but he admitted that propaganda was carried on in the *Maratha* on behalf of the Samyukta Maharashtra Samiti and that he was carrying on propaganda in favour of Messrs. Dange and Manay. It would appear from Mr. Dange's evidence that the Samyukta Maharashtra Samiti as such had no official organ of its own. In his cross-examination Mr. Dange admitted that he contributed, in the beginning of January 1958, Rs. 3,000 to the *Maratha* for purchasing a rotary machine, as his contribution to the Rotary Fund started by the *Maratha*. On this evidence, the Election Tribunal held that Mr. Atre was an agent of Messrs. Dange and Manay so far as speaking at public meetings was concerned, but he was not an agent with regard to propaganda that was carried on on behalf of these two candidates in the columns of the *Maratha*.

The finding of the Election Tribunal that Mr. Atre could be regarded as an agent for the purpose of addressing meetings has not been challenged before us, and it seems that it cannot be so challenged because admittedly a political campaign by way of public meetings was being carried on on behalf of the candidates who had obtained Samyukta Maharashtra Samiti tickets. The question is whether Mr. Atre could be also regarded as an agent of the two successful candidates when he carried on propaganda in his paper *Maratha* on behalf of the Samyukta Maharashtra Samiti candidates. It has been admitted by Mr. Lalji Pendse, the election agent of Mr. Dange, that there was a joint office of the Samyukta Maharashtra Samiti for propaganda on behalf of the candidates. Mr. Atre, as we have already seen, has also stated that the propaganda was carried on in the *Maratha*, which was his sole proprietary concern, on behalf of the Samyukta Maharashtra Samiti candidates and he was accordingly carrying on propaganda in favour of Messrs. Dange and Manay also. He was a member of the Samiti of which Mr. Dange was the Chairman. Now, being a member of a candidate's election committee has been held to be strong evidence of agency. See Halsbury's Laws of England, 3rd edn., Vol. XIV, p. 171, para. 304. In the case of elections, as we have already seen, the expression "agent" has to be given a wider interpretation and, in our judgment, therefore, the Tribunal's view that Mr. Atre was not an agent of Messrs. Dange and Manay with regard to election propaganda is not correct. We must, therefore, hold that so far as exh. P-1, the letter by Sudhir Chavan, appearing in the *Maratha* of February 14, 1957, is concerned, there was a publication by an agent of the candidates and the portion A-3 objected to in that letter contains a false statement in relation to the personal character of the petitioner Hendre. The evidence would also indicate that Mr. Atre could not have believed the statement to be true, and that statement was undoubtedly calculated to prejudice the prospects of the petitioner's election. We must, therefore, hold that so far as the portion A-3 in exh. P-1 is concerned, there has been a corrupt practice within the meaning of s. 123(4) of the Act.

That takes me to the question whether the election of the returned candidates has to be declared void under s. 100 of the Act. Mr. Dhabe's contention is that this statement in exh. P-1 would amount to a corrupt practice and would come within s. 100(1)(b) of the Act inasmuch as, according to him, it is committed by a person with the consent of the returned candidate or his election agent. In this connection, our attention was invited both by Mr. Dhabe as well as Mr. Chari to s. 100, before its amendment in 1956. Under the old s. 100(2)(b), the Tribunal had to arrive at a finding that the corrupt practice had been committed by a returned candidate or his agent or by any other person with the connivance of the returned candidate or his agent; so that under the section, before its amendment, a corrupt practice committed by any agent would have come within the mischief of this section. If it was not committed by either the returned candidate or his agent but by any other person, then, before it could affect the election, it had to be with the connivance of the returned candidate or his agent; and connivance undoubtedly means, in the context, consent, express or implied. After the amendment, the section has substituted for the expression "agent" the expression "election agent", so that a corrupt practice has to be committed by a returned candidate or his election agent; and then no question of consent naturally arises. But if it is a corrupt practice, which has not been committed by a candidate or his election agent, then before it affects the election, it has to be proved that it has been committed by any other person with the consent of the returned candidate or his agent. At one stage, Mr. Chari attempted to argue that the word "consent" must necessarily imply express consent, but he had to concede that consent may be express as well as implied. Since Mr. Atre was not the election agent of respondents Nos. 1 and 2, the question whether he was an agent for the purpose of propaganda is not really relevant for the purpose of this section. Before Mr. Dhabe's client can take advantage of s. 100(1)(b), he will have to prove that Mr. Atre, in publishing the impugned statement in exh. P-1, had either the implied or

express consent of Messrs. Dange and Manay or their election agents. Now, Mr. Dhabe contends that we must look to the circumstances under which this publication was made. It is undoubtedly true that the *Maratha* was carrying on a campaign in favour of all the candidates set up by the Samyukta Maharashtra Samiti. But the question is whether all these candidates will be bound by any statement that appeared in the *Maratha*. Just as Mr. Atre would be an agent for the returned candidates in respect of the propaganda carried on in the *Maratha* in their favour, he would also be an agent for the other candidates set up by the Samyukta Maharashtra Samiti. In an election of this type, the newspaper is bound to publish statements and appeals and everything that may be published in the newspaper would not bind the candidate, unless it is proved that there was either implied or express consent of either the candidate or his election agent. Mr. Dhabe argued that though undoubtedly the onus in such cases is on the person challenging the election, the Court may have regard to all the circumstances in which the propaganda on behalf of the successful candidates is carried on. In support of his argument Mr. Dhabe relied on an observation of the Supreme Court in *Jagan Nath v. Jaswant Singh*,⁹ where it was observed that it is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. Though this observation has been made in connection with a different set of circumstances, the principle underlying this observation has to be accepted in deciding election cases. In this connection, Mr. Chari relied on the meaning of the word 'consent', as given in Wharton's Law Lexicon, as being

"an act of reason accompanied with deliberations the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things—physical power, a mental power, and a free and serious use of them."

Reference may also be made in this connection to a passage from Halsbury's Laws of England, 3rd edn., Vol. XIV, p. 170, para. 301, which is to the following effect:

"... Mere non-interference on the part of the candidate with persons who, feeling interested in the success of the candidate, may act in support of his canvass is not sufficient to saddle the candidate with any unlawful acts of theirs of which the candidate and his election agent are ignorant." *Taunton (Borough) Case*."

There is nothing on the record of this case which would indicate that either the returned candidates Messrs. Dange and Manay or their election agent had knowledge about this letter (exh. P-1) appearing in the *Maratha* of February 14, 1957. No question or suggestion seems to have been put either to Mr. Dange or Mr. Manay or Mr. Lalji Pendse, Mr. Dange's election agent, on this point. We may also observe that with regard to some of the other statements also, about which grievance was made but which we have held to be not false statements of fact affecting the personal character or conduct of the petitioner, there is no evidence to show that either of the returned candidates or their election agents had knowledge about these statements. If that be so, it cannot be held that the statement in exh. P-1 has been made with the consent, express or implied, of respondent Nos. 1 and 2 or their election agents. Giving our most anxious consideration to this question, we must hold that even this statement would not fall within s. 100(1)(b) of the Act.

Mr. Dhabe has not relied on s. 100(1)(d)(ii) of the Act, and he has frankly stated that there is no evidence that this corrupt practice, even though it may have been committed in the interests of the returned candidates, would have materially affected the result of the election in so far as it concerned the returned candidates.

That takes me to the third and fourth points which have been urged before

9 [1954] A.I.R. S.C. 210.

10 (1874) 2 O'M. & H. 66, at p. 74.

us by Mr. Dhabe. He has relied on three exhibits, viz., exh. P-26, P-48 and P-27 (which is the same as exh. P-53) for the purpose of his argument that the election is vitiated by corrupt practice on account of undue influence and also on account of a systematic appeal being made by the respondents and their agents to the electors to vote on grounds of community, which statements, according to Mr. Dhabe, would fall within the ambit of s. 123(2) and (3) of the Act. I will take both these points together because reliance is placed on the same three exhibits regarding these points. In this connection, our attention is drawn to exh. P-48, which is a statement which appeared in the *Maratha*, dated March 6, 1957, over the signature of Mr. Dange as the President of the Samyukta Maharashtra Samiti. The statement reads thus:

"Brother-workers, in the name of Maharashtra and 105 martyrs, do not go out on 11th without giving votes and do not betray Samyukta Maharashtra."

We fail to see how such an appeal would either be an appeal to the voters to vote on grounds of community or how it would amount to undue influence. The appeal is addressed to the workers and it cannot, therefore, be obviously said that it is an appeal to any particular community. This appeal is published in the *Maratha* just before the date of the election which was March 11, and the same was declared to be a holiday. The workers were, therefore, enjoined not to go out without recording their votes. Mr. Dhabe says that this statement refers to the duty of the workers "in the name of Maharashtra and 105 martyrs" to give their votes on the 11th. We do not think on that ground it would either amount to any threat or injury of any kind or social ostracism and excommunication or expulsion from caste or community or of the electors being threatened that they would be objects of divine displeasure or spiritual censure, as Mr. Dhabe tried to suggest relying on the provisions of s. 123(2), proviso (a) (i) and (ii), of the Act. Nor can this appeal be regarded as an appeal to voters to vote on grounds of community or religion.

Then, our attention is invited to exh. P-26, which is an issue of the *Maratha* dated March 11, 1957. Objection is taken to several passages in this issue. There is, first of all, the appeal to "Lions of Maharashtra, make the Congress bullocks bolt away". There is also an appeal, "Saints and warriors of Maharashtra give us blessing". Then there is also an appeal to the following effect: "Worship the Shivashakti (Power of Shivaji) of Maharashtra with the 'bel' (leaves) of your votes". Then there is an appeal headed "Vow of the Maratha" with a picture below which are the words "Where is the black stone of the great bilingual? I reduced it to powder by the hammer of votes." Then on the third page of the issue, photographs of persons who were killed in the Bombay firing are published and on the top of the page there is a heading "Marathas of Bombay, take revenge of this devilish murder". Below these photographs are the words, "The Congress ballot box is besmeared with this blood of the martyrs". On the fourth page of the issue there is a picture of a hand with the Congress ballot box on the palm and on the top of the picture are the words: "Have you seen this ballot box of the Congress" and at the bottom are the words "It is smeared with the blood of the Marathas". The Tribunal was disposed to take the view that all these were political statements, however strong the words used therein, and we are not disposed to take a different view of either the statements or the pictures published in this issue.

Exhibit P-27, which is the same as P. 53, is a poster issued admittedly by the Communist Party on the same date, i.e. March 11, 1957, and on the top of this poster there are words expressing "salutation to the immortal martyrs who sacrificed their lives in the cause of Samyukta Maharashtra and Maharashtra-Gujarat" and at the bottom there is an appeal that the sacrifice of these martyrs should be remembered and the voters should make the Samyukta Maharashtra Samiti successful. That also, in our opinion, is in substance a political appeal to the voters. Mr. Dhabe contended that both exh. P. 26 and exh. P. 27 contain ghastly pictures and were bound to revive the memory of firings in Bombay and would, therefore, amount to undue influence

or direct or indirect interference with the electors' right to freely exercise their power to vote. It cannot be denied that these pictures were meant to be an appeal to the sentiments of the voters, but we are not prepared on that account to say that the publication of these pictures in the issue of the *Maratha* or the publication of the poster on the voting day amounted to undue influence which constituted any direct or indirect interference with the electors' right to freely exercise their power to vote.

Alternatively, Mr. Dhabe contended that the reference to the Marathas of Bombay in exh. P. 26 was an appeal to the voters to vote in favour of the Samiti candidates on grounds of community. Mr. Dhabe said that it might either be an appeal to the Maratha community as such or an appeal to the Marathi speaking citizens of Bombay. But even then according to Mr. Dhabe, it would come within the mischief of s. 123 of the Act. He further argued that we should not, in considering this appeal, construe the term 'community' in the popular sense of that term, and in this connection he relied on the case of *Yeshwantrao v. K. T. Mangalmurti*,¹¹ where a division bench of this Court construed the expression "all the contesting candidates" in s. 82(a) of the Act as meaning not merely those candidates who contested at the election but also those candidates who contested for the election, and the Court rejected the meaning of the expression "contesting candidate who retired from the contest" as not being a contesting candidate in the popular acceptance of the term. That was undoubtedly a case on different facts. In construing the word "community" in s. 123(3) we must no doubt give the word its natural meaning if it can bring out the real intention of the Legislature. In this connection, Mr. Chari referred us to a passage from Maxwell on the Interpretation of Statutes, 10th edn., pp. 19 and 20. Mr. Chari contended that we must construe the term "community" bearing in mind the rule in *Heydon's* case which required consideration of the law as it stood when the statute to be construed was passed, the nature of the mischief or defect for which the old law did not provide and the remedy and the reason for it which was provided by the subsequent statute to cure that mischief or defect. In this case, there is no amendment in the wording of s. 123(3) which is the same as the wording of the old s. 124(5) prior to the amendment of the Act in 1956. Before the said amendment, this kind of corrupt practice was classed as a minor corrupt practice, as distinguished from major corrupt practices included in s. 123 of the old Act. That distinction between major and minor corrupt practices was done away with by the amendment of the Act in 1956. Mr. Chari contends that we ought not to construe the term "community" so as to include therein a community of persons speaking a common language. According to him, what Parliament intended was the avoidance of rousing of communal or religious passions to influence voting at elections and that, he contends, must be understood in the sense it was always understood in this country so far. Now, the Representation of the People Act was passed in 1951 and it was amended in 1956 and Mr. Dhabe's argument in reply to Mr. Chari's contention is that in 1956 circumstances had considerably changed on account of the reorganisation of States and the agitation which ensued in connection with it, and he contends that the term "community" would also, therefore, apply to a 'linguistic' community and reliance is placed on the principle of construction which allows the extension of the language of a statute to new circumstances. In this connection, reference may usefully be made to a passage from Maxwell on the Interpretation of Statutes, 10th ed., at p. 79:

"Except in some cases where the principle of excessively strict construction has been applied, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the Act deals with a genus, and the thing which afterwards comes into existence is a species of it."

There is some force in what Mr. Dhabe has contended. Now, in sub-s. (3) of

s. 123 of the Act, what is regarded as objectionable is a systematic appeal to the voters to vote or refrain from voting on the ground of caste, race, community or religion. In our judgment, the term "community" cannot in the context be confined to a religious community only.

If we were to construe the appeal in the *Maratha* of March 11, 1957, as an appeal to the "Marathas" as a caste, then undoubtedly it would fall within the mischief of this section. But it cannot be so interpreted. The *Maratha* itself is a newspaper which is obviously intended to be read by the Marathi speaking and Marathi knowing persons, and Mr. Atre has admitted that the average circulation of his daily paper in January, February and March 1957 was about 40000 copies per day. The pictures published in that paper as well as in the posters issued by the communist party contain pictures of Gujarati victims of police firings, who appear to be described as being residents of Ahmedabad. The pictures of other victims also are not confined to persons belonging to the Maratha caste or community. Exhibit P. 27, the poster issued by the Communist Party, appealed for the unification of Maharashtra and Mahagujarat. It is not disputed that candidates standing on the Samyukta Maharashtra Samiti ticket were drawn from all communities speaking Marathi and non-Marathi languages. In these circumstances, we are not prepared to hold that either these appeals were intended to be addressed to the caste or community of Marathas or intended to be an appeal to the Marathi speaking electors to vote on the ground of their being a separate community. It is possible to construe these appeals as calling on the voters to vote in favour of the political principle of formation of separate States of Maharashtra and Mahagujarat by voting in favour of candidates pledged to that principle, though undoubtedly they were intended to make an intensely emotional appeal to the voters. We agree, therefore, with the finding of the Election Tribunal that these publications cannot fall within the mischief of sub-s. (3) of s. 123 of the Act.

Besides, it has to be remembered that exh. P. 26 as well as the poster exh. P. 27 were issued on the election day, that is to say, on March 11, 1957, and we agree with the view of the Election Tribunal that these two publications on the election day would not amount to a systematic appeal contemplated under s. 123(3) of the Act. We are not prepared to accede to Mr. Dhabe's argument that because of the publication of the pictures both in exh. P. 26 and exh. P. 27 on the election day, we should hold that there was a systematic appeal to the voters to vote on the ground of community. The expression 'systematic' would involve an element of planning, of method, of some continuity or persistence and admittedly exh. P. 26 and P. 27 or P. 53 were published on the day of the election only. The argument, therefore, that the publication of these exhibits constituted either undue influence or a systematic appeal to the voters to vote on the ground of community must, consequently, fail.

That takes me to the next argument of Mr. Dhabe that the present election has been vitiated by a corrupt practice falling within s. 123(1) of the Act, and Mr. Dhabe says that Mr. Awati, the candidate who stood on the Ram Rajya Parishad ticket, was induced to retire from the contest by reason of a reward offered to him by publication of his photograph in the *Maratha* dated March 12, 1957. That issue of the *Maratha* is exh. P. 30. It may be mentioned that in the trial Court it was also alleged by the petitioner that Mr. Awati was offered a bribe of Rs. 1,800 by one Vinayak Bhawe or somebody else on behalf of the Samyukta Maharashtra Samiti. Mr. Awati denied that allegation and stated that the statement that he got Rs. 1,800 from Vinayak Bhawe or anybody else was false. He characterised it as a creation of the petitioner's brain. He further stated that he had told the Ram Rajya Parishad that he could not afford to incur the expenses of election and as the Parishad was not giving him the necessary aid he would retire; and that was the sole reason of his retiring from the contest. The Tribunal, therefore, rejected the allegation of the petitioner that there was corrupt practice on the part of the successful candidates in inducing Mr. Awati to retire from the contest by giving him

Rs. 1,800. Mr. Dhabe has very properly not pursued that allegation in this Court. But he contends that the publication of Mr. Awati's photograph on the day after the election, giving him a prominent place and showing that he had supported the Samiti candidate, amounted to gratification as defined in the Explanation to s. 123(1). Below the photograph appearing in the *Maratha* it was stated that Mr. Awati who had withdrawn his candidature was the first to give his vote to the Samiti candidate, and Mr. Awati was to be seen in the photograph at the polling station at Shivaji Mandir at Dadar. Mr. Awati in his evidence stated that the representatives of the *Maratha* had not come to him to take his photograph and nobody had asked him to attend to give the first vote at the election. He went of his own accord to the Shivaji Mandir polling booth. He himself, his wife and daughter-in-law went to give their votes, but he did not pose for his photo for any photographer. He did not disclose to anybody for whom he was voting or for whom he voted because it was a secret poll. Then he explained that as there was only one woman voter, who was ahead of him to go inside for voting, and as the number of that voter could not be traced, he was given the ballot paper first. Mr. Atre in his evidence also stated that he did not know for whom Mr. Awati voted, that he was not present when he voted and that the photographer of the *Maratha* took this photo as those were his standing orders. He explained that it was stated in exh. P-30 that Shri and Smt. Awati voted for the Samiti candidate because his correspondent told him that they had in their hands Samiti cards. We do not think that the publication of this photograph amounts to any reward or gratification to Mr. Awati at all. The Explanation to sub-s. (1) of s. 123 of the Act refers to "all forms of entertainment and all forms employment for reward". It is really difficult to appreciate the argument that the publication of Mr. Awati's photo on the next day after the election would amount to a corrupt practice within the meaning of the Explanation to s. 123(1) of the Act.

[The rest of the judgment is not material to this report.]

PATEL J. ... So far as the question of agency is concerned, it must be mentioned that the word has not been defined anywhere in the Act, though it has been freely used in s. 123, s. 100 at one place and s. 98 as well. For the purpose of s. 123, Explanation No. 1 is appended to that section which says:

"In this section the expression 'agent' includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate."

This is an inclusive definition and not an exhaustive one and the question whether or not Mr. Atre was the agent of the returned candidate must therefore be determined with reference to the use of the word "agent" as understood in the law of elections all these days.

I may refer to a passage from the judgment of Mr. Justice Willes in *The Blackburn Case*¹ which is as follows (p. 201):—

"Nothing can be clearer than this law; it has existed for a very considerable period, I believe certainly from as early as the time of James I. Some 265 years ago the general principle was laid down upon the first and only occasion upon which the jurisdiction of the House of Commons over Parliamentary elections was seriously questioned, (*Goodwin's case*, 2 State Trials, 1) and upon which occasion it was confirmed. And it is enacted and settled as the law by the Corrupt Practices Prevention Act of 1854, s. 36, which, to my mind, does no more than lay down in very distinct terms that which has been always the understood law of Parliament, or rather the common law of the land, with respect to the election of members of Parliament; that is to say, that no matter how well the Member may have conducted himself in the election, no matter how clear his character may be from any imputation of corrupt practice in the matter, yet if an authorised agent of his, a person who has been set in motion by him to conduct the election, or canvass voters on his behalf, is in the course of his agency guilty of cor-

¹ (1861) 1 O'M & H, 198.

rupt practices, an election obtained under such circumstances cannot be maintained. As it has been expressed from early time, no person can win and wear a prize upon whose behalf the contest has not been legitimately and fairly carried on, or, as it was expressed [in Goodwin's case (2 St. Tr. 91)] *non coronabitur qui non legitime certaverit*, which is only so much in Latin showing the antiquity of the principle I have already expressed in English; and, whether it be the person who contends in respect of any unfair play of his own, whether it be the owner of a horse in respect of the foul riding of his jockey, whether it be the owner of a ship in respect of the fault of his steersman, or the hoisting of an additional sail against the rules of the race by one of the seamen; or whether it be a candidate, in a Parliamentary contest in respect of his agent, in every one of those cases, whether it has been the principal who has been guilty of illegality, or whether the illegality has been committed by his agent only, even without his authority or against his will, provided it be done in his agency, and for the supposed benefit of his principal, such principal must bear the brunt, and cannot hold the benefit in respect of that in which the agent has compromised him, and would in a matter of this description have also betrayed the public, who have a right that a just election shall be had."

Without multiplying reference to case law it may be stated that Tribunals in England have followed the principle of what is stated above without attempting to lay down a definite and precise definition of the word 'Agency' in election matters for the possible reason "that in some other case that particular definition might be evaded, although what came to substantially the same thing, might have taken place" (Grove J. in *Wakefield Case*²).

Our own Act has not given a precise definition of the word 'agent' and has left it to the Tribunal deciding an election case to determine in what relation a particular person canvassing for the votes for the candidate stands to him and from that to determine whether or not he is the agent of that candidate.

... The question then is whether the action of Mr. P. K. Atre in so far as the publication of the letter by even a correspondent which came within the ambit of s. 123(4) could be brought within s. 100 for declaring the result of the election void. If we turn to s. 123 which defines corrupt practices, in every component part of the section we find the use of the word "by a candidate or his agent or by other person" and those words appear not in sub-s. (1) but in every other sub-section of that section. Coming, however, to s. 100 it is a somewhat different matter. So far as relevant for the immediate purpose it is as follows:—

"100. (1) Subject to the provisions of sub-section (2), if the Tribunal is of opinion...

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent;...

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected...

(4) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his election agent or a person acting with the consent of such candidate or election agent;...

(2) If in the opinion of the Tribunal, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the Tribunal is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;

(b) that all such corrupt practices were of a trivial and limited character or took the form of customary hospitality which did not affect the result of the election;

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then the Tribunal may decide that the election of the returned candidate is not void."

Clause (1) (b) is intended to be directed to any corrupt practice committed by the candidate or election agent who has been defined in the Act, whatever be the nature of the corrupt practice. However if the corrupt practice is by some one other than those two then consent must be proved. Sub-clause (2) cannot be a proviso to this clause for the obvious reason that though an agent may fall within the words "any person other than a candidate or his election agent" as found in sub-cl. (1), to come within the proviso it must be established that the corrupt practice was committed "without consent", a contradiction in terms. Moreover, on fundamental principles acts of agents cannot have been intended to be treated so leniently, for it would be in a rare case that consent of the candidate could be established. It would appear that sub-cl. (2) is meant to be a proviso to some provision which would enable the tribunal to declare the election of a returned candidate void on the ground of a corrupt practice by an agent. But such a provision is absent from this section. If Mr. Atre's action falls within sub-s. (1) even though he is an agent then for the reason stated by my learned brother and with which I agree, consent of the returned candidates or their election agent not having been established the election cannot be held to be void.

Is it then possible to bring this particular action of Mr. Atre within any other provision of the section? The only one under which it could possibly be brought is sub-s. (1) (d) of s. 100. This provision in relation to the words "or a person acting with the consent of such candidate or election agent" is capable of being read in two ways, (1) by any corrupt practice committed in the interest of the returned candidate by a person other than a person acting with the consent of such candidate or election agent, and (2) by any corrupt practice committed by a person acting with the consent of such candidate or election agent. It seems this sub-cl. (d) is directed to something or the other done or omitted to be done by some one other than a candidate or his agent. It is, therefore, that "result of the election is materially affected" required before the election could be set aside. This is obvious for in elections it is common experience, of some persons "volunteers" who without even the knowledge of the candidate or his agent take so much interest in the election of a particular party or person and act in furthering his election. The provision is meant for canvassers like them. As an illustration in the very case it has appeared that in a chawl some persons put up a board and at other places some persons refused to allow the canvassers to even enter the chawl. I would, therefore, read the provision in the first meaning suggested by me. If it is read in this sense, then Mr. Atre's conduct will not be covered by it since he is not some one "other than a person acting with the consent of such candidate or election agent".

Is it possible to assign the second meaning to the section? For that purpose reference must be made to the provisions of sub-s. (2) of s. 100 which I have stated before. It must be remembered that this part must be read as a qualification to sub-s. (1), which undoubtedly it is, as it gives jurisdiction to the Tribunal to decide that the election of the returned candidate is not void if it is satisfied about certain matters in relation to the corrupt practices of an agent of a candidate. The result of applying it to sub-cl. (d) would be that if the corrupt practice is committed by some one falling within the words "person acting with the consent of the candidate" but is not "an agent" then the election must be set aside if it materially affected the result of the election. But if the corrupt practice is by an agent, a person who is more than a person acting with the consent of the candidate or his election agent, then the further facts, if established, would enable the Election Tribunal to decide that the election of the returned candidate is not void, a result obviously not intended. The provisions of this sub-section are wholly unsuited for being applied as a proviso to this method of reading that sub-clause. It is, therefore, impossible to read the section in its second meaning. Further this conclusion is strengthened by the very wording of that sub-s. (2) which refers specifically to a corrupt practice by an agent for which apparently there is no provision in the earlier sub-section.

The discussion above would show that it is a case of omission, an unfortunate result which should not be lightly created. It is no doubt possible to get over this difficulty and to bring out the real intention of the Act by reading the word "his agent" instead of the words "his election agent" in cl. (ii) of s. 100(1) and that is no doubt open to a Court construing a statute (See Maxwell, 10th Edition, page 229):—

"...This may be done by departing from the rules of grammar, by giving an unusual meaning to particular 'words', by altering their collocation, or by rejecting them altogether, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

I would have been tempted to do it in the case under discussion but for the fact that in the Bill† as presented in the House the words were "his agent" while in the Act as passed the words are "his election agent". It would, therefore, appear that what was done was done with some purpose which has, however, left a gap in the legislation. It is not for the Court to remedy that gap. There is, therefore, apparently no provision under s. 100 under which the action of Mr. P. K. Atre can be brought as an agent of the returned candidate. Assuming that the second meaning can be assigned to the provision then it is not proved that the result of the election has been materially affected. The election, therefore, cannot be declared void.

As to the other grounds urged by Mr. Dhabe my learned brother has dealt with them in great detail and I agree with his conclusions and have nothing further to add. I, therefore, agree with the final order that is proposed by my learned brother.

Appeal dismissed.

SUPREME COURT.

*Present: Mr. Justice B. P. Sinha, Mr. Justice Syed Jafer Imam and
Mr. Justice K. Subba Rao.*

NANI BAI v. GITA BAI RAMA GUNGE.*

Indian Limitation Act (IX of 1908), Sec. 134—Indian Registration Act (XVI of 1908), Secs. 17(1)(b), 49—Mortgagor's suit for possession after redemption—Applicability of art. 134 to such suit—Burden of proof whether on defendant that mortgagee has transferred larger interest than justified by mortgage—Partition severing only joint status of members of Hindu coparcenary without division of property by metes and bounds—Document evidencing such severance whether comes within purview of s. 17(1)(b) of Indian Registration Act.

Article 134 of the Indian Limitation Act, 1908, contemplates a sale by the mortgagee in excess of his interest as such. Therefore, to attract the operation of art. 134, the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage. If there is no such proof, the shorter period under art. 134 is not available to the defendant in a suit for possession after redemption.

Under Hindu law a partition by allotting specific properties or parcels to individual coparceners may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property

† (1955) Gazette of India, Extraordinary, Part II, Section II, p. 291 at item 53, re Section 100(2).

*Decided, April 14, 1958. Civil Appeal No. 177 of 1954.

is allotted by partition, and is, thus, within the mischief of s. 17(1)(b) of the Indian Registration Act, 1908. But a partition which is only a severance of the joint status of the members of the coparcenary i.e. what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds, may be brought about by a document and such a document which affects only the status of the member or the members who have separated themselves from the rest of the coparcenary, does not come within the purview of s. 17(1)(b) of the Act, and is, therefore, not compulsorily registrable.

THE facts are stated in the judgment.

L. K. Jha, Rameshwar Nath, J. B. Dadachanji and S. N. Andley, for the appellants.

K. B. Bengeri and K. R. Chaudhari, for the respondent.

SINHA J. This is a defendants' appeal by leave granted by the High Court of Judicature at Bombay, from the decision of that Court, dated October 9, 1950, in two cross-appeals from the decision of the Special Judge of the Special Tribunal Court at Mangalvedhe, dated July 31, 1946, in Special Suit No. 1322 of 1938. Of the two cross-appeals, the First Appeal No. 361 of 1948, by the appellants, was dismissed, and the First Appeal No. 363 of 1948, by the plaintiff, was allowed. The plaintiff-respondent had instituted another suit, being Suit No. 1894 of 1937, which was also tried along with Special Suit No. 1322 of 1938. The former suit stands dismissed as a result of the judgment of the High Court, and no appeal has been brought against that judgment to this Court.

The suit out of which this appeal arises (Special Suit No. 1322 of 1938), was instituted under the provisions of the Sangli State Agriculturists Protection Act, granting certain reliefs from indebtedness to agriculturists of that State which was then outside what used to be called "British India". The suit as originally framed prayed for accounts in respect of two mortgages, though there were really three mortgages, to be described in detail hereinafter, and for possession of the lands comprised in those mortgages. Defendant No. 1 filed his written statement on January 6, 1940, contesting the suit mainly on the ground that the plaintiff had no title to the mortgaged properties in view of the events that had happened; that the mortgaged properties had been sold at auction and purchased by the defendant's father who, thus, became the full owner thereof; and that he had sold most of the properties to other persons who were holding those properties as full owners. Defendant No. 3, who also represents the original mortgagee, filed a separate written statement supporting defendant No. 1. Of the defendants who are transferees from the original mortgagees or their heirs, only defendant No. 8 filed his written statement on March 26, 1940, substantially supporting defendant No. 1's written statement and adding that he had purchased the bulk of the mortgaged properties after acquisition of full title by the mortgagees themselves more than 12 years before the institution of the suit, and that, therefore, it was barred by limitation.

The trial Court dismissed the suit by its judgment dated November 26, 1941, with costs. On appeal by the defeated plaintiff, the Special Bench of the High Court of Sangli State, by its judgment dated June 13, 1944, remanded the suit for a fresh trial after having permitted the plaintiff to amend the plaint so as to include the relief for redemption. It appears that during the pendency of the suit after remand, an application was made in February, 1945, for making substitution in place of defendant No. 2 who had died meanwhile, but the application was refused by the Court on the ground that the suit had abated as against that defendant. After re-framing the issues and re-hearing the case, the trial Court, by its judgment and decree dated July 31, 1946, dismissed the suit as against defendants Nos. 6 to 9 who were holding portions of the mortgaged properties by sale-deeds of the years 1919 and 1922, for more than 12 years, as barred by limitation under art. 134 of the Limitation Act. The

Court decreed the suit in respect of the mortgaged portion of R.S. No. 1735, having an area of 16 *acres* and 21 *gunthas*, as against defendant No. 3, and R.S. No. 334 against defendant No. 1's heirs. Each party was directed to bear its own costs throughout. From that decision, the defendants preferred a first appeal, being First Appeal No. 361 of 1948, and the plaintiff filed a cross-appeal, being First Appeal No. 363 of 1948, in the High Court of Judicature at Bombay. Both the appeals were heard together along with two other cross-appeals arising out of the other suit mentioned above. The High Court, by its judgment and decree dated October 9, 1950, dismissed the defendants' appeal No. 361 of 1948, and allowed the plaintiff's appeal No. 363 of 1948, with costs, holding that art. 148 and not art. 134 of the Limitation Act, applied to the suit, and that, therefore, it was not barred by limitation. In the result, the plaintiff's suit was decreed in its entirety. Hence, this appeal by the defendants.

A number of questions of fact and law have been raised by the learned counsel for the appellants, but before we proceed to deal with them, it is convenient to dispose of the preliminary points in bar of the suit. At the forefront of his submissions, the learned counsel for the appellants contended that the suit was outside the jurisdiction of the Special Court created under the Sangli State Agriculturists Protection Act I of 1936. With reference to the provisions of that Act, it was contended that the Act authorized the Special Court to take accounts and to re-open closed transactions only up to the year 1915, and that as the transactions which were the subject-matter of the suit, were of the years 1898, 1900 and 1901, the Special Court was not competent to go into those transactions and grant any relief to the agriculturist-plaintiff. In our opinion, there is no substance in this contention. The Sangli Act referred to above, had chosen the year 1915 as the date-line beyond which the Court was not competent to grant any relief to agriculturists, by way of re-opening of closed transactions. But that does not mean that the Court itself was incompetent to grant any other relief in respect of transactions of a date prior to 1915. If the Legislature had intended to limit the jurisdiction of the Special Court, as contended on behalf of the appellants, nothing would have been easier than to say in express terms that the Court's jurisdiction to grant relief was limited to transactions of that year and after, but there are no such words of limitation in any part of the statute. The operative portion of the statute does not contain any such provision. In our opinion, therefore, the Special Court was competent to entertain the suit for redemption, though it would not be competent to re-open those transactions even if any such question of re-opening closed transactions had been raised. But it is manifest that no such question arose out of the pleadings in this case. Hence, those words of limitation are wholly out of the way of the plaintiff. It may be mentioned that no such plea of want of jurisdiction of the trial Court had been raised in the pleadings or in the issues in the Courts below. This ground was raised, for the first time, in the statement of case in this Court. The preliminary objection to the jurisdiction of the trial Court is, thus, overruled.

It was next contended that the suit was barred by limitation of one year under art. 12 of the Limitation Act. The point arose in this way. The properties sought to be redeemed were mortgaged, as will presently appear, successively under three bonds of the years 1898, 1900 and 1901, by the plaintiff's father, Gundi (omitting all reference to his brothers). It appears that there was a decree for money of the year 1903, in favour of a third party who is not before us. Gundi had been sued as the original defendant, but after his death, his place was taken by his brother Sadashiv as his heir and legal representative. In execution of the decree, the mortgaged properties were auction-purchased by the mortgagee's son, Fulchand, son of defendant No. 1 as it appears from the sale-certificate, exh. D-56, dated October 31, 1907. On the basis of this auction-purchase, it has been contended on behalf of the mortgagee that unless the sale were set aside, it would bind Gundi and his successor-in-interest, the plaintiff. The High Court has held that art. 12 is out of the

way of the plaintiff because neither the plaintiff nor her father was a party to the sale. If Gundi herself were a party to the execution proceedings, the sale as against him, would bind his estate and his successor-in-interest. But it appears that Gundi was substituted by his brother Sadashiv in the execution proceedings. If Sadashiv could not be the representative-in-interest of Gundi, as will presently appear, he could not have represented Gundi's estate, and, therefore, the sale as against him, would be of no effect as against the plaintiff. But it was argued in answer to this contention that the decision of the Privy Council in the case of *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa*¹ is an authority for the proposition that even if the property was sold by substituting a wrong person as the legal representative of the judgment-debtor, the sale would bind the estate of the judgment-debtor as much as if the right legal representative had been brought on the record of the execution proceedings. Assuming that the decision of the Privy Council in *Malkarjun's* case (*supra*) is correct, and that it is not subject to the infirmities of an *ex parte* judgment, as may well be argued, that decision is clearly distinguishable so far as the present case is concerned. In *Malkarjun's* case, the executing Court had been invited to decide the question as to who was the true legal representative of the judgment-debtor, and the Court, after judicially determining that controversy, had brought on record the person who was adjudged to be the true legal representative. The sale was held to be of the property of the judgment-debtor through his legal representative, after the adjudication by the Court. The Privy Council held that though the decision of the Court on the question as to who was the true legal representative was wrong, it was a decision given in that litigation which affected the judgment-debtor and his true legal representative, unless set aside in due course of law. In the present case, there was no such adjudication. From the scanty evidence that we have on this part of the case, it appears that Gundi, the original defendant, had died and had been, without any controversy, substituted by his brother, Sadashiv. The Court had not been invited to determine any controversy as between Sadashiv and the true legal representative of Gundi deceased. In execution proceedings, the property was sold as that of Sadashiv—the substituted judgment-debtor. It was a money-sale and passed only the right, title and interest of Sadashiv, if it had any effect at all. *Malkarjun's* case (*supra*), therefore, is of no assistance to the appellants. The plaintiff, Gundi's daughter, not being affected in any way by the sale aforesaid, it is not necessary for her to sue for setting aside the sale. She was entitled, as she has done, to ignore those execution proceedings, and to proceed on the assumption, justified in law, that the sale had not affected her inheritance. The suit is, therefore, not barred by art. 12 of the Limitation Act.

It was next contended that even if art. 12 was not available to the defendants by way of a bar to the suit, the suit was certainly barred under art. 134 of the Limitation Act. Under art. 134, the plaintiff has to sue to recover possession of immoveable property mortgaged and, afterwards, transferred by the mortgagee for a valuable consideration, within 12 years from the date the "transfer becomes known to the plaintiff." On the other hand, it has been contended on behalf of the plaintiff that the usual rule of 60 years' limitation under art. 148 of the Limitation Act governs the present case. On this part of the case, the defendants suffer from the initial difficulty that the sale-deeds, relied upon by them in aid of the plea of limitation under art. 134, have not been brought on the record of this case, and, therefore, the Court is not in a position to know the exact terms of the sale-deeds. This difficulty, the appellants sought to overcome by inviting our attention to the statements made in para. 8 of the plaint. But those are bald statements giving the reasons why the defendants other than the original mortgagee were being impleaded as defendants. There is no clear averment in that paragraph of the plaint about the extent of the interest sold by those sale-deeds and other transfers

¹ (1900) L. R. 27 I.A. 216, a.c. 2 Bom. L. R. 927.

referred to therein. The Court is, therefore, not in a position to find out the true position. Those sale-deeds themselves were the primary evidence of the interest sold. If those sale-deeds which are said to be registered documents were not available for any reasons, certified copies thereof could be adduced as secondary evidence, but no foundation has been laid in the pleadings for the reception of other evidence which must always be of a very weak character in place of registered documents evidencing those transactions. Article 134 of the Limitation Act contemplates a sale by the mortgagee in excess of his interest as such. The Legislature, naturally, treats the possession of such transferees as wrongful, and therefore, adverse to the mortgagor if he is aware of the transaction. Hence, the longer period of 60 years for redemption of the mortgaged property in the hands of the mortgagee or his successor-in-interest, is cut down to the shorter period of 12 years' wrongful possession if the transfer by the mortgagee is in respect of a larger interest than that mortgaged to him. In order, therefore, to attract the operation of art. 134, the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage. If there is no such proof, the shorter period under art. 134 is not available to the defendant in a suit for possession after redemption. A good deal of argument was addressed on the question as to upon whom lay the burden to prove the date of the starting point of limitation under that article. It was argued on behalf of the defendants-appellants that as it is a matter within the special knowledge of the plaintiff, the plaint should disclose the date on which the plaintiff became aware of the transfer. On the other hand, it was contended on behalf of the plaintiff-respondent that it is for the defendants to plead and prove the facts including the date of the knowledge which would attract the bar of limitation under art. 134. As we are not satisfied, for the reasons given above, that art. 134 is attracted to the present case, it is not necessary to pronounce upon that controversy. It is, thus, clear that if arts. 12 and 134 of the Limitation Act do not stand in the way of the plaintiff's right to recover possession, the only other article which will apply to the suit, is art. 148. It is common ground that if that article is applied, the suit is well within time.

Before dealing with the factual aspects of the case, it is necessary to deal with another plea in bar of the suit raised on behalf of the appellants. It is contended that the suit is bad for defect of parties in so far as the heirs of defendant No. 2 are concerned. It appears from the order dated March 27, 1946, passed by the trial Court during the pendency of the suit after remand, that defendant No. 2 died on April 26, 1943, that is to say, while the appeal before the Bombay High Court was pending in that Court before remand. The then appellant, who was the plaintiff, did not take steps to bring on record the legal representatives of that defendant. An attempt was made by the plaintiff later on to get his heirs substituted on the record, but the Court upheld the defendants' objection and did not allow substitution to be made. It was, thereof, noted that the appeal, which was then pending in the High Court, had abated as against defendant No. 2, and that, the order of remand made after his death and in the absence of his legal representatives, would not affect them. Therefore it was contended that the whole suit would abate, because, in the absence of the heirs of the deceased defendant No. 2, the suit was imperfectly constituted under O. XXXIV, r. 1, of the Code of Civil Procedure. That rule requires that "all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties..." The original mortgagee under the three mortgages was Kasturchand Kaniram. Defendant No. 1 has contested this suit by filing a separate written statement of his own as the successor-in-interest of the original mortgagee. It does not appear from the pleadings that defendant No. 2 was a joint mortgagee with defendant No. 1 or his ancestors. The only statement in the plaint in para. 8 with reference to defendant No. 2 is that the "Lands R.S. No. 1735 has gone to the share of defendant No. 2. Defendant No. 3 looks after all the transactions of defendant No. 2 and the shop running under

the name of 'Kaniram Kasturchand' has gone to the share of defendant No. '3'. Thus, it is not a case of defendant No. 1 being joint with the other defendants including defendant No. 2 who is not now represented on the record. If defendant No. 2 had any distinct interest, that, on the plaint, appears to be confined to R.S. No. 1735. In the written statement filed on behalf of defendant No. 3 it is stated in para. 9 that the mortgaged portion of R.S. No. 1735, which, according to the plaint, was the property of defendant No. 2, was really in possession of defendant No. 3 as owner. It would, thus, appear that even in respect of that plot, defendant No. 2 had no subsisting interest. This claim of defendant No. 3 is strengthened by the fact that defendant No. 2 did not file any written statement challenging the statement aforesaid of defendant No. 3 or claiming any interest in that plot or any other part of the mortgaged property. Defendant No. 2 had remained *ex parte* throughout, apparently because he had no interest in the property to be redeemed. In any view of the matter, his heirs are not parties to this suit, and any determination in this suit will not bind them. But it does appear that defendant No. 2 had no subsisting interest, if he had any at any anterior period, in any portion of the mortgaged property.

It was also contended that the original defendant No. 8 died, and in his place defendants Nos. 8a to 8g were substituted. It appears that of the seven persons substituted on the record as the legal representatives of the original defendant No. 8, only defendants 8e, 8f and 8g were served, and the others, namely 8a, 8b, 8c and 8d, were not served. On those facts, it was contended that the suit for redemption was bad in the absence of all the necessary parties. It was sought, at one stage of the arguments, to be argued that the suit had abated against defendant No. 8, and this argument, in the High Court, was met by the observation that under O. XXII, r. 4, Code of Civil Procedure, it was enough to bring on record only some out of the several legal representatives of a deceased party, on the authority of the judgment of the Bombay High Court in *Mulchand v. Jairamdas*¹. But on the facts stated above, there was no room for the application of r. 4, O. XXII, of the Code. All the legal representatives, at any rate, all those persons who were said to be the legal representatives of the deceased defendant No. 8, had been substituted. Thus, the requirements of O. XXII had been fulfilled. If, subsequently, some of the heirs, thus substituted, are not served, the question is not one of abatement of the suit or of the appeal, but as to whether the suit or the appeal was competent in the absence of those persons. It does not appear that the absent parties were really necessary parties to the suit or the appeal in the sense that they were jointly interested with the others already on the record in any portion of the mortgaged property. In what circumstances they were not served or ordered to be struck off from the record does not clearly appear from the printed record before us. Defendant No. 8a, who happens to be the brother of the original defendant No. 8, has only filed a written statement claiming that he and his vendor, defendant No. 7, had been in possession for more than 12 years, and that the suit was, on that count, barred by limitation. None of the other defendants, who had been brought on the record in place of the original defendant No. 8, has appeared in the suit or in the appeal to contest the claim of defendant No. 8e that he was in possession of that portion of the property, namely, 6 acres and 32 gunthas out of R.S. No. 242 (old survey No. 233). Hence, there was no question of abatement of the suit or the appeal. The only question which may or may not be ultimately found to be material on a proper investigation, may be whether the decree to be passed in this case, would be binding on those who had not been served. For ought we know it may be that they were not interested in the plot sought to be redeemed. On these findings, it must be held that the preliminary objections raised on behalf of the defendants in bar of the suit must be overruled. Hence, the whole suit cannot be held to be incompetent for the reason that the heirs of defendant No. 2 have not been brought on the record.

¹ (1934) 37 Bom. L.R. 288.

Having thus disposed of the specific pleas in bar of the suit, we now turn to the contentions bearing on the factual aspects of the controversy. It was contended that the plaintiff, who is admittedly the daughter of Gundi, has not established her title to the mortgaged properties. In this connection, it is convenient to set out the essential facts in relation to the three mortgage-deeds in question. The first mortgage is dated June 4, 1898, in favour of Kasturchand Kaniram, executed by Gundi, son of Appa, for the sum of Rs. 700, the amount borrowed by him, mortgaging 7 survey numbers with an aggregate area of 48 acres and 38 gunthas. It was a mortgage with possession for a period of 4 years, with Gundi's two brothers—Sadashiv and Rama—as sureties for the re-payment of the amount borrowed which was the personal responsibility of Gundi under the terms of the document. But the property mortgaged is admittedly the ancestral land of the three brothers. The second mortgage between the same parties in respect of the same properties bears the date May 25, 1900. It secures a further advance of Rs. 300 to the mortgagor, the payment of which debt is again assured by his two brothers—Sadashiv and Rama—as sureties. The third mortgage-bond is for a further advance of Rs. 200 to the mortgagor Gundi, with his brothers aforesaid again figuring as sureties. It would, thus, appear that all the three mortgages are between the same parties as mortgagor and mortgagee, and the two brothers of the mortgagor join in executing the mortgages as sureties, the property given in mortgage belonging to all the three brothers. The total advance of Rs. 1,200 under those three mortgages was made to the principal debtor, Gundi. It appears that, of the three brothers, Rama died first, and then Gundi, some time in 1903, survived by his two daughters—the plaintiff and defendant No. 18. The plaintiff's case is that the common ancestor, Appa, in his life-time, had effected a partition amongst his three sons aforesaid, giving them each specific portions of his lands, reserving a portion for the maintenance of his wife. Those transactions are exhs. P-43, P-44, P-45 and P-46, all dated August 31 or September 1, 1892, and, apparently, forming parts of the same transaction. These are formal documents giving details of the lands allotted to each one of the three brothers and to their mother by way of maintenance. The common recital in these documents is that the executant of the documents, Appa, had three sons—Gundi, Sadashiv and Rama, in order of seniority—"who cannot pull on together". The document further recites: "Hence, separation having been effected with your consent, (I have) divided in every way and given you the estate, the land, the assets etc., pertaining to the one-third share. The same are as under." Then follow the details of the properties separately allotted to each of them. The plaintiff's case is that ever since 1892—the date of the documents aforesaid—the three branches of the family had become separate in estate, if not also divided in all respects, and that on the death of Rama, Gundi and his brother Sadashiv inherited his one-third share in equal moieties, that is to say, on the death of their mother and their brother, the two brothers became owners of half and half of the ancestral property left by Appa who appears to have died soon after the alleged partition. The plaintiff's case further is that the principal mortgagor in all those three transactions aforesaid was Gundi, and his two brothers had joined only as sureties by way of additional security in favour of the mortgagee. It has been contended on the other hand on behalf of the defendants-appellants that, in the first instance, the documents of 1892, referred to above, do not evidence an actual partition by metes and bounds, but only represent an arrangement by way of convenience for more efficient and peaceful management of the family property, and that, alternatively, if those documents are claimed to have the efficacy of partition deeds, they are inadmissible in evidence for want of registration. The Courts below have held that those documents are inadmissible in evidence as regular deeds of partition which they purport to be in view of the provisions of the Registration Act. But those transactions have been used for the collateral purpose of showing that from that time, the three brothers became separate in estate, and evidencing the clear intention on the part of each one of them to

live as separated members, each with one-third share in the paternal estate. In this connection, reliance was placed on behalf of the appellants, upon what was alleged to be the subsequent conduct of the three brothers after 1892, as evidenced by the three mortgage-bonds themselves and the sale-deed—exh. D-54—dated June 17, 1909. By the last named document, Sadashiv purported to sell to Fulchand Kasturchand, son of the original mortgagee, practically the whole of the mortgaged properties, for a sum of Rs. 1,500. The recitals in the sale-deed would certainly make it out that the three brothers were joint in estate, and that the sale-deed was being executed to pay off the personal loans of Gundi and Rama during the years 1900 to 1903, plus the loans taken by the vendor himself. Finally, the deed proceeds to make the following very significant declaration as to the status of the members of the so-called joint family:—

“As I have sold to you my right, title and interest in the abovesaid lands, neither I nor my heirs and executors of my will have any right whatsoever over the said property. As I am the male heir in the joint family by survivorship, nobody except me has any interest in the aforesaid lands. I have sold to you whatever interest I had in the said lands.”

It was further contended that even strangers to the family treated the brothers as joint in estate as shown by the execution proceedings and the sale certificates of the years 1903 to 1907, whereby Sadashiv was substituted as the sole heir and legal representative of the defendant Gundi, in the suit for money which resulted in the auction-sale referred to above, of the year 1907.

If the transaction of the year 1892 is admissible in evidence for the purpose for which the document was used in the Courts below, namely, to prove separation in estate, there is no room for ambiguity, and the position is clear that the three brothers had become separate. Further recitals in those documents that specific portions of the ancestral property had been allotted to the three brothers separately, being in the nature of a partition deed by the father in his life-time, and being unregistered, are inadmissible in evidence to prove such a partition. But the plaintiff's case does not depend upon proof of actual partition by metes and bounds. In the absence of any ambiguity, the later transactions would not be relevant except to show that there was a subsequent re-union amongst the brothers, which is no party's case.

But it was argued on behalf of the appellants that those documents—exhs. D-52, D-53 and D-55—are not admissible in evidence even for the limited purpose of showing separation in estate. The question, therefore, is whether those documents “purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property”, within the meaning of s. 17(1)(b) of the Registration Act. No authority has been cited before us in support of this contention. Partition in the Mitakshara sense may be only a severance of the joint status of the members of the coparcenary, that is to say, what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-sharers who may not be members of a Hindu coparcenary. For partition in the former sense, it is not necessary that all the members of the joint family should agree, because it is a matter of individual volition. If a coparcener expresses his individual intention in unequivocal language to separate himself from the rest of the family, that effects a partition, so far as he is concerned, from the rest of the family. By this process, what was a joint tenancy, has been converted into a tenancy in common. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition, and is, thus, within the

mischief of s. 17(1)(b), the material portion of which has been quoted above. But partition in the former sense of defining the shares only without specific allotments of property has no reference to immovable property. Such a transaction only affects the status of the member or the members who have separated themselves from the rest of the coparcenary. The change of status from a joint member of a coparcenary to a separated member having a defined share in the ancestral property may be effected orally or it may be brought about by a document. If the document does not evidence any partition by metes and bounds, that is to say, the partition in the latter sense, it does not come within the purview of s. 17(1)(b), because so long as there has been no partition in that sense, the interest of the separated member continues to extend over the whole joint property as before. Such a transaction does not purport or operate to do any of the things referred to in that section. Hence, in so far as the documents referred to above are evidence of partition only in the former sense, they are not compulsorily registrable under s. 17, and would, therefore, not come within the mischief of s. 49 which prohibits the reception into evidence of any document "affecting immovable property." It must, therefore, be held that those documents have rightly been received in evidence for that limited purpose.

Lastly, it was contended that if those documents of the year 1892 are admissible to prove separation amongst the three brothers, then, on the death of one of the three, namely, Rama, and of their mother, the entire ancestral properties including the mortgaged properties, vested in the two brothers in equal shares. Both by the auction-purchase of the year 1906 (D-57-D) and the sale deed (exh. D-54 of the year 1909), Sadashiv's moiety share in the mortgaged property was purchased by Fulchand aforesaid. The plaintiff, therefore, could only claim the other moiety share of her father, Gundi. In our opinion, there is no answer to this contention because it is clear upon a proper construction of the three mortgage-bonds and on the plaintiff's own case that the entire ancestral properties and not only Gundi's share, had been mortgaged. The appeal will, therefore, be allowed to the extent of the half share rightly belonging to Sadashiv, and the decree for possession after redemption will be confined to the other half belonging to the plaintiff's father.

In the result, the appeal is allowed to the extent indicated above. As success between the parties has been divided, they are directed to bear their own costs throughout.

Appeal partly allowed.

*Present: Mr. Justice B. P. Sinha, Mr. Justice Syed Jafer Imam and
Mr. Justice K. Subba Rao.*

**MADHAVRAO NARAYANRAO PATWARDHAN v. RAM KRISHNA
GOVIND BHANU.***

Indian Limitation Act (XI of 1922), Sec. 14.—Plaintiff failing to prove affirmatively that previously instituted suit prosecuted by him in good faith and with due diligence—Whether plaintiff entitled to benefit of s. 14—Burden of proof.

When the plaintiff has not satisfied the initial burden which lies upon him to bring his case within s. 14 of the Indian Limitation Act, 1908, namely, that the previously instituted suit was prosecuted in good faith and with due diligence, the burden would not shift to the defendant to show the contrary.

THE facts appear in the judgment.

In C. A. No. 287 of 1955.

A. V. Viswanatha Sastri, with G. A. Desai and Nawnit Lal, for the appellant and respondent No. 6 in C.A. No. 288 of 1955.

**Decided, April 18, 1958. Civil Appeals Nos. 287 and 288 of 1955.*

In C. A. No. 288 of 1955.

H. N. Sanyal, Additional Solicitor-General of India, with *K. L. Hathi* and *R. H. Dhebar*, for the appellant and respondent No. 2 in C. A. No. 287 of 1955.

Purshotam Tricumdass, *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, for respondent No. 1 in both the appeals.

SINHA J. These two appeals are directed against the judgment and decree dated November 30, 1951, passed by a Division Bench of the High Court of Judicature at Bombay, reversing those of the District Judge at Miraj, dismissing the plaintiff's suit for possession and mesne profits in respect of the suit properties in Civil Suit No. 2 of 1940. Civil Appeal No. 287 of 1955 is on behalf of the added respondent No. 7, and the Civil Appeal No. 288 of 1955 is on behalf of the added respondent No. 6—the State of Bombay which now represents the original defendant No. 1—the Miraj State (now merged in the State of Bombay).

In the view we have taken, as will presently appear, on the question of limitation, it is not necessary to state in any detail the pleadings of the parties or the merits of the decisions of the Courts below. For the purposes of these appeals, it is only necessary to state that the plaintiff-respondent, who was the appellant in the High Court, had instituted a suit on January 31, 1929, the very last day of limitation, in the Munsiff's Court at Miraj. This suit was registered as Original Suit No. 724 of 1930, in that Court. The plaintiff prayed in the plaint for possession and mesne profits in respect of lands at Malgaon and Takli, on the ground that the then State of Miraj had wrongfully resumed those lands in 1910, as part of the State *Sheri Khata*, which, after inquiry, was ordered on July 31, 1915, to be recorded as such lands, and the usufruct thereof during that period to be appropriated to the *Khasgi-Khata* of the State. The plaintiff impleaded the State of Miraj as defendant No. 1. Defendants Nos. 2 and 3 are plaintiff's brothers who are said to have relinquished their interest in the suit properties in favour of the plaintiff. Defendants Nos. 4 to 7 belong to the family of Narso who was, until his death in 1910, recorded in respect of the suit properties, but they did not appear and contest the plaintiff's claim. The suit was valued at Rs. 2,065, being 5 times the assessment on the disputed lands for the purposes of court-fee. No valuation was given in the plaint for the purposes of jurisdiction with reference to the value of the properties claimed. A similar suit had been instituted by the plaintiff in the same Court in respect of lands in another village called Tikoni. That had been registered as Original Suit No. 443 of 1928, in the Munsiff's Court at Miraj, and we shall refer to that suit as the 'Tikoni suit'. It appears that the two suits proceeded in that Court in a very leisurely fashion until November 29, 1939, when the Tikoni suit was dismissed. After the dismissal of that suit, the plaintiff made an application on June 21, 1940, drawing the attention of the Court to the fact that the value of the subject-matter of the suit had not been mentioned in the plaint, and that, on a moderate valuation, the disputed land should not be worth "less than a minimum of 8 to 10 thousand rupees", and that, therefore, the Court had no pecuniary jurisdiction to hear the suit. The Court allowed the application and directed the plaint to be returned to be presented to the proper Court, on July 4, 1940. The plaint was accordingly re-presented on that very date to the Court of District Judge at Miraj, and the same was numbered as Suit No. 2 of 1940.

The original defendant No. 1 only contested the suit on a number of grounds, including the plea of limitation. By a petition dated October 27, 1942, the defendant brought it to the notice of the Court that the

"plaintiff despite his knowledge that the value of the subject-matter of the suit was far in excess of the amount of jurisdiction of the Munsiff's court filed the suit in the said court. The said act of the plaintiff was not at all 'bona fide'...The facilities as regards limitations etc. which a 'bona fide' suitor would be entitled to cannot, therefore, be afforded to the plaintiff."

After recording evidence and hearing the parties, the learned District Judge, by his judgment and decree dated December 12, 1945, dismissed the suit with costs. On appeal by the defeated plaintiff, during the pendency of the appeal, the State of Bombay was added as respondent No. 6, and the Yuvaraj of Miraj, Madhavrao Narayanrao, son of the Raja Sahib of Miraj, was added as respondent No. 7, as the latter had acquired an interest in the disputed properties by virtue of a grant in his favour. The appeal was ultimately registered as First Appeal No. 104 of 1950, in the High Court of Bombay. A Division Bench of that Court, by its judgment and decree dated November 30, 1951, allowed the appeal and decreed the suit with costs against respondents Nos. 1 and 7. The respondents Nos. 6 and 7 aforesaid applied for and obtained the necessary certificate for coming up in appeal to this Court. Hence, these two appeals.

We have heard the counsel for the parties at a great length on the preliminary issue of limitation. On behalf of the appellants, it was urged with reference to the plea of limitation that in the facts and circumstances of this case, the plaintiff is not entitled to the benefit of s. 14 of the Limitation Act, and that, therefore, the suit as instituted in the Court of the District Judge at Miraj on re-representation of the plaint in that Court on July 4, 1940, was barred by limitation. Alternatively, it was argued that even assuming that the Courts below were right in giving the plaintiff the benefit of that section, the suit was barred by limitation of 12 years under art. 142 of the Limitation Act, whether the cause of action arose in 1910, on the death of Narsu aforesaid, or in 1915, when the final order was passed by the Miraj State treating the resumed property as part of the *Khas* property of the State, which was the date of the cause of action for the suit as alleged in the plaint. On behalf of the plaintiff-respondent, it was strenuously argued that the Courts below were right in holding that the plaintiff was entitled to a deduction of all the time between January 31, 1929, when the suit had been originally filed in the Court of the Munsiff at Miraj, and July 4, 1940, when the plaint was returned and re-presented as aforesaid. It was also argued that it was common ground that the suit as originally filed on January 31, 1929, was within time though that was the last day of limitation. If the plaintiff is given the benefit of s. 14 of the Limitation Act, *ipso facto*, the suit on re-representation of the plaint in the District Court at Miraj, would be within time.

In our opinion, the appellants' contentions based on the provisions of s. 14 of the Limitation Act, are well-founded, and the decision of the Courts below, granting the plaintiff-respondent the benefit of that section, must be reversed for the following reasons: Before the promulgation, on January 1, 1926, of the Proclamation by State *Karabhari*, Miraj State, the law of limitation in that State, it is common ground, was that the plaintiff had the benefit of the period of 20 years as the period during which a suit for possession after dispossession could be instituted. By that Proclamation, the Indian Limitation Act (IX of 1908) was made applicable to that State with effect from February 1, 1926, subject to this modification that all suits which would have been in time according to the old law of the State, but would have become barred by limitation as a result of the introduction of the Indian Limitation Act, could be filed upto January 31, 1929, by virtue of certain notifications extending the last date for the institution of such suits. Hence, the suit filed on that date in the Munsiff's Court at Miraj was admittedly within time, and was subject to the law of limitation under the Indian Limitation Act. When the plaint was returned by the Munsiff's Court at Miraj, at the instance of the plaintiff himself on the ground of want of pecuniary jurisdiction, and re-presented to the Court of the District Judge at Miraj on July 4, 1940, it was, on the face of it, barred by limitation, whether the period of limitation started to run in 1910 or 1915, unless the case is brought within s. 14 of the Limitation Act. Sub-section (1) of s. 14 of the Limitation Act, which admittedly governs the present case, is in these terms:

"(1). In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding

whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

In order to bring his case within the section quoted above, the plaintiff has to show affirmatively:

(1) that he had been prosecuting with due diligence the previous suit in the Court of the Munsiff at Miraj,

(2) that the previous suit was founded upon the same cause of action,

(3) that it had been prosecuted in good faith in that Court, and,

(4) that that Court was unable to entertain that suit on account of defect of jurisdiction or other cause of a like nature.

There is no dispute between the parties here that conditions (2) and (4) are satisfied. But the parties differ with reference to the first and the third conditions. It has been argued on behalf of the appellants that the Courts below had misdirected themselves when they observed that there was no proof that the plaintiff had not been diligently prosecuting the previously instituted suit, or that it was not being prosecuted in good faith; that the section requires that the plaintiff must affirmatively show that the previously instituted suit was being prosecuted in good faith and with due diligence; and that, viewed in that light, the plaintiff has failed to satisfy those conditions.

The conclusion of the learned trial Judge on this part of the case is in these words:—

"The plaintiff's *mala fides* are therefore not established and the period occupied in prosecuting the former suit must be excluded under section 14 of the Limitation Act."

The observations of the High Court are as follows:

"We do not see our way to accuse the plaintiff of want of good faith or any *mala fides* in the matter of the filing of the suit in the Subordinate Judge's Court at Miraj. There is nothing on the record to show that he was really guilty of want of good faith or non-prosecution of the suit with due diligence in the Court of the Subordinate Judge at Miraj."

Both the Courts below have viewed the controversy under s. 14 of the Limitation Act, as if it was for the defendant to show *mala fides* on the part of the plaintiff when he instituted the previous suit and was carrying on the proceedings in that Court. In our opinion, both the Courts below have misdirected themselves on this question. Though they do not say so in terms, they appear to have applied the definition of "good faith" as contained in the General Clauses Act, to the effect that "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not." But the Indian Limitation Act contains its own definition of good faith to the effect that "nothing shall be deemed to be done in good faith which is not done with due care and attention"—[s. 2(7)]. We have, therefore, to see if the institution and prosecution of the suit in the Munsiff's Court at Miraj was done with due care and attention. We know that the plaint in the Tikoni suit filed by the same plaintiff in the same Court did contain a statement as to the value of the subject-matter, but it was conspicuous by its absence in the plaint in the suit as originally filed in the Munsiff's Court at Miraj. All the facts alleged in the plaintiff's petition for the return of the plaint, were known to the plaintiff ever since the institution of the suit. Nothing fresh was discovered in 1940. On the other hand, we know definitely that the Tikoni suit had been dismissed by the trial Court on merits. The suits were of an analogous character in the sense that the controversy was similar in both of them. The appellants' contention that on the dismissal of the plaintiff's Tikoni suit in November, 1939, he, naturally, became apprehensive about the result of the other suit, and then moved the Court for the return of the plaint on the ground of pecuniary jurisdiction, appears to be well-founded. The plaintiff knew all the time that the value of the properties involved in the suit was much more than Rs. 5,000 which was the limit of the pecuniary jurisdiction of the Subordi-

nate Judge's Court. Can an omission in the plaint to mention the value of the properties involved in the suit, be brought within the condition of 'due care and attention' according to the meaning of "good faith" as understood in the Limitation Act? It has to be remembered that it is not one of those cases which usually arise upon a revision of the valuation as given in the plaint, on an objection raised by the defendant contesting the jurisdiction of the Court to entertain the suit. Curiously enough, the defendant had not raised any objection in his written statement to the jurisdiction of the Court to entertain the suit. Apparently, the plaintiff was hard put to it to discover reasons for having the case transferred to another Court. The question is not whether the plaintiff did it dishonestly or that his acts or omission in this connection were *mala fide*. On the other hand, the question is whether, given due care and attention, the plaintiff could have discovered the omission without having to wait for about 10 years or more. The trial Court examined the plaintiff's allegation that the omission was due to his pleader's mistake. As that Court observed "he makes this contention with a view to shield himself behind a wrong legal advice." That Court has answered the plaintiff's contention against him by observing that the plaintiff was not guided by any legal advice in this suit; that the plaint was entirely written by him in both the suits, and that he himself conducted those suits in the trial Court "in a manner worthy of a senior counsel." The Court, therefore, rightly came to the conclusion that the plaintiff himself was responsible for drafting the plaint and for presenting it in Court, and that no pleader had any responsibility in the matter. No reason was adduced why, in these circumstances, the value of the subject-matter of the suit was mentioned in the plaint in the Tikoni suit but not in the plaint in respect of the present suit.

There is another serious difficulty in the way of the plaintiff. He has not brought on the record of this case any evidence to show that he was prosecuting the previously instituted suit with "due diligence" as required by s. 14. He has not adduced in evidence the order-sheet or some equivalent evidence of the proceedings in the Sub-Judge's Court at Miraj, to show that in spite of his due diligence, the suit remained pending for over ten years in that Court, before he thought of having the suit tried by a Court of higher pecuniary jurisdiction. In our opinion, therefore, all the conditions necessary to bring the case within s. 14 have not been satisfied by the plaintiff. There could be no doubt about the legal position that the burden lay on the plaintiff to satisfy those conditions in order that he may entitle himself to the deduction of all that period between January 31, 1929, and July 4, 1940. It is also clear that the Courts below were in error in expecting the contesting defendant to adduce evidence to the contrary. When the plaintiff has not satisfied the initial burden which lay upon him to bring his case within s. 14, the burden would not shift, if it ever shifted, to the defendant to show the contrary. In view of this conclusion, it is not necessary for us to pronounce upon the other contention raised on behalf of the appellants that, even after giving the benefit of s. 14, the suit is still barred under art. 142 of the Limitation Act. This is a serious question which may have to be determined if and when it becomes necessary.

For the aforesaid reasons, it must be held that the suit is barred by limitation. The appeals are, accordingly, allowed and the suit dismissed with costs throughout, one set to be divided equally between the two appeals.

Appeals allowed.

Present: Mr. Justice Venkatarama Aiyar, Mr. Justice Gajendragadkar and
Mr. Justice A. K. Sarkar.

M. K. VENKATACHALAM v. BOMBAY DYEING AND
MANUFACTURING CO.*

Indian Income-tax Act (XI of 1922), Secs. 35, 18A(5)—Indian Income-tax (Amendment) Act (XXV of 1953), Secs. 1(2), 13, 3(2), 7(2) 30(2)—Income-tax Officer in order passed before coming into force of Amending Act giving credit to assessee under s. 18A(5) for amount representing interest on tax paid in advance—After coming into force of Amending Act, Income-tax Officer under s. 35 making an order that assessee entitled to interest only on difference between advance payment made and amount assessed to tax—Applicability of s. 35—Whether previous order made by Income-tax Officer disclosed a mistake apparent from the record.

The Income-tax Officer by his assessment order made on October 9, 1952, for the relevant assessment year, assessed a company under the Indian Income-tax Act, 1922, and in the order the company was given credit for a certain amount under s. 18A(5) of the Act as it stood then, as representing interest on tax paid in advance. After coming into force of the Indian Income-tax (Amendment) Act, 1953, on May 24, 1953, whereby a proviso was added to s. 18A(5) of the Act, which proviso was deemed to have come into force on April 1, 1952, the Income-tax Officer exercised his power under s. 35 of the Act and purported to rectify the mistake apparent from the record in regard to the credit for the amount allowed by him to the company by making an order that the company was entitled to get interest not on the whole of the advance amount of tax paid by the company, but only on the difference between the payment made and the amount which the company was assessed to tax under s. 23. On the question whether the order made by the Income-tax Officer on October 9, 1952, which was proper and valid when it was made, could be said to disclose a mistake apparent from the record, as the said order would be erroneous in view of the subsequent amendment made by the Amending Act which was intended to operate retrospectively:—

Held, that the subsequently inserted proviso must be read as forming part of s. 18A(5) of the principal Act as from April 1, 1952,

that the order passed by the Income-tax Officer on October 9, 1952, was, therefore, inconsistent with the provisions of the proviso and must be deemed to suffer from a mistake apparent from the record, and

that, therefore, the Income-tax Officer was justified in exercising his power under s. 35 of the Act.

*East End Dwellings Co. Ltd. v. Finsbury Borough Council,*¹ *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi,*² *Meka Venkatappaiah v. Addl. Inc.-Tax Officer*³ and *Comr. of Inc.-Tax, Bom. & Aden v. Khemchand Ramdas,*⁴ referred to.

THE facts appear at 56 *Bombay Law Reporter* 714.

H. N. Sanyal, Additional Solicitor-General, with G. N. Joshi and R. H. Dhebar, for the appellants.

N. A. Palkhivala, with S. N. Andley, J. B. Dadachanji, P. L. Vohra and Rameshwar Nath, for the respondent.

GAJENDRAGADKAR, J. This is an appeal by the Income-tax Officer, Companies Circle I(1), Bombay, and the Union of India, and it raises a short question about the construction of s. 35 of the Income-tax Act read with s. 1, sub-s. (2) and s. 13 of the Indian Income-tax (Amendment) Act, 1953 (XXV of 1953). It arises in this way. The Income-tax Officer, by his assessment order made on October 9, 1952, for the assessment year 1952-53, assessed the respondent, the Bombay Dyeing and Manufacturing Co. Ltd., under the Act.

*Decided, April 28, 1958. Civil Appeal No. L. R. 60.

122 of 1956.

1 [1952] A.C. 109.

2 [1927] L. R. 54 L. A. 421, s.o. 30 Bom.

3 [1957] 32 I.T.R. 274.

4 [1938] 6 I.T.R. 414, s.c. 40 Bom. L.R. 854.

In the said assessment order the respondent was given credit for Rs. 50,603-15-0 as representing interest at 2 per cent. on tax paid in advance under s. 18A of the Act. This credit was given to the respondent in pursuance of the provisions contained in s. 18A, sub-s. (5) of the Act as it then stood. On May 24, 1953, the Amendment Act came into force. Section 1, sub-s. (2) of the Amendment Act provides that "subject to any special provision made in this behalf in the Amendment Act, it shall be deemed to have come into force on the first day of April 1952." By s. 13 of the Amendment Act, a proviso was added to s. 18A(5) of the Act. The effect of the amendment made by the insertion of the said proviso to s. 18A(5) was that the assessee was entitled to get interest at 2 per cent. not on the whole of the advance amount of tax paid by him as before, but only on the difference between the payment made and the amount at which the assessee was assessed to tax under the regular assessment under s. 23 of the Act. After the Amendment Act was passed, appellant No. 1 exercised his power under s. 35 of the Act and purported to rectify the mistake apparent from the record in regard to the credit for Rs. 50,603-15-0 allowed by him to the assessee. Appellant No. 1 held that the assessee was really entitled to a credit of only Rs. 21,157-6-0 by way of interest on tax paid in advance as a result of the retrospective operation of the amendment made in s. 18A(5) by the Amendment Act. In accordance with this order a notice of demand under s. 29 of the Act was issued against the assessee for the sum of Rs. 29,446-9-0 on the ground that the assessee had been given credit for this excess amount through mistake. Aggrieved by this notice of demand, the respondent filed a petition in the High Court of Bombay on January 4, 1954, under art. 226 of the Constitution praying for a writ against the appellants *inter alia* prohibiting them from enforcing the said rectified order and the said notice of demand. It appears that this petition was admitted by Tendolkar J., on January 6, 1954, and a rule issued on it. Thereafter the said petition was referred to a Division Bench by the Hon'ble the Chief Justice for final disposal. Accordingly on March 5, 1954, the petition was heard by Chagla C.J. and Tendolkar J. and a writ was issued against the appellants. The High Court held that s. 35 of the Act had no application to the facts of the case because the mistake apparent from the record contemplated by the said section is not a mistake which is the result of the amendment of the law even though the amending law may be retrospective in operation. In other words, in the opinion of the High Court, the mistake mentioned by s. 35 had to be apparent on the face of the order and it can only be judged in the light of the law as it stood on the day when the order was passed. The appellants then applied for and obtained a certificate from the High Court on October 8, 1954; on their behalf it is urged that the High Court of Bombay has erred in law in taking the view that appellant No. 1 was not entitled to rectify the mistake in question under s. 35 of the Act. Thus the short question which arises before us in the present appeal is whether an order which was proper and valid when it was made can be said to disclose a mistake apparent from the record if the said order would be erroneous in view of a subsequent amendment made by the Amendment Act when the Amendment Act is intended to operate retrospectively?

It is unnecessary to refer to the provisions of s. 18A(5) as well as the provision of the proviso which was subsequently added by s. 13 of the Amendment Act. It is common ground that, in the absence of the subsequently inserted proviso, the assessee would be entitled to obtain a credit for Rs. 50,603-15-0. It is also common ground that, if the subsequently inserted proviso covered the assessee's case, he would be entitled to a credit only of Rs. 21,156-9-0. It is thus obvious that the order giving the relevant credit to the assessee was valid when it was made and that it would be erroneous under the subsequent amendment. Under these circumstances, was appellant No. 1 justified in exercising his power of rectification under s. 35 of the Act?

In deciding this question it would be necessary to determine the true legal effect of the retrospective operation of the Amendment Act. Section 1, sub-

s. (2) of the Amendment Act expressly provides that subject to the special provisions made in the said Act it shall be deemed to have come into force on the first day of April 1952. The result of this provision is that the amendment made in the Act by s. 13 of the Amendment Act must, by legal fiction, be deemed to have been included in the principal Act as from the first of April, 1952, and this inevitably means that, at the time when the Income-tax Officer passed his original order on October 9, 1952, allowing to the respondent credit for Rs. 50,603-15-0, the proviso added by s. 13 of the Amendment Act must be deemed to have been inserted in the Act. As observed by Lord Asquith of Bishopstone in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*¹.

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of those in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

Thus, there can be no doubt that the effect of the retrospective operation of the Amendment Act is that the proviso inserted by the said section in s. 18A(5) of the Act would, for all legal purposes, have to be deemed to have been included in the Act as from April 1, 1952.

But it is urged for the respondent that the retrospective operation of the relevant provision is not intended to affect completed assessments. It is conceded that, if any assessment proceedings in respect of the assessee's income for a period subsequent to the first of April 1952 were pending at the time when the Amendment Act was passed, the proviso inserted by s. 13 would govern the decision in such assessment proceedings; but where an assessment proceeding has been completed and an assessment order has been passed by the Income-tax Officer against the assessee, such a completed assessment would not be affected and cannot be re-opened under s. 35 by virtue of the retrospective operation of the Amendment Act. In support of this contention, reliance is placed on the observations of the Privy Council in *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi*². Lord Blanesburg, who delivered the judgment of the Board, referred to the Board's earlier decision in the *Colonial Sugar Refining Company v. Irving*³ where it was in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. The learned Judge then added that (p. 425):

"...Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders which, when that statute came into force, were final, are provisions which touch existing rights."

The argument for the respondent is that the assessee has obtained a right under the order passed by the Income-tax Officer to claim credit for the specified amount under s. 18A(5) and the said right cannot be taken away by the retrospective operation of s. 13 of the Amendment Act. The same argument is put in another form by contending that the finality of the order passed by the Income-tax Officer cannot be impaired by the retrospective operation of the relevant provision. In our opinion, this argument does not really help the respondent's case because the order passed by the Income-tax Officer under s. 18A(5) cannot be said to be final in the literal sense of the word. This order was and continued to be liable to be modified under s. 35 of the Act. What the Income-tax Officer has purported to do in the present case is not to revise his order in the light of the retrospective amendment made by s. 13 of the Amend-

¹ [1952] A.C. 109, 132.

L.R. 60.

² (1927) L.R. 54 I.A. 421, s.c. 30 Bom.

³ [1905] A.C. 369.

ment Act alone, but to exercise his power under s. 35 of the Act; and so the question which falls to be considered in the present appeal centres round the construction of the expression "mistake apparent from the record" used in s. 35. That is why we think the principle of the finality of the orders or the sanctity of the existing rights cannot be effectively invoked by the respondent in the present case.

The respondent then urged that the Amendment Act should not be given greater retrospective operation than its language and its general scheme render necessary. This contention is based on the provisions of s. 3, sub-s. (2), s. 7, sub-s. (2) and s. 30, sub-s. (2) of the Amendment Act. Where the Amendment Act intended that its provisions should affect even concluded orders of assessment it is expressly so provided. Since s. 13 does not specifically authorise the re-opening of concluded assessments, it should be held that its retrospective operation is not intended to cover such concluded assessments. That in brief is the argument. We are, however, not satisfied that this argument is well-founded. Let us examine the three provisions of the Amendment Act on which the argument rests. Section 3, sub-s. (1) of the Amendment Act makes several additions and modifications in s. 4 of the principal Act. Section 3, sub-s. (2) then provides that the amendments made by sub-cl. (3) of cl. (b) of sub-s. (1) shall be deemed to be operative in relation to all assessments for any year whether such assessments have or have not been concluded before the commencement of the Amendment Act of 1953. It would be noticed that the main object of this sub-section is to extend the retrospective operation of the relevant provisions of the Amendment Act beyond the first of April 1952 mentioned by s. 1, sub-s. (2) of the Amendment Act. Since it was intended to provide for such further retrospective operation of the relevant provision the Legislature thought it advisable to clarify the position by saying that the said extended retrospective operation would cover all assessments whether they had been completed or not before the commencement of the Amendment Act. Section 7, sub-s. (1) adds two provisos to s. 9 of the principal Act by cls. (a) and (b). Sub-section (2) of s. 7 then lays down that the amendments made in cl. (a) of sub-s. (1) shall be deemed to be operative for any assessment for the year-ending the 31st day of March, 1952, whether made before or after the commencement of this Act and, where any such assessment has been made before such commencement, the Income-tax Officer concerned shall revise it whenever necessary to give effect to this amendment. The position under s. 30, sub-s. (2) of the Amendment Act is substantially similar. By sub-s. (1) of this section certain additions and amendments are made in the schedule to the principal Act by cls. (a), (b), (c) and (d). Sub-section (2) then provides for the retrospective operation of the amendment made by sub-s. (1) in terms similar to those used in s. 7, sub-s. (2). It is clear that the provisions in ss. 7 and 30 are intended for the benefit of the assesses and so the Legislature may have thought it necessary to confer on the Income-tax Officer specific and express power to revise his orders in respect of the relevant assessments wherever necessary to give effect to the amendments in question. The effect of this provision is to make it obligatory on the Income-tax Officer to revise his original orders in the light of the amendments and also to confer on the assessee right to claim such revision. It may be conceded that in respect of the other retrospective provisions of the Amendment Act such a power to revise the earlier orders cannot be claimed or exercised by the Income-tax Officer. In other words, a distinction can be drawn between these two provisions of the Amendment Act and the rest in respect of the power which the Income-tax Officer can purport to exercise to give effect to the amendments made by the Amendment Act. Whereas, in respect of the amendments made by s. 7 and s. 30 of the Amendment Act, the Income-tax Officer can and must revise his earlier orders covered by s. 7, sub-s. (2) and s. 30, sub-s. (2), such a power of revision has not been conferred on him in the matter of giving effect to the other amendments made in the Amendment Act. Even so, we do not think it would be legitimate or reasonable to hold that the provisions of s. 7(2) and s. 30(2) lead to the infer-

ence that the retrospective operation of the other provisions of the Amendment Act is not intended to affect concluded assessments in any manner whatever. In this connection, it would be pertinent to remember that the power to revise, which has been conferred on the Income-tax Officer by s. 7(2) and s. 30(2) of the Amendment Act, is distinct and independent of the power to rectify mistakes which the Income-tax Officer can exercise under s. 35 of the Act.

It is in the light of this position that the extent of the Income-tax Officer's power under s. 35 to rectify mistakes apparent from the record must be determined; and in doing so, the scope and effect of the expression "mistake apparent from the record" has to be ascertained. At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as from April 1, 1952. If that be the true position then the order which he made giving credit to the respondent for Rs. 50,603-15-0 is plainly and obviously inconsistent with a specific and clear provision of the statute and that must inevitably be treated as a mistake of law apparent from the record. If a mistake of fact apparent from the record of the assessment order can be rectified under s. 35, we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified. *Prima facie* it may appear somewhat strange that an order which was good and valid when it was made should be treated as patently invalid and wrong by virtue of the retrospective operation of the Amendment Act. But such a result is necessarily involved in the legal fiction about the retrospective operation of the Amendment Act. If, as a result of the said fiction we must read the subsequently inserted proviso as forming part of s. 18A(5) of the principal Act as from April 1, 1952, the conclusion is inescapable that the order in question is inconsistent with the provisions of the said proviso and must be deemed to suffer from a mistake apparent from the record. That is why we think that the Income-tax Officer was justified in the present case in exercising his power under s. 35 and rectifying the said mistakes. Incidentally we may mention that in *Meka Venkatappaiah v. Addl. Inc.-Tax Officer*,⁴ the High Court of Andhra has taken the same view.

In this connection it would be useful to refer to the decision of the Privy Council in the *Comr. of Inc.-Tax, Bom. & Aden v. Khemchand Ramdas*⁵. In *Khemchand's* case, the assessee was registered as a firm and they were assessed under s. 23(4) on an income of Rs. 1,25,000 at the maximum rate. Being a registered firm no super-tax was levied. A notice of demand was also made before March 1927. On February 13, 1928, the Commissioner, in exercise of his powers under s. 33, cancelled the order registering the assessee as a firm and directed the Income-tax Officer to take necessary action. The Income-tax Officer accordingly assessed the firm to super-tax on May 4, 1929. The Privy Council held that the assessment made on January 17, 1927, was final both in respect of the income-tax and super-tax. The fresh action taken by the Income-tax Officer on May 4, 1929, was out of time though it had been taken in pursuance of the directions of the Commissioner and that the order of May 4, 1929, was one which the Income-tax Officer had no power to make. One of the points raised before the Privy Council was whether, under the relevant circumstances the Income-tax Officer had power to make the impugned order in view of the provisions of ss. 34 and 35 of the Act. The Privy Council dealt with this question on the footing that the Commissioner's order cancelling the registration had been properly made. On this basis their Lordships thought that it was unnecessary to consider whether the case would attract the provisions of s. 34 "inasmuch as in their Lordships' opinion the case clearly would have fallen within the provisions of s. 35 had the Income-tax Officer exercised his powers under the section within one year from the date on which the earlier demand was served upon the respondents". The judgment shows that their Lordships took the view that "looking at the record of the assessments

⁴ (1957) 32 I.T.R. 274.

L.R. 854.

⁵ (1938) 6 I.T.R. 414, a.c. 40 Bom.

made upon the respondents as it stood after the cancellation of the respondents' registration and the order effecting the cancellation would have formed part of the record—it would be apparent that a mistake had been made in stating that no super-tax was leviable." This decision clearly shows that the subsequent cancellation of the assessee's registration was held by their Lordships of the Privy Council to form part of the record retrospectively in the light of the said subsequent event, and the order was deemed to suffer from a mistake apparent from the record so as to justify the exercise of the rectification powers under s. 35 of the Act. It is because their Lordships thought that s. 35 would have been clearly applicable that they did not decide the question as to whether s. 34 could also have been invoked. This decision lends considerable support to the view which we are disposed to take about the true meaning and scope of the expression "the mistake apparent from the record" occurring in s. 35.

We must accordingly hold that the High Court of Bombay was in error in coming to the conclusion that the notice issued by the Income-tax Officer calling upon the respondent to pay the sum of Rs. 29,446-9-0 was not warranted by law. The result is the order passed by the High Court issuing a writ against the appellant is set aside and the appeal is allowed with costs throughout.

Appeal allowed.

Present: Mr. Justice Venkatarama Aiyar, Mr. Justice Gajendragadkar and Mr. Justice A. K. Sarkar.

COMMISSIONER OF INCOME-TAX, BOMBAY v. M/S. AMRITLAL BHOGILAL & CO.*

Indian Income-tax Act (XI of 1922), Secs. 33B, 26A, 23(5)(a) & (b), 30(1), 31, 33A—Income-tax Officer granting registration to assessee firm and passing assessment order in respect of firm—Appeal by assessee against assessment made by Income-tax Officer disposed of by Appellate Assistant Commissioner—Whether Commissioner can under s. 33B(1) set aside order of registration made by Income-tax Officer—Order of registration whether merges in appellate order—Exercise of Commissioner's power under s. 33B(1) to set aside registration of assessee firm where assessee's appeal against assessment pending before Appellate Assistant Commissioner.

An order passed by the Income-tax Officer granting registration to an assessee firm continues to be an order passed by the Income-tax Officer even after the assessee's appeal against the assessment made by the Income-tax Officer on the basis that the assessee was a registered firm has been disposed of by the Appellate Assistant Commissioner. Such an order of registration passed by the Income-tax Officer does not merge in the appellate order and the Commissioner can, under s. 33B(1) of the Indian Income-tax Act, 1922, exercise his revisional powers in respect of it.

*Shapurji v. Commissioner of Income-tax, Bombay*¹ and *Rex v. Special Commissioner of Income-tax (Ex parte Elmhorst)*,² referred to.

An order of registration of an assessee firm made by the Income-tax Officer in respect of a particular assessment year can be made the subject-matter of the exercise of the Commissioner's revisional power under s. 33B(1) of the Act even though the assessee's appeal against the assessment for the said year is pending before the Appellate Assistant Commissioner at the material time.

The facts appear at 55 *Bombay Law Reporter* 811.

H. N. Sanyal, Additional Solicitor-General of India, with *K. N. Rajagopala Sastri* and *R. H. Dhabar*, for the appellant.

B. R. L. Aiyangar, for the respondent.

*Decided, April 28, 1958. Civil Appeal No. 138 of 1955.

¹ (1944) 47 Bom. L.R. 174.

² (1935) 20 Tax Cases 281.

GAJENDRAGADKAR J. This is an appeal by the Commissioner of Income-tax, Bombay, by special leave and it raises a short question of law under s. 33B of the Income-tax Act. The respondent assessee had been registered as a firm under s. 26A of the Act for the year 1946-47. For the assessment years 1947-48, 1948-49 and 1949-50, the Income-tax Officer made the assessment on the respondent on June 7, 1949, June 7, 1949 and September 23, 1949, respectively, under s. 23(3) of the Act. The Income-tax Officer made an estimate about the profits of the respondent under the proviso to s. 13 and computed the total income of the respondent at Rs. 95,053, Rs. 93,430 and Rs. 83,752 for the said years respectively. The respondent had applied for and obtained renewal of registration of the firm. The Income-tax Officer had also passed an order under s. 23(6) of the Act and allocated the shares of the various parties.

Against the said assessment orders the respondent preferred an appeal to the Appellate Assistant Commissioner. On November 4, 1950, the Appellate Assistant Commissioner reduced the respondent's estimated profit by Rs. 28,250 in the assessment year 1947-48 and by Rs. 19,000 in the assessment year 1948-49. The respondent's appeal in regard to the assessment year 1949-50 was pending before the Appellate Assistant Commissioner.

Meanwhile it had come to the notice of the Commissioner of Income-tax that the respondent firm which had been granted renewal of registration by the Income-tax Officer was not a firm which could be registered under the Act as one of the partners of the firm was a minor. The Commissioner then took action under s. 33B(1) of the Act and issued notice to the respondent to show cause why the assessments made under s. 23(3) of the Act and the registration granted under s. 26A should not be cancelled. After hearing the parties, the Commissioner passed an order under s. 33B(1) on June 5, 1952, by which he cancelled the registration of the firm under s. 26A and directed the Income-tax Officer to make fresh assessments against the respondent as an unregistered firm for all the three years. As a result of this revisional order passed by the Commissioner of Income-tax, the Income-tax Officer passed fresh orders.

The respondent preferred five appeals to the tribunal; two of these were against the orders passed by the Appellate Assistant Commissioner under s. 31 and related to the assessment years 1947-48 and 1948-49; while the remaining three challenged the orders passed by the Commissioner of Income-tax under s. 33B(1) of the Act and related to the assessment years 1947-48, 1948-49 and 1949-50. In these three appeals, with which we are concerned, the respondent had urged that the Commissioner was not competent in law to pass an order setting aside an assessment which had been confirmed or modified by the Appellate Assistant Commissioner; that the orders passed by the Commissioner under s. 33B(1) were bad in law as they directed the Income-tax Officer to pass an order in a particular manner and that the orders passed by the Income-tax Officer subsequent to the cancellation of the respondent's registration were bad in law as they were passed without giving notice to, or hearing, the respondent. On January 2, 1952, the Tribunal upheld the contentions raised by the respondent and allowed the appeals.

The appellant then moved the tribunal under s. 66(1) of the Act for referring the questions specified in its application for the opinion of the High Court. The tribunal accordingly framed the following three questions and referred them to the High Court of Bombay:

"1. Whether on the facts and circumstances of the case the Commissioner of Income-tax acting under s. 33B(1) can set aside the orders passed by the Appellate Assistant Commissioner, for the assessment years 1947-48 and 1948-49?

2. Whether on the facts and circumstances of the case the order passed by the Commissioner of Income-Tax dated 5th June 1951, is bad in law as it directs the Income-Tax Officer to pass an order in a particular manner?

3. Whether on the facts and circumstances of the case orders passed by the Income-Tax Officer dated 21-8-52 are bad in law, as fresh notices as required by Sections 22 and 23 of the Income-Tax Act were not given by the Income-Tax Officer to the assessee?"

This matter was heard by the High Court on March 5, 1953. In regard to the assessments made for the years 1947-48 and 1948-49 the High Court held that the question raised by the appellant was concluded by the judgment already delivered by it in the *Commr. of Inc.-Tax v. Tejaji Parasram Khara-wala*¹. In *Tejaji's* case the High Court had held that when an appeal is provided from a decision of the tribunal and the appeal Court, after hearing the appeal, passes an order, the order of the original Court ceases to exist and is merged in the order of the appeal Court; and although the appeal Court may merely confirm the order of the trial Court, the order that stands and is operative is not the order of the trial Court but the order of the appeal Court. In that view of the matter, since the Income-tax Officer's order granting registration to the respondent was assumed to have merged in the appellate order, the revisional power of the Commissioner could not be exercised in respect of it. The same view has been taken in the majority decision of the Patna High Court in *Durgabati & Narmadabala Gupta v. Commr. of Inc.-Tax*². In respect of the Income-tax Officer's order renewing registration to the respondent for the year 1949-50, the High Court took the view that the revisional power of the Commissioner could not be exercised even in respect of this order because the propriety or the correctness of this order was open to consideration by the Appellate Assistant Commissioner in the respondent's appeal then pending before him (*Commr. I.T. v. Amritlal*³). In respect of this order the High Court had framed an additional question. It was in these terms (p. 813):

"Whether the order of the Commissioner acting under s. 33B(1) setting aside the order of the Income-Tax Officer while an appeal from that order was pending before the Appellate Assistant Commissioner was valid?"

The High Court answered this additional question also in favour of the assessee. In the result the High Court held that the Commissioner's order cancelling the respondent's registration for all the three years in question was invalid. That is why the High Court did not think it necessary to answer the remaining two questions framed by the tribunal.

The application subsequently made by the appellant to the High Court for a certificate under s. 66A(2) was rejected by the High Court. Thereupon the appellant applied for and obtained special leave from this Court on March 22, 1954. The appellant's contention is that the view taken by the High Court that the Commissioner of Income-tax could not have exercised his revisional power in respect of the Income-tax Officer's order granting registration to the respondent with regard to all the three years in question is based on a misconstruction of the relevant provisions of s. 33B of the Act.

Section 33B(1), which confers revisional power on the Commissioner, provides that the Commissioner may call for and examine the record of any proceeding under the Act, and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and, after making and causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify including an order enhancing or modifying the assessment or cancelling the assessment or directing a fresh assessment. Sub-section (2) provides that orders of re-assessment made under s. 34 cannot be revised under s. 33B(1) and adds that the said revisional power cannot be exercised after the lapse of two years from the date of the order sought to be revised. Sub-section (3) gives the assessee the right to prefer an appeal to the appellate tribunal against the Commissioner's revisional order within the prescribed period; and sub-s. (4) provides for the procedure for filing such an appeal.

In the present appeal two short questions fall to be decided under s. 33B(1). Does the order passed by the Income-tax Officer granting registration to the assessee firm continue to be an order passed by the Income-tax Officer even after

1 (1953) 23 I.T.R. 412.

2 (1956) 30 I.T.R. 101.

3 (1953) 55 Bom. L.R. 811.

the assessee's appeal against the assessment made by the Income-tax Officer on the basis that the assessee was a registered firm has been disposed of by the Appellate Assistant Commissioner? In other words, where the appeal preferred by an assessee against his assessment has been considered and decided by the Appellate Assistant Commissioner, does the order of registration along with the subsequent order of assessment merge in the appellate order? If, in law, the order of registration can be said to merge in the final appellate order, then clearly the Commissioner's revisional power cannot be exercised in respect of it. This question arises in respect of the registration order in regard to the two assessment years 1947-48 and 1948-49. The other question which also falls to be decided is whether the order of registration in respect of the assessment year 1949-50 can be made the subject-matter of the exercise of the Commissioner's revisional power even though the assessee's appeal against the assessment for the said year is pending before the Appellate Assistant Commissioner at the material time.

There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement; but the question is whether this principle can apply to the Income-tax Officer's order granting registration to the respondent.

In dealing with this question it would be necessary first to refer to the relevant provisions of the Act in regard to the granting of registration. Section 26A of the Act lays down the procedure for the registration of firms. An application has to be made by the firm in that behalf specifying the particulars prescribed by the said section and by the material rules framed under the Act. If registration is granted by the Income-tax Officer it enables the Income-tax Officer to adopt the procedure prescribed by s. 23(5)(a) for making assessment orders in respect of the registered firm. If a firm is not registered the Income-tax Officer is required to follow the procedure prescribed by s. 23(5)(b) in making assessment orders in respect of unregistered firms. A firm is an assessee under s. 2(2) whether it is registered under s. 26A or not. The Act does not impose an obligation on firms to apply for and obtain registration. The Act in terms does not purport to define the effect of registration nor does it enumerate the rights of parties on registration of firms. Section 23(5)(a) and (b) provide for the machinery for collecting or recovering the tax and in no sense can they be treated as charging sections. Broadly stated, even if a firm is registered in pursuance of an application made under s. 26A, no difference arises in the liability of the firm or its individual partners to be taxed for the total income as may be determined by the Income-tax Officer under ss. 3 and 4 of the Act. The computation of taxable income is not at all affected by the machinery provided by s. 23(5). The decision in *Shapurji v. Commissioner of Income-Tax, Bombay*⁴ on which Mr. Ayyangar himself relied clearly brings out and emphasizes this position. It is true that the Income-tax Officer is empowered to follow the two methods specified in s. 23(5)(a) and (b) in determining the tax payable by registered and unregistered firms respectively and making the demand for the tax so found due; but this does not affect the computation of taxable income. It is important to bear in mind that the order granting registration to an assessee firm is an independent and separate order and it merely affects or governs the procedure to be adopted in collecting or recovering the tax found due. It is not disputed that the registration granted by the Income-tax Officer to an assessee firm can be cancelled by him either under s. 23(4) or under r. 6B. It is also clear that the Income-tax Officer's order grant-

ing registration can be cancelled by the Commissioner under s. 33B(1). The argument for the respondent, however, is that, as a result of the decision of the appeal preferred by him against the Income-tax Officer's order of assessment, the order of registration passed by the Income-tax Officer in favour of the respondent has ceased to be the order passed by the Income-tax Officer as such.

It is, therefore, necessary to inquire whether the order of registration passed by the Income-tax Officer can be challenged by the department before the Appellate Assistant Commissioner where the assessee firm has preferred an appeal against the order of assessment. The decision of this question would obviously depend upon the relevant provisions of the Act in respect of appeals to the Appellate Assistant Commissioner and the powers of the Appellate Assistant Commissioner. Section 30(1) gives the assessee the right to prefer appeals against the orders specified in the said section. The assessee firm can, for instance, object to the amount of income assessed under s. 23 or s. 27. The assessee firm can also object to the order passed by the Income-tax Officer refusing to register it under s. 23(4) or s. 26A. It can likewise object to the cancellation by the Income-tax Officer of its registration under s. 23(4). It is significant that, whereas an appeal is provided against orders passed by the Income-tax Officer under s. 23(4) or s. 26A either refusing to register the firm or cancelling registration of the firm, no appeal can be filed by the department against the order granting registration. Indeed it is patent that the scheme of the Act in respect of appeals to the Appellate Assistant Commissioner is that it is only the assessee who is given a right to make an appeal and not the department. Thus there can be no doubt that the Income-tax Officer's order granting registration to a firm cannot become the subject-matter of an appeal before the Appellate Assistant Commissioner.

The next question which must be considered is whether the Income-tax Officer's order granting registration to a firm can be challenged by the department during the hearing of the firm's appeal against the final order of assessment made by the Income-tax Officer? The powers of the Appellate Assistant Commissioner are to be found in s. 31 of the Act. Section 31(3)(a) authorises the Appellate Assistant Commissioner to confirm, reduce, enhance or annul the assessment under appeal. Under s. 31(3)(b), wide powers are given to the appellate authority to set aside the assessment or direct the Income-tax Officer to make fresh assessment after making such further enquiry as the Income-tax Officer may think fit or as the Appellate Assistant Commissioner may direct. The Appellate Assistant Commissioner is also given the authority, in the case of an order cancelling the registration of the firm under sub-s. (4) of s. 23 or refusing to register a firm under sub-s. (4) of s. 23 or s. 26A or to make a fresh assessment under s. 27, to confirm such order or cancel it and direct the Income-tax Officer to register the firm or to make a fresh assessment as the case may be. This section further lays down that, at the hearing of an appeal against the order of an Income-tax Officer, the Income-tax Officer shall have the right to be heard either in person or by his representative. It is thus clear that wide powers have been conferred on the Appellate Assistant Commissioner under s. 31. It is also clear that, before the appellate authority exercises his powers, he is bound to hear the Income-tax Officer or his representative. It has been urged before us by Mr. Ayyangar on behalf of the respondent that these provisions indicate that, in exercise of his wide powers the Appellate Assistant Commissioner can, in a proper case, after hearing the Income-tax Officer or his representative, set aside the order of registration passed by the Income-tax Officer. We are not prepared to accept this argument. The powers of the Appellate Assistant Commissioner, however wide, have, we think, to be exercised in respect of the matters which are specifically made appealable under s. 30(1) of the Act. If any order has been deliberately left out from the jurisdiction of the Appellate Assistant Commissioner it would not be open to the appellate authority to entertain a plea about the correctness, propriety or validity of such an order. Indeed, if the respondent's contention is accepted, it would virtually give the department a right of appeal against the order in question and there can be no doubt that the

scheme of the Act is not to give the department a right of appeal to the Appellate Assistant Commissioner against any orders passed by the Income-tax Officer. The order granting registration can be cancelled by the Income-tax Officer himself either under r. 6B or under s. 23(4). It may be cancelled by the Commissioner in exercise of his revisional power under s. 33B; but it cannot be cancelled by the Appellate Assistant Commissioner in exercise of his appellate jurisdiction under s. 31 of the Act. It is true that, in dealing with the assessee's appeal against the order of assessment, the Appellate Assistant Commissioner may modify the assessment, reverse it or send it back for further enquiry; but any order that the Appellate Assistant Commissioner may make in respect of any of the matters brought before him in appeal will not and cannot affect the order of registration made by the Income-tax Officer. If that be the true position, the order of registration passed by the Income-tax Officer stands outside the jurisdiction of the Appellate Assistant Commissioner and does not strictly form part of the proceedings before the appellate authority. Even after the appeal is decided and in consequence the appellate order is the only order which is valid and enforceable in law, what merges in the appellate order is the Income-tax Officer's order under appeal and not his order of registration which was not and could never become the subject-matter of an appeal before the appellate authority. The theory that the order of the tribunal merges in the order of the appellate authority cannot, therefore, apply to the order of registration passed by the Income-tax Officer in the present case.

In this connection we may refer to the argument which Mr. Ayyangar, for the respondent, seriously pressed before us. He contended that, when the Appellate Assistant Commissioner hears the assessee's appeal, he is himself computing the total taxable income of the assessee and, in discharging his obligation in that behalf, he may be entitled to consider all relevant and incidental questions. In support of this argument Mr. Ayyangar referred us to the decision in *Rex v. Special Commissioner of Income Tax (Ex parte Elmhirst)*.⁵ The point which arose before the King's Bench Division in this case was whether, when a notice of appeal has been given, it was open to the assessee to withdraw his appeal and the Court held that once notice of appeal is given the appellate authority was entitled and indeed bound to see that a true assessment of the amount of the taxpayer's liability was arrived at. We are unable to see how this decision can really help the respondent in the present case. When an appeal is taken before the Appellate Assistant Commissioner undoubtedly he is bound to examine the case afresh, but that cannot bring within the purview of his appellate jurisdiction matters which are deliberately left out by the Act. If s. 30(1) does not provide for an appeal against a particular order, Legislature obviously intends that the correctness of the said order cannot be impeached before the appellate authority. The jurisdiction and powers of the appellate authority must inevitably be determined by the specific and relevant provisions of the Act.

In this connection it may be useful to compare the relevant and material features of the revisional powers conferred on the Commissioner by ss. 33A and 33B respectively. The Commissioner's revisional power under s. 33A cannot be exercised to the prejudice of the assessee in any case. It can be exercised in respect of orders passed by any authority subordinate to the Commissioner; but in no case can the revisional order prejudicially affect the assessee. It is significant that the explanation to s. 33A expressly provides that the Appellate Assistant Commissioner shall be deemed to be an authority subordinate to the Commissioner. In other words, in exercise of this revisional power the Commissioner may modify or reverse in favour of the assessee even the orders passed by the Appellate Assistant Commissioner. The position under s. 33B, however, is different. The Commissioner's revisional power under s. 33B can be exercised only in respect of orders passed by the Income-tax Officer. The appellate orders are outside the purview of s. 33B. That is one important distinction

between the two revisional powers. The other important distinction is that, whereas under s. 33A the revisional jurisdiction cannot be exercised to the prejudice of the assessee, under s. 33B the Commissioner can, in exercise of his revisional power, make orders to the prejudice of the assessee. It is not disputed that under s. 33B erroneous orders passed by the Income-tax Officer which are prejudicial to the revenue can be revised by the Commissioner. Now, the Income-tax Officer's order registering the firm is not appealable and so it cannot become the subject-matter of an appeal before the Appellate Assistant Commissioner. Such an order can, therefore, be revised by the Commissioner under s. 33B whenever he considers that it has been erroneously passed. In the present case there is no doubt that the respondent firm cannot be validly registered in view of the fact that one of its partners is a minor and so, on the merits, the Commissioner's order is clearly right. We must accordingly hold that the High Court was in error in taking the view that the Commissioner had no authority to set aside the registration order passed by the Income-tax Officer granting registration to the respondent for the years 1947-48 and 1948-49.

The case in regard to the subsequent year 1949-50 presents no difficulty. The appeal preferred by the respondent against the Income-tax Officer's assessment order in respect of this year was pending at the material time before the Appellate Assistant Commissioner; and so no question of merger arose in respect of the order granting renewal of registration for this period. There can be no doubt that even on the theory of merger the pendency of an appeal may put the order under appeal in jeopardy but until the appeal is finally disposed of the said order subsists and is effective in law. It cannot be urged that the mere pendency of an appeal has the effect of suspending the operation of the order under appeal. The High Court, however, appears to have taken the view that the revisional power is an extraordinary power and can be exercised only for unusual and extraordinary reasons. It was also assumed by the High Court that, in the pending appeal, the department would have an alternative remedy because, according to the High Court, the department could have challenged the validity or the propriety of the respondent's registration and could have asked the Appellate Assistant Commissioner to cancel it. As we have already pointed out, the department could not challenge the validity of the registration order in the assessee's appeal before the appellate authority and so the argument that the department had an alternative remedy is not correct. It is clear from the judgment of the High Court that it is the assumption that the department had an alternative remedy which weighed with the learned Judges in reaching their final conclusion. Then the argument that the extraordinary revisional power must be exercised only for extraordinary reasons is really not very material. Whether or not the revisional power can be exercised in a given case must be determined solely by reference to the terms of s. 33B itself. Courts would not be justified in imposing additional limitations on the exercise of the said power on hypothetical considerations of policy or the extraordinary nature of the power. We must, therefore, hold that the High Court was also in error in holding that the Commissioner was not authorised in cancelling the order of the respondent's registration for the year 1949-50. The result is that the view taken by the High Court must be reversed and the first question framed by the tribunal as well as the additional question framed by the High Court must be answered in favour of the appellant.

Then there remain two other questions which were framed by the tribunal but have not been considered by the High Court. The learned counsel appearing for both the parties agree that we need not remit these two questions to the High Court with the direction that the High Court should deal with them in accordance with law; it has been conceded before us that, if the principal question about the Commissioner's power under s. 33B(1) to cancel the respondent's registration is answered in favour of the appellant, then the two remaining questions would become academic and answers to them would also have to be in favour of the appellant. It is true, by his order the Commissioner purported to set aside the assessment orders made under s. 23(3) and s. 55 and directed

the Income-tax Officer to make fresh assessments according to law for each of the years in question. If this part of the order is literally construed it would clearly be open to the objection raised by the respondent. The assessment orders passed by the Income-tax Officer for the years 1947-48 and 1948-49 had been modified by the Appellate Assistant Commissioner and in that sense they had ceased to be the orders of assessment passed by the Income-tax Officer himself and so the Commissioner could not have exercised his revisional power under s. 33B(1) in respect of the said appellate orders, but we are inclined to think that the Commissioner did not intend to set aside the assessments in this sense. It is clear from the order read as a whole that, having cancelled the respondent's registration, the Commissioner wanted to direct the Income-tax Officer to make suitable consequential amendment in regard to the machinery or procedure to be adopted to recover the tax payable by the respondent. In fact it is conceded that, in his subsequent order, the Income-tax Officer has accepted the figure of the taxable income of the respondent as determined by the appellate authority for the relevant years and has proceeded to act under s. 23(5)(b) on the basis that the respondent is an unregistered firm. Therefore we cannot hold that the order passed by the Commissioner is bad in law on the ground that "he directed the Income-tax Officer to pass the order in a particular manner". The answer to question No. 2 would accordingly be in the negative. Then as regards question No. 3, it is difficult to understand how this question can be said to arise from the proceedings before the tribunal. This question challenges the validity of the procedure adopted by the Income-tax Officer in passing fresh orders against the respondent. This proceeding is clearly subsequent to the impugned order of the Commissioner under s. 33B(1), and so we are unable to see how the tribunal allowed the respondent to raise this contention in appeals which had been filed by the respondent against the Commissioner's order under s. 33B(1). Besides, it has been fairly conceded by Mr. Ayyangar before us that, when the Income-tax Officer merely proceeded to adopt a different machinery to recover the tax due from the respondent in consequence of the cancellation of the respondent's registration, there was no occasion or need to issue another notice against the respondent. We must, accordingly, answer question No. 3 also in the negative.

In the result all the questions framed in this case are answered in favour of the appellant. The order passed by the High Court is set aside and the appeal is allowed with costs throughout.

Appeal allowed.

*Present: Mr. Justice B. P. Sinha, Mr. Justice Syed Jafer Imam and
Mr. Justice J. L. Kapur.*

DR. K. A. DHAIRYAWAN v. J. R. THAKUR.*

Transfer of Property Act (IV of 1882), Sec. 108—Lessees contracting to hand over building erected on demised land to lessors without compensation on expiry of lease—Whether by reason of such contract lessors become owner of building during subsistence of lease.

Under section 108 of the Transfer of Property Act, 1882, there is nothing to prevent the lessees contracting to hand over any building or structure erected on the demised land by them to the lessors at the end of the lease without receiving any compensation. Such a contract, however, does not transfer the ownership in the building to the lessors while the lease subsists.

THE facts appear in the judgment.

A. V. Viswanatha Sastri, with Naunit Lal, for the appellants.

L. K. Jha, with Bameshwar Nath, S. N. Andley and P. L. Vohra, for the respondents.

**Decided, April 28, 1958. Civil Appeal No. 192 of 1954.*

IMAM J. The appellants, as trustees, of the Mankeshwar Temple Trust had filed suit No. 2325 of 1948 in the High Court of Bombay in its Ordinary Original Civil Jurisdiction, for a declaration that they were entitled to the building in suit and were entitled to claim possession of the same and to recover the rents and profits thereof. The appellants further prayed that the defendants may be ordered and decreed to obtain a letter of attornment from the tenants of the said property attorning to the appellants, that defendant No. 1 may be ordered to render accounts of the rents received by him from the tenants of the said property from May 23, 1948, and that pending the hearing of the suit a Receiver may be appointed of the property in suit. The appellants had obtained leave of the High Court under O. II, r. 2, of the Civil Procedure Code, reserving to them liberty to file a separate suit with respect to the land on which the building was situated. The learned Judge who heard the suit decreed it in part in favour of the appellants. He also passed an order of injunction restraining defendant Nos. 1, 2 and 5, their agents and servants, from interfering with the exercise of the rights of the appellants in obtaining possession of the building or otherwise effectuating their possession consistently with the provisions of law. He further directed defendant No. 1 to account for the rents recovered by him from and after May 23, 1948, till the date of the decree. He refused to grant the prayer that the defendants be directed to obtain letters of attornment from the tenants of the building in favour of the appellants. Against this decision the defendants appealed and a Division Bench of the High Court allowed the appeal, reversed the decision of the trial Judge and dismissed the suit with costs.

On May 23, 1927, Krishnarao Ganpatrao and Shamrao Ganpatrao, as trustees of the Mankeshwar Temple, executed a registered lease, exh. A, in favour of Moreswar Kashinath and Radhabai, wife of Ramkrishna Bhai Thakore, whereby they demised a parcel of land specified in the Schedule to the document. The lease was for twenty-one years. The area of land was about 213.66 square yards and the rent reserved was Rs. 50 per month. Under the terms of the lease the lessee had to construct within six months from the date of the lease a double storeyed building consisting of shops on the ground floor and residential rooms on the upper floor. The cost of construction was to be not less than Rs. 10,000. The construction had to be to the satisfaction of the lessors' engineers. There were certain restrictive covenants in the lease. The building had to be insured for at least Rs. 12,000 in the joint names of the lessors and the lessees with an insurance firm approved by the lessors. If the building was damaged or destroyed it had to be repaired or restored by the use of the insurance money received from the insurance company. On the termination of the lease either at the end of twenty-one years or earlier, the lessees were to surrender and yield up the demised premises including the building with its fixtures and appurtenances to the lessors without any compensation for the same. On May 14, 1948, shortly before the lease was to expire, the appellants who were then the trustees of the temple gave notice to the respondents to deliver possession of the demised premises and the building on the expiry of the lease, that is to say, on May 22, 1948. On May 19, 1948, the respondents replied that they were entitled to the benefits of the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter referred to as the Act, and that the appellants were not to interfere with their possession. All that they could get was the rent under the lease from the respondents. On July 23, 1948, the appellants gave the respondents notice to quit the building only as in their opinion the Act did not apply to it. On July 27, 1948, the respondents replied asserting that the Act did apply to it. The appellants, accordingly, filed the present suit in the High Court on September 1, 1948.

The period of the lease under exh. A having expired and the respondents having been given notice to quit, they were bound to vacate the demised premises unless they were protected by the provisions of the Act. Land used for non-agricultural purposes is "premises" under the Act. Although the period of the lease had expired the respondents continued to remain in posses-

sion without the assent of the lessors. Under the Act they would, therefore, be tenants of the land within the meaning of that expression as defined in the Act. There can be no question that so far as the land demised by the lease is concerned the respondents could not be evicted so long as they complied with the provisions of the Act and the lessors, as landlords, were unable to resort to any of the provisions of s. 13 of the Act to evict the respondents from the land. Indeed, the appellants did not claim in the plaint that they were entitled to evict the respondents from the demised land. The plaint, as drafted, confined the reliefs claimed by the appellants only to the building constructed on the land.

The substantial question in issue in this appeal is whether on a proper construction of the lease, exh. A, it can be held that not only the land but also the building to be constructed on it had been demised under it. Other questions had also been raised in the course of the arguments: It was argued on behalf of the respondents that the appellants could not get possession of the building until the lease had been determined. The lease could not be determined as under the law they could not be compelled to give up possession of the land demised under the lease as they were tenants of the land within the meaning of the Act. A further submission made was that even if the lease did not purport to demise the building which was to be constructed on the land demised under that document, the appellants were not entitled to get a declaration to the effect that they were entitled to the rents and profits from the building which had been let out to several persons by the respondents and the respondents could not be restrained from interfering with the collection of the rents and profits from the building by the appellants so long as the respondents were in possession of the land demised. It was also urged that the suit must at any rate fail on the ground that defendant No. 4 having died before the institution of the suit and her name being struck off from the category of defendants and her legal heirs and representatives not having been brought on to the record the suit was bad on account of non-joinder of necessary parties.

A perusal of the Schedule to the lease shows that what was demised thereunder was a parcel of land of an area of about 213 square yards with New Survey No. 1/2600 cadastral survey No. 96. The Schedule leaves no room for doubt as to what was demised. Under the terms of the lease the rent payable for this land was Rs. 50 per month. The terms of the lease show that the land was demised for the purpose of constructing a building thereon by the lessees. Clause 1 of the lease may be quoted as the respondents have strongly relied upon this clause in support of their contention that what was demised under the lease was not only the land but also the building to be erected thereon. This clause runs as follows:

"In consideration of the expenses to be incurred by the Lessees in and about the erection and completion of the building hereinafter mentioned and the rents hereinafter reserved and the Lessee's covenants hereinafter contained the lessors do hereby demise UNTO the lessees ALL that piece or parcel of land situated at Supari Baug Road, more particularly described in the schedule hereto and delineated in the plan thereof hereto annexed and marked "A" and therein bounded by a red line TO HOLD the premises unto the LESSEES for the term of 21 (twenty-one) years to be computed from the date of these presents yielding and paying therefor on the 10th day of each and every Calendar month the first of such payments to be made on 10th of June next, upon the terms and subject to the covenants and conditions hereafter contained:—"

Another clause upon which reliance had been placed was cl. 6 which provides for the building to be erected to be insured in the joint names of the lessors and the lessees with an insurance company approved by the lessors. It was pointed out that the building was to be handed over to the lessors at the end of the lease without compensation to the lessees.

We have examined the various clauses of the lease and find that in none of them has it been positively stated that the building to be erected on the demised land would be in the ownership of the lessors and that the building

would be deemed to have been leased to the lessees along with the demised land. Under the law there was no impediment in the way of the parties to have had a clause, in a positive form, to that effect. In the absence of such a clause the various clauses of the lease, as they exist, will have to be construed in order to ascertain whether on a proper construction thereof it can be said that there had also been a demise of the building. The Schedule to the lease, as already stated, specifically mentions that the land had been demised and there is no mention therein that the building when constructed thereon would also form part of the demised property. In 1927 when the lease was executed the Act was not in existence and it may reasonably be said that none of the parties had ever in contemplation that the Act or anything akin thereto would become law in the future affecting the rights of the parties under the lease. The various clauses of the lease are consistent with the ownership in the building being with the lessees in which the lessors had no right while the lease subsisted. In the case of *Narayan Das Khettry v. Jatindra Nath Roy Chowdhury*¹ the Privy Council approved the observations of Sir Barnes Peacock in the case of *Thakoor Chunder Poramanick v. Bamdhone Bhuttacharjee*² to the following effect (p. 228):

"We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself." In the case of *Vallabhdas Naranji v. Development Officer, Bandra*³ the Privy Council once again referred to Sir Barnes Peacock's observations as stated above. The Privy Council also quoted the following observation of Couch C.J., in the case of *Narayanbin Raghoji v. Bholagir Guru Mangir*⁴ (p. 85):

"...We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, viz., that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India that the party so building on another's land should be allowed to remove the materials."

Normally, under s. 108 of the Transfer of Property Act, before the expiry of the lease, a lessee can remove all structures and buildings erected by him on the demised land. All that was necessary for him to do was to give back the land to the lessor, on the termination of the lease, in the same condition as he found it. The ownership, therefore, of the building in this case was not with the lessors but was with the lessees. Under s. 108 of the Transfer of Property Act there was nothing to prevent the lessees contracting to hand over any building or structure erected on the land by them to the lessors without receiving any compensation. In other words, although under s. 108 the lessees had the right to remove the building, by the contract they had agreed to hand over the same to the lessors without the right to receive compensation at the end of the lease, the matter being entirely one of contract between the parties. Such a contract, however, did not transfer the ownership in the building to the lessors while the lease subsisted.

The various clauses of the lease in the present case make a clear distinction between the demised premises and the building by using the words "demised premises including the building to be erected thereon". It was, however, urged on behalf of the respondents that cl. 1 of the lease indicated that what was demised by the lease was not only the land but also the building to be constructed thereon, because the opening words of cl. 1 make it clear that in consideration of the expenses to be incurred by the lessees in erection and completion of the building and the rent reserved the lessors demised to the lessees the land mentioned in the Schedule. The important words in this clause were "to hold the premises" and not to hold the demised premises. The word "premises" covered both the land and the building to be erected thereon. The intention of the parties was that the premises would be held at a moderate rent of Rs. 50 per

¹ (1926) L.R. 54 L.A. 218, a.c. 29 Bom. L.R. 1143.

² (1866) 6 Subh. W.R. 223.

³ (1929) L. R. 56 L. A. 259, a.c. 31 Bom. L. R. 834.

⁴ (1869) 6 Bom. H.C.R. (A.O.J.) 80.

month as the lessees were going to incur the expenses of erecting the building, maintaining it in proper repair and paying all taxes in connection therewith. In the course of 21 years the lessees would have not only received back the money invested by them in the erection of the building but would have also enjoyed a large margin of profit. Under cl. 5, at the end of the lease, the premises held by the lessees, would be handed over to the lessors, that is to say, the land and the building erected on it without the lessors paying any compensation for the building. Under cl. 6 the building was to be insured in the joint names of the lessors and the lessees. In cl. 9 of the lease the expression "the said demised premises" appears and this clause guaranteed to the lessees enjoyment of peaceful possession of the premises. This clause came after all the clauses referring to the building to be erected on the land. If cls. 1, 5, 6 and 9 were read together and properly construed, it would appear that the intention of the parties was that not only the land demised but also the building which was to be constructed on it was the subject of the lease, as that was the only purpose for which the land was given on lease. These clauses do not necessarily lead to the conclusion suggested. If the ownership in the building was intended to be with the lessors, there was no occasion for providing that the lessees would get no compensation when the building was handed over. This provision rather suggests that the ownership in the building was with the lessees. On behalf of the respondents much reliance was placed on the decision of this Court in the case of *Bhatia Co-operative Housing Society Ltd. v. D. C. Patel*.⁵ Many of the terms of the lease in the case cited were similar to the terms to be found in the lease in the present case. There was, however, cl. 18 of the lease in the case referred to, which expressly stated that immediately after the completion of the building within the time specified in cl. 7, the lessors of the land would grant to the lessees a lease of the land with the building thereon for a term of 999 years from the date of the auction at a yearly rent calculated in accordance with the accepted bid for the plot. There could be no question, as a matter of interpretation, in the case cited, that a lease would be granted not only of the land but also of the building on it for a term of 999 years from the date of the auction. There is no such clause in the lease in the present case. The decision upon which reliance had been placed does not support the case of the respondents, because in the present case none of the clauses of the lease even remotely suggests that on the completion of the building on the land demised the lease in favour of the lessees would be both of the land and the building erected thereon.

On behalf of the appellants, on the other hand, it was submitted that what was demised was actually the land and the expression "to hold the premises" in cl. 1 meant nothing more than to hold the demised premises. The ownership in the building to be constructed did not pass on to the lessors under the lease. During the subsistence of the lease the ownership of the building remained with the lessees. The lessees contracted to hand over the building without compensation at the end of the lease and in consideration for this the lessees were being demised the land at a small rental of Rs. 50 per month. We have examined the various clauses of the lease and are satisfied that not one of them, if properly construed, indicates that there was any contract between the parties to the effect that the building to be erected on the land would be in the ownership of the lessors and that the same would be deemed to have been demised to the lessees along with the land.

It was next urged that even if there had been no demise of the building to be erected on the land possession of it could not be given to the appellants until the lease had been determined, which in law, could not be determined so long as the respondents could not be evicted from the demised land of which they were tenants within the meaning of the Act. This contention is without force as the provisions of the Act do not provide for the continuation of a lease beyond the specified period stated therein. All that the Act does is to give to the person who continues to remain in possession of the land, although the period of the

lease had come to an end, the status of a statutory tenant. That is to say, although the lease had come to an end but the lessee continued to remain in possession without the consent of the lessor, he would nonetheless be a tenant of the land and could not be evicted save as provided by the Act.

It was then submitted that the appellants could not get the declaration to the effect that they were entitled to the rents and profits from the building which had been let out to several persons by the respondents because they could not realise the same without entering upon the land on which the building had been constructed. The appellants could not enter upon the land for the purpose of collecting the rents without the consent of the respondents as the latter were the tenants of the land. They could only enter upon the land as provided for by the Act. The declaration which the appellants seek, however, does not ask for a declaration that they are entitled to enter upon the land. All that it seeks is that they are entitled to the rents and profits of the building which had been let out to several persons by the respondents. The appellants merely seek a declaration of their right to collect the rents and profits from the building. As to how they collect the same was their concern. There seems, therefore, to be no valid objection in law to granting the relief sought by the appellants.

The original lessees were Moreswar Kashinath and Radhabai, wife of Ramakrishna Bhai Thakore. Apparently, these persons were dead and the suit was filed against defendants Nos. 1 to 3 as heirs and legal representatives of Radhabai and defendants Nos. 4 and 5 as heirs and legal representatives of Moreswar Kashinath Thakore. After the suit was filed it was discovered that defendant No. 4 could not be served with a copy of the plaint as she had died before the institution of the suit. Her name was accordingly struck off as a defendant in the suit. It was conceded on behalf of the defendants at the trial that the suit filed against the defendants on a cause of action could not be dismissed merely because of the non-joinder of the legal representatives of defendant No. 4 who was already dead at the institution of the suit. In appeal, the learned Judges were of the opinion that it was not necessary to decide this question because, in their opinion, the suit was bound to fail on other grounds. Whatever other consequences may arise on account of the failure of the appellants to implead the heirs and legal representatives of defendant No. 4, it was conceded on behalf of the respondents at the trial that the suit could not be dismissed merely because of this. It would have been better if the heirs and legal representatives of defendant No. 4 had been brought on to the record as defendants. It seems to us, however, that the suit cannot be dismissed merely on this ground, because the nature of the declaration which the appellants sought could be granted even in the absence of the heirs and representatives of defendant No. 4 being on the record. Though the plaintiffs impleaded 5 persons as defendants in the suit, the plaintiffs claimed a decree against defendant No. 1 only in respect of the rents received by him from the tenants in the building in question. There is no claim against the other defendants for accounts in respect of the usufruct of the property. The correspondence disclosed in the suit, which passed between the plaintiffs and defendant No. 1, showed that it was only he who was in effective control of the building. The suit was contested only by the first three defendants who appear to be brothers and who claim to have continued in possession of the building after the crucial date, i.e., May 22, 1948. It is they who claimed protection under the Act. Defendants Nos. 4 and 5, who were purported to be sued as representatives of one of the joint lessees, do not appear to have taken any interest in the building. After the suit, defendant No. 5 has remained *ex parte* throughout. After the decree of the trial Court, it is only the first three defendants who preferred an appeal to the High Court. From all these considerations, it appears that defendant No. 4 or her heirs or legal representatives were not necessary parties to the suit. The Court could, therefore, proceed with the suit in their absence.

The appeal, accordingly, is allowed with costs throughout and the decision of the High Court in appeal is set aside. The appellants are entitled to a declaration that the building constructed on the land demised under the lease,

exh. A, belongs to the Mankeshwar Temple Trust and the said trust is entitled to recover all the rents and profits from the same and the respondents have no right, title and interest therein since the expiration of the said lease. Respondent No. 1 is directed to render an account of the rents received by him from the tenants of the building from May 23, 1948, and to pay to the appellants the amount found due, after accounting, with interest at 6 per cent. per annum from May 23, 1948, until payment. There will be an order of injunction restraining the respondents, their agents and servants from interfering with the collection of rents and profits by the appellants from the tenants of the afore-said building.

Appeal allowed.

Present: Mr. Justice Venkatarama Aiyar, Mr. Justice Gajendragadkar and
Mr. Justice A. K. Sarkar.

**MAZAGAON DOCK LTD. v. THE COMMISSIONER OF INCOME-TAX
AND EXCESS PROFITS TAX.***

Indian Income-tax Act (XI of 1922), Sec. 42(2)—Assessee company incorporated in India and doing business as ship repairers—Share capital of assessee company beneficially owned by non-resident shipping companies—Assessee company under agreement with non-resident companies repairing ships of these companies at cost and without charging profits—Whether assessee company chargeable to tax under s. 42(2).

The assessee was a private limited company incorporated under the Indian Companies Act and was carrying on business as marine engineers and ship repairers. Its registered office was in Bombay and it was resident and ordinarily resident in India. Its entire share capital was beneficially owned by two British companies whose business consisted in plying ships for hire. Under an agreement entered into with the two non-resident companies, the assessee repaired their ships at cost and charged no profits. On the question whether on these facts the assessee was chargeable to tax under s. 42(2) of the Indian Income-tax Act, 1922, it was contended by the assessee (1) that s. 42(2) of the Act imposes a charge only on a business carried on by a non-resident, and that, therefore, no tax could be imposed under that provision on the business of the assessee who was a resident; and (2) that it is a condition for the levy of a charge under s. 42(2) that the non-resident must carry on business with the resident, and that in the instant case that condition was not satisfied:—

Held, that the business which is the subject-matter of taxation under s. 42(2) is that of the resident and not of a non-resident,

that having regard to the course of dealings between the non-resident companies and the assessee it could be said of the former that they carried on business with the latter within the meaning of s. 42(2), and

that, therefore, the assessee was chargeable to tax under s. 42(2).

A non-resident must be held to carry on business with a resident within s. 42(2) of the Act, if the dealings between them form concerted and organised activities of a business character.

Smith Barry v. Cordy (H. M. Inspector of Taxes),¹ *Narain Swadeshi Weaving Mills v. The Commissioner of Excess Profits Tax*,² *Commr. of Inc.-Tax v. Currimbhoy Ebrahim & Sons*,³ *Anglo-French Textile Co., Ltd. v. Commissioner of Income-tax, Madras*,⁴ *Bangalore W. C. & S. Mills v. Commr. of Inc.-Tax*,⁵ and *Commissioners of Inland Revenue v. The Incorporated Council of Law Reporting*,⁶ referred to.

*Decided, May 12, 1958. Civil Appeal No. 381 of 1958.

¹ (1946) 28 T.C. 250.

² [1955] 1 S.O.R. 953.

³ (1935) 3 I.T.R. 895.

⁴ [1953] S.C.R. 448.

⁵ (1950) 18 I.T.R. 423.

⁶ [1888] 3 T.O. 105.

The word "or" in the clause "derived therefrom or which may reasonably be deemed to have been derived therefrom" in s. 42(2) of the Indian Income-tax Act, 1922, must be read in the context as meaning "and".

THE facts appear at 57 *Bombay Law Reporter* 475.

Sir Jamshedji B. Kanga, N. A. Palkhivala, J. B. Dadachanji, S. N. Andley, P. L. Vohra and Rameshwar Nath, for the appellant.

H. N. Sanjay, Additional Solicitor-General of India, *G. N. Joshi* and *R. H. Dhebar*, for the respondent.

VENKATARAMA AIYAR J. This is an appeal against the judgment of the High Court of Bombay in a reference under s. 66(1) of the Indian Income-tax Act, 1922, hereinafter referred to as the Act.

The appellant is a private limited company incorporated under the Indian Companies Act, and is carrying on business as marine engineers and ship repairers. Its registered office is in Bombay and it is resident and ordinarily resident in India. Its entire share capital is beneficially owned by two British Companies, the P. & O. Steam Navigation Co. Ltd., and the British Indian Steam Navigation Co. Ltd., whose business consists in plying ships for hire. Under an agreement entered into with the two companies aforesaid, which will be referred to hereinafter as the non-resident companies, the appellant repairs their ships at cost, and charges no profits. Now, the point for determination is whether, on these facts, the appellant is chargeable to tax under s. 42(2) of the Act. That sub-section runs as follows:

"Where a person not resident or not ordinarily resident in the taxable territories carries on business with a person resident in the taxable territories, and it appears to the Income-tax Officer that owing to the close connection between such persons the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom, or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income-tax in the name of the resident person who shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax."

The Income-tax Officer, Bombay, who dealt with the matter took the view that the appellant company had so arranged its business with the non-resident companies that it did not produce any profits to it, and that was because it was those companies that really owned its share capital, and that therefore the profits which it could ordinarily have made but for their close financial connection were liable to be taxed under s. 42(2), and he computed the same at Rs. 6,80,000 for the account year 1943-1944, at Rs. 4,67,559 for the account year 1944-1945 and at Rs. 1,68,963 for the account year 1945-1946. On the basis of the above findings, orders of assessment of income-tax were made for the account years 1944-1945 and 1945-1946 and of excess profits tax for the account years 1943-1944, 1944-1945 and 1945-1946. Against these five orders, the appellant preferred appeals to the Appellate Assistant Commissioner, who by his order dated July 3, 1952, confirmed the same. Then there was a further appeal by the appellant to the Appellate Tribunal, and the Bench which heard the same having been divided in its opinion, the matters came up for hearing before the President, who by his order dated March 19, 1954, held that s. 42(2) was inapplicable and he accordingly set aside the orders of assessment of income-tax and excess profits tax made on the appellant. On the application of the Department, the Tribunal referred the following question for the opinion of the High Court of Bombay:

"Whether on the facts and in the circumstances of the case any income falls to be included in the appellant's assessment under s. 42(2)."

The reference was heard by Chagla C.J. and Tendolkar J., who by their judgment dated February 24, 1955, held that, on the facts found, s. 42(2) was applicable and that the appellant was liable to be assessed to income-tax and

excess profits tax under that section. The appellant applied under s. 66(4) for leave to appeal against this judgment to this Court, and that application was dismissed. The appellant thereafter applied for and obtained leave to appeal to this Court under art. 136, and hence this appeal.

It must be mentioned that on December 31, 1948, an order of assessment had been made in respect of the income-tax payable by the appellant for the account year 1943-1944, and therein, the profits chargeable under s. 42(2) had not been included. But subsequently, the Income-tax Officer took action under s. 34 of the Act, and on May 29, 1953, made an order assessing the appellant to tax for that year on the profits deemed to have been made by it under s. 42(2), and against that order, an appeal is pending before the Appellate Assistant Commissioner. That order is not the subject-matter of the present proceedings, which are concerned only with the assessment of income-tax for the account years 1944-1945 and 1945-1946 and of excess profits tax for the account years 1943-1944, 1944-1945 and 1945-1946.

Now, the sole point for determination in this appeal is whether on the facts found the appellant is chargeable to tax under s. 42(2) of the Act. Mr Palkhivala, learned counsel for the appellant, contends that it is not, and urges two grounds in support of his contention: (1) that s. 42(2) imposes a charge only on a business carried on by a non-resident, and that, therefore, no tax could be imposed under that provision on the business of the appellant who is a resident; and (2) that it is a condition for the levy of a charge under s. 42(2) that the non-resident must carry on business with the resident, and that in the instant case it is not satisfied. The first ground does not appear to have been put forward in the Court below, but before us it has been presented with great elaboration and pressed with considerable insistence. The argument in support of it may thus be stated: s. 42(2) imposes a charge on profits of a business, actual or notional, when the conditions specified therein are satisfied; but the section does not, in terms, say who the person is whose business is liable to be taxed, but that that can only be the non-resident is clear from other parts of the section. Thus, the tax is imposed under s. 42(2) on profits "derived" from business, which must mean profits actually made therein. *Ex hypothesi*, the resident has so arranged his business that it produces little or no profits to him. If it has produced some profits, then they are taxable in his hands even apart from this provision, and if he has made no profits, the word "derived" would be inapplicable to his business. Therefore, the profits "derived" and taxable under the section can have reference only to the business of a non-resident. Then again, the profits are chargeable under this section in the name of the resident. If the profits chargeable under s. 42(2) accrue from a business of the resident, he would be the person who would, even apart from the section, be liable for the tax, and in that situation, the expression "in the name of the resident" would be inappropriate. It would make sense if, in fact, the profits accrued in a business carried on by a person other than the resident, and the Legislature sought to tax them in his hands. The true intention behind the legislation, it is said, is that the profits of the non-resident should be taxed, but that the tax should fall on the resident by reason of his close connection with the non-resident. Support for this contention is sought in the provision in s. 42(2) that the resident shall be deemed to be the assessee for all purposes of the Act. The word "deemed" imports, it is argued, a legal fiction, and if it was the business of the resident that was intended to be taxed, then he is, in fact, the assessee, and it would be inconsistent with that position that he should be treated as an assessee by a legal fiction. It is also urged that sub-ss. (1) and (3) of s. 42 deal with the profits of a non-resident and prescribe the conditions under which and the manner in which the tax could be imposed and collected, and s. 42(2) must, in this setting, be construed as referring to the business of the non-resident.

There would have been considerable force in this argument, had there been any ambiguity or uncertainty in the wording of s. 42(2) as to whether it is the business of the resident that is sought to be taxed or that of the non-resident.

But that is not so. The language of the enactment imposing the charge is too plain to admit of any doubt. Now, s. 42(2) is, it may be noted, in two parts. The first part commencing with the opening words "Where a person not resident" and ending with the words "which may reasonably be deemed to have been derived therefrom" prescribes the conditions on which the charge arises. It does not of itself impose the charge. That is done by the second part, which provides that "the profits derived therefrom or which may reasonably be deemed to have been derived therefrom shall be chargeable to income-tax." The word "therefrom" is very important for the purpose of the present discussion. In the context, it can refer only to the business of the resident, and it is this business therefore that is the subject of the charge under s. 42(2). It was suggested for the appellant that the word "therefrom" has reference to the arrangement between the non-resident and the resident, but apart from the fact that such a construction would, on the grammar of it, be untenable, it is impossible to conceive how an arrangement relating to the conduct of business can, as such, be the subject-matter of income-tax, apart from the business in which profits or gains are made. The language of the section is clear beyond all reasonable doubts as to what it is that is sought to be taxed under this section. That is only the business of the resident and not that of the non-resident. In this view, it is only necessary to consider whether there is anything in the wording of the other parts of s. 42(2) relied on for the appellant, which precludes us from giving effect to the plain import of the word "therefrom".

It is on the expression "profits derived" in the charging part of the enactment that the appellant leans heavily in support of his position that it is the business of the non-resident that is really intended to be taxed. But then, those words do not stand alone. They are associated with the words "or which may reasonably be deemed to have been derived", and this association has its origin in the preceding clause "produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business". This clause contemplates two classes of cases, one where the business of the resident produces no profits and the other where it produces less than the normal profits. The charge is imposed on both these classes of cases, and the word "derived" has reference to the latter, while the words "profits which may reasonably be deemed to have been derived" relate to the former. That both these clauses relate to the business of the resident is clear from the words "to the resident" occurring therein. The word "derived" in s. 42(2) must, therefore, be interpreted as referring to the business of the resident.

The respondent sought further support for this conclusion in the words "which may reasonably be deemed to have been derived" in s. 42(2), and contended that those words could apply only to a business which does not yield profits, and that will fit in, in the context, only with the business of the resident and not of the non-resident. The answer of the appellant to this contention is that the words in question should be construed as meaning not notional profits but such proportion of the actual profits of the non-resident as could reasonably be apportioned to the business in India. Reliance was placed in support of this contention on rr. 33 and 34 of the Indian Income-tax Rules, 1922. Rule 33 provides for the determination of the profits of a non-resident in cases falling within s. 42(1), and one of the modes prescribed for such determination is to fix an amount which bears the same proportion to the total profits of the non-resident as the Indian receipts bear to the total receipts in the business. Rule 34 then provides that "the profits derived from any business carried on in the manner referred to in section 42(2) may be determined for the purposes of assessment to income-tax according to the preceding rule". Now, the argument of Mr. Palkhivala is that the interpretation put on s. 42(2) by the rule-making authorities as manifest in r. 34 is that the business chargeable under s. 42(2) is that of the non-resident, and that the words "which may reasonably be deemed to have been derived therefrom" had reference to the apportionment of the Indian, out of the total profits. We see no force in this

contention. There is nothing in r. 34 to justify the assumption that the rule-making authorities considered either that s. 42(2) applied to the business of a non-resident or that the words "which may reasonably be deemed to have been derived therefrom" meant apportionment of the Indian out of the world profits of the non-resident. And even if those be the assumptions on which the rule is based, that can have no effect on the true interpretation of s. 42(2). And whatever doubts one might have had as to the meaning to be given to the words "derived therefrom or which may reasonably be deemed to have been derived therefrom" if they had to be construed in isolation, in the context of the section and read in conjunction with the words "to the resident" and "therefrom", there cannot be any doubt that they have reference to the business of the resident and not that of the non-resident.

The word "or" in the clause would appear to be rather inappropriate, as it is susceptible of the interpretation that when some profits are made but they are less than the normal profits, tax could only be imposed either on the one or on the other, and that accordingly a tax on the actual profits earned would bar the imposition of tax on profits which might have been received. Obviously, that could not have been intended, and the word "or" would have to be read in the context as meaning "and". Vide Maxwell's Interpretation of Statutes, Tenth Ed, pp. 238-239. But that, however, does not affect the present question which is whether the word "derived" indubitably points to the business of the non-resident as the one taxable under s. 42(2), and for the reasons already given, the answer must be in the negative.

The appellant also relied on the clauses in s. 42(2) that 'the profits shall be chargeable to tax in the name of the resident' and that 'he shall be deemed to be the assessee for all purposes of the Act' as indicating that it is not the business of the resident that is really sought to be taxed. But these clauses are explainable with reference to the fact that the profits taxed are not actual profits but what are deemed to be profits. It was argued that if it was the intention of the Legislature that what was not profits should be deemed to be profits, that should have been independently provided for before the tax is imposed, and that in the absence of such a provision, the word "deemed" must be construed as referring not to notional profits being treated as actual profits, but to a person who is not, in fact, an assessee, being treated as an assessee. We see no substance in this argument. There is no reason why an enactment should not both declare notional profits as taxable profits and at the same time impose a charge on the resident in respect of those profits, and that, quite clearly, is what s. 42(2) has done. It may be that its language is not felicitous. But there can, however, be no mistaking its sense that it is the resident that is to be dealt with as assessee in respect of profits which he had not, in fact, made. Nor do we see much force in the argument that s. 42, sub-ss. (1) and (3), relate to income of the non-resident and that s. 42(2) which is wedged in between them should therefore be interpreted as having reference to the profits of the non-resident. If the language of s. 42(2) is clear that it is the resident who is chargeable to tax, it is of no consequence that under s. 42, sub-ss. (1) and (3) it is the non-resident that is taxed. It should be remembered that s. 42 occurs in Chapter V headed "Liability in Special Cases", and s. 42(2) is a liability which is out of the ordinary run, and it is not inappropriate to deal with it in s. 42, because while s. 42(1) seeks to bring within the ambit of taxation the profits of a non-resident which accrue in India, s. 42(2) seeks to tax the resident in respect of profits which he would have normally made but for his business association with a non-resident. On the other hand, on the construction contended for by the appellant s. 42(2) would become practically useless because a non-resident whose profits could be taxed under s. 42(2) could also be taxed under s. 42(1), as also the resident if he were the agent. None of the considerations put forward by the appellant is of sufficient weight to displace the conclusion to be drawn from the words "to the resident" and "therefrom" in s. 42(2), and we must hold that the business which is the subject-matter of taxation under that provision is that of the resident and not

of a non-resident. This contention must accordingly be found against the appellant.

We shall next consider the second ground urged in support of the appeal that it is a condition for the levy of a charge under s. 42(2) that a non-resident should carry on business with the resident, and that, on the facts found, that condition is not satisfied, and that therefore the tax is unauthorised. It is argued that the business of the non-resident companies is to ply ships for hire, and that the appellant has no concern with that; that the business of the appellant is to repair ships and that the non-resident companies have no connection with that business; and that all that the non-resident companies do is to get their ships repaired by the appellant, and that does not amount to carrying on any business with the appellant. A person who regularly purchases his goods from a particular dealer does not, it is said, carry on business with that dealer, and on the same analogy, in getting their ships repaired by the appellant the non-resident companies cannot be said to carry on business with them in the real sense of that word.

We are unable to agree with this contention. The word "business" is, as has often been said, one of wide import, and in fiscal statutes it must be construed in a broad rather than a restricted sense. Discussing the connotation of the word "trade", Scott, L. J., observed in *Smith Barry v. Cordy* (*H. M. Inspector of Taxes*):

"The history of judicial decisions has been similar, showing a strong tendency not to restrict the scope of Schedule D; a tendency which was, we think, in sympathy with the general social and economic outlook of the country. There is hardly any activity for gaining a livelihood and not covered by the other Schedules, which does not seem to us to be swept into the fiscal net by the Schedule D."

"The word 'business' connotes", it was observed by this Court in *Narain Swadeshi Weaving Mills v. The Commissioner of Excess Profits Tax*², "some real, substantial and systematic or organised course of activity or conduct with a set purpose." Now, it may be conceded that when a person purchases his requirements from a particular dealer, he cannot without more be said to carry on business with him. But here there is much more. The non-resident companies send their ships for repair to the appellant, not as they might to any other repairer but under a special agreement that repairs should be done at cost. And further unlike customers who purchase goods for their own consumption or use, the non-resident companies get their ships repaired for use in what is admittedly their business. These are clearly trading activities, organised and continuous in their character and it will be difficult to escape the conclusion that they constitute business. We are not even concerned in this appeal with the larger question whether the activities of the non-resident companies in connection with the repair of the ships amount to carrying on of business. What we have to decide is whether having regard to the course of dealings between the non-resident companies and the appellant it can be said of the former that they carry on business with the latter within the meaning of s. 42(2). Now, it should be observed that s. 42 speaks not of the non-residents carrying on business in the abstract but of their carrying on business with the resident, and in the context, it must include all activities between them having relationship to their business. That is the view taken by the learned Judges in the Court below, and we are in agreement with it.

In this connection, reference may be made to s. 42(1) under which a charge is imposed on income, profits or gains accruing to a non-resident through any business connection in the taxable territories. In *Commr. of Inc. Tax v. Currimbhoy Ebrahim & Sons*³, it was observed by the Privy Council that business connection in s. 42(1) is different from business as defined in s. 4(2) of the Act. "The phrase 'business connection'," observed Sir George Rankin, "is different from, though not unrelated to, the word 'business' of which there

¹ (1946) 28 T. C. 250, 259.

² [1955] 1 S.C.R. 952, 961.

³ (1935) 3 I.T.R. 395.

is a definition in the Act". And in *Anglo-French Textile Co., Ltd. v. Commissioner of Income-tax, Madras*⁴, this Court has observed that "when there is a continuity of business relationship between the person in British India who helps to make the profits and the person outside British India who receives or realises his profits, such relationship does constitute a business connection". Vide also the observations in *Bangalore W., C. & S. Mills v. Commr. of Inc.-Tax*⁵. The words "where a person not resident in the taxable territories carries on business with a person resident" in s. 42(2) must be similarly interpreted, and a non-resident should be held to carry on business with a resident, if the dealings between them form concerted and organised activities of a business character. We are accordingly of opinion that, on the facts found, the non-resident companies must be held to have carried on business with the appellant as provided in s. 42(2).

It was argued that the result of this arrangement was only to reduce the repairing charges and enable the non-resident companies to thereby make a saving; that that was not profit or gains of a business liable to be taxed under the Act, and the decisions in *Tennant v. Smith*⁶ and *Major A. U. John In re*⁷ were cited in support of this position. But, as already held by us, the subject-matter of the tax under s. 42(2) is the business of the resident and not that of the non-resident, and what we have to decide is not whether the non-resident companies made profits in their dealings with the appellant but whether what they did was business, and for that purpose it is immaterial that the business was carried on by them in such manner that no profits could accrue to them therefrom. Vide the observations of Coleridge C.J., at p. 113 in *Commissioners of Inland Revenue v. The Incorporated Council of Law Reporting*⁸. The fact therefore that the non-resident companies could derive no profits from the dealings with the appellant would not detract from their character as business with the appellant. This contention must, therefore, be rejected.

It was finally contended that the profits chargeable under s. 42(2) must be separately assessed and not added on to the other profits or income of the appellant. This contention is based on the assumption that s. 42(2) imposes on the appellant, a vicarious liability, the charge being in reality on the profits of the non-resident. On our finding that the charge is on the business of the appellant and not of the non-resident companies, this contention does not survive.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Gokhale and Mr. Justice Patel.

SUGANDHABAI SHIVRAM HEDE v. SUNDRABAI ABA MADNE.*

Hindu Succession Act (XXX of 1956), Secs. 14, 15(1)(a), 16—Specific Relief Act (I of 1877), Sec. 42—Last male holder leaving widow and daughters—Widow adopting son to her husband after extinguishment of her right to adopt—Suit by daughters for declaration that adoption invalid and not binding upon them—Maintainability of suit—Effect of Hindu Succession Act on legal rights of Hindu female possessed of property and of reversionary heirs of last male holder.

Under s. 15(1)(a) read with s. 16 of the Hindu Succession Act, 1956, the sons and daughters (including the children of a deceased son or daughter) and the husband of a female dying intestate, are entitled to inherit her property simultaneously. Therefore, under s. 42 of the Specific Relief Act, 1877, a daughter can challenge the

⁴ [1958] S.C.R. 448.

⁵ (1950) 18 I.T.R., 423, 433, 434.

⁶ (1892) 8 T.O. 158.

⁷ (1938) 6 I.T.R. 434.

⁸ (1888) 3 T.O. 105.

*Decided, September 15, 1958. First Appeal No. 47 of 1957, against the decision of K. K. Gadgil, Civil Judge, Senior Division, at Sholapur, in Special Civil Suit No. 59 of 1952.

validity of any adoption made by her widowed mother and its binding character in so far as it affects her legal status as the heir of her mother inasmuch as, by virtue of the adoption, the adopted boy would be introduced as an heir to the mother, in respect of property held by her, if she were to die intestate.

The effect of the provisions of the Hindu Succession Act, 1956, on the legal rights of a Hindu female possessed of property and those of the reversionary heirs of the last male holder, is that—

(1) a female Hindu would now become the full owner of the property of which she is possessed, whether she acquired the property before or after the commencement of the Act;

(2) as she would now hold the property of the last male holder as a full and not a limited owner, the other heirs of the last male holder can no longer be called reversionary heirs;

(3) the provisions of s. 14 of the Act being retrospective in operation would affect suits filed before the commencement of the Act, i.e. June 17, 1956, so that any such suit in which the reversionary heir claims a declaration about his or her reversionary right regarding the property of the last male holder or any relief that would, in any manner, be inconsistent with the full proprietary rights conferred on the female Hindu by s. 14 of the Act, would become incompetent by reason of the fact that the heir has ceased to be a reversionary heir.

*H. A. Mistry v. Raghunath,*¹ *Hanuman Prasad v. Indrawati,*² *Bhabani Prasad v. Sm, Sarat Sundari*³ and *Laxmi Debi v. Surendra Kumar,*⁴ distinguished.

*Gurunath v. Kamlabai Kanchanganda*⁵ and *Kamla Devi v. Bachulal,*⁶ referred to.

THE facts appear in the judgment.

V. B. Raje, for the appellants.

S. G. Patwardhan, for respondent No. 1.

GOKHALE J. This is an appeal by original defendants Nos. 1 and 2 against the decree passed by the Court of the Civil Judge, Senior Division, at Sholapur, in favour of the plaintiff and defendant No. 3, who are the respondents in this appeal, declaring that the adoption of appellant No. 2 (defendant No. 2) was invalid and not binding on the respondents. The present suit came to be filed by plaintiff Sundrabai in the following circumstances:—

Plaintiff's father Shivram died in 1918 leaving behind his widow Sugandhabai (defendant No. 1) and two daughters Nagarbai (defendant No. 3) and Sundrabai (plaintiff). Defendant No. 1 adopted to her husband one Bhanudas on April 25, 1937, Bhanudas being the nephew of Shivram. According to plaintiff, Bhanudas died in 1949, leaving his widow Girjabai and it appears that a few months after Bhanudas's death Girjabai remarried. On July 20, 1950, Sugandhabai (defendant No. 1) adopted appellant No. 2 Keshav and executed and got registered an adoption deed in that behalf. It is the plaintiff's case that inasmuch as Bhanudas was survived by his widow Girjabai, defendant No. 1's right to adopt was extinguished and the same could not be revived despite Girjabai's re-marriage. It is, therefore, the plaintiff's case that she and her sister defendant No. 3 are the reversionary heirs to their father Shivram and their right is subject only to defendant No. 1's interest in the property left by her father. That was why plaintiff filed the present suit on November 18, 1952, asking for a declaration that the adoption of defendant No. 2 Keshav was invalid and not binding on plaintiff and defendant No. 3.

The suit was resisted by defendant Nos. 1 and 2 on the basis that there was no marriage between Bhanudas and Girjabai and, therefore, Bhanudas was not survived by any widow. On that ground it was contended that defendant No. 2's adoption was good. This was the principal ground on which the suit came to be resisted.

1 [1957] A.I.R. Pat. 480.

2 [1958] A.I.R. All. 304.

3 [1957] A.I.R. Cal. 527.

4 [1957] A.I.R. Orissa 1.

5 (1954) 57 Bom. L.R. 694, S.C.

6 [1957] A.I.R. S.C. 434.

The trial Court held that plaintiff was entitled to file a suit for a declaration as claimed by her. It also held that Bhanudas had married Girjabai and Girjabai survived Bhanudas as his legal heir and consequently defendant No. 1's right to adopt was extinguished. It appears that plaintiff had originally denied even the factum of adoption of defendant No. 2, but that was admitted by her during the hearing by a *purshis* (exh. 48). She only challenged the validity of defendant No. 2's adoption on the ground that defendant No. 1 was not competent to adopt, as her power to adopt had been extinguished. The trial Court, therefore, came to the conclusion that the factum of adoption was proved, but the adoption was not valid because defendant No. 1 had no right to adopt defendant No. 2, since her right had been extinguished as alleged by the plaintiff. That is why the declaration prayed for by plaintiff was granted by the trial Court. Against this decree defendants Nos. 1 and 2 have filed the present appeal.

Mr. Rege, learned advocate appearing on behalf of the appellants, has raised two points. He says in the first instance that the trial Court's view that Girjabai was Bhanudas's wife and survived him as his widow is not correct on the basis of the evidence on the record. Now, on this point it has to be remembered that defendant No. 1 Sugandhabai, who herself adopted Bhanudas and should have known whether Bhanudas had married or not, has not cared to give any evidence. She has not stepped into the witness-box and Keshav, who is adopted by her, has denied knowledge as to whether Bhanudas was married. He has stated that he had never heard about Bhanudas marrying Girjabai or any other woman. Incidentally, it may be mentioned that defendant No. 2 is the step-brother of defendant No. 1. Plaintiff Sundrabai has stated in her evidence that Girjabai is Bhanudas' widow and she is alive, that 8 or 9 months after Bhanudas' death Girja contracted re-marriage with a man from Shidbache Wadgaon and that man's name was Manohar. She deposed to the fact that she had attended Bhanudas's marriage with Girja and partook of the marriage dinner. According to her, Bhanudas was married to Girja 7 or 8 years after his adoption, which would mean that the marriage took place some time in 1945. She stated that Girja's mother was one Parwati and she admitted that Parwati was her cousin-sister. She further stated that both Parwati and her husband were dead. She also deposed that Bhanudas died 4 years after his marriage and that Girja was 10 years old at the time of her marriage with Bhanudas and that she got no child by Bhanudas. Girja was also examined on behalf of plaintiff. She stated that she was married to Bhanudas 9 years ago and she was 18 years of age at that time. After her marriage, she said, she lived with Bhanudas. She denied that Bhanudas died unmarried. The evidence of these two witnesses has been believed by the learned trial Judge.

Mr. Rege, however, contends that Girja is a relative of the plaintiff and was interested in supporting plaintiff. He also contends that according to plaintiff's evidence Girja was only 10 years old at the time of her marriage and, therefore, her marriage with Bhanudas would contravene the provisions of the Child Marriage Restraint Act, 1929. We are not impressed by this argument. Girja herself has stated that she was 13 when she married Bhanudas, and even if the marriage was in contravention of the Child Marriage Restraint Act, the marriage could not be invalid. In our opinion, the evidence led on behalf of plaintiff, which has been accepted by the learned trial Judge, shows that Bhanudas died leaving Girja his widow and a few months after Bhanudas's death Girja re-married and therefore became civilly dead so far as Bhanudas' family is concerned. Though on Girja's re-marriage Sugandha would inherit Bhanudas' property as the mother of Bhanudas, Sugandha would not be competent to adopt a son to her husband because her right to do so would be extinguished, her son having himself left a widow competent to continue his line by adoption. See *Gurunath v. Kamlabai Kanchangauda*¹.

Mr. Rege has not disputed this legal position.

But then Mr. Rege has raised a new point of law on the basis of the provisions of the Hindu Succession Act, 1956, which came into force on June 17, 1956. Mr. Rege contends that plaintiff claimed a declaration that defendant No. 2 was not validly adopted by defendant No. 1 on the ground that she and defendant No. 3 were the next reversionary heirs of Bhanudas and Mr. Rege argues that under s. 14 of the Hindu Succession Act the property which has been inherited by Bhanudas would be held by defendant No. 1 Sugandha as full owner and not as a limited owner. If that be so, then, according to Mr. Rege, there is no question of there being any reversionary heirs of Bhanudas. Mr. Rege concedes that on the date that the suit was filed, that is to say, on November 18, 1952, both plaintiff Sundrabai and defendant No. 3 Nagarbai would be the next reversionary heirs, if defendant No. 2's adoption was invalid. But, according to Mr. Rege, s. 14 of the Hindu Succession Act has been made expressly retrospective and therefore pending suits would be also affected. Now, Mr. Rege, in our opinion, is right in his contention that s. 14 is retrospective. In *Kamla Devi v. Bachulal Gupta*² it has been held that by reason of the use of the expression "whether acquired before or after the commencement of this Act", s. 14 of the Hindu Succession Act is undoubtedly retrospective, though in that case their Lordships of the Supreme Court did not consider the question of the effect of that section in the circumstances of the case. Mr. Rege contends that an appellate Court is entitled to take into consideration subsequent changes in legislation with a view to moulding its decree in the light of the changed circumstances. That undoubtedly is so and the question in this case is whether we should accede to Mr. Rege's contention that plaintiff's suit should be dismissed on the ground that the plaintiff claimed a declaration about the invalidity of the adoption of defendant No. 2 when plaintiff was a reversionary heir under the Hindu law as it was then prevailing but is no longer a reversionary heir by virtue of s. 14 of the Hindu Succession Act.

In support of his argument, Mr. Rege has referred us to some decisions. In *B. A. Missir v. Raghunath*³ it was held that the effect of ss. 14 and 15 of the Hindu Succession Act was that a reversioner recognised as such under the Hindu law was no more a reversioner as any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, is not a limited estate but an absolute one; after the coming into force of the Act, there is neither a right of reversion nor any kind of *spes successionis*. In that case, a widow had executed a sale-deed in favour of the father of some of the defendants. These properties were subsequently mortgaged in favour of her daughter. The plaintiff as a reversioner brought a suit for a declaration that the sale-deed executed by the widow was without consideration and without legal necessity and was not binding on him. All the lower Courts had decreed the plaintiff's claim and the matter was pending in an appeal under the Letters Patent before the Patna High Court when the Hindu Succession Act came into force, and it was held by that Court that in view of the change in law brought about by the Hindu Succession Act the plaintiff lost his right as reversioner in respect of the property held by the widow and, therefore, plaintiff's suit must be dismissed as not maintainable; and in doing so the Patna High Court followed the well-established rule that an appellate Court was entitled to take into consideration legislative changes which have supervened since the decision under appeal was given. Now, that case is distinguishable from the present case, because there an alienation by a widow in respect of property was challenged by the reversioner and it was held that his right to do so no longer survived he himself having ceased to be a reversioner because of the coming into force of the Hindu Succession Act. In the Patna case the learned Judges do not seem to have considered the question as to whether a property that was alienated by a widow by a sale could be said to be property possessed by her and could be said to be held by her as a full owner and not as a limited owner.

That question was considered in a decision of the Allahabad High Court to which our attention was invited by Mr. Rege, *Hanuman Prasad v. Indrawati*,⁴ where it was held that if a widow had alienated the property without legal necessity, the alienation that was invalid according to the customary Hindu law remained invalid and its invalidity was not affected at all by the provisions of s. 14 of the Hindu Succession Act; but, though the alienation made by a Hindu widow before the passing of the Act was vulnerable and challengeable on the ground of want of legal necessity as if the Act had not been passed, the widow continues to be estopped from challenging the validity on the ground of want of legal necessity and since the reversioners have completely disappeared by virtue of the provisions of the Hindu Succession Act, nobody can get a decree as a reversioner; and even those persons who could have obtained a decree before the passing of the Act that an alienation made before the passing of the Act was invalid, cannot now get a declaration to that effect because they have lost the status by virtue of which they could have got it. That case again was the case of an alienation and the reversioners had asked for a declaration that the said alienation made by the widow was void beyond her lifetime and was not binding against the reversioners who claimed to be entitled after the death of the widow to the possession of the property of her deceased husband.

Mr. Rege has then relied on a ruling of the Calcutta High Court in *Bhabani Prasad v. Sm. Sarat Sundari*,⁵ in which it was held that s. 14 of the Hindu Succession Act made no reservation in favour of pending litigations. In that case a reversioner had filed a suit claiming a declaration that the widow was entitled to enjoy the husband's property during her lifetime only and a further declaration that the plaintiff was a reversioner in respect of the said property and the widow was bound and liable to invest in Government securities the money that would be payable by the Government on account of an award made by the Collector fixing Rs. 75,000 as compensation for properties acquired by Government for extension of the Dum Dum Air Field. It was held in that case that the suit must fail because by virtue of the provisions of s. 14 of the Hindu Succession Act, the widow had become the full and absolute owner of her husband's property. That case again is a case where the reversioner wanted a declaration of his right as a reversioner and certain directions in respect of the property which was in the possession of the widow so as to limit her right of enjoyment of that property during her lifetime alone, and such a declaration, it was held by the Calcutta High Court, could not be granted in view of the change of law on account of the enactment of the Hindu Succession Act. Mr. Rege has also relied on a decision of the Orissa High Court in *Laxmi Debi v. Surendra Kumar*,⁶ where it was held that the right of a reversioner as one of the heirs under s. 42 of the Specific Relief Act is limited to the question of preserving the estate of a limited owner for the benefit of the entire body of reversioners, but as against a full owner the reversioner has no such right at all. There the suit was brought by a sister of the last male holder and the property was in the possession of his widows and it was held that the sister of the last male holder has got, under the Hindu Succession Act, neither any legal character nor any interest *in presenti* as she was included in the second class of heirs and was completely excluded by the widow who comes in as heir in class 1 in the Schedule to the Act. The result is that after the Hindu Succession Act, when the property of the last male holder is in possession of his widows, a suit by a full sister of the last male holder for a mere declaration of her reversionary right was not maintainable. In that case, the plaintiff had also challenged the validity of adoption made by the widow; and Mr. Rege strongly relies on this case in support of his argument that the present suit has become incompetent by virtue of the provisions of the Hindu Succession Act. That case again is distinguishable on the ground that there the declaration that was asked for by the plaintiff, the sister of the last male holder, was of her reversionary right in respect of the property left by her deceased brother,

⁴ [1958] A.I.R. All. 304.

⁵ [1957] A.I.R. Cal. 527.

⁶ [1957] A.I.R. Orissa 1.

and as she had ceased to have the status of a reversioner, declaration of her right as a reversionary heir could not have been granted.

In the present case, it is undoubtedly true that the plaintiff has referred to the fact that she and her sister, defendant No. 3, are reversionary heirs; but the declaration that she claims is a declaration not about her reversionary right or about the property of the deceased Bhanudas but a declaration that defendant No. 2 is not the validly adopted son of defendant No. 1 and that his adoption was not binding on the plaintiff and defendant No. 3. Under s. 42 of the Specific Relief Act, in so far as it is material, any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled. Now, Mr. Rege says that by virtue of s. 14 of the Hindu Succession Act the plaintiff has no right to Bhanudas's property because the mother Sugandha has now become the full owner of his property, with the result that there are now no reversionary heirs of Bhanudas. Mr. Rege further contends that plaintiff has no legal character which defendants Nos. 1 and 2 are denying or are interested to deny, and on this ground Mr. Rege says that a suit under s. 42 of the Specific Relief Act would not also lie. Mr. Patwardhan, learned advocate appearing on behalf of the respondent-plaintiff, on the other hand, contends that this is a new point which Mr. Rege has taken and he has no objection if the declaration granted by the trial Court is modified so as to delete the description of plaintiff and defendant No. 3 as reversionary heirs. Now, the adoption of defendant No. 2 is undoubtedly invalid in law and that is not disputed by Mr. Rege. Under s. 15 of the Hindu Succession Act, both plaintiff as well as defendant No. 3, the daughters of defendant No. 1, would be her heirs and to that extent they would be interested in asserting that they alone would be the heirs of Sugandha, in case she dies intestate, and not defendant No. 2 who would also be entitled to rank as an heir along with them, in case his adoption is a valid adoption. Therefore, it cannot be denied that plaintiff and defendant No. 3 are interested in asserting their legal character as sole heirs of defendant No. 1, whereas defendant No. 1 and defendant No. 2 are interested in denying that character. The matter may also be looked at from another point of view. Under s. 15(1)(d) of the Hindu Succession Act, until the status of defendant No. 2 as an adopted son is dislodged, he himself would be entitled to be one of the heirs of plaintiff herself. It is, therefore, contended, and with some force, that though plaintiff and defendant No. 3 have ceased to be reversionary heirs of Bhanudas and though Sugandha would be the absolute owner of Bhanudas's property by virtue of s. 14 of the Hindu Succession Act, plaintiff's right of suit to challenge the validity of the adoption of defendant No. 2 cannot be said to have come to an end.

The effect of the provisions of the Hindu Succession Act, 1956, on the legal rights of a Hindu female possessed of property and those of the reversionary heirs of the last male holder may be stated thus:

(1) A female Hindu would now become the full owner of the property of which she is possessed, whether she acquired the property before or after the commencement of the Act.

(2) As she would now hold the property of the last male holder as a full and not a limited owner, the other heirs of the last male holder can no longer be called reversionary heirs.

(3) The provisions of s. 14 of the Act being retrospective in operation would affect suits filed before the commencement of the Act, i.e., June 17, 1956, so that any such suit in which the reversionary heir claims a declaration about his or her reversionary right regarding the property of the last male holder or any relief that would, in any manner, be inconsistent with the full proprietary rights conferred on the female Hindu by s. 14 of the Act, would become incompetent by reason of the fact that the heir has ceased to be a reversionary heir.

In the present case, however, the plaintiff has not claimed any relief with

regard to the property left by Bhanudas, her brother, but she claims a declaration that the adoption of defendant No. 2 is invalid under Hindu law and is not binding on her and her sister, defendant No. 3. The competence of such a suit must be judged by the provisions of s. 42 of the Specific Relief Act. The Hindu Succession Act prescribes how the property of a female dying intestate is to be inherited, and under s. 15(1)(a) read with s. 16 of this Act, the sons and daughters (including the children of a deceased son or daughter) and the husband would be entitled to inherit her property simultaneously. In our view, therefore, a daughter would be entitled to challenge the validity of any adoption made by her widowed mother and its binding character in so far as it affects her legal status as the heir of her mother inasmuch as, by virtue of the adoption, the adopted boy would be introduced as an heir to the mother, in respect of property held by her, if she were to die intestate.

But Mr. Rege has further contended that the plaintiff filed the present suit as a reversionary heir and claimed a declaration that the adoption of defendant No. 2 by defendant No. 1 was invalid and not binding on her and defendant No. 3 on that basis. Since she has ceased to be a reversionary heir by virtue of the Hindu Succession Act, Mr. Rege says, this Court cannot grant her relief on a different basis without an amendment of the plaint. We are not prepared to accept this argument. Mr. Rege's client now seeks to defeat plaintiff's suit by reason of the provisions of the Hindu Succession Act. But, while the Court is entitled to take into consideration these provisions, it cannot ignore also the rights which have been conferred on the plaintiff by the same Act. The present suit was filed on November 12, 1952, and decided by the trial Court on August 7, 1954, and this appeal was admitted and notice ordered to issue on February 24, 1955. Even after the coming into force of the Hindu Succession Act on June 17, 1956, no attempt was made by the defendants-appellants to get the hearing of this appeal expedited. In our judgment, therefore, it would not be fair to refuse plaintiff the relief claimed by her in the suit on the ground that she would not be entitled to it unless she amends the plaint deleting all references to her own and defendant No. 3's status as reversionary heirs.

The result is that this appeal fails, but paragraph 1 of the decretal order passed by the trial Court will be modified by deleting the words "who are the reversionary heirs". Subject to this modification, the rest of the decree of the trial Court will be confirmed. The appellants will pay the costs of the respondents.

Order accordingly.

INCOME-TAX REFERENCE.

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

THE COMMISSIONER OF INCOME-TAX, AHMEDABAD

v.
THE NEW DIGVIJAYSINHEJI TIN FACTORY, JAMNAGAR.*

Indian Income-tax Act (XI of 1922), Sec. 10—Partner bound to attend to partnership business engaging, with permission of other partners, person to discharge his duty—Whether remuneration paid to such person an admissible deduction—Partner making gifts out of amount standing to his credit in partnership account—Entries made in books of firm, with consent of partners, debiting partner's account with sums representing the amount of gifts and crediting such sums to account of donees—Firm paying interest on such sums and allowing donees to withdraw moneys from time to time—Whether such transaction evidences a completed and legally valid gift.

Where it is incumbent on a partner to attend to the management and affairs of the partnership business and he finds he is unable or disabled to do so and the other

*Decided, October 3, 1958. Income-tax Reference No. 14 of 1958.

partners permit him to have some other person to discharge his duty by the firm or to deputise for him, the remuneration paid to that person will be an admissible deduction under s. 10 of the Indian Income-tax Act, 1922.

Shri Ratilal B. Daftari v. The Commissioner of Income-tax¹ and Shantil Kumar Narotam Morarji v. Commr., I.-T.,² referred to.

One of the two partners of a firm executed certain writings under which he made a gift of certain sums to his daughter-in-law and his grandchildren out of the amount standing to his credit in the partnership account. Entries were accordingly made in the firm's books with the knowledge and consent of the partners whereby out of the moneys which stood to the credit of the partner the amount of the gift was debited to his account with such consent and credited to the account of the donees with the intention of making them creditors of the firm. The donees accepted the transaction of gift, the firm accepted the transaction and not only paid interest on the amount accepted as due to the donees but also allowed the donees to withdraw moneys from time to time. Held, that in the circumstances of the case a completed and legally valid gift of the aforesaid sums was made by the partner in favour of his daughter-in-law and grandchildren.

Chimanbhai Lalbhai v. Commr. of Inc.-tax,³ referred to.

THE facts appear in the judgment.

G. N. Joshi, with *R. J. Joshi*, for the Commissioner of Income-tax.

N. A. Palkhivala, with *S. P. Mehta* and *B. M. Parekh*, for the assessee.

S. T. DESAI J. In this reference made at the instance of the Commissioner of Income-tax, Ahmedabad, every thing has been said that could possibly have been said on behalf of the Revenue. The assessee is a registered firm of two partners Vithaldas Dhanjibhai and his son Harjivandas Vithaldas carrying on business at Jamnagar in Saurashtra. The relevant assessment year is 1952-53, the accounting year being S.Y. 2007 ending on October 30, 1951. A writing was executed on February 2, 1946, by Vithaldas, the father, in which he declared his intention in writing in order to allay the fears of his son that he might re-marry. He stated in that writing that out of his $\frac{1}{2}$ share in the profits he would give $\frac{1}{4}$ th share to the wife of his son and another $\frac{1}{4}$ th share to Manu, his grand-son, meaning thereby that he would keep to himself only $\frac{1}{4}$ of his 8 annas share in the profits of the partnership. The account of the partners at the end of S.Y. 2003 showed this. To the credit of the two partners stood two sums of Rs. 8,83,070. These sums represented their share of the capital and their accumulation of profits upto the end of S.Y. 2003. On Aso Vad 30, S.Y. 2003 (November 12, 1947) entries were passed in the firm's books debiting the account of Vithaldas with a sum of Rs. 8,83,070 by making corresponding credit entries as we shall immediately state. The whole amount was debited to the account of Vithaldas and on the credit side one item of Rs. 2,25,000 was then entered in his name. It represented the capital amount which was to continue to the credit of Vithaldas so that really Vithaldas was parting with the sum of Rs. 8,83,070 minus Rs. 2,25,000. The other credit entries are:—

- Rs. 1,00,000 credited to Narendrakumar Harjivandas (minor) (son of Harjivandas).
- „ 25,000 credited to Manjula Harjivandas (minor) (daughter of Harjivandas).
- „ 25,000 credited to Pushpa Harjivandas (minor) (another daughter of Harjivandas).
- „ 58,070 credited to Harjivandas Vithaldas (trust a/c).
- „ 2,25,000 credited to Mansukhlal Harjivandas (minor) (another son of Harjivandas).
- „ 2,25,000 credited to the account of Lilavati, daughter-in-law of Vithaldas.

1 (1958) Income-tax Reference No. 9 of 1958, decided by S.T. Desai and K.T. Desai JJ., on September 30, 1958 (Unrep.).

2 (1954) 57 Bom. L.R. 121.

3 (1958) 34 I.T.R. 259.

Now, one of the principal questions, which we have to decide on this reference is whether a completed and legally valid gift of these amounts was made by Vithaldas in favour of his daughter-in-law and his grandchildren. The case for the revenue is that mere book entries cannot result in a gift or a trust. It is an elementary proposition and cannot be disputed by anybody, but in this case we have to see whether there are any other facts which go to show that these gifts were legally valid and binding, as has been concluded by the Tribunal. As we shall presently point out, there is in this case other material which has been considered by the Tribunal. On April 15, 1948, Vithaldas executed another writing on stamp paper in which he expressed his intention not to marry again and confirmed the transfers which had been made in the firm's books at the end of S.Y. 2003. There was yet another document executed by Vithaldas on April 17, 1948. That writing which is on stamp paper has been strongly relied on by the assessee in this case and it will be convenient to refer to the same at this stage. It is in Gujarati language and is addressed to Lilavati, the daughter-in-law. It refers to the various gifts which had been made by Vithaldas in favour of his daughter-in-law and his grandchildren. The writing as translated is as under:—

"Stamp No. 372, Year 1947-48
Printed Block—Nawanagar State.
Documentary Stamp Ten rupees.

Book No. 625 vs Le (Purchaser) Vithaldas Dhanjibhai.

Resident Nagar.
By Mohan, Dated 10-4-1958.
Chan. L. D. Vithaldas Gagubhai.
Nawanagar Stamp Vendor.

Jamnagar, dated 17-4-1948.

(To) A. Sau. Lilavati (Jog) given in writing Jamnagarwala Vithaldas Dhanjibhai (To say) That you are my daughter-in-law and you are equal to my daughter and according to written agreement with Bhai Harjivan of 15-4-1948 and for family peace and for the benefit of you and your children have given gifts out of my property and profits at the end of S.Y. 2003 Rs. 2,25,000 to you, Rs. 2,25,000 to Chh. Mansukh, Rs. 1,00,000 to Chh. Narendra and to Chh. Manju and Pushpa each Rs. 25,000 and which in the books of our firm have been debited to my account and have been credited to the account of each of you. Some conversation having taken place between us today in that matter I once again assure you that there is absolutely no heart-ache in my mind about that giving gifts nor any doubt and I have given all those gifts with pure intelligence and I do not want back even a pie out of it and that to me is equal to cow's beef. Each of you has complete right on those gifts and I had absolutely no right of which be rest assured. Over and above that I am so much satisfied with your Khandani (respectability) and family service that I have also a fond wish that even after my death too my share in the firm be available to you and the children therefore you will not keep in your mind any misgivings of any sort.

I give this writing in the presence of our Mehtaji Jayantilal for your personal satisfaction and give all of you my blessings. That is all.

Darakat: Sd./- Jayantilal.

Dated 17-4-1948.
(Sd.) Vithaldas Dhanji
by his own hand.

(To)
Vadil Pujya Murabbi Sasraji (Father-in-law)
Vithaldas Seth (Jog).

Your abovementioned gifts are agreeable to me and to me on behalf of my children and give you blessings of mine and my children to you and assure you that I will not falter in serving and nursing you just like your daughter in your old age.

Jamnagar: Dated 17-4-1948.

Darakat: Jayantilal.

(Sd.) Lilavati Jagjivandas
by her own hand."

It will be seen that in this writing Vithaldas reaffirms the gifts. He also states that entries were made in the books of account debiting the amounts to his account and giving credit to the various donees. The reason for the gift is also stated in the writing. He swears solemnly and says that it was not his intention to try to get back a pie out of all he had already gifted to the donees. He also states in the writing that the donees have full title and every right to the gifts made in their favour. The writing as already mentioned is addressed to the daughter-in-law Lilavati. Then at the foot of that writing there is an endorsement made by Lilavati in which she says that she has accepted the gifts on behalf of herself and her children. It is essential to observe at this stage that the genuineness of none of these gifts nor of the entries to which we have referred has been challenged by the Department and we have to examine this case on the footing that the transaction was genuine and bona fide. It may also be mentioned that this writing and the entries were made at a time when there was no income-tax law in Saurashtra though that is a factor which has bearing only on the question of the genuineness or otherwise of the gifts. The donees, after the gifts were made, maintained separate books of account in which the amounts gifted to them were debited to the firm and interest earned was credited. The donees have been assessed every year since 1949-50 to 1955-56 on the interest earned by them on the amount of these gifts, which, as a result of the agreement evidenced by the writing and the book entries was a tripartite transaction between the two partners and the donees.

Now, let us see what was the position in the matter of the assessment of the firm itself. In the assessment year 1949-50 deduction was claimed by the firm in respect of interest paid on the amount of these gifts and that was allowed by the Department. In respect of the next assessment year 1950-51, the Income-tax Officer disallowed the amount of interest claimed as a deduction, but in appeal the Appellate Assistant Commissioner allowed the deduction and the contention that was raised before the Appellate Assistant Commissioner was mainly on the question of validity of the gifts and not that the gifts were not genuine. The Appellate Assistant Commissioner held that the gifts had been duly accepted by Lilavati on her own behalf and on behalf of her children. He also held that the documents were all executed prior to the introduction of income-tax in Saurashtra. The Department accepted that position also for the subsequent year 1951-52. So that in the first year, the Department did not take any objection to this deduction; in the second year the objection that it took was about the validity of the gifts which was turned down and in the third year it did not take any objection. However, for the assessment year 1952-53 when the assessee first claimed a deduction in respect of interest amounting to Rs. 15,947, an objection was raised in computing the profits of the assessee under s. 10. The Department carried the matter in appeal to the Tribunal against the orders which were made against it, mainly on the question of validity of the gifts, and in that appeal it raised two contentions. One contention was that in the account books of the firm, the amount shown to the credit of the donees was not strictly in the proportion set out in the writing dated February 2, 1946, and the other contention was that there was no sufficient cash balance with the assessee firm on Aso Vad 30, S.Y. 2003 which could have enabled the donor to make valid and effective gifts by delivery thereof to the donees. In substance, the suggestion was that they were only book entries in the account books of the firm. The Tribunal negatived both the contentions. The Tribunal found that all the gifts had been accepted by Lilavati, the daughter-in-law of Vithaldas, on behalf of herself and on behalf of her minor children and the firm had accepted the transfer by making suitable entries in its books of account. The Tribunal considered the tripartite nature of the transaction contended for by the assessee. It also took into consideration the facts that the donees had maintained separate books of account showing the firm as their debtor and had filed returns and had been assessed for tax on the amount of interest earned by them. It also found that the donees had withdrawn part of the amounts standing to their

credit and had built immoveable properties from the income received from the assessee firm.

There was another contention of the assessee in the matter of the assessment of the firm for the relevant year. The assessee firm was a partner in another partnership firm of Messrs. Halar Salt & Chemical Works in which it was represented by Harjivandas Vithaldas. Harjivandas representing the assessee firm had a 20 per cent. share in the business of the Halar Salt & Chemical Works. There were four other partners in that business. An agreement was executed on April 20, 1948, in which it is stated by Harjivandas that as it was not possible for him to attend to the business of the Salt and Chemical Works in which he was a partner, he had employed Bachubhai and Balkrishna to supervise the general management of that firm and to attend to the correspondence of that firm on his behalf and they were to be paid remuneration at the rate of 42½ per cent. and 7½ per cent. respectively out of the 20 per cent. share of Harjivandas in the partnership firm of Halar Salt & Chemical Works. That agreement states that the remuneration of the two employees was to be paid out of the profits made by the parent firm, and in case that firm made a loss, the share of the loss was to be carried forward to the next year and the remuneration was to be paid to the two employees only out of profits. In the relevant assessment year, the amount of remuneration of the two employees worked out at Rs. 24,706 and Rs. 4,360 respectively. After disallowing this remuneration, the assessable income of the assessee firm from the parent firm was computed at Rs. 70,832. The Income-tax Officer took the view that this was not a permissible deduction but was tantamount to an appropriation of profits as in his opinion it was not necessary for Harjivandas to employ any outsider to represent him in the parent firm. In appeal, the Appellate Assistant Commissioner took the contrary view. He reached the conclusion that it was expedient from the commercial point of view for Harjivandas to employ those two persons to look after his interest. He also found that they were not in any way related to him and that the whole arrangement was genuine. According to him, it was an expenditure wholly laid out for the purpose of earning an income and as such it was an allowable deduction in computing the real income of the assessee firm. The Tribunal also took the same view. On both the questions, the Commissioner of Income-tax has come before us on this reference.

The two questions which we are called upon to answer are:

"(1) Whether, in computing its income under Section 10, the assessee firm is entitled to claim deduction under Section 10(2)(44) of Rs. 15,947 on account of interest paid on moneys transferred by Vithaldas to Narendrakumar, Lilavati, Mansukhlal, Manjula and Pushpa?

(2) Whether the amounts of Rs. 24,706 and Rs. 4,360 are admissible deductions under Section 10(2)(xx) against the share of income falling to its lot from the firm of Messrs. Halar Salt & Chemical Works?"

It has been argued by Mr. Joshi, learned counsel for the Revenue, that mere entries in the books of account of the assessee firm are insufficient to constitute a valid gift. On principle we agree that one cannot create rights and liabilities simply and solely by making book entries. A good deal of the argument urged before us really went to question the genuineness of the gifts; but, as we have already observed, that is not the question before us. The question is of the validity of the transactions of gift and not their genuineness.

We have here entries made with the knowledge and consent of the two partners whereby a large part of the moneys which stood to the credit of one of the partners are debited to his account with such consent and credited to the account of the donees with the intention of making them the creditors of the firm. Had the matter rested at that, different considerations might have arisen but such is not the position. The writings executed by Vithaldas, to which we have already made reference and particularly the document of April 17, 1948—once accepted as genuine—clinch the whole matter. The donees accepted the transaction of gift, the firm accepted the transaction and not only paid interest

on the amounts accepted as due to the donees but also allowed the donees to withdraw moneys from time to time. In case of any gift of such a nature, the Court has to satisfy itself that there is substitution of some other obligation for the original one and that there is the *animus novandi*. There is, in our opinion, ample material which satisfies the legal requirements of a completed and valid gift. The rights of the donees were defined and ascertained; they became creditors of the firm and received interest as such and withdrew part of the moneys accepted and agreed as due to them by the firm as a result of what was a tripartite arrangement. Once you accept the genuineness of the facts relating to the transaction, there is little scope, in the facts and circumstances of this case, for suggesting that what was done was inchoate or incomplete or invalid in law.

Before we proceed to consider another argument of Mr. Joshi, we may observe that two elements were stressed by Mr. Joshi. It was said that when the entries were made in the books of account of the assessee firm there was no sufficient cash in hand, and therefore, there could not, in law, be delivery of the moneys to the donees. The ingredient and question of delivery has its importance in case of gift, but in the context of the transaction before us, actual physical delivery is not the *sine qua non* of the matter. Delivery can be symbolical. This Court had occasion to deal with a similar question in *Chimanbhai Lalbhai v. Commr. of Inc.-tax*,¹ and in view of what this Court there decided, it is not necessary to dwell any more on the subject.

It was next argued by Mr. Joshi that if we look at the question as formulated, we have to determine whether the requirements of s. 10(2)(iii) are satisfied. The suggestion was that there was nothing on the record to show that the amounts shown as due to the donees in the books of account of the assessee were "capital borrowed for the purpose of the business" of the assessee. Now, we do not think Mr. Joshi is entitled to raise this contention on this reference. Even so, we have fully heard him on this point. Let us see what happened before the Tribunal. The order of the Tribunal shows that an attempt was made to contend before it that the moneys had not been borrowed for the purpose of the business and therefore did not fall to be allowed under s. 10(2)(iii). This is what the Tribunal has stated in repelling that contention:

"As regards section 10(2)(iii) the Department does not seem to have challenged that the money had been borrowed for the purpose of the business but the disallowance was made on the short ground that it was an interest payment to a partner. In view of our finding herein above on the first point, this objection of the department no longer survives."

We are in agreement with the view taken by the Tribunal. In surveying the facts, we have already mentioned that in the assessment year 1949-50, the deduction for interest paid was allowed to the assessee firm. In 1950-51 it was disallowed by the Income-tax Officer, but on appeal to the Appellate Assistant Commissioner, the assessee was successful and the interest paid on those amounts was allowed in the assessment of the firm. It was held that the gifts had been accepted by the daughter-in-law on her own behalf and on behalf of her minor children and that the instruments relating to the gifts executed on February 2, 1946, April 15, 1946, and April 17, 1948, were all executed prior to the introduction of the Income-tax Act in Saurashtra. The Department did not carry the matter any further in respect of the assessment for that year. In respect of the subsequent assessment year 1951-52 also no objection was taken to the deduction being claimed. It was only for the assessment year 1952-53, which is the subject-matter of this reference, that an objection was taken. No objection, however, was taken by the Income-tax Officer on the ground that the sums shown to the credit of the donees did not amount to "capital borrowed for the purpose of the business" of the assessee; nor does it appear that any such contention was raised before the Appellate Assistant Commissioner; and when such attempt was made before the Tribunal, it was bound to be discountenanced. Therefore, the present argument must fail.

To turn to the second question which arises on this reference. In our survey of facts we have already referred to the circumstances which give rise to this question. Here also it may be observed that the genuineness of the payments to the two persons Bachubhai and Balkrishna has not been doubted by the Department, the sole question being whether these payments were allowable deduction. The Tribunal has dealt with this contention in the following manner:

"The only other contention is in respect of the deduction of Rs. 24,707 and Rs. 4,360 paid to Bachubhai and Balkrishna respectively out of the share of the assessee standing in the name of Harjivandas from Messrs. Halar Salt & Chemical Works. Harjivandas's share was 20 per cent. and as he was unable to give any personal attention to this business, an agreement dated 20-4-1948 was entered into with Bachubhai and Balkrishna to remunerate them for the work done on behalf of the assessee at the rate of 42½ per cent. and 7½ per cent. respectively, i.e. these two between them were to receive 50 per cent. of the share of Harjivandas. According to the Department this arrangement is tantamount to an appropriation of profits. There is no force in this contention. These two persons are not in any way related to the partners of the assessee firm and it is not denied that they had rendered services. We agree with the A.A.C. that the agreement was a genuine agreement and the impugned sums are admissible deductions."

Learned counsel for the Department has argued that the order of the Tribunal gives no reasoning. We are unable to agree that such is the position. What the Tribunal has done is to state its reasons very briefly in view of the opinion formed by it that there was no force in the contention. Mr. Joshi has drawn our attention to the agreement and argued that it was incumbent on Harjivandas to attend to the business of Halar Salt & Chemical Works. The argument proceeded that under s. 12 of the Partnership Act, it was the duty of Harjivandas to attend personally to the management and affairs of the partnership firm. The argument was that if it was his duty to attend personally to the management and affairs of the partnership firm, he had no right to appoint any representatives, and even if he did so and the other partners permitted him to do so, he could not claim, as legitimate expenses, what he paid them. The short question that we have to consider is whether in a case where it is incumbent on a partner to attend to the management and affairs of the partnership business and he finds he is unable or disabled to do so and if the other partners permit him to have some other person to discharge his duty by the firm or so to say deputise for him, can he or can he not say that the remuneration paid to that person is a legitimate expenditure? Can it be said in such a case that the agreed payments he may bona fide make to such person are no more than appropriation of profits? We see no difficulty in reaching the conclusion that in such a case the payments that would be made would be legitimate deductions under s. 10. Only recently in *Ratilal B. Daftari v. The Commissioner of Income tax*², we had occasion to consider a somewhat similar matter and in *Shantikumar Narottam Morarji v. Comr., I.T.*³ somewhat similar considerations arose before this Court. The question here is not of wiredrawn technicalities or any refined distinction but what is the real income of the partner. The matter has to be approached bearing in mind the commercial aspects of the same. Therefore, in our opinion, the Tribunal was right in the conclusion reached by it that these two sums were legitimate deductions.

It was lastly urged by Mr. Joshi that in the question as formulated reference is only made to s. 10 (2) (xv) and what we have to decide is the question whether the deductions are permissible under s. 10(2) (xv). It is not necessary to deal with this argument in any detail. It is open to the assessee before us to rely also on any other provision in s. 10. Moreover, there is nothing in the judgment of the Tribunal that the decision was under s. 10(2) (xv). In view of what we have observed it is necessary to re-formulate the second question which

² (1953) Income-tax Reference No. 9 of JJ., on September 30 1953 (Unrep.).
1953, decided by S. T. Desai and K. T. Desai . 3 (1954) 57 Bom. L.R. 121.

should be as under :

"Whether on the facts and in the circumstances of the case the amounts of Rs. 24,708 and Rs. 4,360 are admissible deductions against the share of income falling to its lot from the firm of Messrs. Halar Salt & Chemical Works?"

Our answer to the first question is in the affirmative.

Our answer to the second question as reformulated is in the affirmative.

Commissioner to pay the costs.

Solicitor for the applicant: A. S. Parikh.

Solicitor for the respondent: S. P. Mehta.

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

BHOR INDUSTRIES LIMITED v. THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY.*

Taxation Laws (Extension to Merged States and Amendments) Act (LXVII of 1949), Secs. 3, 6—Merged States (Taxation Concessions) Order, 1949; Paras. 12, 4—Indian Income-tax Act (XI of 1922), Secs. 60A, 23A, 18A(8)—Assessee company, a non-resident, incorporated in former Indian State—After merger of State, Extension Act bringing into force Indian Income-tax Act in merged State from April 1, 1949—Income-tax Officer making order against assessee under s. 23A in respect of assessment years 1947-48 and 1948-49—Whether assessee could claim benefit of exemption granted by para. 12 of Taxation Concessions Order, 1949—Interest added to tax under s. 18A(8) whether tax for purpose of computation under s. 23A.

The assessee was a private limited company incorporated in a former Indian State. On August 1, 1949, the State was merged in the Province of Bombay and on December 31, 1949, the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, came into operation and under it the provisions of the Indian Income-tax Act, 1922, and the Indian Finance Act, 1949, were brought into force in all the merged States on April 1, 1949. The Income-tax Officer held the assessee to be non-resident for the assessment years 1947-48 and 1948-49 (accounting years 1946 and 1947), and made an order under s. 23A of the Indian Income-tax Act, 1922, against the assessee in respect of these years. The assessee contended that it was entitled to claim the benefit of the exemptions granted by para. 12 of the Merged States (Taxation Concessions) Order, 1949, made under s. 60A of the Indian Income-tax Act, 1922, and the Income-tax Officer was not entitled to make any order against the assessee under s. 23A in respect of its profits and gains of the previous years ended December 31, 1946, and December 31, 1947:—

Held, that incomes which were not touched by the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, could not benefit by the exemption and that as the Merged States (Taxation Concessions) Order, 1949, could not embrace incomes which were not within the ambit of s. 60A, the Income-tax Officer was not precluded from making the impugned order.

The amount of interest added to tax as provided in s. 18A(8) of the Indian Income-tax Act, 1922, does not become tax for the purpose of computation envisaged by s. 23A of the Act.

THE facts appear in the judgment.

N. A. Palkhivala, with B. J. Kolah, for the assessee.

G. N. Joshi, with B. J. Joshi, for the Commissioner of Income-tax.

S. T. DESAI J. This reference under s. 66(1) made at the instance of the assessee, one of whom is Bhore Industries Ltd. Bombay and five others who are shareholders, raises certain interesting questions. The assessment years so far as the company is concerned are 1947-48 and 1948-49. The assessment year in respect of the shareholders is 1949-50. The Bhore Industries Ltd. was at all material times a private company limited by shares and incorporated in the

*Decided, October 8, 1958. Income-tax Reference No. 18 of 1958.

erstwhile Indian State of Bhore. Its registered office was situated at Bhore and it carried on business of dyeing, printing and bleaching cloth, proofing etc. For both the years 1946 and 1947 it was held to be "non-resident" in the then British India. It will be convenient to use the expression "British India" for taxable territories in our judgment. Holding that the company was non-resident in British India in either of the two years, the Income-tax Officer had to determine its total income and its total world income. The general meetings of the company were held in respect of those years at Bhore and the only dividends that were declared at those meetings aggregated to Rs. 2,580 and Rs. 1,140 for the two years respectively. In this judgment we shall refer to some facts only to serve as an illustration in appreciating the legal contentions raised before us. In 1946 the total income of the company was Rs. 4,32,542. The income arising in the Indian State of Bhore was Rs. 2,24,542, and its total world income which would be the sum of those two items was Rs. 6,57,084 and the only amount that it paid out as dividend was Rs. 2,580. In substance and in effect the profits were kept undistributed and the shareholders of that private limited company were content with that position. The company was one in which the public were not substantially interested within the meaning of the Explanation to s. 23A. The Income-tax Officer, therefore, invoked and brought into operation the provisions of s. 23A and made an order under s. 23A in respect of both the years. The dispute before the Income-tax Officer related to the contents of the order including proportionate quantum that could be included in the total income of the shareholders concerned for the purpose of their assessment for the year 1949-50. It will be convenient to go back to the illustration with which we started. In respect of the year 1946, the position regarding the income of the company was this. The total income, as already mentioned, was Rs. 4,32,542. The income that accrued in the Indian State of Bhore was Rs. 2,24,542 and the income-tax and super-tax payable on the income of the company came to Rs. 1,89,237. The amount available for distribution had to be ascertained as required by s. 23A and that worked out at Rs. 2,43,305 by deducting the amount of income-tax and super-tax from the total income. The dividend declared by the company was only Rs. 2,580. Therefore, the undistributed portion which was deemed to have been distributed under s. 23A amongst the shareholders worked out at Rs. 2,40,725 by deducting Rs. 2,580 from Rs. 2,43,305. The position in respect of the year 1947 was slightly different, but it is not material to go into that for the purpose of this reference. Consequently, the facts for the purpose of this reference in respect of both the years can be taken as the same in view of the nature of the arguments urged before us. At this stage, we are, as already mentioned, referring to the income of the company. Some time after the end of the previous year 1947, the State of Bhore was merged in the then Province of Bombay in consequence of the States Merger (Governor's Provinces) Order, 1949. That order came into operation on August 1, 1949. On December 31, 1949, came into operation the Taxation Laws (Extension to Merged States and Amendment) Act, 1949. By s. 3 of the latter enactment the Indian Income-tax Act, 1922, as also the Indian Finance Act, 1949, were extended to all the merged States. That section specifically provides that the two Acts "shall operate as if they had been extended to, and brought into force in, all the merged States on the first day of April 1949". The effect of this was that, although the State of Bhore became merged in the then Province of Bombay as from August 1, 1949, that being the date on which the assent of the Governor General was given, the effect of s. 3(2) was that the provisions of the Income-tax Act and the relevant Indian Finance Act, 1949, were brought into force in that State some months earlier, that is on April 1, 1949. Section 60A was added to the Indian Income-tax Act to bring the law in harmony and by s. 6 of the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, the Central Government was empowered to make any exemption, reduction in rate or other modification in respect of income-tax in certain cases to avoid hardship and difficulties. We shall presently state the relevant provisions of the enactments of which we have made some

mention. In exercise of the powers conferred by s. 60A, the Central Government made an order intituled "The Merged States (Taxation Concessions) Order, 1949," and it is on the applicability, scope and the effect of para. 12 of that Order that the principal arguments before us have evolved. It is not necessary to set out in this judgment the relevant provisions of the States Merger (Governor's Province) Order, 1949, or the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, or any provision of the Indian Finance Act. The relevant part of s. 60A is as under:—

"If the Central Government considers it necessary or expedient so to do for avoiding any hardship or anomaly, or removing any difficulty, that may arise as a result of the extension of this Act to the merged territories or to the territories which immediately before the 1st November, 1956, were comprised in any Part B State or to Chandernagore, the Central Government may, by general or special order, make an exemption, reduction in rate or other modification in respect of income-tax in favour of any class of income, or in regard to the whole or any part of the income of any person or class of persons."

It will be seen that income and classes of income and income of any person or classes of persons prior to April 1, 1949, was not being touched by the Indian Income-tax law when it was brought into the scheme of the taxation prevalent in the whole country. That, therefore, was bound to result in certain hardships and difficulties and likely to give rise to anomalous situations. To obviate that, and to give relief or exemptions where it was fit and reasonable to grant exemptions, the Legislature empowered the Central Government to pass requisite orders. It may here be mentioned that the Order was to be the creature of the provisions of s. 60A and nothing more. It could not operate beyond the ambit or matrix of s. 60A and was not intended to do so. We make this observation at this stage because the whole brunt of the argument of Mr. Palkhivala is to the contrary. The provision of the Merged States (Taxation Concessions) Order, 1949, which is very strongly relied on by Mr. Palkhivala is para. 12 of the same. In the course of the arguments before us as also in the judgment of the Tribunal reference has been made to certain other paragraphs of that Order. It will be convenient to quote those paragraphs:

"4. The provisions of paragraphs 5, 6, 9, 10 and 11 of this Order shall apply to only so much of the income, profits and gains included in the total income of an assessee as would, had he been resident in the taxable territories, have been exempt under clause (c) of sub-section (2) of section 14 of the Indian Income-tax Act, 1922, if the Act had not been passed.

5. (1) The income, profits and gains of any previous year ending after the 31st day of March 1948, which is a previous year—

(i) for the merged State assessment year 1948-49, or

(ii) for the merged State assessment year 1949-50,

shall be assessed under the Indian Income-tax Act, 1922, if, and only if, such income, profits and gains have not, before the 1st day of August, 1949 been assessed under the State law.

(2) Where the income, profits and gains referred to in sub-paragraph (1) have not been assessed under the State law, they shall be assessed under the Indian Income-tax Act, 1922, and the tax payable thereon shall be determined as hereunder:

(i) the tax on the amount of such income, profits and gains included in the total income shall be computed at the Indian rate of tax;

(ii) the amount of such income, profits and gains shall be computed under the State law and the tax thereon computed at the merged States rate of tax;

(iii) the amount, if any, by which the tax computed under clause (i) exceeds the tax computed under clause (ii) shall be allowed as rebate from the first mentioned tax, and the amount of the first mentioned tax as so reduced shall be the tax payable....

6. (1) The income, profits and gains of any previous year ending after the 31st day of March, 1948, which does not fall within paragraph 5 of this Order or of any previous year commencing after the previous year referred to in the said paragraph shall be assessed under the Indian Income-tax Act, 1922, but the tax payable on so

much of the income as pertains to the period ending before the 1st day of August, 1949, shall be determined as hereunder—

(1) the tax on so much of such income included in the total income shall be computed (a) at the Indian rate of tax and (b) at the rate of tax in force in the merged State immediately before the 1st day of August, 1949;...

12. The provisions of section 23A of the Indian Income-tax Act shall not be applied in respect of the profits and gains of any previous year ending before the 1st day of August 1949, unless the State law contains a provision corresponding thereto."

Section 23A of the Income-tax Act features prominently in this reference and we shall set out here the relevant part of that section, as it stood before the section was recast by the Finance Act of 1955 (we are concerned with the section before the amendment):

"23A. (1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company upto the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent. of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income:

Provided that when the reserves representing accumulations of past profits which have not been the subject of an order under this sub-section exceed the paid up capital of the company, together with any loan capital which is the property of the shareholders, or the actual cost of the fixed assets of the company whichever of these is greater, this section shall apply as if instead of the words "sixty per cent" the words "one hundred per cent" were substituted:

Provided further that no order under this sub-section shall be made where the company has distributed not less than fifty-five per cent of the assessable income of the company as reduced by the amount of income-tax and super-tax payable by the company in respect thereof, unless the company, on receipt of a notice from the Income-tax Officer that he proposes to make such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent of the assessable income of the company of the previous year concerned as reduced by the amount of income-tax and super-tax payable by the company in respect thereof:

Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.

Explanation.—For the purpose of this sub-section,—

a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by the public (not including a company to which the provisions of this sub-section apply), and if any such shares have in the course of such previous year been the subject of dealings in any stock exchange in the taxable territories or are in fact freely transferable by the holders to other members of the public.

(2) The Inspecting Assistant Commissioner shall not give his approval to any order

proposed to be passed by the Income-tax Officer under this section until he has given the company concerned an opportunity of being heard.

(3) (i) ...

(ii) Where the proportionate share of any member of a company in the undistributed profits and gains of the company has been included in his total income under the provisions of sub-section (1) the tax payable in respect thereof shall be recoverable from the company, if it cannot be recovered from such member.

(iii) Where a tax is recoverable from a company under this sub-section, a notice of demand shall be served upon it in the prescribed form showing the sum so payable, and such company shall be deemed to be the assessee in respect of such sum, for the purposes of Chapter VI.

(4) Where tax has been paid in respect of any undistributed profits and gains of a company under this section, and such profits and gains are subsequently distributed in any year, the proportionate share therein of any member of the company shall be excluded in computing his total income of that year.

(5) When a company is a shareholder deemed under sub-section (1) to have received a dividend, the amount of the dividend thus deemed to have been paid to it shall be deemed to be part of its total income for the purpose also of the application of that sub-section to distributions of profits by that company."

The assessee carried the matter in appeal to the Tribunal and the Tribunal decided against them practically on all the points. The primary contention of the assessee company before the Departmental authorities and the Tribunal was that it was entitled to claim benefit of the exemptions granted by para. 12 and the Income-tax Officer was not entitled to make any order against the company under s. 23A in respect of any of the two years. Another contention related to interest which the company was compelled to pay by reason of the fact that no advance payment of income-tax had been made as required by s. 18A of the Indian Income-tax Act. Here, the submission was that the company was not bound to pay any advance tax, and not being bound to pay any advance tax, there could be no question of penalty. The argument was that in any event the interest which it had been compelled to pay would, by the language of s. 18A, be equated with tax and that the amount of that interest had to be taken into consideration in computing the assessable income of the company under s. 23A.

The contention of the shareholder-assessee was that they also were entitled to the benefit of the exemption granted by para. 12 and it was also their contention that they were entitled to the benefit of the provisions of s. 14(2)(c) under which in respect of income arising within any Indian State no tax was payable as laid down in that section.

Three questions have been referred to us by the Tribunal on this reference:

"1. Whether Paragraph 12 of the Merged States (Taxation Concessions) Order, 1949, precluded the Income-tax Officer from making any order under section 23A in the case of the assessee company in respect of its profits and gains of the previous year ended 31st December, 1946?

31st December, 1947?

2. Whether in making an order under section 23A in respect of the profits and gains of the year 1946/1947 the assessable income of that previous year is to be reduced not only by the amount of Income-tax and super-tax payable by the company in respect thereof but also by the amount of interest charged to it in accordance with the provisions of Section 18A?

3. Having regard to the order passed by the Income-tax Officer under section 23A in respect of the company's profits of the year 1947 and having apportioned the sum of Rs. 17,641/- to the shareholder, Pushpakumar, as his proportionate share in the distribution made by the Income-tax Officer under section 23A and having regard to the provisions of section 14(2)(c), whether the said sum of Rs. 17,641/- has been properly included in his total income for the purpose of charging it to tax?"

Questions 1 and 2 relate to the assessment of the company for the two years 1946 and 1947. Question 3 relates to the assessment of the shareholders-assessee for the assessment year 1949-50.

It has been argued before us by Mr. Palkhivala that the effect of para. 12 of the Merged States (Taxation Concessions) Order, 1949, to which we shall refer as "the Concessions Order of 1949" which was promulgated under s. 60A of the Income-tax Act, 1922, was that the company became exempt from the operation of s. 23A of the Income-tax Act notwithstanding the extension of the Income-tax Act to Bhor State. If one confines the matter to the language of para. 12 alone, the argument at first blush seems attractive, but para. 12 cannot be read in isolation. It has to be read in its proper setting and particularly bearing in mind the provisions of s. 60A of the Indian Income-tax Act. The argument founded on the phrasing of para. 12 needs to be stated very briefly and it is that the provisions of s. 23A could not be applied by the Income-tax Officer to the income of this company for the assessment years 1947-48 and 1948-49 (accounting years 1946 and 1947) because those were profits and gains of previous years ending before August 1, 1949, and there was nothing in the law of the Bhor State which contained any provision corresponding to the provision enacted in s. 23A whereby a fiction of law was raised and income which was not distributed amongst shareholders was to be deemed to have been actually distributed amongst them. The object of s. 23A and the sound principle underlying it are obvious and it is not necessary for us to discuss the same. Now the question is not of the object of that enactment or the principle underlying it but of its applicability or otherwise to the assessee company before us. The argument of counsel touches every element mentioned in para. 12 but it ignores the most material consideration, the consideration which goes to the root of the matter, and that consideration is that para. 12 applies to any assessee in respect of any assessment year. The application and scope of para. 12, as we already mentioned in passing, has to be gathered from the language of s. 60A. Therefore, it is necessary for us to examine the language of s. 60A. That section, as we have already mentioned, authorises the Central Government to grant exemption and reduction in respect of any income or classes of income or in regard to the income of any person or classes of persons. The crucial words of the section, it will be seen, are that the exemption or reduction which the Central Government is authorised to grant is in respect of a situation which may arise as a result of the extension of the Act to merged territories, which could only be after the date of the Extension Act, unless there was anything in the enactment itself to give it retroactive operation or it was required that it should have effect *ex post facto*. We have already mentioned that the Income-tax Act and the Finance Act were to be applied from April 1, 1949, but that will have bearing on certain other questions.

The argument of Mr. Palkhivala is that s. 60A contemplates removal of hardships as a result of the extension of the Act to merged States and it was to counteract the hardships that may arise not in respect of assessment years 1949-50 or subsequent years but even in respect of earlier years. It is urged by learned counsel that the words which appear after the word "exemption"—in favour of any class of income, or in regard to the whole or any part of the income of any person or class of persons—were unqualified and not restricted to income-tax on income assessable for the year 1949-50 and subsequent years and the measure therefore applied to any income and the tax payable on that income for earlier years and such relief was in fact calculated to counteract the impact of the extension of the Act to the merged States.

Now, at the very outset, it is necessary to be clear in one's mind as to what was the result of the extension of the Income-tax law of British India to the Merged States. It was that any income not within the purview of the Act, income of persons or class of persons unaffected or untouched by the British Indian Act, became taxable and what is essential to note is that it became taxable for and/or after the assessment years 1949-50. The exemption was to be for the benefit and relief of those who were hit by the Extension Act. Its object was that incomes which were otherwise not liable to tax but, by the Extension Act made so liable, were to be given partial relief or even exemption.

But says Mr. Palkhivala, that is not the object of the Extension Act and that is not the effect of s. 60A. Now, it will be seen from the facts which we have already stated that even before the enactment of s. 60A the assessee company was liable to pay tax in respect of its income in British India (taxable territories). The inevitable starting point must be—Is the exemption claimed in respect of income for the assessment year 1949-50 or any subsequent year? If not, s. 60A has not legislated for it and no question can arise of considering the operation of the Order. In our judgment, this must be so because the Order cannot embrace incomes which were not within the ambit of s. 60A itself. To put it differently, incomes which were not touched by the Extension Act were not to benefit by the exemption. What was legislated for was income for the assessment year 1949-50 and subsequent years. That, to our mind, is the plain meaning of this important provision of the Extension Act.

What we have already mentioned is sufficient to dispose of the first question. But another argument has been advanced before us by Mr. Palkhivala and that is *quod* the income of the assessee-shareholders. The question as formulated relates to the case of the assessee company in respect of its profits and gains of the previous years 1946 and 1947. There is no specific question before us in respect of the income of the assessee-shareholders relating to the applicability and effect of para. 12 of the Concessions Order. But it is clear from the statement of the case itself that the assessee-shareholders also had asked the Tribunal, on this s. 66(1) application, to raise that question of law and it seems but only right that question No. 1 should be reframed by us and answered. We shall reframe question No. 1 by dividing it in two parts. The first part will be as the first question reads at present and the second part of that will be:

“Whether paragraph 12 of the Merged States (Taxation Concessions) Order, 1949 precluded the Income-tax Officer from making any order under Section 23A so as to affect the assessee shareholders in respect of their profits and gains for the assessment year 1949-50?”

It has been urged by Mr. Palkhivala that even on the construction we are inclined to put on s. 60A and the view we are inclined to take of the application and effect of para. 12 of the Concessions Order, the assessee-shareholders have been taxed in respect of the assessment year 1949-50 and would be within the ambit of the section itself and the Order. In a broad general sense we agree with Mr. Palkhivala. It is said by Mr. Palkhivala that the shareholders were hit by the s. 23A order although it was made in respect of the company's income for the years 1946 and 1947 which corresponded with two assessment years prior to August 1, 1949, because here the shareholders were being taxed for the assessment year 1949-50. The next step of the argument is that a shareholder whether resident or non-resident could claim benefit of para. 12 and ask for exemption in respect of the assessment year 1949-50 and the sequitor, it is said, of this premise is that s. 23A could not be applied to the case of these assessee. The primary liability under s. 23A, it is said, was of the shareholders. The profit was the profit of the company and the State law did not contain any provisions analogous to that contained in s. 23A and it stood to reason, so the argument has run, that the shareholders in any event should have the benefit of the exemption. Here also at first blush, the argument sounds somewhat attractive but in substance it amounts to this that we must look only at the Order and read para. 12 in the context of the relevant provisions of the Order but not in the light of s. 60A of the Indian Income-tax Act and the meaning and scope of s. 23A of the Income-tax Act. Section 60A, as we have already observed, is the very foundation of the Order of 1949 including para. 12 of the same and before we look at para. 12, we have to remember that the scope and ambit of the exemption granted by para. 12 has already been determined by s. 60A. Therefore, even when applying para. 12 to the case of an assessee-shareholder in respect of any ‘income of any person or class of persons’ taxed by operation of the Extension Act, we have to go back to the application and effect of that section itself and in the present context, the provisions of that section and s. 23A of the Income-tax Act have to be read

together. Paragraph 12 itself states that the provisions of s. 23A of the Income-tax Act would not be applied in respect of the profits and gains of any previous year ending before August 1, 1949. Mr. Palkhivala rightly agrees that the profits and gains of any previous year here must mean the profits and gains of the company and not profits and gains of the assessee-shareholders. The starting point of invoking the operation of s. 23A is the profits and gains of a company, which profits and gains, it is to be ascertained, were or were not properly distributed as required by law. It necessarily follows that the profits and gains of the company must be profits and gains which are brought within the operation of the Extension Act, and para. 12 cannot be read in isolation or divorced from its setting. It is, however, argued that even if para. 12 has to be read in the light of s. 60A and the context of that section, when it came to making a concession to an assessee-shareholder for the assessment year 1949-50 or any subsequent year, it was open to the Government to extend the relief and grant the exemption to all or part of any income of the assessee. To the difficulty raised by the language of s. 60A, the answer of learned counsel is that to restrict it would be adding words in para. 12. Reference has been made in support of this argument to para. 4 of the Order and it is said that where the Government wanted the operation of the Order to be limited, it has specifically so provided. This part of the argument, in our judgment, is not well-founded. To read para. 12 in the context of s. 60A would not be adding anything to the language of the paragraph. It has of necessity to be read and given effect to only within the ambit of s. 60A. There is another aspect of the same matter. It can be said that in a sense the shareholder does not come into the picture when para. 12 mentions profits and gains of any previous year ending before August 1, 1949, because these profits and gains can only be profits and gains of the company, and the profits and gains of the company, which can give rise to any exemption or any relief are the profits and gains for the year 1949-50 and subsequent years. This is not to suggest that para. 12 has no applicability to the case of any assessee-shareholder. We are merely pointing out that this is another facet of the same question. Of course para. 12 does apply to an assessee-shareholder but it can only apply to an assessee-shareholder within the ambit and scope of s. 60A and not outside it. The result, as we see, is that the assessee-shareholder, although he became entitled to claim relief or exemption by operation of the Order made under s. 60A in respect of the assessment year 1949-50, the effect of para. 12 read with s. 60A and s. 23A of the Income-tax Act is that it was the undistributed profit of a company for the year 1949-50 and subsequent years only to which the exemption can relate.

The second question before us on this reference raises a very short contention and we have already indicated what that contention is. The argument is founded on the language of s. 18A(8) which is as under:

"Where, on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment."

This section, relates to advance payment of tax. Learned counsel has relied on the words "shall be added to the tax as determined on the basis of the regular assessment." The brief argument is that by adding this amount to the tax, the amount became tax for the purpose of computation envisaged by s. 23A. There is nothing in the language of s. 23A which permits of any such artificial meaning being given to penalty interest nor is there anything which permits of any equivalence being established between the payment of penalty interest and tax and super-tax contemplated by s. 23A. We may add that s. 29 deals with the question of tax, penalty and interest as separate concepts.

The third question, which, according to learned counsel, is also an important question on this reference, relates to the contention of the assessee-shareholders that they have always been and have continued to be entitled to the exemption given by s. 14(3)(c) which at the material time was as under:

"The tax shall not be payable by an assessee...

(c) in respect of any income, profits or gains accruing or arising to him within an Indian State, unless such income, profits or gains are received or deemed to be received in or are brought into (British India) in the previous year by or on behalf of the assessee, or are assessable under section 12B or section 42."

We are not concerned here on this reference with s. 12B or s. 42. We have already mentioned that the operation of the Income-tax Act and the Finance Act, 1949, was retroactive from April 1, 1949. Now, relying on s. 14(2)(c) the argument urged on behalf of the assessee-shareholders is that the effect of the Extension Act and the Order was not to deprive them of the benefit of s. 14(2)(c) in any manner. It is said that the income which they derived as dividends could not be charged in their hands unless it was shown that it accrued in British India or is deemed to have accrued in British India or was brought into British India in the previous year. The argument proceeded that this is a case of a fiction of law created by s. 23A. Dividend which may have been distributed could only be at the office of the company in Bhore State, and since the income was to be deemed to have been distributed in the Bhore State, it was exempt from tax under s. 14(2)(c), even though the assessee-shareholders were residents within British India. Though included in their total income, it was to be exempt from taxation and the shareholders would not have to pay tax on it by operation of s. 14(2)(c). It has been urged that the shareholder would be justified in saying that he should be put in the same position in which he would have been if 60 per cent. of the profits of the company had been declared as dividend. The shareholder would not have to pay tax in respect of the income in British India by operation of s. 14(2)(c). Reference has also been made to s. 16(1)(a) and it is said that it relates only to rates and not to assessments. The argument here has centred round one point and that point is that what was to be regarded was not the law in force on August 1, 1949, but the law in force in Bhore State on April 1, 1949, and if that was the position, the application of s. 14(2)(c) survived. Now, we have already pointed out that although the extension of the Income-tax Act to the merged States was by virtue of the provisions of the Extension Act, 1949, retrospective effect was given to the provisions of the Income-tax Act and the Finance Act, 1949, as from April 1, 1949. Therefore, this argument does not survive. Learned counsel has also relied on what he had already submitted in the context of the first question before us. It is not necessary for us to deal with the same over again.

On the other hand, it has been argued by Mr. Joshi learned counsel for the Revenue, that so far as undistributed profits are deemed to be distributed by virtue of an order made under s. 23A, there is no question of accrual. The deemed income is to be included in the total income and the point of exemption is not material in this context because the inclusion is by virtue of s. 23A itself. Then, it is said that even assuming that the place of accrual was of relevance, it became immaterial because Bhore State had become part of British India (taxable territory) for the purpose of application of the Income-tax Act as from April 1, 1949. It is not necessary for us to deal with the first argument of Mr. Joshi. The second argument meets the case. In our opinion, it is not permissible to the assessee-shareholders, in view of the relevant provisions of the legislation to which we have already referred, to claim that they were entitled to the benefit of s. 14(2)(c).

We have so far not referred to one argument of Mr. Palkhivala and that argument is, if we may so describe it, *de hors* the Extension Act. It turns on the construction to be put on para. 4 of the Order of 1949. Succinctly stated, the argument has been that the paragraph gave benefit of the relevant exemptions both to assesseees who were non-residents in the taxable territories and those who were residents in the taxable territories. The identical point was raised before this Court in *Mrs. Kusumben D. Mahadevia v. The Commissioner of*

*Income-tax*¹ in a matter, which, we are informed, has been carried to the Supreme Court. In that case, this very contention was negatived and we are bound by that decision. It is not necessary for us to examine this argument of Mr. Palkhivala.

Our answer to the first part of question (1) will be in the negative and to the second part of the same question will also be in the negative.

Our answer to question (2) will be in the negative.

Our answer to question (3) will be in the affirmative.

Assessee to pay the costs.

Solicitor for the applicant: *Mulla & Mulla and Cragie Blunt & Caroe.*

Solicitor for the respondent: *A. S. Parikh.*

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

**JADAVJI NARSIDAS & COMPANY v. THE COMMISSIONER OF
INCOME-TAX, BOMBAY CITY II, BOMBAY.***

Indian Income-tax Act (XI of 1922), Secs. 23(5), 24—Unregistered firm not assessed—Partner in firm whether can claim to set-off his share of losses of such firm against his other income from business.

An assessee, whether an individual or a registered firm, can, as against the profits of his business, claim to set-off his share of loss of a firm in which he is a partner although the partnership firm is unregistered if the Department does not assess the unregistered firm and determine the loss incurred by such firm.

J. C. Thakkar v. Comr. I. T.¹ and Jannadas Daga v. Commr. I.-Tax,² referred to.

The facts appear in the judgment.

E. J. Kolah, for the assessee.

G. N. Joshi, with *E. J. Joshi*, for the Commissioner of Income-tax.

S. T. DESAI J. A question of some importance arises on this Reference and that question is whether an assessee can, as against the profits of his business, claim to set-off his share of the loss of a firm in which he is a partner although the partnership firm is unregistered and is not assessed as a firm. The assessee is a registered firm of four partners. The assessment year is 1946-47 and the accounting year is S. Y. 2001 (October 18, 1944 to November 4, 1945). The assessee firm carries on speculative business in various commodities. In the year of account it claimed a sum of Rs. 1,05,641 as loss arising to it in a joint venture with Damji Laxmidas. In the statement of the case it is mentioned that the assessee firm had done such transactions with Damji Laxmidas in earlier years and also in subsequent years. The profits and losses arising from such transactions of the nature of the joint venture with Damji Laxmidas in the earlier years and the subsequent years have been taken into account while making up the assessment of the assessee firm for those years. The loss arising from the joint venture with Damji Laxmidas in the accounting year has been disallowed. The assessee produced a deed of partnership, dated November 14, 1944, which is on requisite stamp paper and that agreement states that the parties had agreed to do forward business in partnership in various markets. Damji Laxmidas filed a statement at the instance of the assessee in which he confirmed the case of the assessee that there was such partnership between them. He stated that the procedure followed was that the accounts of the transactions were maintained in the books of the assessee firm and the Ankaḍas in respect of the speculative business were issued in the name of Damji Laxmidas. In the partnership agreement the shares of the four partners are stated and they aggregate to As. 10

1 (1956) Income-tax Reference No. 28 of 1955, decided by Chagla C.J. and Tendolkar J., on February 20, 1956 (Unrep.).

*Decided, October 23, 1955. Income-tax

Reference No. 23 of 1955.

1 (1955) 57 Bom. L.R. 464.

2 (1957) 59 Bom. L.R. 1216.

and Damji's share is shown as six annas in a rupee. The loss claimed by the assessee was on the footing of 8 annas share in the partnership with Damji Laxmidas. The Income-tax Officer disallowed the loss and we shall presently examine the data on which he did so and the reasons given by him for the same. The Income-tax Officer has observed in his order:

"To my mind it looks as though the firm has purchased the losses from Damji Laxmidas to escape taxation to that extent."

The Appellate Assistant Commissioner dismissed the assessee's appeal. The matter was carried to the Tribunal and the Tribunal also agreed with the finding given by the Income-tax authorities. The Tribunal, it is mentioned in the statement of the case, took the view that even if the business transactions were genuine, it was the business of Damji Laxmidas. The Accountant Member agreed with the finding recorded by the Judicial Member. But he expressed the view that the loss could not in any case be allowed to the assessee as it was a loss of an unregistered firm. According to the Accountant Member, in the case of an unregistered firm, the loss can only be carried forward in the account of the firm as provided under the Income-tax Act. The assessee had also relied upon an order of the Tribunal made on September 11, 1952, in the matter of the assessment made on Damji Laxmidas for the same preceding year. Damji Laxmidas had claimed his share of the loss in his own assessment. The Tribunal disallowed the loss claimed by Damji Laxmidas on the ground that the loss arising from an unregistered firm could not be taken into account in the individual assessment of the partner. The question, it seems, was decided only on that short issue and the Tribunal did not go into the question of the genuineness of the loss claimed by Damji Laxmidas. One more fact that needs to be stated is that the assessee had entered into joint venture transactions of the same nature also with other persons and in the assessment of the assessee firm the Department has accepted those transactions of the nature of a joint venture with parties other than Damji Laxmidas. The assessee has come before us on this reference directed to be made by this Court under s. 66(2) of the Act.

The questions which we have to determine are:

"(1) Whether there was any legal admissible evidence to justify the Tribunal's finding that the transaction in question was not the transaction of the assessee?

(2) If not, whether the assessee can claim the set-off of such loss, although it is the loss of an unregistered partnership?"

It has been argued before us by Mr. Kolah, learned counsel for the assessee, that the Tribunal has failed to appreciate the correct position and has decided the matter without there being any evidence to sustain the finding recorded by it on the first question relating to the genuineness of the transactions and the alleged joint venture. The Tribunal had to consider four items, but on this reference we are only concerned with the item of Rs. 1,05,641 which was disallowed by the Income-tax authorities as well as the Tribunal. This is what the Judicial Member has stated in respect of this item:

"We are not satisfied that really the loss of Rs. 1,05,641/- was the loss of the assessee. It is admitted by the assessee that the Ankdas are in the name of Damji Laxmidas. By no evidence we are satisfied that really the assessee did business in the joint account. Consequently, this claim of the assessee is disallowed."

The Accountant Member agreed with the Judicial Member and added:—

"It is not even the assessee's case that loss of Rs. 1,05,641/- was suffered by it. According to the assessee it did some joint venture transactions with Damji Laxmidas. Damji Laxmidas came in appeal to the Tribunal in respect of his share of the loss. It was held that the loss arising to a person in a joint venture cannot be allowed in his personal assessment as the loss is suffered by an unregistered partnership. It can only be carried forward in the account of the unregistered firm."

The argument of counsel is that the mere fact that Ankdas relating to the speculative transactions are in the name of one of the partners in the firm is not evidence on which the conclusion of the Tribunal could be sustained. The further argument of learned counsel is that there is material on the record

including the account books of the assessee firm which has not been taken into consideration by the Tribunal. It is true that there is no reference to the account books of the assessee firm in the order passed by the learned members of the Tribunal. Regarding this item of Rs. 1,05,641 the Income-tax Officer has stated that on referring to the case of Damji Laxmidas he found that Damji Laxmidas had not given any idea in the statement filed by him about the extent of his share of loss in the joint venture and had stated that the loss was approximately Rs. 75,000. On being questioned, the partnership deed dated November 14, 1944, had been produced. In his order the Income-tax Officer refers to the factum of the Ankdas being in the name of Damji Laxmidas and stresses that they were "not in the name of the company". We understand that by "the company" he meant the assessee firm. It will be convenient here to observe that the partnership agreement recites the names of all the four partners in the firm of Messrs. Jadavji Narsidas, the assessee firm before us, and then refers to Damji Laxmidas as the party of the 5th part. There is no firm name given to the partnership brought into existence by that deed between the four partners in the firm of Messrs. Jadavji Narsidas on the one hand and Damji Laxmidas on the other. Therefore, the partnership business could be done either in the name of the group of the four partners or in the name of Damji Laxmidas. We mention this at this stage because the principal argument on behalf of the Revenue on this question has rested on the fact of the Ankdas being in the name of Damji Laxmidas and not in the name of the assessee firm. The Income-tax Officer has also relied upon the fact that the assessee firm had claimed loss on the footing of 8 annas share and not 10 annas share as mentioned in the partnership deed. This is what he has stated:

"It is not also clear in my mind how Messrs. Jadavji Narsidas and Co., one of the biggest brokers in the line, had placed such implicit faith in the ability of Mr. Damji Laxmidas to the extent of losing about four lakhs of rupees."

Then he has observed that the firm had purchased the losses from Damji Laxmidas to escape taxation to that extent. The Income-tax Officer held that the losses claimed by the assessee firm were not losses genuinely incurred in any business and that the transaction as a whole was no more than purchase of losses from Damji Laxmidas. Now, purchase of losses can evidently be after they have been incurred by some party. A statement prepared from the entries in the books of account of the assessee firm showing numerous transactions in various commodities resulting both in profits as well as losses was filed before the Income-tax authorities and is part of the record before us. A cursory perusal of that statement would show that the transactions could not be of the nature of purchase of losses by the assessee firm as found by the Income-tax Officer. We may observe at this stage that learned counsel for the Revenue has not argued before us that this is a case of bogus purchase of losses. We shall presently examine the case as now presented before us on behalf of the Revenue.

Mr. Joshi, learned counsel for the Revenue, has laid stress on the fact that the Ankdas were in the name of Damji Laxmidas, but the way learned counsel has put the case before us is that the business was not the business of the assessee firm, but was the business of Damji Laxmidas and half of the loss had been taken over by the assessee. Learned counsel has stated that he is not supporting the conclusion of the Tribunal that this was a case of bogus purchases of losses. To us it seems that there is little difference between the conclusion of the Tribunal and the way in which Mr. Joshi has now tried to support what seems unsupportable. There is no evidence at all nor is there any finding or inference that the books of account of the assessee firm did not reflect the true position. There is no evidence on the record nor any circumstance why the statement of Damji Laxmidas should not have been accepted. Therefore, the sole factor that could weigh and could be stressed before us was the one which the Tribunal has mentioned in its order viz. the fact of the Ankdas being in the name of Damji Laxmidas. We have already observed that in this case the Ankdas could be in the name of either the assessee or Damji Laxmidas. It is

not possible to suggest in this case that the Ankdas are not in the name of the partnership firm because no firm name appears to have been given to the partnership of the group of four partners and Damji Laxmidas. On this state of the record, we can only reach the conclusion that there was no legal evidence before the Tribunal to sustain the finding that the transactions in question were not the transactions of the assessee.

There remains for consideration the question whether a partner in an unregistered firm can claim to set-off his share of the losses of such firm against his other income from business when the unregistered firm has not been assessed. It has been argued before us by Mr. Kolah that there is no provision in the Income-tax Act which lays down that a person who carries on his own business and is also a partner in an unregistered firm cannot in any case claim to set-off his share of the loss of that firm against his other income from business. Learned counsel for the other side has not been able to point out to us any provision which makes it mandatory that an unregistered firm must be assessed before any claim for set-off in respect of its losses can arise though, as we shall point out later on, some reliance has been placed by him on the second proviso to s. 24. The matter has been argued before us by Mr. Kolah on general principles underlying s. 10 and he has also referred to s. 23(5) and s. 24 and relied on two decisions of this Court to which we shall turn a little later in our judgment. The question is *res integra* and does not appear to have arisen for decision in its present form.

Now, the argument of learned counsel for the assessee is that the Act lays down certain provisions as to when the loss of a partner in an unregistered firm cannot be set-off against his other income from business and he has urged that the case of the assessee does not fall under any of those provisions. Reference was made in this context to ss. 10, 23(5) and 24. The principal argument is that there is authority for the proposition that in case of an individual or a registered firm who is an assessee, if he or it enters into partnership with another and the firm so constituted is not registered, it is still competent to the taxing authority to add the share of the profits of such individual or registered firm (which joined in partnership with another person) in the business of the unregistered firm, to his or its other income even though the unregistered firm has not been assessed to tax. The argument has proceeded that there is no reason why the same principle should not apply to the case of set-off if instead of profit the business of the unregistered firm has resulted in loss simply because it has not been assessed to tax.

It is necessary to examine the scheme of the Income-tax Act on the question of assessment of an unregistered firm and the position of the partners in the firm vis-a-vis the unregistered firm and the Department in the matter of tax. Section 3 speaks of the charge of Income-tax on the total income of every individual, Hindu undivided family, company and local authority, and of every firm or the partners of the firm individually. Section 4 rules that the total income of any person includes all income, profits and gains from whatever source derived. Section 6 states the heads of income chargeable to income-tax, and the sections immediately following deal with the various heads of income. Section 10 deals with the tax payable by an assessee under the head "Profits and gains of business..." in respect of the profits or gains of any business carried on by him. The word 'profit' it is well-established "is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand" and profits must be ascertained on ordinary principles of commercial trading. It is not necessary that the assessee should personally carry on the business. He may carry on one business or numerous businesses. He is assessable under this section in respect of business carried on by himself as also in respect of his share of the profits of business of a firm registered or unregistered and his profits are to be ascertained in accordance with the relevant special requirements of the Act. It is equally well-established that where a deduction is proper and necessary to be made or any loss is to be allowed to be taken into the computation or to be set-off against his profits in business to ascertain the

result or ultimate position, that ought to be allowed provided there is no prohibition against such deduction or allowance or set-off. The levy is on the total income of the assessable entity to be computed in accordance with the provisions of the Act. It is equally firmly established that loss arising from any one source under the head of "business" may be set-off against profits from another source under the same head. This is on general principle—apart from any provision of the Act—since income under each head is to be computed by clubbing or lumping together of the profits of the assessee from various sources under the same head. The levy is on the balance of profits after deducting such losses, and it is not now disputable nor disputed before us that an assessee who carries on a number of businesses is entitled under s. 10 to set-off his losses in one source under the head of 'business' against his profits in another source under the same head. The arguments of learned counsel for the parties and particularly on behalf of the Revenue have touched s. 23(5) and mainly s. 24 but we may in passing mention s. 16 since we are reviewing the scheme of the Act in the context of the share of a partner in the losses of an unregistered firm. Section 16(1)(b) relates to the mode or method of computing a partner's share and lays down certain exemptions and exclusions in determining the total income. No argument has been founded on it and no reference has been made to it by counsel but we mention it because the proviso to that sub-section states that the share of an assessee in the loss of a partnership firm may be set-off in accordance with the provisions of s. 24. Section 23(5) deals with and governs "assessment" of a firm. The firm may or may not have been registered under the relevant provisions of the Act. If the firm is registered [s. 23(5)(a)] the levy must be directly on the firm and each partner's share of the firm's profit is added to his other income and charged as part of his total income; and if such share of the partner is a loss [first proviso to s. 23(5)(a)] it is to be set-off against his other income or to be carried forward in accordance with the provisions of s. 24. Then comes cl. (b) of s. 23(5) which, as has often been said, is an enabling provision. At the relevant time it was as under:

"In the case of an unregistered firm, the Income-tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (a) as applicable to a registered firm if, in his opinion, the aggregate amount of the tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm."

Whether registered or not a firm is an assessee within the meaning of that expression as defined in s. 2(2). Its income may be assessed like that of any other unit or entity of assessment regardless of the fact that it is registered or not. One of two positions can arise in the matter of assessment of a partner in an unregistered firm. The position would be simple when the unregistered firm has made profits. The Income-tax Officer may adopt any of the two courses open to him under s. 23(5)(b). Before completing the assessment of the individual partner the Income-tax Officer may exercise his option and proceed to determine the sum payable by the firm itself as if it were a registered firm, though in fact it is not registered, if it appears to him that such procedure would in the aggregate bring a greater amount to the Revenue by way of tax and super-tax. No question arises in any such case of setting-off of any losses of the unregistered firm, it having made profits in the relevant accounting period. The other position would arise when the unregistered firm has made a loss and an individual partner seeks to set-off his share of that loss in his individual assessment against his other income from business. Here also the Income-tax Officer may before completing the assessment of the individual partner ascertain the loss incurred by the firm and decide upon the course to be adopted by him. He may decide to treat the unregistered firm as if it were registered and the amount of the share of the loss of the individual partner in such a case would be set-off against his other income from business. Or he may determine the amount of loss incurred by the unregistered firm without treating it as a registered firm

and in such a case the latter part of the second proviso to s. 24 would come into play and the position would be what we shall presently point out after referring to s. 24, relevant part of which is as follows:—

"Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 8, he shall be entitled to have the amount of the loss set-off against his income, profits or gains under any other head in that year."

The first proviso to sub-s. (1) of s. 24, which sub-section is set out above, permits the claim for set-off in respect of speculative losses only to the extent of the amount of profits in any other business consisting of speculative transactions. In the present case there is no dispute that the assessee firm's business is in speculative transactions and the loss claimed by the assessee is also in respect of speculative transactions. The second proviso to sub-s. (1) of s. 24 is as under:—

"Provided further that where the assessee is an unregistered firm which has not been assessed under the provisions of clause (b) of sub-section (5) of section 23.., any such loss shall be set-off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm; and where the assessee is a registered firm, any loss which cannot be set-off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set-off under this section."

In order to avoid any unnecessary complication which can arise from the fact that the assessee in the present case happens to be a registered firm and claims to set-off its share of losses as a partner in another firm which is unregistered, it will be convenient to examine the legal position as stated by us at the very outset of our judgment by considering the question whether an individual assessee, can, as against the profits of his business, claim to set-off his share of the loss of a firm in which he is a partner although that partnership firm is unregistered. As already mentioned by us the Income-tax Officer may in such a case decide to treat the unregistered firm as if it were registered and the amount of the share of the loss of the individual partner would be allowed to be set-off against his other income. Or instead he may, as we have already mentioned, determine the amount of loss incurred by the unregistered firm without treating it as a registered firm. It is in such a case that the second proviso to s. 24(1) would come into play and the loss of the unregistered firm can be set-off only against the income, profits and gains of the unregistered firm and not against the income, profits and gains of the individual partner who seeks to set-off his own share of those losses against his other income from business in his personal assessment. The position so far is quite clear and cannot raise any problem for the assessee partner or the unregistered firm or the Department. But difficulty and complication is likely to arise, as it has in fact arisen in the case before us, if the Income-tax Officer neither proceeds to treat the unregistered firm as if it were registered and assess the loss nor proceeds to assess the loss of the unregistered firm and simply refuses to recognize the factum and existence of the unregistered firm and holds that the assessee who claims to be a partner in the unregistered firm was not a partner at all in the alleged unregistered firm or that the transactions are not the partnership business. Question must arise in such a case if it turns out and is ultimately held that he was in fact a partner in the unregistered firm which had incurred losses or that the transactions are of the partnership. And the contention of Mr. Kolah, learned counsel for the assessee before us, is that since the Income-tax Officer did not choose to adopt any of the two courses open to him and simply declined to grant any set-off on the ground that there was no such partnership transaction as alleged by the assessee, the assessee could claim to set-off its share of those losses against its other income from speculative business. The view taken by the Accountant Member was that in no circumstance can a set-off be allowed to an individual partner in respect of his share of the loss of an unregistered firm and that it can only be carried forward in the account of the firm as provided by the second proviso to s. 24(1). Therefore, what we have now to consider is what is

to happen in a case of this nature. Can it be said that since the unregistered firm has not been assessed and its loss not determined the individual partner is not entitled to claim any set-off? The argument of learned counsel for the assessee, as we have already stated, is that there is authority for the proposition that in case of an individual or a registered firm who is an assessee, if he or it enters into partnership with another and the firm so constituted is not registered, it is still competent to the taxing authority to add the share of the profits of such individual or registered firm (which joined in partnership with another person) in the business of the unregistered firm, to his or its other income even though the unregistered firm has not been assessed to tax. The next step of the argument is that there is no reason why the same principle should not apply to the case of set-off if instead of profit the business of the unregistered firm has resulted in loss simply because it has not been assessed to tax.

Mr. Kolah has drawn our attention to two decisions of this Court. In *J. C. Thakkar v. Comr. I.T.*¹ the question arose whether a partner in an unregistered firm could be taxed in respect of his profits in the unregistered firm when the unregistered firm itself had not been assessed to tax. A contention was urged on behalf of the assessee that the scheme of the Act did not permit the Department to tax a partner in an unregistered firm before assessing the unregistered firm itself in the manner provided in s. 23(5)(b). That contention was repelled by the Court and it was held that a partner could be assessed in respect of his share of profits in an unregistered firm even though the unregistered firm itself had not been first assessed to tax. The view taken by the Court was that it was not a condition precedent to the bringing of the share of a partner in the profits of an unregistered firm in his total income simply on the ground that the unregistered firm had not been first assessed to tax. It was also pointed out in that case that there is no provision of the Income-tax Act which prohibits the assessment of a partner until the firm in which he is a partner is assessed. At p. 467 of the Report it is observed:

"...Now, as has often been pointed out, the assessable entity under the Income-tax Act is different from a legal entity. The object of the Income-tax Act is to spread its net wide and to include in that net every person and every association of persons, however that association may have been constituted. Therefore, we find that what is subject to tax under s. 3 is the total income of the previous year of every individual, Hindu undivided family, company and local authority, and every firm and other association of persons or the partners of the firm or the members of the association individually. Therefore, an individual can be assessed to tax, a partnership in which the individual is a partner can be assessed to tax, and s. 3 does not provide that when there is a partnership only the firm can be taxed and not the partners of that firm. Far from so providing, the section makes it clear that even where there is a firm which can be assessed to tax, a partner of that firm can also be an assessee for the purposes of the Act... But all that we wish to point out is that in the charging section itself, far from there being a prohibition against a partner of a firm being assessed to tax, there is a legislative fiat as it were in favour of the Income-tax department if they choose to assess a partner and not the firm of which he was a partner."

The other decision to which our attention has been drawn by Mr. Kolah is *Jamnadas Daga v. Commr. I-Tax*,² which was decided by my brother Tendolkar J. and myself. In that case the assessee was a partner in two registered firms which in the relevant accounting year incurred losses, and in an unregistered firm which in the same year earned a profit which was taxed in the hands of the unregistered firm. The share of the assessee in the profit of the unregistered firm was a larger amount and exceeded the share of losses in the registered firms. The assessee had a small income which had to be taxed at the rate applicable to the total income of the assessee. The assessee contended that his share of the profits in the unregistered firm having been taxed in the hands of that firm, should be entirely ignored and could not be set-off against his share of the losses in the other firms. In that case, reliance was placed on the second

¹ (1955) 57 Bom. L.R. 464.

² (1957) 59 Bom. L.R. 1216.

proviso to s. 24(1). The view we took of the matter was that for the purpose of ascertaining the total income of the assessee, the assessee's share of profit in the unregistered firm which had separately been taxed could not be ignored but should be set-off against his share in the losses of the registered firms.

Now a somewhat ingenious argument has been advanced before us by Mr. Joshi, learned counsel for the Revenue, and the argument is that though the applicant is a registered firm, the correct position for the purpose of the present matter is that it is an unregistered firm consisting of four partners. It is urged that a careful scrutiny of the partnership agreement would show that the partnership was not between the assessee firm of Jadavji Narsidas and Damji Laxmidas. It will be convenient to set out the relevant part of that agreement, on which Mr. Joshi has founded the present argument:

"This Indenture...made between Jadavji Narsidas...of the first part; Parmanand Narsidas...of the second part; Nagindas Jadavji...of the third part; Jashvantral Jadavji...of the fourth part; all partners in the firm of Messrs. Jadavji Narsidas carrying on business at Masjid Bunder Road, Bombay and Damji Laxmidas of the fifth part..."

Learned counsel has also drawn our attention to the fact that the shares in the profits and losses of the business were set out in the names of all the five persons. We do not think there is any scope for the fine distinction which Mr. Joshi has tried to make out from the partnership deed. In effect Mr. Joshi is trying to develop a question which is altogether new. Even so we have heard him on that point. We may observe that the Department as well as the Tribunal has proceeded on the footing that the assessee firm and the individual outsider Damji Laxmidas had entered into partnership. But what has been held is that in the transactions in question the assessee firm had no interest as a partner of the unregistered firm. We have here to consider whether in fact there was or was not a partnership between the firm of four persons on the one hand and Damji Laxmidas on the other in respect of the relevant transactions. The present contention must, therefore, be negatived.

Learned counsel for the Revenue has drawn our attention to s. 3 of the Act and stressed that the persons who can be units of assessment, or an "entity" are mentioned in that section. It is stated that in the case of an assessee who carries on business, what can be taxed under the head of "business" mentioned in s. 10 can be the profits and gains of the business of that firm as a unit or an entity. The argument has proceeded that if a firm carrying on business happens to be a partner in another firm which is unregistered, its share in the other firm may be taken into account in ascertaining the profits or losses of the firm to be ascertained under s. 10 and that before that can be done the profits and losses of the other firm must be separately ascertained and assessed. The argument is that the profits or losses of the other firm would first have to be ascertained and it is only after assessment of that unregistered firm that the question of set-off can arise and that in no case set-off for losses would be allowed. It has been stated that if this position is not accepted, it would not be possible to give effect to the various provisions of the Act relating, for instance, to deductions, allowances and exemptions. Therefore, the argument is that an unregistered firm must be assessed as a unit or as an entity and its loss determined before any set-off in respect of his share of such losses can be claimed by a partner against the profits of his other business. We agree that the procedure suggested by Mr. Joshi is a practical method to adopt and would be convenient and would avoid a good deal of delay and difficulties. But what we are concerned with here is as to what is to happen if the Income-tax Officer does not determine the losses of the unregistered firm. The point before us is as to the right of a partner to claim a set-off in respect of his share of losses in an unregistered firm which has not been assessed and losses of which should have been assessed. It is not difficult to see that if the law requires that under no circumstances any set-off can be claimed by an individual partner unless the unregistered firm was brought to tax, we must give effect to the same. But the question is: Is there any such requirement of the Income-tax law? We have

already referred to ss. 23 and 24 and may add that there is no provision of law which requires an unregistered firm to have its losses assessed. Of course, if the unregistered firm does not have its losses determined, does not file a return and get its losses determined, it would not have the benefit of carrying forward those losses. But that is a different matter. In the absence of any express provision in the Income-tax law and on general principles we do not see why a partner in an unregistered firm should not be permitted to claim a set-off in respect of his share of loss in an unregistered firm against the profits of his other business simply because the Department does not choose to determine the losses of the unregistered firm. The provisions of s. 23(5)(b) enable the Income-tax Officer to choose one of two alternative methods. In a case of the nature before us when a set-off is claimed in respect of the share of loss in an unregistered firm, it would be necessary for the assessee to satisfy him that the losses were in fact incurred and the Income-tax Officer would be justified and indeed bound to satisfy himself about the true position of the business of the unregistered firm for the year in question. It would also be open to him to take such steps as he may deem proper under the provisions of the Act. He may exercise the option laid down in s. 23(5)(b). In case of profits he may determine the profits of the firm. He may then proceed to assess the firm as a registered firm if there is any taxable profit if he thinks that the aggregate amount of the tax including super-tax payable by the partners would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm was assessed as a registered firm, or he may assess it as an unregistered firm. In case of losses he would have to determine the losses of the unregistered firm as he would be doing in the case of a registered firm where loss is shown and for which there is ample provision in the Act. But there is neither principle nor any provision of law which bars an assessee, whether an individual or a firm, from claiming a set-off in respect of his or its share of the loss in an unregistered firm simply on the ground that the latter has not been brought to tax. Partnerships between firms and individuals and firms and firms are not uncommon in our country. The Income-tax department often deals with such partnerships.

In order to test Mr. Joshi's argument we put an illustration to him. We asked Mr. Joshi as to what would happen where the partners themselves had made large profits in their own business and in the partnership business of the unregistered firm had made a profit which was within the taxable minimum or had made a loss and the illustration we mentioned was of the firm of two partners who had made large profits in their own separate businesses and in the joint venture had earned a profit of only Rs. 1,000. Mr. Joshi had to agree that in such a case it cannot be said that the shares of the individual partners in the profits of the firm would not be added to their profit in the other business before the assessment of the unregistered firm, and that could be the only answer because in such a case there would be no assessment of the profits of the unregistered firm. Therefore, it is not possible to accept the contention that the assessment of the unregistered firm is a *sine qua non* to the right of a partner to claim a set-off in respect of his share of the losses in an unregistered firm. Moreover, Mr. Joshi's present argument is contrary to the principle laid down in the decisions to which we have already made reference. The fact that the assessee before us is not an individual but a registered firm does not make any difference. Our answer, therefore, to the second question will be that the assessee can claim a set-off in respect of its share of loss in an unregistered firm if the Income-tax authorities do not proceed to determine the loss of the unregistered firm and do not bring it to tax as permitted by s. 23(5)(b).

Commissioner to pay the costs.

Solicitors for the applicant: *Rustomji & Ginwala.*

Solicitor for the respondent: *A. S. Parikh.*

CRIMINAL REFERENCE.

Before Mr. Justice Gokhale and Mr. Justice Miabhoy.

THE STATE v. SHANKAR BHAURAO KHIRODE.*

Criminal Procedure Code (Act V of 1898), Secs. 173, 4(l) & (k), 190(1)(b), 193; 337—Police Manual, Vol. III, rr. 202, 203—Criminal Law Amendment Act (XLVI of 1952), Secs. 6, 7, 8—Prevention of Corruption Act (II of 1947), Secs. 5A, 6—Final report in connection with offence under s. 161, I. P. Code and s. 5 of Prevention of Corruption Act submitted by police officer to Magistrate under s. 173, Cr. P. Code with request for issue of 'B' summary—Magistrate on merits by order granting 'A' summary—Whether Magistrate had jurisdiction to consider and act on report—Magistrate whether empowered to take cognizance of offence—Whether cognizance of offence taken by Magistrate by issuing 'A' summary—What constitutes cognizance under s. 190.

On a report submitted to a Magistrate of the first class under s. 173 of the Criminal Procedure Code, 1898, by a police officer after completing investigations with reference to offences which are exclusively triable by a Special Judge under s. 7(1) of the Criminal Law Amendment Act, 1952, the Magistrate has jurisdiction to consider the report and grant the type of summary (as contemplated in the Police Manual) which according to him is appropriate in the circumstances of the case.

Before it could be said that a Magistrate has taken cognizance under s. 190 of the Criminal Procedure Code, 1898, it is not sufficient that he should have applied his mind to the report submitted to him by a police officer under s. 173 of the Code, but he must do something for proceeding under the subsequent provisions of the Code, e.g., under s. 200, under which the Magistrate has to examine the complainant on taking cognizance of an offence.

A police officer after completing investigation in connection with an offence under s. 161 of the Indian Penal Code, 1860, and s. 5 of the Prevention of Corruption Act, 1947, submitted a report to a First Class Magistrate under s. 173 of the Criminal Procedure Code, 1898, and requested that 'B' summary may be issued in respect thereof. The Magistrate on merits passed an order granting 'A' type of summary on the report. On the question whether the Magistrate had power to consider the report and act on it, it was contended that the Magistrate was not empowered to take cognizance of the offence which was exclusively triable by a Special Judge under s. 7(1) of the Criminal Law Amendment Act, 1952, and that he could not take cognizance of the offence by refusing to issue 'B' summary and in issuing 'A' summary in contravention of the provisions of s. 6 of the Prevention of Corruption Act, 1947:—

Held, that the Magistrate was not deprived of his power to take cognizance of the offence even though it was exclusively triable by a Court of a Special Judge and, therefore, the submission of the report by the police officer and his request for the issue of 'B' summary and the order passed granting 'A' summary were not without jurisdiction,

that as no further proceedings were intended to be taken by the Magistrate it could not be said that the Magistrate in issuing 'A' summary had taken cognizance of the offence, and

that, therefore, the order could not be challenged on the ground that it was bad as the Magistrate took cognizance of the offence without any previous sanction as contemplated under s. 6 of the Prevention of Corruption Act.

R. R. Chari v. The State of Uttar Pradesh,¹ applied.

Boywalla v. Sorab Engineer,² distinguished.

*Emperor v. Baburao Tatyarao*³ and *Legal Remembrancer v. Abani Kumar*,⁴ referred to.

*Decided, October 29/30, 1958. Criminal Reference No. 119 of 1958, made by V.R. Paralkar, Sessions Judge, Ahmednagar, in Criminal Revision Application No. 16 of 1958, from the orders passed by V. K. Patil, Judicial Magis-

trate, F.C., Akola, in C. R. No. 23 of 1958.

1 [1951] S.C.R. 312.

2 [1941] 48 Bom. L.R. 529.

3 [1938] 38 Bom. L.R. 946.

4 [1950] A.I.R. Cal. 437.

THE facts appear in the judgment.

V. H. Gumaste, Assistant Government Pleader, for the State.

K. H. Nagrani, for the complainant.

GOKHALE J. This Criminal Reference raises a point of some importance as regards the jurisdiction of a Magistrate to take action on a report submitted to him under s. 173 of the Criminal Procedure Code, by a police officer after completing investigations with reference to offences which are exclusively triable by a Special Judge under s. 7(1) of the Criminal Law Amendment Act, 1952.

The present reference has been made by the learned Sessions Judge, Ahmednagar, in these circumstances: It appears that the Circle Police Officer, Rajur, investigated a case registered on the complaint of one Mr. Pahuja, Sub-Inspector of Police, Rajur, against a constable by name Khirode. It was alleged by the Sub-Inspector that the police constable attempted to give him Rs. 100 as a bribe to hush up a chapter case instituted against one Bhaui Mohana. A trap was set for the police constable, and when the amount of Rs. 100 was being attempted to be given to the sub-inspector, it was attached in the presence of the panchas. A report was made with regard to this to the District Superintendent of Police, and the Circle Police Officer was ordered to investigate the matter with regard to this complaint. On investigation, the officer, however, came to the conclusion that the *panchanama* made by the complainant, Sub-Inspector, Rajur, about attaching notes from the police constable Khirode was false and the complaint was also false. In accordance with these findings, the Circle Police Officer submitted a report under s. 173 of the Criminal Procedure Code, to the Judicial Magistrate, First Class, Akola, and it was requested that 'B' summary may be issued in respect thereof. The learned Magistrate issued a notice to the complainant, Sub-Inspector Pahuja, who submitted a detailed report. It was contended on behalf of the complainant that the *panchanama* made by him on November 25, 1956, with regard to the alleged offence was true, and the two *panchas* had subsequently gone back on their statements later on. On these allegations, the learned Magistrate considered the question whether there was proper ground for granting 'B' summary as prayed for in the final report of the Circle Police Officer. It was contended before the learned trial Magistrate, as a preliminary ground, that he had no jurisdiction to grant 'B' summary in respect of the offence under s. 5 of the Prevention of Corruption Act. That contention about jurisdiction was negatived, and the learned Magistrate came to the conclusion that his Court had jurisdiction to grant an appropriate summary which the investigation suggested. On the merits, the learned trial Magistrate came to the conclusion that he should not grant the 'B' type of summary which was sought by the Circle Police Officer, and that, under the circumstances of the case, it was proper to grant the 'A' type of summary. In accordance with these findings, he passed an order granting 'A' type of summary on the report. Against this order, there was an application for revision before the Sessions Court, which held that the learned trial Magistrate had no jurisdiction to pass orders on the report made by the police officer, as the offence in respect of which the report had been made was one exclusively triable by a Special Judge, and, therefore, the report under s. 173 of the Criminal Procedure Code for any type of summary could be made only to a Special Judge and not to any Magistrate. The learned Sessions Judge has, therefore, made this reference recommending to this Court that the order passed by the learned trial Magistrate granting 'A' summary should be set aside as one passed without jurisdiction.

Now, this reference came up for hearing before my learned brother, who ordered that it should be referred to a Division Bench, as it raised a point of some importance.

Before us, Mr. Gumaste, learned Assistant Government Pleader, has supported the reference, and contended that the view of the Sessions Judge, that the trial Magistrate had no jurisdiction to consider the report under s. 173 of the

Criminal Procedure Code, with regard to the alleged offence, was correct. On the other hand, Mr. Nagrani, learned advocate appearing on behalf of the complainant, has contended that the trial Magistrate had jurisdiction to consider the report of the police officer made under s. 173, Criminal Procedure Code, and to grant the type of summary which, according to the Magistrate, was appropriate in the circumstances of the case.

Section 173 of the Criminal Procedure Code forms part of Chapter XIV of Part V relating to the subject of information to the police and their powers to investigate. Under s. 173(1)(a), as soon as every investigation under this chapter is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating the names of the parties, nature of information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating also whether the accused, if arrested, has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties. It would be obvious from the provisions of the Criminal Procedure Code, Chapter XIV, that when a police officer is investigating a case, he would be making three different kinds of reports at three different stages of the investigation. Section 156 refers to investigation into cognizable cases, and under s. 157, the officer in charge of the police station can make a preliminary report to the Magistrate. Section 168 deals with the report of investigation by a subordinate police officer who, if he makes an investigation under Chapter XIV, must submit his report embodying the result of such investigation to the officer in charge of the police station. Section 173 requires the submission of the final report by the police officer as soon as investigations are completed. But the report has to be forwarded to a Magistrate empowered to take cognizance of the offence on a police report. Now, the argument which found favour with the learned Sessions Judge was that the investigation by the police officer in this case being in connection with an offence under s. 161, of the Indian Penal Code and s. 5 of the Prevention of Corruption Act, and these offences being exclusively triable by a Special Judge under s. 7 of the Criminal Law Amendment Act, the Magistrate would not be empowered to take cognizance of these offences, and would not have the power to consider this report and act on it.

In order to test this argument, it is necessary to refer to the relevant provisions of the Prevention of Corruption Act, 1947, as well as the Criminal Law Amendment Act, 1952. By virtue of s. 5A of the Prevention of Corruption Act, police officers of certain ranks would be competent to investigate into cases without any sanction. In the town of Bombay, a Superintendent of Police is so competent to investigate; whereas in the mofussil, the Deputy Superintendent of Police would be similarly able to exercise powers of investigation. But police officers below the ranks of these officers shall not investigate any offence punishable under ss. 161, 165 or s. 165A, Indian Penal Code, or under sub-s. (2) of s. 5 of the Prevention of Corruption Act, without the order of a Presidency Magistrate or a Magistrate of the First Class, as the case may be; so that, an important pre-requisite of an investigation under s. 5A is that an order of a Presidency Magistrate or a Magistrate of the First Class has to be obtained by the police officer in the first instance. There is an exception provided in the case of police officers belonging to the Delhi Special Police Establishment. But, even in that case, the police officer has not to be below the rank of an Inspector of Police and has to be specially authorized by the Inspector General of Police of the Establishment, and even then he cannot investigate the offence without an order of the Magistrate of the First Class, unless he has reasons to believe that, on account of the delay involved in obtaining the order of a Magistrate of the First Class, any valuable evidence relating to such offence is likely to be destroyed or concealed; and further in every case where he makes such investigation without such an order, the police officer concerned, has to send a report as soon as possible to a Magistrate of the First Class, together with the circumstances in which the investigation was made. Under s. 6 of the Prevention of

Corruption Act, no Court can take cognizance of an offence punishable under ss. 161, 164 or 165, Indian Penal Code, or under sub-s. (2) of s. 5 of the Act alleged to have been committed by a public servant except with previous sanction of certain authorities who are mentioned in that section.

Under s. 6 of the Criminal Law Amendment Act, 1952, the State Government is empowered to appoint Special Judges to try offences under s. 161, 165 or 165A, Indian Penal Code, and sub-s. (2) of s. 5 of the Prevention of Corruption Act, or any conspiracy to commit or any attempt to commit or any abetment of any of the offences mentioned above. Sub-section (2) of s. 6 prescribes the necessary qualifications of persons to be appointed as Special Judges. Under s. 7(1), notwithstanding anything contained in the Code of Criminal Procedure or in any other law, the offences mentioned in sub-s. (1) of s. 6 are triable by Special Judges only. Section 8 deals with the procedure and powers of Special Judges, and sub-s. (1) of s. 8 provides that a Special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrates. It is clear from these provisions that Special Judges, appointed under s. 6 of the Criminal Law Amendment Act, are invested with exclusive jurisdiction to try offences mentioned in s. 6, and the Special Judges are further empowered to take cognizance of these offences without the accused being committed to them for trial. Now, Mr. Nagrani contends that, though a Special Judge can take cognizance of these offences, without there being any committal proceedings, s. 8 does not deprive the Magistrates of their power to take cognizance of such offences, though they would not have the power to try these offences. According to Mr. Nagrani, the stage of trial must be distinguished from the stage of taking cognizance of an offence. The argument is that so far as the question of taking cognizance of these offences is concerned, a Magistrate as well as a Special Judge can take cognizance of these offences. In this connection, he relied on *Dagdu v. Punja*,¹ where it was held that

"the 'trial' of a criminal case means the proceeding which commences when the case is called on with the Magistrate on the bench, the accused in the dock and the representatives of the prosecution and defence, if the accused be defended, present in Court for the hearing of the case."

In that case, the question which arose was whether in a warrant case the trial could be said to have begun with the framing of a charge, and it was held that it was not so, and that, where a warrant case was transferred from the Court of one Magistrate to that of another after a charge had been framed, it was open to the latter to hear the case *de novo*, and that he was not bound to recommence the proceedings from the stage of the charge. Mr. Nagrani argues that in the present case there was no question of any trial, but the Magistrate was merely considering the report submitted to him under s. 173, Criminal Procedure Code. In this connection, a reference might be made also to s. 4(l) of the Criminal Procedure Code, which defines 'investigation' as including all proceedings under the Code for the collection of evidence conducted by a police officer or by any person, other than a Magistrate, who is authorised by a Magistrate in that behalf. Section 4(k) defines an 'inquiry' as including every inquiry other than a trial conducted under the Code by a Magistrate or Court. The terms 'investigation', 'inquiry' and 'trial' would, therefore, denote three different stages in a criminal case, and Mr. Nagrani's argument is that in cases of offences falling under s. 6 of the Criminal Law Amendment Act, the stage of trial alone must be conducted by a Special Judge, while there is concurrent jurisdiction as regards taking of cognizance of the offence which must precede the stage of trial.

In support of his argument, Mr. Nagrani has also relied on the provisions of s. 190(1)(b) of the Criminal Procedure Code, under which any District Magistrate or Sub-Divisional Magistrate, and any Judicial Magistrate, specially em-

powered in this behalf, may take cognizance of *any* offence upon a report in writing of such facts made by any police officer, and the argument is that under this section, a Magistrate can take cognizance of even offences mentioned in s. 6 of the Criminal Law Amendment Act, upon a report submitted to him by a police officer. If that be so, Mr. Nagrani says that the learned trial Magistrate would be competent to consider and act upon the final report submitted to him by the police officer under s. 173 of the Criminal Procedure Code. In our view, this argument of Mr. Nagrani is well founded.

Under s. 193 of the Criminal Procedure Code, except as otherwise expressly provided by the Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf. It is true that under s. 8(3) of the Criminal Law Amendment Act, the Court of a Special Judge is deemed to be a Court of Session. But under this sub-s. (3) itself, it is mentioned that it is subject to what is provided for in sub-ss. (1) and (2) of s. 8. As already stated, under sub-s. (1) of s. 8 of the Criminal Law Amendment Act, a Special Judge is entitled to take cognizance of offences covered by s. 6 without there being any committal proceedings in the Court of a Magistrate. It seems, therefore, that so far as the Courts of Special Judges are concerned, though they are placed on the same footing as the Courts of Session, the procedure prescribed under s. 193 of the Criminal Procedure Code is not necessary to be followed in the case of these Courts. Under sub-s. (2) of s. 8 of the Criminal Law Amendment Act, a Special Judge is empowered to tender a pardon to a person supposed to have been directly or indirectly concerned in, or privy to, an offence, with a view to obtaining the evidence of such person. This section also makes a distinction between a Court of a Special Judge and a Court of Session, because, whilst a Special Judge can himself grant pardon under s. 8(2) of the Criminal Law Amendment Act, under s. 338 of the Criminal Procedure Code the Sessions Court has power not only to tender a pardon, but to order the committing Magistrate or the District Magistrate to tender a pardon to any person. But, though the Court of a Special Judge has itself this power of tendering a pardon conferred on it under s. 8(2), in our opinion, that would not affect the general provisions contained in s. 337 of the Criminal Procedure Code, regarding tender of pardon to an accomplice. Prior to 1952, under s. 337(1), there was no provision for tender of pardon to an accomplice with regard to offences under ss. 161, 165 and 165A, Indian Penal Code. By s. 5 of the Criminal Law Amendment Act, 1952, in the first instance and subsequently by s. 59(a) (iv) of the Code of Criminal Procedure (Amendment) Act, XXVI of 1955, these three sections were inserted in s. 337(1) of the Criminal Procedure Code, so that, after this amendment, under s. 337 of the Criminal Procedure Code any Magistrate of a First Class, at any stage of the investigation or inquiry into or trial of an offence even under these three sections, is empowered to tender a pardon. Under the proviso to s. 337(1) as amended in Bombay, when the offence is under enquiry or trial, no Magistrate of the First Class shall exercise this power unless he is the Magistrate making the inquiry or holding the trial, and when the offence is under investigation, a Magistrate can grant pardon only with the sanction of the Sessions Judge. (See s. 2 of Bombay Act XXIII of 1951). Under sub-s. (2) of s. 337, every person accepting a tender under this section, shall be examined as a witness in the Court of a Magistrate taking cognizance of the offence and in the subsequent trial, if any, sub-s. (2A) refers to the powers of a Magistrate, before whom the proceedings are pending, to commit the accused for trial to the Court of Session, in every case where an accomplice has accepted a tender of pardon and has been examined under sub-s. (2), provided the Magistrate is satisfied that there are reasonable grounds for believing that the accused is guilty of the offence, alleged to have been committed by him. Then comes sub-s. (2B) of s. 337, which was in the first instance inserted by s. 5 of the Criminal Law Amendment Act, 1952, and subsequently by s. 59(b)

of the Code of Criminal Procedure (Amendment) Act XXVI of 1955, and that sub-s. (2B) runs as follows:

"(2B) In every case where the offence is punishable under section 161 or section 163 or section 165A of the Indian Penal Code (Act XLV of 1860) or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947 (II of 1947), and where a person has accepted a tender of pardon and has been examined under sub-section (2), then, notwithstanding anything contained in sub-section (2A), the Magistrate shall, without making any further inquiry, send the case for trial to the Court of the Special Judge appointed under the Criminal Law Amendment Act, 1952 (XLVI of 1952)."

Now, this sub-section which is newly added can not have reference to pending cases only for which provision had been made under s. 10 of the Criminal Law Amendment Act, which provided that all cases triable by a Special Judge under s. 7 which, immediately before the commencement of the Act, were pending before any Magistrate shall, on such commencement, be forwarded for trial to the Special Judge having jurisdiction over such cases; so that, under s. 10, all cases which were pending before any Magistrate before the commencement of the Criminal Law Amendment Act, and which were exclusively triable by a Court of a Special Judge, were to be forwarded for trial to such Courts. Now, sub-s. (2B) of s. 337 of the Criminal Procedure Code contemplates that in cases where an offence is triable by a Court of a Special Judge, and where a pardon has been tendered to an accomplice and he has been examined under sub-s. (2), then, notwithstanding the requirement of sub-s. (2A) to commit the accused for trial to the Court of Session, the Magistrate has to send the accused for trial to the Court of a Special Judge without making any further inquiry. This provision is perfectly consistent with s. 8(1) of the Criminal Law Amendment Act which, as already stated, enables the Court of a Special Judge to take cognizance of an offence without any committal proceedings. But the important thing to be noted is that under sub-s. (2B) of s. 337 of the Criminal Procedure Code, a Magistrate has not only the power to tender a pardon to an accomplice, but would have the power to examine him under sub-s. (2) even in respect of the offences triable exclusively by a Court of a Special Judge. This would support the contention of Mr. Nagrani that a Magistrate is not deprived of his power to take cognizance of an offence even though it is exclusively triable by a Court of a Special Judge.

In the Police Manual, Vol. III, p. 176, under r. 202, the reports required by s. 173 of the Criminal Procedure Code to be submitted on the completion of an investigation are classified under two heads: (i) charge sheets which are to be in form C.P.C. 20, and (ii) final reports in form C.P.C. 19. Under sub-r. (2) of r. 202, the police are directed to send a charge-sheet to the Magistrate directly when there is sufficient evidence to justify the sending of the accused person to a Magistrate. Rule 203, at p. 178, deals with the submission of final reports and provides that when there is no sufficient evidence to justify the forwarding of the accused to a Magistrate, the Police Station Officer or the investigating officer will release the accused person on bail, if he is in custody, and submit a final report to the Magistrate requesting to classify the case and issue an appropriate summary of his order. Now, these summaries are of three kinds: "A" type of summary would be issued where the Magistrate classifies the case as true but undetected, and the Police Manual explains this as "where there is no clue whatsoever about the culprits or property or where the accused is known but there is no evidence to justify his being sent up to the Magistrate for trial." "B" type of summary would be issued where the Magistrate classifies the case as maliciously false; and "C" type of summary is issued where the case is classified as neither true nor false which is explained in the Police Manual, as for example being "due to mistake of facts or being of a civil nature." Now, as already stated, under s. 190 of the Criminal Procedure Code, a Magistrate specially empowered in this behalf may take cognizance of any offence upon a report in writing by any police officer. There is no dispute about the learned trial Magistrate in this case having the powers

under s. 190 of the Criminal Procedure Code. If that be so, the submission of the report by the police officer in this case to the learned trial Magistrate, and his request for the issue of B summary and the order passed granting 'A' summary could not be said to be without jurisdiction.

But it is contended by Mr. Gumaste, learned Assistant Government Pleader, that even assuming that this submission of the final report under s. 178 of the Criminal Procedure Code to the learned trial Magistrate was not bad, the Magistrate, in fact, took cognizance of the offence in refusing to issue "B" summary and in issuing "A" summary, and his order, would, therefore, according to Mr. Gumaste, be illegal under s. 6 of the Prevention of Corruption Act, under which no Court can take cognizance of an offence punishable under s. 161, 164 or 165, Indian Penal Code, or under sub-s. (2) of s. 5 of the Prevention of Corruption Act, without obtaining the requisite previous sanction of the authorities mentioned in that section. The next question, therefore, is whether, in fact, the learned trial Magistrate has taken cognizance of the offence mentioned in the report submitted by the police officer. It is true that the order passed by the learned trial Magistrate issuing "A" summary, as contemplated under the provisions of the Police Manual, is not an administrative order but a judicial order. See *Emperor v. Bajaji Appaji*². But the mere fact that in issuing "A" summary he has passed a judicial order would not necessarily mean that he has taken cognizance of the offence referred to in the report. The police officer prayed for the issue of "B" summary on the ground that the complaint was maliciously false. If the learned trial Magistrate had, in fact, accepted the request of the police officer and granted the "B" summary, it is difficult to appreciate how it could have been said that he had taken cognizance of any offence. Mr. Gumaste has contended, however, that even if he had granted the "B" summary, still, it would be taking cognizance of the offence mentioned in the report, and he further contends that the learned trial Magistrate having given the "A" type of summary, he classified the case as true but undetected, and, therefore, he took cognizance of the offence which was the subject-matter of an investigation by the police. In this connection, Mr. Gumaste, in support of his argument has referred to two cases. In *Emperor v. Baburao Tatyarao*,³ it was held that the expression "taking cognizance of an offence" in s. 190 of the Criminal Procedure Code dealt with a matter of a purely technical nature; and that cognizance was usually taken upon complaint when process was issued, but no restricted interpretation could be given to that expression in the consideration of the character of the action of a Magistrate at any particular stage of the proceeding before him. It was further held that cognizance was taken by the Magistrate in that case upon issue of process before evidence was recorded. Reliance is also placed by Mr. Gumaste on another decision of this Court reported in *Boywalla v. Sorab Engineer*⁴, in which the facts were that a complaint was made to the police regarding an offence under s. 420, Indian Penal Code, on which the police started investigation, arrested the accused and released him on bail. Subsequently, the police applied to a Magistrate to have the bail enlarged, which was done. After further investigation into the matter, a report was sent by the police to the Magistrate that no offence was disclosed, whereupon the Magistrate discharged the accused and cancelled his bail bond. Then he in his turn filed a complaint against the original complainant for the offence under s. 211, Indian Penal Code, and it was held by this Court that, in doing what he had done (in the prior proceedings) the Magistrate had taken cognizance of the case under s. 420 of the Indian Penal Code, and that, therefore, under the provisions of s. 195(b) of the Criminal Procedure Code, 1898, it was that Magistrate alone who could lodge the complaint for an offence punishable under s. 211 of the Indian Penal Code. That case, however, can be distinguished on its own facts. There, on a complaint, the accused was actually arrested and

² (1945) 47 Bom. L.R. 664.

³ (1936) 38 Bom. L.R. 946.

⁴ (1941) 43 Bom. L.R. 529.

released on bail, and, subsequently, the police had applied to the Magistrate to have the bail enlarged. Upon a further report by the police, the Magistrate held that no offence was disclosed and passed an order of discharge, and this is what Sir John Beaumont, C.J. observed at pp. 532-533:

"...Where, in the case of a man who has been arrested and released on bail the police officer reports that there appears to be no case, and invites the Magistrate to discharge the man, the Magistrate is not bound to act upon the police view. He can undoubtedly say: 'I will have a further inquiry in this matter. I think the police are wrong in suggesting that the accused should be discharged.' And he may direct further investigation. On the other hand, I have no doubt that he may say: 'I have no reason for thinking that the report of this police-officer, who is a responsible person, is wrong and if he tells me that after investigation he thinks there is no case, I will do as he suggests and discharge the accused.' But in either case the Magistrate is taking cognizance of the case. He cannot discharge the accused, or direct a further investigation, unless he first takes cognizance."

And Sir John Beaumont expressed the view that in discharging the accused, the Magistrate was making an order similar in character to the order which he could make under s. 203, Criminal Procedure Code, where he acts on a report of the police or an investigation undertaken at his request.

The Criminal Procedure Code has not defined the expression "take cognizance". But it appears clear on decided cases that taking of cognizance is a different thing from initiation of proceedings. The Magistrate may apply his mind and consider a report submitted to him by the police officer under s. 173, Criminal Procedure Code; but, before it could be said that he has taken cognizance under s. 190 of the Criminal Procedure Code, it is not sufficient that he should have applied his mind to the report, but he must do something for proceeding under the subsequent provisions of the Code, for example, under s. 200, under which the Magistrate has to examine the complainant on taking cognizance of an offence. In *Legal Remembrancer v. Abani Kumar*,⁵ it was held that:

"Before it can be said that any Magistrate has taken cognizance of any offence under s. 190(1)(a), he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Chapter. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of the Chapter, but for taking action of some other kind, e.g., ordering investigation under s. 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

Now, this view of the Calcutta High Court has been approved by the Supreme Court in *R. B. Chari v. The State of Uttar Pradesh*,⁶ where their Lordships of the Supreme Court were concerned with a case where the police had applied for a warrant of arrest of the accused for an offence punishable under s. 161 or 165, Indian Penal Code. Under s. 3 of the Prevention of Corruption Act, 1947, such an offence is a cognizable offence for the purpose of the Criminal Procedure Code, subject to the condition that the police officers below the rank of officers mentioned in s. 5A cannot investigate without an order of the Magistrate of the First Class, or make an arrest without a warrant, and, it was held by the Supreme Court that, when the police applied for a warrant of arrest during investigation under s. 3, and the Magistrate issued a warrant, he could not be deemed to have taken cognizance of the case under s. 190 of the Criminal Procedure Code, and, therefore, the fact that sanction of Government under s. 197 of the Code had not been obtained before the warrant was issued would not vitiate the trial. That case, therefore, clearly shows that, where a Magistrate applies his mind only for ordering investigation under s. 5A of the Prevention of Corruption Act, or issues a warrant on the application by the police for the purpose of investigation, the Magistrate is not taking cognizance of the offence. In our opinion, the present case would fall within the principle laid

down in this case. All that was done by the police officer here was to submit a report under s. 173 of the Criminal Procedure Code, and the police wanted the Magistrate to issue a "B" summary, classifying the complaint as maliciously false. In fact, the officer did not want the Magistrate to take any further action on the report. It was open to the Magistrate to grant that type of summary. It was also open to the Magistrate to differ from the view of the police, and, in fact, in this case, the trial Magistrate chose to classify the case as fit for the issue of "A" summary. But, since no further proceedings were intended to be taken, it cannot be said that the learned trial Magistrate in issuing "A" summary had taken cognizance of the offence. In these circumstances, the order of the trial Magistrate cannot be challenged on the ground that it was bad, as he took cognizance of an offence without any previous sanction as contemplated under s. 6 of the Prevention of Corruption Act.

Then Mr. Gumaste has contended that the order of the learned trial Magistrate is wrong on merits. According to Mr. Gumaste, if the Magistrate, after applying his mind to the report submitted to him, came to the conclusion that the allegations were true but the offence was undetected, the latter part of the finding would not be correct in the particular circumstances of this case. Now, this reference was made by the learned Sessions Judge purely on the point of law as to whether the learned trial Magistrate had jurisdiction to consider the report submitted to him under s. 173, Criminal Procedure Code. The Sessions Court has not given any consideration to the merits of the order of the trial Magistrate, which, under the rulings of this Court, is a judicial order. We do not, therefore, propose to express any opinion on the merits of the order passed by the learned trial Magistrate.

The result is that we do not accept the reference, but direct that the papers should be sent down to the Sessions Court to dispose of the Criminal Revision Application on merits.

Reference rejected.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

DATTATRAYA NAGESH DEODHAR v. GANESH RAGHUNATH APTE.*

Court-fees Act (VII of 1870), Sec. 7(iv)(f)—Plaintiff valuing suit for accounts—Defendant not challenging such valuation in Court of first instance—Whether defendant in filing appeal against preliminary decree for accounts can alter valuation made by plaintiff.

Where the plaintiff has made a valuation of a suit for accounts under s. 7(iv)(f) of the Court-fees Act, 1870, and the defendant has not challenged that valuation in the Court of first instance, it is not open to the defendant in filing an appeal against the preliminary decree for accounts to alter the valuation made by the plaintiff for purposes of court-fee.

*Samiya Mavali v. Minammal,*¹ *Srinivasachari v. Perindevaramma,*² *Dhanukodi, In re,*³ *Pochalal v. Umedram*⁴ and *Sheoram v. Atmaram,*⁵ agreed with.

*Vershi v. Kaku,*⁶ *C. K. Umbar v. C. K. Ali Umbar*⁷ and *Chunni Lal v. Shao Charan Lal, Lalman,*⁸ dissented from.

*Fairullah Khan v. Mauladad Khan,*⁹ *Venkatanandam, In re*¹⁰ and *Deoji Goa v. Tricumji Jivan Das*¹¹, referred to.

*Decided, October 31, 1958. First Appeal No. 492 of 1954, against the decision of M. H. Shaikh, Second Joint Civil Judge, Senior Division, Poona, in Special Suit No. 188 of 1951.

1 (1899) I.L.R. 23 Mad. 490.

2 (1915) I.L.R. 39 Mad. 725.

3 [1938] Mad. 598.

4 (1928) 30 Bom. L.R. 1284.

5 [1945] Nag. 17.

6 (1934) 37 Bom. L.R. 148.

7 (1931) I.L.R. 9 Rang. 165.

8 (1935) I.L.R. 47 All. 756.

9 (1929) 31 Bom. L.R. 841, P.C.

10 (1932) I.L.R. 56 Mad. 705.

11 (1935) I.L.R. 14 Pat. 658.

THE facts appear in the judgment.

U. R. Lalit, for *Y. V. Chandrachud*, for the appellant.

B. D. Bal, with *C. R. Dalvi*, for the respondent.

SHAH J. The plaintiff filed Special Civil Suit No. 188 of 1951 in the Court of the 2nd Joint Civil Judge, Senior Division, of Poona, for a declaration that the partnership between him and the defendant stands dissolved on July 29, 1951, or from the date determined by the Court, for an account of the partnership and for a decree for the amount that may be found due on taking such accounts and for costs of the suit. The plaintiff valued the claim at Rs. 10,500 for purposes of court-fee and jurisdiction. The defendant denied the partnership set up by the plaintiff and denied liability to account. The learned trial Judge passed a decree declaring that the business referred to in the plaint was carried on by the parties to the suit in partnership and each party had a half share in the profit and loss in the business thereof. He declared the partnership as dissolved from the date of his order, and appointed a commissioner for taking accounts for determining the amount, if any, due to the plaintiff. Against that decree this appeal has been preferred by the defendant and the defendant has valued the claim for purposes of court-fee and advocate's fee at Rs. 200. The office of the Registrar, when the appeal was filed, raised an objection about the adequacy of the court-fee paid on the memorandum of appeal. The defendant explained that he was entitled to value the claim, in an appeal from a decree for accounts, by virtue of the provision contained in s. 7(v) (f) of the Court-fees Act, at any arbitrary figure he chose and he was not bound in appeal by the valuation made by the plaintiff. The office of the Registrar accepted the contention raised by the defendant and registered the appeal. At the hearing of the appeal an objection has been raised about the valuation of the appeal for purposes of court-fee.

Admittedly, in the trial Court the plaintiff had valued the claim at a consolidated amount of Rs. 10,500 for a declaration and for dissolution of the partnership and for accounts. The reliefs for declaration and for dissolution were however purely incidental to the claim for accounts. Section 7(v) (f) of the Court-fees Act, in so far as it is material, provides:

"The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:

(iv) In suits—...

(f) for accounts—according to the amount at which the relief sought is valued in the plaint or memorandum of appeal, and in all such suits, the plaintiff shall state the amount at which he values the relief sought."

The plaintiff, as we have already stated, valued the claim, at Rs. 10,500. By s. 8 of the Suits Valuation Act, this valuation became determinative of the jurisdiction of the Court to entertain the suit. In the trial Court the defendant did not contend that the valuation made by the plaintiff was arbitrary, and defended the suit on the merits. By the decree it was declared that there was, in fact, a partnership and an account of the partnership was directed. In this appeal the defendant seeks to value the claim for court-fee at Rs. 200. The question which then falls to be determined is whether when the plaintiff has made a valuation of a suit for accounts and the defendant has not challenged that valuation in the Court of first instance, it is open to the defendant in filing an appeal to alter that valuation? In suits governed by s. 7(v) (f) of the Court-fees Act, the plaintiff has to value the relief claimed by him. That value placed by the plaintiff for purposes of court-fee in suits for accounts becomes determinative of the jurisdiction of the Court. There is no express provision in the Court-fees Act which justifies the defendant in altering the valuation made by the plaintiff which is determinative of the value of the subject-matter of the suit for purposes of court-fee. But it is urged by Mr. Lalit, who appears on behalf of the defendant, that when the plaintiff is given under the provi-

sions of the Court-fees Act an option to value the subject-matter of the suit for accounts, the exercise of that option enures only during the suit and after a decree is passed by the Court which tries the suit it is open to the defendant to alter the valuation and value the subject-matter at any amount which in his view is the true value. Mr. Lalit contends that to hold otherwise would enable the plaintiff in a possible case to make an arbitrary and exaggerated valuation of the subject-matter and hold the defendant bound by that valuation in the subsequent proceeding, in the court of appeal. This, Mr. Lalit contends, may work injustice by compelling the defendant to pay an excessive court-fee on a claim which is exaggerated.

We are unable to accept the contention raised by Mr. Lalit. If the subject-matter of any suit has been wrongly valued by the plaintiff, it is open to the defendant to apply to the Court to correct that valuation. If, however, the defendant does not raise a contention in the trial Court that the valuation made by the plaintiff is exaggerated and chooses to join issue on the merits of the case, it will not, in our judgment, be open to him after a decree is passed against him to contend that the valuation made by the plaintiff was exaggerated. In any event, in our judgment, once the valuation of the subject-matter is fixed by the plaintiff by valuing the claim for purposes of court-fee in the manner permitted to him by the Legislature, that valuation of the subject-matter must, in the absence of any provision justifying a departure, enure for the entire proceeding in the suit, and if the defendant desires to challenge the whole decree passed by the trial Court, the defendant must accept that valuation.

The view we have expressed has been taken by a majority of the High Courts in India. According to the High Court of Madras, in a suit for accounts of a partnership the valuation made by the plaintiff is binding upon the defendant when the defendant appeals against the whole decree passed by the Court of first instance directing an account to be taken (see *Samiya Mavali v. Minammal*,¹ *Srinivasachari v. Perindevamma*,² and *Dhanukodi In re*³). The view taken by the Madras High Court has also been approved by this Court in *Pochalal v. Umedram*⁴. In that case Mr. Justice Fawcett and Mr. Justice Baker following the decision in *Srinivasachari's* case held that the defendant in an appeal against a preliminary decree for account, was not, having denied liability to account, competent to alter the valuation of the subject-matter made by the plaintiff. With this view Mr. Justice Mirza did not agree.

The same view was also taken by the Nagpur High Court in *Sheoram v. Atmaram*⁵. Mr. Lalit contends that the view taken by the Madras High Court and followed by this Court and the Nagpur High Court is inconsistent with the decision of their Lordships of the Privy Council in *Faizullah Khan v. Mauladad Khan*⁶. That was a case in which the plaintiff claiming a decree for accounts of a partnership between him and the defendant valued the claim in the Court of first instance at Rs. 3,000 and paid court-fee on that valuation. The defendant denied liability and claimed that at the foot of the account he was entitled to recover a sum exceeding Rs. 29,000 from the plaintiff and he counter-claimed that amount. The Court of first instance passed a decree against the plaintiffs for Rs. 19,991. In filing the appeal to the Court of the Judicial Commissioner, the plaintiffs valued the claim for court-fee at Rs. 19,991 at the same time explaining that the claim was for reversal of the decree against them and for a decree in their favour for the amount claimed. The Judicial Commissioner set aside the decree and remanded the case observing that the plaintiffs having failed to pay court-fee on their original claim of Rs. 3,000 were, if they succeeded in the suit on remand, entitled to have the decree in favour of the defendant vacated but not a decree in their favour on their initial claim. Their Lordships of the Privy Council disagreed with this view

1 (1899) I.L.R. 23 Mad. 490.

2 (1915) I.L.R. 39 Mad. 725.

3 [1938] Mad. 598.

4 (1928) 30 Bom. L.R. 1284.

5 [1943] Nag. 17.

6 (1929) 31 Bom. L.R. 841, p.c.

and held that the court-fee paid on a valuation of Rs. 19,991 sufficiently covered the appeal as a whole including the claim of the defendants on the one hand, and the smaller claim of the plaintiffs on the other. We are unable to appreciate how this decision has any bearing on the question whether the defendant in an appeal against a preliminary decree for an account against him is entitled to alter the valuation initially made by the plaintiff in the suit. This question did not fall to be determined before their Lordships of the Privy Council. Mr. Lalit also contended that in a subsequent judgment of this Court a view different from the one which was expressed in *Pochalal's* case has been expressed; and Mr. Lalit placed reliance on *Vershi v. Kaku*.⁷ That was a case which was decided by Mr. Justice Murphy and Mr. Justice Sen. It does not appear that Mr. Justice Murphy dealt with the question of court-fee. Mr. Justice Sen alone dealt with the question of court-fee payable on the memorandum of appeal. In that case the subject-matter of the suit was valued in the trial Court by the plaintiff at Rs. 5,450 and a decree was passed in favour of the plaintiff. The defendant appealed to the High Court and valued the claim at Rs. 200 and counsel for the plaintiffs raised an objection to the maintainability of the appeal without payment of court-fee on a valuation of Rs. 5,450. Mr. Justice Sen relying upon the observations of their Lordships of the Privy Council in *Faizullah Khan v. Mauladad Khan* and following the judgment of the Madras High Court *Venkatanandam*, In re⁸ held that the decision in *Pochalal v. Umedram* must be held to be over-ruled by the Privy Council. We may observe that the decision in *Venkatanandam* In re has been over-ruled by the subsequent judgment of the same High Court, in *Dhanukodi* In re to which we have already referred, and the observation of the Privy Council in *Faizullah Khan's* case have no bearing on the question which falls to be decided before us. We, therefore, with respect, cannot agree with the view taken by Mr. Justice Sen in *Vershi v. Kaku*.

Our attention was also invited to a judgment of the Patna High Court in *Deoji Goa v. Tricumji Jivan Das*.⁹ In our view that case does not support the contention raised by Mr. Lalit but goes against his contention. The majority view of the full bench was that in a case falling under s. 7(iv)(f) of the Court-fees Act, the defendant preferring an appeal from the preliminary decree should not be permitted to value his appeal at anything less than the valuation in the plaint (provided of course that he is appealing from the whole decree), unless he can demonstrate that there is a valid ground for holding that the plaint was deliberately overvalued.

It is true that the Rangoon High Court in *C. K. Ummar v. C. K. Ali Ummar*¹⁰ and the Allahabad High Court in *Chunni Lal v. Sheo Charan Lal, Lalman*¹¹ appear to have taken the view that the defendant is not bound by the valuation made by the plaintiff in a suit for accounts when he appeals against a preliminary decree passed against him, and he is at liberty to value the appeal, for court-fee, at an amount which may seem to him to be approximately correct. We have carefully considered the grounds which appealed to the Court in *Chunni Lal v. Sheo Charan Lal, Lalman*, and *C. K. Ummar v. C. K. Ali Ummar*, and we are of the view that having regard to the phraseology used in s. 7(iv)(f) of the Court-fees Act, the privilege of fixing the value of the subject-matter of a suit for accounts is with the plaintiff and it is not open to the defendant in an appeal against the preliminary decree for accounts to alter the valuation made by the plaintiff of the subject-matter for purposes of court-fee. On that view, we must hold that the defendant has not paid adequate court-fee on the memorandum of appeal.

We adjourn the hearing for one month and call upon the defendant to pay the court-fee payable by him on the memorandum of appeal.

Order accordingly.

7 (1934) 37 Bom. L.R. 143.

8 (1932) I.L.R. 56 Mad. 705.

9 (1935) I.L.R. 14 Pat. 658.

10 (1931) I.L.R. 9 Rang. 185.

11 (1925) I.L.R. 47 All. 758.

SUPREME COURT

Present: The Hon'ble Mr. Harilal J. Kania, Chief Justice, Mr. Justice Mehr Chand Mahajan and Mr. Justice Chandrasekhara Aiyar.

GEOFFREY MANNERS & CO. LTD. v. THE STATE OF BOMBAY.*

Indian Penal Code (Act XLV of 1860), Secs. 486, 487, 482—Person accused of affixing counterfeit mark—Whether such person can be held guilty of offences under ss. 486, 487 and 482 where existence of genuine mark or goods of true nature not proved.

Sections 482, 486 and 487 of the Indian Penal Code, 1860, require that before a person can be held guilty of affixing a counterfeit mark or to have affixed a false mark on a receptacle containing goods of a "quality or nature different from the real nature," there must be proof of the existence of some genuine mark or goods of the true nature.

THE facts appear at 53 *Bombay Law Reporter* 112.

E. C. Ormond, with *H. J. Unrigar*, for the appellants.

C. K. Daphtary, Advocate General of Bombay, with *G. N. Joshi*, for the respondent.

KANIA C.J. This is an appeal from a judgment and order of the High Court at Bombay convicting the appellants under s. 6 of the Indian Merchandise Marks Act (hereafter referred to as the Act) and s. 486 of the Indian Penal Code, in respect of a toilet preparation described as "Anne French, cleansing milk" with a label affixed thereon. The relevant facts are these. The first appellant company is a private limited company, having its registered office in Bombay. Appellants Nos. 2 and 3 are the directors of the company. They were original accused Nos. 1, 2 and 5. On June 7, 1949, Dr. Dhume, Deputy Director of Industries, Department of Industries, Bombay, filed a complaint against the three appellants and two other directors of the first appellant company alleging that amongst the articles manufactured in Bombay by the accused was a facial cream called Anne French Cleansing Milk which was sold by the accused in bottles with a label on which was printed:

"Anne French
Cleansing Milk
4, Old Bond St. London W1."

The label nowhere stated that the preparation contained in the bottle was produced in India. It was contended that on the contrary the whole get-up and descriptive words on the label were fraudulently intended and calculated to suggest that the bottle contained a preparation manufactured in England. The accused were selling the said preparation with the above described label through various stores, *inter alia*, in Bombay. One of the bottles sold by a retail dealer was purchased by Dr. Dhume on May 30, 1949, with the said label and description. The complainant, therefore, charged the accused with applying false trade description to the goods, e.g. Anne French Cleansing Milk, by affixing on the bottle containing their said preparation a label with the description fraudulently intended and calculated to convey that the said preparation was made in London whereas in fact it was manufactured in India and further selling the said goods with the aforesaid false trade description. A process was issued against all the accused and on November 4, 1949, the Magistrate framed the charge. Dr. Dhume, the shop-keeper from whom he had purchased the bottle and a Drug Inspector gave evidence. The Magistrate, on a consideration of the evidence, acquitted all the accused. The State of Bombay filed an appeal and the High Court reversed the acquittal and by their judgment dated September 13, 1950, convicted the three appellants under ss. 6 and 7 of the Act and also under ss. 482, 486 and 487 of the Indian Penal Code. The High Court passed the sentence of one month's rigorous imprisonment on accused

*Decided, May 11, 1951. Criminal Appeal No. 24 of 1950.

Nos. 2 and 5 (appellants Nos. 2 and 3) and a fine of Rs. 200 under s. 6 of the Act and a sentence of three months' rigorous imprisonment and a fine of Rs. 1,000 under s. 486 of the Indian Penal Code. They did not pass any separate sentences under s. 7 of the Act or ss. 482 and 487 of the Penal Code in view of s. 71 of the Code. The substantive sentences were directed to run concurrently and substantive sentences were passed in default of payment of fine. As regards the company, a fine of Rs. 200 under s. 6 of the Act and Rs. 1,000 under s. 486 of the Indian Penal Code was imposed. The appeals against accused Nos. 3 and 4 were kept pending. Under the powers reserved to it under s. 14 of the Act the Court further ordered the three accused against whom it passed the sentence to pay the costs of the proceedings. The Court directed warrants to issue in pursuance of their judgment. In terms of that order, the writs were issued on the same day. When the transcript of the oral judgment was seen, counsel for the accused and also for the State saw the learned senior Judge in his chambers and desired that if the judgment was not signed they would like the matter to be mentioned in Court so far as the liability of the directors, viz. appellants Nos. 2 and 3, was concerned. The Judge doubted the jurisdiction of the Court to make any alteration or review of its judgment after it was pronounced in a criminal case on the Appellate Side of the High Court but allowed the matter to be argued on October 18, 1950. The Court held¹ that it had no power to alter or review its judgment. The Court, however, granted a certificate that it was a fit case for appeal to the Supreme Court. The appellants have thereupon come in appeal.

The sections under which appellants Nos. 2 and 3 stood their trial all required a guilty intention on their part. Apart from the fact that appellants Nos. 2 and 3 were directors of the first appellant company there was no evidence on record to prove their guilty intention. In the judgment delivered by the Court on October 18, 1950, this point was noticed and the Court observed:

"Therefore on the record as it stood, we would probably not have confirmed the order of acquittal but having set it aside we might either have remanded the case for fresh trial or we might ourselves have asked for fresh evidence to be recorded and certified to us."

The observations from the High Court judgment, quoted above, indicate that if the High Court had the power to review it would not have convicted appellants Nos. 2 and 3 as it had done in its first judgment. The further observations that the Court would have either remanded the matter for fresh trial or directed that additional evidence may be recorded and sent to the High Court overlook the fact that the prosecution had full opportunity to lead evidence before the Magistrate and no question of taking additional evidence to supplement the lacuna in the evidence already led could be deemed to arise. If the prosecution had omitted to prove the guilty intention of the two directors, as required by the sections under which they were charged, it will not be proper to allow them to supplement the evidence at a later stage about twenty months after the prosecution had started. In view of this state of the record, the Advocate-General of Bombay quite properly could not sustain the judgment of the High Court against them on the evidence recorded by the trial Court. The result is that the conviction of appellants Nos. 2 and 3 must be quashed and the sentences passed against them must be set aside. The order of costs made against them must also be revoked.

As regards the first appellant company, the position is this. It is not disputed that the company had manufactured in India the "cleansing milk" and had sold the same in bottles with the label in question. Sections 6 and 7 of the Act run as follows:—

Section 6. "If a person applies a false trade description to goods, he shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in the case of a second or subse-

1 See (1950) 53 Bom. L.R. 117.

factured in England. It was suggested that a trade mark may contain the name of a town or country, and a trade mark may be the trade mark of a manufacturer or of a dealer. It was, therefore, argued that the fact of an address being printed on a label does not amount to a description of the place in which the goods were made or produced. In our opinion, the question whether the description does or does not mean a statement of that kind is a question of fact depending on what is exactly stated in the document in question, the manner in which it is stated and also the goods in relation to which it has been stated. On such questions another judicial decision is hardly an authority as it is almost impossible to have the same facts in two cases. When evidence was given before the Magistrate no alternate suggestion was put forth on behalf of the accused and it was not suggested that any other construction was proper or even plausible. The contention that the address may be a part of the trade mark of the producer or a dealer depends on the facts proved in each case and in the absence of any evidence on record we are unable to take into consideration hypothetical questions which may arise on different facts. In our opinion, the High Court was right in its conclusion that the description "4 Old Bond St. London W1" printed on the label with the various things printed thereon when considered along with the fact that this is a toilet preparation, indirectly means a description as to the place and country in which the goods were made or produced. Unless, therefore, the first defendant company proved facts sufficient to bring its defence within one of the exceptions, it is guilty of an offence under s. 6 of the Act.

It was faintly suggested that there was no evidence about the company "applying" the false trade description to goods. This was based on the absence of affirmative evidence led by the Crown to prove that it was the company which had glued the labels on the bottles. In our opinion it is not necessary even in a criminal case to prove that fact by positive affirmative evidence alone. This fact like others can equally be proved by circumstantial evidence. The company has admitted that the goods contained in the bottle have been prepared by it and that it is selling the goods with the labels in question which were printed in India. The contention that the fact of gluing the labels on the bottles is not proved under the circumstances, in our opinion, has no substance. A limited company has no arms to apply the glue to the labels; it must work through some agent and representative. Therefore, the work of gluing the labels on the bottles may be done by a contractor or a clerk or a peon or workmen of the company or its contractors under the directions of the company. In our opinion, the requirements of the section, on the evidence on record, are fully complied with. In our opinion, therefore, the conviction of appellant No. 1 under s. 6 of the Act is correct. We see no reason to differ from that conclusion or to disturb in any way the order of fine based on that conviction.

In our opinion the sentence passed under s. 486 of the Indian Penal Code is not justified on the facts. The different sections of the Penal Code under which the High Court convicted the accused require one important factor. To hold any of the accused guilty of affixing a counterfeit mark or to have affixed a false mark on a receptacle containing goods of a "quality or nature different from the real nature", there must be proof of the existence of some genuine mark or goods of the true nature, because without such proof the requirements of the sections are not complied with. The evidence on record does not show the existence of any such genuine mark or different true article. We, therefore, think that the High Court erred in convicting the accused under the different sections of the Penal Code or s. 7 of the Act. We, therefore, set aside the conviction and sentence passed on appellant No. 1 in respect of all charges except s. 6 of the Act. Having regard to all the circumstances of the case, in our opinion, this is not a fit case in which the accused should be ordered to pay the costs of the prosecution and that order of the High Court is, therefore, also set aside.

Order accordingly.

quent conviction with imprisonment which may extend to one year, or with fine, or with both.

Section 7. "If a person sells or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied ...he shall, unless he proves—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade description, ...and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(c) that otherwise he had acted innocently,

be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both."

Section 486 of the Indian Penal Code, under which the appellant company was convicted and fined, runs as follows:—

"Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

It is clear that to sustain a conviction under s. 6 of the Act it is necessary to prove that there was a "false trade description". That expression is defined in s. 2(3) as follows:—

"'false trade description' means a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description untrue in a material respect, and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description from being a false trade description within the meaning of this Act."

The expression 'trade description' is defined in s. 2(2)(b), the relevant part of which runs as follows:—

"'trade description' means any description, statement or other indication, direct or indirect—...

(b) as to the place or country in which, or the time at which any goods were made or produced"...

On behalf of the Government it is contended that in the absence of any explanation, the statement "4 Old Bond St. London W1" considered in the position in which it has been printed on the label directly, and in any event indirectly, makes it a description as to the place or country in which the goods were made or produced, and as the goods contained in the bottles were admittedly produced in India, that trade description is untrue in a material respect as regards the goods. The Government, therefore, contend that they have established that the company had applied a false trade description to the goods. The burden of proving the exception in s. 6 is on the company and no attempt has been made to prove it. It was, therefore, contended that the conviction of the company is correct and must be sustained.

On behalf of the company it was firstly argued that the description on the label does not necessarily convey that the contents of the bottles were manu-

APPELLATE CIVIL.

Before Mr. Justice Vyas and Mr. Justice Tambe.

SARASWATI PRINTING PRESS v. THE COMMISSIONER OF
SALES-TAX, EASTERN DIVISION, NAGPUR.*

Hyderabad General Sales Tax Act, 1950, Sec. 2(m), Explan. I(i)—Hyderabad General Sales Tax Rules, 1950, r. 5(3)—Constitution of India, Seventh Sch. List II, item 54—Whether s. 2(m), Explan. I(i)(iv) ultra vires Legislature—Rule 5(3) whether ultra vires Constitution—Printing press purchasing stationery and doing printing work upon it and supplying for price printed stationery to its constituents—Whether such transaction amounts to sale or works contract.

Section 2(m), Explanation I, cl. (i) of the Hyderabad General Sales Tax Act, 1950, and r. 5(3) of the Hyderabad General Sales Tax Rules, 1950, are not hit by item No. 54 of List II in the Seventh Schedule to the Constitution of India, and are not, therefore, *ultra vires* the legislative competence of the Legislature of the former State of Hyderabad.

Rule 5(3) of the Hyderabad General Sales Tax Rules, 1950, is *ultra vires* the Constitution of India as it is arbitrary and not based upon any rational basis.

Where a printing press itself purchases stationery and does printing work upon it and supplies the product to its constituents for a price, the transaction of the press with its constituents amounts to a sale of a commercial commodity viz. the printed stationery.

*Kanpur Journals Ltd. v. Commr. of Sales Tax, U.P.*¹ and *Jubilee Engineering Co. v. S. T. Officer*,² referred to.

THE facts appear in the judgment.

H. G. Vaishnav and *K. B. Deshpande*, for the petitioner.

R. J. Joshi, instructed by *Little and Co.*, for the opponents.

VYAS J. This is an application under art. 226 of the Constitution of India by the petitioner press, Messrs. Saraswati Printing Press, wherein the petitioner has prayed for the setting aside of the order dated September 7, 1956, of the Hyderabad Sales Tax Tribunal, by which order the Tribunal confirmed the order dated July 22, 1955, passed by the Deputy Commissioner, Sales Tax, Hyderabad.

The circumstances which have given rise to this application may be briefly stated. The Marathawada Prakashan Limited, a public limited company, which was registered under the Hyderabad Companies Act, was running a printing press known by the name of the Saraswati Printing Press. This press is situated in Aurangabad. The above-mentioned public limited company sold this press to Messrs. Parmanand Bapuji Muley on March 1, 1954. The petitioner press contends that it accepts contracts for printing works and for the supply of printed goods. On March 10, 1955, the Sales Tax Authority under the Hyderabad General Sales Tax Act took accounts of the petitioner press for the years 1950-51, 1951-52, 1952-53 and 1953-54. The Authority found that for the years 1950-51 and 1952-53, the turnover of the press was not of such an amount as to make it chargeable to sales tax. However, the Authority found that the turnover of the press for the years 1951-52 and 1953-54 was chargeable to sales tax. Accordingly, the Authority made an assessment order on March 31, 1955, charging the petitioner press to sales tax for its turnover for the years 1951-52 and 1953-54. The assessment order was communicated on the same day (March 31, 1955) to the petitioner press. The petitioner press appealed from that order to the Deputy Commissioner, Sales Tax. The Deputy Commissioner modified the order of the Authority. The Deputy Commissioner treated the printing work done by the petitioner press as works

*Decided, July 30, 1958. Special Civil Application No. 861 of 1958.

1 (1956)*7 S.T.C. 661.

2 [1956] A.I.R. Hyd. 70.

contract under the Act and allowed a reduction of 30 per cent. on the total turnover on the ground that the said 30 per cent. represented the cost of labour involved in the printing work. Due to this reduction of 30 per cent., the turnover for the year 1953-54 went down so low that it did not become chargeable. After the reduction of 30 per cent., the turnover for the year 1951-52 only remained chargeable to sales tax. From this order made in appeal by the Deputy Commissioner, Sales Tax, the petitioner press made a second appeal to the Sales Tax Tribunal of the Hyderabad State. The Sales Tax Tribunal rejected the petitioner's appeal on September 1, 1956. It is these orders of the Sales Tax Tribunal and the Deputy Commissioner, Sales Tax, made by them on September 9, 1956, and July 22, 1955, respectively, that are sought to be quashed by the petitioner in this application.

Now, the learned advocate Mr. Deshpande appearing for the petitioner press has raised the following contentions before us:

(1) Section 2, cl. (m), Explanation I, cl. (i), of the Hyderabad General Sales Tax Act, 1950, and r. 5, sub-r. (3), of the Hyderabad General Sales Tax Rules framed under the Act were *ultra vires* the legislative competence of the Legislature of the former State of Hyderabad.

(2) The provisions of r. 5, sub-r. (3), of the Hyderabad General Sales Tax Rules are *ultra vires* the Constitution, in that they are arbitrary and not based upon any rational basis.

(3) Even if the Court holds that s. 2, cl. (m), Explanation I, cl. (i), of the Hyderabad General Sales Tax Act, 1950, and r. 5, sub-r. (3) of the Hyderabad General Sales Tax Rules, 1950, were *intra vires* the legislative competence of the Hyderabad State Legislature and the Constitution respectively, even so the petitioner's case would be covered by cl. (iv) of Explanation I to s. 2, cl. (m) of the Act, and

(4) The supply of the printed material to the customers by the petitioner press would not amount to a sale of goods and, therefore, the turnover which would result from the said supply would not be chargeable to sales tax.

Now, so far as the first point out of the points raised by Mr. Deshpande is concerned, Mr. Deshpande's contention is that the provisions of s. 2, cl. (m), Explanation I, cl. (i), of the Hyderabad General Sales Tax Act and r. 5, sub-r. (3), of the Hyderabad General Sales Tax Rules were *ultra vires* the legislative competence of the State Legislature, in so far as they were hit by item No. 54 of List II mentioned in the VIIth Schedule to the Constitution. Section 2, cl. (m) of the Act provides that "turnover" means the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration. Explanation I, cl. (i) at the foot of s. 2, cl. (m) provides:

"Subject to such conditions and restrictions, if any, as may be prescribed in this behalf, the amount for which goods are sold shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract, less such portion as may be prescribed of such amount representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract."

Rule 5, sub-r. (3) of the Hyderabad General Sales Tax Rules, 1950, provides:

"For the purpose of sub-rule (1) the amount for which goods are sold by a dealer shall in relation to works contract be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Commissioner from time to time for different areas representing the usual proportion in such areas, of the cost of labour to the cost of materials used in carrying out such contract, subject to the following maximum percentages:

- (a) in the case of an electrical contract...20 per cent;
- (b) in the case of a structural contract...30 per cent;
- (c) in the case of a sanitary contract...33-1/3 per cent;
- (d) in the case of other contracts...30 per cent."

Since there is a reference to sub-r. (1) in sub-r. (3), it would be convenient to

set out the provisions of sub-r. (1) of r. 5 as well in this context. Sub-rule (1) provides:

"Save as provided in sub-rule (2), the turnover of a dealer for the purpose of these rules shall be the amount for which goods are sold by the dealer."

Now, as I have stated above, the contention of Mr. Deshpande for the petitioner press is that the aforesaid provision of s. 2, cl. (m), Explanation I, cl. (i), of the Act and the provisions of r. 5, sub-r. (3) of the Rules are in violation of the Constitution of India, in that they are hit by item No. 54, List II, mentioned in Schedule VII to the Constitution. Now, if we turn to item No. 54, it relates to "taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92-A of List I." Mr. Deshpande's contention is that the transactions of the petitioner press with its constituents are not sales so as to fall within the ambit of item No. 54 mentioned in List II of the VIIth Schedule to the Constitution. It is Mr. Deshpande's contention that the dealings done by the petitioner press are contracts for services, in other words works contracts and, says Mr. Deshpande, the charges levied by the petitioner press from its constituents are in respect of the services rendered by the press to the constituents. In these circumstances, Mr. Deshpande says that the transactions of the petitioner press would not amount to sales within the meaning of entry No. 54. We have considered this contention of Mr. Deshpande, but we are unable to see force in it. There is no doubt that the essential character of the work done by the petitioner press is the supply of stationery. It is no doubt true that upon the stationery supplied by the press to its constituents, a certain amount of printing work is done by the press. But that is not the essential character of the business done by the press. It cannot be disputed that the petitioner press brings into existence printed stationery according to the orders of the individual customers, and when the press brings into existence such stationery, it produces a commercial commodity which is capable of being sold or supplied. Therefore, when the press sells printed material to its constituents, it sells goods to the constituents upon which sales tax is leviable. The learned advocate Mr. Deshpande also fairly concedes that when the printed material is sold by the press to its customers, there is a sale of finished goods to the customers. What Mr. Deshpande contends for, however, is that the essence of the work done by the press is not production of finished goods, but the printing work. It is in this manner that Mr. Deshpande contends that the transactions done by the petitioner press with its constituents are in the nature of works contracts. Now, the nature of a contract must be determined by the substance of the contract. As the learned Judges of the Allahabad High Court pointed out in *Kanpur Journals Ltd. v. Commr. of Sales Tax, U.P.*¹ (p. 664):

"...We think it now to be established that in order to determine the nature of a contract the Court has to look at its substance. If the substance of the contract is the production of something to be sold to the customer,—such as a suit of clothes—then that is a sale of goods. If, on the other hand, the substance of the contract is that skill and labour have to be exercised for the production of the article, and that it is only ancillary to that that there will pass to the customer some materials in addition to the skill involved—as in the case of an oil painting—the contract will be one of work."

In our opinion, there can be no doubt that the substance of the transactions which the petitioner press enters into with its constituents is the production of something to be sold to the constituents. It is no doubt true that a certain amount of printing work which requires skill and labour is done on the stationery. But unless there is the base of the stationery itself, there would be nothing upon which the skill of the petitioner press could be used. It would have been a different matter if the stationery were to be supplied by the constituents to the press. But that is not the case here. It is a conceded position that the petitioner press itself purchases stationery, and having purchased the stationery, it does printing work upon it. In these circumstances, the essential

character of the business done by the petitioner press is the supply of the stationery itself to the constituents with the printing work done upon that stationery. It would not matter where the press would purchase the stationery from. So far as the relations of the press with its constituents are concerned, the constituents purchase the stationery itself together with the printing material upon it from the press. Therefore, we have no doubt that this is a case in which a commercial commodity, which is a finished product, viz. the printed stationery etc. is sold by the press to its constituents.

Mr. Deshpande has invited our attention to a decision of the Hyderabad High Court in *Jubilee Engineering Co. v. S. T. Officer*². In this case, and be it noted that it was a case of a building contract, it was observed by the Court, agreeing with the view of the Madras High Court, that the power of the provincial Legislature to levy a tax on sale of goods was confined and restricted only to the transaction of sale as understood by the Parliament of the United Kingdom in the law relating to the sale of goods, and any attempt of the Legislature to tax under the guise or under the pretence of such a power transactions which were wholly outside would be *ultra vires* and must be declared invalid. Now, it is to be remembered that a building contract is one entire indivisible contract and in such a contract there is no sale of goods. One fundamental difference between a building contract and the work done by the petitioner press is that in a building contract, the various materials which are used in the process of constructing a building lose their original character, viz. the character of moveable property and get converted into parts of immoveable property by being fixed to a building. It is this important aspect of a building contract which distinguishes it from the work done by the petitioner press. As I have mentioned above, the press purchases stationery and brings into existence a finished product, viz. the printed material and, therefore, when it supplies that product to its constituents, it sells it to the constituents. We are, therefore, unable to accept the contention of Mr. Deshpande that the provisions of s. 2, cl. (m), Explanation 1, cl. (i) of the Hyderabad General Sales Tax Act and r. 5, sub-r. (3), of the Hyderabad General Sales Tax Rules were *ultra vires* the legislative competence of the Legislature of the former State of Hyderabad.

The next point which has been canvassed before us by Mr. Deshpande is that r. 5, sub-r. (3) of the Hyderabad General Sales Tax Rules is *ultra vires* the Constitution as it is arbitrary and not based upon any rational basis. Now, if we turn to r. 5, sub-r. (3), it virtually provides that the sale price of the goods shall be calculated at 70 per cent. of the price paid by the customers. Under sub-r. (3); a deduction of 30 per cent. is to be made towards the cost of labour in case of contracts other than electrical contracts or structural contracts or sanitary contracts. The fixation of the cost of labour at 30 per cent. and the fixation of the sale price at 70 per cent. of the amount realised from the customers are both arbitrary. The learned counsel Mr. Joshi appearing for the respondents in this case has not been able to point out to us any rational basis upon which the above-mentioned percentages were fixed. We are not told that these percentages were fixed upon any enquiry made by the State of Hyderabad or upon the recording of any evidence. Apart from this infirmity which attaches to sub-r. (3) of r. 5 of the Hyderabad General Sales Tax Rules, 1950, it is also to be borne in mind that sub-r. (3) could only be attracted in case of a works contract. Sub-rule (3) provides:

"For the purpose of sub-r. (1), the amount for which goods are sold by a dealer shall in relation to works contract be deemed..."

Now, for the reasons stated in the earlier part of this judgment, we have come to the conclusion that the transactions which are done by the petitioner press for its constituents are not in the nature of works contracts. They are sales of goods. That being so, a recourse to sub-r. (3) of r. 5 of the Hyderabad General Sales Tax Rules, 1950, could not validly avail the respondents. Therefore, on both the grounds, viz. the ground that sub-r. (3) of r. 5 is *ultra vires*

the Constitution in that it is arbitrary and is lacking in any rational basis and also upon the ground that the provisions of this sub-rule could not be attracted in the present case which is not a case of works contract, the levy of sales-tax upon the petitioner press could not be justified.

The third point which Mr. Deshpande has pressed before us is that even in case the Court holds that s. 2, cl. (m), Explanation I, cl. (i), of the Hyderabad General Sales Tax Act and r. 5, sub-r. (3) of the Hyderabad General Sales Tax Rules were *intra vires* the legislative competence of the Legislature of the former State of Hyderabad, even so the petitioner's case would fall within the ambit of cl. (iv) of Explanation I to s. 2, cl. (m) of the Act. We are unable to agree with Mr. Deshpande. Clause (iv) of Explanation I provides:

"Where for accommodating a particular customer, a dealer obtains goods from another dealer and immediately disposes of the same to the said customer, the sale in respect of such goods shall be included in the turnover of the latter dealer but not in that of the former."

Mr. Deshpande says that in the present case, for accommodating its customers, the petitioner press obtains goods from other dealers in the market and disposes of the said goods in favour of its own constituents and, therefore, the sale in respect of such goods should be included in the turnover of the constituents and should not be included in the turnover of the press itself. Mr. Deshpande appears to overlook the importance of the word "immediately" which the Legislature has used in cl. (iv) of Explanation I to s. 2, cl. (m). Had this been a case in which the press, after purchasing the stationery from the market, were to hand over the said stationery immediately to the constituents, it would have been a different thing. Here the press does not immediately dispose of the stationery purchased by it in favour of its constituents. It keeps it in the press. It prints letter-heads etc. upon the stationery and then supplies the finished product to the constituents. That being so, the provisions of cl. (iv) of Explanation I at the foot of cl. (m) of s. 2 would not be attracted in this case.

The last point of Mr. Deshpande is that the supply of the printed material to the constituents by the press would not amount to a sale. We have already dealt with this point while dealing with point No. 1 of the points pressed before us by Mr. Deshpande. Therefore, it is not necessary to add any more observations in respect of this point.

As, in our view, the transactions done by the petitioner press with its constituents are sales of goods, and are not in the nature of works contracts, r. 5, sub-r. (3) would not be attracted in the present case, and as this sub-rule itself is arbitrary as held by the Hyderabad High Court in *Jubilee Engineering Co. v. S. T. Officer*, the turnover of the petitioner press would not be chargeable to sales tax. Accordingly, the order made by the Sales Tax Tribunal on September 7, 1956, whereby it confirmed the order of the Deputy Commissioner, Sales Tax dated July 22, 1955, must be reversed and the application must be allowed. The respondents will bear their own costs and also pay the costs of the petitioner. The respondents are hereby restrained from recovering the sales tax from the petitioner press for the year 1951-52, for which a notice of demand was issued upon the petitioner.

Application allowed.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

THE AHMEDABAD PEOPLE'S CO-OPERATIVE BANK LTD.

v.

PRADIP AMRATLAL ATMARAM BHAGAT.*

Mortgage—Equitable mortgage—Sole surviving coparcener mortgaging property vested in him to bank—Cash credit loan account for specified amount opened with bank as consideration for mortgage—Mortgagor covenanting to repay loan after one year, and on failure to do so, bank entitled to recover amount due by sale of mortgaged property—Two extensions of one year each granted by bank of cash credit loan arrangement—Enforcement of mortgage by bank on failure of mortgagor to pay amount found due at foot of account—Suit by son of mortgagor born after date of execution of mortgage and not conceived on or before that date for declaration that mortgage not binding upon his share in mortgaged property—Whether son can challenge mortgage—Mortgage whether continued to remain in operation notwithstanding the two extensions of cash credit arrangement—Whether mortgage became effective on the date of its execution.

The defendant on June 4, 1947, executed a mortgage deed, called a deed of equitable mortgage, in respect of certain property belonging to him, in favour of a co-operative bank to secure a loan for a certain amount. On the date of the execution of the deed the defendant was the sole coparcener in a joint Hindu family. The deed *inter alia* stated that the defendant had opened a cash credit loan account with the bank for developing his business and the defendant could from time to time withdraw upto the amount of the mortgage loan. Under the deed the defendant covenanted to repay to the bank on or before June 3, 1948, the amount received by him or whatever amount he might withdraw from the cash credit loan account and it was stipulated that the mortgage documents were to remain in possession of the bank till the mortgage amount was repaid by the defendant. It was also provided that if the defendant failed to repay the loan within the time stipulated, the bank was entitled to recover it by sale of the mortgaged property. On May 4, 1948, and again on June 3, 1949, the defendant made applications for extension of the cash credit loan arrangement for a period of one year respectively and both the extensions were granted. On June 3, 1950, a certain amount remained due to the bank at the foot of the account and as the defendant remained indebted in that account till 1952, proceedings were taken against him under the Bombay Co-operative Societies Act, 1925. An award was obtained by the bank under which the defendant was directed to pay the amount due out of the mortgaged property. The plaintiff, who was the son of the defendant, born on April 23, 1948, and who was not conceived on or before June 4, 1947, filed a suit *inter alia* for a declaration that the mortgage of the property executed by the defendant in favour of the bank and the award in favour of the bank were not binding upon his share in the property mortgaged:—

Held, that the mortgage was binding upon the defendant who as the sole surviving coparcener was competent to dispose of the property vested in him and the plaintiff not being in existence at the date of the mortgage could not challenge it,

that notwithstanding the applications for renewal of the agreement under which the cash credit arrangement was extended, the mortgage continued to operate on the property,

that when the deed of mortgage was executed for a consideration which was to be advanced in future, the mortgage became effective and enforceable against the totality of the interest of the joint family of which the defendant was the sole surviving co-parcener and the birth of the plaintiff subsequently did not affect the enforceability of that mortgage against that interest, and

that, therefore, the award obtained by the bank against the defendant was binding upon the plaintiff's share in the property mortgaged.

*Raghunath Bhagat v. Amir Bakhsh*¹ and *Tatia v. Babaji*,² referred to.

*Decided, November 5/6, 1958. First Appeal No. 75 of 1955, against the decision of H. L. Bhatt, Joint Civil Judge, Senior Division, at Ah-

medabad, in Regular Civil Suit No. 286 of 1952.

1 (1923) I.L.R. 1 Pat. 281.

2 (1896) I.L.R. 22 Bom. 176.

THE facts appear in the judgment.

S. M. Shah, with *B. G. Thakore*, for the appellant.

A. H. Mehta, for respondent No. 1.

M. P. Sethna, for respondent No. 2.

SHAH J. The plaintiff, who is a minor, sued through his next friend for (1) a declaration that the mortgage of the properties described in sub-paras. (a) and (b) of para. 16 of the plaint effected by defendant No. 1 in favour of defendant No. 4 and an award in favour of defendant No. 4 by the Registrar under the Bombay Co-operative Societies Act are not binding upon the plaintiff's share in the properties mortgaged; (2) for a declaration that a sale-deed dated October 20, 1949, executed by defendant No. 1 in favour of defendant No. 2 conveying the property described in sub-para. (1) of para. 16 of the plaint is not binding upon the plaintiff, the same being without consideration and brought about by undue influence; (3) that an agreement of sale entered into by defendant No. 1 on January 23, 1950, with defendant No. 3 for sale of the properties described in para. 16 of the plaint is without consideration and without legal necessity; (4) for partition and separate possession of his share in the properties described in para. 16 of the plaint and (5) for an injunction restraining defendant No. 4 from executing the award obtained under the Bombay Co-operative Societies Act against defendant No. 1. The learned trial Judge decreed the plaintiff's suit. Against that decree defendant No. 4 alone has appealed to this Court.

In order to appreciate the claim made by the plaintiff certain material facts may be set out. The plaintiff is the son of defendant No. 1. Defendant No. 5 is the mother of the plaintiff and defendants Nos. 6 to 8 are his sisters. On June 4, 1947, defendant No. 1 was the sole co-parcener in that family. The plaintiff was born on April 23, 1948, and it is conceded that he was not conceived on or before June 4, 1947. On May 23, 1947, defendant No. 1 applied to defendant No. 4, which is a co-operative bank, for a loan of Rs. 8,800 on the security of his property and on June 4, 1947, a mortgage-deed, which is called a deed of equitable mortgage, was executed by defendant No. 1 in favour of defendant No. 4. By the preamble of the deed it was recited that defendant No. 1 had mortgaged to defendant No. 4 two houses belonging to him on the terms and conditions set out therein. By the first paragraph it was recited that defendant No. 1 had opened a cash credit loan account with defendant No. 4 for developing his "radio business." The limit up to which defendant No. 1 could withdraw was fixed at Rs. 8,800, and interest and as security for repayment of the said amount and interest thereon, defendant No. 1 executed a deed of equitable mortgage in favour of defendant No. 4. By the 2nd paragraph a covenant of title in the property mortgaged was guaranteed and it was stipulated that the mortgage documents were to remain in the possession of defendant No. 4 till the amount of Rs. 8,800 together with interest due thereon was repaid to defendant No. 4. It was recited in sub-para. (1) that the loan was sanctioned on May 22, 1947, to be advanced according to the rules and regulations of the bank and the same was advanced to defendant No. 1 on the date of the execution of the mortgage. By the 2nd sub-para. defendant No. 1 covenanted to repay to defendant No. 4 on or before June 3, 1948, the amount received by him or whatever amount he might withdraw from the cash credit loan account sanctioned by the bank together with interest and other incidental expenses. By the fifth sub-para. defendant No. 1 agreed to repay the cash credit loan together with interest and other expenses within the period stipulated or within any other period fixed by the rules and regulations of the bank. By the 6th sub-para. it was provided that in the event of defendant No. 1 failing to repay the loan with interest within the time stipulated together with interest thereon, defendant No. 4 will be entitled to recover the same with interest by sale of the property.

The loan was sanctioned to be advanced by defendant No. 4 to defendant No. 1 on May 22, 1947, and on June 4, 1947, defendant No. 1 executed the deed of mortgage thereby creating an encumbrance for repayment of Rs. 8,000 and interest on the property described therein in favour of defendant No. 4. It appears that by June 3, 1948, the amount advanced to defendant No. 1 was not repaid and defendant No. 1 submitted an application exh. 71 dated May 4, 1948, reciting therein that the period of the loan was expiring on June 4, 1948, and praying for extension of the cash credit loan arrangement for a further period of twelve months.

On June 4, 1948, the amount due at the foot of the cash credit loan account stood at Rs. 2,552. On that date pursuant to the application exh. 71 the cash credit arrangement was extended for one year. Between June 21 and July 2, defendant No. 1 made various repayments and on June 30, 1948, the balance due was Rs. 2-9-0 only. Thereafter the account continued and defendant No. 1 again withdrew large sums of money. On June 3, 1949, the balance due stood at Rs. 8,591-13-9. On that date another application exh. 72 was submitted by defendant No. 1 for extension of the cash credit arrangement for one year more and the extension was granted by defendant No. 4. Pursuant to this arrangement, again defendant No. 1 operated upon the account and on June 3, 1950, Rs. 8,894-8-3 remained due at the foot of the account. No further extension was thereafter asked for but defendant No. 1 remained indebted in that account till the year 1952 when proceedings were taken against him before the Registrar of Co-operative Societies and an award under the Bombay Co-operative Societies Act was obtained by defendant No. 4. By the award defendant No. 1 was directed to pay the amount due at the foot of the account out of the mortgaged property and personally. Defendant No. 4 then filed Darkhast No. 280 of 1952 in the Court of the Third Joint Civil Judge (Junior Division), Ahmedabad, for execution of the award. It appears that in the meanwhile defendant No. 1 had transferred city survey No. 2281, one of the two properties mortgaged by him to defendant No. 4, under a sale-deed dated October 20, 1949, for Rs. 10,000 to defendant No. 2. This sale-deed was registered on October 24, 1949. Defendant No. 1 also agreed to sell both the houses on January 23, 1950, to defendant No. 3. The plaintiff, who is a minor son of defendant No. 1, then filed Civil Suit No. 236 of 1952 in the Court of the Joint Civil Judge, Senior Division, at Ahmedabad for the reliefs which we have set out earlier. The suit was resisted by defendants Nos. 2, 3 and 4. In this appeal we are concerned with the contentions raised by defendant No. 4 only.

Defendant No. 4 contended *inter alia* that the mortgage was binding upon the plaintiff because he was not born on the date of the mortgage, that defendant No. 1 on that date being the sole surviving co-parcener was entitled to deal with the property as absolute owner thereof, that in any event the alienation was binding upon the plaintiff as it was supported by legal necessity of the family, that is, for the business carried on by defendant No. 1, and that the plaintiff could not resist execution of the award obtained by defendant No. 4 and that the plaintiff had no cause of action for the suit against defendant No. 4.

The learned trial Judge decreed the plaintiff's suit and declared that the plaintiff had 1/3 share in the suit properties described in paras. 16(a) and 16(b) of the plaint and further declared that the award obtained by defendant No. 4 against defendant No. 1 was not binding upon the plaintiff's share in the suit property. He also declared that the sale-deed dated October 20, 1949, in favour of defendant No. 2 was not binding on the plaintiff's share if the plaintiff paid Rs. 1,666-10-8 to defendant No. 2. The learned trial Judge also granted an injunction restraining defendant No. 4 from executing the award against the plaintiff's share in the suit properties, and directed that the plaintiff do recover possession of his one-third share in the suit properties. Against that decree defendant No. 4 has appealed to this Court.

In holding that the plaintiff was not bound by the mortgage created by

defendant No. 1 in favour of defendant No. 4, the learned trial Judge held that the encumbrance created by the mortgage-deed dated June 4, 1947, was only in respect of the advances to be made during the course of one year from that date, and that encumbrance could not be enforced by the bank to recover advances made after the expiry of one year from the date of the mortgage, and that in the absence of a renewal of the account, the bank could not make any fresh advances after June 3, 1948. He was also inclined to take the view that each agreement for renewal of the cash credit account created a fresh mortgage by "constructive deposit of title-deeds" and the constructive deposit of title-deeds under exhs. 71 and 72 after the plaintiff was born, in law amounted to the creation of fresh mortgages in favour of defendant No. 4 on the respective dates of those two documents, and consequently on June 4, 1948, defendant No. 1 must be deemed to have created a fresh mortgage in favour of the bank for securing re-payment of Rs. 8,526-4-9 and future advances to be made within the course of the next one year subject to the maximum limit under the original mortgage deed and on June 3, 1949, defendant No. 1 must be deemed to have created a fresh mortgage for securing repayment of an antecedent debt of Rs. 8,591-13-9 and for future advances to be made during the course of that year. He then held that the antecedent debt which was outstanding on June 4, 1949, was satisfied by repayments made by defendant No. 1 during the course of the year and the entire balance outstanding against defendant No. 1 on June 3, 1950, consisted of items withdrawn during the course of the year and thereafter as the account was not renewed the award obtained by defendant No. 4 must be held enforceable against the interest of defendant No. 1 alone in the property mortgaged and not against the interest of the plaintiff.

We are unable to agree with the view taken by the learned trial Judge. It is undisputed that on June 4, 1947, the plaintiff was not born and defendant No. 1 as the sole surviving co-parcener of the joint Hindu family was competent to dispose of the property vested in him even for purposes not supported by legal necessity. On that date a mortgage deed was executed by defendant No. 1 in favour of defendant No. 4 in which it was expressly recited that Rs. 8,800 were borrowed by him and as security for repayment thereof, the two houses in suit were mortgaged. Evidently the mortgage-deed was for consideration. It is true that the amount of Rs. 8,800 was not in fact paid immediately to defendant No. 1 but was credited to defendant No. 1 in a separate cash credit account. It appears from exh. 60, which is a statement of account, that on June 4, 1947, Rs. 8,800 were credited to defendant No. 1's account and Rs. 645 were advanced to defendant No. 1 on the date of the execution of the mortgage. But on that account we are unable to hold that the mortgage for the full amount of Rs. 8,800 was not binding upon defendant No. 1. In substance there was a dual arrangement. For securing repayment of Rs. 8,800 defendant No. 1 on June 4, 1947, mortgaged the properties belonging to him to defendant No. 4 and thereafter under another arrangement he left the amount with defendant No. 4 bank to be called for as and when required. This second arrangement was called the cash credit loan account. The learned trial Judge's observation, that the security created on June 4, 1947, was only in respect of the advances to be made during the course of one year, does not find any support from the covenant contained in the mortgage-deed. The deed merely provided that defendant No. 1 shall repay the amount of Rs. 8,800 within one year, and there was in fact no covenant in the deed whereby the security was to enure only in respect of advances made during the course of one year. There is no covenant again in the deed which supports the view of the learned Judge that defendant No. 4 could not make any fresh advances after June 3, 1948. It is true that according to Mr. Setalwad, the Manager of defendant No. 4 bank, cash credit arrangement was good for one year, and after the expiry of one year, the bank would not have advanced any amount unless the arrangement was renewed, but that evidence, in our judgment, does

not justify the inference that the encumbrance created by the mortgage-deed was restricted to amounts advanced during the course of one year or that the bank was prohibited from making any fresh advances after June 3, 1948. It is true that before the date of the application exh. 71, the plaintiff was born and acquired an interest in the joint family property by his birth, but if the future advances were to be made in consideration of an agreement to make advances to defendant No. 1 as and when required subject to the maximum limit of Rs. 8,800 and defendant No. 1 executed a deed of mortgage at a time when the plaintiff was not in existence, that mortgage, in our judgment, must be regarded as binding upon defendant No. 1; and the plaintiff, not being in existence at the date of the mortgage cannot challenge the same. The application exh. 71 whereby the cash credit arrangement was extended for a period of one year does not, in our judgment, affect the liability which was undertaken by the deed of mortgage. We are unable to hold that the law recognises a "constructive deposit of title-deeds" as creating a mortgage. Normally a mortgage of immovable property is effected by an instrument duly executed and registered. Even if an equitable mortgage is intended to be created, there must be a deposit of title deeds of properties to be mortgaged with intent to mortgage the same as security for repayment of the loan advanced or to be advanced. In the absence of anything to show that the security under the original deed of mortgage created by the deed exh. 70, was extinguished, there is, in our judgment, no support for this theory of a fresh mortgage coming into existence by the application exh. 71 dated June 4, 1948, and of another mortgage by a subsequent application exh. 72 dated June 4, 1949.

Even if the mortgage-deed and the cash credit account be regarded as parts of the same transaction, in our judgment, the mortgage-deed executed by defendant No. 1 on June 4, 1947, must still be regarded as binding upon the plaintiff. Defendant No. 1 had by the deed undertaken liability to repay within one year, the loan of Rs. 8,800 advanced to him. That covenant does not warrant the assumption made by the learned trial Judge that on the expiration of the year, the mortgage became unenforceable. The extension of the cash credit arrangement beyond the period of one year initially contemplated also has not the effect of extinguishing the original encumbrance or substituting it by a fresh encumbrance. It must, in our judgment, be held that the mortgage continued to operate on the properties, renewal of the arrangement under which the cash credit arrangement was extended by applications under exh. 71 and exh. 72 notwithstanding.

Section 58 of the Transfer of Property Act which defines a mortgage states:

"A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability."

From the plain words of the statute for transfer of an interest in immovable property to secure repayment of money, there need not be a present advance at the date of the execution of the deed. Even an agreement to advance money in future will support a mortgage. As has been held in *Raghunath Bhagat v. Amir Baksh*,¹ a mortgage is perfected by registration, and unless the bond provides to the contrary, it takes effect from the date of registration and not from the date when the consideration money is paid. In that case the consideration money was to be paid in pursuance of an arrangement between the parties after the date of execution of the deed of mortgage. Before receiving the consideration agreed to be paid the mortgagor transferred the property by a sale-deed to a third person and there was a contest between the mortgagees and the purchaser. The Patna High Court held that the mortgage document became effective from the date of the execution and the transfer to the third person was subject to the mortgage. In so holding Mr. Justice P. R. Das relied

¹ (1922) I.L.R. 1 Pat. 281.

upon the observations made by this Court in *Tatia v. Babaji*² where Chief Justice Farran observed (p. 183):

"...I am not, however,...prepared to assent to the train of thought which puts conveyances of lands...perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem to me to have been sufficiently borne in mind throughout the judgment."

When the deed of mortgage was executed for a consideration of Rs. 8,800 which was to be advanced in future, the mortgage became effective and enforceable against the totality of the interest of the joint family of which defendant No. 1 was the sole co-parcener and the birth of the plaintiff subsequently did not affect the enforceability of that mortgage against that interest.

Even on the view taken by the learned trial Judge, which, we may observe, we are not prepared to accept his conclusion cannot be accepted. Assuming for the sake of argument that in the month of June 1949 there was, what he calls, a "constructive deposit of title deeds", which gave rise to a new mortgage for a sum of Rs. 8,526-4-9 in favour of defendant No. 4, which the learned trial Judge concedes was an antecedent debt for which defendant No. 1 was liable, we are unable to appreciate why defendant No. 4 is not entitled to enforce that mortgage against the interest of the plaintiff in the joint family property for satisfaction of that debt. A Hindu son is under a pious obligation to pay the debts of his father which are not *Avyavaharika*, and an alienation by a Hindu father for payment of antecedent debts which are not *Avyavaharika*, is binding upon the sons, who are members of the joint Hindu family with the father. If, on June 4, 1949, even assuming the theory, which has been evolved by the learned trial Judge, be correct, there came into existence a fresh mortgage to secure repayment of an antecedent debt of Rs. 8,591-13-0, that mortgage, in our judgment, was enforceable against the interest of the joint family in the property mortgaged and the circumstance that the mortgage amount was credited into an account operated upon by defendant No. 1 was a cash credit account, and payments were made in that account and withdrawals were made from that account, did not affect the enforceability of the mortgage for the amount due at the foot of the account. We are, therefore, of the view that even on the view taken which appealed to the learned trial Judge his conclusion cannot be supported.

The plaintiff had attempted to make out a case that the debts incurred by defendant No. 1 were tainted with immorality. The learned trial Judge negatived that contention and no arguments have been advanced before us in support of that contention. On the view taken by us the decree passed by the trial Court against defendant No. 4 must be set aside. Defendant No. 2 against whom a decree has been passed by the trial Court has not appealed to this Court and we are unable to alter that decree.

On the view taken by us the second sentence of the decretal order will be deleted and will be substituted by the following order.

"It is further declared that the award decree obtained by the 4th defendant against the 1st defendant under the Co-operative Societies Act is binding upon the plaintiff's one-third share in the suit properties."

The last sentence in the first paragraph of the decretal order will also be deleted. The second paragraph of the decretal order will be modified by adding after the words "it is ordered" the words "subject to the directions contained in paragraph (1) of the decretal order". The order regarding the costs passed by the learned trial Judge will be deleted. The plaintiff's suit against defendant No. 4 will be dismissed with costs payable to defendant No. 4. The appeal will be allowed. Defendant No. 4 will be entitled to its costs in this appeal from the plaintiffs.

Appeal allowed.

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

THE NEW SHORROCK SPG. & MFG. COMPANY LIMITED

v.

N. V. RAVAL.*

Indian Income-tax Act (XI of 1922), Sec. 35(10)—Income-tax Officer allowing rebate on undistributed profits of assessee company under Part I, Para B, proviso (i) of Schedules of Finance Acts of 1950-52 for calendar years 1949-51—Assessee company showing loss in calendar year 1952, but paying dividend for that year out of profits made by it in 1949-51—Income-tax Officer passing order under s. 35(10)—Whether Income-tax Officer had power to pass such order.

For the assessment years 1950-51, 1951-52 and 1952-53 the Income-tax Officer passed orders on various dates assessing the total income of the assessee company for the relevant assessment years, the previous years being calendar years 1949, 1950 and 1951. At the time of making these assessments the Income-tax Officer allowed a rebate of income-tax on undistributed profits under Part I, Para. B, proviso (i) of the relevant Schedules to the Finance Acts of 1950, 1951 and 1952. For the assessment year 1953-54, the calendar year being 1952, the assessment order showed that the assessee company had incurred losses. The assessee company, however, declared and paid dividend for the calendar year 1952 and these were paid out of the reserves formed out of the profits of the previous years viz. 1949, 1950 and 1951, which had been subjected to tax. The Income-tax Officer called upon the assessee company to show cause why action should not be taken under s. 35(10) of the Indian Income-tax Act, 1922, as, according to him, dividends declared by the assessee company for the assessment year 1953-54 had come out of reserves of earlier years on which rebate was allowed on undistributed profits. The Income-tax Officer ultimately passed orders on the assessee company under s. 35(10) of the Act. The assessee company challenged the orders contending that as the provisions of s. 35(10), which were added by the Finance Act, 1956, and came into force on April 1, 1956, became operative only from April 1, 1956, the original assessment orders, which had been made before that date, had become final and conclusive before that date and these assessments could not be affected or touched or altered in any manner by the subsequent legislation introduced for the first time by s. 35(10):—

Held, that on a fair reading of s. 35(10) of the Act the Income-tax Officer in the instant case was authorised to recompute the tax payable by the assessee company by reducing the rebate originally allowed as if the recomputation was a rectification of a mistake apparent from the record and, therefore, he had the power to pass the impugned order under s. 35(10).

Chatturam v. Commissioner of Income-tax, Bihar and *Venkatachalam v. Bombay Dyeing and Mfg. Co. Ltd.*,^{*} referred to.

THE facts appear in the judgment.

R. J. Kolah, with *N. A. Palkhivala* and *P. Ramaswamy*, for the petitioner.
G. N. Joshi, for the respondent.

S. T. DESAI J. This petition for a writ of *certiorari* or a writ of *mandamus* or a writ of prohibition raises a rather important question of the construction of s. 35(10) of the Income-tax Act. Sub-section (10) of s. 35 was introduced by amendment brought about by the Finance Act, 1956. We shall have occasion to refer to the amendment little later in our judgment. The facts succinctly stated are these. The petitioner, the New Shorrock Spg. and Mfg. Co. Ltd., which carries on business of manufacturing and selling textiles, has its registered office at Ahmedabad. Respondent No. 1 is the Income-tax Officer having jurisdiction to assess the petitioner. The assessment years in respect of which this petition arises are 1950-51, 1951-52 and 1952-53.

* *Decided, November 6, 1958.* Special Civil Application No. 1609 of 1958.

1 [1947] F. C. R. 116.

2 (1958) 34 I.T.R. 143.

For the assessment year 1950-51 (previous year ending December 31, 1949) the Income-tax Officer had passed an order on January 18, 1951, assessing the total income of the petitioner-mills at Rs. 30,30,822. At that time, in accordance with the provision contained in cl. (1) of the proviso to para. B of Part I of the Schedule to the Finance Act of 1950, he allowed the rebate of one anna in a rupee on the undistributed profits of Rs. 6,43,621. The rebate so allowed amounted to Rs. 40,226.

It will be convenient to reproduce the provision of law relating to that rebate. It is to be found in the First Schedule to the Finance Act of 1950:

"In the case of every company—...

(i) where the total income, as reduced by six and a half annas in the rupee and by the amount if any, exempt from income-tax, exceeds the amount of any dividends (including dividends payable at a fixed rate) declared in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March 1951, and no order has been made under sub-section (1) of section 23A of the Income-tax Act, a rebate shall be allowed at the rate of one anna per rupee on the amount of such excess."

For the assessment year 1951-52 (previous year ending December 31, 1950) the Income-tax Officer passed an order on January 31, 1952, and assessed the total income of the petitioner-mills at Rs. 27,43,730. In that year also he allowed similar rebate of one anna per rupee. That was under cl. (i) of the proviso to Para. B of Part I to the Schedule to the Finance Act, 1951, and it was on the undistributed profits of Rs. 4,01,348 and amounted to Rs. 25,084.

For the assessment year 1952-53 (previous year ending December 31, 1951), the Income-tax Officer assessed the total income of the petitioner-mills at Rs. 34,51,284. In that year also he allowed similar rebate of one anna per rupee, which was under cl. (i) of the proviso to Para. B of Part I of the Schedule to the Finance Act of 1952. In that year, the undistributed profits of the mills company came to Rs. 8,07,363 and the amount of rebate allowed for that year was Rs. 50,460. It may be mentioned that in respect of the assessment for the first two years, there was subsequent review in 1954 of the orders, but that is immaterial for the purpose of this petition.

For the assessment year 1953-54 (previous year ending December 31, 1952) the assessment order showed that the petitioner-mills had incurred losses. The mills, however, declared and paid dividends aggregating to Rs. 10,92,000 for the accounting year ending December 31, 1952, and the dividends were paid out of profits made by the company in the earlier years. The balance-sheet of the company for the year ending December 31, 1952, stated that the dividends had been distributed from:

"(a) Profits of the aforesaid year and/or

(b) the reserves formed out of the profits or accumulated profits of the following 'previous years' which have been subjected to tax.

Year ending	..	..	..	..	..	31-12-1937
Year ending	..	..	..	..	..	31-12-1949
Year ending	..	..	..	..	..	31-12-1950
Year ending	..	..	..	..	..	31-12-1951"

In March 1958 respondent No. 1 called upon the petitioner-mills to show cause why action should not be taken under s. 35(10) of the Act, as, according to him, dividends declared by the mills for the assessment year 1953-54 aggregating to Rs. 10,92,000 had come out of reserves of earlier years on which rebate of one anna in the rupee for the years 1950-51, 1951-52 and 1952-53 had been allowed on undistributed profits. There was some correspondence and ultimately respondent No. 1 passed orders on the mills company under s. 35(10) of the Act, terms of which sub-section are as follows:

"Where, in any of the assessments for the years beginning on the 1st day of April of the years 1948 to 1955 inclusive, a rebate of income-tax was allowed to a company on a part of its total income under clause (i) of the proviso to Paragraph B of Part I

of the relevant Schedules to the Finance Acts specifying the rates of tax for the relevant year, and subsequently the amount on which the rebate of income-tax was allowed as aforesaid is availed of by the company, wholly or partly, for declaring dividends in any year, the amount or that part of the amount availed of as aforesaid as the case may be, shall, by reason of the rebate of income-tax allowed to the company and to the extent to which it has not actually been subjected to an additional income-tax in accordance with the provisions of clause (4) of the proviso to Paragraph B of Part I of the Schedules to the Finance Acts above referred to, be deemed to have been made the subject of incorrect relief under this Act, and the Income-tax Officer shall re-compute the tax payable by the company by reducing the rebate originally allowed, as if the re-computation is a rectification of a mistake apparent from the record within the meaning of this section and the provisions of sub-section (1) shall apply accordingly, the period of four years specified therein being reckoned from the end of the financial year in which the amount on which rebate of income-tax was allowed as aforesaid was availed of by the company wholly or partly for declaring dividends."

The mills company challenged the right of respondent No. 1 to pass those orders and raised before him various contentions, which it is not necessary to set out here. In the petition, the mills company has raised various contentions, one of them being that s. 35(10) of the Act is *ultra vires* the Constitution being in contravention of certain fundamental rights there guaranteed and being in violation of the provisions of art. 265 of the Constitution. One of the contentions set out in the petition is that the provisions of s. 35(10) being added only by the Finance Act of 1956 had no application to the case of the mills company because to apply the provisions of s. 35(10) to the mills company would be to give retrospective operation to those provisions. The contention is that the provisions of s. 35(10) became operative only from April 1, 1956, and the original assessment order had been made much before that and the assessments had become final and conclusive before April 1, 1956. Very briefly stated the contention is that those assessments cannot be affected or touched or altered in any manner by any subsequent legislation introduced for the first time by s. 35(10) in 1956.

The contentions relating to *ultra vires* and violation of fundamental rights have not been urged before us by Mr. Kolah, learned counsel for the petitioner-mills. The only contention which is pressed before us, it is said, falls under two heads: (1) the assessments in question had become final before April 1, 1956, and on a proper construction of s. 35(10) those assessments do not fall within the purview of the section: (2) Section 35(10) properly read is not intended to have any retroactive operation. It seems to us that these are phases of the same argument. It will be convenient to set out here s. 28 of the Finance Act of 1956 whereby s. 35(10) was introduced for the first time in the Income-tax Act:

"The amendments made in the Income-tax Act by section 4 and clause (b) of section 15 shall be deemed to have come into force on the 1st day of April 1955 and the amendments made by sections 3 to 27 inclusive shall come into force on the 1st day of April 1956."

The amendment by way of introduction of s. 35(10) was brought about by s. 19. It is one of the provisions which s. 28 says "shall come into force on the 1st day of April 1956". There is no dispute, and there can be no dispute, that s. 35(10) came into force on April 1, 1956, but the dispute is as to the precise effect of the coming into force of that section on April 1, 1956, in the light of the provisions of s. 35(10) itself. In a case of the nature before us the prospective or retrospective operation of s. 35(10) cannot depend merely on the word "shall come into force on the 1st day of April 1956" if there is something in s. 35(10) itself which shows that the rule laid down in it was to become operative in respect of certain matters of previous years. The major premise of Mr. Kolah's argument is that the assessment of the mills company was changed by the provisions contained in sub-s. (10). It is said that the assessment is sought to be altered and affected by those provisions. He has drawn

our attention to instances where the Legislature in giving retrospective operation to a provision of law had used certain words. He has asked us to contrast those words with the words in s. 28 "shall come into force on the 1st day of April 1956". At one stage of the argument the suggestion seemed to us to be that assessments which had been completed before April 1, 1956, could not be touched by the amended provisions introduced by incorporating s. 35(10), but when the argument was developed Mr. Kolah stated that in a sense s. 35 did apply to completed assessments and in a sense it did not apply to completed assessments, and the distinction rather fine or perhaps overrefined is that s. 35(10) could apply only in respect of assessments completed before April 1, 1956, if dividend was declared after April 1, 1956. Otherwise s. 35(10), it is said, would not apply. Now, as we shall presently point out the language of the section is quite clear and it is difficult to see on what principle or authority or reason this arbitrary distinction is to be drawn.

Before we proceed to examine the language of s. 35(10) and analyse the section we would like to preface our judgment with a few general observations. We have often quoted and we may quote once again the celebrated observations of Mr. Justice Rowlett which have now become classical:

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

One safe and infallible principle which is of guidance in these matters is to read the words through and see if the rule is clearly stated. If the language employed gives the rule in words of sufficient clarity and precision, no more requires to be done. Indeed, in such a case the task of interpretation can hardly be said to arise: *Absoluta sententia expositore non indiget*. The language used by the Legislature best declares its intention and must be accepted as decisive of it. We may permit ourselves to make some further observations of the nature we have made before about the interpretation of provisions said to be retroactive in their operation. The general rule indubitably is that where a statute is passed altering the law it is to be presumed as intended to apply to a state of facts coming into existence after the Act. It is a fundamental and a firmly established rule of interpretation that a statute which deals with matters of substantive law—and taxation is a matter of substantive law—would not be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary implication. Now, the use of the expression "retrospective operation" is at times vague and misleading. In a broad general sense it may be right to say that a statute has retrospective operation when it purports to touch facts or events which took place before the enactment came into force. It is sometimes used in a different sense when vested rights are sought to be affected. It is sometimes loosely used in the context of certain fictions of law which the law-maker deems it necessary to introduce in existing laws for the purpose of setting certain matters right or avoiding certain mischief which might be possible but for the change in the law; and this is done by laying down that certain facts or things which did not in fact exist shall be deemed to have existed. This last need not necessarily be called retrospective legislation. It may be more appropriate to describe it as *ex post facto* legislation of a curative nature. It is unsusceptible of dispute that s. 35(10) lays down a fiction of law. It is also unsusceptible of dispute that by the *fiction juris* the Legislature has laid down a rule which is intended to embrace rebates which were granted in the past before the commencement of the rule. The inherent oppressiveness—or at least hardship—of retroactive operation in case of statutes creating new penalties or liabilities or *ex post facto* deprivation of concessions in matters of taxation and other matters has always induced Courts to view changes in law aimed so to operate, with extreme care and to express the inhibition in unmistakable terms. In examining the language of s. 35(10) and in reaching a

conclusion as to the meaning of the language fairly read, we shall be doing so in the light of the observations just made.

Section 35 deals with rectification of mistake. Section 35(10) is intended to lay down certain provisions in respect of rebate on income-tax allowed to a company on a part of its income by virtue of the concessions given by the Finance Acts of 1948 to 1955 and as the initial words clearly show it deals with rebates granted in respect of any of the assessments for the years 1948 to 1955 inclusive. Then it proceeds to state the condition in which or the event on the happening of which the rebate is to be deemed to have been given by a mistake apparent from the record. That condition or event is that the company to which such rebate of income-tax had been allowed has availed of the amount on which the rebate was allowed, meaning thereby the undistributed profits, for declaring dividends in any subsequent year. The expressions "subsequently" and "for declaring dividends in any year" in the sub-section have reference to the words "in any of the assessments for the year beginning on the 1st day of April of the years 1948 to 1955 inclusive." That, in our judgment, permits of no doubt and little debate. We leave out certain words in sub-s. (10) which deal with matters of detail, and doing so, we find that the words that follow are the crucial words. They are made in the context of rebates made and the amount of undistributed profits on which rebates were granted being availed of by the company for paying dividends in subsequent years, and the crucial words are that in such a case the amount of undistributed profits availed of by the company on which rebate had been allowed "shall be deemed to have been made the subject of incorrect relief under this Act". In such a case the Income-tax Officer is authorised to recompute the tax payable by the company by reducing the rebate originally allowed as if the recomputation is a rectification of a mistake apparent from the record. The substance of the matter, evidently, is that something which had in fact not taken place, something which was not incorrect when done, relief which was correctly given when it was given, all that is to be deemed to have been made the subject of an incorrect relief under the Act and it is to be deemed that the recomputation necessary for the purpose of setting the matter right is nothing more than a rectification of a mistake apparent from the record. It may be said that rebate which was the subject-matter of the relief is to be recalled because of an event which subsequently happened and although the rebate was granted strictly in accordance with the provisions relating to the concessions made by the Finance Act during the relevant year and even though there was no mistake in the matter of granting that rebate or relief, what was done is nevertheless to be deemed to have been made by mistake. In modern statutes the expression "deemed" is used a great deal and for many purposes. It is at times used to introduce artificial conceptions which are intended to go beyond legal principles or to give an artificial construction to a word or phrase. It is not possible to list the purposes for which legal fictions may be created by statute. We had occasion in tax cases to refer to the judgment of the Supreme Court in *The State of Bombay v. Pandurang Vinayak Chaphalkar*¹ where their Lordships observed (p. 778) :

"...When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

Then their Lordships proceeded to quote certain observations of Lord Asquith which have now become classical. In *East End Dwellings Co. Ltd. v. Finsbury Borough Council*,² Lord Asquith observed :

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed

¹ [1953] S.O.R. 773, s.c. 55 Bom. L.R. 526.

² [1952] A.C. 109, at p. 122.

from or accompanied it...The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

Far from there being any prohibition in the present case, the statute enjoins that what when done was not a mistake, what was correct relief granted according to the provisions of the Finance Acts in operation at the relevant times, shall nevertheless be deemed to have been made by mistake and the relief granted shall be deemed to have been incorrectly granted. By virtue of this deeming provision, the granting of rebate must be assumed even factually to have been made as a result of a mistake apparent from the record although in fact and in truth no such mistake had ever been made. Therefore, the crucial question that we have to put to ourselves is: what is the point of time at which the mistake was made and the relief incorrectly given? The first of April 1956 has no cogency to the point under consideration. It is a date after which the Income-tax Officer can sit down for the first time to think as to what is it that is to be deemed by him to have taken place by or through a mistake. Apart from that, April 1, 1956, the date so strongly relied on by Mr. Kolah, has no bearing on the interpretation of this section. Indubitably the section says that relief which was properly given, which was legally given, is to be deemed to have been incorrectly given. Rebate which was justifiably granted and correctly granted is to be deemed to have been granted under a mistake apparent on the record. As already stated we put to ourselves the question as to when the rebate can be said to have been incorrectly given: when was the relief granted by a mistake? And the answer inescapably must be that it was when the relief was granted by permitting rebate, and if that be the true position—and we have no doubt that it is so—it is extremely difficult to see how the principles of construction and the inhibition against retroactive operation can have any real effect on or can in any manner govern the enactment we are called upon to interpret. The language of s. 35(10) is very clear. It is one of those few sections in the Act which do not permit of any doubt as to what the lawmaker intended. It is not possible to see any difficulty of ascertainment of what the Legislature has said it meant. Therefore, on a fair reading of s. 35(10) it seems to us that the Income-tax Officer had the power to pass those orders.

But it is said by Mr. Kolah that there are decisions which are indicative of the contrary view. Before we examine those decisions, we may refer to certain general observations of Lord Dunedin in *Whitney v. The Commissioners of Inland Revenue*³, where the eminent Judge very vividly and clearly brought out the three stages in the imposition of a tax:

"...Once that it is fixed that there is a liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

The declaration of liability of the assessee-mills was by the statute itself. The assessment in respect of the relevant years was made much prior to 1956. But says Mr. Kolah, that assessment is being altered and affected by giving effect to s. 35(10). In our opinion it would not be accurate to say that the effect of s. 35(10) is to assess the mills company over again or to re-open the assessment already made. It is stressed that some change or some alteration is being made. Of course, some change or alteration is being made. That is the very purpose of s. 35(10). But the question is what is the nature of that change

or alteration? The assessment, strictly speaking, is not being changed or affected. There is only recomputation of a restricted nature vis-a-vis the rebate. What is permitted to be done by operation of the deeming provision is that the rebate is wholly or partially to be recalled as it is to be deemed to have been allowed through a mistake and relief which was granted, is to be deemed to have been incorrectly granted. Therefore, in our opinion, it would not be correct to say as learned counsel strongly asserted that his assessment was being disturbed and/or in a sense he was being assessed over again. Nor can it be said that the finality of that assessment has been really affected. The assessment depended on the income of the company for the relevant years. There is to be no recomputation of the income of the company for the relevant years. That has already been done. The only thing to be done is to ascertain what was the amount of undistributed profits in respect of which rebate had been granted that was availed of by the company wholly or partially for declaring dividend in any subsequent years. That is not assessment. There is not a word in s. 35(10) which would even faintly suggest that there was to be anything of the nature of assessment, in the sense in which that expression is to be understood in the present context. The order made by the Income-tax Officer may be considered. In effect the original order of assessment as made said: This is your income. This is the amount of tax you have to pay after bringing into play the various provisions of the Income-tax law having bearing on your assessment. The dividend you have declared leaves undistributed profits. In accordance with law, I give you a rebate or a drawback or a discount and shall only recover from you the balance after subtracting the amount of such drawback from the amount of tax which you are liable to pay and bound to pay. It is difficult to see how this restricted recomputation can properly be said to be alteration or modification or any change in the assessment actually made. But even assuming that this can be regarded as an alteration in the assessment finally made in the earlier years, that does not affect the conclusion we have reached on the question of construction of s. 35(10). In a broad general sense, it is true that there is finality about an order of assessment. Whatever be the position in law as to this doctrine of finality—and it is not necessary for us in this petition to examine the matter in detail—one thing is clear that s. 35 can operate despite any such broad doctrine. Question of rectification obviously would only arise in case of an assessment which is finalised. Section 34 which deals with the re-opening of assessments when income has escaped assessment also has bearing on this doctrine of finality.

To turn to the decisions to which our attention has been drawn by Mr. Kolah. In *Chatturam v. Commissioner of Income-tax, Bihar*⁴, the Federal Court had occasion to consider certain principles of taxation and a dispute about retrospective operation of certain provisions. There is nothing in the observations there made which lend any support to the argument of Mr. Kolah. Particular reliance was placed by counsel on the recent decision of the Supreme Court in *Venkatachalam v. Bombay Dyeing and Mfg. Co. Ltd.*⁵ Statutes which give retrospective operation to their provisions may have different objects in view and the purpose may be to lay down different rules. Mr. Kolah is right when he says that in case of different enactments different words are used in giving retrospective operation. Now, the meaning of the words employed in s. 35(10) and the question whether the rule laid down in those words is to affect any rebates granted in the past can only be determined from the words themselves and the object of the rule if there is language appropriate to that object or purpose. Other enactments with different objects in view and intended to serve different purposes would necessarily have been enacted in different language. Therefore, comparison of the language of one enactment whereby retrospective operation was sought to be given by the lawmaker is of little guidance in matters of this type and it is unnecessary for us to examine the provision which required to be considered in the case before their Lordships of the

⁴ [1947] F.O.R. 116.

⁵ (1958) 34 I.T.R. 143.

Supreme Court. There are, however, certain observations in that case, which, we may respectfully say so, afford guidance on the question before us and we may quote them. Before doing so, we may observe that they were made in a different context (p. 147):

"...The argument for the respondent is that the assessee has obtained a right under the order passed by the Income-tax Officer to claim credit for the specified amount under section 18A(5) and the said right cannot be taken away by the retrospective operation of section 13 of the Amendment Act. The same argument is put in another form by contending that the finality of the order passed by the Income-tax Officer cannot be impaired by the retrospective operation of the relevant provision. In our opinion, this argument does not really help the respondent's case because the order passed by the Income-tax Officer under section 18A(5) cannot be said to be final in the literal sense of the word. This order was and continued to be liable to be modified under section 35 of the Act. What the Income-tax Officer has purported to do in the present case is not to revise his order in the light of the retrospective amendment made by section 13 of the Amendment Act alone, but to exercise his power under section 35 of the Act; and so the question which falls to be considered in the present appeal centres round the construction of the expression "mistake apparent from the record" used in section 35. That is why we think the principle of the finality of the orders or the sanctity of the existing rights cannot be effectively invoked by the respondent in the present case". It is true that the observations, as we have already said, were made in a different context. But we have quoted these observations solely for the purpose of showing that the doctrine of finality is not of the nature sought to be made out by learned counsel.

In the result, the petition fails and will be dismissed with costs.

Petition dismissed.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

ABDUL KARIM HUSSEINBHAI LAKDAWALA v. HAJI MAHOMED
HUSSEIN HAJI ABDULREHMAN.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 2 & 46(3)—Indian Income-tax Act (XI of 1922), Sec. 46(5A)—Execution of decree—Judgment-debtor complying with notice issued against him under s. 46(5A) of Indian Income-tax Act and paying amount to Income-tax Officer payable by assessee judgment-creditor—Whether judgment-debtor discharged from liability to extent of payment made to Income-tax Officer—Judgment-creditor whether competent to execute decree for such payment made to Income-tax Officer.

Where the liability of the judgment-debtor to pay the decretal amount is discharged by virtue of the provisions contained in s. 46(5A) of the Indian Income-tax Act, 1922, the Court executing the decree must recognise this statutory discharge of liability to the extent of the payment made and the decree-holder becomes incompetent to execute the decree for the amount paid by the judgment-debtor to the Income-tax Officer.

THE facts appear in the judgment.

Y. V. Chandrachud, for the appellant.

A. D. Desai, for the respondent.

SHAH J. This is an appeal from an order in an execution proceeding. In Suit No. 13 of 1944 of the file of the Civil Judge, Senior Division at Broach, it was decreed that defendant No. 10 Mahomad Hussein Haji Abdulrehman do pay Rs. 24,426-5-4 to the heirs of one Kadarbhai. After this decree was passed Suit No. 203 of 1949 to administer the estate of Kadarbhai was filed. By the decree in that suit it was directed that Mahomad Hussein Haji Abdulrehman

*Decided, November 14, 1958. First Appeal Sakllkar, Civil Judge, Senior Division at No. 565 of 1955, against the decision of R. K. Broach, in Special Darkhast No. 26 of 1951.

(whom we will hereafter refer to as the judgment-debtor) do pay the decretal amount of Rs. 24,426-5-4 to Abdul Karim Husseinbhai Lakdawala who was one of the heirs of Kadarbhai. Abdul Karim Husseinbhai Lakdawala (whom we will hereafter refer to as the judgment-creditor) then filed Darkhast No. 28 of 1951 to recover the amount declared to be due to him by the decree in Suit No. 203 of 1949. It was contended in that darkhast, that the judgment-debtor had under the orders passed by the Income-tax authorities, paid an amount of Rs. 11,508-9-0 which was payable by the heirs of Kadarbhai to the Income-tax department and the judgment-debtor was to that extent discharged from liability, by virtue of s. 46(5A) of the Income-tax Act.

The learned Judge accepted the contention of the judgment-debtor and directed that execution do proceed after giving credit for Rs. 11,508-9-0 to the judgment-debtor. Against that order the judgment-creditor has appealed to this Court.

Section 46(5A) of the Income-tax Act in so far as it is material provides that the Income-tax Officer may by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income-tax Officer, so much of the money as is sufficient to pay the amount due by the tax-payer in respect of arrears of income-tax and penalty. By the third paragraph of sub-s. (5A) it is provided that any person making payment in compliance with the notice under this sub-section shall be deemed to have made the payment under the authority of the assessee and the receipt of the Income-tax Officer shall constitute a good and sufficient discharge of the liability of such person to the assessee to the extent of the amount referred to in the receipt.

In this case, the judgment-debtor was served with a notice issued by the Income-tax Officer under s. 46(5A) to pay Rs. 11,508-9-0 and the judgment-debtor complied with that notice. By the operation of the third paragraph of sub-s. (5A) of s. 46, the amount must be deemed to have been paid under the authority of the judgment-creditors. Of the heirs of Kadarbhai, the judgment-creditor claims to be an assignee and the judgment-debtor having paid the amount under the direction of the Income-tax Officer, he is by statute discharged from liability to the extent of the payment made.

But Mr. Chandrachud, who appears on behalf of the decree-holder, contends that under O. XXI, r. 2, of the Civil Procedure Code, a payment made by the judgment-debtor in satisfaction of the liability under a decree can only be recognised by the executing Court if it is certified by the Court which passed the decree, and payment by the judgment-debtor to the Income-tax Officer not being certified in the manner and on an application made within the period prescribed, the executing Court was incompetent to entertain the plea of partial discharge of liability by virtue of the provision contained in sub-r. (3) of r. 2, O. XXI, Civil Procedure Code. In other words it is submitted that even if the liability to pay the decretal amount is discharged by virtue of the provision contained in s. 46(5A) unless the payment is certified in the manner prescribed by O. XXI, r. 2, the Court executing the decree is unable to recognise the payment, and the only remedy of the judgment-debtor is to proceed in a criminal Court. We are unable to accept that contention. By the third paragraph of sub-s. (5A) of s. 46 liability under the decree is discharged to the extent of payment made by the judgment-debtor to the Income-tax department. It is the receipt issued by the Income-tax Officer acknowledging payment which by operation of the statute discharges the judgment-debtor's liability for the amount paid. Under the Civil Procedure Code there is an analogous provision in O. XXI, r. 46(3), which discharges liability of a garnishee on payment by him in Court of a debt in respect of which a prohibitory order is issued under cl. (4) of sub-r. (1) thereof. When a judgment-debtor resists execution in these and other analogous provisions, he asks the Court executing the decree to take note of the statutory discharge of liability and not the payment made.

He informs the Court that by operation of the statute, even though the decree-holder has not received the payment, the liability is to the extent of the payment discharged. In our judgment there is nothing in sub-r. (3) which precludes the Court executing the decree from recognizing the statutory discharge of liability to the extent of the payment made. Sub-rule (3) of O. XXI, r. 2 of the Civil Procedure Code is at best a rule of evidence; whereas s. 46(5A) of the Income-tax Act enacts a provision which extinguishes liability. In the absence of an intention clearly expressed or necessarily implied in the statute providing for that extinction, we will not be justified in holding that the statutory discharge of liability operates only when the payment is certified. By reason of the statutory discharge of liability under s. 46(5A) of the Income-tax Act, the decree-holder becomes incompetent to execute the decree for the amount paid by the judgment-debtor on behalf of the assessee to the Income-tax Officer.

We agree with the view of the learned trial Judge that the decree to the extent of the amount paid by the judgment-debtor was unenforceable and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

SHANTABAI BABURAO KALBHOR v. RAMCHANDRA KHANDERAO KORHALE.*

Hindu Law—Stridhan—Non-Saudayika stridhan—Wife separated from husband and living apart from him as husband addicted to vices—Whether wife competent to dispose of by will her non-saudayika stridhan.

Under Hindu law a wife, who on account of incompatibility of temperament or other cause is separated from her husband and the marital home is broken up, is competent to dispose of her non-saudayika stridhan by will without the consent of her husband who is separated from her.

*Bhagvanlal v. Bai Divali*¹, agreed with.

*Sarubai Balakdas v. Narayandas Batragi*², *Bhau v. Raghunath*³, *Gajanan Yeshwant v. Pandurang Govind*⁴ and *Muthukaruppa Pillai v. Sellathamma*⁵, referred to.

ONE Sonubai, wife of Narhari Kalbhor, by sale-deed, dated May 21, 1930, purchased a house, City Survey No. 292 of Somvar Peth, Poona, for Rs. 10,500. Sonubai had paid to the vendor Rs. 1,000 before the date of the sale-deed and the balance of Rs. 9,500 was paid in the presence of the Sub-Registrar. After purchasing this house Sonubai let it out to tenants. Sonubai was conducting a sweetmeat shop in City Survey No. 15 of Shukrawar Peth, Poona, and in the conduct of that business she was assisted by her son Baburao Narhari. Narhari—husband of Sonubai—was living apart from Sonubai. Sonubai made and executed a will on December 16, 1943, which was attested by N. W. Pandit, pleader, and Sitaram Vinayak. By that will, Sonubai purported to appoint Ramchandra Khanderao Korhale (plaintiff) as her executor, and she made various devises thereby. She devised the property substantially to her daughter and provided a legacy of Rs. 20 per month in favour of Shantabai—widow of her son Baburao. She also devised a legacy in favour of the plaintiff. Sonubai died on December 28, 1943. The plaintiff then applied to the District Court at Poona by Miscellaneous Application No. 49 of 1944 for probate of the will of Sonubai. Narhari—husband of Sonubai—contested the proceeding. By order, dated September 28, 1945, the District Court of Poona granted pro-

*Decided, November 15, 1958. First Appeal No. 472 of 1955, against the decision of R. M. Kulkarni, Joint Civil Judge (Senior Division), at Poona, in Special Civil Suit No. 180 of 1953.

¹ (1925) 27 Bom. L.R. 633.

² (1943) I.L.R. Bom. 314, s.c. 45 Bom.

L.R. 473.

³ (1905) I.L.R. 30 Bom. 229, s.c. 7 Bom.

L.R. 936.

⁴ (1949) 52 Bom. L.R. 238, r.p.

⁵ (1914) I.L.R. 30 Mad. 298.

bate to the plaintiff of the will of Sonubai. Even after probate was granted to the plaintiff, in whom the estate had vested by virtue of his appointment as executor under the will of Sonubai, Shantabai (defendant), continued to remain in occupation of the house and declined to deliver possession to the plaintiff. The plaintiff then filed Suit No. 180 of 1953 in the Court of the Joint Civil Judge, Senior Division, Poona, against the defendant, for a decree for possession of the house and for Rs. 3,500 as mesne profits for three years prior to the date of the suit and for an order for payment of mesne profits from the date of the suit till delivery of possession and for costs of the suit. It was the plaintiff's case that the house in dispute had been purchased by Sonubai with her own fund, that it was her property and she was competent to make a will of which probate was granted to the plaintiff, and that the plaintiff was entitled to obtain possession of the house from the defendant who had no title thereto. The defendant by her written statement contended *inter alia* that the house in dispute belonged to Sonubai's husband Narhari and it had been purchased from the joint family funds in Sonubai's name, and accordingly Sonubai had acquired no title to the house, that Sonubai was not in possession of the property, that Narhari and his son Baburao were all along in possession of the property and were managing the same, that on the death of Narhari and Baburao she—the defendant—had become the owner of the house, that Sonubai had no authority to make a will devising the house, that the defendant was in possession and management of the property as the owner and that she the defendant was receiving an income of Rs. 75 per month from the tenants occupying the house. She also contended that she was in possession of the house as owner even during the life-time of Sonubai and was collecting the rents from the tenants.

The trial Judge negatived the contentions raised by the defendant and decreed the plaintiff's suit for possession and directed an inquiry into mesne profits for a period of three years prior to the date of the suit under O. XX, r. 12, of the Civil Procedure Code and also directed ascertainment of mesne profits from the date of the suit under O. XX, r. 12(1)(c), of the Civil Procedure Code. Against that decree the defendant appealed to the High Court.

B. D. Bal, with *C. R. Dalvi*, for the appellant.

K. B. Sukhankar, with *A. A. Adarkar*, for the respondent.

SHAH J. [His Lordship after stating the facts and holding that the house in dispute belonged to Sonubai and it was acquired by her out of a fund in which Narhari and Baburao were not shown to be interested, proceeded.] If the house was purchased from a fund acquired by Sonubai from her sweetmeat business, the house will be regarded as *stridhan* other than *saudayika*, and the question which then falls to be determined is whether that property could in law be disposed of by Sonubai by a will without the consent of her husband. A Hindu married woman's power to dispose of her *stridhan* depends on the character of the *stridhan*. For this purpose, *stridhan* is divided into two classes, (1) *saudayika* and (2) other kinds of *stridhan*. A married woman has absolute power of disposal over her *saudayika stridhan*. She may dispose of it by sale, gift, will, or in any other way she pleases, without the consent of her husband. Her husband has no control over it. He cannot bind her by any dealings with it. This rule is based upon Katyayana's text.

"What a woman, either after marriage or before it, either in the mansion of her husband or of her father, receives from her lord or her parents, is called a gift from affectionate kindred; and such a gift having by them been presented through kindness, that the women possessing it may live well, is declared by law to be their absolute property; the absolute exclusive dominion of women over such a gift is perpetually celebrated; and they have power to sell or give it away as they please, even though it consist of lands and houses. Neither the husband, nor the son, nor the father, nor the brother, have power to use or to alienate the legal property of a woman." (See Colebrooke's Digest of Hindu Law, Book V, p. 475).

Stridhan other than *saudayika* is subject to her husband's dominion; he is entitled to use it at his pleasure even if there be no distress, and it cannot be disposed of by a woman without her husband's consent. She cannot sell it, or make a gift of it, or bequeath it by her will, or otherwise deal with it without her husband's consent.

"But whatever wealth she may gain by arts, as by painting or spinning, or may receive on account of friendship from any but the kindred of her husband or her parents, her Lord alone has dominion over it; of her other property she may dispose without first obtaining his assent" (Katyayana) Colebrook's Digest, Vol. V, p. 581; and the text of Vyavahara Mayukha, Ch. IV, Sec. X, p. 93 (Mandlik's translation):

"As for the text—'A wife, a son, and a slave are all incapable of property. Whatever they earn, belongs to him to whom they belong', that too has reference to wealth acquired by mechanical arts and the like... Hence, says Manu (Ch. IX, v. 199):—'a woman should never make any expenditure out of the family [property] belonging to several or even [out of] her own wealth without the assent of her husband'."

The rule is, however, subject to an exception, that where the husband and wife have drifted apart and the wife is not under the control of her husband, she is regarded as competent to dispose of her non-*saudayika stridhan* without the assent of her husband. In *Bhagvanlal v. Bai Divali*,¹ a Division Bench of this Court held that a Hindu wife, who had lived apart from her husband for nearly 30 or 40 years, was competent to dispose of by will the property which she had inherited from her father, without the consent of her husband. Sir Norman Macleod, C.J., who delivered the judgment of the Court held that the husband and wife had lived apart for many years and the husband had lost all rights of control over the wife "so as to lose also the right to validate any disposition which she might make by will of property inherited by her from her paternal relations." He then observed: "We think this decision is in consonance with the views which would prevail at the present day in the community."

In the present case, the evidence of the plaintiff and of Nikam shows that Sonubai was living apart from her husband Narhari for about 35 years before her death. That evidence is supported by the admission made by the defendant that the grain-ration card was obtained in the name of Sonubai as the head of the family and not in the name of Narhari, and by the evidence of Godse, the photographer, who has stated that Narhari was not staying with Sonubai in 15, Shukrawar Peth, and that he had not seen him, and also by the recitals made in the will made by Sonubai in the first paragraph of which it is recited that Narhari was addicted to vices and thirty or thirty-five years before the date of the will on account of incompatibility of temperament the testatrix had separated from Narhari and had never lived with him thereafter, and that she herself had by starting a sweetmeat shop acquired the property devised thereby.

Mr. Bal contends that the evidence of the plaintiff is interested evidence and that of Nikam who is an insolvent is unreliable. Mr. Bal says that it was possible for the plaintiff to prove, if Narhari was staying apart from Sonubai, that he was paying rent for occupation of the premises in which it is alleged he resided but the plaintiff has not led that evidence. It is urged that the trial Judge was in error in relying upon the story of Godse that he had never seen Narhari living with Sonubai which was related by the witness in answer to the Court's question after the re-examination of the witness was concluded and the defendant had no opportunity to cross-examine the witness on the truth of the assertion made by him. Mr. Bal also submitted that the recitals made in the will by Sonubai must have been made at the instance of the plaintiff and under advice from some lawyer who prepared the will in the light of *Bhagvanlal's* case. He also relies upon the evidence of one Datar and contends that Narhari and Sonubai were living together and Sonubai was "under coverture" at the time when she made the will, and accordingly the will was ineffective, Narhari not having assented to the dispositions contained therein.

It is true that the plaintiff may be regarded as interested in the will because he himself is a devisee, and Nikam has admitted that he was adjudicated an insolvent. But on that account we are unable to hold that his testimony is unreliable. The witness, it appears, has written the accounts of the business conducted by Sonubai for 24 years and those account books were produced in the trial Court. The entries in the books of account relate to the business of the shop and the house which was purchased in the name of Sonubai. The story of the witness that he had occasion to meet Sonubai almost every day appears to be true. It is not suggested that this witness was interested in the subject-matter of the suit and we see no reason to disbelieve his testimony when he says that Sonubai and her husband Narhari were living apart for many years.

Even apart from this testimony, the recital in Sonubai's will that Narhari was addicted to vices and that on that account she had been living apart from him for 30 or 35 years has strong probative value. If Sonubai was living with Narhari, there was no reason for her to make this false recital in the will. We are unable to agree with the contention that relying upon the decision in *Bhagvanlal's* case some lawyer advised that in order to enable Sonubai to make a will of her property she had to allege that she was living apart from her husband for many years prior to the date of execution of the will, and with a view to make the will effective the plaintiff persuaded Sonubai to make a false recital that Narhari was addicted to vices and on that account Sonubai was living apart from him. If Sonubai, who was aged 65 years at the time of her will, had been living happily with her husband Narhari, and even if she was minded to dispose of the property in favour of the plaintiff and her daughter, there was no reason why she should be willing to make a false recital in the will and add thereto that her husband Narhari was addicted to vice and on that account she was living apart from her husband.

Witness Datar, who was a mortgagee of houses Nos. 14 and 15 in Shukrawar Peth in one of which Sonubai resided, has, it is true, stated that Narhari was living with Sonubai till 1938. The learned trial Judge who saw the witness in the witness-box has criticised the testimony of this witness and observed that this story was a "most shabby story" and he has given good reasons for discarding the testimony of this witness. The witness stated that when the house was mortgaged with possession before 1910 the management was with his father Dattatraya and after the death of his father in 1910, the management devolved upon Ramchandra Narayan—brother of the witness—who died in 1925 and since 1925 he, the witness, was managing the property till 1938 when it was redeemed. The witness also stated that about the year 1925 he had been told by Narhari that rent-receipts in respect of the premises occupied by Sonubai in the house under mortgage should be made out in the name of Sonubai and not in his name, and that accordingly the rent receipts were so made out. In cross-examination the witness admitted that he started managing the house some time in 1927-28 and that he had no personal knowledge about any earlier period. That evidently shows that his story that Narhari had told him that the rent receipts should be made out in the name of Sonubai cannot be true. The witness was shown a photograph in his cross-examination and he was able to identify Sonubai sitting at the counter of her shop but he was unable to say where Narhari or his son Baburao were in the photograph. If, as the witness pretends, he was familiar with Narhari and his son Baburao, it would not have been difficult for him to identify from the photograph, which includes a large number of persons, Baburao who, it is conceded, was actually in the photograph, and to state that Narhari was not in the photograph. The non-committal reply given by the witness shows, in our judgment, that the witness did not know Narhari and Baburao. The witness has not produced his books of account on the pretext that they had been destroyed in 1948. Admittedly the witness carries on the business of moneylending and it is difficult to accept the story that he had destroyed his books of account. He is unable to say who

the other tenants residing in the house were. His memory with regard to several matters other than the one fact which he came to depose before the Court, viz., that Sonubai and Narhari were living together, appears to be extremely vague. The learned trial Judge who saw the witness and heard his testimony was not satisfied with that testimony, and sitting in appeal we are unable to disagree with the appreciation of the evidence of this witness by the learned trial Judge.

On the evidence which we have already referred to there can be no doubt that Sonubai and Narhari were living apart for many years prior to the date of Sonubai's will. Once we reach that conclusion, there is no reason why the recital made by Sonubai in the will that for more than thirty years prior to the date of the will she had been living apart because her husband Narhari was addicted to vices may not be accepted as true.

Mr. Bal contends that in *Sarubai Balakdas v. Narayandas Bairagi*,² Sir John Beaumont, C.J., differed from the principle of *Bhagvanlal v. Bai Divali*, and we may accept the view in the latter case as a correct exposition of the law. In *Sarubai's* case, on account of quarrels the plaintiff and his wife had lived apart for some twenty-five years. The plaintiff was living in a temple which belonged to him and the wife also resided in the same temple but in a separate room. The wife made a will a few days before her death and left her non-*saudayika stridhan* to her niece. After the death of the wife, a suit for a declaration of the title of the plaintiff to the property was filed, on the plea that the wife was not competent to dispose of the property as she had not obtained the plaintiff's consent before making the will. On these facts, in second appeal the learned Chief Justice held confirming the decree of the District Court, that the testatrix must be presumed to be "under coverture" when she made the will and she had no power to dispose of the property without the consent of her husband. Beaumont, C.J., observed after referring to *Bhau v. Raghunath*,³ that (p. 317):

"...The rule is expressed to apply to a woman under coverture, which is the expression used in the translation of the texts, and I must assume that the translations are accurate. The word 'coverture' under English law is synonymous with marriage, and a woman under coverture is simply a married woman...in English law a woman does not cease to be under coverture because she ceases to live with her husband."

Our attention has, however, not been invited to any text which can approximately be regarded as paraphrased by the rule stated by the learned Chief Justice. It is true that Jenkins, C.J., in *Bhau's* case (which it may incidentally be observed was on the question expressly decided thereby overruled in *Gajanan Yeshwant v. Pandurang Govind*⁴) after setting out Nilkanth Bhatt's text in the *Vyavahara Mayukha*, observed at page 238:

"This passage clearly indicates that, except as to the kind shown as *saudayika*, a woman's power of disposal over her *stridhan* is during coverture subject to her husband's consent."

But it would be unduly exalting the dictum of Sir Lawrence Jenkins to hold that by using the expression "during coverture" it was intended to convey that so long as the marriage tie subsisted the power of disposal of a Hindu woman over her *stridhan* was inexorably subject to her husband's consent.

The reason of the rule why non-*saudayika stridhan* is subject to the control of the husband is as stated by Sheshgiri Ayyar J. in *Muthukaruppa Pillai v. Sellathammal*,⁵ as follows (p. 299):

"...There is however an exception as regards gifts from strangers not given at the nuptial fire or during the marriage procession, and acquisitions made by means of mechanical arts by a married woman. They are subject to the control of the husband because the spirit of the Hindu law is against a married woman receiving gifts from strangers except at the time of marriage or from making acquisitions during coverture

2 [1943] Bom. 814, s.c. 45 Bom. L.R. 478.

4 (1949) 52 Bom. L.R. 238, s.c.

3 (1905) I.L.R. 30 Bom. 229, s.c. 7 Bom. L.R. 928.

5 (1914) I.L.R. 39 Mad. 298.

as she is expected to give her time and attention solely to the welfare of her husband and children and to the management of the household affairs."

Where a married Hindu woman is on account of incompatibility of temperament or other cause separated from her husband and the marital home is broken up, we are unable to appreciate why the wife should, before making an effective disposition of her property, be required to obtain the assent of her husband who is separated from her. The texts relating to the powers of Hindu women over their *stridhan* property were evolved at a period when the law-givers proclaimed the perpetual tutelage of woman (Manu IX 3), and as a necessary corollary thereto enjoined frugality in enjoyment of property held by them (Colebrook's Digest of Hindu Law, Book V, p. 477) and placed restrictions upon disposal thereof (Vyavahara Mayukha, Ch. IV, Sec. 8, pl. 3). At the time when the sages propounded the law, there was very little property a Hindu woman could possess and the society did not countenance a woman living apart from her husband. If in the context of that social order the law-givers ordained that *stridhan* other than *saudayika* cannot be disposed of by a Hindu woman without her husband's assent, that rule cannot, in our judgment, be made applicable to the Hindu society in the present days. We are unable to hold that the Hindu law is so static or so inelastic that in interpreting the texts the Courts are powerless to mould it to meet situations not contemplated at the time when it was declared and in the light of the consciousness of the society. If, having regard to the conditions prevailing many centuries ago, the rule was laid down by the law-givers that a Hindu married woman was not competent to dispose of her non-*saudayika stridhan* without the consent of her husband in the context of a society which did not contemplate separate residence of a Hindu woman from her husband, we will not in the present days be justified in holding, in a society which favours emancipation of women and does not look with disfavour upon a married woman for sufficient cause living apart from her husband, that even after the marital home is broken up the wife is still liable, before disposing of property acquired by her own exertions and of which she is the absolute owner, to obtain the assent of her husband. We are of the view that when a Hindu husband and wife have drifted apart and the marital home is broken up, the husband not only loses control over the wife but also loses control over the non-*saudayika stridhan* of the wife.

We may observe that in *Sarubai's* case from the facts found proved it appeared that the husband had not lost all control over the wife. They were living under the same roof, and the husband had even control over the residence of the wife. Sir John Beaumont C.J., in *Sarubai's* case did not, and could not, say that the principle of the judgment in *Bhagvanlal's* case was incorrect; and, with great respect, we regard the view expressed in *Bhagvanlal's* case as consistent with the notions of the present-day Hindu society.

[The rest of the judgment is not material to this report].

Appeal dismissed.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Tarkunde.

MOHANLAL CHANDULAL AGARWAL v. JANU DASRAJI.*

Berar Regulation of Agricultural Leases Act (XXIV of 1951), Secs. 10(1) & (2), 23, 3, 8, 9
 —Whether landholder can apply for enhancement of lease-money agreed upon at time of lease—Rights of lessee safeguarded under s. 23 whether rights granted to lessee by Act or rights allunde the Act—Whether s. 3 overrides other provisions of Act.

Under s. 10(2) of the Berar Regulation of Agricultural Leases Act, 1951, a landholder can apply for enhancement of the lease-money which was agreed upon at the time of the lease.

The purpose of s. 23 of the Berar Regulation of Agricultural Leases Act, 1951, is to provide that if a lessee possesses any rights independently of the Act, those rights are not limited or abridged by any of the provisions of the Act except the provisions contained in s. 7(1) of the Act. Therefore, the rights safeguarded are the rights which the lessee has acquired independently of the Act and not the rights granted to the lessee by the Act itself.

Section 3 of the Act must be read along with other sections of the Act, and not so that its provisions override other provisions of the Act.

*Dullab Ganpat v. Vallab Ganpat*¹ and *Sitaram Vithal Chitnis v. Shri Gundu Satyappa Dhade*,² referred to.

THE facts appear in the judgment.

N. B. Chandurkar, for the petitioner.

N. L. Abhyankar, with *S. V. Natu*, for opponent No. 1.

TARKUNDE J. The petitioner is a landholder of two agricultural lands. In the year 1951-52, during which the Berar Regulation of Agricultural Leases Act, 1951 (XXIV of 1951) came into force, the two lands were in the possession of respondent No. 1 as a tenant. The rent agreed for the year was Rs. 150. By virtue of s. 3 of that Act, respondent No. 1 became a protected lessee. Another result of that section was that his lease was deemed to be for a period of five years from the year 1951-52 and by a subsequent amendment that period was extended to seven years. In the year 1954 the petitioner applied under s. 10(2) of the Act to the Sub-Divisional Officer for the determination of reasonable lease-money for the lands, alleging that the agreed rent was very low and that there was an understanding between him and the tenant that the rent was to be increased as the lands improved during the course of tillage. The Sub-Divisional Officer heard the parties and fixed the reasonable lease-money at Rs. 262-8-0 per year. On an appeal taken by respondent No. 1, the Additional Deputy Commissioner confirmed the decision of the Sub-Divisional Officer. Respondent No. 1 went in second appeal to the Bombay Revenue Tribunal, and the Bombay Revenue Tribunal allowed the appeal and set aside the orders of the Courts below. The decision of the Bombay Revenue Tribunal is challenged before us. The Tribunal held that s. 10(2) of the Act did not entitle the petitioner to apply for enhancement of lease-money and that the petitioner's application was not tenable in law. In coming to that conclusion, the Tribunal relied on their earlier Full Bench decision in *Imamkhan v. Sheikh Gulam*.³

Sub-section (1) of s. 10 of the Act, in so far as it is relevant, provides that

"the lease-money payable by a protected lessee shall be the lease-money agreed upon between such lessee and his landholder, or where there is no agreement or either party

*Decided, November 18, 1958. Special Civil Application No. 244 of 1958.

¹ (1953) 56 Bom. L.R. 219.

² (1955) Special Civil Application No. 1695

of 1955, decided by Chagla C.J. and Dixit J., on November 1, 1955 (Unrep.).

³ [1958] N. L. J. 237.

to the agreement considers the agreed lease-money as unreasonable, such reasonable lease-money as may be fixed by the Revenue Officer."

This is followed by sub-s. (2) which is in the following terms:

"For the determination of reasonable lease-money under sub-section (1), either the lessee or the landholder may apply in the prescribed form to a Revenue Officer within whose jurisdiction the land is situated."

Thus, by the express terms of sub-ss. (1) and (2) of s. 10, both the lessee and the landholder have been given the right of getting the reasonable lease-money determined by a Revenue Officer if either of them considers that the agreed lease-money is unreasonable. Despite this, the aforesaid Full Bench of the Bombay Revenue Tribunal held that a landholder cannot apply for enhancement of the lease-money which was agreed upon at the time of the lease; and in coming to this conclusion the Full Bench relied upon the terms of s. 23 of the Act. Section 23 says:

"Save as otherwise provided in sub-section (1) of section 7, no other provision contained in this Act shall be construed to limit or abridge the rights or privileges of any lessee under any usage or law for the time being in force or arising out of any contract, grant, decree or order of a Court or otherwise howsoever."

The Full Bench of the Tribunal held that under s. 3 of the Act the contractual lease between the parties is deemed to be for a period of seven years; that the lease must be deemed to have continued with all the terms and conditions thereof including the term with regard to the lease-money; and that the right so given to the tenant by s. 3 cannot be limited or abridged by anything contained in s. 10, because s. 23 expressly bars any such construction being placed on s. 10.

We are, with respect, unable to accept this view. We agree that s. 3 of the Act creates a legal fiction, and the effect of the legal fiction is that the lease is deemed to be for a period of seven years from 1951-52 with its original terms and conditions. But the rights which are thus granted to the protected lessee by s. 3 of the Act are subject to certain limitations placed by the Act itself; and s. 23 cannot be so construed as to place those rights above the said limitations. For instance, s. 8 of the Act enables a landholder to apply to the Revenue Officer for terminating the lease of a protected lessee on various grounds, such as, that the lessee has failed to pay the lease-money on or before a particular date. Section 9 enables a landholder in certain circumstances to terminate the lease if he requires the land for personal cultivation. These and similar rights granted to the landholder operate as limitations on the security of tenure given to the tenant by s. 3 of the Act, and there is no reason why the right granted to the landholder by s. 10 of the Act of getting reasonable lease-money determined by a Revenue Officer should not have the same effect. Section 3 must be read along with other sections of the Act, and not so that its provisions override other provisions of the Act. If the view of the Revenue Tribunal were accepted, a part of s. 10 would be rendered wholly nugatory, because in no circumstances would a landholder be able to get reasonable lease-money determined by a Revenue Officer, although such a right has been expressly granted to him by that section.

In our view, the purpose of s. 23 of the Act is altogether different. Its purpose is to provide that if a lessee possesses any rights independently of the Act, those rights are not limited or abridged by any of the provisions of the Act except the provision contained in sub-s. (1) of s. 7. Section 7(1) prohibits a protected lessee from transferring his right in the land; so that the effect of this provision read with s. 23 is that even where a protected lessee had the right, independently of the Act, of transferring his leasehold interest, that right is no longer available to him. Subject to this exception, the rights of a lessee are safeguarded by s. 23. But the rights so safeguarded are the rights which the lessee has acquired independently of the Act and not the rights which are granted to the lessee by the Act itself. In the present case, the right of respondent No. 1, the lessee, to remain in possession of the lands on

payment of the annual lease-money of Rs. 150 in and after 1952-53 was wholly the creation of s. 3 of the Act; and s. 23 cannot be so construed as to safeguard that right against the other provisions of the Act.

In support of their conclusion, the Full Bench of the Bombay Revenue Tribunal relied on the decision of Chagla C.J. in *Dullab Ganpat v. Vallab Ganpat*.² That case arose under the Bombay Tenancy Act, 1939; and construing the provisions of that Act corresponding to the provisions of ss. 3, 10 and 23 of the Berar Regulation of Agricultural Leases Act, the learned Chief Justice held that the landlord had no right to get the agreed rent enhanced by applying for the determination of reasonable rent. In that case, however, the contractual lease was for a period of ten years, independently of the legal fiction created by one of the sections of the Bombay Tenancy Act, 1939, and it was during the pendency of this contractual lease that the landlord had applied for determination of reasonable rent by the Mamlatdar. The learned Chief Justice held that the contractual right of the tenant could not be abridged or limited by recourse to the provision in the Act which enabled the Mamlatdar to fix reasonable rent. In a subsequent case *Sitaram Vithal Chitnis v. Shri Gundu Satyappa Dhade*³, the learned Chief Justice, delivering the judgment of a Division Bench consisting of himself and Dixit J., had occasion to refer to the judgment delivered by him in *Dullab Ganpat v. Vallab Ganpat*. Referring to his decision in the earlier case, the learned Chief Justice observed:

"I construed the Act as giving special rights to the tenant, and one further special right was that if he had any right aliunde the Act, that right was safeguarded and that right could not be taken away under the Tenancy Act. But the particular facts I was dealing with in that case were that there was a subsisting lease under which the tenant was liable to pay a certain amount as rent, the landlord applied for the fixation of reasonable rent, and the Mamlatdar fixed the reasonable rent at a higher amount than the contractual rent, and what I held was that as the tenant had a right under the contract to pay a certain rent, that right could not be taken away by the provision of the Act by which the reasonable rent was fixed at a higher amount."

It is thus clear that our view with regard to the scope and construction of s. 23 of the Berar Regulation of Agricultural Leases Act is in no way different from the view taken by the learned Chief Justice about the corresponding provision of the Bombay Tenancy Act.

On behalf of respondent No. 1 Mr. Abhyankar argued before us that s. 23 of the Act safeguards the right of a lessee "arising out of any contract"; that section provides by a legal fiction that the right of respondent No. 1 in this case to pay Rs. 150 as lease-money is a right arising out of a contract; and that the legal fiction must be given full effect by placing that contractual right beyond the limitation comprised in s. 10. Alternatively, Mr. Abhyankar argued that if the said right of respondent No. 1 cannot be regarded as a right arising out of a contract, it was a right "arising...otherwise howsoever", and in that event also, it should receive the protection of s. 23. We are unable to accept either of these arguments. In either case, the right claimed by respondent No. 1 arises by virtue of the provisions of s. 3, and cannot stand independently of it. Section 23 does not safeguard any right derived from the provisions of the Act, whether that right is granted by creating a legal fiction or otherwise.

In the result, we hold that the application of the petitioner for the determination of reasonable lease-money under s. 10(2) of the Act is maintainable, and set aside the decision of the Bombay Revenue Tribunal. As the Bombay Revenue Tribunal have not dealt with the merits of the appeal before them, the appeal is restored with a direction that the Tribunal will deal with the same according to law. In the circumstances of the case, there will be no order as to costs.

Application allowed.

² (1953) 56 Bom. L.R. 219.

³ (1955) Special Civil Application No. 1695

of 1955, decided by Chagla C.J. and Dixit J., on November 1, 1955 (Unrep.).

ORIGINAL CIVIL.

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

KRISHNAPRASAD JWALADUTT PILANI v. THE COLABA LAND & MILLS CO. LTD.*

Companies Act (I of 1956), Secs. 166, 255, 256, 260—Whether elected director continues to hold office as director after expiry of period for calling annual general meeting under s. 166.

The tenure of office of the elected directors of a company does not continue after the expiry of the statutory period laid down under s. 166 of the Companies Act, 1956, for calling an annual general meeting.

*Ananthalakshmi v. Indian Trades and Investments,*¹ agreed with.

*Kailash Chandra v. Jogesh Chandra,*² dissented from.

*Consolidated Nickel Mines, Limited, In re,*³ referred to.

THE facts appear in the judgment.

P. N. Bhagwati, for the applicants.

J. M. Thakore, for respondent No. 2, V. J. Pilani.

D. P. Madon, for petitioner in I.C. Petition No. 113 of 1957, K. J. Pilani.

A. B. Diwan, for respondent No. 4, Jayantilal Patel.

F. S. Nariman, for Mr. Phiroz Wadia.

J. H. Bhabha, for respondents Nos. 9 and 10.

S. K. Desai, for the Director, Solomon Moses.

S. T. DESAI J. A question of considerable importance and some interest arises on this application under the new Companies Act of 1956 and the question relates to the tenure of office of what are usually described as directors elected at annual general meetings of companies. Section 166 of the new Companies Act lays down that the first annual general meeting shall be held by a company within eighteen months of its incorporation. It also lays down that the next annual general meeting of the company shall be held by it within nine months after the expiry of the financial year in which the first annual general meeting was held; and thereafter an annual general meeting shall be held by the company within nine months after the expiry of each financial year. Stripped of details, the provision for years subsequent to the first annual general meeting is that a company shall call its annual general meeting within nine months after the expiry of its financial year. That provision is mandatory. It is express and explicit. Ordinarily, elected directors of companies are not appointed for any specified period of time in term of years. They retire by rotation and they retire from their office of directorship at a date which would be the date of the statutory annual general meeting of the company. The question which we have to determine is whether in a case where despite the mandatory provisions of s. 166 and in breach of their duty as directors, the directors do not call an annual general meeting of the company for any length of time, can they claim to continue in their office of director after the expiry of the period mentioned in the section for calling the statutory meeting. *Prima facie* the contention that they can continue to hold the office in any such case would seem wholly unsound. But we are told that there is a provision in the Companies Act, which, if properly interpreted, leads to such an undesirable result.

The application before us is by the Colaba Land and Mills Co. Ltd. and the circumstances in which it is made are these. On April 14, 1955, the annual general meeting of the company was held for the year 1954. The financial year of this company, which is a public company, ends on December 31. At that

*Decided, November 20 1958. I. C. Petition

No. 180 of 1958.

¹ [1953] Mad. 503.

² [1928] A.I.R. Cal. 868.

³ [1914] 1 Ch. 883.

meeting Jayantilal N. Patel retired by rotation and being eligible for re-election was re-elected as a director. The annual general meeting for the year 1955 was held on March 29, 1956. At that meeting V. J. Pilani retired by rotation and being eligible for re-election was re-elected. The annual general meeting for the year 1956 has not been called to this date. The period for holding that meeting was extended by the Registrar upto March 31, 1958. Even so that meeting was not held. Nor has the annual general meeting for the year 1957 been held to this date. Between March 1957 and November 1957 there were certain changes in the constitution of the Board of Directors of the company as some directors resigned and one of them died. In November 1957 the position as regards the personnel of the Board of Directors of the company was this:

(1) V. J. Pilani who had been elected in the annual general meeting of the shareholders on March 29, 1956.

(2) Jayantilal Patel who had been elected in the annual general meeting of the shareholders of the company on April 14, 1955.

(3) K. J. Pilani who had been elected in the annual general meeting of the shareholders on April 22, 1954.

(4) R. S. Sethna who had been appointed by the Central Government on November 12, 1957.

(5) F. S. Wadia who had been appointed by the Central Government on November 21, 1957.

(6) Solomon Moses who was elected as an additional director of the company under s. 260. That was in November, 1957.

On September 30, 1958, the personnel of the Board of Directors of the company was the same with this difference that K. J. Pilani who, it was said, had vacated his office, was co-opted as a director on September 8, 1958. An objection was raised by one of the directors appointed by the Central Government to the attitude taken up by two of the directors, Jayantilal Patel and Solomon Moses that they had continued to be directors of the company, although if annual general meetings of the company had been held as required by s. 166, they would have retired long since. Their contention was that despite non-conformity with the provisions of s. 166 they continued to be directors of the company and were entitled to act as such till the date when an annual general meeting of the company might be held in future. The company has come before us on this application and the question we are asked to determine is whether Jayantilal Patel and/or Solomon Moses have ceased to be directors of the company.

The relevant part of s. 166 of the new Companies Act to which we have already made some reference may be set out here:

"166. *Annual general meeting.*—(1) (a) Every company shall, in addition to any other meetings, hold a general meeting which shall be styled its annual general meeting at the intervals, and in accordance with the provisions, specified below.

(b) The first annual general meeting shall be held by a company within eighteen months of its incorporation.

(c) The next annual general meeting of the company shall be held by it within nine months after the expiry of the financial year in which the first annual general meeting was held; and thereafter an annual general meeting shall be held by the company within nine months after the expiry of each financial year:

Provided that the Registrar may, for any special reason, extend the time within which any annual general meeting (not being the first annual general meeting) shall be held, by a further period not exceeding six months.

(d) Except in the case referred to in the foregoing proviso, not more than fifteen months shall elapse between the date of one annual general meeting and that of the next." Section 167 empowers the Central Government to call an annual general meeting where default is made in holding an annual general meeting in accordance with s. 166. Section 168 is material and it inflicts penalty for default in complying with the provisions of s. 166. The company and every officer of the

company who is in default is liable to punishment with fine which may extend to Rs. 5,000. The other material sections are ss. 255 and 256 which are as under:

"255. *Appointment of directors and proportion of those who are to retire by rotation.*—(1) Not less than two-thirds of the total number of directors of a public company, or of a private company which is a subsidiary of a public company, shall—

(a) be persons whose period of office is liable to determination by retirement of directors by rotation; and

(b) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(2) The remaining directors in the case of any such company, and the directors generally in the case of a private company which is not a subsidiary of a public company, shall, in default of and subject to any regulations in the articles of the company, also be appointed by the company in general meeting."

"256. *Ascertainment of directors retiring by rotation and filling of vacancies.*—

(1) At the first annual general meeting of a public company, or a private company which is a subsidiary of a public company, held next after the date of the general meeting at which the first directors are appointed in accordance with section 255 and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is not three or a multiple of three, then, the number nearest to one-third, shall retire from office.

(2) The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

(3) At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto..."

V. J. Pilani, respondent No. 2, Jayantilal Patel, respondent No. 4 and K. J. Pilani are represented by different counsel and have made their submissions before us. The company is represented by separate counsel and the company has also made its submissions before us. Solomon Moses, although he is not a party to the petition, is also represented by counsel. Learned counsel for the company as well as these directors have pressed before us the contention that the position in law is that even though there is a breach of the statutory duty on the part of the directors in not calling an annual general meeting of the company as required by law, they continue and will continue to be the directors of the company till an annual general meeting is in fact held. The directors appointed by the Central Government have opposed that contention. The greatest reliance has been placed by learned counsel for those directors and the company on certain words in s. 256 of the Act and the words are: "At the first annual general meeting" and "at every subsequent annual general meeting". It is urged that the directors who are liable to retire by rotation continue to hold their office as directors till the annual general meeting is in fact held. It is said that there is no other provision in the Act which indicates any contrary rule. It is also said that if the directors have committed a breach of the statutory requirement of s. 166 pertaining to calling of annual general meetings, that is irrelevant for the present purpose and if it has any relevance that would only be on the question of penalty which may be inflicted on them under s. 168 for default in complying with the provisions of s. 166 relating to calling of annual general meetings. It is urged that support is to be derived for this construction when reference is made to the proviso to sub-cl. (c) of s. 166(1) which empowers the Registrar for any special reasons to extend for a further period not exceeding six months the time within which an annual general meeting should be held. It is pointed out that if the view pressed for the acceptance of the Court by the directors appointed by the Central Government were to be accepted, the directors would ordinarily retire at the expiry of nine months from the date of the end of the financial year of the company,

and if thereafter the Registrar were to extend the time for the calling of the annual general meeting, the directors who had vacated their office on retirement would not be able to seek re-election. It is difficult to see why they would not be able to seek re-election. But assuming that it is so, we do not see how that can affect the legal position. Another hardship sought to be pointed out on behalf of the company was that if the Central Government were to intervene and call an annual general meeting at a later date, the directors who would be treated as having vacated their office latest at the end of nine months from the expiry of the financial year of the company would be prejudiced. There is no substance in this suggestion either. The question that we have to consider really lies in a very narrow compass and it is whether the tenure of the elected directors can continue after the expiry of the statutory period laid down for calling an annual general meeting? Section 255, as we have already mentioned, is material. It deals with the appointment of directors and proportion of those who are to retire by rotation. Clause (a) of sub-s. (1) speaks of two-thirds of the number of directors as persons whose period of office is liable to termination by retirement of directors by rotation. Section 256 speaks of annual general meeting. But evidently it proceeds on the basis that the annual general meeting has been called as required by statute i.e. s. 166. In our judgment it speaks of directors who till the date of the actual calling of the meeting continued to be directors in accordance with the provisions of law. A person who is to cease to be a director by retirement at the expiry of a stated time cannot claim to have escaped such retirement simply because an annual general meeting had not been called as required by law within that time. Section 256 does not include those who vacated their office. It only applies to directors who had not already vacated their office or ceased to be directors by operation of any provision of law. It has nothing to do with the tenure of the office of a director in the proper sense of that expression. The marginal note of s. 256, which we may look at for the purpose of seeing the trend of the section, speaks of ascertainment of directors retiring by rotation and filling of vacancies. It does not lay down any substantive rule as to the tenure of the office of a director. It is not the only section which has to be considered. We have to ascertain the tenure of the office of an elected director not merely from that section but from the language of ss. 166, 255 and 256 read together.

In the context of the tenure of the office of an elected director, the general meeting at which a director liable to retire by rotation "shall retire from office" must, in our judgment, be understood to be a general meeting called in accordance with the mandatory provisions of s. 166. It is extremely difficult to see how that tenure of office can be extended simply by not calling the annual general meeting and taking shelter under the language of s. 256 which, as we have already said, does not lay down any substantive provision relating to the tenure of the office of an elected director. Mr. Bhabha, learned counsel for respondents Nos. 9 and 10 is, in our opinion, right when he says that persons who have committed a breach of their duty by not calling the required annual general meeting within the statutory time cannot be permitted to say that they have not vacated their office because in fact an annual general meeting has not been called. What we have to consider is the meaning and effect of the sections to which we have already made reference, and reading those sections, we find little difficulty in reaching the conclusion that a director vacates his office at the latest on the last day on which an annual general meeting could have been called as required by s. 166. Now, it is not as if there is no authority in support of the view which we are inclined to take. There is a considerable body of authority in England on the construction of the analogous provisions relating to directors and there are two authorities of Courts in India, one a decision of the Madras High Court and another a decision of the Calcutta High Court. It is not necessary for us to examine the English decisions in any detail since that has been done in the Madras decision to which we shall presently turn. But before we do so, it is necessary to examine the position in law on this question before

the Indian Companies Act of 1956 found place on the statute book. Section 17(2) of the Companies Act of 1913 was as under:

"Articles of Association may adopt all or any of the regulations contained in Table A in the First Schedule and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 53, regulation 66, regulation 71, regulations 78, 79, 80, 81 and 82, regulation 95, regulation 97, regulation 105, regulation 107 and regulations 112, 113, 114, 115 and 116 contained in that Table."

We are only concerned with art. 78 mentioned above which was to be deemed to be contained in the articles of association of every company. That regulation was as under:

"At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office."

The wording of the analogous provision in English law which was also a regulation was in *pari materia*. By the Companies (Amendment) Act of 1936, s. 861 was added in our Companies Act of 1913 which dealt with the question of vacation of office of a director. Sub-section (2) of that section was as under:

"Nothing contained in this section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section."

The position that emerges from the provisions in the Companies Act of 1913 is similar to that under the present s. 256.

A question arose in the case decided by the Madras High Court reported in *Ananthalakshmi v. Indian Trades and Investments*¹ as to whether directors who under the articles of association should have retired from the Board of Directors at any annual general meeting should be held to have vacated their office and ceased to be directors of the company on the last day on which an annual general meeting could have been held. The question was answered by the Court in the affirmative and it was held that the directors had vacated their office despite the fact that an annual general meeting of the company had in fact not been called. The judgment was delivered by Mr. Justice Venkatarama Ayyar (as he then was) and in the course of his judgment his Lordship examined the decisions of Courts in England. The first time when the point came to be decided in England was in 1914 and that was in the case of *Consolidated Nickel Mines, Limited*, In re.² That decision has been accepted as laying down the correct legal position under the analogous provisions in England without being questioned at any time since 1914. So firmly is the rule accepted as established that when the identical question arose in another case in 1944 counsel appearing for the parties accepted the decision in *Consolidated Nickel Mines, Limited*, In re. That decision was accepted in the latter case in the trial Court, also before the Court of Appeal and also before the House of Lords in which the leading speech was of Lord Simonds. All those decisions and the observations there made have been considered by Venkatarama Ayyar J. in the Madras case and it is not necessary for us to rehearse the same. The conclusion reached by the Court was that a director who was bound to retire by rotation as well as a director who was an additional director being co-opted by the other directors should be treated as having vacated their office on the last day on which the annual general meeting of the company could have been held. Incidentally, we may observe that the editors of leading text books on the subject in England have referred to the English decisions as laying down the law on the subject. We are in respectful agreement with the decision of the Madras High Court.

Our attention, however, has been drawn to a decision of the Calcutta High Court where a different view appears to have been taken. That case is reported in *Kailash Chandra v. Jogesh Chandra*³ and this is all that is stated in that

¹ [1953] Mad. 508.

² [1914] 1 Ch. 883.

³ [1928] A.I.R. Cal. 868.

case (p. 870):

"With regard to the merits, the Articles of Association provided that the directors should be elected annually at a general meeting. It follows, therefore, that so long as the general meeting is not held in which the directors are to be elected the directors elected at the previous meeting would continue in office. It is contended by the learned advocate for the respondent that according to the true interpretation of the articles the directors would hold office only for one year from the date of their appointment; and if no general meeting is held at the lapse of one year the directors would automatically vacate their office and the company would go on without any directors at all. I am unable to accept this contention of the learned advocate as it seems to me that it would be unreasonable to hold that this is the true meaning of the Articles of Association."

With great respect, we are unable to agree with this opinion. It appears that the attention of the learned Judges was not drawn to many aspects of the matter nor does it appear that their attention was drawn to the accepted position under the analogous provisions of the English law.

A distinction is sought to be made between the position of a director liable to retire by rotation and an additional director and we have been referred to s. 260 which deals with additional directors. That section is as under:

"Nothing in sections 253, 258 or 259 shall affect any power conferred on the Board of directors by the articles to appoint additional directors:

Provided that such additional directors shall hold office only upto the date of the next annual general meeting of the company:

Provided further that the number of the directors and additional directors together shall not exceed the maximum strength fixed for the Board by the articles."

It is said that here the words used are: "shall hold office only upto the date of the next annual general meeting" and therefore, in any event in case of additional director, he would not vacate his office until the date of the next annual general meeting. We do not think any emphasis can be laid on the words "upto the date of the next annual general meeting". The expression "upto the date" had to be used in the context of the section because the position of an additional director is in certain respects different from the position of an elected director. One-third of the elected directors have to go out by rotation and in computing the number of directors, the additional directors are not to be taken into consideration. Therefore, it may well be that the Legislature thought it desirable that the words "upto the date" should be inserted in the section instead of "at the annual general meeting". This difference in language does not affect the real question before us.

In our opinion, therefore, both Jayantilal N. Patel and Solomon Moses had ceased to be the directors of the company.

The company will pay the costs of this application fixed at Rs. 500 of Mr. Nariman's client, who is a director appointed by the Central Government. The company will also pay the costs of Mr. Bhabha's clients who are respondents Nos. 9 and 10 of this application fixed at Rs. 500.

Solicitors for the petitioner: *Matubhai Jamietram & Madan.*

Solicitors for the respondents: *Mulla & Mulla and Craigie Blunt & Caroe.*

APPELLATE CIVIL.

Before the Hon. Mr. H. K. Chaitani, Acting Chief Justice, and Mr. Justice Shelat.

THE NATIONAL UNION OF COMMERCIAL EMPLOYEES v. M. R. MEHER.*

Industrial Disputes Act (XIV of 1947), Secs. 2(j)(k), 22FF—Constitution of India, arts. 19(1)(g), 276—Bombay Shops and Establishments Act (Bom. LXXIX of 1948), Sec. 2(4)—Solicitor's profession whether an industry within the meaning of Industrial Disputes Act—Dispute between firm of solicitors and its employees whether can be subject of reference under Act.

The profession of a solicitor is not an industry within the meaning of the word in the Industrial Disputes Act, 1947, and therefore a dispute between a firm of solicitors and its employees is not an industrial dispute which could be the subject of a reference under the Act.

An essential requisite of industry is the existence of relationship of master and servant. This relationship must exist in the industry itself. Only that business, trade, undertaking or calling can be held to be an industry, which requires the co-operation of both the employer and the employees for carrying on that business, trade, undertaking or calling.

*Britj Mohan v. N. C. Chatterjee*¹ and *Dunderdale v. Mukherjee*² agreed with.

*Province of Bombay v. Western India Automobile Assn.*³ and *Hospital Mazdoor Sabha v. Bombay State*⁴, distinguished.

*Nagpur Corporation v. N. H. Mujumdar*⁵, commented upon.

*Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation*⁶, *Federated State School Teachers' Association of Australia v. State of Victoria*⁷, *National Association of Local Government Officers v. Bolton Corporation*⁸, *Hariprasad Shivshankar v. A. D. Divelkar*⁹ and *D. N. Banerji v. P. R. Mukherjee*¹⁰, referred to.

THE facts appear in the judgment.

H. R. Gokhale, with *M. C. Bhandare*, *L. C. Dudhia* and *D. M. Buch*, for the petitioners.

P. P. Khambata, instructed by *Romer Dadachanji Sethna & Co.*, for respondents Nos. 2 and 4.

H. D. Banaji, instructed by *Shroff & Co.*, permitted to appear for the Incorporated Law Society.

CHAITANI Actg. C.J. Respondents Nos 2, 3 and 4 were partners in a firm of solicitors, Messrs. Pereira Fazalbhoy & Co. Originally there were three partners, Messrs. Pereira, Amin and Fazalbhoy. A partnership deed between them was executed on January 14, 1929. This partnership came to an end in November 1935 when Mr. Amin retired from the partnership. A new deed of partnership was then executed between Messrs. Pereira and Fazalbhoy respondents Nos. 2 and 3. They carried on the practice of solicitors in the name of Messrs. Pereira Fazalbhoy & Co. This partnership was dissolved on March 31, 1946. From April 1, 1946, there were three partners, Messrs. Pereira, Fazalbhoy and Desai, respondents Nos. 2, 3 and 4. They carried on their practice as solicitors in the name of Messrs. Pereira Fazalbhoy & Co. until November 15, 1957, when the firm was dissolved. Petitioner No. 2 was employed as an assistant accountant in this firm. Petitioner No. 1 is a Trade Union and some of its members were the employees in the firm of Messrs. Pereira Fazalbhoy & Co., to which we will hereafter refer as the firm. In August 1957 petitioner No. 1 wrote to the

*Decided, November 20, 1958. Special Civil Application No. 2789 of 1958.

1 [1958] A.I.R. Cal. 460.

2 [1958] A.I.R. Cal. 465.

3 (1948) 51 Bom. L.R. 58.

4 (1956) 58 Bom. L.R. 769.

5 (1957) 60 Bom. L.R. 180.

6 (1918-1919) 28 C.L.R. 508.

7 (1929) 41 C.L.R. 589.

8 [1943] A.C. 166.

9 (1956) 59 Bom. L.R. 384, S.C.

10 [1953] S.O.R. 302.

firm and submitted certain demands on behalf of the employees of the firm. The demands related to bonus for the years ending March 31, 1955, March 31, 1956, and March 31, 1957, and to certain other matters. As no agreement could be reached between the parties, conciliation proceedings were started. The conciliation Officer could not also bring about a settlement between the parties. He submitted a report to Government who on February 3, 1958, referred the dispute in regard to bonus for two years ending March 31, 1956, and March 31, 1957, to an Industrial Tribunal under sub-s. (5) of s. 12 of the Industrial Disputes Act. Respondents Nos. 2 to 4, to whom I will hereafter refer as the respondents, raised a preliminary objection that the profession followed by them, which is that of solicitors, was not an industry within the meaning of this word in the Industrial Disputes Act, that consequently the dispute between them and their employees was not an industrial dispute, that the reference made by Government was, therefore, bad in law, and that the Tribunal had no jurisdiction to adjudicate upon it. This objection was upheld by the Tribunal. The Tribunal, therefore, passed an order that the reference could not be adjudicated upon. This order is challenged in the present Special Civil Application.

When this application came up for hearing, Mr. Banaji appeared on behalf of the Incorporated Law Society, which is a representative society of the solicitors practising in this Court, registered under the Indian Companies Act. Mr. Banaji stated that the Society was vitally interested in the matter, as the decision given in this case would affect not only the respondents, but all the solicitors and attorneys practising in this Court. He, therefore, requested that the Society should be allowed to appear in the present application. We granted the permission asked for, as our decision will affect all persons following the profession of solicitors. We also adjourned the hearing of the application for two days in order to enable any other Union of persons employed in the offices of other solicitors to make an application for being allowed to appear, in case it chose to do so. No such application was, however, made to us.

To appreciate the arguments, which have been advanced in this case, it is necessary to consider certain provisions of the Industrial Disputes Act. The object of the Act, as stated in the preamble, is to make provision for the investigation and settlement of industrial disputes. The Act has, therefore, been enacted to provide for the settlement of only those disputes, which are of an industrial character, and not of all disputes between employers and employees. Clause (j) in s. 2 of the Act defines the word "industry" as follows:

"'industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;"

The expression "industrial dispute" is defined in cl. (k) as meaning

"any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

Another definition, which is material, is that of the word "workman", who is defined as meaning any person employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward. The rest of the definition of this word is not material in this case. "Workman" is therefore defined as meaning any person employed in any industry. "Industrial dispute" means, so far as is material, a dispute between employers and workmen, that is, between employers and persons employed in an industry. Before there can, therefore, be a workman or industrial dispute, there must first be an industry.

The principal question to be decided in this application, therefore, is whether the profession of a solicitor can be said to be an industry within the meaning of the Act. Mr. Gokhale, who appears on behalf of the petitioners, has strenuously contended that such a profession would fall within the words "business," "undertaking" and "calling" contained in the definition of the word

"industry". All these three words are not defined in the Act. We, therefore, have to consider their ordinary dictionary meaning. In Webster's Dictionary the meaning given to "business" is that which busies or engages time, attention or labour; constant employment; regular occupation; work. In Halsbury, Vol. XXXII, 1939 edn., in para. 487, it is stated that

"trade in its primary meaning is the exchanging of goods for goods or goods for money; and in a secondary meaning it is any business carried on with a view to profit, whether manual or mercantile, as distinguished from the liberal arts or learned professions and from agriculture."

In para. 488 it is stated that business is a wider term, not synonymous with "trade", and means practically anything which is an occupation as distinguished from a pleasure. In para. 489 the learned author has observed that profit or intent to make profit is not an essential part of the legal definition of a trade or business. The word "business" is, therefore, a wider term than "trade", and according to its dictionary meaning it includes any occupation. Mr. Khambata, who appears on behalf of the respondents, has urged that as the word "business" is followed by the word "trade", it must take its colour from the latter word "trade", and that the business referred to in the definition is, therefore, only that kind of business which is analogous to or which is in the nature of a trade. The latter part of the definition, which includes any calling, service, employment or industrial occupation within the meaning of industry, however, seems to indicate that the two words are not necessarily used in an analogous sense.

It is, however, difficult to accept Mr. Gokhale's argument that the profession of a solicitor is an undertaking. The word "undertaking", as defined in the Webster's Dictionary, means anything undertaken; any business, work or project, which one engages in or attempts; an enterprise. In *Province of Bombay v. Western India Automobile Assn.*,¹ at p. 66 it was observed that an undertaking is something different from business, trade or manufacture. In *Hospital Mazdoor Sabha v. Bombay State*,² at p. 774 it was observed that the expression "undertaking" is a term of wide import and is nothing more than any work or project which a person might engage in and that such work or project might have no commercial implications. The word "undertaking" is also used in s. 25FF and s. 25FFF of the Act. Section 25FF begins with the words "Where the ownership or management of an undertaking is transferred..." In these sections "undertaking" is, therefore, used in the sense of an enterprise, which can be owned and transferred. A solicitor's work, which depends entirely on his own personal intellectual ability, is not capable of being transferred. Consequently it would not be an "undertaking" within the meaning of the Act.

The word "calling" is however very wide. According to its dictionary meaning, it means one's usual occupation, vocation, business or trade. Both the words "business" and "calling" are therefore words of wide connotation. If, therefore, the ordinary dictionary meaning is to be given to them, it will be difficult to hold that the practice of the profession of a solicitor is not an industry. In fact it would not be easy to conceive of any profession, which would not then fall within the definition of this expression. This could not be the object of the Legislature: The words "business" and "calling" must be read in their context and in conjunction with other words, which are used in the same definition and from which they must take their colour. The word "calling" is followed by the words "of employers." The latter part of the definition contains the words, "occupation or avocation of workmen." The words "employer" and "workmen" necessarily import the relationship of employer and employee. An essential requisite of industry is, therefore, the existence of relationship of master and servant. This was so held in *Province of Bombay v. Western India Automobile Assn.*, in which it was observed that

¹ (1948) 51 Bom. L.R. 58.

² (1956) 58 Bom. L.R. 769.

what is really emphasised in the definition of "industry" is the relationship of employers and workers.

This relationship of master and servant or employer and employee must, however, exist in the industry itself. In other words, only that business, trade, undertaking or calling can be held to be an industry, which requires the co-operation of both the employer and the employees for carrying on that business, trade, undertaking or calling. This is also the ordinary concept of the word "industry". In Webster's Dictionary this word is defined as

"any department or branch of art, occupation, or business, especially one which employs much labour and capital and is a distinct branch of trade."

Another definition given in the same dictionary is

"systematic labour or habitual employment; especially human exertion employed for creation of value regarded by some as species of capital or wealth; labour."

In its ordinary meaning "industry", therefore, imports the concept of co-operation between the employer and the employed. In order that an enterprise may constitute an industry, it must, therefore, be one for the carrying on of which, it is necessary to employ labour. In other words, it must be one which requires the joint effort of both the employer and the employed.

Mr. Gokhale has contended that under the definition of the word "industry" given in the Act, two things are necessary in order to constitute industry. There must be a business, trade, undertaking, manufacture or calling, and, secondly, there must be relationship of master and servant. If these two are present, the enterprise will be an industry within the meaning of the Act. Mr. Gokhale has, therefore, urged that every occupation or business, in which persons are employed, is an industry within the meaning of the Act. This argument ignores the basic concept of industry, which is that there must be joint endeavour of both the employer and the employed. The argument, if accepted, would lead to astounding results. The business of a hawker would have to be held to be an industry, if he employs a labourer to carry his basket. So also the business of a petty shop-keeper, like that of a panshop, will have to be held to be an industry, if a servant is employed to sweep and clean the shop. A doctor, who visits his patients, would be deemed to be engaged in an industry, if he employs a peon to carry his bag containing instruments and medicines. Several other similar instances could be envisaged. We have no doubt that the Legislature could not have intended that the Act should result in such drastic and serious consequences.

In any case, the basic concept of industry has always been held to be that there must be co-operation between the employer and the employees, either in producing wealth or in the rendering services. In other words, what comes out of the industry must be the result of the combined effort of both. That the Legislature had this concept in mind is indicated by the use of the words "of employer" in the first part of the definition and the words "employment, or industrial occupation or avocation of workmen" in the second part. In *Hariprasad Shivshankar v. A. D. Divelkar*,³ at p. 389, the Supreme Court has observed:

"It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptance of the word which is the subject of definition; but there must then be compelling words to show that such a meaning different from or in excess of the ordinary meaning is intended. Where, within the framework of the ordinary acceptance of the word, every single requirement of the definition clause is fulfilled, it would be wrong to take the definition as destroying the essential meaning of the word defined."

There are no compelling words to show that the Legislature intended to exclude the essential concept of industry from the definition given to this word in the Act.

Mr. Gokhale has urged that the concept of industry has changed in recent

times. That is undoubtedly so. As pointed out by the Supreme Court in *D. N. Banerji v. P. B. Mukherjee*⁴ (p. 307):

"In the ordinary or non-technical sense, according to what is understood by the man in the street, industry or business means an undertaking where capital and labour co-operate with each other for the purpose of producing wealth in the shape of goods, machines, tools etc., and for making profits."

In the same case it has been pointed out that the profit motive is no longer regarded as an essential element of industry. From the observations made at p. 312 it appears that the investment of capital in the ordinary sense is no longer a *sine qua non* or necessary element in the modern conception of industry. It was, therefore, held in this case that the expression "industrial dispute" in the Industrial Disputes Act includes disputes between municipalities and their employees in branches of work that can be regarded as analogous to the carrying on of a trade or business. It is also not in dispute that the word "industry" can no longer be limited to enterprises which are engaged in the production of wealth, goods or other commodities. Relying on the observations of Isaacs J. in *Federated State School Teachers' Association of Australia v. State of Victoria*,⁵ Mr. Gokhale has contended that rendering of services may by itself be sufficient to make an organisation an industry. We are inclined to accept this argument, particularly having regard to the fact that the second part of the definition includes any service within the term "industry". But as I will point out presently, in the same case, for a service to be regarded as industry, Isaacs J. himself considered co-operation between employer and employees as being a necessary requisite.

The pursuit of a learned profession like that of a solicitor does not require any co-operation of labour. A solicitor offers his own personal services, or, to put it in different words, is paid for the legal advice and legal assistance given by him personally. His staff cannot do this work or give legal aid to his clients. The money which he earns is for work done by him personally. Its quality depends on his personal qualifications, his brains, his knowledge of law, and the labour put in by him personally. The remuneration earned by him depends upon his personal reputation and the kind and quality of work done by him personally. His staff performs what may be called ministerial functions by typing his opinions, or the documents prepared by him, or by maintaining accounts of his income and expenditure. There is no co-operation between or joint effort of the employer and the employee in this profession, nor is such co-operation or combined effort indispensable for carrying on the profession. An essential requisite of the concept of industry is, therefore, wanting. Consequently, such a profession cannot be said to be an industry within the meaning of the Act.

Mr. Khambata has contended—and we cannot say that there is no force in this argument—that if the Legislature had intended that a profession like that of a solicitor should also fall within the definition of the word "industry" and that the Act should apply to such professions also, it would have included this word specifically in the definition. In this connection, he has drawn our attention to arts. 19(1)(g) and 276 of the Constitution, and s. 2(4) of the Bombay Shops and Establishments Act, in which the word "profession" has been separately used. In art. 19(1)(g) the words used are "to practise any profession, or to carry on any occupation, trade or business." In art. 276 the words used are "professions, trades, callings or employments." Section 2(4) of the Bombay Shops and Establishments Act uses the words "business, trade or profession."

I will now refer to the various cases, which have been referred to in the course of arguments. In *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation*,⁶ it was held by a majority of 4 to 2, that municipal corporations are not, with regard to the making, main-

⁴ [1953] S.C.R. 302.

⁵ (1929) 41 C.L.R. 569.

⁶ (1918-1919) 26 C.L.R. 508.

tenance, control or lighting of public streets, exempt from Commonwealth Conciliation and Arbitration Act 1904-1915, enacted to provide for the settlement of industrial disputes. Two of the Judges, who formed the majority, were Isaacs and Rich JJ. In their judgment at p. 554 they formulated the concept of an industrial dispute in these words:

"Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation. This formula excludes the two extreme contentions of the claimant and the respondents respectively. It excludes, for instance, the legal and the medical professions, because they are not carried on in any intelligible sense by the co-operation of capital and labour and do not come within the sphere of industrialism.... It implies that 'industry', to lead to an industrial dispute, is not, as the claimant contends, merely industry in the abstract sense, as if it alone effected the result, but it must be acting and be considered in association with its co-operator 'capital' in some form so that the result is, in a sense, the outcome of their combined efforts."

Co-operation of capital and labour and their combined effort were, therefore, held to be essential elements of the concept of industry. This case has been referred to at some length by the Supreme Court in their judgment in *Banerji's* case.

The other case from Australia, to which reference has been made is *Federated State School Teachers' Association of Australia v. State of Victoria*. In that case the High Court of Australia, by a majority of 4 to 1, held that the educational activities of the States carried on under the appropriate statutes and statutory regulations relating to education did not constitute an "industry" within the meaning of s. 4 of the Commonwealth Conciliation and Arbitration Act 1904-1928; that the occupation of teachers so employed was not an industrial occupation, and that the dispute which existed between the States and the teachers employed by them was therefore not an "industrial dispute". The majority of the Judges in their judgment at p. 573 described the economic concept of industry in these words:

"...Economists, notably Mr. J. A. Hobson (*The Industrial System*), say that a scientific interpretation requires us to include in the word 'industry' processes which are concerned with services such as the administrative services of public officials and the skilled professional advice of doctors and lawyers."

At p. 574 it was observed that this economic view had never been accepted by the Court and that it was too wide. It was also observed that the view that the sphere of industrialism is to be found in operations, in which the relation of employer and employee subsists, was too wide. At p. 575 reasons are given for holding that the educational activities of the States did not constitute an industry. These are that they bear no resemblance whatever to an ordinary trade, business or industry; that they are not connected directly with, or attendant upon, the production or distribution of wealth; and that there is no co-operation of capital and labour, in any relevant sense. Isaacs J. did not agree with the majority view, but in his judgment at p. 580 he stated that he adhered to the concept of industrial dispute formulated by him in his judgment in *Federated Municipal Employees' Union* case. After citing the passage from his previous judgment, which I have quoted above, he observed as follows at p. 581:

"First of all, there is co-operation of 'capital' and 'labour'. Everyone knows that means, in the context, the co-operation of employer and employed, the words 'capital and labour' being representative of the two classes of co-operators. They are the 'partners' referred to by Professor Hearn in his work mentioned. In his recent work *Labour Relations in Industry*, Dwight Lowell Hoopingarner, M.A., formerly lecturer, Harvard University, says (p. 11): 'There is a marked division of the active parties in industry into the two groups of employing and employed'."

At p. 577 Isaacs J. rejected the argument that an industrial dispute cannot possibly occur, except where there is furnished to the public—the consumers—by the combined efforts of employers and employed, wealth in the sense of “tangible, ponderable, corpuscular wealth.” In his opinion an organisation for service could also be regarded as an industry. On the same p. 577 he observed:

“...But it further neglects the fundamental character of ‘industrial disputes’ as a distinct and insistent phenomenon of modern society. Such disputes are not simply a claim to share the material wealth jointly produced and capable of registration in statistics. At heart they are a struggle, constantly becoming more intense on the part of the employed group engaged in co-operation with the employing group in rendering services to the community essential for a higher general human welfare, to share in that welfare in a greater degree.”

Even in this judgment, therefore, Isaacs J. adhered to his previous view that in an industry there are two partners, the employer and the employed and that the result or the product of the industry, either in the form of wealth or in services to the community, must be the outcome of their combined efforts.

The next case referred to was *National Association of Local Government Officers v. Bolton Corporation*,⁷ in which it was held that a dispute as to conditions of service of officers of a municipal corporation was a trade dispute. This decision was given having regard to the definitions of the words “trade dispute” and “workman” given in the Conditions of Employment and National Arbitration Order, 1940. These definitions are materially different from those given in our Act. This case is, therefore, not of much assistance.

Mr. Gokhale has also relied on three decisions of this Court in *Province of Bombay v. Western India Automobile Assn.*,⁸ *Hospital Masdoor Sabha v. Bombay State*⁹ and *Nagpur Corporation v. N. H. Mujumdar*.¹⁰ In the first case it was held that the Western India Automobile Association of Bombay, which exists for the purposes of rendering services to its members, falls within the purview of the Industrial Disputes Act. In the second case it was held that the activity of the State of Bombay in running a hospital and employing workmen constitutes an industry within the meaning of the Industrial Disputes Act. Mr. Gokhale has relied on the observations in the judgment at p. 774:

“Now, when we look at the definition of ‘industry’, it is not confined to an activity of a commercial character. Nor does it import necessarily a profit motive or the employment of capital. Industry is not only any business or trade or manufacture, but it is also an undertaking or calling of employers, and no expression could have been used with a wider import and connotation than the expression ‘undertaking’. Undertaking is nothing more than any work or project which a person might engage in. Work or project may have no commercial implications.”

Both these cases are clearly distinguishable from the present one. Neither the Western India Automobile Association in the first case, nor the Hospital in the second case, could be run without the co-operation of labour. The running of these institutions did not depend solely upon the personal skill, knowledge or effort of any individual. We have also not been able to find anything in the judgments in these cases which would indicate that co-operation of labour was regarded as not being a necessary element of the concept of industry.

In the third *Nagpur Corporation* case, the decision in the *Hospital Masdoor Sabha* case was followed and it was held that the question whether any particular activities of a local authority are industrial activities or not can only be decided after bearing in mind the definition of the term “industry” contained in the Act, and examining the activities of these as well as of other departments in the light of that definition as well as of the test laid down in the *Hospital Masdoor Sabha* case. In his judgment at p. 186 Mudholkar J. cited the first sentence in the passage from the judgment of Isaacs and Rich JJ. in *Federated*

7 [1943] A.C. 166.

8 (1948) 51 Bom. L.R. 58.

9 (1956) 58 Bom. L.R. 769.

10 (1957) 60 Bom. L.R. 180.

Municipal Employees' Union case, at p. 554, which I have quoted above, and observed that it did not appear that their Lordships were of the view that for an activity to be classed an industry it must necessarily be carried on by the co-operation of capital and labour for the satisfaction of human wants and desires. The attention of the learned Judge does not appear to have been invited to the subsequent observation in the same passage that "industry" to lead to an "industrial dispute" must be acting and be considered in association with its co-operator capital in some form so that the result is the outcome of their combined efforts. As I have already pointed out, both in this case as well as in the subsequent *Federated School Teachers'* case, co-operation of capital and labour or of employer and employed was regarded as being necessary for holding an enterprise to be an industry.

Then there are two decisions of the Calcutta High Court, *Brij Mohan v. N. C. Chatterjee*¹¹ and *Dunderdele v. Mukherjee*.¹² The identical question, which we have to decide, arose for consideration in these cases. In both the cases it was held that the profession of a solicitor is not an industry and that a dispute between him and his employees does not constitute an industrial dispute. In the former case it was observed that the expression "industry" does not include within its concept the case of an individual, who carries on a profession dependent upon his own intellectual skill, and that the calling of a solicitor carrying on his normal avocations cannot be called an industry. In the latter case Mukharji J. held that the basic and distinctive test of industry is that it is a partnership between labour and capital, that each of them has a share in building the product of industry and that the final product is the result of co-operation and partnership between them. Where, however, the product is not the result of joint labour and capital, the very basic test of industry is absent. At p. 469 he observed:

"...A thinker or a statesman or a philosopher who produces a work which embodies the result of his research, study and ideas does not carry on an industry. The fact that the result of such thought can be produced in print and paper if printers, publishers and other persons help in producing the work does not mean that the work is joint. The work remains the individual effort. The publication of the work is not the work itself. Similarly a professional man like a lawyer or a solicitor who renders his professional services to his clients and provides them with his professional skill and experience does an individual work. The fact that communications have to be carried on and correspondence has to be typed by a typist, the fact that accounts have to be kept which usually have to be done by accountants and the fact that assistants are employed to assist, do not make the result or the product joint as in an industry. The product remains the individual product. A solicitor who gives legal advice to his client may give it orally, or may write it in his own hand. The fact that instead of writing his legal advice in his own hand he employs a typist does not make it an industry, nor does it make the legal advice the joint product between him and the typist."

At p. 468 he observed:

"...In an expanding society with broadening concept of business and industry the word 'industry' is also enlarging its ambit, scope and expression. Even then outside the expanding horizon of industry in an industrial civilization and in an industrial democracy there still remains the vast world of individual work and individual endeavour depending on individual skill, excellence and peculiarity personal to the individual or individuals concerned. That vast world does not come within the increasing glitter and glamour of industry...One such world is the world of private endeavour and private excellence personal to the individual concerned. Learned professions, understood in their professional sense, such as the professions of medicine and of law are not normally industries unless some outstanding feature of industry is added to them."

With respect, we agree with these observations, except that, to quote the words of Isaacs J. in *Federated School Teachers'* case, by co-operation of capital and labour is meant in the context the co-operation of employer and employee, the

11 [1958] A.I.R. Cal. 460.

12 [1958] A.I.R. Cal. 465.

words "capital" and "labour" being representative of and indicating the two classes of co-operators.

The Tribunal was, therefore, right in holding that the profession of a solicitor is not an industry within the meaning of the Industrial Disputes Act.

After the arguments were over before the Industrial Tribunal, the respondents produced a copy of the judgment of the Calcutta High Court in *Brij Mohan's* case. Thereafter an attempt was made on behalf of the petitioners to show that the respondents' firm carried on some business other than that of solicitors. It was alleged that the respondents were engaged in doing business in forward transactions in shares and silver and also in the business of buying and selling property. The allegations with regard to carrying on business in shares and in silver was denied in his affidavit filed by respondent No. 2. The Industrial Tribunal has believed his statement on this point. With regard to the second allegation, the respondents mentioned four instances of purchases and sales of property between 1933 and 1957. Three of these transactions took place before the present firm of the respondents came into existence in April 1946. Consequently, they must be left out of consideration. With regard to the fourth transaction, the affidavit filed by the respondents shows that a property was purchased by the firm at an auction sale held in consequence of a charging order for costs made in favour of the firm. This cannot be regarded as dealing in the business of buying and selling property. It appears from para. 11 of the petition that the petitioners had requested the Tribunal to direct the respondents to produce four documents, the three deeds of partnership executed in 1929, 1935 and 1946, and the document executed when Mr. Amin retired from the partnership in November 1935. The documents executed prior to 1946 were obviously irrelevant. They had no connection with the firm in which the petitioners were employed. With regard to the deed of partnership executed in 1946, it is admitted that this document was produced by the respondents in Court. It was shown to the Tribunal. The petitioners have alleged in cl. (n) of para. 11 of the petition that this document was not shown to them. The respondents have in their affidavit denied in general terms the allegations made by the petitioners in para. 11 of their petition. Even assuming that this document was not shown to the petitioners, we do not think that any injustice has been caused to them, because the only transaction alleged by them, which took place during the time the firm, in which they were employed, was in existence, was a transaction in which the respondents purchased a property in execution of an order made in their favour for costs. This transaction by itself would not be a sufficient ground for holding that the respondents were engaged in the business of purchasing and selling property.

The view taken by the Industrial Tribunal that the respondents' firm did not constitute an industry, and that the dispute between them and their employees was not an industrial dispute, which could be the subject of a reference under the Industrial Disputes Act, is therefore correct.

The rule will be discharged. There will be no order as to costs.

Rule discharged.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

HER HIGHNESS MAHARANI MANDALSA KUMARI DEVI

v.

RAMNARAIN PRIVATE LTD.*

Civil Procedure Code (Act V of 1908), Secs. 86, 87B, O. XXX, r. 1—Suit against firm one of the partners of which Ruler of former Indian State—Consent of Central Government to filing of suit against Ruler not obtained—Decree passed against firm whether a nullity.

A decree passed in a suit against a firm in which one of the partners is a Ruler of a former Indian State is not a nullity on the ground that the consent of the Central Government was not obtained under s. 86 of the Civil Procedure Code, 1908, to the filing of the suit against the Ruler. That want of consent can be availed of only by the Ruler, but the other partners cannot claim any immunity under s. 86 or s. 87B of the Code.

*Dulerai & Co. v. Pokerdas,*¹ explained.

*Western National Bank of City of New York v. Perez Triana & Co.,*² referred to.

THE facts appear in the judgment.

B. N. Singh, for the appellants.

P. N. Bhagwati, for the respondents.

S. T. DESAI J. This is an appeal from a judgment of Mr. Justice Shelat on a chamber summons under O. XXI, r. 50(2) and the order appealed against is one granting leave to the decree-holder to proceed in execution against certain persons as partners in the firm of Messrs. Jagatsons International Corporation. In that firm there were several partners including the Maharaja of Sirmoor, a principality in Himachal Pradesh. There is no dispute that the Government of India had recognised the Maharaja of Sirmoor as a Ruler entitled to the privileges under s. 86 of the Civil Procedure Code. The plaintiffs, who are respondent No. 1 before us, filed a suit against that firm to recover a sum of Rs. 1,96,831.58 nP. The suit was filed as a summary suit and the plaintiffs took out a summons for judgment. The writ of the summons was served only upon the manager of the firm and upon one of the partners, Shib Chunder Kumar, who is respondent No. 5 to the appeal. At the hearing of the summons for judgment, the firm was represented by attorneys and counsel and submitted to a decree as prayed and applied for liberty to pay the decretal amount in certain instalments, which application was granted. The firm failed to pay the instalments and the plaintiffs took out a chamber summons, out of which arises this appeal, for liberty to execute the decree against the seven individual partners (other than the Maharaja of Sirmoor) mentioned in the summons. Those seven persons were admittedly partners in the defendant firm at all material times. Various contentions were raised before Mr. Justice Shelat, who negatived them. We shall only examine those contentions which are pressed before us by Mr. Singh, learned counsel for the appellants. The learned Judge, as we have already mentioned, made the summons absolute and four of the partners have now come to this Court in appeal.

It has been argued firstly that the decree passed on the summons for judgment and which was a consent decree was a nullity, and if it was a nullity, it was competent to the executing Court to go into that contention and decline to grant any execution against the partners against whom execution of the decree was sought to be enforced by the chamber summons. The argument is that one of the partners in the firm of the judgment-debtors being a Ruling

*Decided, November 21, 1958. O.C.J. Appeal No. 31 of 1958; Suit No. 162 of 1957.

1 [1958] Bom. 237, s.c. 54 Bom. L. R. 313.
2 [1891] 1 Q.B. 304.

Prince, no valid decree could be passed against the firm of which he was a partner without the consent of the Central Government certified in writing as required by s. 86 of the Civil Procedure Code. Section 86 of the Civil Procedure Code has to be read with s. 87B which applies the principle of immunity to foreign Rulers to the Rulers of former Indian States. Now, the argument here is that no suit can be filed against a firm if one of the partners in that firm is a Ruler of a former Indian State, and if a suit is filed against a firm in which one of the partners is a Ruler of a former Indian State, the suit is not maintainable, and if a decree were to be passed in that suit, that decree would be a nullity. Another step of the argument is that a decree against a Ruler of a former Indian State without the requisite consent of the Central Government before the institution of the suit is a nullity. We agree with Mr. Singh when he says that a decree passed against a Ruler of a former Indian State without the requisite consent of the Central Government would be a nullity. Sections 9 and 86 of the Civil Procedure Code have, in this context, to be read together, and by doing so it must follow that a Court has no inherent jurisdiction to entertain a suit against a person to whom s. 86 applies. It can only do so if the requisite consent of the Central Government is obtained before the institution of the suit. The provisions contained in s. 86, it is well-established, are imperative, and a decree passed by a Court without the requisite certificate would be by a Court which has no jurisdiction at all to entertain the suit. It would be a case of the total absence of competence and the decree would be a nullity. But that is not the real difficulty of Mr. Singh in this case. The real difficulty of Mr. Singh is when he asks us to accept the proposition that a decree passed against a firm in which one of the partners is a Ruler of a former Indian State would be a nullity if the consent of the Central Government was not obtained to the filing of the suit against him. The suggestion is that a suit against a firm in the name of the firm is as much a suit against every partner of the firm, including the partner who is a Ruler of a former Indian State. So far, we are in agreement with Mr. Singh. A suit against a firm is a suit against all the partners of the firm, and *a fortiori* it is a suit against one of those partners who is a Ruler of a former Indian State. But it is not possible for us to accede to the argument that a decree against a firm in which one of the partners happens to be a Ruler of a former Indian State is a nullity if the suit was filed without the requisite certificate.

Greatest reliance has been placed by Mr. Singh on a decision of Chagla C.J. in Civil Revision Application decided by his Lordship sitting alone reported in *Dulerai & Co. v. Pokedas Meghraj*.¹ We would like to preface our observations on that case by drawing attention to the very peculiar nature of the application which the learned Chief Justice had to consider. In the firm of Dulerai & Co. there were four partners, one of whom was the Maharaja of Orchha, a Ruler of the former Indian State of Orchha. The respondents to the Revision Application were Messrs. Pokedas Meghraj and they filed a suit in the City Civil Court, Bombay, against the firm of Dulerai & Co. in the name of that firm to recover a sum of Rs. 5,000. The defendants filed their appearance under protest and informed the plaintiffs that as the Maharaja of Orchha was one of the partners and as the requisite consent of the Central Government under s. 87B read with s. 86 to file the suit against the Maharaja had not been obtained, the suit was not maintainable. The plaintiffs thereupon took out a chamber summons asking that the appearance under protest be removed. The chamber summons was heard by the Principal Judge of the City Civil Court, who held that as the suit was filed against the firm in the firm name and not against the partners in their individual names, ss. 86 and 87B had no application. He made the summons absolute and the Civil Revision Application was against that order. What the learned Chief Justice had to decide, and in fact decided, was that the learned Principal Judge of the City Civil Court was in error in passing that order. The effect of the

1 [1953] Bom. 237, s.c. 54 Bom. L.R. 313.

judgment was that the appearance under protest was to remain on the record of the suit and the City Civil Court was directed to try the issue as to whether the Maharaja of Orchha was a partner in the defendant firm. It is in that context that certain observations seem to have been made in the judgment in that case. Read out of context, those observations may lend support to the argument pressed before us by Mr. Singh. But we are not prepared to read those observations as laying down the proposition which Mr. Singh has contended for before us. But as we have already observed, those observations are to be read in their proper context bearing in mind the real point which had to be decided and what we are concerned with is the ratio of that decision. We do not think that the correct ratio of that decision is that a suit can in no circumstances be filed against a firm in which a Ruler of a former Indian State is a partner. Of course, if the question arises as to whether a Ruler of a former Indian State is a partner in a firm, then it would be necessary for the Court to determine that point and that is what seems to us to have been decided in that case. But we do not think we should read that decision as laying down the wide general proposition pressed for our acceptance by Mr. Singh.

A suit can be filed against a firm under O. XXX, r. 1, of the Civil Procedure Code if the requirements of that rule are satisfied. When a suit is filed against a firm under O. XXX, r. 1, the effect of that is, as was pointed out by Lindley L. J. in the oft-quoted passage in the decision in *Western National Bank of City of New York v. Perce Triana & Co.*² (p. 314):

"It is only a convenient method for denoting those persons who compose the firm at the time when that name is used and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names." Therefore, when a suit is filed in the name of a firm, the true position is that for all purposes, barring certain exceptions which are in the present context not material, the suit must be treated as operating as a suit and effective as a suit filed against all the partners in their individual names. A firm is not a legal entity or a person. A firm name is merely a label given for convenience to describe and refer to persons who have agreed to carry on business in partnership. Although in mercantile usage a firm is deemed to be clothed with sufficient personality, in the eye of law a firm has no legal existence as such. It is not a juristic person, and when reference is made to a firm, it is really to the individual partners who constitute that firm. This principle is so firmly established that its application permits of no doubt or debate. Therefore, in the present case when the summary suit was filed against the firm of Jagatsons International Corporation, it was for all relevant purposes a suit against all the partners in that firm and when a decree was passed in that suit on the summons for judgment, it was for all relevant purposes a decree against all the partners in that firm. If one of the partners was a person against whom a decree could not have been passed because the requisite consent of the Central Government to the filing of the suit against him had not been obtained, that want of consent can be availed of only by that person and not by the other partners in the firm. The other partners could not possibly claim any immunity under s. 86 or s. 87B of the Code of Civil Procedure. In substance and in effect, the argument of learned counsel for the appellants asks us to extend that immunity to those other partners of the firm.

The same argument has been presented by Mr. Singh in a slightly different form. It is stated that the decree passed by the Court was against Messrs. Jagatsons International Corporation and not against the individual partners. Says Mr. Singh, the decree could have been passed against the individual partners other than the Maharaja of Sirmoor. The next premise is that the decree is not divisible and on these premises it is urged that the conclusion must of necessity be that the decree against the firm was a nullity. The premises of this syllogism are open to serious doubt. To say that the decree against Messrs. Jagatsons International Corporation was not a decree against the indi-

vidual partners is in the present context a fallacy. We have already referred to the legal position on the subject, and we may say it once again that a decree passed against a firm is a decree against the individual partners. There are certain exceptions to this proposition, but they do not in any manner disturb the correctness of this proposition. Those exceptions refer to certain safeguards in the matter of execution and those safeguards are to be found in O. XXI, r. 50, of the Civil Procedure Code. But in dealing with the present point we are not concerned with them. The argument is stressed in the form of a question: How can a decree passed against a firm in which one partner is a Ruler of a former Indian State be said to be a decree not against him? We do not suggest that the decree was not against the Maharaja of Sirmoor. The view we take is that it was a decree not only against the Maharaja of Sirmoor, but a decree against him as also every individual partner in the firm. The partners in the firm being jointly and severally liable to the judgment-creditor, the decree cannot be said to be a nullity against any of the appellants before us. For all these reasons, the present contention of the appellants must be negatived.

[The rest of the judgment is not material to this report.]

Solicitors for the respondent: *Crawford Bayley & Co.*

Appeal dismissed.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chitambar, Acting Chief Justice, and Mr. Justice Shelat.

RAMMAYYA VENKAT NARSU BURA v. THE STATE OF BOMBAY.*

Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Secs. 12, 28—Bombay Primary Education Act (Bom. LXI of 1947)—Wife of municipal councillor working as teacher in municipal school before his election as councillor and continuing to do so thereafter—Whether councillor disqualified under s. 12(2)(b) of Municipal Boroughs Act—Applicability of s. 28(1).

The respondent was elected a councillor of a municipality governed under the Bombay Municipal Boroughs Act, 1925. The wife of the respondent was working as a teacher for the past several years before his election, in a school conducted by the municipality and she continued to do so thereafter. On the question whether the respondent was disqualified to remain as a councillor it was contended that the respondent could be said to have directly or indirectly an interest in the employment of his wife with or under the municipality within the meaning of s. 12(2)(b) of the Act and that s. 28(1) of the Act was applicable though the disqualification had commenced before the election of the respondent:—

Held, that the respondent's duty as a councillor was or at any rate was likely to be in conflict with his interest in his wife's employment with the municipality and, therefore, he suffered from disqualification within the meaning of s. 12(2)(b) of the Act:

Dattatraya v. S. V. Bhavs' and *Champaklal Parikh v. Mahendra Govindlal Choksi*,¹ referred to; and

that the bar of s. 28(1) of the Act applied to the case of the respondent as the disqualification was not only a pre-existing one but one which continued after his election:

Election Commission, India v. Saka Venkata Subba Rao,² referred to.

In the general election held in 1957, one Shrinivas (respondent No. 2) was elected a councillor of the Municipality of Ahmednagar. Thereafter he was

*Decided, November 27, 1958. Special Civil Application No. 2438 of 1958.

¹ (1957) 60 Bom. L.R. 210.

(1955) Special Civil Application No.

1807 of 1955, decided by Chagla C.J. and Dixit J., on December 7, 1955 (Unrep.).

² [1953] S.C.R. 1144.

elected a member of the Standing Committee and the Chairman of the Sanitary Committee. In a general meeting of the councillors held after the election, certain members of the municipality were also elected to represent the municipality on the School Board constituted under the Bombay Primary Education Act of 1947. Anjanibai, the wife of respondent No. 2, was working as a teacher for the last several years in school No. 14 conducted among other schools by the municipality. One Rammayya (petitioner), who was a voter, alleged that respondent No. 2 had a direct interest in her employment with the municipality and, therefore, if respondent No. 2 continued to be a councillor, there would be a conflict between his duty as a councillor and his interest in the furtherance of his wife's interests as an employee of the municipality.

The petitioner presented an application to the Collector, Ahmednagar District, stating therein the aforesaid facts and praying that it should be declared that respondent No. 2 became disqualified to remain as a councillor. It was contended on behalf of respondent No. 2 that the words "becomes subject to any disqualifications specified in section 12" in s. 28(1) (a) of the Bombay Municipal Boroughs Act of 1925 meant a disqualification incurred after the election and, therefore, since the wife of respondent No. 2 was employed as a teacher several years before the election, s. 28 did not apply and respondent No. 2 could not be declared as having been disqualified. It was also contended that the petitioner ought to have raised an objection to the nomination of respondent No. 2 as a candidate in the election under s. 12(2) (b), that it was that section that applied to the facts of the case and that, therefore, the petitioner was not entitled to ask for a declaration under s. 28 of the Act.

The Collector by his order negatived these contentions observing as follows:

"It clearly means that even if the disqualification earned by an intending councillor has been overlooked during the scrutiny of Nominations a subsequent remedy is provided for such disqualification in section 28. If this is not true it will be possible for Councillors to temporarily abstain from acquiring disqualifications and then remain as Councillors for the period for which the Municipality is constituted. This interpretation is therefore too far fetched besides being illogical."

The Collector held that respondent No. 2 was disqualified as a councillor, and declared that a vacancy had occurred in the municipality within the meaning of s. 28(2) of the Act. In the appeal filed by respondent No. 2 against the order of the Collector, the Government of Bombay set aside the Collector's order and held that respondent No. 2 was entitled to continue to be a councillor observing that s. 28(2) could apply only to cases where a disqualification occurs after the election and not to a pre-existing disqualification.

The petitioner applied to the High Court under art. 226 of the Constitution of India for *inter alia* quashing the order passed by the Government of Bombay.

The application was heard.

Rajni Patel, with *A. G. Bhide*, *R. W. Adik* and *G. M. Vakil*, for the petitioner.

M. A. Rane, for opponent No. 2.

B. E. Sompura, Assistant Government Pleader, for opponent No. 1.

N. H. Gursahani, for opponent No. 3.

SHELAT J. [His Lordship after stating the facts of the case, proceeded.] Two questions have been raised by Mr. Patel on behalf of the petitioner; (1) that respondent No. 2 has an interest in the employment of his wife as a teacher and (2) that s. 28(1) would apply even though the disqualification has commenced before the election. Mr. Rane, on the other hand, relied on the decision of the Supreme Court in *Election Commission, India v. Saka Venkata Subba Rao*¹ and contended on the strength of that decision that s. 28(1) cannot apply to a pre-existing disqualification.

To appreciate these contentions, it is necessary to examine certain provisions of the Bombay Municipal Boroughs Act of 1925. Section 12(1) provides that

¹ [1953] S.C.B. 1144.

"No person may become a Councillor" who has been convicted of certain offences or who has been removed from office under s. 27 of the Act, or who is an uncertified bankrupt or an undischarged insolvent or who is of unsound mind or who has acquired the citizenship of a foreign State etc. or who is a Judge. Section 12(2) (b), so far as is material, provides that:

"No person who, save as hereinafter provided, has directly or indirectly...any share or interest in any work...contract or employment with or under...a Municipality... may be a councillor of such Municipality."

It is needless to pause on the proviso contained in sub-s. (3) of s. 12 as it is not material for the purposes of this case. Thus the Legislature has used two different phraseologies. In sub-s. (1) the words are "may become a Councillor" whereas in sub-s. (2) the words used are "may be a councillor of such municipality". It is not clear why this different phraseology has been adopted by the Legislature. But it was not seriously disputed before us that the disqualification set out in sub-s. (2) will also disqualify a person from standing as a candidate.

The first question that falls for determination is whether respondent No. 2 can be said to have directly or indirectly interest in the employment of his wife with or under the municipality within the meaning of s. 12(2)(b). In *Dattatraya v. S. V. Bhave*² a similar question arose though it was under s. 10(1)(f) of the Bombay Provincial Municipal Corporations Act of 1949. But since the language in s. 10(1)(f) of that Act is similar to the one in s. 12(2)(b) of the Act under our consideration, the decision is relevant. In that case that petitioner offered himself as a candidate for election in the Municipal Corporation of Poona. He was living with his wife and children in a house owned by him. At the time he stood for election, his wife was employed as a municipal school teacher. His nomination on that ground was rejected. In the petition filed by him, it was held that he had interest in the employment of his wife with the Municipal Corporation and, therefore, he suffered from disqualification within the meaning of s. 10(1)(f) of that Act. It was also held that the interest contemplated in that section need not be pecuniary but should be such as is likely to come in conflict with one's duty as a councillor. A similar question under the Bombay Municipal Boroughs Act, 1925, arose in *Champaklal Parikh v. Mahendra Govindlal Choksi*³, where a son was wanting to be a councillor of the Petlad Municipality and his father was a pleader representing that municipality in various cases of assessment. It was there observed:

"In our opinion, the interest here is not the interest which a man may have in the prosperity of his friend. There the interest is clearly sentimental or emotional. When you have a person living jointly with his father, it seems to be inarguable that the son's interest in the prosperity of his father is purely sentimental or emotional. If the father earns more, he has more to spend on the family. His prosperity must affect the position of the son and the interest that the son has in the prosperity of his father is clearly a material or a substantial interest."

It is, therefore, clear looking to the close relationship between a husband and a wife that where a wife is in the employment with or under a municipality, the husband, who desires to become or is a councillor of that municipality, has a substantial interest in that employment which is or is likely to be in conflict with his duty as a councillor.

Mr. Rane, however, contended that the position of a Municipal Corporation such as the Poona Municipal Corporation is different from that of a Borough municipality like the Ahmednagar municipality inasmuch as the control over municipal schools in the former case vests in the Municipal Corporation whereas in the latter case it vests in the State Government. To examine the validity of this contention, it is necessary to turn to the Bombay Primary Education Act, 1947. Section 2(2) of that Act defines an "approved school" which means *inter alia* a primary school maintained by a School Board or by an

(1957) 60 Bom. L.R. 210.

3 (1955) Special Civil Application No.

1807 of 1955, decided by Chagla C.J. and Dixit J., December 7, 1955 (Unrep.).

authorised municipality. It is not in dispute that the school in question is maintained by the Ahmednagar Municipality and the Ahmednagar Municipality is an authorised municipality. Section 2(6) defines an authorised municipality as one authorised by the State Government under s. 16(1) of the Act. Therefore, the school in which the wife of respondent No. 2 is serving, is a school maintained by the Ahmednagar Municipality. Section 2(19) defines a 'School Board' meaning a District School Board or a Municipal School Board. Section 3 provides that there shall be a District School Board for each district and a Municipal School Board for each area of an authorised municipality. Section 4 provides for the constitution of a School Board. A School Board is to consist of not less than 12 members and not more than 16, of whom not less than 2 and not more than 3 are to be appointed by the State Government. Except for those to be appointed by the Government, the members of the School Board are to be elected by the District Local Board or the authorised municipality as the case may be. Under s. 18(1) the Municipal School Board is to be responsible for the management and control of all primary schools which vest in the authorised municipality and for the control of all other approved schools within the area of the authorised municipality. Lastly, s. 20 provides that every authorised municipality shall maintain:

"an adequate staff of assistant administrative officers...primary school teachers...and other staff...as may in the opinion of the State Government be necessary for the administration, management and control of approved schools within its areas."

Sub-section (2) of s. 20 provides that this staff shall be the servants of the authorised municipality and shall receive their pay, allowances, gratuities, and pensions from its primary education fund. Under s. 44 this fund, in the case of an authorised municipality, means the grant payable by the municipality on account of primary education together with the grant payable by the State Government, the fees of pupils etc. These sections make it clear that the primary school teachers are the servants of an authorised municipality, such as the Ahmednagar Municipality, and their salaries, allowances, pensions etc. are paid from the primary education fund raised by such municipality.

Mr. Rane, however, contended that in spite of these provisions, the real control over the teachers and the staff of the primary schools in the case of Ahmednagar Municipality does not rest with the municipality and, therefore, there would be no question of any conflict between the duties of the petitioner as a councillor and his interest in his wife's employment. In other words, his contention was, that though the Ahmednagar Municipality pays for the expenditure of the schools, the control over the schools and the staff still remains with the State Government. For that purpose he relied on certain other provisions of the Primary Education Act. Section 20(3) provides that the rates of pay and allowances and terms of employment of the primary school teachers maintained by an authorised municipality shall be fixed from time to time by the State Government. Section 21 then provides that for each School Board there shall be an Administrative Officer, who shall be the Chief Executive Officer of the Board. Under s. 21(2) the Administrative Officer is to be appointed by and is the servant of the State Government; his salary and allowances are also payable from the State revenues. Under s. 22 the State Government may delegate the power to appoint an Administrative Officer to an authorised municipality, but as pointed out by Mr. Rane no such power has been delegated to the Ahmednagar Municipality with the result that the Administrative Officer, so far as this municipality is concerned, is the servant of the State and not of the municipality. Therefore, all executive functions of the School Board are under his control and not the municipality. Likewise, under s. 23, a Staff Selection Committee is constituted consisting of the Educational Inspector, the Chairman of the School Board and the Administrative Officer and it is this Committee which selects the teachers and the other staff. Under s. 24 the Administrative Officer has also the power to promote, transfer and take all disciplinary action including that of removal and dismissal against the staff. But sub-s. (2) of s. 24

provides for an appeal against his orders to a Tribunal consisting of the Chairman of the School Board, and the Educational Inspector of the District. Thus argues Mr. Rane, the entire control over the teachers and the staff including their selection, pay and allowances rests not with the municipality but virtually with the Government.

What Mr. Rane however does not take into account are two other sections of the Bombay Primary Education Act. Section 16 enacts that the Government may authorize a municipality constituted under the Bombay Municipal Boroughs Act, 1925, to control all approved schools within its area. Since the Ahmednagar Municipality is an authorized municipality, it has under s. 16(1) the power to control all approved schools within its area. Furthermore s. 16(2) provides:

"Subject to the provisions of this Act and of the rules and regulations made thereunder, all existing and future rights, liabilities, powers and duties of any municipality, which was a local authority under the Bombay Primary Education Act, 1923, immediately before the date of the coming into force of this Act, in respect of primary school teachers and other persons employed by it for the purposes of primary education shall on such date vest in and be performed or exercised by the said municipality as an authorized municipality under this Act; and all properties, moveable and immovable, vesting in or held by or under the control of such municipality for the purposes of primary education, shall from such date continue to vest in, be held by or be under the control of the said municipality as such authorized municipality."

Section 17 provides that "Subject to the provisions of this Act and the rules made thereunder an authorized municipality shall perform the following duties and functions". Among these duties and functions are:

"(c) to maintain an adequate staff of Assistant Administrative Officers...clerks, teachers;...

(e) to sanction with or without variation the budget of the municipal school board."

Sub-section (3) provides for the power to make regulations, subject, no doubt, to the sanction of the State Government, among other things for determining the qualifications, pay and terms of employment of the Assistant Administrative Officers, Supervisors, Attendance Officers, clerks and other staff, for regulating the administration, management and control of primary schools. Sections 16 and 17 thus vest considerable control over the primary schools in the municipality in their management, budgetary provisions and what is important in determining the terms and conditions, including the pay of the staff. It is true that the Administrative Officer has been conferred considerable powers under ss. 23 and 24 in the matter of appointment of teachers, their promotions, transfers and disciplinary action that may be taken against them, but under s. 23 the Selection Committee which has the power of selection is composed of three persons, one of them being the Chairman of the School Board, who would be the nominee of the municipality. A member of the municipality having a voice in the election of the members of the Board acquires thus a voice in the selection of teachers though indirectly. In regard to the powers of disciplinary action also, an appeal against an order of the Administrative Officer is provided and such appeal is to be heard by the Educational Inspector and the Chairman of the School Board. These provisions show that though there is dual control over the primary schools of the State Government and an authorized municipality, it cannot be gainsaid that the teachers of the primary schools of an authorized municipality are the servants of such municipality and they are under considerable control of the municipality in several important matters. The petitioner in his capacity as a councillor has a voice in the election of at least 10 out of 12 members of the School Board and its Chairman, besides himself exercising a general control through the municipality over all the primary schools within its area. That being so, it must be found that his duty as a councillor is or at any rate is likely to be in conflict with his interest in his wife's employment with the municipality.

The next contention urged by Mr. Rane was that even if the employment of the petitioner's wife were held to be a disqualification, she has been employed since a number of years before the election. Therefore the disqualification is a pre-existing one, and would not attract s. 28(1) of the Bombay Municipal Boroughs Act. It was argued that the words "becomes subject to" any disqualifications set out in s. 12 must be construed as meaning disqualifications accruing after and not before the election. Reliance was placed on the Supreme Court decision in *Election Commission, India v. Saka Venkata Subba Rao*⁴, where on construction of arts. 190(3) and 191(1) of the Constitution it was held that these articles applied to disqualifications to which a member of a State Legislature becomes subject to after being elected as such, and not to a disqualification which arose before his election. Article 190(3) runs as follows:

"If a member of a House of the Legislature of a State—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 191;...

his seat shall thereupon become vacant."

Article 191(1) provides:—

"A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State" etc.

Then follow several kinds of disqualifications. Since the same words viz. "becomes subject to any of the disqualifications" occur also in s. 28(1) of the Act before us, the interpretation put upon them by the Supreme Court must be applied to that section also. The facts which led to that case were that the respondent there was convicted and sentenced to rigorous imprisonment for seven years in 1942. He was, therefore, disqualified for being chosen as and for being a member of the Legislative Assembly under art. 191(1)(e) read with s. 7 of the Representation of the People Act, 1951, for a period of five years since his release on August 15, 1947. He was elected a member of the Madras Legislative Assembly before that period had elapsed. The question arose whether he was disqualified and could be allowed to sit and vote in the Assembly. As aforesaid, it was held that arts. 190(3) and 192(1) provided a remedy when a member incurred a disqualification after he was elected. His Lordship Patanjali Shastri C.J. observes (p. 1158):

"Not only do the words 'becomes subject' in article 190(3) and 'has become subject' in article 192(1) indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, ... further reinforces the view that the article contemplates only a sitting member incurring the disability while so sitting."

But the disqualification which their Lordships of the Supreme Court had to deal with was of a different nature than the one before us. The disqualification there was that the member was convicted and sentenced in 1942, and by reason of that conviction, he was prohibited under s. 7 of the Representation of the People Act from becoming a member for a period of five years. In other words the statutory disability had already occurred once for all in 1942 and was, therefore, a pre-existing one. In the case before us, however, the disqualification is not a personal one as in the case before the Supreme Court, but on the ground of a likely conflict of interest and duty of respondent No. 2. That ground would continue to remain till the employment of respondent No. 2's wife continued. Every day she continues in service, there arises a conflict between interest and duty of respondent No. 2. Every day, therefore, he becomes subject to the disqualification referred to above. Therefore the disqualification not only existed at the time of the nomination of respondent No. 2 as a candidate, but continued thereafter even after he was elected. In this view, the bar of s. 28(1) of the Bombay Municipal Boroughs Act must apply to the case of respondent No. 2 as the disqualification was not only a pre-existing one but one which continued after the election and still continues. The construction, which we are

placing on the section, also appears to us to be in consonance with the intention of the Legislature. Indeed the Legislature could not have intended that a person who is disqualified for standing as a candidate should serve and continue to serve as a councillor even though he continues to be subject to the same disqualification.

In the result the petitioner's contention must be upheld in the interest of purity of municipal administration which is the primary object of ss. 12 and 28 of the Act. We, therefore, set aside the order passed by the Government of Bombay and restore the order of the Collector. There will be no order as to costs.

Application allowed.

Before Mr. Justice Shelat.

THE STATE OF BOMBAY v. THE ESTATE INVESTMENT CO. LTD.,
BOMBAY.²

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 44, 45, 48, 60, 61, 85(1)—Bombay Tenancy and Agricultural Lands Rules, 1956, Rule 33—State Government taking over management of lands belonging to landholder—Whether State Government liable to render account of its management during pendency of management—Suit filed by landholder for such rendition of accounts whether can be entertained by civil Court.

The State Government, where it has taken over management of lands belonging to a landholder under Chapter IV of the Bombay Tenancy and Agricultural Lands Act, 1948, is liable to render an account of its management to the landholder during the pendency of the management and to pay the balance left, after making provision for the payment of items mentioned in s. 48 of the Act, at the end of the year.

The ownership of lands taken under management under Chapter IV of the Act does not vest in the State Government. The only thing that vests in the State Government or in the Manager appointed is the right to possession and of management together with all powers for the purposes of such management which the landholder, but for the notification issued under s. 44 of the Act, could have exercised.

*F. & V. Merchants Union v. Improvement Trust, Delhi,*¹ referred to.

A suit filed by a landholder against the State Government for rendition of accounts of its management and for the payment of balance can be entertained by a civil Court and is not barred by s. 85(1) of the Bombay Tenancy and Agricultural Lands Act, 1948.

Under s. 85(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, a civil Court is barred from entertaining questions dealing with the exercise of powers conferred upon the Manager by Chapter IV of the Act.

THE facts appear in the judgment.

C. C. Vaidya, Assistant Government Pleader, for the appellant.

G. S. Gupta (Sr.) and *P. B. Mridul*, for the respondent.

SHELAT J. This appeal raises two questions under the Bombay Tenancy and Agricultural Lands Act, 1948. They are, whether the State Government, where it has taken over management of lands belonging to a landholder under Chapter IV of the Act, is liable to render an account of its management during the pendency of the management, and secondly whether a suit filed by a landholder for accounts can be entertained by a civil Court.

By an Indenture of grant and demise dated November 7, 1870, the Secretary of State in Council granted and demised certain lands, hereditaments and pre-

²*Decided, November 27, 1958. Second Appeal No. 339 of 1958 (with Civil Application No. 1315 of 1958), against the decision of D.G. Gaine, Assistant Judge, Thana, in Civil Appeal*

No. 288 of 1956, confirming the decree passed by P.D. Mahatekar, Civil Judge, S. D., Thana, in Regular Civil Suit No. 123 of 1955.

¹ [1957] A.L.R. S.C. 344.

mises therein described to one Ramchandra Laxmanji of Bombay for a term of 999 years on certain terms and conditions therein contained. By diverse transfers made subsequently the plaintiff-company became the owner of part of these lands, situate at Bhayandar, Mira and Ghodbunder, aggregating in all to about 7000 acres. The plaintiff-company took over possession of these lands in 1949 and thereafter managed them as the owner thereof and recovered rents and profits arising therefrom.

Under the powers reserved under s. 88(2) of the Bombay Tenancy and Agricultural Lands Act, 1948, the Government of Bombay issued a notification dated July 14, 1949, whereunder the provisions of the Tenancy Act were made applicable to all Crown Leases in the State. Consequently the lands belonging to the plaintiff-company became subject to the provisions of the Act. By a notification dated December 19, 1949, (exh. 21) the State Government declared the plaintiff-company to be a 'landholder' within the meaning of s. 2(9) of the Act. By the said notification the State Government also assumed management of this property under s. 44 of the Act. The notification declared that management of the said lands was being assumed by the State Government for the purpose of improving the economic and social conditions of the peasants and to ensure full and efficient use of these lands for agriculture. Thereafter the Government appointed first the Collector of Thana and after sometime the Prant Officer of Thana as the Manager. Since December 19, 1949, the lands in suit have been in the possession and management of the Manager appointed as afore-said by the State Government.

On January 17, 1955, the plaintiff-company gave a notice (exh. No. 22) to the State of Bombay under s. 80 of the Civil Procedure Code calling upon them to render an account of the management of these properties and declaring therein its intention to file a suit. The State of Bombay did not choose to give any reply to this notice nor to comply with the demands made therein. On April 11, 1955, the plaintiff-company filed the present suit, being Suit No. 123 of 1955, in the Court of the learned Civil Judge (Senior Division), Thana, for rendition of accounts and payment of the balance left in the hands of the State Government.

The State of Bombay contended in the written statement *inter alia* that it was not liable to render any account during the continuance of the management of these lands, that the property in the lands by virtue of the notification dated December 19, 1949, and the provisions contained in Chapter IV of the Act had vested in the Manager, that ownership in these properties had passed to the State of Bombay, that there was no provision in the Act whereby a claim for the rendition of accounts could be made against the State of Bombay while the management was still continuing and finally that by virtue of s. 85(1) of the Act, a civil Court had no jurisdiction to try the suit.

The trial Court raised three issues, viz. whether the plaintiff-company was entitled to ask for accounts from the defendant, whether the plaintiff-company was debarred from claiming such accounts or the balance due during the pendency of the management, and lastly whether the Court was barred under s. 85(1) of the Act from trying the suit. The trial Court answered all the three issues in favour of the plaintiff-company and decreed the suit.

Aggrieved by the said decree and judgment the State of Bombay filed an appeal in the Court of the District Judge of Thana being Civil Appeal No. 288 of 1956. The learned Assistant Judge, Thana, who heard the appeal, confirmed the decree and judgment passed by the trial Court and dismissed the appeal. It is against this order of dismissal that the State of Bombay has preferred this appeal.

The learned Assistant Government Pleader has raised before me the same questions which were raised before the Courts below. The two questions that are raised are (1) that there is no liability of the State of Bombay to render an account to the plaintiff-company during the pendency of the management

and to pay the balance and (2) that by virtue of s. 85(1) of the Act, a civil Court has no jurisdiction to try the suit.

On the first question the learned Assistant Government Pleader relied upon ss. 44 to 61 of the Act. It becomes, therefore, necessary to briefly examine these sections. The title of Chapter IV in which these sections are contained is "Management of Estate held by Landholders". Section 44 deals with the power given to the State Government to assume management of lands belonging to a 'landholder' and provides that when the State Government is satisfied that on account of the neglect of a 'landholder' or disputes between him and his tenants, the cultivation of his estate has seriously suffered, or when it appears to the State Government that it is necessary for that reason or for the purpose of ensuring the full and efficient use of land for agriculture to assume management of any landholder's estate, a notification announcing such intention shall be published in the Official Gazette. Section 44 also provides that such a notification shall be conclusive. Section 45 then lays down the effect of such notification and provides that on the publication of such notification, the estate in respect of which the notification has been published, shall, so long as the management continues, vest in the State Government. Such management shall be deemed to commence from the date on which the notification is published and the State Government shall appoint a Manager to be in charge of such estate.

It was under s. 45 that the State Government appointed in the first instance the Collector of Thana as the Manager of the lands in question and thereafter the Prant Officer to manage the lands. The management was in continuance when the plaintiff-company filed the present suit.

Section 46(3) provides:—

"So long as the management continues the holder of the estate shall be incompetent—

- (a) to enter into any contract involving the estate in pecuniary liability,
- (b) to mortgage, charge, lease or alienate the property under management or any part thereof, or
- (c) to grant valid receipts for the rents and profits arising or accruing therefrom."

Sub-section (4) enacts that so long as the management continues, no person other than the Manager shall be competent to mortgage, charge, lease or alienate such estate or any part thereof. Section 47 deals with the powers of the Manager including the power to receive rents and profits arising from such lands. Section 48, on which considerable reliance was placed by the learned Assistant Government Pleader, provides that the Manager shall make certain payments as provided in cls. (i) to (v) of sub-s. (1) and thereafter he shall retain the residue for the liquidation in the manner provided in the Act of the debts and liabilities other than those mentioned in sub-s. (1) and also for the repayment, either before or after the liquidation of such debts and liabilities of any loan received from Government by the Manager under the Act. Sub-section (2) of s. 48 provides that thereafter "the balance, if any, shall be paid to the holder". Section 49 and the sections thereafter following provide for the settlement of debts and liabilities of the holder of the land incurred by him prior to the management and the liquidation thereof in the manner provided in those sections. Section 54 provides that when the total amount of debts and liabilities including those due and incurred to the Government has been finally determined by the Manager, he shall submit to the Collector a schedule of such debts and liabilities and a scheme, called the liquidation scheme, showing the manner in which it is proposed to pay and discharge the same, whether from the income of the property under management or with the assistance of funds raised under the powers conferred by sections following s. 54. Section 58 no doubt provides that subject to the rules made under this Act the Manager after the liquidation scheme has been sanctioned as provided in these sections shall have the power to sell or grant on lease all or any part of the estate under the management. Section 60 states that even if the holder of the estate were to die after the publication of the order of management, the management shall continue and proceed

in all respects as if the holder was still living. Sub-section (2) of that section then provides that:

"Any person succeeding to the whole or any part of the estate under management shall, while such management continues, be subject in respect of such estate to the disabilities imposed under this Act."

Section 61 then deals with the termination of the management and provides that when the State Government is of opinion that it is no longer necessary to continue the management, it shall direct, by an order published in the Official Gazette, that the said management shall be terminated. On the termination of the management, the estate shall be delivered into the possession of the holder or, if he is dead, of any person entitled to that estate together with "any balances which may be due to the credit of the said holder".

The learned Assistant Government Pleader relying upon these sections and particularly the sections dealing with the scheme of liquidation, which *inter alia* gives powers to the Manager to sell or grant on lease all or any part of the estate under management, contended that as soon as a notification under s. 44 is issued and the Manager is appointed, all rights in the property in question would vest in the Manager appointed by the State Government. In other words, he contended that on the commencement of such management all rights and property in the land would vest absolutely in the State Government and, therefore, the effect of such notification would be to transfer all rights of ownership in such lands to the State Government. Such ownership would remain vested in the State Government so long as the management continues and that, therefore, until such management is terminated, the landholder would not be entitled to call upon the State Government to render account of its management or to recover the balance remaining in the hands of the Manager and referred to in s. 48(2). It is not possible to accept such a wide contention as raised by the learned Assistant Government Pleader. In my view, ss. 48, 60 and 61 clearly show that the effect of the notification issued under s. 44 and the taking over of management of the lands would be to vest only the right to possession and management of the lands in the State Government. It must be remembered that the title of Chapter IV is "Management of Estates held by landholders". If the object of enacting Chapter IV was to transfer ownership of the lands in question, the title of that Chapter would not be "Management" but it would be "Transfer of ownership of estates held by landholders". But the terms of s. 48 make abundantly clear that the only thing that vests in the Manager is the right of possession and management of the lands in question. Under ss. 47 and 48 the Manager has, amongst other powers, the power to receive rents and profits arising from the land and thereafter to make disbursements in the order of priority set out in s. 48. Sub-section (2) of s. 48 then expressly provides that if, after making these disbursements, any balance remains in the hands of the Manager, such balance shall be paid to the landholder. It is clear that if the object in enacting Chapter IV was to transfer rights of ownership in the property either to the State Government or the Manager appointed by it, there would be no necessity for making provision, first, for the payment of debts and liabilities other than those mentioned in sub-s. (1) which means the debts and liabilities incurred on the land by the landholder prior to the management and for the payment of the balance left thereafter in the hands of the Manager to the landholder. This provision is a clear indication that ownership remains vested in the landholder and that the only effect of Chapter IV is that the Manager appointed by the State Government gets the right of possession of the land and the right of management together with all powers for the purposes of such management which the landholder, but for the notification, could have exercised. The provisions of s. 60 furnish even a clearer indication than those of s. 48. Sub-section (2) of s. 60 expressly provides that in the event of a landholder dying while the management is continuing, a person succeeding to the whole or any part of his estate would be subject to the same disabilities as are imposed by Chapter IV upon the landholder. Although sub-s. (2) is

primarily enacted for the purpose of imposing these disabilities upon a successor; that sub-section clearly implies that in spite of the notification for management the ownership still remains in the landholder and the rights of such a landholder to such ownership devolve upon his death on his successor. The fact that under s. 61 the State Government has to deliver possession of the lands to the holder thereof after an order of termination has been issued again shows that under Chapter IV the ownership in the property is not transferred to the State Government.

The learned Assistant Government Pleader, however, argued that the ownership is vested in the Government only during the period that the management continues. The concept of an interim ownership is something novel and nothing has been shown to me either in the Bombay Tenancy and Agricultural Lands Act, 1948, or any other statute whereunder it vests in a party other than the rightful owner for a limited period and thereafter again reverts to the rightful owner. It is no doubt true that under s. 58 a power to sell or grant on lease all or any part of the estate is conferred upon the Manager but rule 33 framed by the State Government under the Act shows that where a Manager proposes to sell any estate or any part thereof under s. 58, he has to give notice to the landholder to show cause why his estate or a part thereof should not be sold and after hearing the landholder or a person acting on his behalf, the Manager has to submit a report to the Collector for permission for the sale. That rule further provides that before giving such permission the Collector has again to hear the landholder or a person acting on his behalf as to why the estate should not be sold. If one were to analyse s. 54 of the Act and the sections following it, it becomes clear that the powers given to the Manager thereunder are powers analogous to those that are given to a Receiver or a Liquidator in winding-up proceedings.

As held in *F. & V. Merchants Union v. Improvement Trust, Delhi*¹ the word "vest" has not a fixed connotation. It does not mean in all cases that the property is owned by the person or authority in whom it vests. Such property may vest in title, or it may vest in possession or it may vest in a limited sense, depending upon the context in which such vesting is enacted. The word 'vest' therefore is a word of variable import. For instance, under s. 56 of the Provincial Insolvency Act, property of an insolvent vests in the receiver for the purpose of administering his estate for payment of his debts. In that case the property of the insolvent vests in the receiver not for all purposes but only for the purpose of the Insolvency Act and the receiver has no interest of his own in the property. On the other hand, under ss. 16 and 17 of the Land Acquisition Act, 1894, the property acquired thereunder upon the happening of certain events vests absolutely in the Government free from all encumbrances and without any conditions or limitations either as to title or possession.

It is thus clear from the provisions of Chapter IV that ownership of lands taken under management does not vest in the State Government. There is nothing in these sections indicating any such intention or object. On the contrary, as I have pointed out from ss. 48, 60 and 61 and rule 33, the only thing that vests in the State Government or in the Manager appointed is the right to possession and of management, though in the course of such management wide powers have been conferred under Chapter IV on the Manager. The contention raised by the learned Assistant Government Pleader therefore cannot be accepted.

The next contention raised on behalf of the State was that even if the ownership in the property does not vest in the State Government there is nothing in Chapter IV which imposes upon the Manager any obligation to render account of his management or to pay to the landholder the balance that may remain in his hands after making the disbursements provided for in s. 48. It was contended that there being no such provision in Chapter IV the Courts below were in error in holding that the Manager was liable to render an account and to

¹ [1957] A.I.R. S.C. 344.

make payment of the moneys lying with him after making provision for the payment of items mentioned in s. 48. Reliance was placed upon s. 61 which provides that on the termination of the management the estate is to be delivered to the holder together with any balance which may be left to the credit of the holder. It was contended that s. 61 shows that it is only on and after the termination of management that there could be any obligation to render an account or to make payment of monies that may be left in the hands of the Manager. The Courts below rejected this contention and held that by virtue of the provisions contained in Chapter IV the position of the Manager was that of a trustee or an agent of the landholder and the Manager was consequently liable to render an account of his management and to pay the balance lying in his hands. In my view, there is considerable justification in the conclusion arrived at by both the Courts below. If ss. 48 and 61 are properly looked at, it becomes apparent that their objects are different. Section 48 deals with payments to be made during the course of the management; whereas s. 61 deals with the things that are to happen on and after the termination of management. If this difference is borne in mind, there would be no difficulty in construing s. 48. As I have pointed out, under s. 48 the Manager has to make payments in the order of priority laid down in sub-s. (1) from the rents and income received by him under s. 47. He has first to make provision for the costs of management, the Government revenue, all debts and liabilities due or incurred to the Government in respect of the property in question, the rent due to any superior holder, periodical allowances allowed to the holder and his family by the Collector from time to time and costs of improvement of the estate. After making these disbursements if there is any residue left then the same is to be utilised for the repayment of debts and liabilities other than those mentioned in sub-s. (1) and if thereafter any balance is still left it has to be paid to the holder. It is true that s. 48 does not expressly state that the Manager has to do all these things at the end of the year or at a particular fixed time. But the section impliedly means that these disbursements and payments are to be made during the year of management and like every other management accounts have to be maintained and made up at the end of the year of management and if any balance is left the same is to be paid to the holder at the end of the year. On the other hand s. 61 shows that if on the termination of management any balances are due to the credit of the holder either as a result of a balance left in the hands of the Manager or otherwise, the same are to be handed over when the lands are delivered to the holder. Considering the scheme of Chapter IV, it is clear that except for certain special powers given to the Manager, the Manager appointed by the State Government is no more than a manager and has all the obligations of a trustee or an agent of the landholder. Consequently he is under all the obligations that such an agent would be except where such obligations are expressly saved by Chapter IV or any other provision of the Act. In that view the Courts below were right in holding that the State Government was liable to render an account of the management of the lands in question and to pay the balance left at the end of the year.

Finally it was contended by the learned Assistant Government Pleader that in any event a civil Court was barred under s. 85(1) from entertaining a claim such as the one made by the plaintiff-company in this case. A somewhat different contention was raised in the Courts below than the one that is now sought to be raised by the learned Assistant Government Pleader. The contention raised before them was that as these matters arise under the Bombay Tenancy and Agricultural Lands Act, 1948, they are triable by the tenancy Courts only, and consequently there is a bar to the jurisdiction of a civil Court. That contention has not been persisted before me. What the learned Assistant Government Pleader now contends is that s. 85(1) provides that no civil Court shall have

"jurisdiction to settle, decide or deal with any question which is by or under the Act required to be settled, decided or dealt with by...a Manager."

He, therefore, contends that rendition of accounts and the payment of any balance left in his hands being questions which the Manager is entitled to decide or deal with there is a bar against a civil Court dealing with such questions. In my opinion, such a construction is untenable. This question was neither raised in the lower Courts nor has it been raised in the Memo of Appeal. But the learned Assistant Government Pleader submitted that though it is so, he should be allowed to argue this question as it is a point of law. Mr. Gupte says that he has no objection to the State being allowed to raise this point even at this late stage. It is clear, however, that the Act does not call upon nor does it confer any power upon the Manager "to settle, decide or deal with any question" as to the Manager's obligation to render account of the management or to the payment of the balance. It cannot surely be the intention of the Legislature to invest a Manager with the power to decide questions about his own obligations, in other words, to enable him to act both as a party and as a judge. It is difficult to conceive that the Legislature had such an extraordinary intention while enacting s. 85(1) of the Act. The only construction, and that seems to be the only reasonable construction, that can be placed upon s. 85(1) is that a civil Court is barred from entertaining questions dealing with the exercise of powers conferred upon the Manager by Chapter IV of the Act. The bar of s. 85(1) cannot possibly come in the way of the plaintiff-company, because what it is claiming in the suit is an account of its estate, of which the State Government has taken over management. The question that arises in the suit is whether the plaintiff-company is entitled to the relief of having an account rendered of the management by the State. This obviously is not a question which the Manager is entitled to decide, deal with or settle. Consequently s. 85(1) has no application.

These were the only contentions raised on behalf of the State. In my view, none of them has any substance.

The result is that the appeal fails and is dismissed with costs. Rule in Civil Application No. 1315 of 1958 for stay is also discharged with costs.

Appeal dismissed.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

GANGARAM ICHHARAM PARDESHI v. BHIKASING NATHUSING PARDESHI.*

Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947), Secs. 24, 22—Transfer declared to be a mortgage under s. 24(1)—Whether mortgagee liable to account for rents and profits received by him from date of application or from date of award.

Where under s. 24(1) of the Bombay Agricultural Debtors Relief Act, 1947, a transfer is declared to be a mortgage, the mortgagee will be liable to account for the rents and profits received by him from the date of the institution of the debt adjustment proceedings.

By adjudicating the true nature of a transaction under s. 24 of the Act the Court is not converting a transfer in the nature of a sale or other transfer into a mortgage. The Court being authorised to declare the real nature of the transaction, the declaration operates as from the date of the transaction.

Ratilal Ranchhodji Davda v. Narshahdas Jamnadas,¹ dissented from.

Danappa Satveerappa v. Malgouda,² approved.

*Ramchandra v. Kallo*³ and *Dattatraya v. Mahomedkhan*,⁴ referred to.

The facts appear in the judgment.

*Decided, November 28, 1958. Civil Revision Application No. 1736 of 1958, against the decision of R. R. Bhole, Assistant Judge of East Khandesh at Jalgaon, in B.A.D.R. Appeal No. 54 of 1955, confirming the order passed by S. S. Sansare, Joint Civil Judge (J. D.) at Bhusewal, in Case No. 9496 of 1948.

1 (1951) Civil Revision Application No. 151 of 1951, decided by Chagla C.J., on November 16, 1951 (Unrep.).

2 (1955) 58 Bom. L.R. 324.

3 (1915) 17 Bom. L.R. 630.

4 (1934) 37 Bom. L.R. 78.

V. V. Divekar, for the petitioner.

M. V. Paranjpe, for respondents Nos. 1 to 3.

SHAH J. The respondents filed Civil Suit No. 169 of 1945 in the Court of the Joint Civil Judge, Junior Division, Bhusaval, claiming that a transaction effected by their father Nathusing on April 30, 1938, in favour of the petitioner, whereby lands S. Nos. 3/5A and 31/3/1 of the village Borkhede, Taluka Raver, were ostensibly sold, was in the nature of a mortgage and for accounts. The suit was transferred under s. 19(b) of the Bombay Agricultural Debtors Relief Act, 1939, to the Board established in that behalf, and it was numbered as application No. 4874 of 1945. It was heard by the Civil Judge on whom the powers of the Board were conferred by the Bombay Agricultural Debtors Relief Act, 1947, with other applications in which the respondents were concerned. The Joint Civil Judge, Junior Division, Bhusaval, by his order dated June 28, 1955, declared the impugned transaction to be in the nature of a mortgage, and directed the transferee Gangaram Ichharam to deliver possession of the lands to the respondents and to pay to the respondents mesne profits from the date of the application. Against that order an appeal was preferred to the District Court at Jalgaon. In appeal, the learned Assistant Judge confirmed the order passed by the trial Court. Gangaram Ichharam has applied to this Court in revision against the order passed by the District Court.

The question whether the transaction, dated April 30, 1938, was in the nature of a mortgage is essentially one of fact and the finding on that question by the Courts below is not liable to be challenged in this revision application. But Mr. Divekar, who appears on behalf of the petitioner, contends that the Courts below were in error in awarding mesne profits from the date of institution of the debt adjustment proceeding against the petitioner. Mr. Divekar contends that the disputed transaction could be regarded as a mortgage from the date on which the award was made by the Bombay Agricultural Debtors Relief Court and the mortgagees' liability to pay mesne profits will arise only from that date and not anterior thereto. Mr. Divekar submits that the Bombay Agricultural Debtors Relief Act was passed with the object of relieving debtors of their indebtedness and that once the liability of a debtor under a disputed transaction creating a debt is regarded as discharged, it was not the intention of the Legislature to render the creditor liable to pay to the debtor any amount in which he may be found liable on taking accounts under the special procedure prescribed by the Bombay Agricultural Debtors Relief Act. Therefore, Mr. Divekar says, if under a transaction which is found to be in the nature of a mortgage on taking accounts nothing is due by the debtor at the date of the application, the mortgagee will not be required to account for the rents and profits received by him during the period that the application was pending in the Court of first instance. In our view, these contentions cannot be accepted. By s. 24 of the Bombay Agricultural Debtors Relief Act a Debt Adjustment Court is authorised to declare the true nature of a transaction by declaring it to be a mortgage though ostensibly in the form of a sale or of any other nature. The power conferred upon the Court under the Bombay Agricultural Debtors Relief Act is, however, a power to declare the true nature of a transaction, that is, to ascertain the true intention and agreement between the parties irrespective of the form in which the transaction is clothed and unhampered by any rules of evidence or other law. Section 24(1) of the Bombay Agricultural Debtors Relief Act, in so far as it is material, provides:

"Notwithstanding anything to the contrary contained in any law, custom, or contract, whenever it is alleged during the course of the hearing of an application made under section 4 that any transfer of land by a person whose debts are being adjusted under this Act...was a transfer in the nature of a mortgage, the Court shall declare the transfer to be a mortgage, if the Court is satisfied that the circumstances connected with that transaction showed it to be in the nature of a mortgage."

Even if a transaction is intended by the parties to be in the nature of a mortgage, but is in form otherwise, under the Evidence Act the Court will not be entitled to declare such a transaction to be in the nature of a mortgage. The only effect of s. 24 is to do away with the restrictions placed by the Evidence Act or other laws upon the powers of the Court if from the circumstances connected with the transaction it is shown to be in the nature of a mortgage. We are, therefore, unable to agree with the contention raised by Mr. Divekar that a transaction becomes a mortgage only when it is so declared under the provisions of s. 24. In our view, by its adjudication, the Court declares the true nature of the transaction, and does not impress upon it a character which was not initially intended by the parties thereto.

Reliance was sought to be placed by Mr. Divekar upon an unreported judgment of Chagla C.J. in *Ratilal Ranchhodji Davda v. Narsinhadas Jamnadas*.¹ In that case, it is true that the learned Chief Justice took the view that only when the declaration is made under the Bombay Agricultural Debtors Relief Act that the transaction operates as a mortgage and, therefore, mesne profits cannot be awarded from the date of the application but can only be ordered from the date of the award. With respect, we are unable to accept that view. If the power, as we have already observed, under s. 24 of the Bombay Agricultural Debtors Relief Act conferred upon the Court is to declare the real nature of the transaction, the Court is not by adjudicating the true nature of a transaction converting a transfer in the nature of a sale or other transfer into a mortgage. The Court being authorised to declare the real nature of the transaction, the declaration, in our judgment, operates as from the date of the transaction.

The alternative argument advanced by Mr. Divekar cannot also be sustained. It is true that under s. 22 of the Bombay Agricultural Debtors Relief Act an account has to be taken between the parties in the manner prescribed thereby for determining the amount due to the creditor at the date of the application under s. 4. By sub-ss. (2), (3) and (4) of s. 22 it is provided that the account has to be taken till the date of institution of the application; but the Legislature has made no provision for the manner of taking accounts after the date of the application. Undoubtedly, if it be found on taking accounts according to the special mode prescribed by s. 22 that the creditor has at the date of the application been overpaid in respect of a transaction which is declared to be in the nature of a mortgage, the creditor will not be called upon to repay the amount to the mortgagor. But if the creditor remains in possession of the property mortgaged after the date of the application, in the absence of any statutory provision to the contrary, we see no reason why the mortgagee will not be liable to account for the rents and profits received by him since the date of the application.

The view we are taking is supported by a judgment of Mr. Justice Gajendra-gadkar in *Daneppa Satveerappa v. Malgouda*.² In that case, it was held that under the Bombay Agricultural Debtors Relief Act, 1947, accounts can be taken between the creditor and the debtor subsequent to the making of the application for adjustment of debts and up to the date when the award is made. In our view, the judgment in *Daneppa's* case sets out the correct rule. A mortgagee in possession of the mortgaged property is in the position of a trustee for the mortgagor, and when the Legislature has not made any provision relating to the method of taking accounts from the mortgagee under the special statute by which the rights of the mortgagor and the mortgagee are governed, in our view, accounts must be taken under the Transfer of Property Act and the Civil Procedure Code. Absence of an express provision in the special statute about the method of taking accounts since the institution of the debt adjustment proceeding does not justify the inference that there is no liability to account.

¹ (1951) Civil Revision Application No. 151 of 1951, decided by Chagla C.J., on November

16, 1951 (Unrep.).

² (1955) 58 Bom. L.R. 324.

Mr. Divekar contends that the rule that the mortgagee after the date of the application for adjustment of the debts is liable to account for the rents and profits received by him must be restricted only to those cases where something is found due to the mortgagee from the mortgagor at the date of the application, and it cannot apply to cases where the mortgage debt is before that date fully satisfied out of the rents and profits. In support of this contention, our attention is invited by Mr. Divekar to a judgment of this Court in *Ramchandra v. Kollo*.³ It is true that in that case a Division Bench of this Court held that under the Dekkhan Agriculturists' Relief Act, 1879, if it be found on taking accounts that at the date of institution of the suit nothing was due to the mortgagee from the mortgagor, the mortgagee after the date of the suit will not be held liable for mesne profits till the date of the decree. But we are unable to hold that this decision can be regarded as binding in interpreting the provisions of the Bombay Agricultural Debtors Relief Act. The scheme of the Dekkhan Agriculturists' Relief Act and the scheme of the Bombay Agricultural Debtors Relief Act are not identical. Whereas the Dekkhan Agriculturists' Relief Act makes provision for taking accounts between a debtor and his individual creditor and for assessing his liability according to the procedure and in the manner prescribed thereby, the Bombay Agricultural Debtors Relief Act is intended to provide for a scheme of settlement of the liability of the debtor *qua* all his creditors. The Dekkhan Agriculturists' Relief Act provided for taking accounts on terms favourable to the agriculturist debtor and for other facilities such as paying the debt by instalments and exemption from liability for personal arrest and exemption from attachment and sale of unencumbered property. Under the Bombay Agricultural Debtors Relief Act, the Court has to assess the liability of the debtor and to ascertain the assets of the debtor and his paying capacity, and to prepare a scheme under which the liability is scaled down and related to his paying capacity. It is evident that the accounts of all transactions of the debtor are required to be taken by the Bombay Agricultural Debtors Relief Court and the assets and liabilities have then to be assessed and related. If liability of a creditor to account for the rents and profits received by him after the application is to depend upon the accidental circumstance whether the debt due to him before the date of the application has been satisfied, in our judgment, the rule suggested will be inequitable and unjust and may operate to the prejudice of the debtor as well as the general body of creditors. We are, therefore, unable to hold that the decision in *Ramchandra's* case can be pressed into service in construing the provisions of the Bombay Agricultural Debtors Relief Act. It may be observed that even under the Dekkhan Agriculturists' Relief Act this Court has taken the view that a mortgagee in possession since the date of institution of the suit is liable to account for the rents and profits received by him since the date of institution of the suit and that the account has to be taken under the Civil Procedure Code and the Transfer of Property Act (see *Dattatraya v. Mahomedkhan*⁴). It may be that to the principle enunciated in *Dattatraya's* case the principle in *Ramchandra's* case is an exception. But we do not see any reason why any similar exception should be engrafted in interpreting the provisions of the Bombay Agricultural Debtors Relief Act, in the absence of any compelling ground of justice or equity or binding authority.

We are, therefore, of the view that the Courts below were right in directing the creditor to pay mesne profits from the date of institution of the proceeding. It is true that the Courts below should, strictly speaking, have directed the creditor to account for the rents and profits received by him. But whether the Court directs the creditor to account for the rents and profits received by him or to pay mesne profits for the period during which he is in possession, it will make no substantial difference in the extent of the ultimate liability incurred by the creditor. On the view taken by us, the rule is discharged with costs.

Rule discharged.

CRIMINAL APPEAL—FULL BENCH.

Before the Hon'ble Mr. H. K. Chinnai, Chief Justice, Mr. Justice Mudholkar and Mr. Justice Shelat.

BASTAV VICTORY RODRIGUES v. THE STATE.*

Criminal Procedure Code (Act V of 1898), Sec. 304—Sessions Judge finding verdict of jury wrong due to their making a mistake on question of law—Whether Sessions Judge competent to re-charge or give further directions to jury.

If the Sessions Judge finds that the verdict of the jury is wrong due to their misunderstanding or making a mistake on a question of law, he is competent, under s. 304 of the Criminal Procedure Code, 1898, to invite the attention of the jury to that mistake and to give his reasons therefor. To that extent alone he can re-charge or give further directions to the jury.

*Emperor v. Kondiba,*¹ commented upon.

*Hamid Ali Haldar v. King Emperor,*² *Rafat Shetkh v. Emperor*³ and *Sadek Mandal v. Emperor,*⁴ dissented from.

*Queen-Empress v. Madhavrao,*⁵ *Empress v. Bharmia,*⁶ *Janak Singh v. Emperor*⁷ and *Sundaram Ayyar In re,*⁸ referred to.

BEFORE the Court of Session of Greater Bombay four persons were charged for committing offences under s. 392 read with s. 34, under s. 392/394 read with s. 34, under s. 392 read with s. 34, and under s. 392/394 read with s. 34 of the Indian Penal Code, respectively, for robbery alleged to have been committed by them in furtherance of the common intention of all, of eight gold bangles and one gold chain from the person of one Padma, wife of Kishanchand Shamdas Bhatia; for causing hurt in the course of the same transaction and in furtherance of the common intention of all, to the said Padma; for committing robbery in furtherance of the common intention of all of a wrist-watch from the person of Kishanchand Shamdas Bhatia; and voluntarily causing hurt in the course of the same transaction and in furtherance of the common intention of all to Kishanchand Shamdas Bhatia. The Additional Sessions Judge delivered a detailed charge to the jury on the evidence and the law. The jury brought in against accused No. 1 a unanimous verdict of guilty for the offences under s. 392 read with s. 34, and under s. 392/394 read with s. 34 in respect of robbery of property belonging to Padma and voluntarily causing hurt to her, and also in respect of robbery of property belonging to Kishanchand Shamdas Bhatia and voluntarily causing hurt to him. Similarly, in respect of accused No. 2 they brought in a unanimous verdict of guilty on all the four charges. When the Additional Sessions Judge asked the Foreman of the jury about the verdict in respect of one Rodrigues (accused No. 3) on the first charge under s. 392 read with s. 34 of the Indian Penal Code, he stated that the jury were unanimous in holding him guilty for robbery of property from the person of Bai Padma. But on the second charge against accused No. 3 under s. 392/394 read with s. 34 of the Indian Penal Code, i.e., for the charge of causing hurt to Bai Padma in the course of the same transaction and in furtherance of the common intention of all, the Foreman told the learned Judge that the jury were unanimous in holding him not guilty. At that stage, the Additional Sessions Judge felt that there was some confusion in the mind of the jury. He, therefore, re-charged the jury. He told them:

"...Let there be no confusion in your mind. Gentlemen, if you come to the conclusion that s. 34, I.P.C., applies and that a particular accused was present, then it does

*Decided, December 5, 1958. Criminal Appeal No. 1436 of 1957, against the order of conviction and sentence passed by K. M. Vakil, Additional Sessions Judge, Greater Bombay, in Case No. 32-IV, Criminal Session, 1957.

1 (1904) 6 Bom. L.R. 361.

2 (1929) I.L.R. 57 Cal. 61.

3 (1933) I.L.R. 60 Cal. 739.

4 (1933) I.L.R. 61 Cal. 256.

5 (1894) I.L.R. 19 Bom. 735.

6 (1895) 6 Bom. L.R. 258.

7 [1942] A.I.R. Pat. 446.

8 (1931) I.L.R. 55 Mad. 250.

not matter as to what was done by which accused. What you have to consider is whether s. 34 applies or not and then whether the particular accused person was present or not. If s. 34 applies, then even if a little thing is done by the accused and actually the removal of ornaments was done by another accused, even then he will be equally responsible with others, even though he himself did not do it. It is only when you come to the conclusion that s. 34 does not apply that you have to consider what offence, if any, the individual accused has done. If you come to the conclusion that accused No. 3 was there and s. 34 applies, then even if the hurt was caused by one of the accused and it was caused during the course of the robbery then he will be equally guilty as if he has himself caused the hurt. Therefore, consider your verdict as a whole with regard to all accused in the light of what I have stated."

The jury again retired and reconsidered the matter. The Judge, when the jury reappeared, asked them whether they had reconsidered their verdict, and they confirmed their verdict previously recorded against accused Nos. 1 and 2 in respect of all the charges against them, and also against accused No. 3 in respect of the first head of the charge. But, on re-consideration of their verdict, they stated that they wanted to vary their verdict in so far as accused No. 3 was concerned on the second charge. In answer to the further question by the Court the Foreman stated that the jury were unanimous that accused No. 3 was guilty on the second charge under s. 392/394 read with s. 34 of the Indian Penal Code. The Judge then proceeded to record the verdict of the jury on the third and fourth heads of charge against accused No. 3 and also on the four heads of the charge against accused No. 4. The Judge then proceeded to convict all the accused for the offences charged against them. Accused Nos. 3 and 4 were sentenced by the Additional Sessions Judge to suffer rigorous imprisonment for three years on each head of the charge, and the sentences were directed to run concurrently. Both these accused appealed against the order of conviction and sentence passed against them. At the hearing for admission the High Court summarily dismissed the appeal of accused No. 4, but admitted the appeal of accused No. 3.

The appeal came up for hearing before Shah and Shelat JJ. A question was raised in the appeal whether the Sessions Judge had jurisdiction to re-charge the jury and to ask them to reconsider their verdict. Their Lordships referred this question to a larger bench. The referring judgment was delivered by Shah J. on September 25, 1958, who after stating the facts as above, proceeded:—

SHAH J. Mr. Mirchandani, who appears on behalf of accused No. 3, contends that there was a serious irregularity in the procedure followed by the learned Additional Sessions Judge and that the verdict of the jury cannot be regarded as binding upon this Court. Mr. Mirchandani points out that the jury had, on the second charge against accused No. 3, i.e., on the charge under s. 392/394 read with s. 34 of the Indian Penal Code, brought in a unanimous verdict of "not guilty", and that if the learned Judge was of the view that the verdict could not be sustained, i.e., the verdict was so perverse that no reasonable body of men could have arrived at that verdict, it was his duty to act under s. 307 of the Code of Criminal Procedure and to make a reference to this Court, but he had no jurisdiction under the Code of Criminal Procedure, on the assumption that there was some confusion in the mind of the jury, to re-charge the jury and to ask them to reconsider their verdict. Mr. Mirchandani says that the procedure followed by the learned Additional Sessions Judge is in direct violation of the terms of s. 304 of the Criminal Procedure Code. Mr. Mirchandani also relies upon a judgment of this Court in *Emperor v. Kondiba*,¹ in support of the contention raised by him.

Section 300 of the Code of Criminal Procedure provides that after the Judge has concluded his charge, the jury may retire to consider their verdict, and that, except with the leave of the Court, no person other than a juror shall speak to

1 (1904) I.L.R. 28 Bom. 412, s.c. 6 Bom. L.R. 861.

or hold any communication with any member of such jury. Section 301 provides that when the jury have considered their verdict, the Foreman shall inform the Judge what their verdict is, or what the verdict of the majority is, or that the jurors are equally divided in opinion. Section 302 provides that if the jury are not unanimous, the Judge may require them to retire for further consideration, and that after such period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous, or the Foreman may inform the Judge that the jurors are still equally divided in opinion. Section 303 provides that the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is. Section 304, on which Mr. Mirchandani relies, provides that when by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended. Mr. Mirchandani says that under s. 303 the Court is entitled only to ask the jury such questions as are necessary to ascertain what the verdict of the jury is, and if by reason of an accident or mistake a wrong verdict is delivered, then under s. 304 the jury are entitled, before or immediately after the verdict is recorded, to amend the verdict. Mr. Mirchandani contends that the mistake or accident must be in the delivery of the verdict by the jury and not in the consideration of the evidence or law. Even if by reason of a confusion in the mind of the jury about the evidence on the law applicable a wrong verdict is brought, it is not open to the jury, contends Mr. Mirchandani, to amend their verdict, and much less is it open to the Judge to ask the jury to amend their verdict. The only provision, Mr. Mirchandani contends, for rectifying the erroneous verdict is to be found in s. 307 under which where the Judge disagrees with the verdict of the jury, he has to make a reference to the High Court recording the grounds of his opinion. In the present case, evidently there was an inconsistency in the verdict of the jury in so far as it related to the first head of the charge against accused Nos. 1, 2 and 3 and the second head of the charge against them; and the question which falls to be determined is, whether, on the view that there was some confusion in the mind of the jury in understanding the law, the learned Additional Sessions Judge was entitled to ask them to reconsider their verdict which was already delivered and recorded?

In *Emperor v. Kondiba* certain persons were tried for counterfeiting coins and having in their possession implements and materials for counterfeiting coins, i.e., offences punishable under ss. 232 and 235 of the Indian Penal Code. They were tried by the Sessions Judge with a jury. The jury brought in a unanimous verdict of guilty under s. 235, part 2, and a unanimous verdict of not guilty under s. 232 in respect of all the accused. The Judge did not agree with the verdict of the jury on the charge under s. 232, and he then asked the jury the reasons for holding that the accused were not guilty under s. 232. The answer given by the jury was that the accused were not actually caught in the act of coining. What followed then was recorded by the Sessions Judge as follows (p. 418):

"The commentary of section 232 (which had already been read to the jury by the Public Prosecutor when summing up the case) is again read to the jury, as it appears to me probable that their verdict of 'not guilty' under section 232 is the result of a mistake, and the jury are asked to retire and reconsider their verdict in the light of the commentary on s. 232."

Now, that case was substantially of the same type as the present. The jury brought in what apparently was an inconsistent verdict and the Judge thought that there was some confusion in the mind of the jury on the true effect of s. 232 of the Indian Penal Code. After the jury reconsidered the verdict and stated to the Judge that they were under a mistake, and that they had not properly understood "the commentary on s. 232" and that their verdict after reconsideration was that all the accused were guilty under s. 232 also, the learned Sessions Judge accepted the amended verdict of the jury and sentenced each

accused to undergo rigorous imprisonment for five years. Against that conviction an appeal was preferred to this Court, and this Court observed that the ground upon which the Judge asked the jury to reconsider their verdict was that it appeared to him that the first verdict of 'not guilty' was the result of a mistake, and that s. 304 of the Code of Criminal Procedure enabled the jury to amend their verdict, if it was *wrongly delivered* on account of an accident or mistake. It was then observed (p. 314):

"...But that section (s. 304) obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. Here there was no accident or mistake in the delivery of the verdict, for the jury having arrived at the conclusion that the accused were not guilty gave the verdict in accordance with it. The mistake was in their misunderstanding the law under section 232. If such mistake has resulted in an erroneous verdict, it can be corrected only by the Judge disagreeing with the jury and referring the case under s. 307 of the Criminal Procedure Code to the High Court. There is no provision in the Code which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself and no lurking uncertainty in the minds of the jury themselves regarding it."

If this were the only authority of this Court, there can be no doubt that the procedure followed by the learned Judge in the Court below was erroneous. But our attention was invited to another decision of this Court in *Queen-Empress v. Madhavrao*.² In that case, the accused was tried with the aid of a jury for the offence of rape. The jury announced through their Foreman that the accused "did the act with consent". The Sessions Judge, thereupon, without requiring the jury to reconsider their verdict or giving them any fresh directions, asked them whether they found the accused guilty or not-guilty. The jury again retired and brought in a verdict of guilty, upon which the Sessions Judge sentenced the accused to imprisonment for three years. The order of conviction was reversed in appeal to this Court. In the view of this Court, the first verdict of the jury was a "special verdict" and there being no real ambiguity about it, the Court of Session was bound under s. 302 of the Code of Criminal Procedure to record the verdict and apply the law thereto. That case has, it is true, no direct application to the present case. But it appears to have been assumed in that case by Mr. Justice Jardine, who delivered the judgment of the Court, that it was open to the Court, even after the verdict of the jury was delivered, to re-charge the jury and to reconsider the verdict. It was observed in that case (at p. 736) criticising the procedure of the trial Judge, that—

"...The learned Judge for some reason, not apparent on the record, then required the jury to say whether Madhavrao was guilty or not guilty. It does not appear that he required them to re-consider their first verdict, as has been held to be a legal course in England—*Reg. v. Meany*,³ or that he gave them any fresh directions or explained to them that a finding that the woman consented was tantamount to acquittal."

Relying upon these observations, the learned Assistant Government Pleader contends that in the absence of an express provision in the Code of Criminal Procedure prohibiting re-charging the jury and asking them to reconsider their first verdict, it is open to the Judge to re-charge the jury and ask them to reconsider their verdict even after the verdict is delivered and recorded, if the Judge is of the view that the verdict is the result of confusion in the mind of the jury. In the present case, the verdict, it is true, was not ambiguous or indefinite, nor can it be regarded as a "special verdict". The verdict on the second charge, though clear, was inconsistent with what was implicit in the verdict against accused Nos. 1, 2 and 3 on the first charge. The question which falls to be determined is, if an apparently unambiguous verdict is delivered by the jury, but that verdict is inconsistent with the rest of the verdict *qua* the same accused or other accused, is it open to the Court to ask the

² (1894) I.L.R. 19 Bom. 735.

L.R.—48.

³ (1862) 9 Cox. C.C. 231.

jury to reconsider the verdict after giving them further directions on questions of law or fact? The observations made in the case of *Emperor v. Kondiba*, to which we have already referred, appear definitely to hold that such a course is not justified. But in *Queen-Empress v. Madhavrao*, it seems implicit that it is open to the Court in certain circumstances to re-charge the jury and ask them to reconsider their verdict apart from the provision of s. 302 of the Code of Criminal Procedure.

Our attention was also invited to a recent judgment of the Calcutta High Court in *Sadar Sheikh v. State*.⁴ It appears to have been the view of the Calcutta High Court (see *Rafat Sheikh v. Emperor*⁵) that where a Sessions Judge is not minded to accept what obviously is an inconsistent verdict he is competent to address a further charge to the jury and he need not deal with the matter by referring the case to the High Court for consideration. In the later decision—*Sadar Sheikh v. State*, to which our attention was invited, the Calcutta High Court extended the principle and held that if it appeared from their verdict that the jury had not understood the charge, it was open to the Court to re-charge the jury and to ask them to reconsider the verdict.

As the question raised is of some importance and the observations made in the judgment in *Emperor v. Kondiba* are emphatic, we are of the view that this question may be considered by a larger Bench. We, therefore, order that the papers of this case be placed before the learned Chief Justice for constituting a larger Bench to decide the question.

"Whether it is open to a Court of Session trying a case with the aid of a jury, after recording the opinion of the jury, which is *ex facie* not ambiguous, to re-charge the jury, because the Judge feels that the verdict is the result of confusion in the minds of the jury, and to obtain the verdict of the jury after so re-charging the jury?" After the opinion of the Full Bench is received, the appeal to be placed for hearing.

The question was considered by a full bench composed of Chainani C.J. and Mudholkar and Shelat JJ.

V. K. Mirchandani, with B. K. Vasvani, for the appellant-accused No. 3.
Y. V. Chandrachud, Government Pleader, for the State.

CHAINANI C.J. The question referred to the full bench is:

"Whether it is open to a Court of Session trying a case with the aid of a jury, after recording the opinion of the jury, which is *ex facie* not ambiguous, to re-charge the jury, because the Judge feels that the verdict is the result of confusion in the minds of the jury, and to obtain the verdict of the jury after so re-charging the jury."

In order to answer this question, it is necessary to consider the provisions contained in the Code relating to trial of cases tried by jury. Section 297, Criminal Procedure Code, provides that in cases tried by jury, when the case for the defence and the prosecutor's reply are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided. Section 298, Criminal Procedure Code, lays down that in such cases it is the duty of the Judge to decide all questions of law. Section 299 states that it is the duty of the jury to decide which view of the facts is true and also all questions, which according to law, are to be deemed questions of fact.

Under ss. 298 and 299, Criminal Procedure Code, there is, therefore, a division of functions between the Judge and the jury. All questions of fact are to be decided by the jury, while questions of law must be decided by the Judge himself. Section 300 states that after the Judge has finished his charge, the jury may retire to consider their verdict. Section 301 states that when the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority or that the jurors are equally divided in opinion. Section 302, Criminal Procedure Code, provides that if

the jury are not unanimous, the Judge may require them to retire for further consideration. Section 303, Criminal Procedure Code, empowers the Judge to ask such questions to the jury as are necessary to ascertain what the jury really meant by their verdict. It can, therefore, be used only in cases in which the verdict of the jury is ambiguous. When, however, the verdict is free from ambiguity, no questions can be put under s. 303, Criminal Procedure Code. Section 304 provides that when by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended. Section 306 provides that when the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly. Section 307, Criminal Procedure Code, states that if in any such case the Judge disagrees with the verdict of the jurors or of a majority of the jurors and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly.

It will be seen from these provisions that the Code does not contain any specific provision empowering the Judge to re-charge the jury. The learned Government Pleader has urged that in the absence of any provision to the contrary in the Code, it is open to the Judge to re-charge the jury, whenever he finds it necessary to do so in the interest of justice. This argument cannot be accepted, because the Code lays down in detail the procedure, which is to be followed in trial of sessions cases tried by jury. It is, therefore, not open to the Judge to follow any procedure other than that laid down in the Code.

The question, which we have to decide in this case, is whether a Judge can re-charge the jury, when he finds that the verdict is the result of confusion in the minds of the jury. As I have stated, there is no express provision in the Code empowering a Judge to re-charge the jury. Section 304, Criminal Procedure Code, however, provides that when by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended. This section, therefore, enables a wrong verdict to be corrected, when it is due to an accident or a mistake. The verdict would be wrong due to an accident, when, for instance, the foreman while informing the Judge of the jury's verdict, accidentally makes a slip and mentions a wrong section of law. The other case, in which a wrong verdict can be corrected, is when it is due to a mistake. The mistake may be discovered either by the jury itself or by the Judge. This section does not say that it can be used only when the mistake is discovered by the jury itself. In the absence of any such provision in the section, it will be reasonable to hold that this section can be used even when the mistake is discovered by the Judge. Consequently, under this section the Judge can point out the mistake to the jury, and if he has the power to point out the mistake to the jury, it is necessarily implied that he can also give reasons, on account of which he thinks that there is a mistake. The power of the Judge to point out the mistake and give reasons therefor is, therefore, in our opinion, implicit in the provisions of s. 304, Criminal Procedure Code. The mistake may be a mistake of fact or a mistake of law. So far as questions of fact are concerned, they are entirely within the province of the jury, for under s. 299, Criminal Procedure Code, they have to decide all questions of fact. Unless the Judge makes a reference under s. 307, Criminal Procedure Code, to the High Court, he is bound by the view taken by the jury on questions of fact. The various sections laying down the procedure for trial of sessions cases by jury must be read together. Section 304, Criminal Procedure Code, must, therefore, be read along with ss. 298 and 299, Criminal Procedure Code. The finding of the jury on questions of fact being binding upon the Judge, it necessarily follows that it will not be open to the Judge to tell the jury that their finding is incorrect due to a mistake of fact. Consequently, if the wrong verdict of the jury is due to a mistake of fact, the Judge cannot point out such a mistake to the jury under s. 304, Criminal Procedure Code. On the other hand, if it is a mistake of law,

he is perfectly competent to draw the attention of the jury to it, for under s. 298, Criminal Procedure Code, all questions of law have to be decided by him. In our opinion, therefore, if the Judge finds that the jury has delivered a verdict, which is wrong due to a mistake of law, it would be competent for him to point that mistake to the jury and also to give his reasons therefor. To that extent alone he can re-charge the jury.

It will now refer to various cases, which have been cited in the course of arguments. Mr. Mirchandani, who appears on behalf of the accused, has relied on *Emperor v. Kondiba*¹ in support of his argument that s. 304, Criminal Procedure Code, contemplates only those cases, in which there is a mistake in the actual delivery of the verdict, i.e., where the verdict is different from what the jury actually intended to deliver. In that case the accused were tried before the Sessions Court on charges under ss. 232 and 235, Indian Penal Code. The jury returned a unanimous verdict of guilty under s. 235, Indian Penal Code, and a unanimous verdict of not guilty under s. 232, Indian Penal Code. The learned Judge questioned the jury as to the reasons for holding that the accused were not guilty under s. 232, Indian Penal Code. The jury answered that the accused were not actually caught in the act of coining. The learned Judge then explained to them the law under s. 232, Indian Penal Code, and asked them to reconsider their verdict. Accordingly, the jury reconsidered the matter and returned a unanimous verdict that the accused were also guilty under s. 232, Indian Penal Code. It was held that s. 303, Criminal Procedure Code, limits the power of the Judge to question the jury only to cases in which it is necessary to ascertain what the verdict of the jury is, i.e., where the verdict delivered is in ambiguous terms or with uncertain sound so that their meaning is not clear. As there was no ambiguity in the unanimous verdict of not guilty under s. 232, Indian Penal Code, it was not necessary to put any question under s. 303, Criminal Procedure Code, in order to ascertain what the jury's verdict was. Consequently, the only course left for the Judge, if he disagreed with the verdict of the jury, was to refer the case under s. 307, Criminal Procedure Code, to the High Court. In this view it was really not necessary in that case to consider the provisions of s. 304, Criminal Procedure Code. The learned Judges, however, referred to this section and observed that this section contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. With respect, it is difficult to see why the provisions of s. 304, Criminal Procedure Code, should be limited in this manner. The section provides for the correction of a wrong verdict, when such wrong verdict is due to an accident or a mistake. There does not appear to be any sufficient reason why the words "accident" or "mistake" must be confined only to cases, in which the verdict actually delivered is different from what the jury intended to give.

A different view was expressed in *Queen-Empress v. Madhav Rao*.² In that case the verdict of the jury was that the accused, who was tried for rape, did the act with consent. The Sessions Judge then asked the jurors whether they found the accused guilty or not guilty. The jury again retired and brought in a verdict of guilty. Accordingly, the Sessions Judge convicted the accused. The conviction was set aside on the ground that as there was no ambiguity in the verdict of the jury, the Sessions Judge was bound to record the verdict and apply the law thereto. It was also held that the second verdict could not be sustained, as there was nothing to show that the Sessions Judge gave the jury any fresh directions or explained to them that a finding that the woman had consented was tantamount to an acquittal. The learned Judges, therefore, appear to have been of the opinion that the Sessions Judge could give fresh directions to the jury. This case was followed in *Empress v. Bharmia*.³ In that case, the jury, by a majority of four to one, found the accused, who was charged with murder, guilty of voluntarily causing grievous hurt. The Ses-

¹ (1904) 6 Bom. L.R. 381. ² (1895) 6 Bom. L.R. 258.

³ (1894) 11 L.R. 19 Bom. 735.

sions Judge thereupon put several questions to the jury. Thereafter the learned Judge, disagreeing with the verdict of the jury, referred the case to the High Court. It was held that questions put to a jury by the Sessions Judge, demanding their reasons for acquitting the accused on the charge on which the jury had delivered a unanimous verdict without any uncertain sound, exceeded the limits of questioning which the law contemplates. It was further held that if the jury were not unanimous, the proper course open to the Judge was to require them, under s. 302, Criminal Procedure Code, to retire for further consideration. It was also observed that the Sessions Judge might, at the same time, have given further directions on matters of law. In these two cases, therefore, the view taken was that the Judge can give further directions to the jury, in case he finds that the jury has delivered a wrong verdict due to misunderstanding of law.

The Calcutta High Court has in a series of cases taken the view that it is open to the Sessions Judge to re-charge the jury on specific points, in the absence of anything in the Criminal Procedure Code, which prevents him from doing so. (See *Hamid Ali Haldar v. King-Emperor*,⁴ *Rafat Sheikh v. Emperor*,⁵ and *Sadek Mandal v. Emperor*⁶). These cases have been followed by the Patna High Court in *Janak Singh v. Emperor*.⁷ With respect, it seems to us that the power of the Sessions Judge to charge the jury must be derived from the provisions of the Code, which lay down the procedure to be followed in trial of Sessions cases and that unless these provisions expressly or impliedly confer a power upon the Sessions Judge to re-charge the jury, he cannot do so.

The other case, which has been cited in the course of arguments, on which Mr. Mirchandani has relied, is *Sundaram Ayyar*, In re.⁸ In that case, the decision in *Emperor v. Kondiba* was followed, and it was held that when a Sessions Judge thinks that the jury had, by committing an error of law, committed an error of judgment but not that they had delivered a verdict, which they did not intend to deliver, he cannot address another charge to the jury on the law and request them to reconsider their verdict in the light of the same, but should, if he disagrees with the verdict of the jury, submit the case to the High Court under s. 307, Criminal Procedure Code. It was observed in the same case that s. 304, Criminal Procedure Code, has no application where there is no accident or mistake in the delivery of the verdict and the mistake lies in the misunderstanding of the law by the jury. For the reasons, which I have already given, it seems to us, however, that where a verdict of the jury obviously appears to be due to a misunderstanding or mistake of law, the Sessions Judge can, under s. 304, Criminal Procedure Code, draw the attention of the jury to that mistake.

Our reply to the question, which has been referred to the full bench, is that if the Sessions Judge finds that the verdict of the jury is wrong due to their misunderstanding or making a mistake on a question of law, he is competent, under s. 304, Criminal Procedure Code, to invite the attention of the jury to that mistake and to give his reasons therefor. To that extent alone he can re-charge or give further directions to the jury.

Answer accordingly.

4 (1939) I.L.R. 57 Cal. 61.

5 (1933) I.L.R. 60 Cal. 729.

6 (1933) I.L.R. 61 Cal. 256.

7 [1942] A.I.R. Pat. 446.

8 (1931) I.L.R. 53 Mad. 256.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chaudhary, Chief Justice, and Mr. Justice Shelat.

THE MAHARANA MILL KAMDAR UNION v. N. L. VYAS.*

Industrial Disputes Act (XIV of 1947); Secs. 3(b), 20(3), 33, 33A, 15—Parties to industrial dispute, pending references to Industrial Tribunal under s. 10, arriving at settlement to refer disputes to private arbitration—Application by such parties to Tribunal for permission to withdraw pending cases—Terms of settlement, stating that disputes should be referred to specified arbitrators, attached to application—Tribunal by order giving "award as per terms of settlement"—Order published in Official Gazette—Complaint made by party to dispute under s. 33-A of dismissal within one month of publication of award—Whether order made by Tribunal, award within meaning of Act—Effect of the order passed by Tribunal.

During the pendency of certain references made to the Industrial Tribunal under s. 10 of the Industrial Disputes Act, 1947, the parties arrived at a settlement, by which they agreed to refer the dispute between them to private arbitration. Accordingly the parties applied to the Industrial Tribunal for permission to withdraw the cases pending before it and to this application they attached the terms of the settlement which stated that the disputes should be referred for decision to certain specified arbitrators. On this application the Industrial Tribunal made the following order:—"The terms of agreement have been filed by the parties. I, therefore, give my award as per terms of settlement appended herewith." This order was published as an award in the Government Gazette. Thereafter complaints were made to the Industrial Tribunal under s. 33-A of the Act by the petitioners, one of the parties to the dispute, in which they contended that as they had been dismissed within one month from the date of the publication of the award, there had been a contravention of the provisions of s. 33 of the Act:—

Held, that the effect of the order passed by the Industrial Tribunal was that the proceedings before it came to an end when it passed the order, but the disputes still continued and there was no determination thereof by the Tribunal and consequently the order made by the Tribunal was not award within the meaning of the Act, and that as no proceedings were pending before the Tribunal when the petitioners were dismissed, the provisions of s. 33 could not, therefore, be said to have been contravened.

State of Bihar v. D. N. Ganguly and *Krishnakutty Nair v. Industrial Tribunal*,² referred to.

THE facts appear in the judgment.

K. K. Singhi, for the petitioners in all the five applications.

I. M. Nanavati, with *Vithalbai B. Patel* and *J. B. Patel*, for opponent No. 2 in all.

CHAUDHARY C.J. The petitioners in these five applications were employees of the Maharana Mills Ltd. at Porbandar, respondent No. 2, to whom I will hereinafter refer to as 'the respondent'. In 1954-55 there were disputes between the respondent and its workmen represented by the Maharana Mill Majoor Mahajan Sangh. Three references were then made by the Saurashtra Government under s. 10 of the Industrial Disputes Act to the Industrial Tribunal. These were References Nos. 47 of 1954, 91 of 1955 and 102 of 1955. During the pendency of these references before the Industrial Tribunal the parties arrived at a settlement, by which they agreed to refer the disputes between them to private arbitration. On June 8, 1956, an application signed on behalf of both the parties, that is to say, the respondent and the workmen represented by the Maharana Mill Majoor Mahajan Sangh was made to the Industrial Tribunal

*Decided, December 10, 1958. Special Civil Application No. 2358 of 1958 (with Special Civil Applications Nos. 2359, 2360, 2361 and 2362 of 1958).
1 [1958] A.I.R. 8.C. 1018.
2 (1957) 2 Labour L.J. 45.

the Industrial Tribunal; the Tribunal had not issued general notice to persons employed in the mills. It was, therefore, contended on the part of the respondent that the petitioners were not parties to or concerned in the dispute referred to the Tribunal or bound by the award made by the Tribunal. These contentions were accepted by the Industrial Tribunal, which dismissed the applications made by the petitioners. The orders of the Tribunal dismissing the applications of the petitioners have been sought to be set aside in these five special civil applications.

In order to appreciate the arguments, which have been advanced in support of the petitioners, it is necessary to consider the provisions of the Industrial Disputes Act, 1947. The references had been made to the Industrial Tribunal as they were made before the coming into force of the Act. Section 2(b) of the Act defines the word "award" as a decision or final determination by an Industrial Tribunal of any industrial dispute or of any question relating thereto. Section 10 provides for a reference of an industrial dispute being made by the appropriate Government to the Industrial Tribunal for adjudication, it shall hold its proceedings expeditiously and shall submit its award as soon as practicable on the conclusion thereof, to the appropriate Government. Section 17 provides for publication of the award in the Official Gazette. Section 17A states that the award of the Tribunal shall become enforceable on the expiry of thirty days from the date of its publication in the Official Gazette. Section 18 provides that an award, which has been made, shall be binding on all parties to the industrial dispute and on all persons employed in the establishment to which the dispute relates, on the date of the award and on all persons who subsequently become employed in the establishment. Sub-section (3) of s. 20 states that proceedings before a Tribunal shall be deemed to have concluded on the date on which the award becomes enforceable under s. 17A, i.e., on the expiry of one month from the date of publication of the award in the Official Gazette. Section 33 states that during the pendency of proceedings before a Tribunal in respect of an industrial dispute, an employer shall not dismiss any workman concerned in such dispute without the express permission in writing of the Tribunal. Section 33-A, which was inserted in the Act by the Industrial Disputes (Amendment) Act, 1952, states that where contravention of the provisions of s. 33 during the pendency of proceedings before a Tribunal, any employee aggrieved by such contravention may file a complaint in writing to such Tribunal and on receipt of such complaint the Tribunal shall adjudicate upon the complaint as if it was a dispute pending before it in accordance with the provisions of this Act.

The orders made by the Industrial Tribunal on the three references which it has described as awards, were published on June 13, 1956. They were dismissed within a week thereafter. The petitioners' case is that the proceedings before the Tribunal must under sub-s. (3) of s. 20 be deemed to have concluded on the date on which the award becomes enforceable under s. 17A, i.e., on the expiry of one month from the date of publication of the award in the Official Gazette. The respondent contended that the provisions of s. 33 have been contravened. The respondent on the other hand, is that the orders made by the Tribunal on the three references were not awards within the meaning of the Act, that the proceedings before the Tribunal were concluded when the Tribunal passed its orders on June 9, 1956, and June 11, 1956, allowing the disputes to be withdrawn. It is contended that consequently no proceedings were pending before the Tribunal when the orders were dismissed on and after June 14, 1956. The material question for consideration, therefore, is whether the orders passed by the Tribunal were awards within the meaning of the Act. According to the definition given in the Act, an award must be (1) a determination, (2) by the Industrial Tribunal, and (3) the determination must be of an industrial dispute or any question relating thereto. Where a Tribunal allows a dispute to be withdrawn, in order that it may be referred to a private arbitration, there is no determination of the dispute itself, the dispute is

instead of being decided by the Industrial Tribunal, it is to be decided by private arbitration. There is, therefore, no determination of the dispute in such cases; much less is it a determination by an Industrial Tribunal.

Mr. Singhvi has contended that the three references could not be withdrawn, as these references had been made to the Tribunal by the State Government and as under s. 15 the Tribunal was bound to proceed with the references until it had made the awards. He has relied on the decision of the Supreme Court in *State of Bihar v. D. N. Ganguly*¹, in which it was held that Government has no power to cancel or supersede a reference made by it under s. 10 of the Act. That case does not, however, decide that the parties, between whom the dispute is to be adjudicated upon by the Industrial Tribunal, cannot withdraw the dispute from adjudication by the Tribunal. It is, however, not necessary to decide this point in these applications, because the question before us is not whether the withdrawals were legal, but whether the orders permitting the withdrawals amount to awards.

The orders passed by the Tribunal on the applications for withdrawal made to it were that it was giving awards as per terms of the settlements. The terms of the settlements show that the disputes between the parties had not been resolved; all that had been agreed was that these disputes should be referred for decision to certain specified arbitrators. There was no decision by the Tribunal on the matters in dispute. Consequently, there was no determination of the disputes within the meaning of the Act. Even though, therefore, the orders made by the Tribunal are described as awards and were published as such in the Official Gazette, they were not awards within the meaning of the Act. The position might have been different, if the disputes had been settled on merits by private agreements and the Tribunal had been asked to make awards in terms of the agreements, but that is not the case here.

Mr. Singhvi has relied on the decision of a single Judge of the Kerala High Court reported in *Krishnakutty Nair v. Industrial Tribunal*.² In that case, during the pendency of a reference before an Industrial Tribunal, the parties agreed to refer the matters in dispute to arbitration of certain persons. An application was then made to the Tribunal for permission to withdraw the dispute. The Tribunal after holding an inquiry came to the conclusion that the terms of the settlement were fair and beneficial to the workers. The Tribunal then made an award accepting the terms of settlement and holding that there was no subsisting dispute to be decided by the Tribunal. The question then arose whether parties by agreement between them could withdraw a reference made to an Industrial Tribunal. It was held that they could do so, and that the Industrial Tribunal was competent to allow the withdrawal of the dispute. The judgment shows that the learned Judge was inclined to regard the order made by the Tribunal as an award. He has observed that the expression "determination" in the definition of "award" indicates only coming to an end, which may be in any way whatever. With respect, it seems to us however that the definition clearly contemplates determination of the dispute by an Industrial Tribunal. Where a dispute is withdrawn from the purview of an Industrial Tribunal, the proceedings before the Tribunal come to an end by the Tribunal allowing the dispute to be withdrawn, but there is no determination of the dispute by it. A distinction must be drawn between the determination of an industrial dispute and the determination or termination of proceedings before a Tribunal. In the present cases, the effect of the orders passed by the Tribunal was that the proceedings before it came to an end, but the disputes still continued and there was no determination thereof by the Tribunal. Consequently, the orders made by the Tribunal are not awards within the meaning of the Act.

Section 15 of the Act provides that where an industrial dispute has been referred to a Tribunal, it shall, on the conclusion of proceedings before it, submit its award. Mr. Singhvi has, therefore, contended that in case we hold, as

1 [1958] A.L.R. 8. 6. 1018. 2 [1957] 2 Labour L.J. 45.

we are inclined to do, that the orders made by the Tribunal cannot amount to awards, the proceedings must be held to be still pending before the Industrial Tribunal. This argument cannot be accepted, because rightly or wrongly the Tribunal allowed the parties to withdraw the matters in dispute from adjudication by it. After the Tribunal passed orders sanctioning the withdrawals, the proceedings before the Tribunal came to an end. The orders allowing the matters in dispute to be withdrawn were passed on June 9 and 11. The petitioners were dismissed thereafter. Consequently, no proceedings were pending before the Tribunal, when the petitioners were dismissed. The provisions of s. 33 cannot, therefore, be said to have been contravened.

The view taken by the Industrial Tribunal is, therefore, correct. The rules issued on the five applications will, therefore, be discharged. There will be no order as to costs.

Rules discharged.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Kotval.

M/S. JIWAJI ESMAILJEE & SONS v. UNION OF INDIA.*

Indian Railways Act (IX of 1890), Secs. 74-B, 74-C—Goods consigned in open wagon and booking done at Railway Risk Note I—Goods found short in weight when received by consignee—Suit by consignee against railway for loss of goods—Whether railway protected under s. 74-B—Whether words "destruction, deterioration or damage" in s. 74-B includes loss.

The words "destruction, deterioration or damage" in s. 74-B of the Indian Railways Act, 1890, do not include "loss". Therefore, the section does not grant immunity to the railway in case of loss where the goods are carried in open wagons.

Bengal and North-Western Rly., Co., Ltd. v. Tupon Dass, explained.

G. G. in Council v. Patal Paul & Co., referred to.

THE facts appear in the judgment.

Abidali, for the applicant.

P. N. Rudra, for the opponent.

KOTVAL J. On March 30, 1955, the Tata Iron and Steel Company, Ltd. consigned one wagon-load of mild steel angle iron bars from the Kumardubi railway station under railway receipt No. 259507, invoice No. 2, dated March 30, 1955. The consignee was the plaintiff who is an iron and steel merchant at Nagpur. When the consignment was received at Nagpur, it was found short in weight, i.e. the goods weighed 20 tons and 3 cwts. when sent, but they were found to be only 19 tons and 3 cwts. on reweighment at Nagpur. The plaintiff sued the defendant, the Union of India, representing the South-Eastern Railway, for the loss of the goods.

Now, there is no dispute as to the findings on the question of fact. Both the parties have accepted the findings of the trial Court which are as follows:—

"The following facts are now too clear to be disputed (as seen from the evidence on record): (i) that the consignment was loaded in an open wagon, not by the defendants' men or under their supervision though the booking was done at the railway risk note I, (ii) that on reweighment at Nagpur, the consignment did weigh only 19 tons and 4 cwts. as against the original weight of 20 tons and 3 cwts., (iii) that the plaintiff did protest on account of the shortage though he did not do so promptly, (iv) in the

*Decided, August 31, 1958. Civil Revision Application No. 284 of 1958, against the decree passed by M.P. Wadhakar, Fifth Civil Judge,

Nagpur, in Civil Suit No. 1663 of 1956.

1 (1926) I.L.R. 5 Pat. 465.

2 [1952] A.I.R. Cal. 285.

absence of any cogent evidence from the defendants' side I see no reason to disbelieve the plaintiff."

Notwithstanding these findings the trial Court dismissed the plaintiff's claim, because it held that the defendant railway was protected under s. 74-B of the Indian Railways Act.

Section 74-B runs as follows:—

"When any goods which, under ordinary circumstances, would be carried in covered vehicles or vessels and would be liable to damage if carried otherwise, are, at the request of the sender or his agent recorded in the forwarding note, tendered for carriage by railway in open vehicles or vessels, the railway administration shall not be responsible for any destruction, deterioration or damage which may arise only by reason of the goods being so carried."

The view which prevailed with the trial Court was that since the goods were carried in an open wagon, the railway was completely protected and was not responsible for any destruction, deterioration or damage, which presumably includes loss.

On behalf of the plaintiff it is now urged that s. 74-B does not afford any protection to the railway if the goods are lost because it only protects the railway against "destruction, deterioration or damage". Mr. Rudra on behalf of the railway has urged that loss of the goods is included in the word "deterioration" in s. 74-B and he relies upon a decision of the Patna High Court in *Bengal and North-Western Rly., Co., Ltd. v. Tupan Dass*.¹

In that case the division bench of the Patna High Court was concerned with the interpretation of s. 75 of the Railways Act and the words used in s. 75 are "the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package". In interpreting the word "deterioration" the division bench held upon a reference to the meaning of the word in the Oxford Dictionary that it meant impairment in quality or value, and the division bench concluded that if any goods are abstracted from a parcel, the parcel was impaired in value and therefore the loss is included in the word "deterioration". Mr. Rudra on behalf of the railway urges that the word "deterioration" as used in s. 74-B is indicative of the same connotation. Section 75 of the Railways Act is curiously worded and the wording is peculiar to itself. It differs from the new s. 74-B with which I am here concerned. Section 75 speaks of "articles...contained in any parcel or package" and indemnifies the railway in the following words "the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package". In my opinion it is important to notice that the emphasis is on the loss, destruction or deterioration of the "parcel or package" as distinct from the articles contained therein. It is this peculiar dichotomy which induced the Patna High Court to hold in *Bengal and North-Western Rly., Co., Ltd. v. Tupan Dass* (cit. sup.) at p. 467 that "the parcel was impaired in value by the abstraction of these articles and consequently there was deterioration of the parcel".

Section 74-B, however, does not refer to the parcel or package in which the goods are contained but speaks directly of the goods themselves. In the different context of s. 74-B it seems to me difficult to hold that "deterioration" of the goods is the same thing as loss of the goods.

The provisions of s. 74-B were based upon the provisions incorporated in the old Risk Note in form C which were similar in language. Considering the provisions of Risk Note C, the Calcutta High Court in *G. in Council v. Patal Paul & Co.*² held that the words "destruction, deterioration or damage" do not include loss. In para. 6 of the judgment at p. 286 Mr. Justice Mookerjee observed as follows:—

"In risk note C, no indemnity is given in case of loss as distinct from cases of destruction, deterioration or damage. This is clear from a comparison of risk note 'C' with the other risk notes where the word 'loss' is also included."

One finds the same distinction also made in the provisions of the railways Act if one compares s. 74-B with s. 74-C, sub-s. (3). In that the word "loss" is used in contradistinction to the words "destruction or deterioration of or damage to". Having regard to the provisions of not too much to suppose that if the Legislature had intended to railway administration against such loss, they would have used the in s. 74-B in addition to the words "destruction, deterioration, or they have done in s. 74-C. Moreover, the opening words of s. 74-B make such an interpretation possible. The opening words are:

"When any goods which, under ordinary circumstances, would be carried vehicles or vessels and would be liable to damage if carried otherwise are of the sender or his agent recorded in the forwarding note etc." (Italics as The section intended to provide a protection for the railway when are carried in an open wagon which ordinarily would be carried vehicles and would be liable to damage if carried otherwise.

The emphasis is more upon the damage to quality of the goods to the quantity, and therefore I am not prepared to hold that the "destruction, deterioration, or damage" include "loss". It does not the judgment of the trial Court that it considered this aspect of. It assumed that the section granted immunity to the railway in where the goods are carried in open wagons.

As to the quantum of damages, the trial Court found that the de be Rs. 724-14-0. The quantum of damages was not disputed before.

I allow the application for revision, set aside the judgment of the trial Court dismissing the plaintiff's suit and instead pass in favour of the plaintiff and against the defendant for the sum of with costs throughout.

Application

CRIMINAL APPELLATE

Before Mr. Justice Datar and Mr. Justice Tarkunde.

KRISHNA NAYAR RAM NAYAR v. STATE.*

Criminal Procedure Code (Act V of 1898), Sec. 264—Bombay Prohibition Act of 1949, Sec. 116—Substance of evidence required to be recorded under their substance of evidence embodied in judgment from memory or when evidence given amounts to compliance with s. 264—Substance of meaning of expression—Whether in trial under Bombay Prohibition Act upon magistrate to record substance of evidence of witnesses.

Under s. 264 of the Criminal Procedure Code, 1898, the substance of is to be recorded at the time when the evidence is given in Court. The the substance of the evidence is embodied in a judgment from memory notes made at the time when evidence was given it does not amount with s. 264 of the Code.

The expression "the substance of the evidence" occurring in the Criminal Code, 1898, implies that all the important or substantial part of the deposition should be recorded by the presiding authority.

In a trial under the Bombay Prohibition Act, 1949, by virtue of s. 116 it is incumbent upon the magistrate to record the substance of the evidence when the evidence is led in Court. Failure to record such evidence generally vitiates the trial.

*Decided, September 11/12, 1953. Criminal. Unsekar, Presidency Magistrate Appeal No. 887 of 1953, from the orders of Mulund, Bombay, in Case No conviction and sentence passed by H. S. of 1957.

These facts appear in the judgment; no question of no question as to the facts.

K. B. Joshi, for the appellant-accused.

V. H. Gurnasie, Assistant Government Pleader, for the State.

TAKKUNDU J. The appellant was convicted by the Presidency Magistrate, 27th Court, Mulund, Bombay, under ss. 65(b), 65(f) and 36(b) of the Bombay Prohibition Act and sentenced to rigorous imprisonment for six months and a fine of Rs. 500; in default rigorous imprisonment for three months. He has come in appeal from the order of conviction and sentence. The prosecution case was that on November 2, 1957, a police party had gone for patrolling in the Chandivali jungle, that they came across a working still for the manufacture of illicit liquor at about 7 p.m. on that day, and that the appellant was found operating that still and was arrested on the spot. The police party seized a quantity of illicit liquor, some wash, and certain utensils for the manufacture of liquor. The appellant pleaded that he was not guilty of the offences charged against him, that he was not arrested in Chandivali jungle, and that he was picked up from his house at Kurla Road at about 5-30 p.m. on that day.

The prosecution evidence consisted of the depositions of two police constables who were in the police party that was patrolling the Chandivali jungle on the day of the offence. As the still was found in a jungle, no panchnama was made about it. The accused examined two witnesses to prove that he was arrested at about 5-30 p.m. on that day from his house at Kurla Road. The learned Magistrate relied upon the evidence of the police constables, rejected the evidence of the defence witnesses, and came to the conclusion that the alleged offences were established beyond a reasonable doubt.

We find that, although this was a case under the Prohibition Act, the learned Presidency Magistrate has not recorded the substance of the evidence of the witnesses examined on behalf of the prosecution and on behalf of the accused. The learned Magistrate has stated in his judgment that the two police constables were cross-examined in the minutest details and for some length of time, but we do not find the substance of that cross-examination from the record of the case. The evidence of the first police constable examined on behalf of the prosecution, Sampat Atmaram, consists, according to the record, of only a few lines. Regarding the other prosecution witness, Balkrishna Yeshwant, the learned Presidency Magistrate has noted that in his examination-in-chief the witness corroborated the earlier prosecution witness Sampat Atmaram, but the substance of the examination-in-chief is not mentioned in the notes maintained by the learned Presidency Magistrate. The record of his cross-examination consists of two short lines with many crosses. It is clear that this record consists of some stray notes which the learned Presidency Magistrate made of the evidence led before him, and does not purport to be the substance of the evidence of the witnesses. It appears further that towards the end of the case the learned Magistrate was requested on behalf of the accused that an appealable sentence should be passed against him. The learned Magistrate says in that connection that he had initially intended to pass a non-appealable sentence and proceeds to say:

"I may add that it is due to last minute request coming from the defence that detailed notes of evidence are not on record, though the sentence I am going to impose is an appealable one."

We are of the opinion that irrespective of whether the learned Magistrate intended initially to impose an appealable sentence or not, it was incumbent upon him to record the substance of the evidence of each witness when the evidence was led in Court. The procedure to be ordinarily followed by Presidency Magistrates in regard to the recording of evidence is mentioned in s. 362 of the Criminal Procedure Code. According to that section, no evidence need be recorded where the Presidency Magistrate does not propose to impose an appealable sentence on the accused. It appears that the learned Presidency

Magistrate was acting on the assumption that the procedure laid down in s. 362, Criminal Procedure Code, is to be followed even in cases under the Bombay Prohibition Act. Section 116 of the Bombay Prohibition Act, however, requires a somewhat different procedure to be adopted. That section says:

"In all trials for offences under this Act, the magistrate shall follow the procedure prescribed in the Code of Criminal Procedure, 1898, for the trial of summary cases in which an appeal lies."

The procedure for the trial of summary cases is to be found in Chapter XXII of the Criminal Procedure Code consisting of ss. 260 to 265. Out of these sections, s. 263 applies to cases where no appeal lies, and s. 264 to cases in which an appeal lies. Under s. 263, the Magistrate is not required to record the evidence of witnesses or to frame a formal charge, but has to enter certain particulars in a prescribed form. Section 264, as amended by Parliamentary Act XXVI of 1955, provides:—

"In every case tried summarily by a magistrate or bench in which an appeal lies, such magistrate or bench shall record the substance of the evidence and also the particulars mentioned in section 263 and shall, before passing any sentence, record a judgment in the case."

Now, none of the sections in Chap. XXII of the Criminal Procedure Code, including s. 264, apply normally to trials conducted by Presidency Magistrates. Section 116 of the Bombay Prohibition Act, however, makes it clear that the procedure mentioned in Chap. XXII of the Criminal Procedure Code, in so far as it relates to cases in which an appeal lies, has to be followed even by Presidency Magistrates in the trial of cases under the Prohibition Act. This is clear from the fact that s. 116 provides the procedure for "all trials for offences under this Act." The learned Presidency Magistrate not having recorded "the substance of the evidence" in this case, the trial of the appellant was clearly irregular.

The learned Assistant Government Pleader argues that inasmuch as the judgment of the learned Presidency Magistrate embodies the substance of the evidence in the case, we should hold that s. 264 has been substantially complied with. We are unable to accept this argument. When s. 264 provides that the Magistrate shall record the substance of the evidence, it is implied that the substance of the evidence is to be recorded at the time when the evidence is given in Court. To embody the substance of the evidence in a judgment from memory or from short notes made at the time when evidence was given does not amount to compliance with s. 264. This is further clear when we consider the wording of the original s. 264 which was replaced by the amendment brought about by Parliamentary Act XXVI of 1955. That section as it originally stood required that the Magistrate "shall, before passing sentence, record judgment embodying the substance of the evidence and also the particulars mentioned in section 263." The purpose of amending this section was obviously to require that the record of the substance of the evidence shall be separate from the judgment delivered by the Magistrate.

The learned Assistant Government Pleader has also argued that in this case the learned Presidency Magistrate has in fact recorded the substance of the evidence of witnesses at the time when the evidence was given in his Court. We find that what the learned Presidency Magistrate has done is to record a few notes, and no attempt was made by him to record the substance of the evidence. The expression "the substance of the evidence" occurs in several sections of the Code of Criminal Procedure, and what is implied by that expression is that all the important or substantial part of the deposition of each witness should be recorded by the presiding authority. That obviously has not been done in this case.

It was further argued by the learned Assistant Government Pleader that, at the time when the Prohibition Act, including s. 116 therein, was passed by the Bombay Provincial Legislature in 1949, s. 264 of the Criminal Procedure Code as it then stood required the Magistrate merely to embody the substance of the

evidence in his judgment, and that the Bombay Provincial Legislature must have intended that the procedure which is to be followed in cases under the Bombay Prohibition Act is the procedure laid down in s. 264 of the Criminal Procedure Code as it then was and not the procedure of the section as substituted by the amending Parliamentary Act XXVI of 1955. This argument is clearly untenable, because the intention of the Legislature is to be gathered from the language used in the legislation. The language used in s. 116 of the Bombay Prohibition Act shows that the Legislature intended that the same procedure shall be followed for the trial of offences under that Act as is followed in the "trial of summary cases in which an appeal lies". It is clear that the Magistrate who tries a case under the Prohibition Act has merely to apply the same procedure which is applicable at the time of the trial to "summary cases in which an appeal lies". If we were to accept the argument of the learned Assistant Government Pleader, we would have to come to the conclusion, which appears to us absurd, that the provisions which now apply to the trial of warrant cases after the amendments brought about by Parliamentary Act XXVI of 1955 would also be inapplicable to all cases under the Prohibition Act.

It was further urged by the learned Assistant Government Pleader that the alleged irregularity in procedure of the learned Presidency Magistrate has not caused any prejudice to the appellant and that, therefore, we should not interfere with the order of conviction. It is obvious to us that the case of the appellant has been prejudiced by the irregular procedure, the reason being that in the absence of an adequate record of the substance of the evidence in the case, it is not possible for us in appeal to decide whether the conviction of the appellant was justified.

We must, therefore, set aside the order of conviction and sentence. We have considered whether we should order a retrial of the appellant, but have come to the conclusion that, in the circumstances of the case, a retrial would expose the appellant to unmerited harassment. The alleged offence took place nearly a year back. After his conviction the appellant was in jail for about three weeks before he was released on bail. The prosecution evidence consists of two police constables only. Under the circumstances, we hold that the appellant should not be retried, but should be acquitted of the offences of which he was charged.

In the result, we allow the appeal, set aside the order of conviction and sentence, and acquit the accused. The bail bond is cancelled. Fine, if paid, should be refunded.

Appeal allowed: Conviction and sentence set aside.

SUPREME COURT

Present: Mr. Justice Bhuvaneshwar Prasad Sinha, Mr. Justice Syed Jafer Imam
and Mr. Justice J. L. Kapur.

S. M. JAKATI v. S. M. BORKAR.*

Hindu law—Debts—Debt by father—Avyavaharika debt, what is—Father, managing director of bank drawing salary, incurring liability as result of negligence in discharge of his duties as such director—Whether such liability incurred an Avyavaharika debt—Pious obligation of sons to discharge debts of father not tainted with immorality or illegality whether comes to an end on partition of joint family property—Partition taking place after decree and pending execution proceedings—Sale of whole joint family estate in execution—Whether partition saves shares of sons or impairs rights of creditors—Sons not challenging the liability of their interest in execution of decree against father and Court ordering sale of whole estate—Whether auction-purchaser's right defeated on ground that sons not brought on record—What passes to auction-purchaser where right, title and interest of judgment-debtor are sold—Words "right, title and interest" in s. 155 of Bombay Land Revenue Code (Bom. V of 1879).

Under Hindu law an Avyavaharika debt is any debt for a cause repugnant to good morals.

Where as a result of certain proceedings taken against a father, who was a managing director of a co-operative bank receiving a salary, by the liquidator of the bank, a payment order for a certain amount was made against him by the Deputy Registrar of Co-operative Societies, held that the liability incurred by the father as a result of negligence in the discharge of his duties as a managing director was not an Avyavaharika debt.

Hemraj alias Babu Lal v. Khem Chand¹ and Toshanpal Singh v. District Judge of Agra,² referred to.

Under Hindu law the liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and it does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make alienation comes to an end.

Pannalal v. Mst. Naraini,³ Sidheshwar Mukherji v. Bhubneshwar Prasad Narain Singh,⁴ and Bankey Lal v. Durga Prasad,⁵ referred to.

Where the pious obligation exists and partition takes place after the decree and pending execution proceedings, the sale of the whole estate in execution of the decree cannot be challenged except on proof by the sons of the immoral or illegal purpose of the debt and partition cannot relieve the sons of their pious obligation or their shares of their liability to be sold or be a means of reducing the efficacy of the attachment or impair the rights of the creditor.

Girdharse Lall v. Kantoo Lall; Muddan Thakoor v. Kantoo Lall,⁶ Suraj Bunsel Koer v. Sheo Proshad Singh,⁷ Mussamut Nanomi Babuastin v. Modun Mohun,⁸ Chandradeo Singh v. Mata Prasad,⁹ Sahu Ram Chander v. Bhup Singh,¹⁰ Pannalal v. Naraini,¹¹ Sidheshwar Mukherji v. Bhubneshwar Prasad Narain Singh,¹² Ganpatrao Vishwanath v. Bhimrao Sahibrao¹³ and Kameswaramma v. Venkata Subba Row,¹⁴ referred to.

In cases where the sons do not challenge the liability of their interest in the execution of the decree against the father and the Court after attachment and proper notice of sale sells the whole estate and the auction-purchaser purchases and

*Decided, September 24, 1958. Civil Appeal No. 233 of 1954.

1 (1943) L. R. 70 I. A. 171, 176, s.c. 48

Bom. L. R. 503.

2 (1934) L. R. 61 I. A. 350.

3 [1952] S.O.R. 544.

4 [1954] S.O.R. 177.

5 (1931) I.L.R. 53 All. 888.

6 (1874) L.R. 1 I.A. 321.

7 (1878) L.R. 6 I.A. 88

8 (1885) L.R. 13 I.A. 1.

9 (1909) I.L.R. 31 All. 176.

10 (1916) L.R. 44 I.A. 1, s.c. 10 Bom. L.R. 498.

11 Supra.

12 Supra.

13 [1950] Bom. 114, s.c. 52 Bom. L.R. 154.

14 (1914) I.L.R. 38 Mad. 1120.

pays for the whole estate, the mere fact that the sons were so nomine not brought on the record would not be sufficient to defeat the rights of the auction-purchaser or put an end to the pious obligation of the sons.

Where the right, title and interest of a judgment-debtor are set up for sale as to what passes to the auction-purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for.

The words "right, title and interest" occurring in s. 155 of the Bombay Land Revenue Code, 1879, have the same connotation as they had in the corresponding words used in the Civil Procedure Code existing at the time the Bombay Land Revenue Code was enacted.

Khizarajmal v. Daim," *Sat Narain v. Das*," *Malkarjun Bn Shidramappa Pasare v. Narhari Bn Shrivappa*," *Mussumut Nanomi Babuastin v. Modun Mohun*," *Simbhunath Pandey v. Golab Singh*," *Meenakshi Naidu v. Immudi Kanaka Rammaya Koundan*," *Bhagbut Pershad v. Mussumat Gtrja Koer*," *Rai Babu Mahabir Persad v. Rai Mar-kunda Nath Sahai*," *Doukut Ram v. Mehr Chand*," *Sripat Singh v. Tagore*" and *Mulgund Co-operative Society v. Shidlingappa Ishwarappa*," referred to.

In execution proceedings it is not necessary to implead the sons or to bring another suit if severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property.

THE facts appear in the judgment.

A. V. Viswanatha Sastri, with M. S. K. Sastri, for the appellants.

A. S. E. Chari, with Bawa Shrivcharan Singh and Govindsaran Singh, for respondents Nos. 2-4.

KAPUR J. This is an appeal against the judgment and decree of the High Court of Bombay varying the decree of the trial Court decreeing the plaintiff's suit for possession by partition of joint family property.

The facts of the case lie in a narrow compass. M. B. Jakati defendant No. 1 was the managing director of Dharwar Urban Co-operative Bank Limited which went into liquidation, and in that capacity he was receiving a yearly remuneration of Rs. 1,000. As a result of certain proceedings taken against defendant No. 1 M. B. Jakati by the liquidator of the bank, a payment order for Rs. 15,100 was made by the Deputy Registrar of Co-operative Societies on April 21, 1942. In execution of this payment order a bungalow belonging to M. B. Jakati, defendant No. 1, was attached by the Collector under the Bombay Land Revenue Code on July 27, 1942. Notice for sale was issued on November 24, 1942, and the proclamation on December 24, 1942. The sale was fixed for February 2, 1943. On January 16, 1943, M. B. Jakati defendant No. 1 applied for postponing the sale which was rejected. The auction sale was held on February 2, 1943, and was confirmed on June 23, 1943,—the purchaser was S. N. Borkar defendant No. 7 now respondent No. 1. On February 10, 1944, respondent No. 1 sold the property to defendants Nos. 8 to 10 who are respondents Nos. 2 to 4.

The following pedigree table will assist in understanding the case:

Madhavrao Balkrishnan Jakati Deft. 1			
= Bhimabai " 2			
Krishnaji Plff. 1	Shrinivas Plff. 1(a)	Shantibai daughter Deft. No. 3	Indumati daughter Deft. No. 4
15 (1904) L.R. 32 I.A. 23, s.c. 7 Bom. L.R. 1.		19 (1887) L.R. 14 I.A. 77.	
16 (1936) L.R. 63 I.A. 384, s.c. 38 Bom. L.R. 1129.		20 (1888) L.R. 16 I.A. 1.	
17 (1900) L.R. 27 I.A. 216, s.c. 2 Bom. L.R. 927.		21 (1888) L.R. 15 I.A. 99.	
18 (1885) L. R. 13 I.A. 1.		22 (1889) L.R. 17 I. A. 11.	
		23 (1887) L.R. 14 I.A. 187.	
		24 Supra.	
		25 (1941) 43 Bom. L.R. 807.	

On January 15, 1943, Krishnaji, a son of defendant No. 1 brought a suit for partition of the joint family property and possession of his separate share alleging *inter alia* that the purchase by respondent No. 1 of the bungalow was not binding on the joint family as "it was not liable to be sold for the illegal and immoral acts on the part of defendant No. 1 which were characterised as misfeasance"; that the auction sale was under s. 155 of the Bombay Land Revenue Code under which only "the right, title and interest of the defaulter" could be sold and therefore the right, title and interest of only the father, defendant No. 1, was sold and not that of the other members. The plaintiff claimed $\frac{1}{3}$ share of the property and also alleged that he was not on good terms with his father who had neglected his interest; that he was staying with his mother's sister and was not being maintained by his father and mother. On January 12, 1944, appellant No. 1 (Srinivas) filed his written statement supporting the claim for partition and claiming his own share. He supported the claim of the then plaintiff that the sale in favour of respondent No. 1 was not binding on the joint family. Defendant No. 2, now appellant No. 2, the mother, also supported the plaintiff's claim and on the death of Krishnaji, she claimed his $\frac{1}{3}$ share as his heir. After the death of the original plaintiff Krishnaji, Shrinivas (appellant No. 1) was substituted as plaintiff on June 28, 1944.

The suit was mainly contested by respondents Nos. 1 to 4. Respondent No. 1 pleaded that plaintiff's suit for partition was collusive having been brought at the instance of defendant No. 1 M. B. Jakati and it was not *bona fide*; that defendant No. 1 was made liable at the instance of the liquidator of the Dharwar Urban Co-operative Bank Ltd., for misfeasance because he acted negligently in the discharge of his duties as managing director of the bank; that the debt was binding on the family as defendant No. 1 M. B. Jakati had been receiving a yearly remuneration from the bank and the properties were sold in payment of a debt binding on the family and, therefore, the sale in execution of the payment order could not be challenged as the sons were under a pious obligation under the Hindu law to discharge the debts of their father; that the sale could only be challenged on proof of the debt of defendant No. 1 being for an "immoral or illegal" purpose. These pleadings gave rise to several issues.

The learned Civil Judge held that the suit was collusive; that the liability which defendant No. 1 incurred was *Avyavaharika* and was, therefore, not binding on the sons and thus appellant No. 1 would have $\frac{1}{3}$ share in the joint family property, defendant No. 1, $\frac{1}{3}$ and appellant No. 2 also $\frac{1}{3}$. He, therefore, declared the shares as above in the whole of the joint family property including the bungalow which is the only property in which the respondents are interested and which is in dispute in this appeal.

On appeal the High Court held that the debt was not *Avyavaharika* as there was no evidence to support the finding of the trial Court, the order of the Deputy Registrar being in the nature of a judgment to which neither the sons nor the auction purchasers were parties and, therefore, it was not "evidence of anything except the historical fact that it was delivered". In regard to the question as to what interest passed to the auction-purchaser on a sale under s. 155 of the Bombay Land Revenue Code, it held that the whole estate including the share of the sons was sold in execution of the payment order and, therefore, *qua* that property the sons had no interest left. The High Court varied the decree to this extent and the plaintiffs have come up in appeal to this Court by certificate of the High Court of Bombay.

The case of the appellants is (1) that the debt was *Avyavaharika* and therefore in an auction sale the interest of the sons and other members of the joint family did not pass to the auction-purchaser; (2) that even if the debt was not *Avyavaharika* the institution of the suit for partition operated as severance of status between the members of the family and, therefore, the father's power of disposition over the son's share had come to an end and consequently in the auction sale the share of the sons did not pass to the auction-purchaser; and

(3) that what could legally be sold under s. 155 of the Bombay Land Revenue Code was the right, title and interest of the defaulter i.e. of the father alone which could not include the share of the other members of the joint family.

The first question for decision is whether the debt of the father was *Avyavaharika*. This term has been variously translated as being that which is not lawful or what is not just or what is not admissible under the law or under normal conditions. Colebrooke translated it as "a debt for a cause repugnant to good morals". There is another track of decision which has translated it as meaning "a debt which is not supported as valid by legal arguments". The Judicial Committee of the Privy Council in *Hemraj alias Babu Lal v. Khem Chand*²⁶ held that the translation of the term as given by Colebrooke makes the nearest approach to the true conception of the term used in the *Smriti* texts and may well be taken to represent its correct meaning and that it did not admit of a more precise definition.

In *Toshanpal Singh v. District Judge of Agra*²⁷ the Judicial Committee held that drawings of monies for unauthorised purposes, which amounted to criminal breach of trust under s. 405 of the Indian Penal Code, were not binding on the sons, but a civil debt arising on account of the receipt of monies by the father which were not accounted for could not be termed *Avyavaharika*.

In the case now before us the appellants have attempted to prove that the debt fell within the term *Avyavaharika* by relying upon the payment order and the findings given by the Deputy Registrar in the payment order where the liability was *inter alia* based on a breach of trust. Any opinion given in the order of the Deputy Registrar as to the nature of the liability of defendant No. 1 M. B. Jakati cannot be used as evidence in the present case to determine whether the debt was *Avyavaharika* or otherwise. The order is not admissible to prove the truth of the facts therein stated and except that it may be relevant to prove the existence of the judgment itself, it will not be admissible in evidence. Section 43 of the Evidence Act, the principle of which is, that judgments excepting those upon questions of public and general interest, judgment *in rem* or when necessary to prove the existence of a judgment, order or decree, which may be a fact in issue are irrelevant. It was then submitted that the pleadings of respondent No. 1 himself show that the debt was of an immoral or illegal nature. In his written statement, respondent No. 1 had pleaded that the liquidator of the bank had charged defendant No. 1 with misfeasance because he was grossly negligent in the discharge of his duty and responsibility as managing director and that after a thorough enquiry the Deputy Registrar held misfeasance proved and ordered a contribution of Rs. 15,100 by him. As we have said above the translation given by Colebrooke of the term *Avyavaharika* is the nearest approach to its true concept i.e. "any debt for a cause repugnant to good morals". The managing director of a bank of the position of defendant No. 1 who should have been more vigilant in investing the monies of the bank cannot be said to have incurred the liability for a cause "repugnant to good morals". We are unable to subscribe to the proposition that in the modern age with its complex institutions of banks and joint stock companies governed by many technicalities and complex system of laws the liability such as has arisen in the present case could be called *Avyavaharika*. The debt was, therefore, binding on the sons.

The effect of severance of status brought about by the filing of the suit on January 25, 1943, has been made the basis of the argument that only the share of the father could be seized in execution of the payment order made against him. This would necessitate an examination into the rights and liabilities of Hindu sons in *Mitakshara* coparcenary family where the father is the *karta*. In Hindu law there are two mutually destructive principles, one the principle of independent coparcenary rights in the sons which is an incident of birth, giving to the sons vested right in the coparcenary property, and the other the

²⁶ (1943) L.R. 70 I.A. 171, 176, 46 Bom. L.R. 503. ²⁷ (1934) L.R. 61 I.A. 350.

pious duty of the sons to discharge their father's debts not to morality or illegality, which lays open the whole estate to be payment of such debts. According to the Hindu law-givers²⁸ to pay off the ancestors' debts and to relieve him of the death-toll on non-payment was irrespective of their inheriting any the Courts rejected this liability arising irrespective of inheritance and gave to this religious duty a legal character. *Masit Ull Prasad*²⁹. For the payment of his debts it is open to the father whole coparcenary estate including the share of the sons and it to his creditors to proceed against it; but this is subject to the right to challenge the alienation or protest against a creditor pro their shares on proof of illegal or immoral purpose of the debt. Positions are well settled and are not within the realm of controversy. *v. Mst. Narain*²⁹; *Girdharee Lall v. Kantoo Lall*; *Muddan Thall*³⁰; *Suraj Bansi Koer v. Sheo Proshad Singh*³¹; *Brij Narain Sad*³². In the last mentioned case the Privy Council said:—

"...Nothing clearer could be said than what was said by Lord Ho the judgment of the Board in *Musamat Nanomi Babussein v. Modun* quoted: destructive as it may be of the principle of independent coparcenary the sons, the decisions have, for some time, established the principle that set up their rights against their father's alienation for an antecedent debt creditor's remedies for their debts, if not tainted with immorality. (The question of the liability of the joint estate, their Lordships think that it is of authority."

There is no discrepancy of judicial opinion as to the pious duty. In *Pannalal v. Mst. Naraini* (*supra*) this Court approved the finding of Sulaiman A.C.J., in *Bankey Lal v. Durga Prasad*³⁴:

"The Hindu Law texts based the liability on the pious obligation of the father's power to sell the sons' share."

So great was the importance attached to the payment of debts that the law-givers gave the non-payment of a debt the status of sinfulness. Such payment was wholly repugnant to Hindu concept of son's right. In *Bankey Lal v. Durga Prasad*, Lal Gopal Mukherji J. said (

"...A perusal of the texts of Smṛiti dealing with debts will show that under Hindu law the non-payment of a just debt was regarded as a very heinous sin. The liability of the Hindu son based on his pious obligation against his father's debts has received the approval of this Court in *Sidheshwar Mukherjee v. Bhubneshwar Singh*³⁵, where the following observation made in *Pannalal's case*

"The father's power of alienating the family property for payment of his debts may be one of the consequences of the pious obligation which the Hindu law imposes upon the sons; or it may be one of the means of enforcing it, but it is not a measure of the entire obligation"

was reiterated. And again at page 183 Mukherjee J. (as he then was) said:

"...It is a special liability created on purely religious grounds and is enforceable only against the sons of the father and no other coparcener. The liability has its basis entirely on the relationship between the father and the son. Therefore unless the son succeeds in proving that the decree was obtained which was for an immoral or illegal purpose the creditor's right to the execution of his decree the whole coparcenary property including the share of the son remains unaffected, because except where the debt is for an immoral or illegal purpose it is open to the execution-creditor to sell the whole estate of the father. The finding of the judgment obtained against the father alone. (

²⁸ (1926) L.R. 53 I.A. 204, s.c. 28 Bom. L.R. 1402.

²⁹ [1952] S.O.R. 544, 552, 553, 556, 559.

³⁰ (1874) L.R. 1 I.A. 321, 333.

³¹ (1878) L.R. 6 I.A. 88, 101.

³² (1923) L.R. 51 I.A. 500.

³³ (1885) L.R. 13 I.A. 100.

³⁴ (1931) I.L.R. 53 A.L.J. 100.

³⁵ [1954] S.O.R. 177,

*Tagore*³⁶. The necessary corollary which flows from the pious obligation imposed on Hindu sons is that it is not ended by the partition of the family estate unless a provision has been made for the payment of the just debts of the father. This again is supported by the authority of this Court in *Pannalal's* case where Mukherjea J. said at p. 559:—

"Thus, in our opinion, a son is liable, even after partition for the pre-partition debts of his father which are not immoral or illegal and for the payment of which no arrangement was made at the date of the partition."

The liability of the sons is thus unaffected by partition, because the pious duty of the sons to pay the debt of the father, unless it is for an immoral or illegal purpose, continues till the debt is paid off and the pious obligation incumbent on the sons to see that their father's debts are paid prevents the sons from asserting that the family estate, so far as their interest is concerned, is not liable to purge that debt. Therefore, even though the father's power to discharge his debt by selling the share of his sons in the property may no longer exist as a result of partition the right of the judgment-creditor to seize the erstwhile coparcenary property remains unaffected and undiminished because of the pious obligation of the sons. There does not seem to be any divergence of judicial opinion in regard to the Hindu son's liability to pay the debts of his father after partition and by the mere device of entering into partition with their father the sons cannot get rid of this pious obligation. It has received the approval of this Court in *Pannalal v. Mst. Naraini* and *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh* where Mukherjea J., observed in the latter case at p. 184:—

"...It is settled law that even after partition the sons could be made liable for the pre-partition debts of the father if there was no proper arrangement for the payment of such debts at the time when the partition was effected, although the father could have no longer any right of alienation in regard to the separated share of the sons."

The question then arises how the liability of the sons is to be enforced. Another principle of Hindu law is that in a coparcenary family the decree obtained against the father is binding on the sons as they would be deemed to have been represented by the father in the suit: *Kishan Sarup v. Brijraj Singh*³⁷. As was pointed out in *Sidheshwar Mukherjee's* case, the sons are not necessary parties to a money suit against the father who is the *karta*, but they may be joined as defendants. The result of the partition in a joint family is nothing more than a change in the mode of enjoyment and what was held jointly is by the partition held in severalty and, therefore, attachment of the whole coparcenary estate would not be affected by the change in the mode of enjoyment, because the liability of the share which the sons got on partition remains unaffected as also the attachment itself which is not ended by partition. (Section 64, Civil Procedure Code, is a useful guide in such circumstances).

Dealing with the question as to how the interest of the sons in joint family property can be attached and sold, Mukherjea J., as he then was, observed at p. 185 in *Sidheshwar Mukherjee's* case:—

"...Be that as it may, the money decree passed against the father certainly created a debt payable by him. If the debt was not tainted with immorality, it was open to the creditor to realise the dues by attachment and sale of the sons' coparcenary interest in the joint property on the principles discussed above. As has been laid down by the Judicial Committee in a series of cases, of which the case of *Mussumut Nanomi Babuasin v. Modun Mohun* may be taken as a type, the creditor has an option in such cases. He can, if he likes, proceed against the father's interest alone but he can, if he so chooses, put up to sale the sons' interest also and it is a question of fact to be determined with reference to the circumstances of each individual case whether the smaller or the larger interest was actually sold in execution."

But it was contended that a partition after the decree but before the auction

³⁶ (1916) L.R. 44 I. A. 1, s.c. 19 Bom. ³⁷ (1929) I.L.R. 51 All. 932.
L. R. 498.

sale limited the efficacy of the sale to the share of the father even though the sale in fact was of the whole estate, including the interest of the sons, because after the partition the father no longer possessed the right of alienation of the whole coparcenary estate to discharge his debts. But this contention ignores the doctrine of pious obligation of the sons. The right of the pre-partition creditor to seize the property of the erstwhile joint family in execution of his decree is not dependant upon the father's power to alienate the share of his sons, but on the principle of pious obligation on the part of the sons to discharge the debt of the father. The pious obligation continues to exist even though the power of the father to alienate may come to an end as a result of partition. The consequence is that as between the sons' right to take a vested interest jointly with their father in their ancestral estate and the remedy of the father's creditor to seize the whole of the estate for payment of his debt not contracted for immoral or illegal purpose, the latter will prevail and the sons are precluded from setting up their right, and this will apply even to the divided property which, under the doctrine of pious obligation continues to be liable for the debts of the father. Therefore, where the joint ancestral property including the share of the sons has passed out of the family in execution of the decree on the father's debt the remedy of the sons would be to prove in appropriate proceedings taken by them the illegal or immoral purpose of the debt, and in the absence of any such proof the sale will be screened from the sons' attack, because even after the partition their share remains liable. *Girdharee Lall v. Kantoo Lall*; *Muddan Thakoor v. Kantoo Lall* (*supra*)⁶; *Suraj Bansi Koer v. Sheo Proshad Singh* (*supra*)⁷; *Mussamut Nanomi Babuasin v. Modun Mohun*³⁸; *Chandradeo Singh v. Mata Prasad*³⁹; which was approved by the Privy Council in *Sahu Ram Chander v. Bhup Singh*¹⁰; *Pannalal v. Mst. Naraini*³ (*supra*) and *Sidheshwar Mukherjee's case* (*supra*)⁴.

Our attention was drawn to two decisions, one by the High Court of Bombay in *Ganpatrao Vishwanath v. Bhimrao Sahibrao*,⁴⁰ that in order to make the share of the sons liable after partition they should be brought on the record and the other of the Madras High Court in *Kameswaramma v. Venkata Subba Row*,⁴¹ that the creditor has to bring another suit against the sons, obtain a decree against them limited to the shares allotted to them on partition and then attach and sell their share unless the partition was not *bona fide* in which case the decree could be executed against the joint family property. But the decision in these cases must be confined to their own facts. It is true that the right of the father to alienate for payment of personal debt is ended by the partition, but as we have said above, it does not affect the pious duty of the sons to discharge the debt of their father. Therefore, where after attachment and a proper notice of sale the whole estate including the sons' share, which was attached, is sold and the purchaser buys it intending it to be the whole coparcenary estate, the presence of the sons *eo nomine* is not necessary because they still have the right to challenge the sale on showing the immoral or illegal purpose of the debt. In our opinion, where the pious obligation exists and partition takes place after the decree and pending execution proceedings as in the present case, the sale of the whole estate in execution of the decree cannot be challenged except on proof by the sons of the immoral or illegal purpose of the debt and partition cannot relieve the sons of their pious obligation or their shares of their liability to be sold or be a means of reducing the efficacy of the attachment or impair the rights of the creditor.

Reliance is placed on the judgment in *Khierajmal v. Daim*⁴² where the Privy Council held that the sale cannot be treated as void on the ground of mere irregularity, but the Court has no jurisdiction to sell the property of persons "not parties to the proceedings or properly represented on the record". There two such persons were Alibux and Naurex. As against Alibux there was no

38 (1885) L.R. 13 I.A. 1.

39 (1909) I.L.R. 31 All. 176, 196.

40 [1950] Bom. 114, s.c. 52 Bom. L.R. 154.

41 (1914) I.L.R. 38 Mad. 1120.

42 (1904) L. R. 32 I.A. 23, s.c. 7 Bom.

L.R. 1.

decree. He was not a party to the suit and it was held by the Privy Council that his interest in the property "seems to have been ignored altogether". He was not even mentioned as a debtor in the award on the basis of which the decree, which was executed, was made. Similarly, Naurez was not represented in either of the suits and, therefore, there was no decree against him and the sale of his property also was, therefore, without jurisdiction and null and void. This case cannot apply to sons in a joint Hindu family where a father represents the family and the decree is executable against the shares of the sons while the coparcenary continues and the liability of their shares continues after partition. *Sat Narain v. Das*⁴³ is equally inapplicable to the present case. There the Privy Council was dealing with the father's power of disposal of property before and after partition which power vests in the Official Assignee on his bankruptcy, the question of the right of the judgment-creditor to proceed in execution against the divided shares of sons which had been attached before partition was not a point in controversy. There was no decision on the powers of an executing Court to proceed against the shares of the sons but the question related to voluntary alienations by a father for payment of his debts not incurred for an immoral or illegal purpose.

In cases where the sons do not challenge the liability of their interest in the execution of the decree against the father and the Court after attachment and proper notice of sale sells the whole estate and the auction-purchaser purchases and pays for the whole estate, the mere fact that the sons were *eo nomine* not brought on the record would not be sufficient to defeat the rights of the auction-purchaser or put an end to the pious obligation of the sons. As was pointed out by Lord Hobhouse in *Malkarjun Bin Shidramappa Pasare v. Narhari Bin Shivappa*:⁴⁴

"...Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the facts; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business, no purchaser at a Court sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Court it ought to do."

In *Mussamat Nanomi Babuasin v. Modun Mohun* Lord Hobhouse said at p. 18:—

"...But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the executing proceedings."

The question which assumes importance in an auction sale of this kind, therefore, is what did the Court intend to sell and did sell and what did the auction purchaser purport to buy and did buy and what did he pay for. One track of decision, of which *Simbhunath Panday v. Golab Singh*⁴⁵ is an instance, shows when the father's share alone passes. In that case the father alone was made a party to the proceedings. The mortgage, the suit of the creditor and the decree and the sale certificate all purported to affect the rights of the father and his interest alone. It was, therefore, held that whatever the nature of the debt, only the father's right and interest was intended to pass to the auction-purchaser. In *Meenakshi Naidu v. Immudi Kanaka Rammaya Kounden*⁴⁶, which represents the other track of decision, the Privy Council held that upon the documents the Court intended to sell and did sell the whole of the coparcenary interest and not any partial interest. The query in decided cases has been as to what was put up for sale and was sold and what the purchaser had reason to think he was buying in execution of the decree. *Mussamat Nanomi Babuasin v. Modun Mohun* (*supra*); *Bhagbut Persad v. Mussamat Girja Koer*⁴⁷; *Meenakshi Naidu v. Immudi Rammaya Kounden*; *Rai Babu Mahabir Persad v. Rai Markunda Nath Sahai*⁴⁸ and *Doulat Ram v. Mehr Chand*.⁴⁹

43 (1936) L.R. 63 I.A. 384.

44 (1900) L.R. 27 I.A. 216, 225, s.c. 2
Bom. L. R. 927.

45 (1887) L.R. 14 I.A. 77.

46 (1888) L.R. 16 I.A. 1.

47 (1888) L.R. 15 I.A. 99.

48 (1889) L.R. 17 I.A. 11, 16.

49 (1889) L.R. 14 I.A. 187.

In the present case the payment order was made by the Deputy Registrar on April 21, 1942, and after the order had been sent to the Collector for recovery, the property was attached on April 24, 1942, and notice of sale was issued on November 24, 1942, and was published under ss. 165 and 166 of the Bombay Land Revenue Code. The proclamation of sale was dated December 12, 1942.

The property put up for sale was plot No. 36-D measuring 6 acres and one guntha and its value was specified as 13,000 rupees. There was a note added:—

"No guarantee is given of the title of the said defendant or of the validity of any of the rights, charges or interests claimed by third parties."

The order confirming the sale also shows that the whole bungalow was sold. It was valued at Rs. 16,000 and there was a mortgage of Rs. 2,000 against it and what was sold and confirmed by this order was the whole bungalow. The sale certificate was in regard to the whole bungalow i.e. City Survey No. 67-D measuring 6 acres and one guntha the sale price being Rs. 13,025. There is little doubt, therefore, that what was put up for auction sale was the whole bungalow and what the auction-purchaser purported to buy and paid for was also the whole bungalow and not any fractional share in it. It is a case where not only was the payment order passed before the partition, but the attachment was made and the sale proclamation was issued before the suit for partition was filed and the sale took place of the whole property without any protest or challenge by the sons and without any notice to the Collector or the judgment-creditor of the filing of the suit for partition. In such a case respondent No. 1 is entitled to defend his title upon the grounds which would have justified the sale had the appellants been brought on record in execution proceedings. The binding nature of the decree passed on the father's debts not tainted with immorality or illegality and the pious obligation imposed on the sons under the Mitakshara law would be sufficient to sustain the sale and defeat the sons' suit in the same way and on the same grounds as in the case of execution proceedings. *Mussamut Nanomi Babuasin v. Modun Mohun*. Consequently whether the sons were made parties to the execution proceedings or brought a suit challenging the sale of their shares the points for decision are the same—the nature of the debts and liability of the sons under Hindu law and these are the determining factors in both the cases i.e. the sons being parties to the execution proceedings or their suit challenging the sale of their shares.

The effect of attachment on the severance of status by the filing of a suit by one of the members of the coparcenary whose share was liable in execution of the decree has not been debated at the bar and how exactly it would affect the rights of the parties need not, therefore, be decided in this case. As a consequence it would not be necessary to discuss the pronouncements of the Privy Council in *Suraj Bansi Koer v. Sheo Proshad Singh*; *Moti Lal v. Karrabuddin*⁵⁰; *Raghunath Das v. Sundar Das Khatri*⁵¹ and *Anantapadmanabhaswami v. Official Receiver of Secunderabad*.⁵²

The argument based on the interpretation of the words 'right, title and interest of the defaulter' in s. 155 of the Bombay Land Revenue Code was that it was only the share of the defaulter himself which was and could be put up for auction sale. That the whole of the property was put up for sale, was sold and was purchased as such is shown by the documents to which reference has already been made viz., the notice of November 24, 1942, proclamation of sale of December 24, 1942, the order of confirmation of sale dated June 28, 1943, and the sale certificate issued by the Collector.

The Civil Procedure Code at the time of the enactment of the Bombay Land Revenue Code required that the property sold in execution should be described as "right, title and interest of the judgment debtor" and the same words have been used in s. 155 of the Bombay Land Revenue Code. It is a question of fact in each case as to what was sold in execution of the decree. In *Rai Babu*

50 (1897) E.R. 24 I.A. 170.

51 (1914) L.R. 41 I.A. 261, 16 Bom. L.R.

514.

52 (1933) L.R. 60 I.A. 167, 174-176.

Mahabir Prasad v. Markunda Nath Sahai Lord Hobhouse observed as follows at p. 16:—

"...It is a question of fact in each case, and in this case their Lordships think that the transactions of the 4th and 5th of January, 1875, and the description of the property in the sale certificate, are conclusive to shew that the entire corpus of the estate was sold."

Similarly in *Meenakshi Naidu v. Immudi Kanaka Rammaya Kounden* the whole interest of the coparcenary was held to be sold taking into consideration the evidence which had been placed on the record. Lord FitzGerald at p. 5 pointed out the difference where only the father's interest was intended to pass:—

"...In *Hurday Narain's case*, (*Baboo Hurday Narain Sahu v. Pundit Baboo Rooder Perakash Misset*) all the documents shewed that the Court intended to sell, and that it did sell nothing but the father's share—the share and interest that he would take on partition, and nothing beyond it—and this tribunal in that case puts it entirely upon the ground that everything shewed that the thing sold was 'whatever rights and interests, the said judgment debtor had in the property' and nothing else."

In *Sripat Singh v. Tagore* the "right, title and interest of the judgment debtor" were sold and there also it was held to convey the whole coparcenary estate and it was remarked that it was of the utmost importance that the substance and not merely the technicality of the transaction should be regarded. What is to be seen is what was put up for sale, what the Court intended to sell and what the purchaser was intending to buy and what he purported to buy.

Counsel for the appellants relied on *Simbunath Panday v. Golab Singh* where it was held that right and interest of the father meant personal interest, but in that case, as we have pointed out, the documents produced all showed that the father's interest alone was intended to pass.

In *Mulgund Co-operative Society v. Shidlingappa Ishwarappa*⁵⁴ it was held that the sale under Bombay Land Revenue Code has the same effect as the sale by the civil Court. The language used in the Bombay Land Revenue Code and the then existing Civil Procedure Code is similar i.e. "the right, title and interest of the defaulter" in one case and "of the judgment debtor" in the other. This is supported by the observation of the Privy Council in *Rai Babu Mahabir Prasad v. Markunda Nath Sahai* and as to what passed under the sale does not become any different merely because the sale is held under s. 155 of the Bombay Land Revenue Code rather than the Code of Civil Procedure. The effect in both cases is the same.

We hold therefore (1) that the liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make alienation comes to an end. (2) Where the right, title and interest of a judgment-debtor are set up for sale as to what passes to the auction-purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for. (3) The words "right, title and interest" occurring in s. 155 of the Bombay Land Revenue Code have the same connotation as they had in the corresponding words used in the Code of Civil Procedure existing at the time the Bombay Land Revenue Code was enacted. (4) In execution proceedings it is not necessary to implead the sons or to bring another suit if severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property. (5) The liability of a father, who is a managing director and who draws a salary or a remuneration,

incurred as a result of negligence in the discharge of his duties is not an *Ayavakarika* debt as it cannot be termed as "repugnant to good morals".

In the result the appeal fails and is dismissed with costs.

SINHA J. I agree to the order proposed.

Appeal dismissed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Kotval.

BALIRAMBHAU DAJIBABHAU v. CHATURBHUI BISANLAL.*

*Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (I of 1951), Secs. 43, 17—Civil Procedure Code (Act V of 1908), O. XX, r. 15—Preliminary decree declaring partnership dissolved, plaintiff to render accounts and accounts to be taken—Such decree passed before coming into force of M.P. Act, but final decree against plaintiff for payment of specified amount passed after coming into force of M.P. Act—Attachment of plaintiff's *sir* fields in execution of decree—Applicability of s. 43.*

A preliminary decree for dissolution of partnership and for partnership accounts does not amount to a "debt" within the meaning of s. 43 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950.

*Mahommed Hasan v. Ahmad Hafiz Khan,*¹ referred to.

THE facts appear in the judgment.

G. B. Mudholkar, for the appellant.

N. S. Nandedkar, for the respondent.

KOTVAL J. This second appeal gives rise to a short but interesting question as to whether a preliminary decree for dissolution of partnership and for partnership accounts amounts to a "debt" within the meaning of s. 43 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. I of 1951).

The facts are not in dispute. The appellant was the plaintiff in Civil Suit No. 124-A of 1948. The suit was a suit for dissolution of partnership between the plaintiff and the two defendants. The plaintiff also claimed the usual decree for rendition of accounts. As a result of the preliminary decree, however, it was the appellant-plaintiff who was found liable to render account.

The preliminary decree was passed on March 18, 1950. Thereafter, the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, came into force as from April 1, 1951. Next, proceedings for making the preliminary decree final were taken and a final decree was passed on January 15, 1952. By the final decree, the appellant (plaintiff) was made liable to pay to defendant No. 1 Rs. 14,611-2-0. A separate decree was passed against the plaintiff in respect of defendant No. 2, but with that part of the decree we are not here concerned. Defendant No. 1 thereafter assigned his rights under the decree to the respondent Chaturbhui for a consideration of Rs. 12,000. On November 27, 1952, in execution of the decree, the respondent Chaturbhui attached certain *sir* fields belonging to the appellant and the appellant took objection to the attachment on the ground that the debt having been incurred before the coming into force of the Act, it could

*Decided, September 30, 1953. Second Appeal No. 168 of 1957, against the order passed by S. M. L. Alvi, Second Additional District Judge at Bhandara, in Civil Appeal No. 52-A of 1956, reversing the order passed by N. P.

Mishra, Civil Judge, Class II, at Gondia, in Miscellaneous Judicial Case No. 9 of 1955.

¹ (1955) Miscellaneous Appeal No. 117 of 1952, decided by Kauslendra and Bhutt JJ. on March 24, 1955 (Unrep.).

not be executed against the *sir* fields. The first Court upheld the objection but the lower appellate Court has, in appeal, reversed the decision and the judgment-debtor appeals.

Section 43 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, runs as follows:—

"Any land which immediately before the date of vesting, was held in absolute occupancy or occupancy right or recorded as *Sir* land, shall not be liable to attachment or sale in execution of a decree or order for the recovery of any debt incurred before the date of vesting except where such debt was validly secured by mortgage of or a charge on the absolute occupancy or occupancy land or the cultivating right in the *sir* land."

On behalf of the appellant Mr. G. R. Mudholkar submits that the important words are the word "any" which precedes the word "debt" and the word "incurred" which succeeds it, and he says that the question to be decided is when was this debt "incurred". It may be that it became payable after the date of the final decree, but there is no doubt that the liability was "incurred" at least on the date of the preliminary decree, if not before and, therefore, the appellant's lands could not be attached. He also emphasises that the expression used is not "a debt" but "any debt" and that would include even debts arising as a result of a decree.

It seems to me, however, that the crucial word in the clause in dispute is the word "debt". In the Act, the word "debt" is nowhere defined. In s. 17, no doubt, the word "secured debt" is defined, but that expression cannot help to construe the word "debt" *simpliciter*. But even in s. 17 "decretal debts" and the "excluded debts" are not included. At least, so far as "secured debts" are concerned, it is clear that decretal debts are not included.

We are thus remitted to the ordinary connotation of the word. The word "debt" is defined in Wharton's Law Lexicon to mean "a sum of money due from one person to another". Stroud, in his Judicial Dictionary, defines it as "a sum payable in respect of a liquidated money demand, recoverable by action". The essence of the word is that the amount must be an ascertained or liquidated sum of money which a party is liable to pay. In the instant case, all that was done, when the preliminary decree was passed, was that it was declared under O. XX, r. 15, of the Code of Civil Procedure that the partnership between the plaintiff and the defendants was to stand dissolved from a certain date, that the plaintiff was to render all accounts and the decree directed that such accounts be taken. On that date it was impossible for any of the parties to the litigation to have said that any amount was due to or recoverable from one by the other. On the other hand, it was completely in doubt as to which of the parties was to pay to the other until the final decree was passed on January 15, 1952. Therefore, in my opinion, the liability, whatever it was, did not become a debt till the final decree was passed on January 15, 1952. Thus the debt was incurred after the coming into force of the Act and the bar against attachment created by s. 43 will not be available to the appellant.

The view, which I have taken, is supported in some measure by the decision of a division bench of the Nagpur High Court in *Mohammad Hasan Khan v. Ahmad Hafiz Khan*¹. In para. 14 of the judgment, the division bench observed as follows:—

"The term 'debt' has not been defined in the Act, but evidently it is independent of the liability created by the decree itself. In the absence of any specific definition, it has to be given the ordinary connotation of a loan which, as commonly understood, is an advance of money or in kind at interest. The normal connotation of the word 'debt' does not include a claim for damages but a liquidated money demand. (*Jones v. Thompson* 120 E.R. 430) and *Ex-parte Charles* (104 E.R. 576)."

The view I have taken is also borne out by another consideration, namely, what is the true relation of partners to each other. A partner is not merely

¹ (1955) Miscellaneous Appeal No. 117 of on March 24, 1955 (Unrep.).
1952, decided by Kaushtandra and Bhutt JJ.,

entitled to rights against his co-partner but he is also under correlative obligations. One of these obligations is to account to his partners in respect of his dealings with the partnership assets. The liability is thus stated in Halsbury's Laws of England, Vol. XXIV, at page 481:

"Partners are not, as regards partnership dealings, considered as debtor and creditor *inter se* until the concern is wound up or until there is a binding settlement of the accounts. It follows that one partner has no right of action against another for the balance owing to him until after final settlement of the accounts."

That being so, it seems to me that the liability of the appellant in the present case did not become a debt until the binding settlement of accounts took place by the final decree. It was only then that the relationship of debtor and creditor arose between the erstwhile partners. It is on that date, therefore, that the debt was incurred within the meaning of s. 43. The decision of the lower appellate Court is upheld.

The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Gokhale and Mr. Justice Patel.

THE STATE OF BOMBAY v. SHASTRI YAGNA PURUSHADASJI.*

Bombay Hindu Places of Public Worship (Entry Authorisation) Act (Bom. XXXI of 1956), Secs. 2, 3—Constitution of India, Arts. 25(1), 25(2)(b), 26—Temples belonging to Swaminarayan Sampradaya sect whether come within ambit of Act—Such temples whether Hindu religious institutions and "places of public worship"—Swaminarayan Sampradaya whether distinct religion from Hinduism—Whether Act ultra vires art. 25(1) of Constitution.

The Swaminarayan Sampradaya is not a different religion from Hinduism and, therefore, the temples belonging to the Swaminarayan Sampradaya sect are Hindu religious institutions within the meaning of art. 25(2)(b) of the Constitution of India and are also "places of public worship" within the meaning of s. 2 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956.

*Rani Bhagwan Kuar v. Jogendra Chandra Bose,*¹ *Ma Yakt v. Maung Chit Maung,*² *Muthusami Mudaliar v. Masilamani*³ and *Nalnaksha Majhi v. Rajanikanta Das Mohanta*,⁴ referred to.

The Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956, is not ultra vires the provisions of art. 25(1) of the Constitution of India.

*Ratilal Panachand v. State of Bombay*⁵ and *Venkataramana Devaru v. State of Mysore*,⁶ referred to.

ONE Shastri Yagna Purushadasji and others (plaintiffs) who claimed to be Satsangis, as being members of the Swaminarayan Sampradaya, becoming apprehensive that one Muldas Bhudardas Vaishya, president of the Mahagujarat Dalit Sangh, Ahmedabad, for self and on behalf of non-Satsangi Harijans of Ahmedabad, wanted to exercise the right conferred on Harijans under the Bombay Harijan Temple Entry Act, 1947, by entering the Nar Narayan Temple of the Swaminarayan sect at Ahmedabad and further that this was to be followed by entry in other temples of the sect, brought a representative suit on January 12, 1948, against Muldas and two others for a declaration that the Nar Narayan Temple of Ahmedabad belonging to their sect and all temples subordinate thereto were not temples within the meaning of the Bombay Harijan Temple Entry Act of 1947 as subsequently amended by Act LXXXVII of 1948. The Acharya of the northern diocese of the Swaminarayan sect and the Mahant

*Decided, October 3, 1958. First Appeal No. 107 of 1952, against the decision of S. T. Advani, Joint Civil Judge, Senior Division, at Ahmedabad, in Civil Suit No. 12 of 1948.

¹ (1908) L.R. 30 I.A. 249, s.o. 5 Bom. L.R. 845.

² (1921) L.R. 48 I.A. 558.

³ (1910) I.L.R. 33 Mad. 342.

⁴ (1931) I.L.R. 58 Cal. 1392.

⁵ (1953) 55 Bom. L.R. 86.

⁶ [1958] A.I.R. S.O. 255.

of the Nar Narayan Temple at Ahmedabad were impleaded to this suit as defendants Nos. 2 and 3 respectively and plaintiffs also prayed for the issue of an injunction directing these two defendants to take steps to prevent defendant No. 1 and other non-Satsangi Harijans from entering and offering worship in the suit temples. Defendants Nos. 5 and 6, who claimed to be Satsangis, appeared and were joined as parties, and on its own application the State of Bombay was also added as a party as defendant No. 4.

It was the case of the plaintiffs that the Swaminarayan temples were for the Satsang congregation or the Swaminarayan sect only, that non-Satsangis had no legal right of entry and worship therein, nor were the said temples dedicated to or meant for the benefit of Hindus in general. The plaintiffs asserted that non-Satsangis were not using the suit temples as places of religious worship and the alleged user, if any, by them was not by custom, usage or otherwise. The temple of Nar Narayan Dev and the temples subordinate thereto formed an institution in which only the Satsangis of the northern diocese were legally interested and these temples were Sampradayaic temples of the sect "entirely distinct from the vast majority of other Hindu temples where Hindus in general have a legal right to go." It was the case of the plaintiffs that the Satsangis were a religious congregation and formed a distinct sect or community with its membership and its peculiar beliefs in Shriji Maharaj as God himself and with its own administrations, scriptures and doctrines. It was also the plaintiffs' case that the Satsangis came from all castes, from Brahmins to Harijans, and they also came from other communities such as Mahomedans, Khojas and Parsis. During the pendency of the suit the Bombay Harijan Temple Entry Act (XXXV of 1947) was amended by Bombay Act LXXVII of 1948 and the Constitution of India also came into force. The plaintiffs then applied for an amendment of the plaint on November 30, 1950, and that amendment was allowed. In accordance with the amended plaint, the plaintiffs pleaded that the Swaminarayan temples were not temples within the meaning of the Harijan Temple Entry Act (XXXV of 1947) as amended by Act LXXVII of 1948. It was also stated that the Harijan Temple Entry Act was *ultra vires* of the powers of the State of Bombay, being inconsistent with the Constitution of India and the fundamental rights declared therein. Plaintiffs further contended that the Swaminarayan cult was an institution distinct and different from Hindu religion and, therefore, these two Acts could not affect the temples of this sect. On these grounds the plaintiffs claimed a declaration that the Swaminarayan Temple of Shri Nar Narayan Dev at Ahmedabad and all other temples subordinate thereto were not temples within the meaning of the Bombay Harijan Temple Entry Act, 1947, and also for a declaration that the said Act was *ultra vires* being derogatory and inconsistent with the Constitution of India. The suit was resisted by defendant No. 1 on the ground that it was not tenable at law or on facts and the Court had no jurisdiction to entertain the suit under s. 5 of the Bombay Harijan Temple Entry Act (XXXV of 1947). He denied the plaintiffs' right to represent the Satsangis of the Swaminarayan sect and asserted that many Satsangis were in favour of the Harijan entry into the Swaminarayan temples, even though such Harijans were not the followers of the Swaminarayan creed or Sampradaya. He contended further that the suit temples were temples within the meaning of the Bombay Harijan Temple Entry Act and that non-Satsangi Harijans had a legal right of entry and worship in these temples. It was further contended that the Bombay Harijan Temple Entry Act was *intra vires* and the State Legislature had power to enact the Act. Defendant No. 1 denied that the Swaminarayan cult was an institution distinct and different from Hindu religion and submitted that under the new Constitution as also under the earlier Bombay Act the plaintiffs had no right to debar the non-Satsangi Harijans from entry in the suit temples. Defendant No. 2, the Acharya, and defendant No. 3, the Mahant of the temple, filed a purshis stating that they did not object to the plaintiffs' suit. Defendant No. 4, the State of Bombay, and defendants Nos. 5 and 6 filed no written statements.

The trial Judge framed several issues and on the oral and documentary evidence held that the suit was maintainable and was not barred under s. 5 of the Bombay Harijan Temple Entry Act (XXXV of 1947). He further held that Act XXXV of 1947 was not *ultra vires* the legislative powers of the Bombay State and did not infringe any of the principles of the Indian Constitution. The trial Court further held that it was not proved by plaintiffs that the Swaminarayan sect was distinct and different from Hindu religion and found that the suit temples were temples which were used as places of religious worship by the congregation of the Satsang which constituted a section of the Hindu community. But the trial Court also found that it was not established that the suit temples were used by non-Satsangi Hindus as places of religious worship by custom, usage or otherwise and consequently the trial Court came to the conclusion that the suit temples did not come with the meaning of the word "temple" under the Bombay Harijan Temple Entry Act. In accordance with this finding the trial Court passed a decree in favour of the plaintiffs giving them a declaration that the Swaminarayan temple of Shree Nar Narayan Dev at Ahmedabad and all the temples subordinate thereto were not temples within the meaning of Bombay Act XXXV of 1947 as amended by Act LXXVII of 1948, and an injunction restraining defendant No. 1 and other non-Satsangi Harijans from entering and worshipping in the Swaminarayan temples of the northern diocese of the Swaminarayan sect. A mandatory injunction was also issued against defendants Nos. 2 and 3 directing them to take such lawful steps to prevent non-Satsangi Harijans from entry and worship in the suit temples, as they thought fit.

Against this decision, the present appeal was filed originally by the State of Bombay (defendant No. 4) and defendant No. 1 and the same was heard by a Bench consisting of Shah and Palnitkar, JJ. on March 8, 1957. On the merits it was contended on behalf of the appellants that the declaration granted to plaintiffs could not be allowed to stand in view of the Untouchability (Offences) Act of 1955 passed by Parliament which came into force on May 8, 1955, and which repealed the Bombay Harijan Temple Entry Act (XXXV of 1947). That contention was negatived on the ground that the declaration and injunction granted by the trial Court in favour of the plaintiffs were not based on the provisions of Act XXXV of 1947 but the relief was in respect of rights which were not affected by the Act, though the Court at that stage refused to consider whether the view of the trial Court was correct. It was further argued by the learned Advocate General on behalf of the appellants that the injunction would also be bad in view of the provisions of s. 3 of the Untouchability (Offences) Act, which prohibited the practice of untouchability in any form. To this, the reply on behalf of plaintiffs was that they sought to prevent defendant No. 1 and others from entering the temple not on the ground of untouchability but because they were non-Satsangis, and the counsel on behalf of the plaintiffs stated that his clients were prepared to amend the plaint by deleting the word "Harijan" in the prayer clause and claiming injunction against entry into the suit temples by all non-Satsangis. But it was thought not necessary to deal with this point in view of the provisions of s. 3 of the Bombay Hindu Places of Public Worship (Entry Authorization) Act, 1956 (XXXI of 1956), on which reliance was placed on behalf of the appellants. But the plaintiffs challenged the *vires* of this Act on the ground that it infringed the right of freedom of religion under arts. 25 and 26 of the Constitution and, therefore, it was argued that the Act would be bad under art. 13. In view of this challenge the Court, after directing the issue of notice to the Advocate General under O. XXVIA of the Civil Procedure Code, sent down the case to the trial Court for recording a finding on the issue "whether the Swaminarayan Temple at Ahmedabad and the temples subordinate thereto are Hindu religious institutions within the meaning of Article 25(2)(b) of the Constitution?" Both parties were allowed to lead evidence on this issue. On remand, plaintiffs did not lead any oral evidence, but defendant No. 1 examined two witnesses, Venibhai and Keshavlal.

The second witness failed to appear for his final cross-examination despite adjournments, even though a commission was appointed by the Court to record his evidence. The trial Court recorded a finding that the Swaminarayan temple at Ahmedabad and the temples subordinate thereto were Hindu religious institutions within the meaning of art. 25(2)(b) of the Constitution.

Y. V. Chandrachud, Government Pleader, for the appellant.

M. V. Desai and *N. K. Desai*, with *S. A. Wale*, for respondents Nos. 1 & 4.

M. V. Desai and *N. K. Desai*, with *M. D. Desai*, for respondents Nos 2, 4 & 5.

GOKHALE J. [His Lordship after stating the facts of the case, proceeded.] It was not contested before the trial Court after remand that the temples in suit were public religious institutions. The only question that was agitated was whether the temples could be regarded as Hindu temples and it was submitted on behalf of plaintiffs that they were not, as these temples were meant exclusively for the followers of the Swaminarayan creed who, according to plaintiffs, did not profess the Hindu religion. The learned trial Judge held, in view of the definite finding of his predecessor before remand that the congregation of Satsang constituted a section of the Hindu community, that it was not open to the plaintiffs to contend before him that the followers of the Swaminarayan sect were not a section of the Hindu community. As regards the nature of the temples, after considering exhaustively the evidence on the record, the trial Court recorded a finding that the Swaminarayan temple at Ahmedabad and the temples subordinate thereto were Hindu religious institutions within the meaning of art. 25(2)(b) of the Constitution.

This finding is supported by the learned Government Pleader and is challenged strenuously by Mr. M. V. Desai, learned counsel appearing on behalf of respondent-plaintiffs. According to Mr. Desai, members belonging to the Swaminarayan Sampradaya do not profess the Hindu religion and, therefore, their temples are not Hindu temples. It is not disputed before us that the declaration and injunction granted by the trial Court would not stand in case the temples belonging to the Swaminarayan sect come within the ambit of the provisions of the Bombay Hindu Places of Public Worship (Entry Authorization) Act (XXXI of 1956), which will hereafter be also referred to as Act XXXI of 1956. Now, the Bombay Harijan Temple Entry Act, 1947, has been repealed by this Act. Sections 2 and 3 of Act XXXI of 1956 run as follows:—

"2. In this Act, unless the context otherwise requires,—

(a) 'place of public worship' means a place, whether a temple or by any other name called, to whomsoever belonging which is dedicated to, or for the benefit of, or is used generally by, Hindus, Jains, Sikhs or Buddhists or any section or class thereof, for the performance of any religious service or for offering prayers therein; and includes all lands and subsidiary shrines appurtenant or attached to any such place, and also any sacred tanks, wells, springs and water courses the waters of which are worshipped, or are used for bathing or for worship;

(b) 'section' or 'class' of Hindus includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever of Hindus.

3. Notwithstanding any custom, usage or law for the time being in force, or the decree or order of a court, or anything contained in any instrument, to the contrary, every place of public worship which is open to Hindus generally, or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class, shall in any manner be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform."

Mr. Desai's submission is that under s. 2, cl. (a), the reference to Hindus, Jains, Sikhs and Buddhists is a reference to persons belonging to these religious faiths. He says that Satsangis belonging to Swaminarayan Temple may be members of the Hindu community and therefore Hindus for cultural and social purpo-

ses, but they are not persons professing Hindu religion and, til ing to Mr. Desai, Satsangis do not form a section, class or sect of Hindu religion. If that be so, Mr. Desai argues, s. 3 of Act will not apply and there is no question of throwing open the su classes and sections of Hindus. On this basis Mr. Desai conten really necessary for him to challenge the *vires* of this Ac Mr. Desai, he cannot attribute to the Legislature an intention Swaminarayan sect as a sect professing Hindu religion. In reference was made to the explanation to s. 3 of the Untouchal Act, 1955, which was enacted by Parliament and came into f 1955. Sections 3 and 4 of that Act deal with the subject of enforcing religious and social disabilities on the ground of " and the *Explanation* to s. 3 says:

"For the purposes of this section and section 4 persons profess Sikh or Jaina religion or persons professing the Hindu religion in ar developments including Virashatvas, Lingayats, Adivasis, followers of E Arya Samaj and the Swaminarayan Sampraday shall be deemed to be As I have already stated, before the remand it was Mr. Desai's s. 3 of this Act would not apply because defendant No. 1 and ot to be prevented from entering these temples not on the grou ability but on the ground that they were non-Satsangis. Tl issue was sent down to the trial Court as to the nature of t the matter in dispute being confined to the question whethe could be allowed to stand in view of the provisions of ss. 2 and of 1956.

Mr. Desai contends that though these temples are religious are not Hindu religious institutions and he has, therefore, dra to certain definitions of 'religion' as well as of an 'institution Mr. Desai, 'religion' is a state of life bound by monastic vo conduct indicating a belief in, reverence for and desire to pleas power; or the exercise or practice of rites or observances impl gion, according to Mr. Desai, would be also recognition on the some higher unseen power as having control of his destiny a titled to obedience, reverence and worship and the general m attitude resulting from this belief, with reference to its effect dual or the community; personal or general acceptance of t standard of spiritual and practical life. These definitions se taken from the Shorter Oxford English Dictionary. Mr. Des on the definition of 'religion' as given in Webster's Dictionar ward act or form by which men indicate their recognition of t God or the Gods having power over their destiny, to whom c and honour are due." This Dictionary defines "institution" : ment or organised society or corporation, an establishment, es public character or one affecting a community; a foundation ferred to these definitions in some detail because Mr. Desai re sised that they were germane to the consideration of the que this appeal and the same was of great importance and affect members of the Satsangi sect. We may say that in our judgm nitions do not essentially differ from the definition of religion sense, viz., a system of divine faith and worship; and in orde should succeed in his contention it will be necessary for him t sons belonging to the Swaminarayan sect follow a system of worship essentially distinct from Hindu religion. Mr. Desai that Swaminarayan was born a Hindu of Hindu parents, bu that the religion which he founded is a distinct religion, firstly narayan considered himself as the Supreme God, secondly, he ples for his own worship, thirdly, he propagated the ideal tha other god was a betrayal of his faith and treason to him, and k

ed Acharyas and prescribed a form of 'diksha' (Initiation) in order that his disciples may attain salvation through him. This, in short, is the whole argument of Mr. Desai on this point.

[His Lordship after referring to passages from *Vachanamrit*, *Shikshapatri* and *Satsangijwan*, scriptures of the Swaminarayan sect, proceeded.]

In the plaint itself, reference is made to Swaminarayan Sampradaya as a Sampradaya, congregation, and at numerous places as a sect. All the plaintiffs have described themselves as Hindus. Defendant No. 1 is also described as a Hindu and so also defendant No. 2, the present Acharya, and defendant No. 3, the Mahant. Defendant No. 2, who occupies the highest place in the hierarchy of the Sampradaya of the northern diocese has not chosen to give his evidence in the suit as also defendant No. 3, who is the Mahant of the temple at Ahmedabad. They have contented themselves by filing purshis (exh. 101) stating that they do not object to the plaintiffs' suit. Though this was a representative suit, none belonging to the southern diocese joined in the suit. Two Satsangis, as we have already stated, were added as defendants Nos. 5 and 6 and they filed a purshis on their own behalf, which is exh. 280, and in that purshis they made a statement disagreeing with the contention of the plaintiffs that the Satsangi or Swaminarayan Sampradaya was different from Hindu religion but they asserted that it was a section (*vibhag*) of Hindu religion. They did not, however, either give evidence themselves nor did they examine any witnesses. Our attention was also invited to two judgments, namely, exh. 81, the judgment of Mr. Knight, District Judge, in Suit No. 22 of 1902 dated June 23, 1905, which refers to the founder of the sect as belonging to Vallabhacharya sect of the Vaishnavas, and the judgment of N. J. Wadia J. in First Appeal No. 430 of 1927 decided on October 10, 1904, (exh. 80) where Swaminarayan is referred to as belonging to the Vallabhacharya sect of Vaishnavites. Mr. Desai says that these descriptions have no value in evidence because the point was not at issue in these prior suits. That is no doubt true, but at the same time it cannot be forgotten that till now no claim was ever made on behalf of the Swaminarayan sect that it constituted a religion different from Hinduism. In the Gazetteer of the Bombay Presidency, Vol. IX, to which reference has already been made above, at pp. 536-537 the Swaminarayan sect has been described as containing amongst its followers, Brahmans, Bhavsars, Charans, Darjis, Ghanchis, Golas, Kanbis, Kathis, Kolis, Luhars, Malis, Rajputs, Salats, Sathvaras, Sonis and Suthars and is described as the most modern of Vaishnav sects. See also Mr. Bhattacharya's *Hindu Castes and Sects*, pp. 472-475.

It is well known that a census has been held in India every ten years since 1872, and in censuses prior to 1951 religion and community loomed fairly large in the treatment of census data, the primary sorting of the slips being done on the basis of religion. It is only in 1951 that information was extracted in respect of four main religions of Indian origin, namely, Hindu, Sikh, Jain and Buddha, and four main religions of non-Indian origin, namely, Zoroastrian, Muslim, Christian and Jew, and those persons who professed other religions were tabulated as 'others'. See Census of India, 1951, Vol. IV, Bombay, Saurashtra and Kutch, Part I. In the General Report of the Census of the Bombay Presidency, 1872, Part II, census figures based on religion are given both with regard to Indian areas of the Bombay Presidency as well as in the area of Native States. As regards Indian areas, the report reveals that out of every 100 Hindus by religion, no less than 62.19 belonged to "mixed" class, while 26.83 were Saivas and 10.98 were Vaishnavas and in the Vaishnav class the following sects are mentioned: Madhvacharia, Ramanuj, Swaminarayan, Vallabhacharis, Kabir Panthis, Brijmargis, Purnamis, and it appears that Swaminarayan sect comprised 0.56 in the total of 10.98 per cent. In the figures with regard to Native States also Swaminarayans are shown as a Hindu sect. The total number of persons belonging to this sect in 1872 in the Indian area were 72,629 and in the Native States 2,17,080. The census returns are based on

slips filled in by individuals and from information collected by the census personnel and it is clear that nearly three lacs of followers of Swaminarayan raised no objection to their being described as belonging to a sect professing the Hindu religion.

Exhibit 257 is a book on Swami Sahajanand written by Shri Manilal L. Bhalja, a pleader who instructed plaintiffs' pleader in the trial Court and was instructing Mr. M. V. Desai throughout in this appeal. At page 69 of that book it is stated:

"Just as Gauranga Prabhu Chaitanya and Ramanand had accepted various non-Hindus in their Vaishnava religion, so Sahajanand had accepted Parsis and Muslims in his Vaishnava religion."

At page 107 the effect of Swaminarayan's teachings is stated as follows:

"Women obtained their rightful place in the society and the Sampradaya and they made progress in religion and knowledge. Non-Hindus were brought within Hindu religion and Sudras adopted the practices of Brahmins and pure Bhagwat Dharma was thus illuminated... Sahajanand was a teacher of Bhagwat religion."

In the preface to the book called "Sri Swami Narayana" by Bhai Manilal C. Parekh, reference is made to the late Mr. Justice Ranade's description of Swaminarayan as "the last of the Hindu Reformers" and it is stated

"One should qualify, however, this description by adding to it the words 'of the old type'. This is undoubtedly what Ranade meant, for he has paid his tribute again and again in unmistakable terms to such men as Ram Mohan, Keshub, Dayananda, etc., as Reformers of Hinduism, and Ranade himself was one of them. But the difference between all these and Swami Narayana lies in the fact that while they were influenced in one way or another by whatever light came from the Western World, he was wholly untouched by any alien influence and was as purely Hindu in his mental and spiritual constitution as any in the long roll of Teachers and Reformers of the past. This constitutes his uniqueness among the reformers of our times, for in him we see Hinduism in its purest and most indigenous form."

Mr. M. V. Desai at one stage questioned the authority of this book, but when his attention was drawn to the fact that exh. 257 written by Shri Bhalja itself refers to "Sri Swami Narayana" written by Bhai Manilal C. Parekh as one of the source books, Mr. Desai was good enough to make available to us a copy of Mr. Parekh's book on "Sri Swami Narayana" which contains at the end a complete translation of the *Shiksha-patri*. Mr. Justice Marten, as he then was, in his judgment in Appeal No. 62 of 1919 decided on November 9, 1922, part of which is reported in *Shripatprasad v. Lakshmidas*¹ has referred to Mr. Monier Williams' writing in the journals of the Royal Asiatic Society, Vol. 14, at page 311, where the essence of Swaminarayan's teachings was described as "devotion to Shri Krishna—as the Supreme Being—with observance of duty, chastity and purity of life." In his account of the religions of the Indian people entitled "Religious Thought and Life in India", Mr. Monier Williams has devoted a few passages to the sect founded by Swaminarayan and has stated his conclusion about that sect, after studying its system and having discussions with Pandits of the Sampradaya, as follows:—

"Without doubt the tendency of their doctrines is towards purity of life, which is supposed to be effected by suppression of the passions (udasa), and complete devotion to the Supreme Being in his names of Narayana, Vishnu and Krishna. In an honest desire to purify the Vaishnava faith this sect has done and is doing much good; but there can be no question that its doctrines, like its gods, its idols, and its sectarian marks, are part and parcel of genuine Vaishnavism."

The passages from the scriptures of the Sampradaya to which reference has already been made seem to confirm the view that the teaching of Swaminarayan Sampradaya was an attempt at purifying Vaishnavism and was not intended to constitute a separate religion from Hinduism.

[His Lordship after dealing with the oral evidence in the case, proceeded.]

This oral evidence does not, in our opinion, establish that Swaminarayan Sampradaya is a distinct religion from Hinduism. It is well known that Hinduism is a religion not only based on the Vedas but other scriptures as well. Every tradition which has sought to purify Hinduism has been absorbed by it with the result that Hindu religion cannot be described as a definite dogmatic creed, but in its essence is very elastic in its scope. The evidence discloses that Swaminarayan was born of Hindu parents and started his career as a devotee of Krishna and that admittedly an overwhelming majority of Satsangis have been drawn from the ranks of Hindus, i.e., persons professing Hindu religion. Satsangis are known as belonging to the Swaminarayan as also to the Udhav Sampradaya and Udhav was a well known devotee of Shri Krishna. The essence of the teachings of Shikshapatri is based on Hindu religion. Shikshapatri mentions Shri Krishna as *Ishta Dev* (tutelary deity) of the Sampradaya and other Hindu Gods, like Vishnu, Shiva, Ganapati, Parvati and Surya, are mentioned as fit to be worshipped. The four castes of Hinduism, namely, Brahmins, Kshatriyas, Vaishyas and Sudras, are recognised and eight religious books are mentioned as scriptures of the Swaminarayan faith. The main temple of Nar Narayan at Ahmedabad contains below the dome Hindu idols. Hindu non-Satsangis, except Harijans, have freely visited and worshipped the idols in this temple without any let or hindrance whatsoever. The learned trial Judge, before remand, has remarked that not even a single man came forward to say that he disclosed that he was a non-Satsangi and after that he was allowed to visit the suit temple as a place of religious worship. To some extent this is true; but, as we have already seen, witness Trikamlal Patel was asked whether the right of entry in the suit temple had been asserted by any non-Satsangi non-Harijan Hindu, to which his reply was that such a right was being enjoyed daily and it had never been denied, and our attention has not been invited to any evidence to the contrary. Considerable stress was laid on the fact that persons belonging to other religions, that is to say, Muslims and Parsis, have been initiated as Satsangis and have been admitted to the Swaminarayan fold and it is contended that a Sampradaya which admits persons professing other religions cannot be regarded as Hindu religion. But this contention fails to take into account the fact that these persons of other religions who have been initiated as Satsangis have thereby admittedly not ceased to belong to their own religion. If that be so, it cannot be argued that the overwhelming majority of Hindus who have joined the Swaminarayan Sampradaya have alone forsaken Hindu religion, as is sought to be made out before us.

The learned Government Pleader has relied on two Privy Council decisions in support of his contention that the Swaminarayan faith is not distinct from Hinduism. In *Rani Bhagwan Kuar v. Jogendra Chandra Bose*², their Lordships of the Privy Council had to consider whether the term 'Hindu' in s. 331 of the Indian Succession Act, 1865, and s. 2 of the Probate and Administration Act, 1881, included, on its true construction, a Sikh. The argument before them was that the testator as a Sikh was not included in the term 'Hindu' as used in the Act of 1881 and, secondly, that assuming Sikhs to be Hindus within the meaning of the Act, the testator had before his death ceased to be a Sikh and become a member of the Brahmo Samaj, and so was not a Hindu. On the first point, their Lordships agreed with the view of the Chief Court of the Punjab that a Sikh was included in the term 'Hindu' as used in the Probate and Administration Act. Then they dealt with the second argument as to whether the testator, having become a member of the Brahmo Samaj, had ceased to be either a Sikh or a Hindu. The Chief Court examined the literature bearing upon the Brahmo Samaj and it came to the conclusion that a Sikh or Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born and on evidence the Chief Court found that the testator never became a professed Brahmo at all; and both these conclusions were accepted by the Privy Council. It also dealt with another objection

that in matters of diet and ceremonial observance the testator had departed so far from the standard of orthodoxy binding upon him as a Hindu or a Sikh as to exclude him from the term 'Hindu' in the Probate and Administration Act and their Lordships agreed with the Chief Court in thinking that such lapses from orthodox practice, assuming them to be established, could not have the effect of excluding from the category of 'Hindu' in the Act one who was born within it, and who never become otherwise separated from the religious communion in which he was born. The other case on which reliance is placed by the learned Government Pleader is *Ma Yait v. Maung Chit Maung*³. In that case the question was whether persons belonging to the community of Kalais in Burma, who were descendants from Hindus who married Burmese women, as a community were 'Hindus' within the meaning of s. 13 of the Burma Laws Act, 1898, or s. 331 of the Indian Succession Act, 1865. In their judgment, their Lordships of the Privy Council referred to the decision of Sankaran Nair J. in *Muthusami Mudaliar v. Masilamani*⁴, in which Sankaran Nair J. referred to the evolution of sects amongst Hindus and considered certain criteria according to which new castes or classes which have been evolved among the descendants of Hindus are to be considered as having retained Hindu religion. According to the learned Judge's view, the formation of new castes was a process which was constantly taking place. Usage modified old principles and it governed the sects which adopted such usage. Contact with other religions such as Buddhism, Mahomedanism and Christianity evolved sects which discarded many characteristics of orthodox Hinduism, and adopted ideas and rites which were popularly supposed to appertain to other systems. Their Lordships of the Privy Council were of the view, however, that in such cases the test to be applied was whether continuity with the original religion had been retained or broken. In the case of an individual, the question does not become very difficult because considerable latitude of action is extended to him before he is deemed to have deprived himself of the religion which gave him his law until he does anything which amounts to a clear renunciation of that religion. In the instance of a community, the question must always be whether there has been continuity of character, or variations from the regular practices of those who are Hindus, which, though considerable, ought not necessarily to be taken as involving a break in the continuity of relationship. But there is a limit to such processes and the continuity may be so broken that the new sect goes outside the original pale. Dealing with the case before them, viz., the community of Kalais, their Lordships observed as follows (p. 563):

"...The Hindu law which the Courts administer rests on the Shastras, which claim divine sanction and are followed by Brahmins generally. There may have been introduced usages which constitute a departure from the principles of the Shastras so great that the community which has adopted them must be taken to have lost the character of being one in which Hindu religion governs. In the case of a sect at a distance from Hindu centres, where the surroundings are Burman and Buddhist and the mode of life is different from that of the Hindu communities in India proper, popularly known as such, it is easier to determine it as being outside Hinduism than it is in the case of an isolated individual who has merely lapsed into unorthodox practices. It is obvious that few influences can be more potent in producing new communities of this separate kind than the combined operation of migration, intermarriage and new occupations. When these influences have operated for sufficiently long a different community, with its peculiar religion and usages, may well result and be so outside Hinduism in the proper meaning of the word."

The learned Government Pleader also invited our attention to the case of *Nalinaksha Majhi v. Rajanikanta Das Mohanta*⁵. There it was held that under the Bengal School of the Hindu law of inheritance, a Vaishnava of whatever class was entitled to inherit from an ancestor who professed the orthodox Hindu creed and that a person of Vaishnava faith does not renounce the Hindu reli-

³ (1921) L.R. 48 L.A. 553.

⁴ (1910) L.L.R. 33 Mad. 342.

⁵ (1931) L.L.R. 58 Cal. 1392.

gion and continues to be a Hindu and professes Hindu religion in his own way, and though he may have seceded from orthodox Hinduism, as Lutherans did from the orthodox Catholic Church, he does not go out of the pale of Hinduism. In our opinion, it cannot be said that the Swaminarayan Sampradaya has taken the overwhelming majority of its Hindu *Satsangis* outside the pale of Hinduism or that the teachings and principles of the Sampradaya constitute such a departure from Hindu religion that it could be said that the connection between the two has snapped.

Mr. Desai conceded that in case we hold that the Swaminarayan Sampradaya is not a different religion from Hinduism, the conclusion cannot be resisted that the Nar Narayan temple at Ahmedabad and the temples subordinate thereto would be Hindu religious institutions and also "places of public worship" within the meaning of s. 2 of the Bombay Hindu Places of Public Worship (Entry Authorization) Act (XXXI of 1956). Even assuming that these temples are mainly used by Satsangis and are for their benefit only, the fact that an overwhelming majority of the Satsangis are Hindus by religion and use these places for the purpose of religious service and for offering prayers therein should make these temples places of public worship within the Act; and, if that be so, under s. 3 of this Act notwithstanding any custom, usage or law for the time being in force, they would be open to Hindus generally including Harijans and no Hindu of whatever section or class can in any manner be prevented, obstructed or discouraged from entering these places of public worship or from worshipping or offering prayers therein.

That leads me to the alternative argument of Mr. Desai who says that in that case Act XXXI of 1956 would be in conflict with art. 25 of the Constitution of India. He relied strongly on art. 25(1) of the Constitution which provides that:

"Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion",

and Mr. Desai contended that the Satsangis or members belonging to the Swaminarayan Sampradaya have got the right to profess, practise and propagate their faith, and that right would be interfered with if non-Satsangi Hindus including the Harijans are allowed entry into the suit temples. He says that these temples contain idols of Swaminarayan and his parents which are unknown to Hindus and for these idols non-Satsangi Hindus cannot be expected to have any reverence, and he contends that in case non-Satsangi Hindus are allowed to worship in these temples, that would come in the way of Satsangis freely professing, practising and propagating their Sampradaya. We are not prepared to accept this argument. Religious freedom contemplated under art. 25(1) of the Constitution is subject to the provisions of art. 25(2) as also art. 26. Under art. 25(2)(b), the State is empowered to make any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Religious freedom as envisaged in the Constitution is not unrestricted and unlimited religious freedom. For instance, it will be competent to the Legislature to pass a law dealing with the administration of property belonging to any religious denomination or any section thereof and that would not infringe the right of that denomination to manage its own affairs in matters of religion as contemplated in art. 26(b) of the Constitution. See *Batilal Panachand v. State of Bombay*⁶. In *Venkataramana Devaru v. State of Mysore*⁷, the Supreme Court was dealing with the challenge made to the Madras Temple Entry Authorization Act and it held that art. 25(2)(b) of the Constitution applied in terms to all religious institutions of a public character without any qualification or reserve. Public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof and denominational temples would be comprised therein. According to their Lordships of

the Supreme Court, the language of this article being plain & it was not open to the Courts to read into it limitations which were based on *a priori* reasoning as to the probable intention of the Legislature. The Court would be gathered only from the words actually used in the case their Lordships laid down the following propositions:—art. 25 of the Constitution declares the right of all persons to freedom of conscience and the right to freely profess, practise and propagate religion. cl. (1) itself that right was subject to the other provisions in the Rights Chapter and one of the provisions to which the right conferred by art. 25(1) was subject was art. 25(2). A law, therefore, which art. 25(2)(b) would control the right conferred by art. 25(1) and art. 25(1) does not apply to that law. (2) The true nature of the right conferred by art. 25(2)(b) was that the State Legislature would have power to make laws by legislation on all classes and sections of Hindus the right to enter a public temple and such a right would be available whether it was exercised against an individual under art. 25(1) or against a corporation under art. 26(b). (3) Article 25(1) deals with right of individual and art. 25(2) was much wider in its contents and has reference to the community and controls both art. 25(1) and art. 26(b). None of the members of the Temple Committee in this case to manage the affairs of the temple matters of religion and it is not Mr. Desai's contention that the Places of Public Worship (Entry Authorization) Act in any way infringes art. 26(b) of the Constitution. His only contention is that the right of Satsangis to freely profess, practise and propagate religion conferred by art. 25(1). That contention, in our opinion, cannot be accepted. The right conferred by art. 25(1) is subject to the power of the State, under art. 25(2), to make any law providing for social welfare and reform or to regulate the affairs of Hindu religious institutions of a public character to all classes of Hindus. The alternative argument of Mr. Desai, therefore, that the Places of Public Worship (Entry Authorization) Act, 1956 is *ultra vires* the provisions of art. 25(1) of the Constitution cannot succeed.

These were the only contentions raised before us by Mr. Desai. The finding recorded by the trial Judge after remand and in support of the injunction granted by the trial Court before remand cannot be accepted as valid.

The result is that this appeal will be allowed, the decree of the trial Court will be set aside and the plaintiffs' suit will be dismissed with costs.

PATEL J. I agree with my learned brother that the plaintiffs' suit should be dismissed with costs throughout.

CRIMINAL REVISION.

[NAGPUR BENCH]

Before Mr. Justice Kotval.

RADHAKISHAN RAMNATH v. THE STATE.*

Central Provinces and Berar Maternity Benefit Act (VI of 1930), Secs. 2(a), 5(3)—Factories Act (LXIII of 1948), Sec. 2(m)—General Clauses Act (X of 1897), Sec. 8(1)—Central Provinces and Berar General Clauses Act (I of 1914), Sec. 7—Factory as defined in s. 2(a) of C. P. & Berar Maternity Benefit Act, 1930, whether means factory as defined in s. 2(m) of Factories Act of 1948—Construction of s. 8(1) of General Clauses Act.

References to the Factories Act, 1934 in s. 2(a) of the Central Provinces and Berar Maternity Benefit Act, 1930, must be construed as references to Factories Act, 1948, by virtue of s. 8(1) of the General Clauses Act, 1897. Therefore, the definition of "factory" contained in s. 2(m) of the Factories Act, 1948, must be read into s. 2(a) of the Central Provinces and Berar Maternity Benefit Act, 1930.

The words "unless a different intention appears" in s. 8(1) of the General Clauses Act, 1897, qualify the precedent words of the section viz., "references in any other enactment or in any instrument" or "this Act or any Central Act or Regulation." Therefore, the contrary intention must be found in the repealing Act or in the other enactment or instrument, and it is not permissible to turn to circumstances outside those Acts or instruments to find whether a contrary intention appears or not.

*National Sewing Thread Co. Ltd. v. James Chadwick and Bros. Ltd.*¹ and *Khuda Bux v. Manager, Cal. Press*,² referred to.

M. N. Phadke and *V. M. Golwalkar*, for the applicants-accused.

G. R. Mudholkar, Additional Special Government Pleader, for the State.

KOTVAL J. The applicants are the proprietor and manager respectively of the Ramkrishna Ramnath Bidi Factory at Kamptee. Both have been convicted under s. 9 of the Central Provinces and Berar Maternity Benefit Act, 1930, read with s. 5(3) and under r. 10 read with r. 4 of the Central Provinces and Berar Maternity Benefit Rules, 1930, for not paying maternity benefit to a female employee in their factory, and for failing to maintain a muster roll of female employees. Both the applicants have been fined Rs. 200 and Rs. 25 respectively on each of the above counts, or in default, ordered to undergo simple imprisonment for 8 weeks each.

The merits of the convictions have not been challenged before me nor was the evidence referred to. But Mr. M. N. Phadke on behalf of the applicants has raised several contentions.

In order to show the nature of these contentions it is necessary to state certain facts. The Central Provinces and Berar Maternity Benefit Act is Act VI of 1930. Though published in the Central Provinces and Berar Gazette Extra-ordinary, of March 22, 1930, it was brought into force on January 1, 1931 by a notification of the then Government of the Central Provinces and Berar, dated December 16, 1930, Notification No. 3308-1740-XIII, issued under the powers vested in the State Government by s. 1(c) of the Act. By virtue of s. 2(a) of the Act as originally enacted "factory" was defined as follows:—

"'factory' means a factory as defined in section 2(j) of the Factories Act, 1911."

After the enactment of the Maternity Benefit Act the Factories Act of 1911 was replaced by the Factories Act of 1934 (Act XXV of 1934), and in consequence of the enactment of that Act s. 2 of the Maternity Benefit Act was amended. The amendment of s. 2 was made by the Central Provinces Mater-

*Decided, October 10, 1958. Criminal Revision Application No. 297 of 1958, against the order passed in Criminal Appeal No. 337 of 1957, by T. P. Ghogale, Sessions Judge, Nagpur, confirming the conviction and sentence passed by N. B. Indurkar, Magistrate First Class Nagpur, in Criminal Case No. 368 of 1957.

1 [1953] S.O.R. 1028.

2 [1954] A.I.R. Cal. 484.

nity Benefit (Amendment) Act, 1955, (Act 22 of 1935). As amended, s. 2(a) defines "factory" as follows:—

"'factory' means a factory as defined in section 2(i) of the Factories Act, 1934, or any premises declared to be a factory under section 5 of that Act;"

It will be noticed that the definition remained in substance the same except that instead of reference to s. 2(j) of the Factories Act of 1911, s. 2(j) of the Factories Act of 1934 was referred to and a clause added permitting a factory to be declared a factory.

The amendment of s. 2(a) came into force on November 15, 1935. After the Maternity Benefit Act was thus amended in 1935, the then existing Factories Act of 1934 was repealed and re-enacted. It is now Act LXIII of 1948. The Factories Act of 1948 came into force on April 1, 1949. When the new Factories Act came into force, it is to be noted that the definition of "factory" in s. 2(a) of the Central Provinces and Berar Maternity Benefit Act of 1930 was not amended, with the result that even to day the Maternity Benefit Act in defining "factory" refers to s. 2(j) of the Factories Act of 1934, and makes no reference to the Factories Act of 1948. Mr. Phadke's argument is founded upon this failure to amend the Maternity Benefit Act in consequence of the enactment of the Factories Act of 1948.

The Factories Act of 1948 made sweeping changes in the definition of "factory" as contained in s. 2(m) of that Act. I need not stress the points of difference but it is sufficient for the purposes of this revision to state that if the definition of "factory" in s. 2(m) of the 1948 Factories Act is considered, the applicants' premises would be included in the definition of "factory" whereas under s. 2(j) of the Factories Act of 1934, it is conceded, it would not fall within the definition of "factory". Now, Mr. Phadke contends that the omission to amend s. 2(a) of the Maternity Benefit Act shows that reference was deliberately intended only to the definition of "factory" in the old Factories Act of 1934 and that the new definition contained in s. 2(m) of the Factories Act of 1948 was not intended to be brought into force so far as payment of maternity benefit was concerned. Therefore, he urges that the applicants' premises admittedly would not be a "factory" and the conviction under the Maternity Benefit Act of 1930 and its rules cannot be sustained.

On behalf of the State reliance was placed by the Additional Special Government Pleader on s. 8 of the General Clauses Act which is the same as s. 7 of the Central Provinces and Berar General Clauses Act and s. 38 of the English Interpretation Act. Section 8(1) of the Central General Clauses Act runs as follows:—

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

No doubt, if s. 8(1) of the General Clauses Act were applicable, it is clear that the repeal of the Factories Act of 1934, followed by its re-enactment as the Factories Act of 1948, would have this effect, that in the Central Provinces and Berar Maternity Benefit Act the reference to the Factories Act of 1934 would have to be read as a reference to the Factories Act of 1948. This of course would be subject to the governing clause of s. 8(1) "unless a different intention appears".

Mr. Phadke relied upon those words and urged that such a different intention does appear in the present case. He urged that that would be so for three reasons. Firstly, that the nature of the change brought about in the definition of "factory" in the Factories Act of 1948 is so fundamental and sweeping that it would include within its ambit several business premises which were never factories in the accepted sense of that term and could never have been intended to be included in the definition of "factory". Therefore, according to him, a contrary intention appears. Secondly, he urged that when the Factories Act

of 1911 was repealed and re-enacted in 1934, s. 2(a) of the Maternity Benefit Act was soon after amended in order to bring it in conformity with the Factories Act of 1934, but it is of great significance that when the new Factories Act of 1948 was brought into force and the Factories Act of 1934 was repealed, no corresponding change was made in the Maternity Benefit Act. He contends that this omission was deliberate and it shows a clear intention on the part of the Legislature, so far as payment of the maternity benefit is concerned, to define "factory" with reference to the Factories Act of 1934 and not with reference to the Factories Act of 1948. Thirdly, Mr. Phadke urged that when the Factories Act was re-enacted in 1948 there was extant in the former territory of the Central Provinces and Berar an Act known as the Central Provinces and Berar Unregulated Factories Act, 1937 (XXI of 1937). That Act no doubt was later on repealed by the Madhya Pradesh Unregulated Factories Repealing Act, 1952, which came into force on July 25, 1952, but in 1948 Act XXI of 1937 was in force. Mr. Phadke's further contention was that the Unregulated Factories Act was in force at the time when the Factories Act of 1948 was brought into force, and therefore at that time the Legislature advisedly did not amend the Maternity Benefit Act because they probably took the view that the provisions of the Unregulated Factories Act were sufficient to deal with the case of unregulated factories under which class the applicants' factory fell and that it was not necessary to apply the wider definition in the Factories Act of 1948 to such unregulated factories so far as maternity benefit was concerned. He urged that the omission was deliberate and, therefore, a contrary intention appears within the meaning of s. 8(1) of the General Clauses Act.

Now, in the first place it seems to me that the words "unless a different intention appears" in s. 8(1) of the General Clauses Act must be read in the light of the precedent words of the section and they cannot be isolated from their context. The precedent words are:

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts...any provision of a former enactment then references in any other enactment or in any instrument to the provisions so repealed shall"

and the succeeding words are:—

"be construed as references to the provision so re-enacted."

The words "unless a different intention appears" therefore qualify the words "references in any other enactment or in any instrument" or "this Act or any Central Act or Regulation". The effect of this is, therefore, that the contrary intention must be found in the repealing Act or in the other enactment or instrument, and we cannot turn to circumstances outside those Acts or instruments to find whether a contrary intention appears or not. All the three contentions raised by Mr. Phadke refer to such circumstances outside the enactment namely, the Factories Act, 1948, and the Minimum Wages Act, in the present case and, in my opinion, having regard to the terms of s. 8(1) of the General Clauses Act we cannot look to those circumstances. It was conceded that there was nothing in the Maternity Benefit Act as such to indicate a contrary intention.

Apart from this there is no doubt that when the Factories Act of 1934 was repealed and its provisions were re-enacted in the shape of the Factories Act of 1948, by virtue of s. 8(1) of the General Clauses Act the references to the Act of 1934 must be taken as references to the Act of 1948. Even if s. 8 would not strictly apply, still the principle of construction enunciated in that section would apply. It has been held by the Supreme Court of India to be a principle of general application in construing statutes in *National Sewing Thread Co. Ltd. v. James Chadwick and Bros., Ltd.*¹

When the rule of interpretation was clearly laid down in s. 8 of the General Clauses Act, it is to be presumed that the Legislature had in mind the provi-

sions of that law when they re-enacted the Factories Act in 1948 and the alleged failure to correspondingly amend the Maternity Benefit Act must be construed in the light of that provision of law. In this view it seems to me that it was entirely unnecessary to have amended cl. 2(a) of the Maternity Benefit Act because references to the Factories Act of 1934 in that clause would, without further amendment of the Maternity Benefit Act, be construed as references to the Factories Act of 1948, by virtue of s. 8(1) of the General Clauses Act, and, therefore, no amendment was made.

No doubt, when the Factories Act was brought into force in 1934, an amendment was made in the Maternity Benefit Act, but if such an amendment was made, one can only hold that it was made by way of abundant caution. At any rate, I am unable to hold that mere omission on the part of the Legislature to amend an Act can be indicative of a contrary intention as required by s. 8 of the General Clauses Act. The drawing of any such inference would render the provisions of s. 8 of the General Clauses Act largely otiose. The second of the contentions raised by Mr. Phadke, therefore, fails.

I am also not impressed by the third contention founded upon the provisions of the Unregulated Factories Act. That Act has now been repealed, and the effect of the repeal without re-enactment is that that law had never existed. Therefore, no advantage can be taken of such a law. Even if reference could be justified to the Unregulated Factories Act, I do not think that I can speculate as to what must have been the intention of the Legislature, in the face of provisions of s. 8 of the General Clauses Act. Nor can I presume that because the Unregulated Factories Act was then in force, the Legislature did not amend the Maternity Benefit Act.

As to the first argument that the amendment of the definition of "factory", as contained in the Factories Act of 1948 makes sweeping changes and indirectly lays a liability upon the applicants for the first time by amending the Factories Act rather than the Maternity Benefit Act, it is only necessary to say that if the Legislature clearly has the power to make an amendment and its terms are clear it is not for the Courts to speculate upon its possible effect or the so-called hardship to the citizen. The Maternity Benefit Act is a necessary and very salutary measure of social amelioration and any hardship upon factory owners like the applicants is far outweighed by the benefits thereby conferred upon their female employees.

On a question similar to the second contention of Mr. Phadke as to the applicability of the definition of "Factory" contained in the Factories Act of 1948 to the Workmen's Compensation Act, a Division Bench of the Calcutta High Court ruled in *Khuda Bux v. Manager, Cale. Press*² that s. 8 of the General Clauses Act would apply. With reference to an argument similar to the one advanced in this case, Chief Justice Chakravartti held as follows:—

"(7) In my opinion, this contention is plainly unsound. The Factories Act of 1934 was repealed and re-enacted by the Act of 1948 and therefore by virtue of s. 8, General Clauses Act, references in the Workmen's Compensation Act to the Act of 1934 must be construed as references to the Act of 1948. There is nothing from which a different intention appears. Had the Workmen's Compensation Act been amended after 1948, and had the reference to the Act of 1934 yet remained, there would be reason for saying that it was the Act of 1934 which was intended to be regarded, but there has been no amendment of the Workmen's Compensation Act after the Factories Act of 1948, nor is there any other indication that the new Act is not to be read for the old, as required by s. 8, General Clauses Act.

(8) As against these considerations, it was urged that the Factories Act of 1948 was not a repealing and amending Act, but was an Act to consolidate and amend the law relating to labour in factories, as the preamble showed, and, consequently, s. 8, General Clauses Act would not apply. That argument was founded on a misconception. Section 8, General Clauses Act, does not require that the later Act repealing and re-enact-

ing an earlier Act, should be a repealing and amending Act. All that it requires is that a Central Act should repeal and re-enact a former enactment."

I am in respectful agreement with this view. It seems to me that there is no doubt in the present case that the definition of "factory" contained in the Factories Act of 1948 must be read into the Maternity Benefit Act of 1930. The contentions raised by Mr. Phadke on behalf of the applicants fail and the convictions of the applicants must be upheld. The sentences of fine in the circumstances were proper. The application for revision fails and is dismissed.

Application dismissed.

GRIMINAL APPELLATE.

Before Mr. Justice Datar and Mr. Justice Patel.

STATE v. MEMON MOHMAD HUSAIN ISMAIL.*

Indian Evidence Act (I of 1872), Secs. 27, 24—Information received from person who is not accused when information given but becomes accused when such statement sought to be given in evidence—Whether statement admissible under s. 27—Person making statement before police officer showing that offence committed by him—Such person whether deemed to be in police custody within s. 27.

The words "information received from a person accused of any offence" in s. 27 of the Indian Evidence Act, 1872, cannot be read to mean that he must be an accused when he gives the information but would include a person if he became subsequently an accused person, at the time when that statement is sought to be received in evidence against him.

Deonandan Dusadh v. King-Emperor,¹ Jalla v. Emperor,² Queen-Empress v. Babu Lal³ and Emperor v. Cunna,⁴ referred to.

Where a person goes to a police officer and makes a statement which shows that an offence has been committed by him, he accuses himself and though he is formally not arrested, since he is not free to move wherever he likes after disclosure of the information to the police he must be deemed to be in custody of the police within s. 27 of the Indian Evidence Act, 1872.

Santokhi Belder v. King Emperor⁵ and Legal Remembrancer v. Lalit Mohan Singh Roy,⁶ referred to.

THE prosecution case was that one Ahmed Ibrahim was the son of the eldest step-sister of Mohamad and Umar (accused Nos. 1 and 2), i.e. accused Nos. 1 and 2 were the maternal uncles of Ahmed. After the death of Ismail, the father of accused Nos. 1 and 2, Ahmed was looking after the management of the estate of Ismail, in which he or his mother had a share. There were some disputes between Ahmed and accused Nos. 1 and 2 with regard to this property. After separation Ahmed started a shop in the Sanghedia Bazar in Bhavnagar wherein in the opposite row the accused also had their shop. On September 11, 1957, Ahmed went to the shop of the accused at about 7 p.m. and when he went there, he was asked by accused No. 1 to come to the shop in the night as there was some work. At about 10-30 or 11 p.m. at night Ahmed went to the shop of accused Nos. 1 and 2 and that was the last that was seen of Ahmed. Ahmed did not return to his home thereafter and his wife Hanifa sent their daughter Aysha to enquire at the house of the accused and she was told that he had not gone there. In the meanwhile a rumour started about the disappearance of Ahmed and some persons with whom he was associated enquired

*Decided, October 30/31, 1958. Criminal Appeal No. 491 of 1958 (with Criminal Appeal No. 784 of 1958), against the order of conviction and sentence passed by S. M. Vidyarthi, Additional Sessions Judge, Bhavnagar, in Sessions Case No. 92 of 1957.

1 (1929) I.L.R. 7 Pat. 411.

2 [1931] A.I.R. Lah. 278.

3 (1884) I.L.R. 6 All. 509, F.B.

4 (1920) 22 Bom. L.R. 1247.

5 (1932) I.L.R. 12 Pat. 241.

6 (1921) I.L.R. 49 Cal. 167.

at the house of Ahmed and found both the accused along with members of their family at the house of Ahmed. They persuaded Hanifa to lodge a complaint with the police and as a result of that Hanifa, the associates of Ahmed and accused Nos. 1 and 2 went to the police station, "C" Division, Bhavnagar. At the "C" Division police station Sub-Inspector Jadeja took down the statements of Hanifa and of accused No. 1. He then took the party to the "A" Division police station where the police officer one Unnadkat questioned accused No. 1. As a result of the information given by accused No. 1 and as a result of the discovery made by him, it was found that the dead body of Ahmed was buried in the Naveli belonging to the accused. A regular panchnama was drawn with regard to the discovery. On this discovery a formal arrest was made and a complaint filed by Unnadkat at the Police Station. Further investigation was thereafter carried out, during the course of which on the same day accused No. 1 made a statement and pointed out the cap and the shoes belonging to Ahmed from under a cupboard in his own bed room. He also made a statement and made the discovery of a bag of salt concealed amongst the bags of grain in the back portion of the rows and at the bottom, the relevance of this bag of salt being that when the dead body was taken out of the pit in the Naveli, it was found that there was salt along with the body in the pit. Statements of important witnesses were recorded. Thereafter the accused were charge-sheeted before the Judicial First Class Magistrate, Bhavnagar, for having committed the offence of murder punishable under s. 302 read with s. 24 of the Indian Penal Code or in the alternative for causing the evidence of the murder to disappear with the intention of screening the offender, an offence punishable under s. 201 read with s. 34 of the Indian Penal Code. The accused were committed for trial to the Court of Session.

The Sessions Judge convicted accused Nos. 1 and 2 under s. 201 read with s. 34 and each of them was sentenced to undergo rigorous imprisonment for 7 years. Both the accused were acquitted of the charge of the offence under s. 302 read with s. 34 of the Indian Penal Code. The accused appealed (Appeal No. 491 of 1958) against their conviction and sentence and the State appealed (Appeal No. 784 of 1958) against the acquittal of the accused under s. 302 read with s. 34, Indian Penal Code.

E. B. Ghasvala, with *Y. S. Murudkar* and *R. M. Joshi*, for the accused.

C. C. Vaidya, Assistant Government Pleader, for the State.

PATEL J. [His Lordship after setting out the facts of the case, proceeded.] Before dealing with the evidence, at this stage I might dispose of the contention with regard to the admissibility of exh. 29 containing some admissions and of statements made by the accused and reproduced in the panchnama regarding the discovery of the body. So far as the question of exh. 29 is concerned, an objection to its admissibility was raised at the time when that document was put in and has been renewed in this Court at the time of arguments, though not very seriously. It would appear that the said statement would be admissible under s. 8 of the Evidence Act as showing the conduct of the accused subsequent to the death of the deceased in any event. It would also appear that it is not hit by the provisions of s. 25 at all in this case. In order that s. 25 should be operative to prevent an admission being received in evidence, it must amount to a confession, for it is provided therein that no confession made to a police officer shall be proved as against a person accused of any offence. It has been observed in *Pakala Narayana Swami v. The King-Emperor*¹ (p. 81):—

"...a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession,..."

This being so the statements in exh. 29 not being confession, cannot be excluded by provisions of s. 25 of the Evidence Act. It would further appear that since

this statement happens to have been made to the Police prior to the commencement of the investigation in the case it could not possibly be hit by s. 162 of the Criminal Procedure Code: vide *Sital Chandra v. State*.² We are, therefore, of the view that exh. 29 is admissible not being a confession.

With regard to the panchnama exh. 54, or what will be more appropriate to state the statements of accused reproduced in the panchnama or deposed to by witnesses which are sought to be proved, it is argued that these are not admissible under s. 27 of the Indian Evidence Act. The learned counsel argues that s. 27, which says:

"...when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer,..."

would show that the information must be given or a statement must be made by a person who at that time is accused of any offence and is in the custody of the police. If these two conditions are not satisfied then even if it satisfied the other conditions of the section it is not admissible. For the proposition that at the time of making the statement he must be an accused person the learned counsel has relied on *Deonandan Dusadh v. King-Emperor*³ and *Jalla v. Emperor*.⁴ In *Deonandan Dusadh v. Emperor*, it was held that a statement made by a person who was not accused of an offence at the time of making the statement, was not admissible under that section. In coming to this conclusion reliance was placed on the case of *Queen-Empress v. Babu Lal*⁵ which is a full bench case. The question referred to the full bench was whether or not s. 27 was a qualification to both ss. 25 and 26 or only to s. 26. It appears there was some difference of opinion in the cases decided in that Court; in one of the cases Mr. Justice Mahmood had held that s. 27 was merely a proviso or a qualification to s. 26 and had no bearing on s. 25; and which resulted in making every statement made to a police officer inadmissible in evidence even if it satisfied the conditions laid down in s. 27. The other view was that it was a proviso to both ss. 25 and 26. The majority of the Judges constituting the full bench held that s. 27 was applicable as a proviso to both ss. 25 and 26. Mr. Justice Oldfield does not construe the section in this manner, nor does Mr. Justice Brodhurst. It would appear that the learned Judge states at p. 519, after giving an illustration of a person immediately after committing a murder going to the police station and giving himself up to the police officer and making a statement before that officer and his subordinates of all the facts and pointing out the body of the victim and giving up the weapon with which he had committed the murder, that s. 27 would still be applicable to a case like that. The learned officiating Chief Justice held that s. 27 is applicable as a proviso to both ss. 25 and 26, and Mr. Justice Duthoit expressed a general opinion without expressing any opinion as to the construction of s. 27 itself. It is only Mr. Justice Mahmood who construed s. 27 in the manner suggested while dealing with the argument as to whether it is a qualification to s. 26 or to s. 25 as well. That case, therefore, cannot be regarded as an authority for the suggested construction. The Lahore case seems to construe the section in the same way.

In s. 24 of the Evidence Act, words precisely similar to those used in s. 27 are used; it refers to a confession made by an accused person and if the contention that is now made is accepted it might introduce a great deal of injustice to persons accused of an offence, because all confessions made by a person before he became an accused, would be admissible even if they were obtained by inducement, threat or promise. Section 24 is considered in the case of *Emperor v. Cunna*.⁶ Sir Lallubhai Shah at page 1261 says that that section will be applicable to a confession made by a person, who becomes subsequently accused of an offence. The other Judges in effect accept this, but they differed from the learned Chief Justice on the question of fact as to whether the confessions were made by inducement, threat or promise. The phrase has been

2 [1956] A.I.R. Cal. 83.

3 [1928] I.L.R. 7 Pat. 411.

4 [1931] A.I.R. Lab. 278.

5 (1884) I.L.R. 6 All. 509. F.B.

6 (1920) 23 Bom. L.R. 1247.

used in both sections and it must be interpreted in the same manner in both sections. No possible reason can be suggested why it should have a different meaning. We are, therefore, of opinion that the words information received from "a person accused of any offence" in s. 27 cannot be read to mean that he must be an accused when he gives the information but would include a person if he became subsequently an accused person, at the time when that statement is sought to be received in evidence against him.

So far as the further requirement of being in the custody of the police is concerned the words of the section are there. The object and reason of the rule, which excludes confessions and statements as inadmissible in evidence if they are made in the presence of or to police officers or where investigation is going on, is that there is likelihood of their having been obtained by unjustifiable means. The reason of the exception contained in s. 27 would appear to be that though they might have been improperly obtained, if a discovery of facts is made then there is great likelihood of the statements being true, and if this is so, it is difficult to see the reason or the sense of the rule requiring that when that statement is made the person who makes that statement should and ought to be in custody before it could be received in evidence. If the reason of admitting this statement is what I have stated before, it would be much more likely to be true when made by a person who is not in custody as it would be without any pressure at all and being voluntary cannot offend any rules of moral justice. One way out of the difficulty of the words in the statute would be to disregard those words as being superfluous and not intended by the Legislature in the sense in which they appear and that is the justifiable procedure. The other way is to read the words "even if" before the words "in the custody of police" which is also permissible to give sensible meaning to the section. James Stephen, the draftsman of the Indian Evidence Act, in his Introduction to the Indian Evidence Act while discussing confessions at page 165 of the 1892 edition (which is a reprint of the 1872 edition) says:—

"Admissions in reference to crimes are usually called confessions. I may observe upon the provisions relating to them that sections 25, 26, and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act XXV of 1861."

Section 150 of the Criminal Procedure Code, Act XXV. of 1861, reads as under:—

"When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence."

It appears in 1869 in Act VIII of 1869 this section was modified by the addition of the words "or in the custody of a police officer" after the words "a person accused of any offence". If the intention was to reproduce the provisions contained in s. 150 of the Criminal Procedure Code, 1861, it is apparent that the intention was to make the statements admissible even if a person were in custody. It appears, therefore, that it would be the better way of reading the provisions of the section which course is permissible in order to make the meaning of the section sensible. See Maxwell on Statutes pp. 236, 237 (9th edn.). If that is the correct view, then all these statements were made as a result of which facts mentioned were discovered and would, therefore, be admissible in evidence.

Even assuming however that it will not be permissible to disregard the words of the section or read "even if" as suggested then, we are clearly of the view that the case falls within the authority of cases *Santokhi Beldar v. King Emperor*⁷ and *Legal Remembrancer v. Lalit Mohan Singh Roy*⁸, with the conclusion of which we agree. The ratio of those cases is that where a person goes to a police officer and makes a statement which shows that an offence has been committed by him, he accuses himself and though he is formally not arrest-

7 (1932) LL.R. 13, Pat. 241.

8 (1921) LL.R. 49 Cal. 167.

ed, since he is not free to move wherever he likes after disclosure of the information to the police he must be deemed to be in custody of the police.

[The rest of the judgment is not material to this report].

Appeal by accused dismissed.

Appeal by State allowed.

ESTATE DUTY REFERENCE.

Before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai.

KHATIZABAI MOHOMED IBRAHIM v. CONTROLLER OF ESTATE DUTY, BOMBAY.*

Estate Duty Act (XXXIV of 1953), Secs. 5, 12, 10—Finance Act, 1894 (57 & 58 Vict. Ch. 30), Secs. 1, 2(b)—Settlement of property where interest reserved by settlor for life and settlement not taking effect as will—Lesser part of property i.e. interest reserved could pass by application of general rule laid down in s. 5—Whether whole of settled property to be deemed to pass—Applicability of s. 12—"Property passing on the death," definition of—Decisions of English Courts on analogous provisions of English law how far to be adhered to—Rule of construction relating to provisions of enactments in pari materia.

Section 12 of the Estate Duty Act, 1953, lays down the special rule that in case of a settlement of any property with reservation to the settlor of any interest in such property for life, although less may pass by application of the general rule laid down in s. 5 of the Act (i.e. only the interest which was reserved), the whole of such property of the settlor, the subject-matter of the settlement in which he has reserved interest for life, must be deemed to pass on the settlor's death.

The object of the Legislature in enacting s. 12 of the Act was that where an interest, however small, is reserved by a settlor under any settlement not taking effect as a will for life or any other period determinable by reference to death, the whole of the property would be deemed to pass even though otherwise a lesser part thereof might pass, and that if he has reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property, the whole property would pass whether he has reserved any aliquot share in the income of any other interest in the property or not.

By a *wakf-al-ulad* certain properties were transferred to Mutavalls by the settlor, a Sunni Hanafi Mohammedan, who reserved for the maintenance during her lifetime 62½ per cent. of the net income of the property and the remaining income was given in certain proportion to her daughter and her children for their maintenance. Under this deed it was further provided that after the death of the settlor the entire income of the property was to be paid in certain proportion to her daughter and her children from generation to generation. There was, in the deed, an ultimate provision for the benefit of the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. After the death of the settlor, the Collector of Estate Duty included all the properties in the estate duty assessment under s. 12 of the Estate Duty Act, 1953. On the question whether the entire Wakf property or only 62½ per cent. of the Wakf was chargeable to estate duty, it was contended that there was actual passing of the interest of the settlor on her death which was 62½ per cent. of the income of the properties, and that, therefore, the property that could be brought to estate duty under s. 5 of the Act could only be 62½ per cent. of the corpus and the fact that the case was wholly covered by the language and scope of s. 12 of the Act which expressly deals with such a settlement and such reservation of interest, was of no consequence:—

Held, that s. 12 in terms applied to the settlement in the case and, therefore, the entire Wakf property was chargeable to estate duty.

*Decided, November 1 and 3, 1958. Estate Duty Reference No. 1 of 1958.

Earl Cowley v. Inland Revenue Commissioners, *Christie v. The Lord Advocate*, *Northcliffe*, In re: *Arnholz v. Hudson*, *Duke of Norfolk*, In re: *Public Trustees v. Inland Revenue Commissioners*, *Attorney-General v. Milne*, *Sanderson v. Inland Revenue Comrs.*, *Public Trustees v. I. R. Comrs.*, *Attorney-General v. Earl Grey* and *Hey's Settlement Trusts*, In re: *Hey v. Nickeil-Lean*, referred to.

To ascertain whether a property has passed on the death of a person within the meaning of the Estate Duty Act, 1953, the comparison must be made between the persons beneficially interested the moment before the death and the persons so interested the moment after the death.

Sir S. E. Scott, Br., and Coutts and Co. v. Inland Revenue Commissioners, referred to.

The scheme of the Estate Duty Act, 1953, is substantially the same as the scheme of the English Finance Act of 1894.

On analogous provisions of the Indian law unaffected by the specialities of the English law and on fundamental concepts and on broad general principles, decisions of Courts in England can be useful and of considerable guidance if utilised with due care and caution. Danger, however, lies in phrases used aptly enough in a particular context and opinions weighty and useful in their own sphere and context being treated as expressing doctrines of universal application or adopting those principles as riders to the actual statutory language. Rigid adherence to decisions of Courts in England must be deprecated and particularly when they have some bearing on the English law of property with its highly technical and overrefined rules affecting reality which operated when the English enactment came into force.

The rule of construction relating to provisions of enactments *in pari materia* is one of great convenience and aid from outside may legitimately be derived when any doubtful point of interpretation of any provision has to be solved. But reference to it simply on the ground of similarity has to be avoided.

THE facts appear fully in the judgment of S. T. Desai J.

N. A. Palkhivala, with *K. H. Bhabha*, for the applicant.

G. N. Joshi, with *B. J. Joshi*, for the respondent.

S. T. DESAI J. This reference under the Estate Duty Act raises a question of considerable importance and interest affecting the levy of estate duty on property which may be the subject of a *wakf-al-ulad*. The settlement, we have to consider, was created by Aishabai, a wealthy Memon lady who was a Hanifa Mohammedan. The facts are simple and we shall only give a broad outline of the relevant facts supplementing it if occasion demands. The deed of wakf, which we shall presently examine, was made on March 31, 1951. It accords with the requirements of the statute on the subject. There is permanent dedication of property for the benefit of the poor and other purposes recognized by the Musalman law as religious, pious or a charitable purpose of a permanent character. The ultimate benefit to the charity is postponed until the extinction of the descendants of the Wakif. There is the usual provision relating to maintenance and support of the settlor during her life-time and for the maintenance and support of her family consisting of her daughter and the children of that daughter from generation to generation. Mutavallis were appointed, the settlor herself being one, and the property was conveyed and transferred to them. The property settled by the Wakifnama consisted of 12 immoveable properties of large value and a sum of Rs. 1 lac. It is the provisions for maintenance contained in the deed that have given rise to the dispute between the Revenue and those who represent the estate of Aishabai. The settlor reserved for her maintenance during her lifetime 62½ per cent. of the net income, 3½ per cent. of the income was given to her daughter Khatizabai for her maintenance

1 [1899] A.C. 198.

2 [1936] A.C. 569.

3 [1929] 1 Ch. 327.

4 [1950] 1 Ch. 467.

5 [1914] A.C. 765.

6 [1956] 1 All E.R. 14.

7 [1958] 2 All E.R. 720.

8 [1898] 1 Q.B. 318.

9 [1945] Ch. 285.

10 [1937] A.C. 174.

and the remaining 34½ per cent. was given for the maintenance of Khatizabai's children, the share of each male child being double that of each female child. Clauses 5 and 6 of the deed are material and relate to reservation and dispositions after the demise of the settlor:

"5. From and after the demise of the Wakif, the Mutavalis shall out of the said 62½ per cent. of the net income hereinabove directed to be paid to the Wakif set apart 9½ per cent. and add the same to the said 3½ per cent. of the income hereinabove directed to be paid to the said Khatizabai and shall add the remaining 53½ per cent. to the said 34½ per cent. . . . to be distributed among the children of the said Khatizabai and their descendants so that after the death of the Wakif, 12½ per cent. of the nett income shall be paid to the said Khatizabai and the remaining 87½ per cent. of the nett income shall be distributed among the children and descendants of the said Khatizabai in the same manner and to the same extent as hereinabove mentioned in clauses 4(b) and 4(c) hereof for the benefit of the said Khatizabai and her children and their descendants respectively.

6. From and after the death of the survivor of them the Wakif and the said Khatizabai, the whole of the nett income shall be dealt with and distributed amongst the children of the said Khatizabai and their descendants in the same manner and to the same extent and in accordance with the same proportion and method of distribution as hereinabove mentioned in clause 4(c) hereof."

Reference may briefly be made to the sum of Rs. 1 lac settled by the deed. The Mutavalis were directed to credit that sum of Rs. 1 lac to an account called "Extraordinary heavy repair fund account" and invest the moneys so credited in such security or securities as they may think fit. The Mutavalis would be at liberty to make use of and apply the moneys to the credit of the said account as may be required.

Aishabai, the settlor, died on August 2, 1954. The Collector of Estate Duty included all the properties in the estate duty assessment under s. 12 of the Act. With regard to the sum of Rs. 1 lac also, he took the view that the sum was credited to an account as directed and the moneys had been invested in Government paper, but the income from the investment had been enjoyed by the deceased and her daughter and grand-children in the same proportion in which they enjoyed the income from the settled properties. Being of that view, he assessed that sum of Rs. 1 lac also to duty under s. 12 of the Act. The matter was carried in appeal to the Central Board of Revenue. The contentions which are pressed before us were raised by the parties before the Board and we shall presently examine them. The Board rejected the appeal and the applicant has come before us on this reference.

The question we are asked to determine is:

"Whether in the facts and circumstances of the case, the entire Wakf property (including the sum of Rs. 1 lakh) or only 62½ per cent. of the Wakf is chargeable to estate duty?"

On this question, numerous points arise for discussion. To state it without refinement, the principal and the crucial question is what property passed on the death of the settlor? The contention in the fore-front of the argument of Mr. Palkhivala, learned counsel for the applicant, has been that there was actual passing of the interest of Aishabai, the settlor, on her death. That interest being 62½ per cent. of the income, the property that can be brought to death duty can only be 62½ per cent. of the corpus and not the whole of it as held by the Board. Reliance has been placed on s. 5 of the Act and the main argument is that s. 12 on which the Revenue has taken its stand—and which is one of the provisions relating to "property which is deemed to pass"—has been erroneously applied by the Board. The archstone of the contention is that the law on the subject laid down in ss. 1 and 2(b) of the English Finance Act, 1894, which deals with estate duty is the same as laid down in the relevant provisions of our Estate Duty Act and in support of the contention counsel has relied on certain decisions of Courts in England and particularly on the case

of *Earl Cowley v. Inland Revenue Commissioners*¹. The contention of the Revenue is that the whole corpus passed on the demise of Aishabai. It is urged that the decision of Courts in England on the question are on sections which are not wholly similar and what is stressed is that though a number of provisions of the English enactment have been adopted in the Estate Duty Act, the scheme of the latter enactment is different. It will facilitate the appreciation of the rival contentions if we start with an examination of the scheme of our Act. Before turning to the decisions of Courts in England very strongly relied on by Mr. Palkhivala, it seems convenient and indeed necessary to gather the meaning and effect of the relevant provisions of our Act read in their proper context and having regard to the scheme of the Act. The material language of the sections has always in these matters to be borne in mind before seeking aid and guidance from observations made in the course of interpretation of analogous provisions even though they are *in pari materia*. Of this more hereafter.

To turn to the scheme of the Act and the provisions with which we are mainly concerned on this reference. The estate duty is imposed by s. 5, which is the charging section and the relevant part of it is in the following terms:

"5. (1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the States specified in the First Schedule to this Act, which passes on the death of such person, a duty called 'estate duty' at the rates fixed in accordance with section 35."

The section applies to the case of every person dying after the Act came into operation. It speaks of the imposition of levy and payment of the same which is to be upon the principal value of property to be ascertained in accordance with certain other provisions of the Act. It embraces property settled as well as not settled and it touches property on the death of a person. The expression "property" is defined in s. 2(15) as including

"any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale and also includes any property converted from one species into another by any method;"

The expression "settled property" is defined in s. 2(19) to mean:

"Property which stands limited to, or in trust for, any persons, natural or juridical, by way of succession, whether the settlement took effect before or after the commencement of this Act;"

The expression "Property passing on the death" has been defined in s. 2(16) which is as under:

"'Property passing on the death' includes property passing either immediately, on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and 'on the death' includes 'at a period ascertainable only by reference to the death';"

It will be noticed that the word "passing" has not been defined in the Act, and what is the meaning of the word "passing" is perhaps the only point about which there is no controversy in this reference. Learned counsel for the applicant and learned counsel for the Revenue are agreed that the meaning of the expression "passing" in the Indian enactment is the same as has been given to that word in decisions of Courts in England. It is clear that the expression "passing" is not used in the Act in any technical sense. It has been held that the very general word "passes" is not a technical word but one capable of the widest possible meaning and has been used as language to be understood by ordinary people and not in a technical sense. Again it has been said that the expression "passing on death" which is not further defined is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. It has also been said that

¹ [1899] A.C. 198.

changing of hands may convey the meaning of passing of property. The oft-quoted meaning of this expression is this: To ascertain whether a property had passed, the comparison must be made between the persons beneficially interested the moment before the death, and the persons so interested the moment after the death. This definition given by Lord Russell in a House of Lords case has not been improved upon by any Judge, and with respect, the identical expression in our enactment has the same meaning.

The purpose and object of Parliament was to impose a levy on property passing on death of a person, and Parliament being fully conscious of human ingenuity and devices that might be adopted to avoid the operation of the imposition has proceeded to lay down a catena of rules headed "property which is deemed to pass". This has been done in sections which immediately follow s. 5. It will suffice at this stage to state some of those sections (6 to 16) to gather an idea of the scheme of the Act and while doing so we shall set out ss. 9, 10 and 12 on which certain arguments have been advanced before us:

"6. *Property within disposing capacity*.—Property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death.

7. (1) Subject to the provisions of this section, property in which the deceased or any other person had a interest ceasing on the death of the deceased shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cesser of such interest, including, in particular, a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Altyasantana law.

8. *Gifts mortis causa*.—Property taken as a gift made in contemplation of death shall be deemed to pass on the donor's death.

9. *Gifts within a certain period before death*.—(1) Property taken under a disposition made by the deceased purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, settlement upon persons in succession, or otherwise, which shall not have been *bona fide* made two years or more before the death of the deceased shall be deemed to pass on the death:...

(2) The provisions of sub-section (1) shall not apply to gifts made in consideration of marriage or which are proved to the satisfaction of the Controller to have been part of the normal expenditure of the deceased, but not exceeding rupees five thousand in the aggregate.

10. *Gifts whenever made where donor not entirely excluded*.—Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that *bona fide* possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise:

12. *Settlements with reservation*.—(1) Property passing under any settlement made by the deceased by deed or any other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor or whereby the settlor may have reserved to himself the right by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property shall be deemed to pass on the settlor's death:

Provided that the property shall not be deemed to pass on the settlor's death by reason only that any such interest or right was so reserved if by means of the surrender of such interest or right the property is subsequently enjoyed to the entire exclusion of the settlor and of any benefit to him by contract or otherwise, for at least two years before his death.

Explanation.—A settlor reserving an interest in the settled property for the maintenance of himself and any of his relatives (as defined in section 27) shall be deemed to reserve an interest for himself within the meaning of this section.

(2) Notwithstanding anything contained in sub-section (1) where property is settled by a person on one or more other persons for their respective lives and after their death, on the settlor for life and thereafter on other persons and the settlor dies before his

interest in the property becomes an interest in possession, the property shall not be deemed to pass on the settlor's death within the meaning of this section.

13. *Joint investments*.—Where a person, having been absolutely entitled to any property or to the funds with which any property was purchased, has caused it to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, either by himself alone, or in concert, or by arrangement, with any other person so that the beneficial interest in some part of that property passes or accrues by survivorship on his death to the other person, the whole of that property shall be deemed to pass on the death."

Section 11 deals with limited interest disposed of within a certain period before death. Section 14 deals with policies kept up for a donee. Section 15 relates to annuity or other interest purchased or provided by the deceased. Section 16 relates to annuity or other interest purchased or provided out of property derived from the deceased. Section 17 brings within the field of taxation property transferred to a controlled company. Although, the ss. 6 to 16 were headed "property which is deemed to pass" and proceeded to embrace all types of property and interest in property, there was no express provision in the Act when enacted in 1953 that duty was leviable on property deemed to pass. A plain reading of s. 5 would have meant that the section only touched property which would ordinarily pass on the death of a person under the general law. In a taxing statute this was a serious lacuna and that was amended by the Finance Act of 1954 by adding sub-s. (3) to s. 3:

"For the avoidance of doubt, it is hereby declared that references in this Act to property passing on the death of a person shall be construed as including references to property deemed to pass on the death of such person."

We have examined the scheme of the English enactment and it will be convenient here to dispose of the argument urged on behalf of the Revenue that the scheme of our Estate Duty Act is different from that of the English Finance Act of 1894. Section 5 of the Estate Duty Act is *in pari materia* with s. 1 of the English statute. Section 2 of that enactment deals with what property is deemed to pass and the initial words are: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say..." Then follow a series of clauses the language of which has been substantially adopted in similar provisions relating to "Property which is deemed to pass" enacted in ss. 6 to 16 of our Act. The reason for enacting s. 3(3) becomes manifest when it is noticed that in the English enactment the initial words of s. 2 clearly brought out the operation of the provisions relating to property deemed to pass. It is not necessary to go into a detailed comparison of all the relevant provisions of the enactments and it will suffice to observe that the scheme of the two enactments is substantially the same. Certain provisions of the two enactments particularly those to which reference has been made in the argument before us and with which we are here concerned are also substantially the same. They are *in pari materia*. Section 9 of our Act corresponds to s. 38(2)(a) of the Customs and Inland Revenue Act of 1881. Certain provisions of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, were incorporated by reference in s. 2(1)(c) of the Finance Act of 1894. Section 10 of our enactment also has a corresponding provision in the English Act. Section 12 of our Act corresponds with s. 38(2)(c) of the Customs and Inland Revenue Act, 1882, as amended by s. 11 of the Customs and Inland Revenue Act, 1889. Section 13 of our Act corresponds to certain provisions in the Customs and Inland Revenue Act mentioned above. The wording of the relevant sections in the English enactment has been freely, and in most cases bodily, adopted in the Estate Duty Act. On analogous provisions of the Indian law unaffected by the specialities of the English law and on fundamental concepts and on broad general principles, decisions of Courts in England, can, therefore, be useful and of considerable guidance if utilised with due care and caution. While we do not accede to the argument of Mr. Joshi that the scheme of the two Acts is

different, we agree that the provisions of our Act must be understood in their background and setting, and in interpreting them regard must be had to the conditions, customs and religious beliefs of those affected by the provisions. In a branch of the law, rules of which are inspired by the broad general principles of the English law on the subject and are so adopted as to be *in pari materia*, reference to the decisions under that law can be of great importance. Danger, however, lies in phrases used aptly enough, no doubt, in a particular context and opinions weighty and useful in their own sphere and context being treated as expressing doctrines of universal application or adopting those principles as riders to the actual statutory language. The rule of construction relating to provisions of enactments *in pari materia* is one of great convenience and aid from outside may legitimately be derived when any doubtful point of interpretation of any provision has to be solved. But reference to it simply on the ground of similarity has to be avoided. Rigid adherence to any of those decisions must be deprecated and particularly when they have some bearing on the English law of property with its highly technical and overrefined rules affecting realty which operated when the English enactment came into force.

It is well settled that it is incumbent on the Revenue to establish that its claim comes within the very words used and the subject cannot be taxed unless there are words clear enough to impose taxation. The presumption is that the Parliament has granted precisely that tax to the Revenue which it has described and no more. The burden is upon the Revenue to bring the subject within a charge. This does not mean that there has to be any discrimination against the Revenue or deliberate weighing in favour of the subject. The observations of Rowlatt J. so often quoted in income-tax matters are appropriate to the subject of death-duty and have been cited with approval by the House of Lords in England as equally applicable in Estate Duty cases:

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Nor is there anything like an equitable construction of a statute. It has often been said, and this Court also has often said, that in a taxing statute, we have no governing principles to look at. We have simply to go on the Act itself and see whether the levy claimed under it is that which Parliament has enacted. It is not for us to approach the case with considerations of what is fair and what is equitable or permissible. Of course, the Court will not readily accept that any glaring injustice could have been intended by the law-maker. One safe guide is to see what is the meaning of the words used in the statute when they are plain and unambiguous and do not lead to ambiguity or repugnance. The safest and infallible guide to the interpretation of any legislation is to gather all that the Legislature itself has thought necessary to say about the matter or subject.

It is in the light of these observations that we shall in the first instance proceed to read the vital clauses of the statute relevant to our enquiry and see if we can ascertain the intention of the law-maker in enacting ss. 5 and 12 uninfluenced by any extrinsic evidence. Now, we have already set out s. 3(3) and ss. 5 and 12 of the Act and it is evident that for the purpose of the present reference, they must be read together. It will be convenient to write out the material part of s. 5 with the rule of interpretation enacted in sub-s. (3) of s. 3 and then consider it with s. 12. In that way, the material part of s. 5 would read as under:

"In the case of every person dying after the commencement of this Act, there shall ...be levied and paid upon the principal value ascertained...of all property, settled or not settled...which passes on the death of such person—including property deemed to pass on the death of that person—a duty called 'estate duty' at the rates fixed in accordance with section 35."

Sections 5 to 17 are in Part II of the Act and that Part is headed "Imposition of Estate Duty." The heading of s. 5 is "extent of charge" and the heading of ss. 6 to 16 is "property which is deemed to pass." One thing is clear from the incorporation of sub-s. (3) of s. 3 by the amendment made in 1954 that any of the provisions relating to property which is deemed to pass have to be read along with s. 5, and not in any manner divorced from s. 5 or in water-tight compartments. So read, s. 12, to our mind, is plain legislation. There is no ambiguity about it; there is no repugnance about it and there is no expression in it which can be said to cause any difficulty of interpretation, or any doubt about the intention of the law-maker. Read in the context of s. 5, the only meaning that can be given to the part of it relevant for the purpose of this reference seems to us to be this: In case of any settlement made by the deceased by a non-testamentary instrument in respect of any property if the settlor has reserved any interest in such property for life, his absolute interest in such property would be deemed to pass on his death. It is clear that the Legislature has in enacting this section ruled that where in case of settlement of any property made by the settlor he has reserved to himself any interest in such property for life, not merely the interest so reserved, but the whole of such property in which that interest was reserved shall be deemed to pass on his death. We put this to learned counsel for the applicant and the answer was that the language of the corresponding provisions in the English enactment is *in pari materia* and the general proposition which he has advanced for our acceptance is equally applicable to the provisions of s. 12. It is said that if that general proposition is right, then s. 12 would not govern this case. We shall presently examine that general proposition which is to the effect that if a case falls directly under s. 5 and there is actual passing there is no scope for applying any of the 'deeming' provisions. In the absence of any overriding principle or compelling authority the conclusion would be irresistible that the Legislature has laid down in s. 12 the special rule that in case of a settlement of any property with reservation although less may pass by application of the general rule laid down in s. 5 (only interest which was reserved) the whole of such property of the settlor the subject-matter of the settlement in which he has reserved any interest for life, shall none the less be deemed to pass. The language of the section and the plain, fair and literal meaning of it does not present any doubt or difficulty. We have, therefore, to see if there is any overriding principle which requires that we should depart from the cardinal rule of interpretation according to which the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or some inconsistency with the rest of the enactment.

The principal contention pressed before us by Mr. Palkhivala, learned counsel for the applicant, is that distinction has to be drawn between "actual passing" of property or any interest in such property and "deemed passing of property". In the former case, it is said, s. 5 must be applied to the exclusion of any of the provisions relating to all property which is deemed to pass under any of the ss. 6 to 16; and this must be so even if the case falls wholly within the ambit of any such provision contained in any of those sections. If the property or any part of the property passes on death, it is not permissible to refer to any of those sections—no matter what they say—because they speak only of what is deemed to have passed. The argument is that in the Act there are two categories of rules: the provisions in s. 5; the other the provisions of ss. 6 to 16; and the two categories, it is emphasised, are mutually exclusive. It has been urged that where under a settlement like the one before us, a specific percentage of income—an aliquot share of the income—of the property is reserved to the settlor under a settlement made by him, what can be brought to charge is not the absolute interest which the settlor had in that property but only a proportionate part of the corpus. Here, the specific percentage of the income reserved was 62½ per cent. and, therefore, 62½ per cent. of the property can be brought to charge under s. 5. The fact

that the case is wholly covered by the language and scope of s. 12 which expressly deals with such a settlement and such reservation of interest, it is said, is of no consequence.

The whole argument has rested on the decision of the House of Lords in *Earl Cowley's* case on which counsel has heavily leaned and we shall now turn to examine the facts of that case and state the *ratio decidendi* of it. In that case, father and son, tenant for life and tenant in tail respectively, executed a disentailing deed by which they granted the estate to a trustee to hold freed from the estate tail to such uses as they should jointly appoint. In exercise of that power father and son mortgaged the estate in fee simple to a company to secure a loan part of which was advanced for the benefit of the father and part for the benefit of the son. With part of the loan prior incumbrances on the father's life estate were paid off, and the company took an assignment of the debts and all the assignor's rights and powers of recovery as further security for the loan. Father and son then executed a deed of resettlement by which the estates were charged with an annuity to the son payable during the father's life and subject thereto were declared to be held in trust for the father for life and after his death for the son for life with remainders over. Upon the father's death in 1895, the Crown claimed from the son under the Finance Act, 1894, estate duty upon the gross value of the estates without allowing any deduction in respect either of the mortgage to the company or of the annuity which ceased with the father's life. It was held that the settlement which passed to the son on the father's death was not the entire estate but only the equity of redemption and the estate duty was, therefore, payable only on the equity of redemption. The *ratio decidendi* of that case evidently is that in case of a deed of settlement of the nature which was under consideration, if there were prior encumbrances and an annuity reserved what would pass on the death of the annuitant cannot be the whole estate but only the equity of redemption. In the course of his speech in that case Lord Macnaghten, however, made certain observations which dicta have been considered thereafter in a number of cases. Since so much reliance has been placed on the dicta of Lord Macnaghten in that case, we shall first turn to the observations made by that eminent Law Lord at pp. 212-213 of the report:

"...But s. 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section. For property in the lifetime of the deceased subject to a charge or interest which ceased on the death must of course pass free from that charge or interest. And, so passing, it must of course be valued accordingly. That is s. 1. You do not want s. 2 for that. You cannot resort to s. 2. For that would be giving the duty twice over. The Crown cannot have it both ways. Double duty is forbidden by the Act."

Lord Davey agreed in that case with the views expressed by Lord Macnaghten as to the construction of the Act. Lord Chancellor Lord Halsbury observed at p. 207:

"I see no ground for dealing with s. 2, since, for the reasons I have given, I think it is s. 1 to which you must look to see what property real or personal, settled or not settled, passed upon the death of the second to the third Earl; but if I were compelled to give a construction to s. 2 sub-s. 1(b), I should come to the same conclusion in respect of the liability to duty, since I think the benefit accruing or arising to the third Earl was only to the extent of the value of the equity of redemption. But, as I have said, the question must be determined on s. 1 alone."

It will be seen that the Lord Chancellor did not express any view as to the dicta of Lord Macnaghten and confined his opinion strictly to the question whether the duty could be imposed on the whole estate or only on the equity of redemption. Lord Morris also in his speech confined his opinion to the question of equity of redemption passing on the death of the father. Lord Shand also in that case confined his opinion to the same point. It is the dicta of Lord Macnaghten that have been relied upon by Mr. Palkhivala. Now, the history of those dicta of Lord Macnaghten is very interesting and requires to

be noted. But before we do so, it will be convenient if we refer to cases to which our attention was drawn by learned counsel on

Section 1 and sub-s. 1(b) of s. 2 of the English enactment all consideration in *Christie v. The Lord Advocate*². In *Earl Cowley* the sections under consideration were s. 1 and sub-s. 1(b) of s. 2 of the Report, Lord Russell of Killowen referred to the dicta of Lord Macnaghten in *Cowley's* case and observed that the property which passed on death in that case fell within the ambit of s. 1 of the Act. It was also cited for the purpose of showing that a percentage of income of the subject-matter of the settlement, can be reserved by a settlor necessary that he should reserve to himself any specific parcel of the subject-matter of the trust-deed, to invite the operation of

Northcliffe In re: *Arnholme v. Hudson*³ was another decision. That case was also cited for the purpose of showing that a specific percentage of income as residuary may be reserved by a settlor in the settlement of the trust and it was not necessary that any specific parcel of the subject-matter should be reserved.

Another case to which our attention was drawn by Mr. Palkhivala of *Norfolk*, In re: *Public Trustee v. Inland Revenue Commission* of that case were somewhat peculiar. One continuing annuity was charged on that property of the annuitant. The dicta of Lord Macnaghten were considered by the Court of Appeal. It was held that an annuity charged on property, nor is it equivalent to an interest in proportion of the capital charged sufficient to produce its yearly amount on the annuitant and the Crown is not entitled to charge duty under s. 38(2)(c) of capital ascertained by means of calculations on the lines prescribed in sub-s. (7). Our attention has been drawn by counsel to observations of the learned Lord Justices and particularly of Lord Macnaghten. Those observations do not carry the matter any further. We point out what Dymond in his treatise on Death Duties has to say on the application of the dicta of Lord Macnaghten to cases of joint tenancies and other provisions where property is deemed to pass.

Before reverting to *Cowley's* case, we may refer to certain observations of Green's work on Death Duties at p. 127 which were relied on

"If the property actually passes on the settlor's death, duty is payable under s. 38(2)(c) is not in point. Thus in *Inland Revenue v. Angus's Trustees* settled property on trust during his life to pay an annuity to his wife for life; and after his death, in the events that happened, it passed to the wife for life. It was held that the whole of the settled property passed under s. 1."

There is nothing in these observations of Green which support the observations of Mr. Palkhivala. It is true that the dicta of Lord Macnaghten in *Cowley's* case were applied in England in some cases where question arose of the application of sub-s. 1(b) of s. 2. But the application of the dichotomy of Lord Macnaghten has not been carried further than that.

There are observations of Lord Dunedin in *Attorney-General v. The Trustees of the Scottish Widows' Fund* which are very instructive on the question before us and we mention them *in extenso* (pp. 774-775):

"The paramount enacting section of the Act is undoubtedly to be s. 38(2)(c). The duty which it is the object of the Act to levy is imposed on property, settled or not settled, which 'passes' on the death of any person on the commencement of the Act. Now, although the word 'passes' is what I consider a rather vague word, it is so naturally associated with the idea of 'from the death' so directs attention to the death of a person who leaves prop-

² [1936] A.C. 589.

³ [1922] 1 Ch. 327.

⁴ [1950] 1 Ch. 467.

^{4a} [1951] S.L.T. 57, 60.

⁵ [1914] A.C. 765.

that had that section stood alone it is reasonably clear that much property would have escaped which the framers of the Act wished to tax. Accordingly we have s. 2. That section was authoritatively discussed in your Lordships' House in the case of *Earl Cowley*. Whether Lord Macnaghten was strictly correct or not in saying that the two sections were mutually exclusive seems to me to matter little. At any rate—and that is all that is material—s. 2 sweeps into the net various things which s. 1 would have failed to secure, or as Lord Watson put it in the case of *Attorney-General v. Beech*,⁵ 'it extends it to all cases where a survivor of the deceased takes a succession, or I should say rather, derives a benefit by reason of the death of the deceased dependant upon and emerging upon the death of the deceased.'

How does s. 2 do this? It does not do it by being conceived in the words of a taxing section imposing the duty on certain specified kinds of property. It does it by saying that property passing on the death of the deceased—which is already taxed by virtue of s. 1—shall be deemed to include the property following, that is to say—and then follow the various sub-sections.

It seems to me that that is as much as to say that the words, 'property passing on the death', in the 1st section, are to be read as if the words, 'including the property following, that is to say'—(and then all the sub-sections)—had been there inserted. In other words, I do not think that any one can criticize Lord Macnaghten because in *Cowley's* case he talks of property being 'deemed to pass,' although that expression is not actually used. The net result is that the expression, 'property which passes', in the 1st section, must include property which is deemed to pass by virtue of the 2nd section—for s. 1 is the only taxing section."

We have already made some observations on s. 3(3) of our Act and the effect of that section. We have also pointed that s. 5 is to be read as if ss. 6 to 16 had been inserted in it. The observations of Lord Dunedin, though extremely guarded, are pertinent to the question before us and this much is clear that Lord Dunedin for himself was not prepared to subscribe to the view that ss. 1 and 2 of the English enactment were mutually exclusive.

In a number of other cases observations were made about the dicta of Lord Macnaghten, but it is not necessary to burden this judgment with all those observations. We shall refer to only some of those observations.

In the case of *Sanderson v. Inland Revenue Comrs.*,⁶ Lord Radcliffe struck a discordant note and found himself unable to agree with the dicta of Lord Macnaghten. He also quoted there certain observations of Lord Haldane in another case to the following effect:

"The principle is contained in s. 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in s. 1 to certain cases which are not in reality cases of changing hands on death at all..."

He also quoted an observation of Lord Haldane L.C., in *Attorney-General v. M'Innes*. The observation of Lord Haldane was:

"Section 2 is thus not a definition section but an independent section operating outside the field of s. 1."

Lord Radcliffe wound up his observations on the dicta of Lord Macnaghten by observing:

"I think that we may safely resign these passages to the list of the many minor mysteries of the law."

The passages referred to by Lord Radcliffe are the passages which we have quoted. But the suggestion is that the observations made in those passages were not in harmony with the dicta of Lord Macnaghten and those dicta may desirably be forgotten.

The question cropped up once again in a very recent case before the Court of appeal in *Public Trustees v. Inland Revenue Commissioner*.⁷ That also we may point out was a case not under cl. (1)(a) of s. 2 or cl. (1)(c) or cl. (1)(d) of s. 2 but cl. (1)(b) of s. 2. Lord Evershed M.R. it seems was considerably

⁵ [1899] A.C. 53 p. 59.

⁶ [1956] 1 All E.R. 14, 19.

⁷ [1958] 2 All E.R. 720.

impressed with the arguments which went counter to the dicta of Lord Macnaghten. He observes at p. 722 of the report:

"It cannot, I think, be disputed that the argument of counsel for the trustee has formidable and attractive points in its support."

The argument put forward on behalf of the trustees was characterised by the Master of the Rolls as a forceful contention. He also referred to the opinion expressed by Lord Radcliffe in the case to which we have already referred, but ultimately agreed with the view of Jenkins L.J. in *Duke of Norfolk* in re: that it was not open to the Court to depart from the construction placed on s. 1 and s. 2 over fifty years ago by the House of Lords in *Earl Cowley's* case. The Master of the Rolls has also observed in this most recent case that on well recognised principles, it would not be right for the Court of Appeal to treat the matter as thrown open by Lord Radcliffe's observation since Lord Macnaghten's speech had been hallowed by those who practised in this branch of the law. He also added that the Court of Appeal was bound by the view expressed in the speech of Lord Macnaghten.

To go back to *Cowley's* case. Dymond in the 12th edn. of his well-known treatise observes at p. 58:

"Usually, property of which the deceased was competent to dispose actually passes on his death within the meaning of s. 1 of the Finance Act, 1894, and it has been laid down by the House of Lords that in such cases Estate Duty is payable under s. 1 and not under s. 2(1)(a) of the Act, the latter subsection only applying to property of which the deceased was competent to dispose but which does not actually pass on his death... This is not of much practical importance, since the charge for duty under s. 1 and s. 2(1)(a) is normally the same, and, as regards accountability, the executor is accountable under the Finance Act, 1894..."

At p. 53 there are some pertinent observations made by Dymond. After referring to the principle in *Cowley's* case, he states:

"...The principle has been applied... to cases of continuing annuities, where the liability to duty of the annuity itself under s. 1 was held to preclude liability to duty under s. 2(1)(b) of the property on which it was charged... It is not altogether clear how far the repercussions of this principle extend."

Dymond observes at p. 94:

"Except where annuities subsisted during the life of a deceased life-tenant, the distinction between s. 1 and s. 2(1)(b) is rarely of practical importance, for the combined effect of s. 2(1)(b) and s. 7(7) of the Act is that the property or 'slice' of property, to which the ceasing interest extended, is not only deemed to pass but is taxed on the same basis as if it actually passed."

It is to be noted that the practical importance of the distinction drawn between s. 1 and s. 2(1)(b) is regarded in England as of little practical importance. It is now treated as of theoretical rather than practical importance. Again at p. 104, Dymond observes in examining the distinction between s. 1 and s. 2(1)(b):

"...It is not entirely clear how far this principle goes, but it does not apply to a life interest in an aliquot share of income..."

There is a case to which we have so far not made any reference and that is the case of *Attorney-General v. Earl Grey*⁸. Mr. Palkhivala himself drew our attention to this case and observed that presumably the Department would strongly rely on the same. In that case s. 38(2)(c) of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889 (and which corresponds to s. 12 of our Act) came up for consideration and at p. 325 of the Report Channel J. said that any reservation of interest however small was sufficient to bring the property within the ambit of s. 38(2)(c) provided the interest issued out of that property. Much has been said about *Grey's* case in some later decisions in England, but it is not necessary for us to go in any detail over the matter.

At p. 185 Dymond refers to the case of *Hey's Settlement Trusts*, In re: *Hey v. Nickell-Lean*⁹. In that case the deceased on his marriage settled property on trust to pay the income to his wife for life and on her death for himself for life with an ultimate trust for his children and it was provided that the income paid to the wife was to be used for household expenses and management. The marriage lasted fifty-seven years and the whole income was in fact applied by the wife for her personal purposes. The Court of Appeal confirmed the decision of the Court of first instance and held that on the facts the husband had reserved an interest for his life and Estate Duty was payable under s. 2(1)(c) of the Finance Act, 1894. We have already mentioned that s. 2(1)(c) incorporates in s. 2 *inter alia* the provisions of s. 38(1)(c) of the earlier Customs and Inland Revenue Act and substantially corresponds to our s. 12.

There is considerable force in the argument tersely and ably pressed for our acceptance by Mr. Joshi, learned counsel for the Revenue, that there is no warrant for introducing in the relevant provisions of our Act—particularly in view of s. 3(3)—the concept of mutually exclusive categories as stated in the dicta in *Earl Cowley's* case and that on a proper construction of ss. 5 and 12 read together that which is notional passing of property must be treated for all purposes as actual passing of property on death of the settlor. We agree with counsel that the correct approach to the whole matter should be to “look at the Deed of Waqf; look at the disposition; and see under what section the case falls.”

Even the *obiter dicta* of such an eminent Judge and legal luminary as Lord Macnaghten are entitled to very great respect. In this Court we have read the speeches of Lord Macnaghten with very great respect for the exposition of jurisprudential concepts by that great Judge. But in the case before us we must read his dicta in *Lord Cowley's* case in the light of all that has been said about them in subsequent years and without in any manner digressing from the language of our enactment.

Now, the *ratio decidendi* of *Cowley's* case is that in case of a settlement made by a tenant for life and a tenant in tail of property on which prior incumbrances exist what passes on the death of the tenant for life is not the entire estate but only the equity of redemption and estate duty is payable only on the equity of redemption under s. 1 of the Finance Act, 1894. The celebrated dichotomy between s. 1 and s. 2(1), it is true, is ‘enshrined’ in the speech of Lord Macnaghten. But the dicta should be confined to a case under s. 1 and s. 2(1)(b) of the English enactment. They were certainly not made in considering or in the context of the other sub-clauses in s. 2. But that is how Mr. Palkhivala wants us to read the English decisions. It has been observed that there are formidable considerations which support the other view that s. 1 and s. 2(1)(b) are not mutually exclusive. In the case reported in *Public Trustee v. I. B. Comrs.*, Lord Evershed speaks of the well-recognised principle of finality for feeling compelled to reach the conclusion that the applicability of the dicta should not be disturbed. The concept is akin to the doctrine of *stare decisis*.

In this state of the law on the point in England we do not think we would be justified in constraining ourselves to adhere to the binary classification of Lord Macnaghten. It seems impermissible to us to accept that dicta as applicable to all cases of property deemed to pass. In any case there is no warrant for extending that dichotomy even assuming it is to be introduced in interpreting the Finance Act—in our opinion, respectfully, that should not be done—to cases of settlements with reservations which evidently fall under s. 12 of the Act. It is not for us to express any opinion on what is in England a debatable matter, nor is it necessary for us to prefer one view or the other as between the celebrated dicta of Lord Macnaghten on the one hand and on the other hand the contrary view expressed by Lord Radcliffe—to some lawyers in England that view may perhaps seem somewhat radical—when he observed

that the time-honoured dicta must be resigned "to the list of many minor mysteries of the law". The observations of Lord Dunedin, which we have quoted *in extenso*, seem to us to be a surer foundation for cases which fall for determination under s. 12 of our enactment. Section 12, as we read it with the Explanation to it, sweeps wholly into the net of s. 5 property the subject-matter of settlements with reservation there indicated and particularly waqfs of the nature before us.

There is another and an important aspect of the same matter. The argument of Mr. Palkhivala, when analysed comes to this:—(1) The provisions of the two Acts are in *pari materia*: It is now accepted law in England that s. 1 and s. 2(1)(b) are mutually exclusive; (2) Section 2(1)(b) is a provision relating to property to be deemed to pass on death; (3) the other provisions of s. 2(1)(a), 2(1)(c) and 2(1)(d) are also provisions relating to property to be deemed to pass on death. Therefore, the moment it is shown that in a given case there is actual passing, of the property, none of the provisions relating to property to be deemed to pass can have any application. They must be excluded from consideration because ss. 1 and 2(1)(b) are mutually exclusive. There can be many answers to this syllogism of which the premises themselves are highly debatable. We shall only mention one or two answers since we are only concerned with the interpretation of s. 12 of our Act read with s. 5 of it. Firstly, no such analogy is really permissible in interpretation of statutes. Secondly, the argument assumes many points. Section 12 speaks of property to be deemed to pass and it is of vital importance to note what is it that is to be deemed to pass. The expression "deemed" is used a great deal in many modern statutes and for many purposes. It is at times used to give a special glossary or paraphrase to an expression or an artificial construction to a word or a phrase. It is at times used to introduce artificial conceptions which are intended to go beyond settled legal principles. It is at times used to remove uncertainty or leave no scope for doubts and debates which may involve refined and ingenious points. At times it is used to give extended or restricted operation to a rule which cannot be given to it if it be read as enacted. This last is of considerable importance when the Legislature lays down a rule the extent and operation of which according to ordinary canons of construction would be confined—we shall take an illustration close to the case before us—to property or interest in property of a particular nature or type or class and the intention is that the rule should have wider extent and embrace more than what it states. In such a case the Legislature may well lay down and add that more than what is stated in the rule shall be deemed to be included in the meaning and concept of the words or phrase used in the rule. In such a case the language of the rule notwithstanding the operation and extent of it is widened by the 'deeming' provision. This is precisely what the Legislature has done by enacting s. 12 and the ambit of s. 5, the charging section, has been expressly extended by s. 3(3) to include what is stated in s. 12. We may quote the following observations of the Supreme Court, although they are made in a different context in *The State of Bombay v. Pandurang Vinayak Chaphalkar*.¹⁰

"...When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion" (p. 778).

Their Lordships of the Supreme Court went on to quote a passage from a judgment of Lord Asquith which has already become *locus classicus*. It is not necessary in the present context to reproduce that passage.

There is no overriding principle to be spelt out from the decisions of Courts in England under the analogous legislation, and s. 12 of the Estate Duty Act read with section 5 must lead to the inescapable conclusion that the statutory

fiction laid down in it must be resorted to and full effect must be given to the language employed. The language does not point to any binary classification. There is no reason why we should deliberately impose upon ourselves any construction of the nature pressed for our acceptance by Mr. Palkhivala. In the course of the arguments before us we put it to Mr. Palkhivala that if his contention were accepted no case of a settlement of the nature before us would invite the operation of s. 12 however large or however small the interest reserved for life by the settlor may be and the answer was that such would be the position wherever there was any actual passing of interest howsoever slight it may be. We do not think that the contention is sound. Nor do we think that the decisions so strongly relied on point to any such broad general principle applicable to all the provisions of our Act enacted in ss. 6 to 16 and in particular s. 12. The intention of the law-maker has been expressed in language of sufficient clarity and precision and effect must be given to it. There is neither principle nor authority for departing from the fundamental rule of interpretation and we see no reason for doing so and launching into a sea of difficulties not easy to fathom. The sure conclusion seems to us to be that s. 12 wholly governs the case before us.

Another contention urged before us by learned counsel for the applicant was that s. 10 and not s. 12 should apply to the settlement before us. The argument here was rather feeble and somewhat involved. It was said that s. 9 in dealing with gifts includes any category of gifts *inter vivos*, actual gifts as well as those made through the instrumentality of trusts and settlements. Now, s. 9 cannot possibly be relied upon as foundation for any argument of the nature before us. That section clubs under one heading gifts and settlements which are not made *bona fide* and settlements which are made two years or more before the death of the deceased. Section 10, which we have already set out in the earlier part of our judgment, deals with gifts whenever made where the donor is not entirely excluded. It is true that to an extent ss. 10 and 12 may be overlapping. But in the case before us, as we shall presently point out, reference to s. 10 is impermissible. The argument has proceeded in this way: In s. 9 declarations of trusts and settlement upon persons in succession are dealt with under the head of gifts *inter vivos*. Therefore, in s. 10 gifts must be read in the same manner that is as including settlements and therefore, s. 10 must be read as applicable both to gifts and settlements with reservation.

The next step of this chain of argument is that since s. 10 must be read as dealing with settlements and since s. 12 also deals with settlements, ss. 10 and 12 apply to all cases of settlements and on those premises the ultimate argument is that the general principle of lighter burden should be applied to the present case. In England the view has been expressed that when on the same facts a case falls under two provisions, the option lies with the Crown to exclude benefit under the provisions imposing lighter duty and proceed under the provision which imposes a larger levy. Mr. Palkhivala has, however, relied on the principle favoured in decisions under the Indian Income-tax Act where it has been laid down that where on the same facts an assessee is liable to be taxed under two separate provisions, tax to be imposed upon him should be under the provisions which impose a lighter tax. In the case before us it is not necessary for us to express any opinion on this question in the context of estate duty since the view we take is that the whole argument is untenable. The argument wholly ignores the position that we are dealing in this case with a *wakf-al-ulad* and it is impossible to see how a *wakf-al-ulad* can be called a gift. It is true that under Mussalman law there can be a gift through the medium of a trust and the same conditions are necessary for the validity of such a gift as those for a gift to the donee direct with this difference that the gift should be accepted by the trustees and the possession also should be delivered to the trustees. Life interest and vested remainders are unknown to Muslim law, but life interest can be construed as an interest in the usufruct.

Successive life interests, however, may be created both under the Sunni and the Shia law in favour of even unborn persons by means of a wakf. Wakfs are a speciality of Muslim law. There is no element of gift in a wakf. The primary concept is that it is permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable. The concept of retention or detention is not wholly absent and is even permissible. A wakf extinguishes the right of the wakif and transfers ownership to God. The Mutavali is the manager of the wakf, but the property does not vest in him as it would in a trustee in the case of an ordinary settlement. Of course, as we have already mentioned in the case before us, there is the vesting of the property in the trustees. When we refer to the basic principles of the law of wakf and the provisions of the relevant statute validating certain wakfs, it is extremely difficult to see how it can be said that there is any gift in case of a wakf which gift can be brought within the ambit of s. 10 of the Estate Duty Act. A wakf of the nature before us must necessarily fall within the scope of s. 12 read with the Explanation to the same and that is the only section in the enactment which can apply to a *wakf-al-ulad*. In the view we take of the matter it is unnecessary to discuss the point in any detail.

It is lastly urged by Mr. Palkhivala that even if it be held that the provisions of s. 12 govern the case before us and the broad general principle enunciated by him is not applicable to it we must hold that in this case there is both actual passing and deemed passing of property. It is said that there is nothing in the Act to prevent any such principle being accepted by the Court. The argument has been that we must first give effect to what is described as "actual passing of property" viz. 62½ per cent. interest of Aishabai and then after carving it out we should take the view that the remaining 37½ per cent passed on the death of Aishabai by operation of the legal fiction enacted in 12. It has been stressed in support of this argument that there is no difference between ss. 10 and 12. Here also we may observe that the argument ignores the real nature of the wakf before us. But furthermore, the argument goes counter to the express language of s. 12. Section 12 states in terms express and explicit that in any case within its purview, it is the absolute interest of the settlor which was the subject-matter of the settlement that is to be deemed to pass on the settlor's death and not only the reserved interest. It is very difficult for us to see how we can introduce in the relevant provisions of the Act any idea of splitting up of the entire absolute interest of the settlor, the subject-matter of the trust, which in its entirety is deemed to pass on the settlor's death. There is no room for any such division. Learned counsel has not been able to point out to us any such procedure having been adopted in any case in England. There is no precedent and we see no principle or reason why there should be any such arbitrary division of the nature now suggested by learned counsel between actual passing and deemed passing in a case which falls under s. 12. This contention also must, therefore, be negatived. No separate argument has been urged in respect of the sum of Rs. one lac mentioned in the deed.

In the result, our answer to the question will be that the entire wakf property including the sum of Rs. one lac is chargeable to estate duty.

Applicant to pay the cost.

K. T. DESAI J. This Reference under s. 64(1) of the Estate Duty Act, 1953, raises an interesting question concerning the application of s. 12 of the Estate Duty Act, 1953. One Aishabai widow of Mohamed Saleh Haji Jackeria Patel, a Sunni Hanafi Mahomedan, died on August 12, 1954. Prior to her death, on March 31, 1951, she executed a deed of wakf. By that deed of wakf she appointed herself and two other persons as the Mutavalis and transferred to them 12 immovable properties and a sum of Rs. one lac. By the said deed of wakf she provided that after making all disbursements and meeting all out-

goings in connection with the properties, 10 per cent. of the net income of the said 12 immoveable properties was to be set apart every year for repairs that may be required to be done to the wakf properties and was to be credited in an account to be called the "Repairs Fund Account". In connection with the balance of the income, she provided by cl. 4 as under:—

"For and during the life time of the Wakf (Aishabai) the Mutawalis shall distribute and pay the balance of the income which remains after providing for the expenses mentioned in the above clauses hereinafter referred to as "the net income" amongst and to the following persons for their respective maintenance, support and benefit in the manner following, that is to say:

(a) 62½ per cent. of the net income shall be paid to the Wakf (Aishabai) for and during her life time.

(b) 3½ per cent. of the net income shall be paid to the said Khatizabai, the daughter of the Wakf for and during her life-time.

(c) The remaining 34½ per cent. of the net income shall be divided into as many parts as there may be children of the said Khatizabai so that the share of each male child shall be double that of each female and two such parts shall be given to each male child of the said Khatizabai or shall be applied for his maintenance, education, advancement and benefit and one such part shall be given to each female child of the said Khatizabai or shall be applied for her maintenance, education, advancement or benefit. From and after the death of each child of the said Khatizabai the part of the net income which such child was receiving in his or her life-time shall be paid to his or her children or remoter descendants in the same degree of propinquity so that each male child shall receive double the share of each female child for and during his or her life-time and such payment shall be continued to be made in the same manner as aforesaid from generation to generation."

There is an ultimate provision made for the benefit of the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. It is a *wakf-al-awlad*. Under the said deed of wakf the said sum of Rs. one lac is directed to be set apart and credited to an account called "Extraordinary Heavy Repair Fund Account". The moneys to the credit of that account are required to be applied for effecting and making alterations in and additions to the wakf properties, to meet expenses of constructing a structure or structures on any vacant plot or plots of land forming part of the wakf properties and to effect heavy repairs involving an expenditure exceeding Rs. 10,000. The income of this sum of Rs. one lac and of the investments representing the same has been utilised in the same manner as the income of the immoveable properties settled upon trust. It is not disputed before us that for the purpose of estate duty the said sum of Rs. one lac stands on the same footing as the said 12 immoveable properties settled upon trust.

The Central Board of Revenue considered that all the properties settled upon trust viz. the 12 immoveable properties and the sum of Rs. one lac passed on the death of the said Aishabai and that estate duty was payable thereon. The applicant being the accountable person within the meaning of sub-s. (1) of s. 53 of the Estate Duty, Act, 1953, contends that only 62½ per cent. thereof passed upon Aishabai's death and that estate duty is payable only in respect thereof. Mr. Palkhivala, the learned counsel for the applicant, very ably urged before us all that could possibly be urged in support of the contention that only 62½ per cent. of the corpus of the trust properties existing at the date of death of Aishabai passed on her death and said that it would be inequitable to hold that all the trust properties held under the said deed of wakf should be deemed to have passed on the death of Aishabai and that estate duty was leviable thereon. Now, it is well-known that there is no equity about a tax. The only thing that we have to consider is whether the Legislature has used clear language having regard to which we can fairly say that all the properties settled upon trust are deemed to have passed on the death of Aishabai. As has been observed

by Viscount Cave in *Nevill v. Inland Revenue Commissioners*¹ (p. 399):

"If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."

It will be necessary to examine some of the provisions of the Estate Duty Act, 1953, in order to appreciate the rival contentions that have been advanced in this case. Section 5(1) of the Act, which is termed as the life and soul of the Act or which is sometimes said to constitute the pith and substance of the enactment runs as follows:—

"5. (1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the States specified in the First Schedule to this Act, which passes on the death of such person, a duty called 'estate duty' at the rates fixed in accordance with section 35."

Section 12 of the Estate Duty Act, 1953, on which reliance has been placed by the Controller of Estate Duty, provides as follows:—

"12. *Settlements with reservation.*—(1) Property passing under any settlement made by the deceased by deed or any other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor or whereby the settlor may have reserved to himself the right by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property shall be deemed to pass on the settlor's death:

Provided that the property shall not be deemed to pass on the settlor's death by reason only that any such interest or right was so reserved if by means of the surrender of such interest or right the property is subsequently enjoyed to the entire exclusion of the settlor and of any benefit to him by contract or otherwise, for at least two years before his death.

Explanation.—A settlor reserving an interest in the settled property for the maintenance of himself and any of his relatives (as defined in section 27) shall be deemed to reserve an interest for himself within the meaning of this section.

(2) Notwithstanding anything contained in sub-section (1), where property is settled by a person on one or more other persons for their respective lives and after their death, on the settlor for life and thereafter on other persons and the settlor dies before his interest in the property becomes an interest in possession, the property shall not be deemed to pass on the settlor's death within the meaning of this section."

In view of the fact that the Indian Legislature has followed the pattern of the legislation in England on the subject and of the fact that a large number of authorities that have been cited at the Bar relate to the provisions of the law prevailing in England, it would not be out of place to consider the corresponding provisions of the law in England on the subject. Section 1 of the Finance Act, 1894, which corresponds to s. 5 of the Estate Duty Act, 1953, provides *inter alia* as under:—

"1. *Grant of Estate duty.*—In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate duty' at the graduated rates hereinafter mentioned..."

The expression "property" appearing in s. 5 of the Estate Duty Act, 1953, has been defined by s. 2(15) of the Act to include

"any interest in property, movable or immovable, the proceeds of sale thereof and

any money or investment for the time being representing the proceeds of sale and also includes any property converted from one species into another by any method;"

The section corresponding thereto in the English enactment is s. 22(f) which runs as under:—

"22. (f) The expression 'property' includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale."

The expression "passes" in connection with property has not been defined either in England or in India. That expression has been used sometimes to denote some actual change in the title or possession of the property as a whole which takes place at the death. In general, the word "passes" may be taken to mean "changes hands". In the case like the present where the property is the subject-matter of a wakf, it would not be out of place to refer to the observations of Lord Russell of Killowen in the case of *Sir S. E. Scott, Br. and Coutts and Co. v. The Commissioners of Inland Revenue*,² where in connection with the question what property "passes" the learned Law Lord observes as follows (p. 183):—

"To answer that question a comparison must be made between the persons beneficially interested in that fund the moment before the death, and the persons so interested the moment after the death."

This view of the matter has not been the subject of any controversy before us. The expression "property passing on the death" has been defined by s. 2(16) of the Estate Duty Act, 1953, which runs as under:—

"2. (16) 'property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and 'on the death' includes 'at a period ascertainable only by reference to the death'."

The corresponding provision in England is contained in s. 22(1) of the Finance Act, 1894, which runs as follows:—

"22. (1)(i) The expression 'property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and the expression 'on the death' includes 'at a period ascertainable only by reference to the death'."

The properties in question are settled upon the trusts mentioned in the deed of wakf. The expression "settled property" has been defined by s. 2(19) of the Estate Duty Act, 1953, as follows:—

"2. (19) 'settled property' means property which stands limited to, or in trust for, any persons, natural or juridical, by way of succession, whether the settlement took effect before or after the commencement of this Act; and 'settlement' means any disposition, including a dedication or endowment, whereby property is settled;"

So far as the English enactment is concerned, s. 22(h) and 22(i) deal with the matter and provide as follows:—

"22. (h) The expression 'settled property' means property comprised in a settlement:

(i) The expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of section two of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust."

There is no dispute that the properties covered by the wakf before us are settled properties within the meaning of the Indian enactment.

Section 5 of the Estate Duty Act, 1953, is followed by ss. 6 to 16 which deal with property which is deemed to pass on death. Section 2 of the English Finance Act, 1894, deals with property deemed to pass on death. The provisions in England which correspond to s. 6 of the Estate Duty Act, 1953, are those contained in s. 2(1)(a) of the English Finance Act, 1894, those which correspond to s. 7 of the Indian enactment with some variations are those

contained in s. 2(1)(b) of the Finance Act, 1894; those corresponding of the Indian enactment are those contained in s. 28(2)(a) of the C Inland Revenue Act, 1881, as amended by s. 11(1) of the Customs Revenue Act, 1889, read with s. 2(1)(c) of the Finance Act, 1894 corresponding to s. 12 of the Indian enactment are those contained in s. 38(2)(c) of the Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, read with s. 2(1)(c) of the Finance Act, 1894. By s. 4 of the Indian Finance Act, 1954, the Legislature substituted s. 3(3) to the Estate Duty Act, 1953, which runs as under:—

“3. (3) For the avoidance of doubt, it is hereby declared that reference to property passing on the death of a person shall be construed as including property deemed to pass on the death of such person.”

There is no such provision in the English enactment. Under the Indian Act, 1953, s. 5 is the charging section. Under it duty is leviable in respect of all property passing and deemed to pass on the death of a person. The respondent had reserved 62½ per cent. of the net income of the wakf properties during her lifetime, 62½ per cent. of the corpus of the wakf properties on her death within the ordinary natural meaning of the words “property which passes on the death of such person” appearing in s. 5(1) of the Act. It is urged on behalf of the respondent that as Aishabai had reserved an interest in all the properties settled upon trust under the said Act for life, all the wakf properties are deemed to pass on the death of Aishabai under s. 12 of the Act and that estate duty is payable in respect thereof under the provisions of s. 5(1).

The principal argument advanced by Mr. Palkhivala is that as 62½ per cent. of the corpus of the wakf properties passed on the death of Aishabai, the ordinary natural meaning of the words “property settled . . . which passes on the death of such person” appearing in s. 5(1) of the Estate Duty Act, 1953, it is not permissible to invoke any other provisions of the Act under which the wakf properties are deemed to pass on death for the purpose of the levy of estate duty and he relied upon several English cases. Mr. Palkhivala cited several authorities to show that where a share of the income of a property is reserved for life by a person, on the death of such person the portion of the property corresponding to that portion of the income would pass on the death of such person. He referred to the case of *Christie v. The Lord Advocate*³ and to *Northcliffe In re: Arnholz v. Hudson*⁴. It is not necessary to refer to other cases as it is not disputed that under the ordinary natural meaning of the words contained in s. 5(1) of the Estate Duty Act, 1953, 62½ per cent. of the corpus of the wakf properties would pass.

The bone of contention is that not merely 62½ per cent. but the whole corpus of the trust properties would pass on the death of Aishabai. Mr. Palkhivala's argument has mainly been based upon a decision of the House of Lords in *Earl Cowley v. Inland Revenue Commissioner*⁵. Mr. Palkhivala relied upon the observations of Lord Macnaghten in that case which have been the subject-matter of discussion in various cases referred to at the Bar. In the case of *Earl Cowley*, the settlement was executed by father and son. Under that settlement, the estates were charged with an annuity to the son payable during his father's life, and subject thereto were declared to be held in trust for the son for life and after his death for the son for life with remainders over to the Crown after father's death the Crown claimed from the son under the Finance Act, 1894, estate duty upon the gross value of the estates. In that case the House of Lords held that the property settled upon trust was held to pass under the provisions of the Finance Act, 1894. In that case, the provisions of s. 2 of that Act were invoked. At page 212 of the report appear the following observations of Lord Macnaghten:

“Now, if the case falls within s. 1 it cannot also come within s. 2. The

³ [1935] A.C. 589, 576.

⁴ [1929] 1 Ch. 327, 332.

⁵ [1899] A.C. 198.

are mutually exclusive. Section 1 might properly, I think, be headed, 'With regard to property passing on death, be it enacted as follows.' Sect. 2 might with equal propriety be headed, 'And with regard to property not passing on death, be it enacted as follows.' I cannot, therefore, agree with Rigby L.J. when he says that s. 2 is a provision 'explanatory' of s. 1. In my opinion the two sections are quite distinct and s. 2 throws no light on s. 1. But, then, no doubt s. 2 speaks of 'property in which the deceased...had an interest ceasing on the death of the deceased.' And that, it may be said, was just the position of the second Earl with regard to the Mornington settled estates. So it was. But s. 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section. For property in the lifetime of the deceased subject to a charge or interest which ceased on the death must of course pass free from that charge or interest. And, so passing, it must of course be valued accordingly. That is s. 1. You do not want s. 2 for that. You cannot resort to s. 2. For that would be giving the duty twice over."

He further observes at page 213:

"It is quite plain, I think, that the provisions of s. 2, sub-s. (1)(b) of the Finance Act 1894, have been borrowed and adapted from that section. But they do not, as I said just now, refer to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass."

These observations draw a line between s. 1 and s. 2 of the Finance Act, 1894, and the two are considered to be mutually exclusive. Mr. Palkhivala strongly relies upon the observations quoted above and says that in the present case 62½ per cent. of the corpus of the wakf properties passed under s. 5(1) of the Estate Duty Act, 1953, and that it is not open to the respondent to invoke the deeming provisions contained in s. 12 of the Act. In *Earl Cowley's* case the whole of the property resettled upon trust passed under s. 1 of the Finance Act, 1894, without invoking the aid of the deeming provisions. In a case where the whole property passes under the ordinary natural meaning of the words used in a section, it would not be necessary or proper to invoke the deeming provisions in order to bring about the same result. Mr. Palkhivala's contention, however, is that even if the result be different, even if as a result of the deeming provisions greater estate is roped in, it is not proper to invoke the deeming provisions when the case to any extent falls within the ordinary natural meaning of the words used by the Legislature. *Earl Cowley's* case does not lay down that where a larger slice of property or more properties are roped in as a result of the deeming provisions, you cannot invoke them.

Mr. Palkhivala in support of his contention has relied upon another case, *Duke of Norfolk, In re: Public Trustees v. Inland Revenue Commissioners*.⁶ That was a case of a single annuity bequeathed to several persons in succession. Upon the death of any annuitant other than the last to die, it was held that estate duty was payable under s. 1 of the Finance Act, 1894, on the footing that it is the annuity which passes on the annuitant's death. On the death of an annuitant, other than the last to die, no benefit accrues or arises by the cesser of his interest within s. 2, sub-s. (1)(b). In that case the Master of the Rolls, after dealing with some of the earlier cases in England observes as follows (p. 475):—

"...But they are, in my judgment and for reasons which I will later give, no authority for the view that on the death of the first taker of a continuing annuity there is a passing of any part of the corpus of the property out of which the annuity is raised or on which it may be charged."

At page 473, the Master of the Rolls has observed as follows:—

"Wynn-Parry J. was of opinion that the simultaneous existence of a right to tax under s. 1 and s. 2 was inconsistent with the well-known statement of Lord Macnaghten in *Cowley (Earl) v. Inland Revenue Commissioners*, and could not, therefore, be sustained. I agree with him. It is true that the actual language used by Lord Macnaghten, and particularly his words: Section 2 does not apply to an interest in property which passes

on the death of the 'deceased', was used in reference to a case in which only one possible subject-matter of taxation was under consideration; and that it is of the essence of the Crown's argument in the present case that there are two distinct proprietary interests. Mr. Stamp observed further that the celebrated pronouncement of Lord Macnaghten, which has constituted one of the most significant decisions on the interpretation of the Finance Act, 1894, did not in fact represent the determination of an issue argued in the *Cowley* case. Nevertheless, I think with Wynn-Parry J. that Lord Macnaghten's opinion ought not to be regarded as subject to such refinement, and that the law (at any rate in the courts of first instance and in this Court) must be taken to be that, as regards any such single benefaction as that with which we are concerned, the application of s. 2 of the Act is necessarily excluded by the application to the annuity itself of s. 1." In making these observations the Master of the Rolls felt himself bound to follow the observations of Lord Macnaghten in *Earl Cowley's* case.

In this context, it will not be out of place to refer to the following statement in Dymond's *Death Duties*, 12th edn., at p. 94:

"...The principle of *Re Duke of Norfolk's Will Trusts*...is not officially regarded as involving the exclusion of the claim at (b) by the claim at (a)."

The claim at (b) is the claim under s. 2(1)(b) of the Finance Act, 1894, and the claim at (a) is the claim under s. 1 of the said Act.

Mr. Palkhivala referred us to *Re Longbourne's Marriage Settlement*⁷. In that case there was an ante-nuptial settlement. The wife directed the trustees to stand possessed of the investments therein mentioned on trust after the intended marriage, to pay out of the annual income of the settled property a yearly sum to the husband during his life and subject thereto to pay the annual income of the settled property to the wife during her life and after the death of the wife and subject to the payment of the yearly sum to the husband for the children or child of the marriage who attained twenty one. It was held that the whole settled property passed under the Finance Act, 1894, s. 1, and for the purposes of duty a deduction could not be made from the value thereof for the "slice" required to produce the annuity which continued payable to the husband, but, as was conceded, an allowance for the burden of the annuity could be taken equivalent to the actuarial value of the annuity. That again was a case where the whole settled property passed under the Finance Act, 1894, s. 1. That case is not an authority for the proposition that where the whole settled property did not pass under s. 1, the deeming provisions cannot be invoked. In that case in connection with the deduction that had been allowed, Wynn-Parry J. observes as follows (p. 937):—

"...As the Crown concedes that there should be a deduction, in my view, I can do nothing else but accept the effect of that concession and direct that the value of the deduction must be the value of the annuity at the date of the death calculated on actuarial principles."

The deduction in that case was based on a concession and was not the result of any judicial pronouncement on the subject.

The next case to which reference may be made is that of *Sanderson v. Inland Revenue Commissioners*.⁸ In that case, the settlor had voluntarily settled on trust for his son and daughter shares in a private company in which he held a controlling interest. It was admitted that on his death estate duty in respect of these shares was payable under s. 2(1)(c) of the Act of 1894. It was held that, on its true construction, s. 55(1) of the Finance Act of 1940 was simply a valuation section applying equally to property which "passes on the death" within s. 1 of the Finance Act, 1894, and property which is deemed by s. 2 to be "included" in property passing on the death and that accordingly it applied to the shares in question. That case contains some interesting observations made by Lord Radcliffe. At page 498, he observes as follows:—

"Estate duty is not charged by the Act upon two different kinds or classes of property, property which passes in the natural sense and property, which is deemed to pass by

virtue of special statutory provision. Strictly speaking, as has often been pointed out, no property at all is 'deemed to pass' under the Act. What section 1 provides is that estate duty is to be charged upon all property passing on death, whether real or personal, settled or not settled. It offers no other clue as to the meaning to be attached to those words. What section 2 provides is that property passing on death is to be deemed to include certain kinds of property or, perhaps more accurately, certain property in certain situations, and is not to be deemed to include certain property in other situations. I have never known it disputed that the exclusion provision which is contained in section 2(3) applies to all property passing, whether it passes under section 1 simpliciter or under section 1 so enlarged or interpreted by section 2(1). But the result of this is that it is section 1 and no other section that imposes the charge of estate duty, that the charge so imposed is imposed upon property that passes on death and no other property, and that the effect of section 2(1) is to give the word "passes" in section 1 a meaning wider and, if you please, less natural than it would have had if section 2(1) had not been enacted. Personally, I find this approach to the general purport of the Act a more satisfactory method than that of dividing the property charged by the Act into two categories consisting in the one case of property actually passing and in the other of property notionally passing, categories which the Act itself does not employ."

At page 500 he further observes as under:—

"I do not see that our decision can be said in any way to conflict with those earlier cases. The most that can be said in that connection is that it will leave unexplained what exactly Lord Macnaghten meant in *Cowley* when he said of sections 1 and 2 'the two sections are mutually exclusive,' or what Lord Haldane meant in *Milne* by the words: 'section 2 is thus not a definition section, but an independent section operating outside the field of section 1.' But, as Lord Macnaghten's words have been a matter of inquiry since the year 1900 (see *Attorney-General v. Dobree*, per Channell J.) and since Lord Haldane himself gave a substantially different explanation of the relation of the two sections in *Nevill v. Inland Revenue Commissioners*, when he said: 'The principle is contained in section 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in section 1 to certain cases which are not in reality cases of changing hands on death at all...', I think we may safely resign these passages to the list of the many minor mysteries of the law."

Mr. Palkhiwala cited the case reported in *Public Trustee v. I. R. Comrs.*⁹ In that case, a testator appointed A to be one of his executors and trustees and directed that the income of his residuary estate be divided among a number of persons, of whom A was one, in specified shares and so that when one beneficiary died the total income was divided among the survivors or survivor. The income directed to be paid to A was expressed to be given to him in respect of his acting as executor and trustee and by way of remuneration for his so doing. At the date of his death, A was receiving 6/99 of the income of the residuary estate and estate duty was claimed on 6/99 of the capital of the fund under the Finance Act, 1894, s. 1. It was not disputed that the relevant charging provision was s. 1 and not s. 2(1)(b) of the Act of 1894, but the trustee contended that the claim was precluded by virtue of s. 2(1)(b) which excluded "property the interest in which of the deceased... was only an interest as holder of an office" from property deemed by s. 2(1)(b) to be included in property passing on the death of the deceased. It was held that since the relevant charging provision was s. 1 and not s. 2(1)(b) of the Act of 1894, the dichotomy between s. 1 and s. 2(1) of that Act precluded the application of the words of exemption quoted above, which related only to a claim arising under s. 2(1)(b). This latest case of the Court of Appeal in England contains some interesting observations by Lord Evershed, Master of the Rolls. Lord Evershed observes as follows (p. 723):—

"It is certainly a forceful contention to observe that property of which the deceased was at the time of his death competent to dispose, according to the ordinary use of the language, would include the testator's own free estate no less than property over which

he had but a general power of appointing. So it is counsel's contention the standing Lord Macnaghten's dictum, s. 2(1) cannot be regarded as dealing with which is exclusive of property strictly within the first section; and that view is fully reflected in the speech of Lord Radcliffe (see especially *Sanderson v. Inland Commissioners*). I add further that Lord Radcliffe notices language used by learned Judge, Channell J. in *A.-G. v. Dobree*¹¹ and also the differing views of the House in a later case, *A.-G. v. Milne*. Notwithstanding the weight of those I feel myself compelled to the view that in this Court, as before Danckwerts, not do other than treat Lord Macnaghten's dictum as still applicable."

In dealing with the case of *Sanderson v. Inland Revenue Commissioners* serves as follows (p. 723):—

"It may well be that this case has disclosed, perhaps for the first time, in which a strict application of the dichotomy has hitherto concealed, and the other anomalies—one being in relation to a corporation sole—which, if the Crown which have been indicated in argument are right, may add some to the view that the matter is one which ought properly to be considered by the House resolved only by, the House of Lords itself."

In this connection, reference may be made to the instructive observation of Lord Dunedin in his dissenting judgment in the case of *Attorney General v. Lord*. At pages 774-775 he observes as follows:—

"The paramount enacting section of the Act is undoubtedly to be found in s. 2. If that section stood alone it is reasonably clear that much property would be included which the framers of the Act wished to tax. Accordingly we have s. 1. It was authoritatively discussed in your Lordships' House in the case of *Edwards*. Whether Lord Macnaghten was strictly correct or not in saying that the two classes were mutually exclusive seems to me to matter little. At any rate—and that is material—s. 2 sweeps into the net various things which s. 1 would have excluded. It is secure,...

How does s. 2 do this? It does not do it by being conceived in the working section imposing the duty on certain specified kinds of property. It does it by including that property passing on the death of the deceased—which is already included by virtue of s. 1—shall be deemed to include the property following, that is to say, the property then follow the various sub-sections.

...The net result is that the expression, 'property which passes', in the definition of the duty must include property which is deemed to pass by virtue of the 2nd section of the Act, the only taxing section."

In connection with the dichotomy enshrined in the speech of Lord Macnaghten it would not be out of place to refer to the following statement in *Death Duties*, 12th edn., at p. 94:

"Where the deceased is both an annuitant and a life-tenant of an aliquot share of the surplus income of the settled funds, duty is charged (a) under s. 1, on the share of the funds, with a deduction for the appropriate proportion of the annuity, and (b) under s. 2(1)(b) on the aliquot share of the funds required to provide the annuity, so far as attributable to the other share or shares of the funds. This dichotomy, even though hallowed by time, has been assailed in recent years. Forceful arguments based on sound logic have been advanced against it."

Mr. Palkhivala now seeks to establish in India a dichotomy between the provisions of s. 5(1) and s. 12 of the Estate Duty Act, 1953. Under s. 5(1) is provided that property passing under any settlement made by the testator by deed or any other instrument not taking effect as a will whereby the property is reserved either expressly or by implication to the settlor shall be included in the settlement. Now, the words "property passing under any settlement" in s. 12 refer not to property passing on the death, but to property comprised in the settlement. It has been stated in *Green's Death Duties*

¹⁰ [1956] 1 All E.R. 14, at p. 19.

¹¹ [1900] 1 Q.B. 442.

¹² [1914] A.C. 765.

edn., p. 127, that property "passing" under a settlement or trust in the context of the corresponding provisions in the English statute does not connote a passing on death, in the sense of s. 1 of the Finance Act of 1894. Broadly speaking, it means merely property comprised in the settlement or subject to the trust. To a similar effect are the observations in Dymond's Death Duties, 12th edn., at p. 183. It is the property which is comprised in the settlement which is deemed to pass on the settlor's death on the conditions mentioned in s. 12 being fulfilled. The property comprised in the settlement must be property in which "an interest in such property for life or any other period determinable by reference to death is reserved". The words "an interest" in the context mean any interest however small. It has been so considered under the analogous provisions in England. It has been so stated in Green's Death Duties, 4th edn., at p. 129. There is a decision reported in *Attorney General v. Earl Grey*¹³, where a similar view is expressed. In that case by a deed made in 1885 the owner of certain estates gave them to his nephew in fee subject to the reservation of an annual rent charge payable to the donor and expressed to be issuing out of the estates so given. The annual income of the estates was considerably in excess of the rent charge. At page 325 of that report Channell J. observes as follows:

"...Any interest however small will do, provided it issues out of such property—that is, out of the property sought to be taxed. I agree that if several parcels of land be given by one and the same deed of gift, and an interest be reserved to the donor out of one of those parcels only, estate duty would not be payable upon the whole subject-matter of the gift, but only out of that specific portion in which the interest is expressed to be reserved."

There are no words which qualify the words "an interest" in s. 12(1) provided it is for life or any other period determinable by reference to death. The interest may be an aliquot share in the income of the property settled upon trust. If Mr. Palkhivala's contention was to be accepted, it would mean that where an interest in property has been reserved by the settlor which constitutes an aliquot share of the income of the property, this section would not apply. I do not see any warrant for such a construction. Section 12 also refers to another set of circumstances under which the whole property may be deemed to pass on the settlor's death. It is where the settlor has reserved to himself the right by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property. If Mr. Palkhivala's contention is right, where a settlor reserves to himself the power to restore to himself the absolute interest in the property settled upon trust and reserves to himself also a very small, say a thousandth share in the income of that property for life, then to the extent of a thousandth share of the corpus it would pass under s. 5(1) of the Estate Duty Act, 1953, without the aid of any deeming provisions and the application of s. 12 would be excluded. There is no reason to exclude the operation of s. 12 in such cases. The Legislature has not laid down that where any interest in any property, however small, passes on the death of a person within the ordinary meaning of those words under s. 5(1), the deeming provisions contained in ss. 6 to 16 of the Act cannot be invoked. There is no reason to add words to that effect. Where there is a deeming provision, it does not necessarily imply that what is sought to be included thereby must of necessity have otherwise been wholly excluded. In this connection, reference may be made to the following observations of Lord Radcliffe in the case of *St. Aubyn v. Attorney-General*¹⁴ (p. 53):—

"...The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

It seems to me clear that the object of the Legislature in enacting s. 12 was that where an interest, however small, is reserved by a settlor under any settlement not taking effect as a will for life or any other period determinable by reference to death, the whole of the property would be deemed to pass even though otherwise a lesser part thereof might pass, and that if he has reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property, the whole property would pass whether he has reserved any aliquot share in the income or any other interest in the property or not. Any other construction would not give full effect to the words used by the Legislature. The dichotomy of Lord Macnaghten has not in terms been extended even in England to a case like the one before us and I see no reason why, however hallowed by time the dichotomy may be in England, it should be extended to the provisions contained in s. 5 and s. 12 of the Estate Duty Act, 1953. Section 3(3) of the Estate Duty Act, 1953, provides that all references in the Act to property passing on the death of a person shall be construed as including references to property deemed to pass on the death of such person. Section 5 is the charging section within which all properties liable to estate duty have to fall before they may be charged to estate duty. By s. 12 the Legislature has cast a wide net and if it has hauled up in the catch the whole of the property settled upon trust by the wakf executed by Aishabai, there is no scope for escape by reference to the provisions of s. 5. The clear language of s. 12 embraces cases like the present and the whole of the property settled upon trust must be deemed to pass on the settlor's death.

Mr. Palkhivala has then advanced an alternative argument. Mr. Palkhivala says that even if the provisions of s. 5 are not considered to exclude the application of s. 12, both s. 5 and s. 12 should be applied, wherever they are applicable. He urges that under the provisions of s. 5, 62½ per cent. of the corpus of the wakf properties would pass on the death of Aishabai as Aishabai had reserved an interest in 62½ per cent. of the net income for her life. Then he says that as regards the balance of 37½ per cent., it cannot be said that the settlor had reserved any interest therein and that as she had not reserved any interest therein, it does not fall within the ambit of s. 12. There is a fallacy in this argument. What is reserved by the settlor is not the income of 62½ per cent. of the corpus of the trust properties. She has reserved for herself 62½ per cent. of the net income of every one of the properties settled upon trust. She has reserved an interest in every property. It is not possible to say that she has an interest reserved only in some properties and not in others. As the settlor has reserved an interest in each one of the properties settled upon trust, even though that interest may not extend to the whole of the net income thereof, it is sufficient for the purpose of attracting the provisions of s. 12 so that all the properties settled upon trust would pass on her death. On the basis of the alternative argument of Mr. Palkhivala all the properties settled upon trust are liable to pass on the death of Aishabai.

Mr. Palkhivala has lastly urged that even if s. 12 applied in its entirety, effect should not be given thereto as s. 10 can be said equally to apply. Section 10 is in terms following:

"Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that *bona fide* possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise:

Provided that the property shall not be deemed to pass by reason only that it was not, as from the date of the gift, exclusively retained as aforesaid, if, by means of the surrender of the reserved benefit or otherwise, it is subsequently enjoyed to the entire exclusion of the donor or of any benefit to him for at least two years before the death." He says that s. 10 imposes a lighter burden and that he is entitled to the benefit thereof. In my view, s. 12 is the specific section which governs the matter. It deals with settlements with reservation. Gifts may be made

through the medium of a trust or a settlement. But when under the trust or settlement the settlor reserves for himself or herself an interest in the property so settled for life or any other period determinable by reference to death, s. 12 will apply and the whole property will be deemed to pass on the settlor's death. We are dealing here with the case of a wakf, which is a settlement within the meaning of s. 2(19) of the Act wherein the settlor has reserved 62½ per cent. of the net income of the settled properties for herself for life. It is not necessary to set out here the difference in the provisions of law relating to gifts and wakfs as applicable to a Hanafi Sunni Mahomedan like the settlor. If the wakf in question was treated only as a disposition by way of gift, a large number of its provisions would have to be regarded as invalid under the Mahomedan law of gift though they may be valid under the law applicable to Wakfs.

Mr. Palkhivala has relied upon *Commissioner for Stamp Duties, New South Wales v. Perpetual Trustee Co.*¹⁵ In that case, by an indenture of settlement made between the settlor and five trustees, of whom the settlor himself was one, it was declared that the trustees should hold certain company shares of which the settlor was the owner in trust, to apply during the minority of his son the whole or any part of the income or corpus as the trustees should think fit for the maintenance, advancement or benefit of the son, and on his attaining the age of twenty-one years to transfer to him as his absolute property all the assets and property whatsoever, including accumulations of income. At page 439 of the report the following observations have been made by the Privy Council:

"...In their opinion the property comprised in the gift was the equitable interest in the eight hundred and fifty shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees, and declaring such trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift; whether the son alone was the donee...or whether the son and the body of trustees together constituted the donee, seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty. Did the donee assume *bona fide* possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question therefore must be answered in the affirmative, because the son was (through the medium of the trustees) immediately put in such *bona fide* beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted."

In that case, *bona fide* possession and enjoyment of the property comprised in the gift was assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him. That case is clearly distinguishable from the facts of the present case.

It is not necessary for the purpose of the present reference to decide whether in India, when there is a choice between two alternative provisions, the authorities are entitled to choose that which yields the higher duty as in England.

Mr. Joshi, the learned counsel for the respondent, has urged that the scheme of the Indian enactment is materially different from the scheme of the enactment in England. In our view, the scheme of both the enactments is substantially the same. Mr. Joshi has asked us to look at the provisions of s. 12, to look at the settlement and to see if that section applies having regard to the terms of the settlement. He says that if that section applies, there is no reason why it should not be made applicable and the whole property should not be deemed to pass thereunder. We agree with Mr. Joshi. The section in terms applies, and if it in terms applies, there is no reason why effect should not be given to the provisions of that section.

In the result, I agree with my brother Mr. Justice S. T. Desai as re-
answer to the question raised in this reference and the order for costs.

Answer ac

SUPREME COURT.

Present: Mr. Justice N. H. Bhagwati, Mr. Justice K. Subba Rao
Mr. Justice K. N. Wanchoo.

BHOGILAL CHUNILAL PANDYA v. THE STATE OF BOMBAY
Indian Evidence Act (I of 1872), Secs. 157, 159—Meaning of word 'statement'

Whether section requires that such statement must be communicated by
to any other person—Notes of attendance prepared by solicitor of certain
between himself and others—Prosecution producing such notes of att
examination-in-chief of solicitor to corroborate his evidence in Court—A
of notes of attendance under s. 157.

The word 'statement' used in s. 157 of the Indian Evidence Act, 1872, is
'something that is stated' and the element of communication to another pe
necessary before 'something that is stated' becomes a statement under th

Where certain conversation took place between the accused and the
witnesses and one of the prosecution witnesses who was a solicitor, prep
of attendance of this conversation soon afterwards, and these notes of
were produced by the prosecution to corroborate the testimony of the soli
he deposed to what had taken place between him and these persons, he
notes of attendance prepared by the solicitor were statements within th
of s. 157 of the Indian Evidence Act, 1872, and were admissible in evidence.

The King v. Nga Myo, *Bhogilal v. Royal Insurance Co., Ltd.* and *Re.
ceased*): *Powe v. Barclays Bank Ltd.*, referred to.

THE facts appear in the judgment.

Purshottam Tricunddas, with G. R. Ganatra and I. N. Shroff, for
appellant.

C. K. Daphtary, Solicitor General of India, with R. H. Dhebar, fo
respondent.

WANCHOO J. This appeal by special leave is limited to the questi
admissibility in evidence of a certain document in a criminal trial.
facts of the case necessary for elucidation of the question are these
Chunilal Pandya appellant was tried for committing criminal breach
in respect of Rs. 4,14,750 and the trial was with the aid of a jury. He
cashier in the employment of Messrs. Morarji Gokuldas Spinning a
ing Co. Ltd., Bombay. As such he was entrusted with the funds of
pany. The charge against him was that between July 1 and Decembe
he embezzled the amount mentioned above. Among the witnesses fo
secution were Gopikisan, Chairman, Modi, Secretary, and Santook,
of the company. When the defalcation was discovered, certain con
took place between Gopikisan, Modi and Santook, who was consult
connection, and the appellant, between January 21 and 27, 1955.
prepared what are called notes of attendance of these conversations s
wards. In his evidence in Court Santook deposed to what had ta
between him and these persons on those dates. The notes of attenda
ed exh. V were also produced to corroborate the testimony of San

*Decided, November 4, 1958. Criminal 2 (1927) 30 Bom. L.R. 818, r.
Appeal No. 31 of 1958. 3 [1955] 3 All. E.R. 448.

1 [1938] A.L.R. Rang. 177, r.n.

objection was taken before the trial Judge to the admissibility of these notes on two grounds, namely—

(1) that they could not be admitted in evidence as copies had not been supplied to the accused under s. 173 of the Code of Criminal Procedure, and

(2) that they could not be given in evidence under s. 157 of the Evidence Act (hereinafter called the Act) as corroboration of Santook's evidence.

The trial Judge negatived both these contentions and admitted the notes in evidence. He referred to them in his charge to the jury. Eventually, however, the jury returned a verdict of not guilty by a majority of 5 : 3. The trial Judge thereupon made a reference to the High Court under s. 307 of the Code of Criminal Procedure. The High Court went through the entire evidence, including exh. V, found the case proved, and convicted the appellant.

Learned counsel for the appellant has given up the attack on the admissibility of these notes on the basis of s. 173 of the Code of Criminal Procedure in view of the decision of this Court in *Narayan Rao v. The State of Andhra Pradesh*¹. He has, however, strenuously contended that the notes cannot be admitted in evidence under s. 157 of the Act.

Section 157 is in these terms—

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

The contention is that the words 'statement made by' in this section require that there must be a communication of the statement by the maker of it to another person and that a statement within the meaning of s. 157 does not include any writing or memorandum made by a person for his own use when it is not communicated to any other person. It is said that such a writing may be used to refresh the memory of a witness under s. 159; but it does not become admissible in evidence unless the other party cross-examines the witness on the document under s. 161. In this case there was no question of cross-examination upon the document as the prosecution itself produced the notes during the examination-in-chief of Santook in order to corroborate him. In short, the contention of the learned counsel is that such a writing can only be used under s. 159 and cannot be called a statement within the meaning of s. 157, for the word 'statement' used in s. 157 implies that it must have been communicated to another person.

Now, the word 'statement' is not defined in the Act. We have, therefore, to go to the dictionary meaning of the word in order to discover what it means. Assistance may also be taken from the use of the word 'statement' in other parts of the Act to discover in what sense it has been used therein.

The primary meaning of the word 'statement' to be found in *Shorter Oxford English Dictionary* and *Webster's New World Dictionary* is 'something that is stated'. Another meaning that is given in the *Shorter Oxford English Dictionary* is 'written or oral communication'. There is no doubt that a statement may be made to someone in the sense of a communication. But that is not its primary meaning. Unless, therefore, there is something in s. 157 or in the other provisions of the Act, which compels us to depart from the primary meaning of the word 'statement', there is no reason to hold that communication to another person is of the essence and there can be no statement within the meaning of s. 157 without such communication. The word 'statement' has been used in a number of sections of the Act in its primary meaning of 'something that is stated' and that meaning should be given to it under s. 157 also unless there is something that cuts down that meaning for the purpose of that section. Words are generally used in the same sense throughout in a statute unless there is something repugnant in the context.

The first group of sections in the Act in which the word 'statement' occurs, are ss. 17 to 21, which deal with admissions. Section 17 defines the word

'admission', ss. 18 to 20 lay down what statements are admissions, and s. 21 deals with the proof of admissions against persons making them. The words used in ss. 18 to 21 in this connection are 'statements made by'. It is not disputed that statements made by persons may be used as admissions against them even though they may not have been communicated to any other person. For example, statements in the account-books of a person showing that he was indebted to another person are admissions which can be used against him even though these statements were never communicated to any other person. *Illustration* (b) of s. 21 also shows that the word 'statement' used in these sections does not necessarily imply that they must have been communicated to any other person. In the *Illustration* in question entries made in the book kept by a ship's captain in the ordinary course of business are called statements, though these entries are not communicated to any other person. An examination, therefore, of these sections show that in this part of the Act the word 'statement' has been used in its primary meaning, namely, 'something that is stated' and communication is not necessary in order that it may be a statement.

The next section to which reference may be made is s. 32 of the Act. It deals with statements made by persons who are dead, or cannot be found or who become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which appears to the Court unreasonable. Sub-section (2) in particular shows that any entry or memorandum made in books kept in the ordinary course of business or in the discharge of professional duty is a statement, though there is no question of communicating it to another person. Similarly, sub-s. (6) shows that statements relating to the existence of any relationship made in any will or deed relating to the affairs of the family, or in any family pedigree, or upon any tombstone, or family portrait are statements though there is no question of their communication to another person.

Again, s. 39 shows that a statement may be contained in a document which forms part of a book. In this case also there is no question of any communication of that statement to another person in order to make it a statement.

Then, there is s. 145, which lays down that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing for the purpose of contradicting him. Under this section a witness may be contradicted by statements in a diary kept by him, though there is no question of any communication of those statements to another person.

Then comes s. 157, which we have already set out above. Here also the words used are 'statement made by'. We see no reason why the word 'statement' should not have been used in its primary meaning in this section also. There is nothing in the section which in any way requires that an element of communication to another person should be imported into the meaning of the word 'statement' used therein. It was urged that if we do not imply communication to another person in the meaning of the word 'statement' in this section, it would result in a witness corroborating himself by producing some writing made by him and kept secret and that this would be very dangerous. Now, a distinction must be made between admissibility of such a writing and the value to be attached to it. Section 157 makes previous statements even of this type admissible; but what value should be attached to a corroboration of this nature is a different matter to be decided by the Court in the circumstances of each case. The witness who is sought to be corroborated is produced in the witness-box and is liable to cross-examination. The cross-examiner may show that no reliance should be placed on such an earlier statement. The danger, therefore, which the learned counsel for the appellant emphasised is really no danger at all for the witness it subject to cross-examination. The main evidence is the statement of the witness in the witness-box and a document of this nature is only used to corroborate him. If the main evidence is shaken by cross-examination, corroboration by such a document would be of no use. There

is, therefore, no reason to give a different meaning to the word 'statement' in this section because of this alleged danger, which really does not exist.

Learned counsel for the appellant particularly referred to s. 159 of the Act to show that notes like exh. V can only be used for refreshing memory and can be evidence under the conditions prescribed under s. 161. He does not suggest that what comes under s. 159 is necessarily excluded from the meaning of the word 'statement' under s. 157. For example, a man may write a letter to another referring to certain facts at or about the time when they took place and may use it to refresh his memory. A letter is a communication to another person; it would, even according to the learned counsel for the appellant, be a statement within the meaning of s. 157 and be admissible for purposes of corroboration. Therefore, it cannot be said that because a document can be used to refresh memory under s. 159 it cannot be a statement within the meaning of s. 157. Section 159 deals with a particular set of circumstances and the word 'statement' does not appear therein at all. Section 159 is, in our opinion, of no help in deciding what the word 'statement' means in s. 157. Refreshing memory under s. 159 is confined to statements in writing made under the conditions mentioned in that section, while corroboration under s. 157 may be by statements in writing or even by oral statements. That is why there is difference in language of ss. 157 and 159. But that difference does not, in our opinion, lead to any conclusion which would cut down the meaning of the word 'statement' under s. 157 to those statements only which are communicated to another person. On a consideration, therefore, of the primary meaning of the word 'statement' and the various sections of the Act, we come to the conclusion that a 'statement' under s. 157 means only 'something that is stated' and the element of communication to another person is not necessary before 'something that is stated' becomes a statement under that section. In this view of the matter the notes of attendance would be statements within the meaning of s. 157 and would be admissible to corroborate Santook's evidence under s. 157.

Let us now turn to the cases cited at the bar. In *The King v. Nga Myo*², a full bench of the Rangoon High Court was considering questions relating to the nature of corroboration and the circumstances in which it should be sought when a person is accused of a crime and the evidence against him is partly or wholly that of an accomplice or accomplices. The point, therefore, which is specifically raised before us was not before the Rangoon High Court. In passing, the learned Judges referred to s. 157 of the Act and stated that it was settled law that a person cannot corroborate himself. In making these observations, the learned Judges must be referring to the settled law in England before the amendment by the English Evidence Act, 1938. A change was, however, introduced in the English law by the Evidence Act, 1938, (1 and 2 Geo. VI, c. 28). That Act provides that in any civil proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact, if the maker of the statement had personal knowledge of the matters dealt with by the statement and if he is called as a witness in the proceeding. Thus notes of an interview prepared by a solicitor similar to exh. V are now admissible as statements in a document under certain conditions in England (See *In Re. Powe* (deceased): *Powe v. Barclays Bank Ltd.*³). For this reason and also because the judgment does not consider the specific question raised before us it is of no help.

The next case is *Bhogilal v. Royal Insurance Co. Ltd.*⁴ Reliance is placed on the observations of their Lordships of the Privy Council in these words at p. 820:—

"The second matter on which their Lordships feel it desirable to observe is the tendering and reception in evidence of the letter written by Bhattacharjee to his official

² [1938] A.I.R. Ran. 177.

⁴ [1927] 80 Bom. L.R. 518, p.c.

³ [1955] 3 All E.R. 448.

chief in June 30, 1923. This letter was tendered and received under s. 157 of Evidence Act. Their Lordships desire emphatically to say that the letter was that section, properly receivable for any purpose."

These observations do not in our opinion help the learned counsel of appellant. His contention throughout has been that a statement within the meaning of s. 157 has to be communicated to another person. These observations show that the letter which their Lordships were rejecting was certain statement which was communicated to another person. Therefore, if their Lordships rejected the letter it could not be on the ground that the letter was not communicated to another person; it must be due to the want of evidence of Bhattacharjee, which was considered in the previous paragraph.

It is clear, therefore, the word 'statement' used in s. 157 of the Evidence Act means 'something that is stated' and the element of communication to another person is not included in it. As such the notes of attendance prepared by the appellant were statements within the meaning of s. 157 and admissible in evidence.

The result is that the appeal fails and is hereby dismissed.

Appeal

APPELLATE CIVIL.

Before Mr. Justice Mudholkar.

M. F. DeSOUZA v. CHILDREN'S EDUCATIONAL UPLIFT SOCIETY.
Indian Easements Act (V of 1882), Sec. 69—Parties agreeing that licence to occupy granted by one to the other to be irrevocable for certain duration. Plaintiff can terminate such licence at will.

If parties enter into a contract and arrive at an agreement to the effect that the licence shall be irrevocable or shall be limited for a particular duration, the licensee will not be entitled to terminate or revoke the licence at his will.

The plaintiff who had lost his suit in the first Court for possession of a portion of the room and further agreed that the defendant's right as a licensee to occupy it was irrevocable so long as the Bombay Rent Act remained in force. In the subsequent suit by the plaintiff for possession of the one-third portion of the room in occupation of the defendant, it was contended by the plaintiff that the licence was revocable at his will as it did not fall in any of the two classes of cases of licences set out in s. 60 of the Indian Easements Act, 1882:—

Held, that apart from s. 60 of the Indian Easements Act which means that a case falls in either of the two categories mentioned therein the licence is irrevocable, under the law of contract the plaintiff was precluded from terminating the contract because of the contractual engagement into which he had entered.

THE facts appear in the judgment.

The applicant in person.

R. Jeikmalani and *B. K. Hirani*, for the opponent.

MUDHOLKAR J. This is a defendant's application for revision of the order of the Presidency Small Cause Court, Bombay, decreeing the plaintiff's possession of a portion of a room which is in the occupation of the defendant as a licensee by virtue of a compromise decree passed in the previous suit between the parties by this Court. Now, one of the terms of the compromise decree is that the defendant will be entitled to occupy the aforesaid portion of the room as a licensee and that the licence in her favour would be irrevocable.

**Decided, November 17, 1928. Civil Revision Application No. 886 of 1928.*

plaintiff, which is an educational society, contends that it is entitled to revoke the licence because the defendant has not been paying any compensation to the plaintiff for the use and occupation of the portion of the room in her possession as a licensee. The defendant contended that the consent decree made no reference whatsoever to the payment of rent or compensation to the plaintiff, and that, therefore, she was not liable. She further stated that while she was a licensee in respect of the entire room, she used to pay Rs. 15 per month as rent to the plaintiff, and now that she is in possession of only one-third the portion, she is liable to pay only Rs. 5 per month. She has further stated that she has tendered rent or compensation to the plaintiff at the rate of Rs. 5 per month, but that the plaintiff has refused to accept it and therefore, according to her, she has committed no breach whatsoever of the terms of the licence.

On behalf of the plaintiff it is contended before me that a licence must always be regarded as revocable at the will of the licensor except in the two cases set out in s. 60 of the Easements Act. Section 60 reads thus:—

"A licence may be revoked by the grantor, unless—

(a) it is coupled with a transfer of property and such transfer is in force;

(b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution."

The learned counsel for the plaintiff points out that there is no mention here of a third class of cases wherein a licence would be irrevocable, that is, cases where parties have agreed that it shall be irrevocable. In my opinion, the argument advanced by the learned counsel is not sound. It is no doubt true that s. 60 mentions only two classes of cases in which the licence would be regarded as irrevocable. This means that where a case falls in either of these categories the licence is made irrevocable by operation of law, that is the Easements Act. But apart from the Easements Act, there is the law of contract, and if parties enter into a contract and arrive at a solemn agreement to the effect that the licence shall be irrevocable or shall be limited for a particular duration, it follows that the licensor will be bound by his engagement and will not be entitled to terminate the licence or revoke the licence at his sweet will and pleasure. If authority were necessary for this proposition, I may refer to the following passage in *Corpus Juris Secundum*, Vol. LIII, pp. 815-816:—

"As a general rule a mere licence, that is, one which is merely a personal privilege not coupled with an interest in the land, may be revoked by the licensor at any time, at his pleasure. This rule generally applies regardless of how long the use has been permitted, and although the intention was to confer a continuing right, and even though the licence was created by a deed or other written instrument. The general rule, however, is not without its modifications and exceptions, and does not apply where the licence is coupled with or partakes of the character of an easement and the rights under it are affirmatively and definitely fixed and settled, or where it constitutes part of a contract between the parties..."

Now, here the consent decree to which I have referred earlier was passed in an appeal which the plaintiff had brought to this Court from the dismissal of its suit for possession of the very room a portion of which is in the defendant's occupation. The plaintiff, which had lost its suit in the first Court, agreed to allow the defendant to be in exclusive possession of one-third portion of that room, and further agreed that her right as a licensee to occupy the room will be irrevocable so long as the Bombay Rent Act remains in force. Now, it is clear that the plaintiff, which had lost earlier in the City Civil Court, wanted to rescue something out of its original claim and therefore it entered into the aforesaid compromise. The consideration for the compromise was apparently the defendant's parting with her right to the use of two-thirds of the room, because as a result of the compromise she became entitled to use only one-third of the room. The plaintiff having thus received consideration for the compromise, cannot in equity and in all fairness be allowed to go back upon it. Therefore, I am of opinion that, quite apart from s. 60 of the Easements Act, the Court will have to bear in mind in a suit of this nature whether the licensor is

precluded from revoking the licence because of any contractual engagement into which he has entered. There being an engagement of this kind here, I am of the opinion that the plaintiff cannot claim to itself the right of revocation at its free will and pleasure. To hold otherwise and to decree possession in such circumstances would be nothing else than putting the seal of approval of the Court to a breach of contract.

Then it was contended that the learned Judge of the Court below has found that the defendant has not been paying any compensation to the plaintiff for her occupation of the 1/3rd portion of the room and has therefore committed a breach of a term of the licence. Because of the breach of the term, the plaintiff says that it is entitled to revoke the licence. Now, if we scan the terms of the consent decree passed in the preliminary suit, we find that there is no reference whatsoever to the right of occupation being conditioned by the liability to pay compensation. The learned counsel for the plaintiff, however, says that this must be implied in the agreement between the parties. He further points out that, even according to the defendant herself, she was occupying the room or using it without paying rent, and that when she was examined before the Court below she has admitted that she did not expect to use the room gratis and that she was liable to pay the proportionate amount of rent, i.e. Rs. 5. From this he wants me to conclude that one of the conditions of the licence was the payment of compensation by the defendant to the plaintiff. All that we have is the plaintiff's statement in the "Cause of Action" to the effect that the defendant neglected to pay "the licence charges at the rate of Rs. 15 per month". There is no averment there, or even in the evidence of Dharamdas who was examined on behalf of the plaintiff, to the effect that the payment of Rs. 15 per month was a condition for the occupation of one-third of the room. Now, since the plaintiff has failed to establish that the payment of Rs. 15 per month was a condition of the licence, it is not open to it to say that it is entitled to revoke the licence because the defendant has not been paying compensation at the aforesaid rate.

That being the position, I am of the opinion that the learned Judge of the Small Cause Court acted erroneously in the exercise of his jurisdiction in passing a decree in favour of the plaintiff. Accordingly, I allow the application in revision and make the rule absolute with costs.

Application allowed: Rule made absolute.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

GULABRAO FAKIRRAO HARPHALE v. BABURAO FAKIRRAO HARPHALE.*

Tenants in common—Ancestral property, after partition between members of joint Hindu family, remaining with one of the members—Such member receiving income of other members from property and mixing it with his own from such property—Purchase of property by member from such income—Separate accounts of income received on behalf of other members not maintained—Whether property so acquired belonged to erstwhile members as tenants in common—Indian Trusts Act (II of 1882), Secs. 90, 94, 95.

The entire immovable property of a joint Hindu family which consisted of ancestral property and subsequent acquisitions remained, after severance of the joint family status by partition between the plaintiffs and the defendant, who were members of the family, with the defendant. The defendant did not maintain separate accounts of the income received from the properties in which the plaintiffs had a share and the properties acquired by him after the partition. The defendant dealt with the income derived from his share and the share of the plaintiffs. It was contended by

*Decided, November 18/19, 1958. First Division, at Poona, in Special Civil Suit No. 8 Appeal No. 90 of 1955, against the decision of M. V. Purandare, Joint Civil Judge, Senior of 1953.

the plaintiffs that when the defendant continued to receive the share of the income even after partition in the ancestral and joint family properties and mixed up the income belonging to their share with the income of his own share and acquired properties from time to time, all the properties so acquired must be deemed to be impressed with the character of the fund out of which the properties were acquired i.e. the acquired properties belonged to the plaintiffs and the defendant as tenants in common:—

Held, that because the defendant continued to receive the rents and profits of the share of the plaintiffs in the properties which were originally ancestral or joint family properties he did not thereby become a trustee of the rents and profits so received for the plaintiffs, although he was liable to account for the rents and profits received by him,

that the fact that the defendant failed to maintain separate accounts of the income of the plaintiffs' share collected by him did not impress the fund accumulated by him after severance with the character of a fund belonging to the plaintiffs and the defendant,

that the fund in the hands of the defendant was still a fund of which he was the owner and it was not impressed with any trust in favour of the plaintiffs, and

that the property acquired with the aid of that fund was the exclusive property of the defendant and the plaintiffs had no claim or share in that property.

*Kennedy v. De Trafford*¹ and *Ramabai Govind v. Raghunath*², referred to.

ONE Fakirrao Manikrao, a resident of the village of Fursungi in the district of Poona, died on March 12, 1929, leaving him surviving two sons—Baburao (defendant) and Gulabrao (plaintiff)—and his wife Anusuyabai. At the time of Fakirrao's death, the defendant was about 19 years of age and the plaintiff was about 5 years of age. Fakirrao was the village Patil, and after his death the office of Patil devolved upon the defendant. The family was receiving an annual income of Rs. 150 whenever the duties of the office of the Patil were performed by members thereof. Between 1910 and 1920 Fakirrao officiated as the Patil, and between the years 1930 and 1940 the defendant performed the duties of the Patil. Fakirrao was possessed of certain lands and three houses in Fursungi. Some of these lands were mortgaged and sold by Fakirrao. After the death of Fakirrao the defendant assumed management of the joint family and exerted himself with a view to improve the condition of the family. The only ancestral lands which were in the possession of the defendant were a few lands and by exerting himself in these and certain lands which were obtained by him on lease, the defendant was able to accumulate a sufficient amount with the aid of which he redeemed one of the mortgages. In 1937 the defendant purchased a survey number from one Ranu Kule for Rs. 200 and later redeemed another mortgage. Some time about 1941 an income of about Rs. 600 was received by the defendant from orange trees planted by him on some land taken on lease. Thereafter by several transactions of sale and purchase the defendant made a profit of about Rs. 3,000. On July 8, 1943, the defendant purchased from one Anusuya a house at Fursungi for Rs. 1,150. Till the year 1940 the plaintiff was attending school and in 1943 his marriage was performed and Rs. 500 were spent by the defendant for the marriage ceremony. Some time about the end of 1944 there were disputes between the plaintiff and the defendant. It was the case of the defendant that there was an arrangement to partition the joint family properties between the two brothers, that the cattle, ornaments, utensils and the agricultural implements were partitioned between the two brothers and the plaintiff took his share of the ornaments, utensils and the furniture; that the agricultural implements were left with the defendant at Fursungi, and that the immoveable properties of the joint family were not divided because the defendant insisted upon receiving the share payable by the plaintiff for redeeming the ancestral lands which were redeemed by the defendant, as he claimed, at his own expense. On March 31, 1945, a transferee reconveyed the land to the defendant for Rs. 1,050 which

¹ [1897] A.C. 180.

L.R.—48.

² (1951) 53 Bom. L.R. 883.

was paid by the latter. On August 11, 1945, the defendant executed a rent note for five years in respect of a survey number and agreed to take those lands on lease at an annual rental of Rs. 500. Possession of this land was obtained on April 5, 1946. He also executed a rent note in respect of a survey number and obtained possession thereof on March 6, 1946, to be held on lease at an annual rental of Rs. 300. Thereafter by various transactions he purchased some lands between March 6, 1947, and August 22, 1947. On January 8, 1953, the plaintiff and his mother Anusuyabai commenced the present suit in the Court of the Joint Civil Judge, Senior Division, at Poona, against the defendant for a declaration that they had each a third share in the properties described in the plaint and for separate possession of their shares by metes and bounds. In the alternative, it was claimed that if the Court held that Anusuyabai was not entitled to a share in the property, provision be made for her maintenance and the plaintiff be awarded his share in the properties. It was the case of the plaintiffs that all the properties which were in the possession of the defendant were either ancestral properties or properties acquired with the aid of ancestral properties or properties which were thrown into the common stock or acquired by joint exertions by the parties and the same were accordingly impressed with the character of joint family property and that the plaintiffs had under the Hindu law collectively a 2/3rd share therein and the defendant had the remaining one-third share. The defendant contended *inter alia* that the properties in which the plaintiffs claimed a share were not joint or ancestral estate, that the properties in his possession were his exclusive properties and that the plaintiffs had no share therein, that he had never blended the properties acquired by him with any joint family or ancestral property in his hand, that in any event there was severance between him and the plaintiffs some time after the year 1944 and that the moveables belonging to the plaintiffs and the defendant were divided but the immoveable properties could not be divided because the plaintiff declined to pay his share of the debts charged upon the properties which were satisfied by the defendant. The trial Judge held that certain lands and houses were joint family properties and certain other lands were not joint family properties. He ordered that in the properties declared to be joint family properties the plaintiffs had a 2/3rd share.

The plaintiff appealed.

M. V. Paranjape, for the appellant.

M. A. Rane, for respondent No. 1.

K. J. Abhyankar, for respondent No. 2.

SHAH J. [His Lordship after setting out the facts of the case and holding that there was in fact severance of the joint family status in 1945 between the plaintiffs and the defendants, proceeded.] The content of the presumption is set out by their Lordships of the Privy Council in *Appalaswami v. Suryanaraynamurti*,¹ in the following terms (p. 631):

"...Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

The presumption applies only to property acquired during the subsistence of the joint family and not thereafter. Mr. Paranjape has not been able to invite our attention to any rule of Hindu law which supports the submission that pro-

perty which is acquired, after severance of the joint family status must, even if there be no agreement in that behalf, be regarded as acquired for the family. Evidently by the severance of the status effected in the year 1945 the plaintiffs and the defendant became tenants in common of the property held by them. The entire immoveable property of the family, which consisted of the ancestral lands and the subsequent acquisitions till the year 1945, remained after severance with the defendant, and it is admitted by the defendant that he did not maintain separate accounts of the income received from the properties in which the plaintiff had a share, and the properties acquired by him after the partition. The defendant also, it is conceded, dealt with the income derived from his own share and the share of the plaintiffs.

Mr. Paranjpe says that when the defendant continued to receive the plaintiffs' share of the income even after partition, in the ancestral and the joint family properties and mixed up the income belonging to the plaintiffs' share with the income of his own share and acquired properties from time to time, all the properties so acquired must be deemed to be impressed with the character of the fund out of which the properties were acquired, i.e., that the properties belonged to the three parties to the suit as tenants in common. Counsel does not rely in support of this contention upon any agreement express or implied in that behalf. He merely asserts it as a proposition of law that a co-sharer in possession of immoveable property belonging to himself and other sharers is a trustee for the other co-sharers, and when he mixes up the income received by him from property in which he is a co-sharer with his own fund and acquires property with that fund, the property so acquired is impressed with the same tenure in which the other property of which the income is received is held; and in support of this argument Mr. Paranjpe relies upon ss. 90, 94 and 95 of the Trusts Act. In our judgment, the argument of Mr. Paranjpe proceeds upon several assumptions which are not warranted. Because the defendant continued to receive the rents and profits of the share of the plaintiffs in the properties which were originally ancestral or joint family properties he did not thereby become a trustee of the rents and profits so received for the plaintiffs. As a co-sharer, it is true, the defendant was and continued to be liable to account for the rents and profits received by him, but the fact that the defendant failed to maintain separate accounts of the income of the plaintiffs' share collected by him did not impress the fund accumulated by him after severance with the character of a fund belonging jointly to the plaintiffs and the defendant: the fund in the hands of the defendant was still a fund of which he was the owner. It was not impressed with any trust in favour of the plaintiffs: and the property acquired with the aid of that fund was the exclusive property of the defendant and the plaintiffs had no claim or share in that property. Mr. Paranjpe also urged that when the income received by the defendant from the properties held by him as a tenant in common with the plaintiffs was blended by the defendant with the other income received by him, the defendant was guilty of conversion and the property which was acquired by that conversion must be regarded as impressed with the rights which the plaintiffs had in the property from which the income was received from time to time. But this is the same argument in another guise; and in support of this contention also Mr. Paranjpe has not been able to cite any authority or to advance any substantial argument.

In *Kennedy v. De Trafford*,² it was observed:

"There is no fiduciary relation between tenants in common of real estate as such. Nor can one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character."

A co-sharer collecting rents and profits of the entire property is, therefore, not a trustee for the other co-sharers. It is then difficult to accept the argument of Mr. Paranjpe that when the defendant collected the rents and profits of the immoveable property after the plaintiffs left Fursungi and migrated to

Poona, and mixed up the same with the income of his separate acquisitions, the total fund became impressed with a trust in favour of the plaintiffs, and in the property acquired with the aid thereof, the plaintiffs acquired an interest.

Sections 90, 94 and 95 fall in Chap. IX of the Trusts Act, and they deal with certain obligations in the nature of trusts. A person who is not an express trustee, but who holds a position *qua* another which may be regarded as fiduciary in character, will be subject to certain obligations set out in the various sections of that chapter. Section 90, on which reliance is placed, requires a person who has qualified ownership in any property to hold, for the benefit of all the persons interested, any advantage gained by him by availing himself of his position in derogation of the rights of the other persons interested in the property. In order that s. 90 of the Trusts Act may apply, it must be established that the party against whom relief is sought availed himself of his position, that he gained an advantage by so doing and that the advantage was gained in derogation of the right of the person interested in the property. In other words, a person standing in a fiduciary relation to another cannot by taking advantage of his position gain exclusively for himself an advantage which he could not have obtained but for the position which he occupied. That the defendant when he collected the rents and profits of the property may be liable to account for the same is undisputed. But it is difficult to appreciate when the plaintiffs left the defendant in enjoyment of their share of the property and the latter collected the rents and profits thereof how he may be regarded as having availed himself of his position and having obtained an advantage in derogation of the rights of the plaintiffs which rendered him liable to hold for the benefit of the plaintiffs the property acquired by him out of the fund with which the income of the plaintiff's share was mixed up. In our judgment, s. 90 can have no application to this case.

Section 94 only extends the obligations prescribed by ss. 81 to 93 of the Trusts Act to constructive trusts in cases not otherwise expressly provided for; and does not add substantially to the provisions of s. 90 on which reliance has primarily been placed.

Section 95 of the Trusts Act provides:

"The person holding property in accordance with any of the preceding sections of this Chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it."

If, however, the defendant be not regarded as holding the property in a fiduciary capacity in accordance with any of the preceding sections of Chap. IX, by reason of s. 95 he will not evidently be subject to the liabilities and disabilities of a trustee. There is, in our judgment, nothing in ss. 90, 94 and 95 which expressly or by implication renders the self-acquisition of the defendant liable to be held for the benefit of the plaintiffs merely because the defendant has not maintained a separate account of the income received by him out of the share of the plaintiffs in the property.

But Mr. Paranjpe relied strongly upon a judgment of this Court in *Ramabai Govind v. Raghunath*,³ in support of his argument. In that case, the Court held that where a trustee had purchased property from a fund, which consisted of the income received from trust property and the other property belonging to the trustee, the property so purchased will be held by the trustee as if the beneficiary had the same right therein as in the trust property. In that case, the person who acquired the property in the view of the Court occupied the position of an express trustee. He had collected the income of the trust property as well as of other properties, and had mixed up the income and out of the fund so collected he had acquired the disputed property. The question then arose whether to the disputed property the beneficiary of the trust could have recourse; and this Court held that the property so acquired must

tion and the civil application arise are briefly as follows. The applicant and opponent No. 1 are brothers. Opponents Nos. 2 and 3 are the sons of oppo-

**Decided, December 2, 1958.* Civil Revision Application No. 1378 of 1958 (with C.A. No. 2318 of 1958), from the orders passed by K.J. Manjrekar, Civil Judge, S. D., Ahmednagar, in Special Civil Suit No. 28 of 1957.

1 [1946] Nag. 824, F.B.

2 [1954] A.I.R. Nag. 250.

3 (1950) 32 Bom. L.R. 645, F.C.

4 (1945) 37 Bom. L.R. 845, F.C.

5 [1923] A.I.R. P.C. 13.

6 [1923] A.I.R. P.C. 98.

7 (1939) 41 Bom. L.R. 994.

that in all these cases what the Court was called upon to consider was the power of a pleader to enter into a compromise. None of these cases dealt with the question of the power of an advocate to compromise a suit. In *Sourendra Nath Mitra v. Tarubala Dasi*⁴, it was held by their Lordships of the Privy Council that an advocate in India, whether practising in the presidency towns

1 [1923] A.I.R. P.C. 13.

2 [1923] A.I.R. P.C. 98.

3 (1930) 41 Bom. L. R. 994.

4 (1930) 32 Bom. L. R. 645, P.C.

or in the mofussil, who derives his general authority for being briefed in a suit on behalf of the client, has implied authority to settle and compromise in all matters connected solely with the action in which he has received a brief (but not in matters merely collateral to the action), unless he has received express instructions to the contrary from his client. This decision of their Lordships goes against the contention advanced before me by Mr. Pendse. Mr. Pendse, however, relies upon the following passage in the judgment of their Lordships (p. 652) :—

“...Their Lordships desire to confine their decision on this point to the case of advocates, whatever their qualifications, admitted as such by the respective appropriate Courts in India, who derived their general authority from being briefed in a suit on behalf of a client. Where the legal representative in Court of a client derives his authority from an express written authority, such as a *vakalatnama*, different considerations may well arise, and in such cases their Lordships express no opinion as to the existence of any implied authority of the kind in discussion.”

Mr. Pendse argues that these observations of their Lordships would clearly show that where an advocate has filed a *vakalatnama*, his powers must be deemed to be limited to matters specifically mentioned in the *vakalatnama*. In other words, his argument is that there is no scope for implying any powers with an advocate who has in his favour a *vakalatnama* from his client who has engaged him. It seems to me that though their Lordships have stated that other considerations will have to be borne in mind while considering the question as to whether advocates deriving their authority from a *vakalatnama* have an implied power to enter into a compromise, their Lordships have not expressed any opinion to the effect that where a *vakalatnama* exists there is no scope for implying in favour of the counsel authority with regard to matters which are not specifically mentioned in the *vakalatnama*. On the basis of the decision of their Lordships it has been held by a Full Bench of the late High Court of Nagpur in *Jiwibai v. Ramkuwar*⁵, that counsel in India, whether barristers, advocates or pleaders, have inherent powers, both to compromise claims and also to refer disputes in Court to arbitration, without the authority or consent of the client, unless their powers in this behalf have been expressly countermanded, and this is so whether the law requires a written authority to act or to plead or not. It is true that a division bench of the same High Court have in *Supaji v. Nagorao*,⁶ pointed out that the view taken by the full bench in so far as the scope of the authority of pleaders is concerned is not in accord with the decision of their Lordships of the Privy Council in *Sarat Kumari v. Amulyadhan* and *Sourindra v. Heramba*. But the division bench has accepted as correct the view of the full bench to the effect that the authority of an advocate to compromise is implicit in the appointment of the advocate unless it is expressly countermanded by the client. I respectfully agree with the view taken in these cases and hold that Mr. Kotwal had an implied authority to enter into a compromise with respect to the matter under appeal.

It must, however, be borne in mind that the implied authority of an advocate to enter into a compromise is limited to the action in which he has been engaged and does not extend to matters which are extraneous to the action or which are merely collateral to it. It is argued by Mr. Pendse that here the compromise is beyond the authority of the counsel because it embraces a matter which is extraneous to the appeal before this Court. It seems to me that this argument is correct and must be accepted. Now, the matter which was before this Court was whether a temporary injunction should issue to the present applicant, i.e. to the respondent in the appeal, or not. No question of depositing any money was at all involved in this appeal. On the other hand, what was sought by the appellants in the appeal, i.e. the present opponents, was a restraint order against the present applicant, prohibiting him from withdrawing certain monies which were in deposit with certain banks. The effect of the order of the High Court passed on the consent accorded by Mr. Kotwal is

to make available to opponent No. 1 the amount with respect to which the opponents had sought an injunction. No doubt, under that order the applicant is only required to deposit half of the amount withdrawn by him in Court; but upon the order as it stands, if such amount is deposited by the applicant, the opponents will be at liberty to obtain permission of the Court to withdraw the amount on such terms as the Court may impose on them. In my opinion, what was agreed to by Mr. Kotwal is thus quite extraneous to the matter which was before this Court in the appeal. In *Shoonandan Prasad Singh v. Abdul Fateh Mohammad Reza*⁷, their Lordships of the Privy Council observed as follows (pp. 847-48):—

"But whatever may be the authority of counsel, whether actual or ostensible, it frequently happens that actions are compromised without reference to the implied authority of counsel at all. In these days communication with actual principals is much easier and quicker than in the days when the authority of counsel was first established. In their Lordships' experience both in this country and in India it constantly happens, indeed it may be said, that it more often happens that counsel do not take upon themselves to compromise a case without receiving express authority from their clients for the particular terms: and that this position in each particular case is mutually known between the parties."

Then their Lordships proceeded to observe (p. 848):—

"Their Lordships, however, think it advisable to say that if the facts are as they suppose them to be, viz. that the attack on the plaintiffs' title was not seriously made in the Court of Appeal, counsel's authority could not in any circumstances extend to an agreement to part with the plaintiffs' rights in the property over which the mortgage was claimed which the plaintiffs were seeking to get rid of..."

After making these observations, their Lordships quoted with approval the following observations of Pollock C.B. in *Swinfen v. Lord Chelmsford*⁸:—

"The other complaint made in the first count is, that the defendant agreed, on the plaintiff's behalf, that the estate should be given up and a conveyance of it be executed by the plaintiff. As to this, the plaintiff has always contended that the defendant had no authority or power to make such an agreement, that it was not binding, and that the agreement was a nullity; and we are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it—such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial—we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think, in an action for a nuisance between the owners of adjoining land,—however desirable it may be that litigation should cease by one of the parties purchasing the property of the other, we think the counsel have no authority to agree to such a sale and bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void."

Here if we substitute "injunction" for "nuisance", the analogy between the case decided by Pollock C.B. and the present case would also be very clear. In my opinion, therefore, though Mr. Kotwal had authority to compromise, his authority did not extend to agreeing on behalf of his client to deposit half the amount in Court.

For these reasons, I allow Civil Application No. 2318 of 1958 and direct that the appeal shall now be heard again. The Rule is made absolute in the civil application.

In view of the fact that the civil application is allowed and the appeal is ordered to be re-heard, the civil revision application (No. 1378 of 1958) has become infructuous and is accordingly dismissed.

There will be no order as to costs.

The appeal from Order will now be heard next week.

Order accordingly.

therefore, he passed a gift deed in favour of his minor grandsons, making his daughter-

**Decided, December 11, 1953.* Second Appeal No. 256 of 1953 (with Second Appeal No. 257 of 1953), against the decision of T.P. Ghogale, District Judge at Nasik, in Civil Appeal No. 208 of 1954, confirming the order passed by D. M. Honavar, Civil Judge, Junior Divi-

sion, at Igatpuri, in Regular Darkbast No. 352 of 1953.

- 1 (1923) I. L. R. 52 Bom. 316, F.C.
- 2 [1933] A.I.R. Rang. 155.
- 3 (1884) I.L.R. 9 Bom. 146.

the minors accepted delivery on their behalf. Now, the mother had no right to the custody of the minors' property as long as their father was alive. She was not even the *de facto* guardian. For this reason, she could not accept delivery of possession on their behalf. This is what was held in the Rangoon case referred to above. It was contended by Mr. Karlekar for the donees, who

1 (1928) L. L. R. 52 Bom. 316, F.C.

2 [1933] A.I.R. Rang. 155.

are the appellants before me, that it is not necessary that a gift must be accepted on behalf of the minor donees by their legal guardian and that it would be open to any person to accept a gift on their behalf. He points out that, after all, in accepting delivery of possession of property gifted to a minor, the person who so accepts it does something for the benefit of the minor, and that, therefore, that person must be held to be competent in law to accept such gift. I am afraid I cannot accept this argument, because the law contemplates that delivery of possession is essential for completion of a valid gift; and delivery of possession must ordinarily be made, when the property is capable of actual delivery of possession, to the person who is to take possession of such property or a person duly authorised in law to take delivery of possession on his behalf. In the case of a minor, the only person who can be said to be legally authorised to take possession or accept delivery of possession on behalf of the minor is his legal guardian. A stranger cannot step in and take possession on his behalf. No doubt, in accepting delivery of possession of property gifted to a minor, the person taking possession will be accepting a benefit, but it seems to me that a benefit cannot be forced upon a minor in this way. It can be accepted only by someone who is competent to act on behalf of the minor.

One of the properties gifted is a house in which the grandfather, who is the donor, the donees and their father and mother live. Relying upon the decision of West J. in *Shah Ibham v. Shah Suloman*,³ Mr. Karlekar contended that in a case of this kind no actual delivery of possession by the donor to the donees was necessary. In the decision just referred to, West J. has observed as follows (pp. 150-151) :—

“...As to the delivery of the house, the principle is to be borne in mind, that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. He occupies certain part, and this occupation becoming actual possession by the will of the parties, extends to the whole which is in immediate connection with such part where the possession is rightfully, though not where it is wrongfully taken—*Ex parte Fletcher*. An appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner, whose intention to transfer has been unequivocally manifested.”

It is not necessary for me to consider how far this statement of the law can be regarded as correct in view of the decision of their Lordships of the Privy Council in *Musa Miya v. Kadar Bux*, because the decision of West J. is distinguishable. In the case before him, the donee does not appear to have been a minor and was thus a person who could legally form an intention to continue in possession of the property as an owner. Where the donee is a minor, an intention of the kind contemplated by West J. could only be formed on his behalf by his legal guardian.

Then Mr. Karlekar pointed out that the suit property was actually mutated in the name of the minor and, therefore, it must be held that the possession of that property was delivered to him. It may be mentioned that even the record of rights does not show that the minors were in possession through their legal guardian. On the contrary, it shows that they were in possession through their mother. Therefore, even if it is held that possession had been delivered by the donor, it was so delivered, not to the legal guardian, but to the mother of the minors who could not in law be entitled to act for and on behalf of the minors and accept delivery of possession.

That being the position, I hold that the Courts below were right in coming to the conclusion that the deed of gift was not complete and, therefore, not valid in law. Accordingly, I dismiss the appeals with costs.

Appeals dismissed.

Before Mr. Justice Vyas and Mr. Justice Tamba.

MESSRS. BHIKUSA YAMASA KSHATRIYA v. SANGAMNER
AKOLA TALUKA BIDI KAMGAR UNION.*

Minimum Wages Act (XI of 1948), Secs. 3, 5, 6, 7, 8, 10, 20, 26—Constitution of India, Arts. 13, 14—Whether obligatory upon State Government to fix or revise rates of minimum wages according to cost of living index—Section 3(3)(a)(iv) of Act whether discriminatory—Burden of proof where notification issued under statute challenged as being discriminatory—Whether necessary to prove that discrimination intentional and purposeful.

The Minimum Wages Act, 1948, does not cast a statutory obligation upon the State Government to fix or revise the rates of minimum wages strictly according to the cost of living index. Therefore, if the cost of living index in a particular locality is not strictly followed while fixing or revising the rates of minimum wages under s. 3 of the Act, no breach of a statutory duty is committed.

Section 3(3)(a)(iv) of the Minimum Wages Act, 1948, is not discriminatory and it, therefore, does not violate the provisions of art. 14 of the Constitution of India.

Bijay Cotton Mills Ltd. v. The State of Ajmer,¹ referred to.

When a notification issued by Government in pursuance of the power conferred upon it by the statute is challenged under art. 14 of the Constitution of India as being discriminatory, the challenger must prove not only that the notification is not based on any classification or that it is based on classification which is not founded upon intelligible differentia having rational relation to the object which the Legislature has sought to attain by enacting the statute, but further that the discrimination is intentional and purposeful.

Chitranjitlal Choudhuri v. The Union of India,² *Ram Krishna Dalmia v. Tendolkar J.*,³ *The State of Rajasthan v. Rao Manohar Singhji*,⁴ *Ram Prasad Narayan Sahi v. The State of Bihar*,⁵ *Budhan Choudhry v. The State of Bihar*,⁶ *Snowden v. Hughes*,⁷ *Edward Mills Co. Ltd. v. The State of Ajmer*⁸ and *State of Bombay v. Narothamdas Jethabhai*,⁹ referred to.

Article 13(3) of the Constitution of India does not confer upon the order, rule, regulation, notification etc. referred to in cl. (a) of art. 13(3), the character identical with the character of the Act of the Legislature. All that it says is that the order, notification etc. shall have the same force, and shall be treated on the same footing, as the Act of the Legislature.

THE facts appear in the judgment.

R. B. Kotwal, for the petitioners.

D. S. Nargolkar, for opponent No. 1.

H. R. Gokhale, for opponents Nos. 2(a) and 2(b).

H. M. Seervai, Advocate General, with B. N. Vakil, for opponent No. 3.

H. M. Seervai, Advocate General, instructed by *Little and Co.*, for opponent No. 4.

H. M. Seervai, Advocate General, for opponent No. 5.

VYAS J. This is an application under art. 226 of the Constitution of India by the owners of the Bidi manufacturing concerns of Sangamner, Akola and places within 7 miles of their respective municipal limits and it raises certain important questions of law.

In the year 1948 the Central Legislature passed an Act, being Act No. XI of 1948, called the Minimum Wages Act. Section 3(1) of the Act empowers the appropriate Government to fix the minimum rates of wages for certain industries which are described as "scheduled industries". Section 3, sub-s. (3),

*Decided, June 27/30, 1958. November, 28, 1958. Special Civil Application No. 67 of 1958 (with Civil Application No. 1555 of 1958).

1 [1955] 1 S.O.R. 752.

2 [1950] S.O.R. 869, s.c. 53 Bom. L.R. 499.

3 (1958) 61 Bom. L.R. 192, S.O.

4 [1954] S.O.R. 996.

5 [1953] S.O.R. 1129.

6 [1955] 1 S.O.R. 1045.

7 (1944) 88 Law ed. 497.

8 [1955] 1 S.O.R. 755.

9 [1951] S.O.R. 51, s.c. 53 Bom. L.R. 402.

cl. (a), sub-cl. (iv), provides that different minimum rates of wages may be fixed for different localities at the time of fixing or revising the minimum rates of wages. Section 4 lays down what the minimum rates of wages fixed or revised by the appropriate Government under s. 3 may consist of. Section 5, sub-s. (1), cl. (a), provides for the appointment of a Committee to hold enquiries in the matter of fixing minimum rates of wages in respect of any scheduled employment. Section 5, sub-s. (2), empowers the appropriate Government to fix the minimum rates of wages in respect of each scheduled employment, after considering the advice of the Committee appointed under cl. (a) of sub-s. (1) of s. 5. Section 6 requires the appropriate Government to appoint Advisory Committees and Sub-committees to inquire into the conditions prevailing in any scheduled employment and to advise the appropriate Government in the matter of revising the rates of wages in respect of such employment. Under s. 7 the appropriate Government is empowered to appoint an Advisory Board for coordinating the work of the Advisory Committees and Sub-committees. Section 8 provides that the Central Government shall appoint a Central Advisory Board for the purpose of advising the Central Government and State Governments in the matters of fixation and revision of minimum rates of wages and other matters under the Act and for coordinating the work of the Advisory Boards. Section 10 lays down that before revising any minimum rates of wages fixed under the Act, the appropriate Government shall consult all the Advisory Committees appointed under s. 6 and the Advisory Board also. Section 20 empowers the appropriate Government to appoint an Authority to hear and decide for any specified area all claims arising out of payment of less than the minimum rates of wages to employees employed or paid in that area. Sub-section (2) of s. 20 provides that where an employee is paid less than the minimum rates of wages fixed for his class of work under the Act, the employee himself, or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any inspector, or any person acting with the permission of the Authority appointed under sub-s. (1), may apply to such Authority for a direction under sub-s. (3) of s. 20. Then, there is s. 26, sub-s. (2A) whereof provides:

"The appropriate Government may, if it is of opinion that, having regard to the terms and conditions of service applicable to any class of employees in a scheduled employment generally or in a scheduled employment in a local area, it is not necessary to fix minimum wages in respect of such employees of that class as are in receipt of wages exceeding such limit as may be prescribed in this behalf, direct, by notification in the Official Gazette and subject to such conditions, if any, as it may think fit to impose, that the provisions of this Act or any of them shall not apply in relation to such employees."

In the year 1952 the State of Bombay issued a notification No. 146/48-XIII under s. 5, sub-s. (2), of the Act (the Minimum Wages Act) fixing the rates of minimum wages with effect from March 31, 1952, for workers employed in certain Bidi manufacturing concerns. Under that notification the districts of Thana, Ahmednagar, East Khandesh, West Khandesh, Nasik, Poona, Satara North, Kolaba and Dangs comprised Zone No. III; the districts of Banaskantha, Panchmahala, Broach and Surat comprised Zone No. II; and the districts of Dharwar, Bijapur, Belgaum, Kanara, Ratnagiri, Sholapur, Satara South and Kolhapur comprised Zone No. IV. The notification provided that in the districts comprised in Zone No. III the minimum rate of wages to be paid to employees working in the Bidi manufacturing concerns in that Zone was Rs. 2 for thousand Bidis.

It may be noted at this stage that the towns of Akola, Sangamner and places situated within 7 miles of their respective municipal limits fell within the District of Ahmednagar. Sinnar is a town situated in the District of Nasik. Jalgaon is a town situated in the District of East Khandesh and Dhulia is a town situated in the District of West Khandesh.

On August 29, 1953, the State of Bombay issued a notification under s. 26,

sub-s. (2), of the Act declaring that the Act shall not apply during from August 30, 1953, to December 31, 1953, to any locality in Bombay except certain specified localities and the localities so excluded the towns of Sangamner and Akola. By a notification dated 1953, the above exemption from the provisions of the Act was extended from January 1, 1954, to March 31, 1954. By a further notification dated 1954, once again the said exemption was extended from April 1, 1954, to September 30, 1954. As I have mentioned above, the exemption from the operation of the Act, which was originally declared by the notification dated August 29, 1953, did not apply to certain areas, including the towns of Sangamner and Akola. By a further notification dated September 1, 1954, issued under sub-s. (2) of s. 26, the said exemption was still further extended from October 1, 1954, to December 31, 1954. Again, this exemption was extended by a similar notification from January 1, 1955, to March 31, 1955. By a notification dated March 31, 1955, the State Government extended the above exemption from April 1, 1955, to June 30, 1955. By a notification dated June 30, 1955, issued under sub-s. (2) of s. 26, the Government of Bombay directed that for a period of three months from July 1, 1955, the provisions of the Act shall not apply to any tobacco manufactory in Sangamner and Akola and in 7 miles of their respective municipal limits also. It would thus follow that till June 30, 1955, the provisions of the Act applied to the towns of Sangamner and places within 7 miles of their respective municipal limits although they did not apply to certain other areas and that with effect from July 1, 1955, the Act ceased to apply even to the towns of Akola and places within 7 miles of their municipal limits. This exemption from the application of the Act was extended from time to time by notifications dated December 31, 1956. However, in the meantime, on August 22, 1956, the Government of Bombay issued a notification No. 2438/48-J cancelling the exemption with effect from September 1, 1956, so far as Sangamner, Akola and 7 miles of their municipal limits were concerned.

During the period from March 31, 1952, to June 30, 1955, a period during which the Act applied to Sangamner, Akola and places within 7 miles of their respective municipal limits, the State Government issued a notification on August 1, 1955, revising the minimum rates of wages. As a result of this notification, the minimum rates of wages in Sinnar, Sangamner, Akola and places within 7 miles of their respective municipal limits were raised. In Sangamner, Akola and places within 7 miles of their respective municipal limits, the rate was raised from Rs. 2 for thousand Bidis to Rs. 2-4-0 for thousand Bidis. So far as the rate in the town of Sinnar was concerned, it was raised from Rs. 2 for thousand Bidis to Rs. 2-4-0 for thousand Bidis. It may be noted that in the case of East Khandesh and West Khandesh, the rate of minimum wages was reduced from Rs. 2 for thousand Bidis to Rs. 1-8-0 for thousand Bidis. So far as the cities of Poona and Sholapur were concerned, the rate of minimum wages was kept constant. In Poona it remained at Rs. 2 for thousand Bidis and in Sholapur it continued to remain at Rs. 2 for thousand Bidis.

Taking advantage of the above position, the Bidi workers at Sangamner, Akola and at various places situated within 7 miles of their respective municipal limits started demanding wages at the revised rates. These claims under s. 20 of the Act before the Authority under the Act. of 1947, of the Bidi manufacturing concerns resisted the claims of the workers on various grounds. One of the contentions put forward by the workers was that complicated questions of law under the Constitution of India were involved in the determination of the claims of the employees and, therefore, the Authority should submit the cases to the High Court for a decision of the questions under the Constitution. The Authority, however, did not consent to accede to the prayer of the employers and proceeded to hear the

claims of the workers. On November 6, 1957, the Authority gave his decision in one of the Miscellaneous Applications, namely, Miscellaneous Application No. 65 of 1956, and he held that the Bidi workers were not entitled to receive wages at the revised rates for the period September 1, 1956, to December 31, 1956. But the Authority further declared that with effect from January 1, 1957, onwards the Bidi workers would be entitled to receive wages at the rates revised under the notification dated April 19, 1955. It is from this decision of the Authority that both the parties have filed the various applications. The present application (No. 67 of 1958) is filed by the owners of the Bidi manufacturing concerns of Sangamner, Akola and places situated within 7 miles of their respective municipal limits. As I have mentioned above, both the parties, namely, the owners of the Bidi manufacturing concerns and the employees working in those concerns have felt dissatisfied with the decision of the Authority. The employers contend that the Authority erred in granting a declaration that the Bidi workers in Sangamner, Akola and places within 7 miles of their respective municipal limits were entitled to the wages of Rs. 2-2-0 for thousand Bidis from January 1, 1957. The Bidi workers, on the other hand, contend that they should have been granted wages at the rate of Rs. 2-2-0 for thousand Bidis for the period from September 1, 1956, to December 31, 1956, also.

Now, the learned advocate Mr. Kotwal for the petitioners has pressed several contentions before us in this application. His first contention is that the procedure requisite under the Minimum Wages Act was not followed by the State Government before revising the rates of minimum wages payable to the Bidi workers, that no sufficient thought was given by Government to the diminishing cost of living index number in the localities concerned and that the revision of the rates of minimum wages was done in a manner which was arbitrary, capricious and against the rules of natural justice. Mr. Kotwal has made this contention in this way: He says that when the rates of minimum wages were originally fixed by a notification dated March 31, 1952, and when various Zones were created for that purpose, Jalgaon and Ahmednagar were placed in the same Zone, being Zone No. III. Akola and Sangamner are towns situated in the district of Ahmednagar. Mr. Kotwal says that the cost of living index number, so far as the town of Jalgaon in the East Khandesh district was concerned, went down substantially in the years 1954 and 1955. The district of East Khandesh and the district of Ahmednagar were grouped together in the same Zone in the year 1952, the basis of the grouping being the similarity of conditions regarding the cost of living. The district of Nasik was also included in the same Zone in the year 1952. As the cost of living index number went down in Jalgaon, says Mr. Kotwal, it must presumably have gone down in Ahmednagar district as well. As between Jalgaon and Ahmednagar, the former being a much more industrialised place, the living must have been more expensive there than in the places in the Ahmednagar district, and yet the revised rates of minimum wages in Jalgaon were lower than in Sangamner, Akola and places within 7 miles of their respective municipal limits. The rate of minimum wages as originally fixed by the notification, dated March 31, 1952, for Nasik, Jalgaon, Sinnar, Sangamner, Akola and places within 7 miles of the respective municipal limits of Sangamner and Akola was Rs. 2 for thousand Bidis. The revised rate for Nasik was increased to Rs. 2-4-0 for thousand Bidis from Rs. 2 for thousand Bidis. The revised rate for Sinnar, Sangamner, Akola and places within 7 miles of the respective municipal limits of Sangamner and Akola was increased from Rs. 2 for thousand Bidis to Rs. 2-2-0 for thousand Bidis. The revised rate for Jalgaon, on the other hand, was reduced from Rs. 2 for thousand Bidis to Rs. 1-10-0 for thousand Bidis. Thus, says Mr. Kotwal, the rate of minimum wages payable to Bidi workers in the localities where the living was cheaper was increased and it was reduced in places where the living was more expensive. Such a result, Mr. Kotwal says, would not have

occurred if proper procedure under the Act had been followed by the State Government at the time of the revision of the rates.

Mr. Kotwal's submission rests on the exaggerated importance attached by him to the cost of living index number in the various places. It is a fallacy to say that if the cost of living index number in one place is higher than that in another, the living is more expensive in the former place than in the latter. Cost of living indices are family baskets containing varying quantities of variable factors, such as, needs of the people concerned, their standards of living, the quality of goods available to them for consumption, transport charges, etc. We do not think it could be seriously disputed that an index number of the cost of living is really the ratio that the current cost of fixed collection of goods and services bears to the cost of the same collection of goods and services during a based period. One has to keep before him the family basket with contents varying in quantity as well as in quality. The cost of living index over a period of years is a measure of the variations in the prices of identical family baskets. We cannot compare the index for two different places, because the contents and size of the baskets in two places may be different, as, for example, in Bombay the basket may contain 28 items of food, whereas in Ahmednagar it may contain only 14 items of food. It would, therefore, not be entirely safe to rely exclusively upon the test of the cost of living index number while determining the question whether the rates of minimum wages fixed or revised were arbitrarily or properly fixed or revised.

It may be noted at this stage—and this is important—that the Minimum Wages Act does not cast a statutory obligation upon the State Government to fix or revise the rates of minimum wages *strictly* according to the cost of living index. Therefore, if the cost of living index in a particular locality is not strictly followed while fixing or revising the rates of minimum wages, there is no breach of a statutory duty committed. Section 4, sub-s. (1), merely provides that a minimum rate of wages fixed or revised by the appropriate Government under s. 3 may consist of any one of the three alternative methods. The first and the third methods in which there is a reference to the cost of living index are not obligatory. The State Government may adopt them or may not. Of course, if the State Government does adopt these methods, the element of the cost of living index may to a certain extent influence the rate. In the present case, however, there is nothing to show what method was adopted by the State Government for revising the rates of minimum wages by the notification, dated April 19, 1955. Indeed, we do not know what particular method was adopted by the State Government when the rates were originally fixed in 1952. If the method adopted by the State Government was the one provided by cl. (ii) of sub-s. (1) of s. 4, the cost of living index would not play the part which Mr. Kotwal says it should in the fixing or revising the rates of minimum wages. I have referred to this aspect of the case in some detail, because Mr. Kotwal has laid an emphasis, which appears to us to be an exaggerated emphasis, on the cost of living index number in the context of the question of fixing or revising the rates of minimum wages under the Act.

Next Mr. Kotwal says that the revision of the minimum rates of wages was done by the State Government arbitrarily and in a manner against the rules of natural justice. We have considered this contention carefully, but have felt ourselves unable to accept it. As I have stated above, s. 5, sub-s. (1), of the Act provides for the appointment of a Committee to hold an enquiry and advise the appropriate Government in the matter of fixing the minimum rates of wages. Section 6 provides for the appointment of Advisory Committees and Sub-Committees to enquire into the conditions prevailing in any scheduled employment and to advise the appropriate Government in the matter of the revision of the rates of minimum wages. It is not disputed that in this case an Advisory Committee was appointed by the State Government under s. 6. The said Committee was consulted by the State Government. It is also not disputed that this Committee made requisite enquiry into the conditions prevail-

ing in the Bidi making industry in the District of Ahmednagar wherein the towns of Akola, Sangamner and the places within 7 miles of their respective municipal limits are situated. This Committee, after due deliberations, made a report to the State Government, i.e., the Government of Bombay. After the report of the Advisory Committee was received by the Government of Bombay, the Government appointed an Advisory Board under s. 7 of the Act. It appears that the report submitted to the Government by the Advisory Committee was not a unanimous report. The Advisory Committee consisted of seven members. Three of the members were representatives of the employers, and three others were representatives of the employees. Shri P. S. Bakhle was the Chairman of the Committee. The Government sent the Committee's report to the Advisory Board and the Board, after going carefully into the question of the revision of the rates of minimum wages, made a unanimous report to the Government.

It may be noted at this stage that on June 29, 1954, the Under-Secretary to the Government of Bombay, Development Department, wrote a letter, being letter No. 2438/48-J, to the Chairman of the Advisory Board. Along with this letter the Government forwarded to the Chairman of the Board a copy of the report of the Advisory Committee. In the course of this letter the Government brought it to the notice of the Chairman that the Bidi Manufacturers and Merchants Association of Sholapur had represented to the Government that the rates of wages in the Bidi factories in the neighbouring areas of Hyderabad were unduly low and that the rate of minimum wages at Re. 1-14-0 for thousand Bidis, which was prevailing at Sholapur, would not allow them to compete with the Bidi factories in the Hyderabad area. The Chairman of the Advisory Board was requested by the Government to go into that question and to give to the Government the benefit of the Board's advice on that point. It may be noted—and this is important—that along with this letter, dated June 29, 1954, Government forwarded to the Chairman of the Advisory Board a copy of a letter, dated September 29, 1953, which was received from the Chairman, Nasik-Sinnar-Sangamner Bidi Karkhandar Mandal, Sinnar, on the subject of the revision of minimum rates of wages and the Chairman of the Advisory Board was particularly requested to take into consideration the various suggestions which were made by the Chairman of the above-mentioned Bidi Karkhandar Mandal in the matter of revising the minimum rates of wages.

Not only this, but on July 30, 1954, Shri Joshi, the Secretary of the Advisory Board, wrote letters to the employers in the Bidi industry. In these letters the employers in the Bidi industry were in terms told that the Government had referred the question of revising the rates of minimum wages, which were originally fixed in pursuance of the notification, dated December 27, 1951, to the Advisory Board. The employers were requested to forward their suggestions, if any, to the Advisory Board on or before August 9, 1954. In particular, the employers in the Bidi industry were requested to forward to the Secretary of the Advisory Board certified accounts for the year 1952-53, income-tax statements and sales-tax returns (in support of the case of the employers), details of the price for preparing 1000 Bidis, selling price and wage rate respectively for each year since 1948, the strength of the workers employed by them in the factory as well as on "Khep", etc., etc. The employers were also requested to inform the Secretary of the Advisory Board as to what rate of minimum wages was appropriate in their view. It is, therefore, reasonable to assume that the employers must have made representations to the Advisory Board and must have told the Board what they considered was an appropriate rate of minimum wages payable to the workers in their factories. The Advisory Board must have taken into consideration all the material supplied to them by the employers and the employees. Thereupon the Board made a unanimous recommendation to the appropriate Government. The said unanimous recommendation was the basis upon which the notification, dated April 19, 1955, was issued by the State of Bombay and it was under that notification that the revision of

the rates of minimum wages was ordered in Nasik, Sinnar, Sangar and places situated within 7 miles of the respective municipal limits and Akola. Under these circumstances, it is impossible to contend of Mr. Kotwal that the rates of minimum wages were in a manner that was arbitrary and contrary to the rules of natural justice.

The next contention of Mr. Kotwal is that s. 3, sub-s. (3), cl. (a), of the Minimum Wages Act is a discriminatory law. Mr. Kotwal is using the expression "different localities" in sub-cl. (iv), the Legislature conferred an unfettered power upon Government to make a discrimination of the various localities, and he contends that this power in a manner may be abused by the Government. It is contended for the petitioner that the phraseology "different localities" is too wide and vague and may mean a town or a street of a town or even a house in a particular town, and a grievance is made that in the body of the Act no guiding principle has been laid down to throw light as to the proper meaning assigned to the words "different localities."

We have heard Mr. Kotwal at considerable length upon this point and do not see force in this contention. In *Bijay Cotton Mills Ltd. v. State of Ajmer*,¹⁰ it was contended that the provisions relating to the fixation of minimum wages were unreasonable and arbitrary and that the whole question had been left to the unfettered discretion of the Government. A point was made that the restrictions put by the Act were unreasonable and excessive with regard to a class of employers whose factories might be situated in one locality and who for purely economic reasons might not be able to pay minimum rates of wages, but who might have had no intention to export at all. It was argued in that case that the provisions of the Act in question would have no reasonable relation to the object which the Act sought to achieve. It was held by their Lordships that the restrictions imposed upon freedom of contract by the fixation of minimum rates of wages, though they interfered to some extent with the freedom of trade or business, were justified under art. 19, cl. (1), sub-cl. (g), of the Constitution, were not unconstitutional and that they were being imposed in the interest of the general public with a view to carry out one of the directive principles of the State embodied in art. 43 of the Constitution and were protected by the provisions of cl. (6) of art. 19.

If s. 3, sub-s. (3), cl. (a), sub-cl. (iv), were the only provision of the Act relating to the subject of fixing or revising the minimum rates of wages, it might have been a different matter. But upon examining the scheme of the Act it is clear that adequate safeguards against discrimination are provided by the Act itself. Under s. 5, sub-s. (1), it is obligatory upon the appropriate Government to have recourse to one of the two procedures before fixing the rates of wages and each of these procedures is an adequate safeguard against discrimination. Clause (a) of sub-s. (1) of s. 5 provides:

"In fixing minimum rates of wages in respect of any scheduled employment for the first time under this Act, the appropriate Government shall—

(a) appoint a committee to hold enquiries and advise it in this behalf and may also appoint sub-committees for different localities as it may deem expedient to appoint to the committee,..."

It is clear, therefore, that the Committee, which is required to be appointed under cl. (a), is charged with the duty of advising the State Government on the matter of fixing minimum rates of wages in different localities. Under cl. (b) of sub-s. (1) of s. 5 Government is required to publish its proposals and to give the information of persons likely to be affected thereby and two months' notice has to be given to enable the persons likely to be affected to make representations against the proposals if they wish to make any. Sub-section (2) requires the Government to consider the advice that may be tendered by the Committee appointed under cl. (a) of sub-s. (1). It also requires

ernment to take into consideration such representations as might have been received by it from the persons affected by its proposals. Section 7 requires the appropriate Government to appoint an Advisory Board for the purpose of co-ordinating the work of the Committees, Sub-Committees, Advisory Committees and Advisory Sub-Committees appointed under ss. 5 and 6. Section 10 requires that before revising the rates of minimum wages, the Government shall consult all the Advisory Committees appointed under s. 6 and also the Advisory Board. Section 28 provides that the Central Government may give directions to a State Government as to the carrying into execution of the Act. All these provisions of the Act are to be considered together. Therefore, upon a proper examination of the scheme of the Act, it is clear that under the Act no scope is left for the State Government to make arbitrary discrimination between different localities.

The next point pressed by Mr. Kotwal is that the notification, dated April 19, 1955, was itself discriminatory and, therefore, it infringed the provisions of art. 14 of the Constitution. Mr. Kotwal says that while revising the rates of minimum wages by this notification, the rates were increased in some places, reduced in other localities and kept constant in some areas. In Nasik the rate was increased from Rs. 2 to Rs. 2-4-0 for thousand Bidis; in Sangamner, Akola and places within 7 miles of the respective municipal limits of Sangamner and Akola the rate was increased from Rs. 2 to Rs. 2-2-0 for thousand Bidis; in Poona and Sholapur the rate was kept constant at Rs. 2 and Re. 1-14-0 for thousand Bidis respectively; and in East Khandesh and West Khandesh the rate was reduced from Rs. 2 to Re. 1-10-0 for thousand Bidis. The petitioners say that this discrimination, which flowed from the notification dated April 19, 1955, was purposeful and intentional. It would be convenient in this context to set out some of the contents of para. 11 of the petition wherein the petitioners contend:

"The words 'different localities' are so elastic as to be capable of being applied even to different parts of the same village or to different parts of the same lane in the same village. The provisions of section 3, sub-section 3(iv) give the executive ample and unlimited scope for discriminating between industries in one area from those in another merely on the ostensible ground that they are situate in different localities. It leaves the door wide open to a purposeful and intentional discrimination on the part of the executive on political and other important grounds."

To say that the notification, dated April 19, 1955, was discriminatory and that the discrimination was purposeful and intentional is to say that the notification was issued with an "evil eye". Now it is necessary to remember that after the Advisory Committee was appointed by the State Government under s. 6 of the Act and after that Committee made its report, the State Government appointed an Advisory Board. Not only did the State Government forward the report of the Advisory Committee to the Advisory Board, but it also addressed letters to the employers in the Bidi industry asking them to forward to the Advisory Board certified copies of their accounts for the year 1952-53, Income-tax statements and Sales-tax returns in support of their contentions, details of the price for preparing 1000 bidis, selling price and wage rate respectively for each year since 1948, etc., etc. The State Government also forwarded to the Advisory Board a letter received by it from the Chairman of the Nasik-Sinnar-Sangamner Bidi Karkhandar Mandal on the subject of the revision of the rates of minimum wages. After a consideration of all the material which was placed before the Advisory Board by the employers and employees, the Board, consisting, besides the Chairman, of 20 members who were drawn equally from the employers and employees made a unanimous recommendation to the State Government. The Government accepted the said recommendation and made it the basis of the notification, dated April 19, 1955. In other words, the notification issued by the State Government on April 19, 1955, was in terms of the recommendation made unanimously by the Advisory Board consisting of 10 representatives of the employers, 10 representatives of

the employees and the Chairman. In these circumstances, the allegation of the petitioners that the notification made purposeful and intentional discrimination appears to be fantastic.

Mr. Kotwal says that the appointment of the Advisory Board in this case was a farce. As I have said, the Advisory Board was constituted of 21 persons, one of whom, Shri Bakhle, was the Chairman. Ten persons represented the employers and ten others represented the employees. Mr. Kotwal contends that only one out of the 10 representatives of the employers was connected with the tobacco industry and only one person out of the employees' representatives had also some connection with the Bidi making industry. 9 out of 10 representatives of the employers and 9 out of 10 representatives of the employees were not connected with the Bidi making industry. They were concerned with different industries, such as oil industry, road construction, building operations, stone breaking, stone crushing, motor transport, tannery, leather manufacturing, salt-pan industry, agriculture etc. They resided in various areas or localities remote from the District of Ahmednagar. In short, Mr. Kotwal says that a large majority of the representatives of the employers and the employees were not connected with the Bidi industry and they did not even belong to any place situated near the District of Ahmednagar. Therefore, says Mr. Kotwal, the appointment of the Advisory Board was merely "an eye wash".

Now, in this connection it is to be borne in mind that s. 7 of the Act does not require that the State Advisory Board should be constituted of the employers and employees belonging to a particular industry. The Central Advisory Board is required to be constituted in such a manner that there has got to be a representative upon it of the employers and employees in the scheduled employment. But that is not the case with the constitution of the State Advisory Board. In our view, the Advisory Board appointed by the State Government was a good Board. It consisted of independent men belonging to different industries and different places and with minds free from predilections and prejudices. To the Board of such independent character requisite material was supplied by the employers in the Bidi industry in response to the letter, dated July 30, 1954, written by the Board's Secretary. This independent body of the representatives of the employers and the employees applied their minds to the said material, considered it carefully and then arrived at certain unanimous conclusions upon which the notification, dated April 19, 1955, was based. In these circumstances we find ourselves unable to accept Mr. Kotwal's contention that the notification proceeded upon a purposeful and intentional discrimination.

Mr. Kotwal has referred us to the case of *Chiranjitlal Chowdhuri v. The Union of India*.¹¹ In this case the Governor General of India, finding that on account of mis-management and neglect a situation had arisen in the affairs of the Sholapur Spinning and Weaving Company Limited which had prejudicially affected the production of an essential commodity and had caused serious unemployment amongst a certain section of the community and that an emergency had thereby arisen which rendered it necessary to make special provision for the proper management and administration of the said company, promulgated an Ordinance, which was subsequently re-enacted in the form of a legislation called the Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950. The result of the promulgation of the Ordinance was that the Managing Agents of the said company were dismissed, the Directors holding office vacated their office automatically, the Government was authorised to appoint new Directors, the rights of the shareholders of the company were curtailed in the matter of voting, appointment of Directors, passing of resolutions and applying for winding up, and power was also given to the Government to modify the Indian Companies Act in its application to the company. In accordance with the provisions of the Ordinance new Directors were ap-

pointed by Government. A share-holder made an application under art. 32 of the Constitution for a declaration that the Act was void and for enforcement of his fundamental rights by a writ of *mandamus* against the Central Government, the Government of Bombay and the Directors restraining them from exercising any powers under the Act and from interfering with the management of the company on the ground that the Act was not within the legislative competence of the Parliament and infringed his fundamental rights guaranteed by arts. 19(1)(f), 31 and 14 of the Constitution and was consequently void under art. 13. It was held by their Lordships of the Supreme Court that the presumption was always in favour of the constitutionality of an enactment, since it must be assumed that the Legislature understood and correctly appreciated the needs of its own people, that its laws were directed to problems made manifest by experience and that its discriminations were based upon adequate grounds. It was also held that the above presumption regarding constitutionality of an enactment might be rebutted in certain cases by showing that on the face of the statute there was no classification at all or none on the basis of any apparent difference specially peculiar to any particular individual or class and not applicable to any other person or class of persons. Now, in the present case, on the face of the notification there is a classification. It is *ex facie* clear that the Government of Bombay had appointed an Advisory Committee for the purpose of enquiring into the conditions of employment in the Bidi making industry, that the said Committee had made its report as to those conditions, that the Government had also consulted the Advisory Board and that it was after considering the advice of the Committee and the Board that the rates of minimum wages were revised. It is, therefore, clear on the face of the notification that the conditions of employment in the Bidi making industry must have been found different in the different areas. As I have mentioned in the earlier part of this judgment, the Advisory Board had called upon the employers to submit certain details, such as the accounts, the income-tax statements, the sales-tax returns in respect of the industry, the selling price and the wage rate since 1948, the strength of the employees in the industry etc. The advice tendered by the Board to the Government must have been in the light of the above material. It is but reasonable to assume that the examination of the above material must have revealed that the employers in the various areas mentioned in the notification had varying capacity to pay wages to their employees, that their profits from the industry were unequal, that the industrial competition which they had to encounter from the industry in the neighbouring areas was not uniform, that the quantum of production, conditions of labour and transport facilities in different places were different etc., etc. It is, therefore, apparent that the notification proceeded upon a classification that was based upon differences, peculiar to the particular employers and employees. These differences or distinctions were real and substantial and they had a reasonable relation to the object which the Legislature sought to attain by enacting the Act.

The learned advocate Mr. Kotwal for the petitioners-employers contends that it is for the State of Bombay to show that the notification, dated April 19, 1955, was not discriminatory. The learned Advocate General, on the other hand, says that the onus to show that the notification is discriminatory is upon the petitioners. In *Chiranjitlal Chowdhuri v. The Union of India*, it was held that the burden was upon him who attacked the constitutionality of an enactment to show that there had been a clear transgression of constitutional principles. Their Lordships held in that case that the petitioner had not been able to rebut the presumption which was in favour of the constitutionality of the enactment which was challenged. In *Ram Krishna Dalmia v. Tendolkar J.*¹² also, where a certain notification issued by the Government was challenged, it was observed by their Lordships of the Supreme Court that it was to be expected—and, until the contrary was proved, it was to be presumed—that the

Government, which was responsible to the Parliament, would act honestly, properly and in conformity with the policy and principle laid down by the Parliament. The learned Advocate General is therefore right in the submission made by him that the presumption is in favour of the constitutionality of the notification issued by the State Government under s. 10, sub-s. (2). It is true that in *The State of Rajasthan v. Rao Manohar Singhji*,¹³ where the jagirdars of only a particular area of Rajasthan were subjected to a disability in that the revenue which till then was collected by them was required thenceforward to be collected by and paid to Government, it was held by the Supreme Court that the classification might have been justified if the State had shown that it was based upon a substantial distinction, namely, that the jagirdars of the area subjected to the disability were in some way different to those of the other areas of Rajasthan who were not similarly situated. It is to be seen however that in that case s. 8A of the Act which was introduced by Ordinance X of 1949 was *ex facie* discriminatory. The section read:

"Without prejudice to the generality of the foregoing provisions, it is hereby enacted that the revenue which was heretofore collected by Jagirdars shall henceforward be collected by and paid to the Government; the Government will after deducting the collection and other expenses pay it to the Jagirdar concerned."

The discrimination between the Jagirdars of one area of Rajasthan and those of the other areas was apparent on the face of the enactment itself. In the case of the present notification whose constitutionality is challenged, namely, the notification, dated April 19, 1955, issued under s. 10, sub-s. (2), by the State of Bombay, it is clear that on the face of it there was classification which, as I have stated in this judgment, was based upon distinctions which were real and substantial and which bore a reasonable relation to the object which was sought to be attained by enacting the Minimum Wages Act. That being so, the decision in *The State of Rajasthan v. Rao Manohar Singhji* would not assist the petitioners. In *Ram Prasad Narayan Sahi v. The State of Bihar*¹⁴ their Lordships stated that where on the face of a statute there was no classification at all and where no attempt had been made to select an individual or a group with reference to any differentiating attribute peculiar to that individual or group and not possessed by others, the presumption in favour of the constitutionality of the enactment was of little or no assistance to the State. This case also would not help the petitioners, since the notification in the present case proceeded upon a classification. Therefore, so far as the question of onus of proof is concerned, we must accept the contention pressed before us by the learned Advocate General that it is for the petitioners to show that the notification dated April 19, 1955, was discriminatory and therefore offended against the provisions of art. 14 of the Constitution. This the petitioners have failed to show. Beyond merely alleging that there was no "plausible and reasonable" basis for laying down different rates for the different localities and that there was no plausible or reasonable basis for laying down higher rates for places where the cost of living was lower and lower rates at places where the cost of living was higher and that there was no justification for Government to make a distinction against Sinnar, Sangamner, Akola and places situated within 7 miles of Akola and Sangamner, they have said nothing. It is clear upon a proper construction of the notification that this is a case where persons differently circumstanced were differently treated. The essence of a discriminatory notification would lie in differently treating persons who were similarly circumstanced. That is not the case with the notification, dated April 19, 1955.

It is settled on authority that when a legislative enactment is challenged as being discriminatory, the challenger must prove that the enactment is not based on any classification at all or that it is based on a classification which is not founded upon any intelligible differentia having a rational relation to the object sought to be attained by the enactment. *Ram Prasad Narayan Sahi v.*

*The State of Bihar and Budhan Choudhry v. The State of Bihar*¹⁶ are authorities on this point. In the present case, I have already shown that the classification is apparent on the face of the notification and further that the classification was founded on a reasonable differentia distinguishing the cases of employers and employees in Nasik, Sinnar, Sangamner, Akola and places within 7 miles of Sangamner and Akola from those in other areas. There was clearly a nexus between the said differentia and the object of the Act, viz. the revision of the rates of minimum wages. When a notification issued by Government in pursuance of the power conferred upon it by the statute is challenged under art. 14 as being discriminatory, the challenger must prove not only that the notification is not based on any classification or that it is based on classification which is not founded upon intelligible differentia having rational relation to the object which the Legislature has sought to attain by enacting the statute, but further that the discrimination is intentional and purposeful.

In *Snowden v. Hughes*,¹⁶ the provisions of the Fourteenth Amendment which are analogous to the provisions of art. 14 of the Constitution of India came up for consideration before the Supreme Court of the United States. The learned Judges of the Supreme Court said that it was not every denial of a right conferred by the State law that involved a denial of the equal protection of the law, even though the denial of the right to one person might operate to confer it on another. It was also pointed out that where the executive action purported to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, was not, without more, a denial of the equal protection of the laws. Their Lordships said that an unlawful administration by the State officers of a State statute fair on its face, resulting in its unequal application to those who were entitled to be treated alike, was not a denial of equal protection, unless there was shown to be present in it an element of intentional or purposeful discrimination. Their Lordships further observed that the Constitution did not assure uniformity of decisions or immunity from merely erroneous action whether by the Courts or the executive agencies of a State, and then they pointed out that:

"the talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derived merely from error or fallible judgment."

Upon the application of the principle laid down in *Snowden's* case it is clear that although the Advisory Board might have committed an error in making the recommendation which it did make to the State of Bombay and although the State might likewise have committed an error in accepting the unanimous recommendation of the Advisory Board, the notification could not, merely on that ground, be held to be in violation of the provisions of art. 14 of the Constitution. In order to come to the conclusion that the notification offended against the provisions of art. 14 of the Constitution, the Court must hold that the discrimination was purposeful and intentional discrimination.

The above principle of *Snowden's* case was approved by the Supreme Court of India in *Budhan Choudhry's* case, where their Lordships dealt with a contention that discrimination might be brought about either by the Legislature or the Executive or even the Judiciary and that the inhibition of art. 14 extended to all actions of the State denying equal protection of the laws, whether it was the action of any one of the three limbs of the State. Dealing with this contention, their Lordships said (p. 1054):

"...It has, however, to be remembered that, in the language of Frankfurter, J., in *Snowden v. Hughes*, 'the Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State.' The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal ap-

plication of the law may not necessarily amount to a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination."

It is clear, therefore, that although ostensibly it might appear that tobacco dealers in the different localities referred to in the notification were unequally treated, that by itself would not amount to a denial of equal protection of the laws unless it was further shown that in the notification there was an element of purposeful and intentional discrimination. A point which I wish to emphasise is that the principle of *Snowden*,¹⁷ the gist of infringement of the Fourteenth Amendment, which is an article 14 of the Constitution, lay in purposeful and intentional discrimination. This was approved by the Supreme Court of India in *Budhan Choudhry*.

This principle would by implication appear to have been reiterated by the Supreme Court in *Ram Krishna Dalmia's* case wherein their Lordships dealing with a notification of the Government of India regarding the Commission of Inquiry, observed (p. 207):

"...We feel sure, however, that if this law (meaning thereby the notification by the Government regarding the Commission of Inquiry) is administered by the Government 'with an evil eye and an unequal hand' or for an oblique or unwarranted purpose the arms of this Court will be long enough to reach it and to strike down with a heavy hand."

It is implicit in these observations that their Lordships took the view that in order to hold that the notification issued by the Government about the Commission of Inquiry was in violation of article 14 of the Constitution, it was necessary to hold that there was purposeful and intentional discrimination made by the said notification.

Mr. Kotwal says that the principle of *Snowden's* case would not be applicable by the facts of this case, since the question of discrimination which was in *Snowden's* case was in respect of an executive act of the Government. In the present case the question of discrimination has arisen in respect of a notification which, Mr. Kotwal says, amounts to a piece of subordination. Now, in our view, Mr. Kotwal is not right when he contends that the notification dated April 19, 1955, which was issued by Government under the Act is a piece of legislation. In *Edward Mills Co. Ltd. v. The State of Ajmer*,¹⁷ their Lordships of the Supreme Court were dealing with a notification issued under s. 27 of this very Act and they said that they did not think that in enacting s. 27 the Legislature had in any way stripped itself of its essential power to legislate or had assigned to the administrative authority anything but an accessory or subordinate power which was deemed necessary to carry out the purpose and the policy of the Act. Now, there is no doubt that the purpose and the policy of the Minimum Wages Act is to provide minimum rates of wages to certain employees. The impugned notification in this case, namely, the notification dated April 19, 1955, was in our view nothing more than an executive action taken by the State to carry out the purpose and the policy of the Act. We do not think that when the Legislature enacted sub-s. (2) of s. 10 of the Act it had any intention to strip itself of its power of legislation under the Act. It had no intention, in our view, to assign to the appropriate Government anything more than a mere executive power of taking an executive action of issuing notifications which was necessary to carry out the policy of the Act. Then again, in *State of Bombay v. Narothamdas Jetthabhai*,¹⁸ the validity of s. 4 of the Bombay City Municipal Corporation Act was challenged and it was held that all that was left to the discretion of the Provincial Government under the section was the determination of the conditions under which the Court should be invested with the enhanced jurisdiction. It was held that s. 4 did not involve any delegation of legislative power. It was only an instance of conditional legislation and was not *ultra vires*.

¹⁷ [1955] 1 S.C.R. 737.

¹⁸ [1951] 8 C.R. 51, s.c. 53 Bom. I.

valid on this ground. In the present case also all that was left to the discretion of the Provincial Government under sub-s. (2) of s. 10 of the Act was to determine whether an administrative action in the form of issuing a notification should be taken by the State Government for the purpose of giving effect to the object of the Act, namely for the purpose of revising the rates of minimum wages. The power conferred upon the Government under sub-s. (2) of s. 10 did not involve any delegation of legislative powers. Mr. Kotwal contends that the notification should be looked upon as an instance of a conditional legislation. We are unable to accept this contention. Sub-section (2) of s. 10 itself, and not the notification, would amount to conditional legislation. In our view, the notification issued by Government under s. 10(2) is not a piece of legislation of any kind, neither delegated legislation nor subordinate legislation nor conditional legislation.

Mr. Kotwal has next referred us to art. 13 of the Constitution and has contended that under cl. (3) of art. 13, the notification dated April 19, 1955, issued by Government under s. 10(2), would be law and that, therefore, the question arising out of this notification is one of discrimination made by law and not one of discrimination made by an official or executive act of Government. Therefore, says Mr. Kotwal, the principle of *Snowden's* case would not apply to the facts of the present case, since in *Snowden's* case the question was one of discrimination made not by law but by an executive act of the State. We are unable to see much force in this contention. Article 13, cl. (3), provides:

"law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

It is to be noted that art. 13, cl. (3) does not confer upon the order, rule, regulation, notification etc. the character identical with the character of the Act of the Legislature. All that it says is that the order, notification etc. shall have the same force, and shall be treated on the same footing, as the Act of the Legislature. It is significant to note that the Parliament did not use the words "law means and includes". It is implicit in the word 'includes' that but for the inclusion, the thing included would not have fallen in the same category under which it is included. It is clear that an order made by Government, as, for example, the notification dated April 19, 1955, is an executive act of the Government. It is not the act of the Legislature done in consequence of its legislative competence. Section 10, sub-s. (2) is a piece of conditional legislation. By enacting that section, the Legislature itself provided that upon the condition of a certain satisfaction being reached by Government, the Government may make a certain order. The order which the Government may make under that section is not a piece of legislation of any kind, since no legislative competence is conferred upon Government under the section. It is not even a conditional legislation. As I have said, the conditional legislation is contained in the section itself (s. 10, sub-s. (2)). The order or notification issued by the Government under that section is an executive act of the Government done in pursuance of the power conferred upon it by the conditional legislation enacted by the Legislature, and all that would follow from art. 13, cl. (3) is that the said order would have the same force as if it were the law of the land. While dealing with the question of discrimination introduced by an executive act of an authority, it is not invariably possible to rule out a probability that an element of intention or purpose might have entered into the discrimination. Such a probability must invariably stand ruled out in the case of an Act of the Legislature. This essential difference between the two kinds of acts—the executive act of the Government, albeit done in pursuance of the power given to it by a piece of conditional legislation, and the legislative act of the Legislature itself—must be borne in mind when the act is challenged on the ground of discrimination; or else the constitutional guarantee would be rendered illusory. If an administrative act of an executive Government is to enjoy the same immunity as the Act of the Legislature, in that the question of intention or purpose in respect of it cannot be gone into as it cannot be in

the case of an Act of the Legislature, the constitutional guarantee of equal protection against executive orders which would have the force of law under art. 13, cl. (3), would be reduced to a rope of sands. Therefore, before the petitioners can successfully challenge the notification of Government dated April 19, 1955, they must establish that there was an intention or purpose on the part of Government to make a discrimination. In this connection, the petitioners have alleged in para. 14 of the petition:

"This action (meaning thereby the issue of a notification) of the Government was mala fide and dishonest. It was prompted by political considerations for the purpose of bettering the chances of the Congress party and for weakening their opponents."

This allegation raises a disputed question of fact and it cannot be decided without recording evidence. It is well-settled that a recourse to art. 226 is not a remedy for deciding such disputed questions of fact. A suit is a remedy and the petitioners have not chosen to adopt that remedy. The result, therefore, is that the petitioners have failed to establish that the discrimination introduced by the notification dated April 19, 1955, was intentional and purposeful and accordingly their challenge to the constitutionality of the notification must fail.

Mr. Kotwal has next attacked the constitutionality of the notification dated April 19, 1955, upon another ground, namely the ground that within the same industry—the Bidi making industry—one class of employees was treated differently from the other classes of employees. He has invited our attention to the notification issued by the Government of Bombay under cl. (a) of sub-s. (1) of s. 8 of the Act, creating various zones and laying down the rates of minimum wages in those zones. If we turn to this notification, it would appear that it refers to several categories of employees in the Bidi making industry, namely, Bidi-makers, wrappers, Taraiwallas, Bhattiwallas, tobacco mixers, distributors of leaves, etc. Different rates of wages were provided for in the case of these different categories of employees. If we turn to the notification dated April 19, 1955, it would appear that the revision of rates which was ordered by it was in respect of Bidi-makers only, i.e. in respect of only one category of employees out of the several categories referred to in the earlier notification. Mr. Kotwal says that what was done by the issue of the notification dated April 19, 1955, was that in the same industry, namely, the Bidi-making industry, the Government of Bombay treated one class of employees—the Bidi-makers—differently from the other classes of employees in the same industry. Upon this ground Mr. Kotwal says that the notification was *ex facie* discriminatory and that, therefore, it was not necessary for the petitioners to lead any proof about it. Now, it is to be noted that such an attack upon the constitutionality of the notification dated April 19, 1955, was not made by the petitioners in the petition. The notification was challenged as discriminatory on only two grounds by the petitioners and those grounds are found in para. 12 of the petition. It would be convenient to set out the contents of para. 12 at this stage. Paragraph 12 of the petition says:

"That the petitioners maintain that in issuing the notification dated 19-4-1955 the State Government had exercised its power under s. 3(3)(iv) in a manner which was capricious and arbitrary. There was no plausible and reasonable basis for laying down different rates fixed for the different localities referred to in the same notification.... If the rate fixed for these district places which were commercially much more important and had a much larger population than the small towns of Sangamner and Akola were fixed at Re. 1-10-0, Re. 1-14-0 and Rs. 2-0-0, there was no plausible or reasonable basis for fixing the rate for Sangamner and Akola at Rs. 2-2-0. "

Thus, the notification was challenged as being discriminatory upon only two grounds in the petition, namely, that different rates were laid down for different localities and that higher rates were provided for smaller places where the living was cheaper and lower rates were provided for bigger places where the living was more expensive. There was no allegation made in the petition that the notification was discriminatory, because within the same industry, namely,

the Bidi-making industry, the notification purported to treat one class of employees, namely, the Bidi-makers, differently from the other classes of employees, namely, wrappers, Taraiwallas, Bhattiwalas and others. If such an allegation had been made by the petitioners in the petition, the State would have had an opportunity of meeting it. For instance, in that case, the State might have been in a position to show that in respect of the other categories of employees also in the Bidi-making industry notifications were issued corresponding to the notification issued in this case on April 19, 1955. We must not be taken to suggest that other notifications similar to the notification dated April 19, 1955, were in fact issued by the State of Bombay, revising the rates of minimum wages payable to the other categories of employees in the Bidi-making industry. What we wish to say is that if such a contention had been taken by the petitioners, the State of Bombay would have had an opportunity of meeting it. Such an opportunity to the State of Bombay has been denied by reason of the absence of such an allegation in the petition itself and we do not think that we can permit Mr. Kotwal to raise this allegation for the first time in an application under art. 226. Not only such a contention was not taken by the petitioners in the petition itself, but no reference whatsoever was made to it during the course of the initial exhaustive address of the learned advocate Mr. Kotwal. It was after the learned Advocate General had made a reply to all the contentions which were advanced by Mr. Kotwal that Mr. Kotwal for the first time in reply to the learned Advocate General's address attacked the notification as being discriminatory upon the ground that it introduced discrimination in respect of only one class of employees in the Bidi-making industry in Akola, Sangamner and places within 7 miles of their respective municipal jurisdictions. We could not permit Mr. Kotwal to raise such a contention at such an extremely late stage.

Lastly, Mr. Kotwal has contended that by virtue of the various notifications issued by the State of Bombay under sub-s. (2) of s. 26 of the Act between August 29, 1953, and June 30, 1955, it was provided that the provisions of the Act shall not apply to places situated within 7 miles of the municipal limits of Akola and Sangamner. So, says Mr. Kotwal, upon the date upon which the impugned notification was issued, namely on April 19, 1955, the Act was not applicable to the places situated within 7 miles of Akola and Sangamner and, therefore, the Government of the State of Bombay had no power to issue the notification, so far as the employees working in the Bidi making industry in places situated within 7 miles of Akola and Sangamner were concerned. Then Mr. Kotwal says that by the notifications dated June 30, 1955, and June 28, 1956, issued by the State under sub-s. (2) of s. 26 it was provided that the Act shall not apply to Sangamner and Akola as well and it was further provided that the duration of the non-application of the Act to these places would be up to December 31, 1956. The result of the notifications dated June 30, 1955, and June 28, 1956, was that the Act had become inapplicable to Sangamner, Akola and places within 7 miles of Sangamner and Akola up to December 31, 1956. In the meantime, on August 22, 1956, by a notification issued by the State of Bombay, the exemption which was granted to Sangamner and Akola from the operation of the Act up to December 31, 1956, was withdrawn with effect from September 1, 1956. In the light of these facts, Mr. Kotwal contends firstly that the Act must be deemed to have been repealed, so far as Sangamner, Akola and places within 7 miles thereof were concerned, by reason of the notifications dated June 30, 1955, and June 28, 1956. Secondly, Mr. Kotwal says that by reason of the notification dated August 22, 1956, the above repeal itself was repealed. Mr. Kotwal says that the repeal of the repeal would not result in the revival of the Act and he says that even if we hold that by reason of the repeal of the repeal the Act was revived, even so the revival of the Act would not result in the revival of the notification dated April 19, 1955. Mr. Kotwal contends that in any view of the matter, even if we were to hold that the Act itself was revived by the repeal of the repeal,

it was obligatory upon the Government to make a fresh inquiry and issue a fresh notification under s. 10(2) consequent upon the result of that inquiry. It is clear from what has been stated above that the whole of Mr. Kotwal's contention in this context proceeds upon the assumption made by him that the Act was repealed, so far as Sangamner, Akola and places within 7 miles thereof were concerned, by virtue of the notifications issued by the State on June 30, 1955, and June 28, 1956. If this contention fails, then the whole argument of Mr. Kotwal on this point fails. Now, in this connection it is to be noted in the first place that none of the notifications issued between August 29, 1953, and June 30, 1955, and neither of the notifications dated June 30, 1955, and June 28, 1956, stated in terms that the Act was repealed by these notifications. To take one notification by way of an instance (all notifications were similarly worded), namely, the notification dated August 29, 1953, it stated:

"In exercise of the powers conferred by sub-section (2) of section 26 of the Minimum Wages Act, 1948 (XI of 1948), the Government of Bombay is pleased to direct that for the period from the 30th August, 1953 to the 31st December, 1953 (both days inclusive) the provisions of the said Act shall not apply to bidi-makers employed in any tobacco (including bidi-making) manufactory in any locality in this State except the following localities etc., etc."

It is clear, therefore, that what the Government did when it issued the various notifications was that it simply granted exemption to certain areas from the operation of the Act. The learned Advocate General contends—and in our view rightly—that the granting of an exemption from the operation of the Act is not, and cannot be, equivalent to a repeal of the Act. Granting of an exemption only meant that for certain reasons Government considered it fit to suspend the operation of the Act in respect of certain areas for a certain time. It may be noted that the exemption which was granted initially to the places situated within 7 miles of Sangamner and Akola from the operation of the Act was extended from time to time by various notifications. It could not be contended that the repeal was being extended from time to time. In our view, the very fact that the exemption from the operation of the Act was being extended to certain localities from time to time would show that the Act had not ceased to exist, but for certain reasons the Government had thought it appropriate to suspend its operation in certain areas. If we turn to s. 21 of the General Clause Act it says:

"Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions if any, to add to, to amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

Under s. 26(2) of the Minimum Wages Act, power is given to the State Government to issue a notification. Under s. 21 of the General Clauses Act a statutory power is given to the State, in pursuance whereof the State may decide to issue a notification, an order or a rule saying that certain provisions of the Act or all the provisions of the Act shall not apply to certain industries situated within certain areas for a certain time. It was in pursuance of the statutory power that the Government in the first instance issued a notification saying that the Act shall not apply to certain areas, then extended the said exemption from time to time and ultimately rescinded or withdrew the exemption. From this it could not be contended that the Act had ceased to exist at any time or that it had been abrogated or repealed. On the contrary, the facts of this case would show that the existence of the Act was postulated. As the Act was never repealed and as it continued to exist all the while, the Government had power to issue the notification on April 19, 1955, and as soon as the exemption granted by the notifications dated June 30, 1955, and June 28, 1956, was withdrawn, the said notification could validly apply to the various localities referred to therein.

Mr. Kotwal has invited our attention to s. 6 of the General Clauses Act and

contended that unless the repeal explicitly said so, it shall not revive anything which was not in force at the time at which the repeal took effect. It is scarcely necessary for us to deal with this contention of Mr. Kotwal, since we find ourselves wholly unable to agree with his argument that the granting of exemption amounted to a repeal of the Act from time to time. Lastly, Mr. Kotwal referred us to the latter part of s. 24 of the General Clauses Act, which says:

"When any Central Act or Regulation, which, by a notification under section 5 or 5A of the Scheduled Districts Act, 1874, or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn from and re-extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this section".

This is not a case where a Central Act has been extended to any area by a notification issued under s. 5 or s. 5A of the Scheduled Districts Act, 1874, or any law like the law contained in the Scheduled Districts Act, 1874. That being so, a reference to s. 24 of the General Clauses Act is futile in this case and it cannot assist Mr. Kotwal's clients.

In the result, we have come to the conclusion that the petitioners have failed to show that the requisite procedure under the Minimum Wages Act was not followed by the State of Bombay before revising the rates of minimum wages by issuing the notification dated April 19, 1955, that s. 3(3) (a) (iv) of the Act is discriminatory and violates the provisions of art. 14 of the Constitution, that the notification dated April 19, 1955, itself is discriminatory, and that by reason of the exemption granted to the various localities from the operation of the Act from time to time the Act itself was repealed from time to time. All these contentions of the petitioners having failed, the application is rejected.

On the question of costs, it may be noted that the learned Advocate General is appearing in this application for the Union of India, the State of Bombay and the Authority appointed under the Minimum Wages Act, 1948. Now, so far as his representation of the Union of India is concerned, he would not be entitled to any costs. Order XXVILA, r. 3, of the Code of Civil Procedure provides:—

"Where under rule 2 Government is added as a defendant in a suit, the Attorney General, the Advocate-General, or the Government shall not be entitled to or liable for costs in the Court which ordered the addition unless the Court having regard to all the circumstances of the case for any special reason otherwise orders."

In this application the Act that was challenged was the Central Act and, therefore, the "Government" referred to in r. 3 would be the Union of India in this case. It is, therefore, clear that so far as the representation of the Union of India is concerned, the Advocate General will not be entitled to any costs. But he represents the State of Bombay also. In *Dialdas Parmanand v. Talwalkar*,¹⁹ and *Parasram Damodhar v. State of Bombay*,²⁰ the costs awarded to each party were Rs. 1,000. Having regard to the considerable effort put in by the learned Advocate General in this case which involved substantial questions of unusual complexity, we direct that the petitioners shall pay the costs to the tune of Rs. 1,000, so far as the costs of the Advocate General representing the State of Bombay are concerned. So far as the learned advocates appearing for respondents Nos. 2A and 2B are concerned, they will get their usual costs. The petitioners will bear their own costs.

In Civil Application No. 155 of 1958, stay is dissolved. No order as to costs.

We cannot part with the case without saying that the case was argued by the learned Advocate General and the learned advocate Mr. Kotwal with great ability and thoroughness and the Court appreciates the valuable help rendered by them in deciding the case.

No order as to costs of opponent No. 1.

TAMBE J. I entirely agree with the findings given by my learned brother at page 51 of his judgment. I also agree that the petition should be dismissed.

I, however find it difficult to accept the argument of the learned Advocate General that in order to establish infringement of art. 14 of the Constitution it would, as a general rule, be necessary to establish that the alleged discrimination had been intentional and purposeful. May be that in certain cases, e.g., where it is challenged that the discrimination has resulted on account of a decision of a Court or on account of action in a particular case taken by an officer of the executive, it may be necessary for the petitioner to establish that the decision of the Court or the action taken by the officer in dealing with a particular case was intentional or purposeful. Now, discrimination may arise not only on account of an erroneous decision or act of a Court or executive agency, but may also arise on account of a law enacted by the Legislature. If for establishing the infringement of art. 14 of the Constitution it is necessary as a general rule to prove that discrimination has been intentional or purposeful, then to discharge that burden in the case of challenge to a law it would well nigh be impossible and would, in my view, reduce the constitutional guarantee under art. 14 to a "rope of sand". Reliance is placed on the following observations made in *Snowden v. Hughes*¹ at pp. 506-507:

"The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State. See *McGovern v. New York*, 229 US 363, 370, 371; 57 L.Ed. 1223, 1231, 1232; 33 S.Ct. 876, 48 LRA (NS) 391. However, in forbidding a State to 'deny to any person within its jurisdiction the equal protection of the laws', the Fourteenth Amendment does not permit a State to deny the equal protection of its laws because such denial is not wholesale. The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment."

In my view, these observations do not take the case any further and are no authority for the proposition contended for. The decision in *Snowden's* case was referred to in the case of *Budhan Choudhary v. The State of Bihar*² and at page 1054 it is observed:—

"...It has, however, to be remembered that, in the language of Frankfurter, J., in *Snowden v. Hughes*, 'the Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State'. The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination."

But those observations have to be read in the context of the facts of that case. They were made in answer of the argument advanced that the discrimination might arise on account of erroneous decision of a Criminal Court. These observations also, therefore, in my opinion, are of no support to the contention raised. The principles deducible from the previous decisions given by their Lordships of the Supreme Court relating to art. 14 of the Constitution were summarised by their Lordships in *Ram Krishna Dalmia v. Tendolkar J.*³ and in the summary it has not been stated by their Lordships that, as a general rule, it is necessary for a petitioner to establish that the discrimination has been intentional or purposeful. Reliance, however, was placed on the following observations of their Lordships by the Advocate General in support of his contention (p. 207):—

"...As this Court has said in *Matajog Dobey v. H. C. Bhari*,⁴ 'a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the Government and not in a minor official.' We feel sure, however, that if this law is administered by the Government 'with an evil

1 (1944) 88 Law. ed. 497.

2 [1955] 1 S.C.R. 1045.

3 (1958) 61 Bom. L.R. 192, S.C.

4 [1955] 2 S.C.R. 925.

eye and an unequal hand' or for an oblique or unworthy purpose the arms of this Court will be long enough to reach it and to strike down such abuse with a heavy hand."

These observations also are of no avail to respondents Nos. 3 and 4 and do not support their contention that as a general rule it has to be shown that discrimination was intentional or purposeful.

Coming next to the question as to whether the notification of April 19, 1955, is purely an executive act or is law within the meaning of art. 13(3)(a) of the Constitution, with respect to the learned Advocate General, in my opinion, it is law within the meaning of art. 13(3)(a) of the Constitution. Section 10 of the Minimum Wages Act authorizes the State Government to issue a notification revising minimum wages after following certain procedure. That procedure has been followed by the State Government before issuing this notification. It is issued by the State Government in exercise of its powers conferred on it by the said s. 10. It owes its legal efficacy to that section and action can be taken against the employers for its infringement under s. 20 of the Minimum Wages Act. It has, therefore, the force of law within the meaning of art. 13(3)(a) of the Constitution. It was, therefore, not necessary for the petitioners to establish that the alleged discrimination on account of the notification was intentional or purposeful. It is sufficient for them to show that as a result of this notification discrimination in fact resulted. In my opinion, however, the petitioners have not been able to discharge this burden. I agree with my learned brother that the notification *ex facie* is not discriminatory. The burden was, therefore, on the petitioners to establish that the discrimination has resulted on account of the notification. The main ground on which it was claimed that the discrimination has resulted is that in bigger places, viz., Jalgaon, Dhulia, Dharwar, Hubli and Poona, some of which were formerly grouped with Akola and Sangamner, the rates have been reduced while in places which are smaller, viz., Akola and Sangamner and places within 7 miles round about, the rates have been increased. In my opinion, the smallness or bigness of the place cannot be the sole criterion in determining the minimum wages of workers in a particular industry. Various other factors will also have to be taken into consideration in determining the minimum wages. In the instant case, the wages have been revised by the State Government after consulting the Advisory Committee and following its unanimous advice. The petitioners were afforded an opportunity to place their case before the Advisory Committee. It is, therefore, not possible to assume that the State Government had revised the minimum wages arbitrarily without taking into consideration various relevant factors. In these circumstances, in my judgment, the petitioners have not been able to establish that they had been discriminated against. The petition, therefore, fails and should be dismissed with costs.

Petition dismissed.

[NAGPUR BENCH]

*Before Mr. Justice Tambe and Mr. Justice Tarkunde.*VALLABHDAS NARAYANDAS *v.* MUNICIPAL COMMITTEE OF
AKOLA*

C. P. and Berar Municipalities Act (II of 1922), Secs. 67(2), 71—Expression "system of assessment" in s. 67(2), meaning of—Expression whether means draft rules for assessment and collection of tax—Whether incumbent on municipal committee to include such draft rules in proposals made under s. 67(2) and publish them.

The expression "system of assessment" occurring in s. 67(2) of the C. P. and Berar Municipalities Act, 1922, means the principles underlying the ascertainment of the basis upon which a tax is proposed to be computed and it does not mean draft rules for the assessment and collection of tax. Therefore, under the Act it is not incumbent on a municipal committee to include in the proposals made by it under s. 67(2) of the Act, the draft rules for the assessment, collection and refund of the tax proposed and publish them for inviting objections thereto.

THE facts appear in the judgment.

M. N. Phadke and S. A. Sohoni, for the petitioners.

B. R. Mandlikar, for respondent No. 1.

N. L. Abhyankar, Special Government Pleader, for respondent No. 2.

TAMBE J. By this petition under arts. 226 and 227 of the Constitution of India, three inhabitants of the Akola town challenge the validity of the imposition of the octroi tax. Petitioners Nos. 1 and 2 are cloth merchants and petitioner No. 3 is an ordinary resident of Akola.

Section 66 of the C. P. and Berar Municipalities Act, 1922, Act No. II of 1922, hereinafter called the Act, empowers a municipal committee to impose certain taxes mentioned therein. The imposition, however, is to be subject to the provisions of other sections contained in Chapter IX which relates to the imposition, assessment and collection of taxes. We are here concerned with cl. (e) of sub-s. (1) of s. 66. Under that clause, a municipal committee is empowered to impose an octroi tax on animals or goods brought within the limits of the municipality for sale, consumption or use within those limits. Sub-section (1) of s. 67 provides that a committee may, at a special meeting, pass a resolution to propose the imposition of any tax under s. 66. Purporting to act under this sub-section, the municipal committee, Akola, passed a resolution on November 11, 1957, to the effect that in pursuance of the power vested in it under s. 66(1)(e), octroi tax should be imposed on animals and goods brought within the limits of the municipality of Akola for sale, consumption or use within those limits. It also by the said resolution passed proposals for levying the said octroi tax and further resolved that the said proposals (referred to as rules in the resolution) be forwarded to the Government for preliminary publication as required by s. 67(2) of the Act. The committee also passed a further resolution that draft rules for the assessment, collection and refund of the octroi tax be also forwarded to the State Government for necessary action. The State Government published the said proposals of the municipal committee in the Government Gazette of January 16, 1958, under notification No. VMA(M) 5457-I-A. This notification is purported to have been issued under sub-s. (2) of s. 67 of the Act for the information of all persons likely to be affected thereby and it is mentioned therein that any person desiring to raise any objections to the proposed tax or desiring to make any suggestions should lodge his objections or suggestions with the municipal committee of Akola within 30 days of the publication of this notification in the Gazette. This notification is hereinafter referred to as notification I-A.

*Decided, November 18, 1958. Special Civil Application No. 201 of 1958.

In the same Gazette, rules referred to as draft rules for assessment, collection and refund of octroi tax were also published under notification No. VMA(M) 5457-II-A. The notification purports to emanate from the Government; and it is stated therein that any person desirous of raising any objections or suggestions to the rules should lodge his objections or suggestions with the Secretary to the Government of Bombay, Local Self-Government and Public Health Department, within 30 days of the publication of the notice. This notification is hereinafter referred to as notification II-A.

It appears that to the proposals contained in notification I-A certain objections were lodged by the inhabitants of Akola, with the municipal committee, Akola. These objections were first considered by the President and then the report of the President as well as the objections were considered at a special meeting of the municipal committee convened and held on March 3, 1958. The municipal committee thereafter modified its original proposals in certain respects and sent the modified proposals along with its original proposals, objections received thereto from the inhabitants and its decisions on these objections to the Government as required by sub-s. (4) of s. 67. The date on which these papers were forwarded to the State Government is not known. The three petitioners at this stage made an application under arts. 226 and 227 of the Constitution to this Court on April 14, 1958, praying therein that the entire proceeding of the municipal committee and the resolution passed by it on March 3, 1958, should be quashed; a mandate be issued against the State Government prohibiting it from sanctioning the proposals sent to it by the municipal committee for the imposition of octroi tax, and from notifying the imposition of octroi tax or taking action under s. 67(7) and 67(8) of the Act. They also by a separate application prayed for an interim injunction against the State Government prohibiting it from sanctioning the proposals of the municipal committee and issuing notification for the imposition of the tax. These petitions came up for hearing before this Court on April 18, 1958. This Court by its order dated April 18, 1958, ordered rule to issue on both these petitions. As summer holidays intervened rule issued on the application for interim injunction was made returnable on June 16, 1958. It appears that the case was not taken up on June 16, 1958, but was taken up on June 23, 1958. In between, on June 17, 1958, appearance was put in on behalf of the State by the learned Additional Special Government Pleader. We are informed that his instructions were to oppose the application for interim injunction. On June 23, 1958, when this application was heard, this Court granted interim injunction. It appears that the State Government had already on June 19, 1958, issued notification under s. 67 of the Act in exercise of the powers conferred on it by sub-ss. (5) and (7) of s. 67 sanctioning the imposition of octroi tax; and published it in Gazette Extraordinary of June 19, 1958. It appears that the State Government had not instructed its counsel about the issue of the notification and therefore information about it was not given to this Court by the Government Pleader appearing for the State when the order was made on June 23, 1958. It was later brought to the notice of this Court on June 23, 1958, after the order was made.

On learning about the publication of this notification an application was made on behalf of the petitioners to amend their petition. It was granted and the additional relief now claimed by the petitioners is for quashing the aforesaid notification of the Government dated June 19, 1958, also.

The contentions raised by Mr. M. N. Phadke, learned counsel for the petitioners, in brief, are: (i) that the imposition of octroi tax is bad on account of non-observance or contravention of the mandatory provisions of sub-ss. (2), (3), (4) and (6) of s. 67 of the Act; (ii) that as two of the members of the municipal committee viz. G. M. Savarkar and H. P. Gole, were not served with notice convening the special meeting on March 3, 1958, the resolution passed on March 3, 1958, by the municipal committee was, therefore, bad in law and (iii) the conduct of the Government in issuing the notification dated June 19,

1958, during the pendency of the petition was not bona fide and the notification is, therefore, liable to be quashed.

Turning now to the contention raised as regards non-compliance with the provisions of sub-s. (2) of s. 67, Mr. Phadke contends that even though the proposals of the municipal committee for the imposition of octroi tax and the draft rules for assessment, collection and refund of octroi tax were published in the Official Gazette the draft rules were not published within the municipal limits of the town of Akola as was required under r. 1 of the Rules framed under s. 67(2). The draft rules formed an integral part of the proposals of the municipal committee within the meaning of s. 67(2) of the Act, and failure to publish these draft rules within the limits of the town of Akola amounts to a breach of a mandatory provision of that section vitiating the imposition of octroi tax. It is indeed true that draft rules for assessment, collection and refund of octroi tax published in Notification II-A were not published in any of the local papers at Akola. In fact, there had been no other publication of it save and except that in the Gazette. The proposals contained in Notification I-A were published in the form of pamphlets distributed throughout the town of Akola. They were also published in a local fortnightly paper called 'Jana Sewak'.

If the aforesaid contention of Mr. Phadke is correct, then certainly the imposition of octroi tax is bad in law. The petitioners and other inhabitants of Akola had been denied the statutory right of an opportunity to lodge their objections to these draft rules with the municipal committee. It is, therefore, necessary to consider whether it was incumbent on the municipal committee to include these draft rules in the proposals made by it under sub-s. (2) of s. 67 and publish them for inviting objections thereto from the inhabitants of the Akola municipal committee. Sub-section (2) of s. 67 reads as follows:

"When such a resolution has been passed, the committee shall publish in accordance with rules made under this Act, a notice defining the class of persons or description of property proposed to be taxed, the amount or rate of the tax to be imposed and the system of assessment to be adopted."

It is the argument of Mr. Phadke that in the instant case the municipal committee has published the description of property proposed to be taxed, the amount or rate of the tax proposed to be imposed thereon, but has not published the system of assessment it proposed to adopt in the imposition of the tax. According to Mr. Phadke the system of assessment is contained in the draft rules and, therefore, it was incumbent on the municipal committee to publish them for inviting objections thereto.

Now, the word "assessment" is understood in various senses. In its comprehensive sense it means the method prescribed for making an assessment of a tax, including the steps taken for ascertainment of the basis upon which the tax is to be computed; ascertainment of the amount of tax payable by a tax-payer; and the actual demand of the tax from that tax-payer or the procedure followed for imposing the liability of the tax on the tax-payer. Any one of the aforesaid three steps by itself is also termed as assessment. If the term "assessment" occurring in sub-s. (2) of s. 67 is understood in its comprehensive sense then certainly the rules published in Notification II-A would fall within the meaning of "system of assessment". In our opinion, however, the word "assessment" is not used in its comprehensive sense in sub-s. (2) but is used only in the sense of ascertainment of the basis upon which the tax is to be computed.

We find it difficult to give a comprehensive meaning to the word "assessment" used in this sub-section because in s. 71 of the Act we find that the State Government is empowered to make rules regulating the assessment of taxes and for preventing evasion of assessment. It is difficult to assume that the Legislature had intended to confer concurrent powers both on the municipal committee and the Government and thereby create a conflict between the two authorities. Obviously, therefore, the Legislature intended to confer cer-

tain powers on the municipal committee relating to the assessment of tax and it intended to confer certain other powers on the State Government relating to it.

It is no doubt true that normally the presumption is that the same word used in the Act has to be given the same meaning but that presumption is a very weak presumption. Craies at page 159 (Craies on Statute Law, 5th edn.) observed:

"The presumption that the same words are used in the same meaning is however very slight and it is proper, if sufficient reason can be assigned, to construe a word in one part of an Act in a different sense from that which it bears in another part of an Act."

Similar are also the observations in Maxwell at page 322 (Maxwell on Interpretation of Statutes, 10th edn.):

"But the presumption is not of much weight. The same word may be used in different senses in the same statute and even in the same section."

This Chapter, i.e. Chapter IX which relates to imposition, assessment and collection of taxes is sub-divided into four parts; first part relates to the imposition of taxes, s. 67 falls within that part. Second part relates to assessment of taxes, s. 71 falls within this part. Third part relates to collection of taxes and s. 76 falls within this part and the fourth part relates to appeals and also refund of taxes, s. 85 falls under this part. As already stated, s. 71 empowers the State Government to make rules regulating assessment of taxes and for preventing evasion of assessment. Section 76 empowers the State Government to make rules regulating the collection of taxes, and preventing evasion of payment etc. and s. 85 empowers the State Government to make rules regulating the refund of taxes. The sub-division of this Chapter into these parts and the powers conferred on the State Government by the aforesaid sections clearly indicate that the intention of the Legislature was to confer on the municipal committee only the power of imposition of a tax and to confer other powers relating thereto on the State Government. It necessarily follows that the expression "system of assessment" used by the Legislature in sub-s. (2) of s. 67 connotes only to the stage of imposition of the tax and not the other stages of assessment as a whole.

Second reason why we feel that a restricted meaning has to be given to the word "assessment" used in sub-s. (2) is the use of the word "defining" in the sub-section which governs the clause "system of assessment to be adopted". Sub-section (2), does not require the municipal committee to publish all the procedure in details regarding the imposition of a tax. What it requires the municipal committee to do, is to define the class of persons or description of property proposed to be taxed, the amount or rate of the tax to be imposed and the system of assessment to be adopted. Now, the word "define" means to describe accurately. This would not normally mean stating elaborately the entire system of assessment in all its details.

The scheme of s. 67 appears to be that when a municipal committee resolves to impose a tax, it should publish its proposals for imposition of that tax, so that the inhabitants of the municipal committee should have an opportunity to place their objections to the imposition of the proposed tax before the municipal committee for its consideration. The municipal committee has to consider these objections. If, thereafter the municipal committee does not consider it necessary to alter its original proposals in substance it has to send its proposals with the objections received, its decision thereon and the modifications, if any, made by it in its original proposals for the consideration of the State Government. In the event the municipal committee decides to alter its original proposals in substance it has to go over the procedure once again by republishing its altered proposals for inviting objections thereto. When the proposals in their final form are received by the State Government it may on consideration of the matter sanction them or refuse to sanction them or sanction them with modifications affecting the substance. Here again if the State Government desires to modify the proposals of the municipal committee so as

to affect their substance it has to send them back to the municipal committee for its acceptance. Thus, the right which is conferred on the inhabitants of the municipal committee by s. 67 is only the right to submit their objections to the proposed tax. Now, to afford an adequate opportunity to the inhabitants of the municipal committee for raising objections to the proposed tax the whole procedure of assessment of the tax need not be made known to them. It is sufficient if the inhabitants know the basic principles underlying the imposition of the proposed tax. And they, in our opinion, are that the inhabitants must know what is going to be taxed, the rate at which it is going to be taxed and the basis on which the proposed rate is going to be computed on a tax-payer.

Mr. Phadke placed reliance on r. 1 framed under s. 67(2) of the Act in support of his contention that the expression "system of assessment" is used in its comprehensive sense. The material part of the rule reads as follows:

"A notice under section 67(2) of the intention of the municipal committee to impose a tax... shall be forwarded to the State Government through the Deputy Commissioner for publication in the Madhya Pradesh Gazette. The notice under section 67(2) shall be accompanied by draft rules for the assessment and collection of the tax. After its publication in the gazette, the notice shall be published by affixing copies thereof to a notice-board at the municipal office and at conspicuous places in the town, and shall also be published in the local papers, if any. As an alternative to its publication in local papers, the committee may circulate the notice in print in vernacular within the municipal limits. Proclamation shall also be made by beat of drum throughout the municipality notifying the intention of the committee and calling the attention of the inhabitants to the notice in question and to the term of thirty days laid down in the law as that within which objections to the proposed imposition or increase must be submitted to the committee."

Laying emphasis on the words "shall publish in accordance with rules made under sub-section (2) of section 67" and "the notice under section 67(2) shall be accompanied by draft rules for the assessment and collection of the tax", Mr. Phadke contends that what is meant by the expression "system of assessment" in sub-s. (2) of s. 67 is these rules for the assessment and collection of the tax. In our view, on the language of the rule itself it is clear that the draft rules for the assessment and collection of the tax is something distinct and separate from the proposals of the committee. It is true that this rule requires publication in Gazette of the draft rules for the assessment and collection of the tax along with the proposals of the municipal committee, but that does not mean that these draft rules form part of the proposals of the municipal committee for the imposition of the tax. It will be further noted that on the language of the rule these draft rules are required to be published only in the Gazette. They are not required to be published in any other manner, while the proposals of the municipal committee have to be further published in other manner as stated in r. 1. This also indicates that these draft rules for the assessment and collection of the tax do not form part of the proposals of the municipal committee.

For reasons stated above, in our opinion, the expression "system of assessment" occurring in sub-s. (2) of s. 67 means the principles underlying the ascertainment of the basis upon which a tax is proposed to be computed.

Now, these principles are bound to vary in each case. For example, in the case of octroi tax imposed on animals all that is required to be stated is at what rate it is to be taxed. There is no further principle involved as regards the ascertainment of the basis upon which the proposed tax is to be computed. The tax is to be imposed on an animal at the proposed rate and that is all. But such would not be the case for example in imposition of a house-tax. The municipal committee undoubtedly would then be required to publish the principles which it proposes to adopt for ascertaining the basis upon which a house-tax is to be computed.

It is next necessary to see whether in the instant case there has been any failure on the part of the municipal committee to publish principles which

it proposed to adopt in ascertaining the basis upon which the octroi tax was to be computed on any article or any animal.

Turning to the Notification I-A, which is published in the Gazette as well as in the local newspapers and pamphlets, it indicates the articles which are proposed to be taxed. A list of articles exempt from the octroi tax is given in cl. (2). There is an elaborate schedule containing a list of articles proposed to be taxed. In the schedule against each item is given the rate at which it is proposed to be taxed and it also gives the basis on which the tax would be computed. In certain cases the tax is computed per cart-load drawn by two animals; in certain other cases the tax is proposed to be computed on head-load, per number, animal load, motor truck-load, wagon load and in certain cases the tax is proposed to be computed at *ad valorem* rate. Then the municipal committee has given details as to what a maund is equal to and has also given details as to how in weightment a fraction of a maund would be computed for purposes of the tax. Looking to the notification and the details mentioned therein, in our opinion, there had been no failure on the part of the municipal committee to publish any detail which it was required to publish under sub-s. (2) of s. 67 of the Act. It has given the description of the property proposed to be taxed, rate of the proposed tax and the principles for ascertainment of the basis upon which the tax would be computed.

Mr. Phadke, however, contends that the details given in Notification I-A relating to the principles for ascertainment of the basis for the computation of tax are not full and complete. Rules 6(b), 8, 11, 26, 26A and 27 appearing in Notification II-A also relate to the same topic and should have been published in the Notification I-A. Failure on the part of the municipal committee has resulted in the denial of an opportunity to the inhabitants to raise objections to these rules. The imposition of tax is, therefore, bad in law.

Rule 6(b) provides for preparation of a table of current prices of articles liable to duty *ad valorem*. It is to be prepared on the basis of local inquiries and the invoices received during the week, and is to be corrected every week according to the fluctuation in prices so ascertained. Under r. 8, a tax-payer in anticipation of the arrival of dutiable articles exceeding Rs. 20 in value is permitted to approach the taxing authorities, and on the basis of the invoices satisfy them regarding the value of the articles and on that basis the officials charge the tax. If, however, there is any dispute between the two, then the matter is settled by the secretary. The difficulty would arise where the prices mentioned in the invoices are substantially at variance with the prices mentioned in the table. Rule 11 provides that in a case when an invoice of articles imported is produced by the importer of such article, the rates given in the invoice shall be compared with the rates shown in the table of current prices, or, in the absence of rates having been stated in the table, with the rates prevailing in the market situated within the limits of the municipality; if the invoice rate is found less by more than 12½ per cent., duty shall be assessed and collected according to the market rate as stated in the table or as ascertained from the condition in the market. These rules, in our opinion, only relate to the working out of the basic principle of computation of the tax on the value of the articles. No principle as such is laid down in rr. 6(b), 8 and 11. These rules also provide against evasion of the tax by an importer. It would be seen that under s. 71 of the Act the State Government is empowered to make rules not only for the assessment of tax, i.e. for ascertaining the tax payable by a tax-payer but also for preventing evasion of assessment, i.e. for preventing evasion of ascertaining the proper amount of tax payable by him.

Turning now to the provisions of rr. 26, 26A and 27, in our opinion, they hardly have any relevance to the principle underlying the ascertainment of the basis on which a tax is to be computed. Rules 26 and 26A relate to the procedure relating to articles which are imported within the limits of Akola town but which are intended to be immediately exported, and r. 27 relates to

the detention of goods in a bonded warehouse when they are intended to be kept within the municipal limits for a temporary period. In our opinion, therefore, in the rules published in Notification II-A, there is no rule which can be said to be forming part of the system of assessment within the meaning of sub-s. (2) of s. 67 of the Act. In our opinion, therefore, the petitioners have not been able to show that there had been any non-compliance with the provisions of sub-s. (2) or sub-s. (3) of s. 67.

Turning now to the contention raised on behalf of the petitioners as to the contravention of sub-s. (4) of s. 67, it provides:

"The committee shall take the proposal and all objections received thereon into consideration at a special meeting, and may modify the proposals so as not to affect the substance, and may then forward them to the State Government along with all objections received, its decisions thereon and its reasons therefor. If the committee decides to modify the proposals so as to affect their substance, it shall publish them again in the manner prescribed in sub-section (3)."

It is the contention of Mr. Phadke that in the final proposals submitted to the State Government the municipal committee had made substantial modifications in respect of items 23, 38 and 48 in the schedule appearing in Notification I-A. These changes amount to modification of the original proposals affecting the substance. The municipal committee, therefore, was bound to follow the procedure once over again, i.e. republish its modified proposals, inviting the attention of the inhabitants of the municipality before finally submitting them to the State Government. In our opinion, this contention is also without substance. The modifications suggested in the final proposals only relate to corrections of printing mistakes or omissions. We will illustrate this by reference to the entries. Entry No. 23 relates to "Tea, coffee, cocoa etc". It is stated that goods liable to octroi duty. In printing, the rate at which the tax was proposed to be had remained to be mentioned. It appears that the Brooke Bond Company, a well-known company dealing in tea, noticing this omission, made inquiries as regards the amount of tax proposed to be imposed on it and thereafter noting this mistake the municipal committee in its proposals of March 3, 1958, corrected it by stating that the proposed tax was at 75 nP. per maund. Now, anybody who would be misled by this schedule in the Notification I-A could not be under any mistake. No tax was proposed to be imposed on tea, coffee etc. It is obvious that the omission to mention the rate of tax was due to some mistake. It is contended that this mistake led the inhabitants to believe that no tax was proposed to be levied on this item. We are informed that this proposal of the municipal committee has not been accepted by the Government. It is that tea and coffee have become taxable under a residuary clause. This was the position under Notification I-A as it stood. In our opinion, the petitioners have not been able to establish that there was any non-compliance with the provisions of sub-s. (4) of s. 67 of the Act.

Turning to the non-compliance with sub-s. (6) of s. 67, it provides that any modification affecting the substance shall be made under sub-s. (5), (which relates to granting of sanction by the Government to the final proposal of the municipal committee) unless and until the modification has been approved by the committee at a special meeting. We had asked Mr. Phadke to show modifications effected by the sanction of the State Government which would result in substantially affecting the proposals of the municipal committee. However, were not shown any items. This contention, therefore, must fail.

As regards the next contention relating to non-service of notice of the meeting of March 3, 1958, on two of the members of the committee, viz. G. M. Savarkar and H. P. Gole, controversy on facts is raised by the municipal committee. It is the contention of the municipal committee that G. M. Savarkar was not at the station. Notice was, therefore, handed over to his brother who has taken to give it to G. M. Savarkar on his return. An affidavit of G. M. Savarkar's brother to that effect is filed in this Court by the municipal committee.

so advised, by a regular suit.

This brings us to the last contention raised by Mr. Phadke on behalf of the petitioners and that is as regards lack of bona fides of the State Government in issuing the notification of June 19, 1958. Mr. Phadke contends that the State Government full well knew that a petition had been filed in this Court. It was served with the notice of the petitioners' application for grant of interim injunction. It was the desire of the State Government to shut out an inquiry by this Court as regards the illegalities alleged to have been committed by the municipal committee and it is with this view that the notification had been issued. The case of the Government, as stated in the return, is that notice of stay was not served on the Secretary, Local Self-Government, at any time. A copy of the stay application was received only in the office of the Special Government Pleader on May 9, 1958, it was forwarded by the Special Government Pleader to the Collector, Akola, on May 16, 1958. He sent his report to the Special Government Pleader on May 24, 1958, and by a further letter dated June 7, 1958, instructed the Special Government Pleader to oppose the stay application. It is further averred by the State Government that it was not served with the copy of the application on merits and it did not know what the contentions of the petitioners were. The Government thus denied that it acted in any mala fide way in issuing the notification on June 19, 1958. In short, the case of the Government is that it did not know what the grievance of the petitioners was as the petition on merits was not served on it. The stay application also was not served on the Secretary of the Department concerned. The matter remained only between the Special Government Pleader and the Collector, Akola, and the Government acting in its usual course, after considering the objections of the inhabitants on June 13, 1958, issued the notification. Now, it is difficult to believe that the Secretary of the Department did not know of the application for interim injunction made by the petitioners in this Court or rule issued by this Court on April 18, 1958. Admittedly, the Special Government Pleader had written to the Collector, Akola, on May 9, 1958. He had instructed the Special Government Pleader on June 7, 1958, to oppose the application. It is difficult to assume that the Collector of Akola had instructed the Special Government Pleader to oppose the application without any instructions from the Government. There is also no substance in the contention raised on behalf of the Government that the Secretary, Local Self-Government, was not served with the notice. Provisions of law do not require service on the Secretary. On the other hand, provisions of O. XXVII, r. 4, of the Civil Procedure Code clearly show that the Government Pleader in any Court is the agent of the Government for the purpose of receiving processes against the Government issued by such Court. The Special Government Pleader was duly served with notice. These facts, however, are not sufficient to hold that the Government in issuing the notification was acting mala fide or was actuated with the motive of shutting out an inquiry at the hands of this Court into the irregularities alleged to have been committed by the municipal committee.

The learned Special Government Pleader has not pressed before us the objection raised about the presumption of conclusiveness of the notification under sub-s. (8) of s. 67 of the Act.

We may, however, observe that in our experience, at any rate, in my experience, this is a first time when the State Government, departing from a healthy practice, has issued a notification likely to affect the merits of this case, after rule had been issued and served on the Government Pleader. We hope not to come across any such instance in future.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

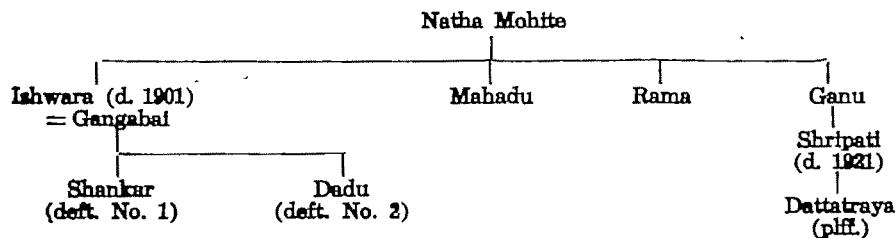
DATTATRAYA SHRIPATI MOHITE v. SHANKAR ISHWARA MOHITE.

Admission—Evidentiary value of,—Admission by party to suit concerning subject-matter in dispute—Whether Court entitled to consider such admission in subsequent proceeding concerning same subject-matter.

An admission on a question of fact made by a party in the course of a proceeding can be regarded as a good piece of evidence relying on which the opposing party may contend that the claim made in the subsequent proceeding is unjustifiable. Therefore, the Court is entitled to consider admissions solemnly made by a party concerning the subject-matter in dispute in the course of a proceeding in adjudging upon the truth or otherwise of the claim made by that party in a subsequent proceeding concerning the same subject-matter.

*Ramabai Shrinivas v. Government of Bombay*¹, explained.

The following genealogy explains the relationship between the parties to the suit:—



Ishwara and Ganu were two sons of Natha Mohite. Shankar and Dadu (defendants Nos. 1 and 2) were the sons of Ishwara and Dattatraya (plaintiff) was the grandson of Ganu. Ishwara died in 1901 leaving him surviving his wife Gangabai and the defendants. Defendant No. 1 was at the date of Ishwara's death about 7 years of age and defendant No. 2 was about 10 years of age. The dispute in this litigation arose in respect of four lands. All these lands were held as Kotkari Inam lands of the ancient Kadim grants in the Jahagir of Sarlaskar Bahadur of the former Kolhapur State. Of these lands, Ishwara during his lifetime was the Navavala. On the death of Ishwara in 1901, an heirship enquiry was commenced. That enquiry was concluded some time in the year 1908. During the enquiry Gangabai, widow of Ishwara, continued to remain in possession of the lands and let them out to her tenants. In 1909 the order passed by the authorities declaring that Shripati—son of Ganu—was the Navavala was given effect to, and Shripati was put in possession of all the lands held by Ishwara. Thereafter the defendants filed suit No. 10 of 1912 against Shripati, Mahadu Natha and Rama Natha for setting aside the order passed in the heirship enquiry and claiming possession of lands other than inam lands held by Ishwara. The trial Judge held that defendants Nos. 1 and 2—sons of Ishwara—were the lawful heirs of Ishwara and were entitled to all his properties except the Inam lands and the income accruing therefrom for performance of Government service. In 1918, defendant No. 2, who is the elder of the two defendants, submitted an application for reviewing the order passed in the heirship enquiry. That application was rejected on May 18, 1918. Thereafter Shripati died, and another heirship enquiry was started

¹Decided, November 20, 1953/January 23, 1959. First Appeal No. 653 of 1955, against the decision of V. C. Angadi, Joint Civil Judge, Senior Division, at Kolhapur, in Special Civil Suit No. 26 of 1953. 1 (1940) 43 Bom. L.R. 232.

which remained pending till sometime in 1936. During the enquiry the plaintiff—son of Shripati—remained in possession of the Inam lands and he performed the service for holding these lands. The enquiry officer recognised the claim of the plaintiff, and the plaintiff was declared the Navavala. On May 13, 1939, defendant No. 2 executed a *Kabulayat* in favour of the plaintiff under which he purported to enter into possession of the Inam lands as a tenant of the plaintiff. Thereafter on May 25, 1939, defendant No. 1 obtained a lease of the Inam lands for ten years from the plaintiff. Thereafter, the plaintiff challenged the lease, dated May 25, 1939, in Suit No. 3 of 1941 on the plea that it was procured from him by practising fraud. In that suit, defendant No. 1 denied the allegations set up by the plaintiff and claimed that he was a tenant of the lands, and that he was paying rent to the plaintiff. That suit was dismissed. Record of Rights was introduced in the area in which the lands were situate some time about the year 1947 and the lands were entered in the name of the plaintiff. The plaintiff paid the assessment of the lands year after year and the same was accepted by the revenue authorities. The plaintiff then filed Suit No. 565 of 1948 against the defendants for a decree for rent due by defendant No. 1 under the rent note, dated May 25, 1939. In that suit defendant No. 1 contended that the lease dated May 25, 1939, was extended by mutual agreement for a period of five years and that he was accordingly entitled to remain in possession of the lands as a tenant. Defendant No. 1 admitted in that suit that he was in possession as a tenant. The suit filed by the plaintiff was decreed on November 29, 1949. In the meanwhile the Bombay Tenancy and Agricultural Lands Act was made applicable to the area in which the lands were situate, and the plaintiff filed Tenancy Application No. 25 of 1950 in the Court of the Mamlatdar for an order for possession of the lands on the expiry of the period of the lease. In that application, defendant No. 1 contended that he was a protected tenant and that he was not liable to be evicted. That contention of defendant No. 1 was negatived and an order for possession was passed against the defendants. In pursuance of this order of the Mamlatdar, possession of the Inam lands was delivered to the plaintiff on September 23, 1950, and June 3, 1951. Against the order passed by the Mamlatdar the defendants preferred an appeal to the Prant Officer and that appeal was dismissed in 1951 and the defendants acquiesced in that order. In the meanwhile the defendants attempted to trespass upon the land in the possession of the plaintiff. On August 23, 1951, the police officer in charge of the police station within the jurisdiction of which the lands were situate started proceedings under s. 145 of the Criminal Procedure Code apprehending breach of the public peace. Thereafter the plaintiff filed the present suit for a declaration that the rent which was collected by the Receiver who was appointed in the proceedings under s. 145 of the Criminal Procedure Code was payable to him. The defendants resisted the claim of the plaintiff to that amount and contended that the plaintiff was not in possession and was not entitled to the injunction claimed by him. The plaintiff then amended the plaint and asked for relief for possession of the lands from the defendants in the event of the Court holding that he was at the date of the suit not in possession of the suit lands. To the claim made by the plaintiff for a declaration of title and for an injunction and alternatively for possession, the defendants raised diverse contentions. They denied that the plaintiff had title to the suit property. They contended that they were in possession of the suit property in their own right and not as tenants under rent note, dated May 25, 1939; that the plaintiff was not in possession of the suit lands within twelve years prior to the date of the suit; that their father Ishwara was the Navavala of the suit lands and that the orders declaring the plaintiff's father and after his death the plaintiff as the Navavala of the suit lands were illegal and were obtained fraudulently and the same were not binding on the defendants; that certain other persons were necessary parties to the suit, and the claim made by the plaintiff could not be decreed unless those persons were impleaded; that the plaintiff

had no title to the suit property either derivatively or by adverse possession and that the lands being Rayatawa lands at the date of institution of the suit the plaintiff's suit was liable to be dismissed.

The trial Judge decided all the issues against the plaintiff and in favour of the defendants. He, therefore, dismissed the plaintiff's suit.

The plaintiff appealed.

P. S. Joshi, for the appellant.

G. S. Gupta (Jr.), for respondent No. 1.

B. B. Kotwal, for respondent No. 2.

SHAH J. [His Lordship after stating the facts of the case and dealing with points not material to this report, proceeded:] We have referred to the diverse admissions made by the defendants from time to time since the year 1939 of the title of the plaintiff to the suit lands. The learned trial Judge ignored these admissions somewhat lightly purporting to rely upon the judgment of Beaumont C.J. in *Ramabai Shrinivas v. Government of Bombay*.¹ In the view of the learned trial Judge, it was decided in *Ramabai's* case that admissions made by a person concerning the subject-matter in dispute in the course of a proceeding, cannot have any evidentiary value in adjudging upon the truth or otherwise of the claim made by that person in a subsequent proceeding concerning the same subject-matter. It must at once be observed that Beaumont C.J. has not laid down any such proposition. We may take this opportunity of stating that the observations made in this case are often misunderstood. Beaumont C.J. merely laid down that an admission made by a party in a pleading in a civil proceeding will be regarded as binding upon him in that proceeding and he will not be permitted to go back upon it in the course of that proceeding: but the admission cannot be regarded as conclusive and binding upon him in any other proceeding and it is open to him to show that that admission made in the earlier proceeding was in fact not true. The observation on which reliance was placed by the learned trial Judge is contained in the following paragraph (p. 234):

"...The learned Judge, in the case of defendants Nos. 2 and 3, held that Government were bound by an admission in their written statement filed in the original suit of 1913 in which the costs were incurred, and that by that admission Government had acknowledged that the lands had been assigned as reward for services; but the learned Judge's view on that point is clearly wrong. A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground and to make an admission, but that admission is not binding in any other suit, and certainly not for all time. Government may have known much less about the position in 1913 than they know now. If they had pleaded erroneously in the suit of 1913 and had discovered the error in time, they could have amended the pleading, and it would be a strange thing to hold that, after the suit had been disposed of, and the chance to amend the pleading had gone, Government were bound for all time by their admission."

It is difficult to hold that by these observations the learned Chief Justice intended to lay down the proposition that an admission on a question of fact made by a party in the course of a proceeding has in another proceeding no value whatever and cannot be regarded as a good piece of evidence relying on which the opposing party may contend that the claim made in the subsequent proceeding is unjustifiable. In our view, *Ramabai's* case is not an authority in support of the view that the Court is not even entitled to consider admissions solemnly made by a party in the course of proceedings in other suits relating to the same subject-matter. We are unable to agree with the observation made by the learned trial Judge in paras. 35, 36 and 44 of his judgment that the admissions made by defendants Nos. 1 and 2, in the proceedings in Suit No. 565

of 1948 and the revenue proceedings and in the earlier Suit No. 3 of 1941 have no evidentiary value.

[The rest of the judgment is not material to this report.]

Appeal allowed.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

THE PETLAD TOWN MUNICIPALITY v. THE PETLAD KESHAV
MILLS CO. LTD.*

Bombay District Municipal Act (Bom. III of 1901), Secs. 59, 60, 46, 167-A, 180-A—Bombay Merged States (Laws) Act (Bom. IV of 1950)—Baroda State (Application of Laws) Order, 1949—Whether municipality by framing rules can grant remission of any tax specified in s. 59—Person entitled to refund of part of tax paid to municipality—Municipality admitting its liability to refund but not making the refund—Suit for recovery of such refund whether governed by s. 167-A—Indian Limitation Act (IX of 1908), art. 62.

Under ss. 59, 60 and 46 of the Bombay District Municipal Act, 1901, a municipality has power to provide by rules a scheme for granting remissions in the matter of recovery of any of the taxes specified in s. 59 of the Act including a terminal tax.

Failure by a municipality governed under the Bombay District Municipal Act, 1901, to refund an amount of tax, while accepting liability to refund the same, cannot be said to be an "act done in pursuance or execution or intended execution" of the Act. Therefore, where the plaintiff was in the first instance bound to pay a tax to a municipality and had in fact paid the same, but under the law prevailing the plaintiff was entitled to refund of a percentage of the tax paid and the municipality while admitting liability did not refund the same, a suit filed by the plaintiff for refund of tax would not be governed by s. 167-A of the Act, but by art. 62 of the Indian Limitation Act, 1908.

Ranchordas Mooraji v. The Municipal Commissioner for the City of Bombay', followed.

Municipality of Chopda v. Motilal Manekchand', distinguished.

Quære: Whether it is open to the State to direct by general or special order grant of remission in the matter of levy of a tax by exercising authority under s. 59 of the Bombay District Municipal Act, 1901.

THE facts appear in the judgment.

B. B. Kotwal, for the appellant.

S. M. Shah, with *C. C. Vaidya*, for the respondent.

SHAH J. This is an appeal against the decree passed by the Civil Judge, Senior Division, at Nadiad, decreeing against the Petlad Town Municipality, a municipality governed by the Bombay District Municipal Act III of 1901, a sum of Rs. 13,397-9-9 and proportionate costs of the suit and future interest from the date of the suit till satisfaction.

The facts which give rise to this appeal may be briefly stated. The town of Petlad was originally within the jurisdiction of the former Baroda State. The Keshav Mills Co. Ltd. is a limited liability company which was registered under the Companies Act of the Baroda State, and owns a factory in the town of Petlad for manufacture of cotton textile and yarn. For its manufacturing business the company had to import machinery, raw materials and other goods from outside the limits of the municipality, and had to export the manufactured goods. The company applied to the former Baroda State Government for remission in the matter of levy of taxes such as income-tax, excess profit tax, and octroi and the terminal taxes. From time to time remissions were given to the

*Decided, November 26, 1958. First Appeal 1 (1901) LL.R. 25 Bom. 387, s.c. 3 Bom. No. 854 of 1955, against the decision of J.T. L.R. 158. Jabade, Civil Judge, Senior Division, at Nadiad, 2 (1957) 60 Bom. L.R. 48. in Kaira Special Civil Suit No. 24 of 1953.

company. Finally in the year 1946 the Baroda State Government granted remissions which were to endure for a period of 15 years in the matter of recovery of taxes including the octroi duty and the terminal tax levied by the Petlad Municipality. The Baroda State Government from time to time directed the municipality, in exercise of its authority under s. 59 (Tha) of the Baroda State Municipal Act of Samvat Year 1962, to give remission to the company in the levy of octroi duty and the terminal tax. The municipality, in exercise of its powers under s. 46 of that Act, framed rules in conformity with the directions given by the State authorities. By Act XII of 1949 the Baroda Act of S. Y. 1962 was repealed, and a new Act called the A Class Municipalities Act was enacted, and under that Act also the State Government reserved to itself the power to grant remission in the matter of recovery of municipal taxes and to issue directions in that behalf to the municipalities concerned. Provision was also made for framing rules by the municipalities for granting remissions in the levy of taxes, and the notifications issued under the Act of S.Y. 1962 were directed to be continued in operation as if they were made under Act XII of 1949. On July 30, 1949, the Baroda State (Application of Laws) Order, 1949, was issued under the Extra Provincial Jurisdiction Act, 1947. By that Order, the Bombay District Municipal Act III of 1901 was applied to the area of the former Baroda State: and by the operation of that Order the Baroda Act XII of 1949 stood repealed. The provisions of the Baroda State (Application of Laws) Order, 1949, were repealed and re-enacted by Bombay Act IV of 1950 called the Bombay Merged States (Laws) Act, 1950, and by Schedule 1 to that Act Bombay Act III of 1901 was extended to the area of the former Baroda State with the addition of s. 180A which was added thereto by an amendment to the Act. It appears that the Petlad Municipality gave remissions consistently with the directions issued by the Baroda State Government under Baroda Act 1 of S.Y. 1962 in the matter of levy of the terminal tax payable by the company. After the Baroda State merged with the Indian Union and Bombay Act III of 1901 was made applicable to that area, disputes arose as to the liability of the municipality to refund a percentage of the tax collected by it. It may be observed that the scheme for giving remission adopted by the municipality under the rules framed by it was that in the first instance the entire amount of tax payable was collected from the company and at the end of the year the municipality made up accounts and refunded the excess amount collected consistently with the remission or concession declared by the State authorities. As the municipality after the merger of the Baroda State did not refund the excess amount of terminal tax collected by it, by letter, dated February 3, 1950, the company called upon the Chief Officer of the municipality to refund Rs. 3,445-4-0 due by the municipality for the period between August 1, 1948, and July 31, 1949. To this letter a reply was sent by the municipality on March 15, 1950, informing the company that the request made for refund of the terminal tax was placed before the General Body of the municipality and it was resolved that the tax be refunded. The resolution which was moved and the amendment thereto were set out in the letter. The company was also intimated that it was decided to refund to the "industries," amounts as may be decided by the Sub-Committee, but it was "specially so resolved" that the opinion of the Legal Remembrancer be obtained and the amount may be refunded to the "industries" on condition that if the final decision in the matter was against the "industries" the "industries" will repay to the municipality the amounts refunded. It appears that thereafter the excess tax collected for the years 1946-47 and 1947-48 was refunded to the company.

On November 7, 1950, a letter was addressed by the company to the Chief Officer of the municipality stating that terminal tax for the period between August 1, 1949, and July 31, 1950, amounting to Rs. 9,265-9-0 was paid and according to the resolution of the Department of Commerce and Industries an amount of Rs. 3,706-4-0 being 40 per cent. of the tax paid by the com-

pany was refundable, and a request was then made for payment of that amount. That request was repeated by letter, dated August 4, 1951, and also by letters dated August 13 and 23, 1951. A resolution was passed by the municipality on September 29, 1951, whereby it was resolved to refund to the mills and factories the amounts remitted to them from the terminal tax both for the period prior to the date on which the Baroda State merged with the Indian Union and for the period subsequent to the merger. It appears that on October 16, 1951, a voucher was made out for refund of the taxes for the years 1948-49 and 1949-50 and even cheques were drawn on October 22, 1951, in that behalf but were not delivered to the company. Thereafter by letter, exh. 95, dated October 2, 1951, the company demanded refund of Rs. 1,906-1-0 being 40 per cent. of the terminal tax paid for the period between August 1, 1950, and March 31, 1951. This request was repeated by letters, exhs. 103, 104 and 105, respectively dated October 6, October 25, and December 12, 1951. By letter, exh. 96, dated August 25, 1952, the company again demanded refund of Rs. 3,323-1-0 being 45 per cent. of the total amount of terminal tax paid for the period between April 1, 1951, and March 31, 1952. By letter, exh. 97, dated December 17, 1952, a demand was made for refund of Rs. 1,946-4-0 being 45 per cent. of the terminal tax paid for the period between April 1, 1952, and October 21, 1952. This request was not complied with by the municipality. It may be observed that the company restricted its claim for refund of the terminal tax up to October 21, 1952, because by a notification issued by the Government of Bombay, dated October 22, 1952, the remissions which were directed by the former Baroda State Government to be given were cancelled. By letter, dated December 26, 1952, the company again wrote to the municipality stating that the terminal tax for the period between August 1, 1948, and July 31, 1950, in spite of the General Board Resolution had not been refunded. The company informed the municipality that it "was being put in difficulty and monetary loss" on account of the default of the municipality in complying with the resolution and the orders passed by the Government. A reminder was sent on January 9, 1953. By letter, dated January 24, 1953, the company was informed by the municipality that the matter was under consideration of the municipality and "clarification" will be made thereon. Thereafter on February 1, 1953, the municipality resolved that if the Government of the State of Bombay gave to the municipality as "help" an amount equal to the amount refundable to the industries, then the said amount should be "paid off to the industries." It was further resolved to take steps to get "help" immediately from the Government and to send the bills for the amount of refund for every year to the Government together with the demand. The Government of Bombay declined to comply with the request made by the municipality. The company after serving a notice commenced suit No. 24 of 1953 on July 30, 1953, against the municipality for a decree for Rs. 14,324-14-0 and Rs. 1,072-8-0 as interest as damages. It was the company's case that it was entitled to receive from the municipality Rs. 3,445-4-0 for the period between August 1, 1948 and July 31, 1949, Rs. 3,706-4-0 for the period between August 1, 1949 and July 31, 1950, Rs. 1,906-1-0 for the period between August 1, 1950 and March 31, 1951, Rs. 3,321-1-0 for the period between April 1, 1951 and March 31, 1952, and Rs. 1,946-4-0 for the period between April 1, 1952 and October 21, 1952, aggregating in all to Rs. 14,324-14-0, by virtue of the orders passed by the former Baroda State Government and the rules framed by the municipality in the matter of refund of terminal taxes and the provisions of s. 180A added to the Bombay District Municipal Act III of 1901 when the Bombay Merged States (Laws) Act was enacted. It was submitted by the company that the cause of action arose in favour of the company for the first time when the municipality by resolution, dated February 1, 1953, resolved that the amount will be paid to the company only in the event of the Government of Bombay paying the sum to the municipality.

The claim of the company was resisted by the municipality on diverse grounds. It was contended that the State of Bombay was a necessary party to the suit, that no concession in respect of terminal taxes was granted by the former Baroda State, that in any event the municipality was not bound to grant remissions according to the orders relied upon by the company, that the concessions in any event became ineffective on July 30, 1949, when the Baroda State (Application of Laws) Order was enacted and the concessions could not be continued under s. 180A of Bombay Act III of 1901, that the company was not entitled to claim interest by way of damages, and that no claim to recover the amount of remission or concession could be made in the suit as framed, and in any event the municipality was not liable to pay the amount claimed because the company was in a "prosperous condition". It was also contended that the suit was barred by the law of limitation. Finally it was contended that the defendant-municipality was entitled to deduct the collection charges out of the amount claimed.

The learned trial Judge substantially negatived all the contentions raised by the defendant except two: (i) relating to the claim made by the company about the award of interest by way of damages and (ii) regarding collection charges for the taxes; and he passed a decree for Rs. 13,397-9-9 in favour of the plaintiff company.

In this appeal, Mr. Kotwal on behalf of the municipality has raised three contentions: (i) that the municipality is not liable, since the date on which the Baroda State (Application of Laws) Order, 1949, was issued, to give effect to the remissions granted by the former Baroda State because there is no provision in the Bombay District Municipal Act under which such remissions could be directed to be given by the State to the municipality; (ii) that enforcement of the claim made by the plaintiff company is barred by s. 167A of the Bombay District Municipal Act; and (iii) that unless the municipality received the amount from the Government of Bombay it was under no obligation to pay the same to the plaintiff company; in other words, the liability of the municipality was conditional upon the amount being received from the Government of Bombay which was primarily liable to pay the same. We will deal with these contentions seriatim.

The Baroda Municipal Act of S.Y. 1962 was substantially based upon Bombay Act III of 1901. A large majority of the provisions of the former Act were identical with the provisions of Act III of 1901. But by s. 59 (Tha) of the Baroda Municipal Act (for which there is no parallel provision in Act III of 1901) it was provided that

"For the development of Trade and Industry, if the Government deems fit to grant exemption or any other concession, (1) to any factory in respect of any of these taxes, or (2) in respect of the levy of octroi or other tax on goods manufactured in any factory in the State and imported or exported at any place in the State, the Huzur shall pass proper order, after considering the opinion of the municipality, and the municipality shall abide by it."

Evidently by this clause authority was reserved to the Ruler of the Baroda State to grant exemption to certain tax payers in the matter of levy of petroi duty and other taxes and the municipality was bound to comply with the direction given by the State authorities. It is in pursuance of this authority that the former Baroda State granted concessions or remissions to the plaintiff company in the levy of terminal tax. The municipality under s. 46 framed the Terminal Tax Rules prescribing the rates of terminal tax, and the terms on which exemption was to be given. Rule No. 7 thereof provided:

"The concessions given to industries for the development of trade will continue for this tax also."

The procedure for giving the concession was then set out in the rule. It was stated:

"...the merchants and factory owners of Petlad who are given exemption of octroi or who are given concession of paying a fixed amount should pay the amount of

terminal tax and take receipts thereof and produce the same in the municipality at the end of the year and the municipality after just deducting 5 per cent. charges of the Railways company for collecting the terminal tax or octroi, refund the balance to the factory owners; and no factory owner is to be given a free pass."

That pursuant to this direction remission of terminal tax was given up to the year 1947-48 is undisputed. The dispute between the parties has arisen in respect of the concession claimed to be due since and after the year 1948-49. As we have already observed, on July 30, 1949, the Baroda (Application of Laws) Order, 1949 was passed and thereby Bombay Act III of 1901 was applied and Baroda Act XII of 1949 which had repealed the Baroda Act of S.Y. 1962 was itself repealed. At the time when the Bombay Merged State (Laws) Act, 1950, was passed, s. 180A was added to Bombay Act III of 1901. It was provided by sub-s. (1) of that section:

"Notwithstanding anything contained in the foregoing provisions of this Act, such rules, by-laws, or orders made, issued or sanctioned by or in respect of any of the municipalities whether constituted under the A Class Municipalities Act (Baroda No. XII of 1949) or the B Class Municipalities Act (Baroda No. XIV of 1949) of the former Baroda State (hereinafter called "the said Municipalities" and "the said Baroda Municipalities Acts" respectively) as were in force immediately before the 30th day of July 1949 under the said Baroda Municipalities Acts, shall in so far as they are consistent with the provisions of the Bombay District Municipal Act, 1901 (Bom. III of 1901), be deemed to have been made, issued, or sanctioned by or in respect of the said municipalities under the appropriate provisions of the said Act on the said date and continue in force until altered, repealed or amended by a competent authority."

By Bombay Act IV of 1950, Bombay Act III of 1901 was applied to municipalities in the merged areas, by including that Act in the first schedule with the addition of s. 180-A as stated by us earlier. It is evident, therefore, that all rules, bye-laws and orders made, issued or sanctioned by or in respect of any of the municipalities constituted under the Baroda Acts were to be deemed to have been made, issued or sanctioned by or in respect of the said municipalities under the appropriate provisions of Bombay Act III of 1901 as from July 30, 1949. By statute, therefore, the orders issued by the Baroda State to the municipalities were to be deemed to continue under the appropriate provisions of Bombay Act III of 1901. If, therefore, under Bombay Act III of 1901 a remission could be granted in the matter of levy of terminal tax, the order passed by the former Baroda State must be deemed to be continued by the Bombay Merged States (Laws) Act, 1950, read with Bombay Act III of 1901.

Mr. Kotwal on behalf of the municipality contended that there was no provision in Bombay Act III of 1901 under which a remission of the nature granted to the company could be claimed. We are unable to accept that contention. Under s. 59 of Bombay Act III of 1901, a municipality is entitled to select for imposition, subject to general or special orders of the State Government, any of the taxes specified therein: and terminal tax is one of the taxes which may be imposed by a municipality under s. 59. By s. 60 it is provided that the municipality before imposing a tax shall observe certain preliminary procedure, viz., that it shall resolve to select for the purpose one or other of the taxes specified in s. 59 and prepare rules for the purpose of cl. (i) of s. 46 prescribing the tax selected and shall by such resolution and in such rules specify *inter alia* the class or classes of persons or of property, or of both, which the municipality desires to make liable. Section 46(i) provides that the municipality shall make and from time to time alter or rescind rules, prescribing, subject to the provisions of Chapter VII, the taxes to be levied in the municipal district for municipal purposes, the grounds on which exemptions are to be recognised, the conditions on which and the extent to which remissions may be granted and the system on which refunds are to be allowed and paid. It is clear, therefore, from ss. 59, 60 and 46 that the municipality was competent to select for imposition a tax called the terminal tax on goods imported into or exported from the municipal limit and also to prescribe by

rules framed in that behalf the exemptions which may be recognised and the conditions on which and the extent to which remissions may be granted. The power of the municipality to provide by rules a scheme for granting remissions in the matter of recovery of any of the taxes specified in s. 59 including the terminal tax will sustain the remission granted by r. 7 which we have already referred to as appropriately granted under ss. 59, 60 and 46 of the Act.

But Mr. Kotwal contends that there is no provision in Act III of 1901 whereby the State Authority is competent to direct the municipality to grant remission to any class of tax-payers. It is urged that a municipality may by resolution grant a remission to any class of tax-payers but the municipality cannot be compelled by the State Authorities to grant such a remission. Mr. S. M. Shah, who appears on behalf of the company, invited our attention to the opening words of s. 59 of the Act which contemplate that the imposition of a tax may be subject to any general or special orders which the State Government may make in that behalf, and contended that orders which could be passed by the former Baroda State may appropriately be passed under the head of "special orders" contemplated by s. 59. But we do not think it necessary to decide the question whether it is open to the State to direct by general or special order grant of remission in the matter of levy of a tax by exercising authority under s. 59, because, in our view, the municipality of Petlad has in fact framed rules which grant remissions in the matter of levy of the terminal tax to the cotton textile mills within its area. Whether the rule has been made because the municipality was ordered by the Baroda State Authorities or by a resolution passed in the unfettered discretion of the members of the municipality, is not germane in discussing the question about the obligation of the municipality to refund a percentage of the tax. The rule is a statutory rule which the municipality has framed and that rule is within the competence of the municipality. That being so, it must be held that the remission was granted by the municipality under the rules made under the appropriate provisions of the Bombay District Municipal Act III of 1901.

Incidentally it was sought to be urged by Mr. Kotwal that taxation of trade and industry was not within the competence of the municipality and, therefore, the granting of remissions of a tax with the object of protecting trade and industry was not within the competence of the municipality. But the terminal tax is one of the taxes which is within the competence of a District Municipality to impose, and that tax has been selected for imposition by the Petlad Municipality, and there is no dispute that it has lawfully been imposed and levied. If the municipality may competently levy the terminal tax, we fail to appreciate why the municipality may not make rules for granting remissions or exemptions to certain classes of tax-payers in the levy and collection of that tax. When the municipality is framing rules for granting remission in the recovery of a certain tax which is imposed upon the citizens generally or a certain class of tax-payers, it is not seeking to legislate in the matter of the object for which the remission is given. We are, therefore, unable to accept the argument of Mr. Kotwal that the municipality was incompetent to grant remission of a percentage of the terminal tax merely because the object of the remission was to protect or benefit trade and industry. The remissions granted by the municipality must, therefore, be regarded as validly continued after July 30, 1949, and the plaintiff-company is entitled to the remissions.

The contention that the company's claim is barred by the law of limitation has, in our judgment, no substance. The taxes in respect of which refund is claimed related to the period between August 1, 1948, and October 21, 1952. It is urged that a suit for recovery of tax, which the municipality under the Act or the Rules was obliged to refund, may lie within the period and subject to the conditions prescribed by s. 167-A of Bombay Act III of 1901, and not otherwise, and the present suit by the company being beyond the period prescribed thereby, is barred. Section 167-A(1) of the Bombay District Municipal Act, in so far as it is material, provides:

"No suit shall lie against a municipality... in respect of any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act—

(a) unless it is commenced within six months next after the accrual of the cause of action; and

(b) until the expiration of one month after notice in writing has been, in the case of a municipality, delivered or left at the municipal office...."

If the cause of action has accrued to the plaintiff-company more than six months before the date of the suit, and the suit is in respect of any act done in pursuance or execution or intended execution of the Act, the suit may be liable to be dismissed as barred by s. 167-A. But, in our judgment, s. 167-A has no application to the claim made by the company. The municipality had never before the suit was filed denied liability to pay the amount claimed by the plaintiff company. As we have pointed out earlier, from time to time demands were made by the company for the amounts payable and the municipality did not deny liability to satisfy the claim. In resolution after resolution formally discussed and put to vote before the meetings of the General Board of the municipality, the liability of the municipality to refund the amount of terminal tax to the company was accepted and acknowledged, but the liability was not discharged by payment. It was only on February 1, 1953, that the municipality resolved that the amount will be paid on the same being received from the Government; but even by that resolution the liability was not denied. In our judgment, failure, while accepting liability, to satisfy the same cannot be said to be an "act done in pursuance or execution or intended execution" of the Bombay District Municipal Act III of 1901.

It was held by a division bench of this Court in *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay*,¹ that a suit for refund of taxes which had been paid and which the plaintiff was entitled under the rules to a refund of was not governed by s. 527 of the City of Bombay Municipal Act III of 1888. In that case, a tax-payer of the Bombay Municipality sued to recover certain town duty which he had paid on importing grain and sugar but which under s. 195 of Act III of 1888 he was entitled to have refunded on exporting the commodity. The tax-payer applied for refund in October 1899, but his claim was rejected on February 21, 1900. A suit was then filed on August 21, 1900. It was contended by the municipality that the suit was barred as it did not comply with the requirements of s. 527 of Act III of 1888 which prescribed that one month's notice shall be given of any suit intended to be commenced in respect of any act in pursuance or execution or intended execution of the Act, and the action shall be commenced within ninety days from the date of the act or omission complained of. The Court held that s. 527 did not apply and that no notice of the suit to the defendant-municipality was necessary. It was observed that the defendant—Commissioner of the municipality—could not claim that his conduct had any relation to the execution of the Act if he knowingly and intentionally acted in contravention of its provisions, and to the claim made by the plaintiff s. 527 was no bar.

In *Ranchordas's* case, after paying the tax in the first instance the plaintiff had a right to obtain a refund and when the municipality while admitting liability did not refund the tax, it was held that the suit was not governed by s. 527 of Act III of 1888. In the present case, when the plaintiff-company was in the first instance bound to pay the tax, and in fact paid the same, but under the law prevailing it was entitled to refund of a percentage of the tax paid, and the municipality while admitting liability did not refund the same, it must, on the authority of *Ranchordas's* case, be held that the suit was not governed by s. 167-A of the Bombay District Municipal Act III of 1901.

Mr. Kotwal sought to place strong reliance upon a judgment of this Court in the *Municipality of Chopda v. Motilal*.² In that case, the Municipality of Chopda had levied under s. 59 of the Bombay District Municipal Act, 1901,

1 (1901) I.L.R. 25 Bom. 387, s.c. 3 Bom. L.R. 158. 2 (1957) 60 Bom. L.R. 48.

a tax called the "cotton manufacturing tax", and a dispute as to the legality of that tax. This Court held that a substantial part of the tax was not leviable by the municipality as the levy thereof was in excess of the ceiling provided by art. 276 of the Constitution. But the Court in the plaintiff's suit for refund of the tax already paid by him was governed by s. 167-A of the Bombay District Municipal Act, 1901. In that case, the municipality was not leviable, but the municipality in execution or intended execution of the Act purported to levy it, and the plaintiff sought refund of it. It was held that the suit for recovery of the tax was governed by s. 167-A of the Bombay District Municipal Act, 1901. In the present case, there is no dispute that the tax is leviable by the municipality and there is no illegality in the levy thereof. The plaintiff-company claimed a part of the tax paid by it, relying upon the remission given by the Baroda State and continued under the provisions of the Bombay District Municipal Act, 1901. In failing to refund the tax, the municipality is entitled under the Rules, the municipality is not doing an "act in pursuance or execution or intended execution of the Act. We are, therefore, of the view that the present case is governed by s. 167-A of the Bombay District Municipal Act but by the no limitation provided in that behalf by the Limitation Act. I am of the view that if the suit does not fall within the scope of s. 167-A, it is barred by art. 62 of the Limitation Act.

Mr. Kotwal contended that even if the suit was governed by s. 167-A of the Bombay District Municipal Act, the claim made by the plaintiff for the amount which fell due for the period from July 31, 1949 to July 31, 1950, is barred by limitation. But, in our view, the contention also cannot be sustained. As we have already pointed out, the municipality had not only passed resolutions but had also informed the plaintiff-company that the liability to refund the tax was accepted. For instance, on January 24, 1953, the municipality had informed the plaintiff-company that the matter was under consideration and "proper clarification" will be given. It also appears from the resolution, dated September 29, 1951, passed by the President of the municipality, that the liability to refund the tax claimed by the plaintiff company was accepted. These resolutions, in our view, amounted to clear acknowledgment of liability, and the plaintiff company was by virtue of the acknowledgment of liability in respect of the amounts which fell due for the period between July 31, 1949 and July 31, 1950.

There is also, in our judgment, no substance in the submission that the municipality is not liable to provide funds for granting remission is of the State unless the amount to be refunded is received from the State Government. It is true that it was under the direction of the State Government that the municipality refunded a certain percentage of the tax paid by the tax-payers within the area of the Petlad Municipality. But the fact that the Baroda State did reimburse to the municipality the amount refunded to the tax-payers does not make the municipality liable to refund the tax by the plaintiff by way of remission was by the rules imposed by the Government and not upon the Government. Whatever arrangements have existed between the municipality and the State Government do not affect the incidence of liability. The liability remained the liability of the municipality, and the fact that the Baroda Government chose to make good the amount paid by the municipality to the tax-payers from the municipality to the State Government. We are unable to agree with the contention of Mr. Kotwal that the municipality was not liable to be sued by the plaintiff company for the amount of remission claimed by the company unless the municipality obtained the same from the Government of Bombay.

On the view taken by us, the appeal must fail and is dismissed.

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

STATE v. IBRAHIM NABIJI.*

Foreigners Act (XXXI of 1946), Secs. 2(a), 3, 14, 12—Foreigners Orders, 1948, Rule 7—Foreigners Laws (Amendment) Act (XI of 1957)—Citizenship Act (No. LVII of 1955), Sec. 9(2)—Citizenship Rules, 1956, Rule 30—British subject claiming that he was not foreigner in India before passing of Act XI of 1957—Such person entering India in 1956 and continuing to stay in India beyond period of stay specified in visa—Notice issued by Superintendent of Police directing person to leave India within specified time—Person claiming status of citizen of India—Validity of notice issued by Superintendent of Police.

Persons who, before the date on which the Foreigners Laws (Amendment) Act, 1957, was enacted, were entitled as British subjects to claim that they were not foreigners in India, must since the date on which the Act came into force establish that they hold the status of a citizen of India before they can resist enforcement of an order validly passed against them in exercise of the authority conferred under s. 3 of the Foreigners Act, 1946.

Prima facie, when a person enters India under a passport issued by a foreign country and under a visa obtained by him on an application submitted by him claiming that he was a national of a foreign country and that he desired to visit India for a limited period, it may be assumed that he is not a citizen of India. If after entering India such a person claims the status of a citizen by virtue of r. 30 of the Citizenship Rules of 1956 issued under the Citizenship Act, 1955, the question whether, when or how he has acquired the citizenship of another country, must be determined, for purposes of s. 9(2) of the Citizenship Act, 1955, by the Central Government.

By virtue of Notification issued by the Government of India on October 17, 1955, (No. 949/46/68/409-A) power under s. 3(2)(c) of the Foreigners Act, 1946, may be deemed to be conferred upon the State Governments in respect of foreigners and enemy foreigners. But in the absence of any order issued by the Central Government or competently by the State Government which has delegated the authority under s. 3(2)(c) of the Act upon the Superintendent of Police, an order passed by a Superintendent of Police requiring a person who is a foreigner within the Act as amended under the Foreigners Law (Amendment) Act, 1957, to leave India, must be regarded as unauthorised, and failure to carry out the requisition contained in that order cannot be penalised under s. 14 of the Foreigners Act.

THE facts appear in the judgment.

Y. V. Chandrachud, Government Pleader, for the State in all appeals.

C. S. Trivedi, (appointed) for the accused in all the appeals.

SHAH J. The Superintendent of Police, District Kaira, served a notice dated August 20, 1957, upon the respondent Ibrahim Nabiji, that the respondent who was a foreigner as defined under s. 2(a) of the Foreigners Act, 1946, as amended by the Foreigners Laws (Amendment) Act, 1957, having entered India on January 31, 1956, through the Barmer Check Post on a Pakistan Passport No. 3748944 dated December 3, 1955, bearing an Indian Visa No. 5993 dated January 27, 1956, valid for stay in India till April 30, 1956, was unauthorisedly staying in India since May 1, 1956, and that he do leave India within one month from the date of receipt of the notice, and that failing compliance he will be prosecuted and deported under the Foreigners Act, 1946. The respondent failed to carry out the direction contained in the notice. The Sub-Inspector of Police, Petlad, then filed a complaint in the Court of the Judicial Magistrate, F.C., Petlad, against the respondent on October 23, 1957, charging

*Decided, December 9, 1958. Criminal Appeal No. 895 of 1958 (with Criminal Appeals Nos. 923, 984, 985, 1002, 1004-06 and 1020 to 1022 of 1958), against the order of acquittal

passed by N. H. Bhatt, Joint Civil Judge and Judicial Magistrate, First Class, Petlad, in Criminal Case No. 1458 of 1957.

him with having committed an offence under s. 14 of the Foreigners Act, 1946. It was alleged in the complaint that the respondent was a foreigner within the meaning of the Foreigners Laws (Amendment) Act, 1957, and had not obtained under r. 7 of the Foreigners Orders, 1948, the necessary residential permit and had thereby infringed the provisions of s. 14 of the Foreigners Act.

Before the Judicial Magistrate, the respondent claimed that he was a citizen of India. He admitted that he had gone to Pakistan in 1951 but he contended that he had not accepted the citizenship of Pakistan. He submitted that even though in his passport his domicile was shown as "Pakistan", that statement was untrue. The learned Judicial Magistrate acquitted the respondent. In his view as the respondent was born in the territory of India and there was no evidence to show that he had renounced his citizenship of India, or that he had voluntarily acquired by naturalisation, registration or otherwise, at any time between January 26, 1950, and December 30, 1955, citizenship of Pakistan, by virtue of the presumption contained in art. 10 of the Constitution, the respondent must be deemed to be a citizen of India. The learned Magistrate observed that the respondent by "physically migrating to Pakistan", did not lose his Indian citizenship and the respondent was, therefore, not a foreigner and had not infringed the provisions of s. 14 of the Foreigners Act, 1946. Against the order of acquittal passed by the Judicial Magistrate the State has appealed to this Court.

Before us the arguments advanced on behalf of the State have traversed a very much wider ground. The learned Government Pleader contended that the respondent, who had come armed with a passport of a foreign country describing him as a national of that country, and had obtained a visa which limited the duration of his stay to the period specified therein, by overstaying the period prescribed by the visa, had infringed the provisions of s. 14 of the Foreigners Act. It was also contended that as the respondent had failed to obtain a permit as he was by law required to obtain, he had infringed r. 7 framed under the Foreigners Act and on that account also he had violated the provisions of s. 14 of the Foreigners Act. Finally it was urged that even if the respondent was not initially a foreigner within the meaning of the Foreigners Act since the date on which the Foreigners Laws (Amendment) Act, 1957, was brought into operation the respondent became a foreigner and was bound to comply with the directions issued by the Superintendent of Police and the respondent, by failing to carry out the directions, committed an offence punishable under s. 14 of the Foreigners Act.

In order to appreciate these contentions, it is necessary to refer to certain provisions of the Foreigners Act as amended from time to time and the rules framed thereunder. The expression "foreigner" was defined by s. 2(a) of the Foreigners Act, XXXI of 1946, as modified by Act XXXVIII of 1947 as follows:

"Foreigner" means a person who—

(i) is not a natural-born British subject as defined in sub-sections (1) and (2) of section 1 of the British Nationality and Status of Aliens Act, 1914, (4 and 5 Geo. 5, C. 17), or

(ii) has not been granted a certificate of naturalisation as a British subject under any law for the time being in force in India, or

(iii) is not a ruler or subject of an acceding State, or

(iv) is not a native of the Assam tribal areas;

provided that any British subject who, under any law for the time being in force in India, ceased to be a British subject shall thereupon be deemed to be a foreigner;"

By this definition it is evident that all natural-born British subjects and persons who had obtained certificates of naturalisation as British subjects under any law for the time being in force in India were not foreigners within the meaning of the Act. The respondent was born in India and under the Foreigners Act XXXI of 1946, being a natural-born British subject he was not a foreigner. The definition of the word "foreigner" was amended by the Adaptation of

Laws Order, 1950, when the Constitution of India came into operation and cls. (iii) and (iv) and the proviso of the original definition were deleted and substituted by a new clause in the following words: "is not a citizen of India". Even after this amendment natural-born British subjects and persons holding certificates of naturalization as British subjects under any law for the time being in force, could not be regarded as foreigners. By s. 3 of the Foreigners Act, authority was conferred upon the Central Government to make orders, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein. In exercise of that authority, the Government of India issued the Foreigners Order, 1948, and by r. 7 thereof it was provided:

"Restriction on sojourn in India.—Every foreigner who enters India on the authority of a visa issued in pursuance of the Indian Passport Act, 1920 (XXXIV of 1920), shall obtain from the Registration Officer having jurisdiction either at the place at which the said foreigner enters India or if he has entered India otherwise than on the authority of a transit visa or as tourist, as defined in the Registration of Foreigners Rules 1939 at the place at which he resides in India a permit indicating the period during which he is authorised to remain in India and shall, unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period...."

By s. 14 of the Foreigners Act, persons contravening the provisions of the Act or of any order made thereunder, or any direction given in pursuance of the Act or such order, were liable to be punished with imprisonment for a term which may extend to five years.

Evidently, under the Foreigners Act as originally enacted and even after it was amended by the Adaptation of Laws Order, 1950, the respondent could not be deemed to be a foreigner. Rule 7, which we have already referred to, places restriction on sojourn in India by foreigners who enter India on the authority of a visa issued under the Indian Passport Act, 1920, and requires them to obtain from the Registration Officer having jurisdiction either at the place at which the said foreigners enter India or if they had entered India otherwise than on the authority of a transit visa or as tourists, a residential permit. But the respondent was not a foreigner, and by failing to obtain a permit from the Registration Officer or overstaying the period prescribed by the permit, if one was obtained, the respondent could not be deemed to have infringed r. 7, because one of the conditions precedent to the application of that rule is that the person sojourning must be a foreigner. Even if a natural-born British subject entered India under a visa, he was under no obligation to obtain a permit from the Registration Officer. Nor was he required to leave the country within the period prescribed by the permit granted to him. In any event, if he failed to comply with the provisions of r. 7, he could not be penalised under s. 14 of the Foreigners Act. But since the year 1957, the position is fundamentally altered. Section 2, cl. (a) of the Foreigners Act, 1946, has been amended by Act XI of 1957, and a foreigner is defined as a person who is not a citizen of India.

It is evident that persons who, before the date on which Act No. XI of 1957 was enacted, were entitled as British subjects to claim that they were not foreigners in India, must, since the date on which the Act came into force, be deemed to be foreigners if they are not citizens of India.

The notice served upon the respondent expressly refers to the status of the respondent as a foreigner by virtue of the provisions of s. 2(a) of the Foreigners Act, 1946, as amended by the Foreigners Laws (Amendment) Act, 1957. The circumstance that the respondent being originally a British subject was not a foreigner, within the meaning of that expression as used in the Foreigners Act, 1946, before it was amended, will not come to his aid. Since the amendment of the Act he has to establish that he holds the status

of a citizen of India before he can resist enforcement of an order in exercise of the authority conferred under s. 3 of the *Prima facie*, when a person enters India under a passport of a foreign country and under a visa obtained by him on an application by him claiming that he was a national of a foreign country, and desired to visit India for a limited period, it may be assumed that he is a citizen of India. If after entering India such a person claims to be a citizen, by virtue of r. 30 of the Citizenship Rules of 1956 or the Citizenship Act, LVII of 1955, the question whether, when or where he acquired the citizenship of another country, must be determined, under s. 9(2), by the Central Government.

In the present case, the respondent did claim that he is a citizen of India, and but for a defect in the notice which we will presently address, we have remanded this case to the trial Court giving an opportunity to the respondent to obtain an adjudication from a competent authority as to whether he had acquired the citizenship of another country. We think, that, it is necessary in this case to pursue that course. As has already been observed, the Superintendent of Police has issued the order directing the respondent to leave India, whereas under s. 3 of the Foreigners Act, power to make an order against an individual or against a class of persons, is conferred upon the Central Government. It is true that under s. 3 of the Foreigners Act the power to make orders under s. 3 may be conferred upon a subordinate authority subject to such conditions as may be prescribed by the Government, and the learned Government Pleader has in this case relied upon a Notification issued by the Government of India on C.O. No. 949/46/68/409-A, whereby power has been conferred under cl. (c) of the Foreigners Act, 1946, in respect of foreigners and persons, upon the State Governments amongst others of Bombay. In this case, however, the notification the power may be deemed to be conferred upon the Superintendent of Police; but the learned Government Pleader has not been able to draw attention to any order issued by the Central Government or the State Government which has delegated the authority under cl. (c), of the Foreigners Act upon the Superintendent of Police. The order passed by the Superintendent of Police on August 20, 1957, cannot be regarded as unauthorised, and failure to carry out the requirement of that order cannot, in our judgment, be penalised under s. 14 of the Foreigners Act.

We are, therefore, of the view that the respondent has not contravened the provisions of the Foreigners Act. At the date when he entered India he was a foreigner and was by law not required to obtain a permit; and the period prescribed by the visa, also he did not infringe r. 7 of the Foreigners Order. He cannot be held otherwise guilty of infringement of the provisions of s. 14 because there is no lawful direction issued against him under s. 3, sub-s. (2), cl. (c), of the Foreigners Act to leave India. The respondent is a foreigner under the Foreigners Act as amended by the Foreigners Laws (Amendment) Act, 1957.

On that view of the case, the order passed by the learned Government Pleader must be confirmed and the appeal dismissed.

A.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

STATE v. CHUNILAL VALLABHJI GANDHI.*

Bombay Drugs Rules, 1946—Drugs Act (XXIII of 1940), Secs. 33(1), 18(c)—The Drugs (Amendment) Act (XI of 1955), Sec. 15—General Clauses Act (X of 1897), Secs. 24, 3(19)—Whether Bombay Drugs Rules, 1946, stood repealed on amendment of s. 33(1) of Drugs Act by Act XI of 1955.

The Bombay Drugs Rules, 1946, did not stand repealed on the amendment of s. 33(1) of the Drugs Act, 1940, by the Drugs (Amendment) Act, 1955, but must be deemed to have been re-enacted and to have remained in force under the amended s. 33(1) of the Act by virtue of s. 24 of the General Clauses Act, 1897, till they were repealed by fresh rules framed by the Central Government in 1957.

THE facts appear in the judgment.

M. J. Gordhandas, for the appellant-accused.

V. H. Gumaste, Assistant Government Pleader, for the State.

SHAH J. The appellant was convicted by the Presidency Magistrate, 27th Court, Mulund, Bombay, of an offence under s. 18(c) read with s. 27 of the Drugs Act, 1940, and sentenced to pay a fine of Rs. 250 and in default of payment of fine to suffer simple imprisonment for one month. Against the order of conviction and sentence this appeal has been preferred.

C. N. Patel, Drugs Inspector, received information on October 19, 1956, that the appellant, who was trading in the name of Vivigan Products Corporation at Kandivli, was manufacturing drugs without obtaining a licence under the Drugs Act, 1940. Patel then lodged a complaint with the Kandivli Police Station against the appellant for contravention of s. 18(c) of the Drugs Act. The police officer in charge of the station raided the place occupied by the appellant and attached under a *panchnama* certain articles found on the premises. At that time the son and daughters of the appellant were also found present and taking part in processing Vivigan Ointment and Menthostrine Pain Balm. The appellant was arrested on October 20, 1956, and on February 22, 1957, a charge-sheet was filed against the appellant, his son and his two daughters for offences under ss. 18(a)(i), 18(a)(ii) and 18(c) read with s. 27 of the Drugs Act, 1940, as amended by s. 12 of the Drugs Act, 1955. With the charge-sheet was lodged in Court a complaint addressed to the Magistrate and signed by Patel. The Presidency Magistrate, 27th Court, took cognizance of the offences and framed a charge against the appellant, his son and two daughters on the assumption that the offences were to be tried in the manner of a warrant case under the procedure prescribed by s. 251-A of the Criminal Procedure Code as amended by Act 26 of 1955. After the evidence of the witnesses for the prosecution was recorded, the Prosecutor appearing on behalf of the State applied that as the procedure followed by the Magistrate was inappropriate a new charge be framed against the accused. The learned Magistrate acceded to the request. He held that the procedure prescribed by s. 251-A was inappropriate in view of the provision contained in s. 32 of the Drugs Act. The learned Magistrate then considered the evidence led by the prosecution ignoring the charge which was initially framed, and held that, a *prima facie* case was made out against the appellant and that no case was made out against the other three accused. He, therefore, framed a fresh charge for the offence under s. 18(c) read with s. 27 of the Drugs Act, and proceeded to try the appellant.

The learned Magistrate held that the Vivigan Ointment and Menthostrine Pain Balm were "drugs" within the meaning of the Drugs Act, 1940, and that the prosecution initiated against the appellant was not "bad" even though under s. 33 of the Act no rules were framed by the Central Government at

*Decided, December 12, 1958. Criminal Appeal No. 1060 of 1958, against the order of conviction and sentence passed by R. S.

Dhurandhar, Presidency Magistrate, 27th Court, Mulund, Bombay, in Case No. 1209/P of 1958.

the date of the offence under the Drugs Act as amended by Act XI of 1955. On the view taken by him, the learned Magistrate convicted the appellant and sentenced him as stated earlier.

In this appeal Mr. Gordhandas, who appears on behalf of the appellant, has raised four contentions: (i) that the trial Court had no jurisdiction to entertain the proceeding against the accused because it was not instituted by an Inspector under the Drugs Act; (ii) that even though under s. 18(c) of the Drugs Act the manufacture for sale, or sale, or stocking or exhibiting for sale or distribution of any drugs, except under, and in accordance with the conditions of, a licence issued for such purpose was penalised, no rules having been framed for the issue of a licence under the Drugs Act, 1940, as amended by Act XI of 1955, the appellant could not be convicted of manufacturing for sale a drug without a licence; (iii) that there was no evidence on the record to show that Vivigan Ointment was a "drug" within the meaning of the Drugs Act, 1940; and (iv) that the charge framed against the appellant was vague. In our view, there is no substance in any of these contentions.

As we have already observed, C. N. Patel filed an information before the police at Kandivli and obtained the assistance of the Sub-Inspector in charge of that police station for raiding the premises occupied by the appellant. On the record there is a complaint addressed to the Presidency Magistrate, at Borivli, by C. N. Patel, who has described himself as a Drugs Inspector appointed under s. 21 of the Drugs Act, complaining that the appellant had contravened the provisions of ss. 18(a)(i), 18(a)(iii) and 18(c) of the Drugs Act and had thereby rendered himself liable for punishment under s. 27 of the Act as amended by s. 12 of India Act XI of 1955, and praying that process be issued against the appellant and others and that they be dealt with according to law. This complaint, it is not disputed, was filed with the charge-sheet lodged in Court by the police. Section 32 of the Drugs Act, in so far as it is material, provides by the first sub-section: "No prosecution under this Chapter (Chap. IV) shall be instituted except by an Inspector." Mr. Gordhandas submits that in this case prosecution was not instituted by an Inspector and that the Presidency Magistrate had no jurisdiction to entertain the proceeding and to issue process against the appellant, and that the proceeding having been in its inception entertained without jurisdiction, the conviction of the appellant cannot be sustained. We are unable to hold that the prosecution in this case was not instituted by an Inspector. There was before the learned Presidency Magistrate a complaint by an Inspector under the Drugs Act charging the appellant with having committed offences under ss. 18(a)(i), 18(a)(iii) and 18(c) of the Drugs Act. That complaint having been filed in Court, it cannot be said that the prosecution against the appellant was not instituted by an Inspector. It is true that the complaint was accompanied by a charge-sheet filed by the police, but, that charge-sheet may be regarded as superfluous. As a complaint was filed by an Inspector under the Drugs Act, the prosecution was competently entertained by the Presidency Magistrate, and the fact that the complaint was accompanied by a charge-sheet under the signature of the Inspector of Police did not render the prosecution instituted otherwise than by an Inspector.

By s. 33(1) of the Drugs Act before it was amended by Act XI of 1955 it was provided that the State Government may, after consultation with the Board and after previous publication by notification in the Official Gazette, make rules for giving effect to the provisions of Chap. IV, and by sub-s. (2)(e) of s. 33 provision was made prescribing the forms of licences for manufacture, sale or distribution of drugs. It appears that the Central Government had framed certain model rules under the Drugs Act which were called "the (Central) Drugs Rules, 1945," and those rules were bodily adopted by the State of Bombay in 1946 and published as "the Bombay Drugs Rules, 1946". It was provided that r. 2 and Parts V to XII of the Drugs Rules, 1945, including the connected forms and Schedule, shall apply to the State of Bombay as

ed to be references to the State Government. Evidently the rules must be regarded as framed by the State Government and not by the Central Government.

Section 33 of the Drugs Act, 1940, was amended by s. 15 of India Act XI of 1955, and the first sub-section of s. 15, in so far as it is material, provides that the Central Government may, after consultation with the Board and after previous publication by notification in the Official Gazette, make rules for the purpose of giving effect to the provisions of Chap. IV. There is no dispute that after India Act XI of 1955 was enacted, the Central Government did not immediately frame rules in exercise of the powers conferred by s. 33 of the Drugs Act, 1940, as amended by Act XI of 1955. Mr. Gordhandas contends that on the amendment of the Drugs Act, 1940, by Act XI of 1955, the rules framed by the Bombay Government called the Bombay Drugs Rules, 1946, stood repealed; and no fresh rules having been framed by the Central Government, there was no authority which was competent in that behalf to issue a licence, and if there was no authority competent to issue a licence, the appellant could not be regarded as having infringed the provisions of s. 18(c) of the Drugs Act which penalised the manufacture for sale, or sale, or stocking or exhibiting for sale or distribution of any drug except under and in accordance with the conditions of a licence. It is urged that s. 18(c) postulates the existence of a licensing authority which can competently grant a licence, and if there be no licensing authority, the manufacture for sale, or sale, or stocking or exhibiting for sale or distribution of any drug without a licence cannot be regarded as effectively penalised by the provisions of s. 18(c). We do not think that it is necessary in this appeal to deal with this argument because, in our judgment, the contention that on the enactment of Act XI of 1955, which amended s. 33(1) of the Drugs Act, 1940, the rules framed by the State of Bombay stood repealed cannot be accepted.

Section 24 of the General Clauses Act X of 1897, in so far as it is material, provides:

"Where any Central Act...is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or bye-law, made or issued under the repealed Act...shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification, order, scheme, rule, form or bye-law made or issued under the provisions so re-enacted..."

The rules which were framed by the State of Bombay in 1946 were repealed by fresh rules framed by the Central Government in 1957, and the question arises whether since the amendment of s. 33(1) the rules framed by the Bombay Government must be deemed to have remained in force till they were repealed or superseded.

Section 3(19) of the General Clauses Act X of 1897 defines "enactment" as inclusive of

"...a Regulation...and any Regulation of the Bengal, Madras or Bombay Code, and ...any provision contained in any Act or in any such Regulation as aforesaid;"

By this definition even a part of an Act is deemed to be an enactment within the meaning of the General Clauses Act. When, therefore, the Legislature has provided that rules framed under an enactment, which is repealed and re-enacted with or without modification, shall, unless they are inconsistent with the provisions of the re-enactment, continue in force and be deemed to have been made or issued under the provisions so re-enacted, it must mean that the rules framed by the Bombay State must be deemed to have been re-enacted under the amended s. 33(1) of the Drugs Act. It is undisputed that under the Bombay Drugs Rules, 1946, provision is made in Chaps. VI and VII for granting licences

committed by the appellant no lawfully constituted licensing authority.

We are also unable to agree with the contention that Vivigan Ointment is not a drug within the meaning of the Drugs Act. The prosecution examined one H. H. Banerji, Director of the Central Drug Laboratory, Calcutta. Banerji produced before the Court the formula submitted by the appellant to the Drug Controller in 1954 and renewed in the year 1955. Every drug set out in the formula is an allopathic drug. It may be that some of these drugs may also be used in the Ayurvedic or Unani systems of medicine. But the definition of the word "drug" in s. 3(b) of the Drugs Act is inclusive of

"all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals other than medicines and substances exclusively used or prepared for use in accordance with the Ayurvedic or Unani systems of medicine."

Mr. Gordhandas has fairly, and in our judgment rightly, conceded that the medicines and substances set out in the formula submitted by the appellant to the Director of the Central Drug Laboratory are not exclusively used or prepared for use in accordance with the Ayurvedic or Unani systems of medicine. The medicines or substances which are set out in the formula must accordingly be regarded as drugs within the meaning of the Drugs Act, 1940, as amended by Act XI of 1955.

The appellant had addressed a letter, dated March 16, 1956, to the Drugs Controller for the State of Bombay, on which reliance was placed by Mr. Gordhandas. It was contended by Mr. Gordhandas that it was the case of the appellant that Vivigan Ointment was an exclusively Ayurvedic medicine or a preparation according to the Ayurvedic system of medicine. There is, however, on the record no evidence whatever to support that contention; and the letter on which reliance has been placed is so obscure that it is difficult to make out its purport. The appellant is stated to have written to the Drugs Controller that he was "very much annoyed" and was "compelled to divert" all his activities towards Unani and Ayurvedics which he believed were "very much desired and encouraged by the leaders of the nation, shifting the same to some other State, perhaps to Calcutta." It is difficult to understand what was intended to be conveyed by this statement. In any event, our attention has not been invited to any evidence on the record of the case which supports the view that the medicines or substances which are used for the preparation of Vivigan Ointment and Menthocraine Pain Balm are exclusively used or prepared for use in accordance with the Ayurvedic or Unani systems of medicine.

In our view, there is no substance in the contention that the charge was in any manner vague.

We are of the view that the trial Magistrate was right in convicting the appellant for the offence under s. 18(c) read with s. 27 of the Drugs Act. The sentence imposed upon the appellant cannot be regarded as severe. We, therefore, confirm the order of conviction and sentence passed against the appellant and dismiss the appeal.

Appeal dismissed.

SUPREME COURT.

Present: The Hon'ble Mr. S. R. Das, Chief Justice, Mr. Justice N. H. Bhagwati, Mr. Justice B. P. Sinha, Mr. Justice K. Subba Rao and Mr. Justice K. N. Wanchoo.

SRI RAM RAM NARAIN MEDHO v. THE STATE OF BOMBAY.*

Bombay Tenancy and Agricultural Lands (Amendment) Act (Bom. XIII of 1956), Secs. 5-9, 17A, 31A-31D, 32, 32R—Constitution of India, Arts. 31A, 14, 19, 31; Seventh Sch., List II, Entry 18—Bombay Land Revenue Code (Bom. V of 1819), Sec. 3(5)—Whether Bom. Act XIII of 1956 a legislation with reference to "land" within Entry 18 in List II—Competency of the State Legislature to enact the Act—Act whether protected by art. 31A—"Estate" defined in s. 3(5) of Bombay Land Revenue Code whether includes unalienated lands held by occupants—Whether s. 7 of Bom. Act XIII of 1956 void on ground of excessive delegation of legislative power.

The Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, is covered by Entry 18 in List II of the Seventh Schedule to the Constitution of India and is a legislation with reference to "land" and, therefore, the State Legislature was competent to enact the Act.

*British Coal Corporation v. The King,*¹ *The United Provinces v. Atiqe Begum,*² *Navinchandra Majumdar v. The Commissioner of Income-tax, Bombay City*³ and *Thakur Amar Singhji v. State of Rajasthan*,⁴ referred to.

The Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, is covered by art. 31A of the Constitution and is, therefore, not unconstitutional on the ground of its having violated the fundamental rights enshrined in arts. 14, 19 and 31 of the Constitution.

The words of the definition of "estate" contained in s. 3(5) of the Bombay Land Revenue Code, 1879, mean "any interest in lands" which comprise within their scope alienated as well as unalienated lands and cover holdings of occupants within the meaning thereof.

*Hariprasad Shivshankar Shukla v. A. D. Diolkar,*⁵ *The Vexatious Actions Act, 1896 In re: Boaler In re,*⁶ *The Queen v. Judge of City of London Court*⁷ and *Raja Sri Sailendra Narayan Bhanja Deo v. The State of Orissa*,⁸ referred to.

Section 7 of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, is not void on the ground of excessive delegation of legislative power.

The State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga,⁹ referred to.

"Any other factors which may be prescribed" referred to in s. 7(b) of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, are factors *ejusdem generis* to the factors mentioned earlier in the section and not any and every factor which might cross the mind of the executive.

THE facts appear in the judgment.

In Petitions Nos. 13, 38-41 of 1957.

V. M. Limaye and S. S. Shukla, for the petitioners.

In Petition No. 55 of 1958.

Purshottam Triumdas, with J. B. Dadachanji, for the petitioner.

H. N. Sanyal, Additional Solicitor-General of India, with H. J. Umrigar, K. L. Hathi and R. H. Dhebar, for the respondent.

BHAGWATI J. These six petitions under art. 32 of the Constitution challenge the vires of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 (Bom. XIII of 1956) (hereinafter referred to as the "impugned Act").

*Decided, November 18, 1958. Petitions Nos. 13 and 38-41 of 1957 and 55 of 1958.

1 (1935) A.C. 500.

2 [1940] F.C.R. 110.

3 [1955] 1 S.O.R. 829, s.c. 57 Bom. L.R. 628.

4 [1955] 2 S.O.R. 303.

5 [1957] S.O.R. 121, s.c. 59 Bom. L.R. 384.

6 [1915] 1 K.B. 21.

7 [1892] 1 Q.B. 273.

8 [1956] S.O.R. 72.

9 [1952] S.O.R. 889.

It was an Act further to amend the Bombay Tenancy and Agricultural Lands Act, 1948 (Bom. LXVII of 1948) (hereinafter called the "1948 Act").

The petitioners are citizens of India and landholders within the meaning of the 1948 Act holding several acres of land within the State of Bombay out of which a few acres are under their own cultivation, the bulk of the lands being under the cultivation of tenants—except in the case of the petitioners in petition No. 58 of 1958 where the whole of the lands are under the cultivation of tenants.

The 1948 Act had been passed by the State Legislature as a measure of agrarian reform on December 28, 1948, with a view to amend the law relating to tenancies of agricultural lands and to make certain other provisions in regard to those lands and the objectives sought to be achieved were thus set out in the second paragraph of the preamble:—

"AND WHEREAS on account of the neglect of a landholder or disputes between a landholder and his tenants, the cultivation of his estate has seriously suffered, or for the purpose of improving the economic and social conditions of peasants or ensuring the full and efficient use of land for agricultural purposes, it is expedient to assume management of estates held by landholders and to regulate and impose restrictions on the transfer of agricultural lands, dwelling houses, sites and lands appurtenant thereto belonging to or occupied by agriculturists, agricultural labourers and artisans in the Province of Bombay and to make provisions for certain other purposes hereinafter appearing..."

Section 2(8) of the said Act defined "Land" to mean:

"(a) land which is used for agricultural purposes, and includes the sites of farm buildings appurtenant to such land; and used for agricultural purposes, and

(b) ...

(i) the sites of dwelling houses occupied by agriculturists, agricultural labourers or artisans and land appurtenant to such dwelling houses.

(ii) ..."

"Landholder" was defined in s. 2(9) of the said Act to mean:—

"a zamindar, jagirdar, saranjamdar, inamdar, talukdar, malik or a khot or any person not hereinbefore specified who is a holder of land or who is interested in land, and whom the State Government has declared on account of the extent and the value of the land or his interests therein to be a land-holder for the purposes of this Act."

Under s. 2(21) of the said Act the words and expressions used in the Act but not defined were to have the meaning assigned to them in the Bombay Land Revenue Code, 1879, and the Transfer of Property Act, 1882, as the case may be.

With a view to achieve the objective of establishing a socialistic pattern of society in the State within the meaning of arts. 38 and 39 of the Constitution, a further measure of agrarian reform was enacted by the State Legislature being the impugned Act, hereinbefore referred to, which was designed to bring about such distribution of the ownership and control of agricultural lands as best to subserve the common good thus eliminating concentration of wealth and means of production to the common detriment. The said Act received the assent of the President on March 16, 1956, was published in the Bombay Government Gazette on March 29, 1956, and came into force throughout the State on August 1, 1956.

In about November, 1956, certain landholders from Kolhapur and Sholapur districts in the State of Bombay filed petitions in the Bombay High Court under art. 226 of the Constitution challenging the constitutionality of the impugned Act on various grounds. A division bench of the Bombay High Court pronounced its judgment on February 21, 1957,† dismissing those petitions with costs except in regard to a declaration as regards the invalidity of s. 88D of the Act. The petitioners herein thereupon filed these petitions under art. 32 of the Constitution challenging the vires of the impugned Act and praying

†See *Parasram Damodhar v. State of Bombay*, (59 Bom. L. R. 616).

for a writ of *mandamus* against the State of Bombay ordering them to forbear from enforcing or taking any steps in enforcement of the Act, costs and further reliefs.

Petition No. 13 of 1957 appears to have been filed on December 3, 1956, but effective steps therein were taken only when an application for stay with a prayer for an *ex parte* order being C.M.P. No. 359 of 1957 was filed herein on March 21, 1957. Petitions Nos. 38 to 41 of 1957 were filed on March 21, 1957, and Petition No. 55 of 1958 was filed on March 19, 1958.

All these petitions followed a common pattern and the main grounds of attack were: that the State Legislature was not competent to pass the said Act, the topic of legislation not being covered by any entry in the State List; that the said Act was beyond the ambit of art. 31-A of the Constitution and was, therefore, vulnerable as infringing the fundamental rights enshrined in arts. 14, 19 and 31 thereof; that the provisions of the said Act in fact infringed the fundamental rights of the petitioners conferred upon them by arts. 14, 19 and 31 of the Constitution; that the said Act was a piece of colourable legislation and in any event a part of the provisions thereof suffered from the vice of excessive delegation of legislative power. The answer of the State was that the impugned Act was covered by Entry No. 18 in List II of the Seventh Schedule to the Constitution, that it was a piece of legislation for the extinguishment or modification of rights in relation to estates within the definition thereof in art. 31-A of the Constitution and that, therefore, it was not open to challenge under arts. 14, 19 and 31 thereof and that it was neither a piece of colourable legislation nor did any part thereof come within the mischief of excessive delegation.

As to the legislative competence of the State Legislature to pass the impugned Act the question lies within a very narrow compass. As already stated, the impugned Act was a further measure of agrarian reform enacted with a view to further amend the 1948 Act and the object of the enactment was to bring about such distribution of the ownership and control of agricultural lands as best to subserve the common good. This object was sought to be achieved by fixing ceiling areas of lands which could be held by a person and by prescribing what was an economic holding. It sought to equitably distribute the lands between the landholders and the tenants, and except in those cases where the landholder wanted the land for cultivating the same personally for which due provision was made in the Act, transferred by way of compulsory purchase all the other lands to tenants in possession of the same with effect from April 1, 1957, which was called the "tillers day". Provision was also made for disposal of balance of lands after purchase by tenants and the basic idea underlying the provisions of the impugned Act was to prevent the concentration of agricultural lands in the hands of landholders to the common detriment. The tiller or the cultivator was brought into direct contact with the State eliminating thereby the landholders who were in the position of intermediaries. The enactment thus affected the relation between landlord and tenant, provided for the transfer and alienation of agricultural lands, aimed at land improvement and was broadly stated a legislation in regard to the rights in or over land: categories specifically referred to in Entry 18 in List II of the Seventh Schedule to the Constitution, which specifies the head of legislation as "land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization".

It is well settled that these heads of legislation should not be construed in a narrow and pedantic sense but should be given a large and liberal interpretation. As was observed by the Judicial Committee of the Privy Council in *British Coal Corporation v. The King*¹ :—

"...indeed, in interpreting a constituent or organic statute such as the Act, that

construction most beneficial to the widest possible amplitude of its power must be adopted."

The Federal Court also in *The United Provinces v. Atiq Begum*² pointed out that none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. This Court in *Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City*³ also expressed the same opinion and stated (p. 836):—

"...The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon words so that the same may have effect in their widest amplitude." (See also *Thakur Amar Singhji v. State of Rajasthan*).

Having regard to the principle of construction enunciated above it is clear that the impugned Act is covered by Entry 18 in List II of the Seventh Schedule to the Constitution and is a legislation with reference to "land" and this plea of legislative incompetence of the State Legislature to enact the impugned Act, therefore, fails.

If, then, the State Legislature was competent to enact the impugned Act, is the Act *ultra vires* the Constitution as infringing any of the fundamental rights conferred upon the petitioners? In the course of the arguments before us learned counsel for the petitioners confined their attack only to the constitutionality of ss. 5, 6, 7, 8, 9, 17-A, 31-A to 31-D and 32 to 32-R of the impugned Act as violative of the fundamental right guaranteed under art. 19(1)(g) of the Constitution. The first question to consider in this context however is whether the impugned Act is protected by art. 31-A of the Constitution because, if it is so protected, no challenge on the score of the provisions thereof violating arts. 14, 19 and 31 of the Constitution would be available to the petitioners.

The relevant portions of art. 31-A which fall to be considered here read as follows:—

"(1) Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights...shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent...

(2) In this article,—

(a) the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, inam, or muafi or other similar grant and in the States of Madras and Travancore-Cochin any janmam rights.

(b) the expression 'rights' in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue."

The question which we have to address ourselves initially is whether the lands held by the petitioners, who are admittedly landholders within the definition of the term contained in s. 2(9) of the 1948 Act, are "estates" within the meaning of art. 31-A of the Constitution.

Before we launch upon that enquiry it would perhaps be of help to note how the various land tenures originated. Baden-Powell in his *Land-Systems of British India* (1892 Ed.) Vol. 1 dealing with the general view of land tenures traced the origin and growth of different tenures in the manner following at pp. 97-99 (Chap. IV):—

"4. *Effects of Land-Revenue Administration and Revenue-farming.* Then again, the

² [1940] F.C.R. 110, 134.

³ [1955] 1 S.C.R. 829, 836, 837.

⁴ [1955] 2 S.C.R. 303, 329.

greater Oriental governments which preceded ours, have always, in one form or another, derived the bulk of their State-revenues and Royal property from the land. In one system known to us, 'Royal lands' were allotted in the principal villages, and this fact may have suggested to the Mughals their plan of allotting special farms and villages to furnish the privy purse, and has had other survivals. But, speaking generally, the universal plan of taking revenue was by taking a share of the actual grain heap on the threshing-floor from each holding. Afterwards this was commuted for a money payment levied on each estate or each field as the case might be... To collect this revenue, the ruler appointed or recognized not only a headman and accountant in each village, but also a hierarchy of graded officials in districts and minor divisions of territory formed for administrative purposes. These officers were often remunerated by holdings of land, and a class of land-tenures will be found in some parts of India owning its origin to these hereditary official holdings. Not only so, but during the decline which Oriental governments have usually undergone, the Revenue officials have been commonly found to merge in, or be superseded, by revenue-farmers—persons who contracted for a certain sum of revenue to be paid into the Treasury from a given area, as representing the State dues exigible from the land-holdings within that area. Such revenue-farmers, or officials, whatever their origin, have always tended to absorb the interests of the land-holders and to become in time the virtual landlords over them.

Nor is it only that landlord tenures arise in this way. No sooner does the superior right take shape than we find many curious new tenures created by the landlord or arising out of his attempts to conciliate or provide for certain eminent claims in the grade below him.

a. 5. Effects of Assignment or Remission of Land-Revenue. Yet another class of tenures arises in connection with the State Revenue-administration; and that is when the ruler either excuses an existing land-holder from paying his revenue, either wholly or in part; or 'alienates' or assigns the revenue of a certain estate or tract of country in favour of some chief, or other person of importance, or to provide funds for some special objects, or to serve as a recompense for services to be rendered.

At first such grants are carefully regulated, are for life only, and strictly kept to their purpose, and to the amount fixed. But as matters go on, and the ruler is a bad or unscrupulous one, his treasury is empty, and he makes such grants to avoid the difficulty of finding a cash salary. The grants become permanent and hereditary; they are also issued by officials who have no right to make them; and not only do they then result in landlord tenures and other curious rights, but are a burden to after times, and have furnished a most troublesome legacy to our own Government when it found the revenues eaten up by grantees whose titles were invalid, and whose pretensions, though grown old in times of disorder, were inadmissible.

Such grants may have begun with no title to the land but only a right to the revenue, but want of supervision and control has resulted in the grantee seizing the landed right also."

Here we find the distinction between the State owned lands which are unalienated where the tenures arise out of the exigencies of revenue collection and alienated lands the revenue whereof is remitted either wholly or in part or in other words "alienated" or assigned to grantees for various purposes.

Various land tenures thus developed and series of proprietorships came into existence. The main tenures which the British found when they came into power comprised: (1) the Khas or tenure by Government; (2) the Raiyatwari tenure; (3) the Zamindari or landlord tenure and (4) the Taluqdari or double tenure.

It is interesting to note in this connection that in the table compiled by Baden-Powell in Vol. III of his Book at p. 142 giving some idea of the distribution of the different classes of landed estates in Madras the different classes of landed estates described therein included not only Zamindaris but also "estates" held by Raiyats paying diverse sums as and by way of land revenue.

So far as the area within the State of Bombay was concerned the position is thus summed up in Dandekar's Law of Land Tenures, Vol. I, at p. 12:—

Section III. Classification of land according to the interest of the holder:

"Land is either Government land or not Government land; that is, it is either unalienated or alienated. The expression for unalienated land is *khalsa* or *ryatawari* in some parts as opposed to *dumala* or *inam* lands, that is, alienated lands. In Gujrat Government lands are called '*sarkari*' as opposed to '*baharkali*' lands meaning alienated lands—lands the produce of which had not to be brought to the common threshing ground. In some parts of Gujrat there are, '*talpad*' (Government) lands as opposed to '*Wanta*' lands. In old Regulations two kinds of land have been referred to, namely, *malguzary*, land and *lakhiraj* land. The former meant land paying assessment to Government, whereas, the latter meant land free from payment of assessment. *Khalsa* land in the permanent occupation of holders was denominated, before the survey-settlements, in the different parts of the Presidency by the expressions *mirasi*, *dhara*, *suti* and *muli*. Government arable land not in the permanent occupation of an occupant was and is described by the name *sher*. In alienated villages, lands corresponding to Government '*sher*' lands are denominated by the expressions '*sher*' '*Khas Kamath*' and '*Ghar Khedu*'. Lands in leasehold or farmed villages are called *khoti* lands. Lands which are given under leases and the assessment of which is regulated by the terms thereof are called *kauli* lands."

It will be observed that *Mirasi*, *Dhara*, *Suti* and *Muli* were all tenures in regard to unalienated lands, the tenure-holders being permanent holders of land having hereditary interests in their holdings. The *Khoti* tenures in the Konkan and the *Bhagdari* and *Narvadari* tenures in some parts of Gujrat were also tenures in regard to unalienated lands, the revenue being assessed on those lands on entire villages and not on specific pieces of land either in lump or on the basis of a fixed *Bighoti* assessment on each field and the tenure-holders being responsible for the payment of the sum in certain specified modes. The general prevailing tenure, however, was the *Raiyatwari* tenure where the *Raiyat* or the tenant had the right of an occupant in his holding. The right of an occupant was a heritable right and on the death of a registered occupant the name of his heir was entered in his place. All these were land tenures in respect of unalienated lands and the Bombay Survey and Settlement Act (Bom. I of 1865) passed in 1865 applied generally to the same. There were, of course, certain Acts which dealt with specific tenures mentioned above, e.g., *Bhagdari* and *Narvadari* Tenures Act (Bom. V of 1862), and *Khoti* Settlement Act (Bom. I of 1880); but by and large they were tenures in regard to unalienated lands and were governed by the Bombay Survey and Settlement Act, 1865. In 1879 the State Legislature enacted the Bombay Land Revenue Code (Bom. V of 1879) with a view to consolidate and amend the law relating to Revenue Officers, to the assessment and recovery of land revenue and to other matters connected with land revenue administration. This Act extended to the whole of the State of Bombay excluding the City of Bombay and certain other areas therein mentioned. We shall have occasion to refer to certain provisions of this Act hereafter.

Turning now to alienated lands in which category were comprised lands not belonging to government and lands not paying revenue to government which were exceptions to the principles of State proprietorship and of liability of landholders to pay land revenue to government we find that the alienations were classified as: (1) political tenures such as *Jagirs* and *Saranjams*; (2) *Service Inams*; (3) *Personal Inams* and (4) *Religious endowments*. The principal alienations were *Inams*, *Jagirs* or *Saranjams* and *Watan*s. Each of them was considered as a tenure, had got its own history, its own features and peculiarities. Summary settlements were effected by the government with these tenure-holders and their rights as such recognized. There were *Taluqdari* tenures or *estates* in Gujrat which also came under this category and it may be noted that several pieces of legislation were passed by the State Legislature in regard to those several tenures of alienated lands, e.g., *Titles to Rent-Free Estates Act* (Bom. XI of 1852); *Ahmedabad Taluqdar's Act* (Bom. VI of 1862); *Bombay Hereditary Offices Act* (Bom. III of 1874); *Broach and Kaira Encumbered Estates Act* (Bom. XIV of 1877); *Broach and Kaira Encumbered Estates Act* (Bom. XXI of 1881); *Matadars Act* (Bom. VI of 1887) and *Gujrat Taluqdars*

Act (Bom. VI of 1888). Our attention was also drawn in this connection to the various Acts passed by the State Legislature (between 1949 and 1955) abolishing the several land tenures in Bombay where the government was not in direct contact with the tiller of the soil but there was an interposition of intermediaries between them, the intermediaries having leased out parts of the lands to the tenants who actually cultivated the soil and it was urged that the interests of these intermediaries were estates properly so called.

It is to be noticed, however, that the several land tenures which were thus abolished were not only tenures in respect of alienated lands but also comprised unalienated lands, e.g., the Bombay Bhagdari and Narvadari Tenures Abolition Act, 1949 (Bom. XXXII of 1949); The Bombay Khoti Abolition Act, 1949 (Bom. VI of 1950) and the Bombay Merged Territories (Janjira and Bhore) Khoti Tenure Abolition Act, 1953 (Bom. LXXI of 1953). There was no distinction made thus between land tenures in regard to alienated lands and those in regard to unalienated lands. It may also be noted that all these Acts followed a common pattern, viz., the abolition of these land tenures, award of compensation to the tenure holders whose tenures were thus abolished and the establishment of direct relations between the government on the one hand and the tenure-holders cultivating the lands personally and the tenants cultivating the soil on the other. All these persons, thus cultivating the soil were given the status of occupants and direct relationship was thus established between the government and them. These Acts, so far as our present purpose is concerned, are only mentioned to show the different types of land tenures which existed in the State of Bombay prior to their abolition as aforesaid.

These were the various land tenures known in the State of Bombay and we may at this stage appropriately refer to the statistics (1886-87) of these tenures given by Baden-Powell in Vol. III of his said book at p. 251:—

Tenure	Number of estates or holdings.	Number of villages	Area in acres.	Remarks.
Village landholders: Raiyatwari villages	1284,338	30,118½	28,475,016 (occupied land only)	I have added together these paying at full rates and the much smaller number paying at privileged rates, the latter are 213,405, and how far these represent bhagdar, etc., etc., I have no means of telling.
Overlord tenures	530½	530½	1,419,897 (gross area)	
Talukdari			79334	
Mowasi	41	41	194,830	
Udhad Jambandi	123	123	2160,517	
Khoti	1732½	1732½	3808	
Isafat	7	7	4433,343	
Revenue free i.e. inam & Jagir.	2165½	2165½		These refer to whole villages or estates not to revenue privileges on individual fields, etc., which are included in village land-holdings.

It is to be noted that the holdings of the land-holders in Ryatwari villages apart from others were also styled therein as estates or holdings.

It was vehemently urged before us by learned counsel for the petitioners that the expression "estate" aptly applied only to lands held by the various tenure holders of alienated lands above referred to, and that it could not apply to the holdings of occupants who had merely a right of occupancy in specific pieces of unalienated lands. The word "estate" had been defined in the Bombay Land Revenue Code, 1879, in s. 3(5) to mean: "any interest in lands and the aggregate of such interests vested in a person or aggregate of persons capable of holding the same," and would *prima facie* cover not only an interest in alienated lands but also in unalienated lands. It was, however, urged that the expres-

sion "estate" should be construed in a narrower sense having legislative history and particularly to the fact that the lands held by holders of alienated lands only had prior to 1879 been recognized as such. The holding of an occupant was not treated as such. The distinction sought to be made between holders of unalienated lands and holders of alienated lands is not of much consequence, because even in regard to unalienated lands besides the occupants there were tenure holders called *Narwadars* and *Khotes* who had interests in lands held by them under several tenures which lands were unalienated lands. The interests of tenure holders enjoyed in the lands held by them were "estates" and not, therefore, be predicated of the expression "estate" that it is used in connection with alienated lands. If this distinction was not available, we have only got to consider if there is any reason why the interpretation should be put upon the expression "estate" as suggested by the petitioners. Reliance was placed by the learned counsel for the appellants on a decision of this Court in *Hariprasad Shivshankar Shukla v. A. S. Wadia* where the word "retrenchment" as defined in s. 2(oo) and the word "dismissal" in s. 25F of the Industrial Disputes Act, 1947, as amended by Act XLIII of 1953, were held to have no wider meaning than the ordinary connotation of those words and were held to mean the discharge of labour or staff by the employer for any reason whatsoever, other than a punishment inflicted by way of disciplinary action, and did not include the termination of services of all workmen on a bona fide closure of industry or on change of ownership or management thereof. Even though the word "dismissal" was defined as meaning the termination of services by a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, which words were capable of including within their scope the termination of services of all workmen on a bona fide closure of industry or on change of ownership or management thereof, the word "retrenchment" was construed in a narrow sense because the word "dismissal" connoted in its ordinary acceptance that the business was being conducted and a portion of the staff or labour force was discharged. This Court observed in the course of the judgment (1957) 1 L.R. 101.

"...In the absence of any compelling words to indicate that the intention was to include a bona fide closure of the whole business, it would, we think, be wrong to extend the expression altogether from its context to give it such a wide meaning as suggested by learned counsel for the respondents. What is being defined is retrenchment in the context of the definition. It is true that an artificial definition may be made different from or in excess of the ordinary acceptance of the word as the subject of definition; but there must then be compelling words to show that a different meaning or an extension of the ordinary meaning is intended. Where, in the ordinary work of the word, every single requirement of the definition is fulfilled, it would be wrong to take the definition as destroying the ordinary meaning of the word defined."

Reliance was also placed on a decision of the Court of Appeal in *Boaler v. Board of Education* (1896) 1 Q.B. 373, 280, where the words "proceedings" were held not to include criminal proceedings, in spite of the fact that they were *prima facie* capable of including the same. Kennedy C.J. viewed at page 32 that it was impossible to say that the meaning of "legal proceedings" was in itself and by itself clear and unambiguous and followed the dictum of Lord Esher in *The Queen v. Judge of the Court of Common Pleas*.⁷

"If the words of an Act admit of two interpretations then they are ambiguous. If one interpretation leads to an absurdity and the other does not, the Court will adopt the latter. If the Legislature did not intend to lead to an absurdity, and will not be interpreted as leading to an absurdity, it will be interpreted as leading to an interpretation."

⁵ [1957] S.C.R. 121, 132.

⁶ [1915] 1 K.B. 21.

⁷ [1892] 1 Q.B. 373, 280.

Scrutton J. also expressed the same opinion, (p. 41) :—

"...I find general words used in the Act capable of two meanings, a wider and a narrower one. On the whole I think the language is more suited to the narrower than the wider meaning. The narrower meaning will affect the liberties of the subject to some extent; the wider meaning will most seriously affect the liberties of the subject in a matter, his personal liberty and safety, which I see no reason in the Act to believe was in the contemplation of the Legislature. I decline to make this more serious interference with the liberty of the subject, unless the Legislature uses language clear enough to convince me that that was its intention, and I think ample meaning is provided for its words, and ample remedy is provided for the grievance in respect of which Parliament was legislating by putting the narrower construction on the general words it has used."

Are there any circumstances in the present case which would compel us to put a narrower construction on the expression "estate" in s. 3(5) of the Bombay Land Revenue Code, 1879? It is true that the expression "estate" was used prior to 1879 in connection with the interests which the various tenure-holders of alienated lands held in their respective lands, but it does not, therefore, follow that that expression could be used only in connection with those interests and no others. The Watandars, Saranjamdars, Inamdars and Taluqdars and the like were no doubt holders of "estates", but does that fact militate against the occupants also holding "estates" in the lands which were the subject-matter of their tenures? The words of the definition contained in s. 3(5) of the Bombay Land Revenue Code, 1879, were clear and unambiguous. They meant any interest in lands and the expression "lands" was capable of comprising within its ambit alienated and unalienated lands.

As a matter of fact, the definition of "Superior holder" in s. 3(13) and the definition of "alienated" in s. 3(20) of the Code, provisions of s. 111 in regard to revenue management of villages or estates not belonging to the Government, of s. 113 with regard to the partition of estates and of s. 136 prescribing liability for revenue, amongst others refer not only to alienated lands but also to unalienated lands and the expression "estates" used therein can have reference not only to alienated lands but also to unalienated lands. If the definition of the expression "estate" in the context of the Code is thus clear and unambiguous as comprising both the types of lands, there is no reason why a narrower construction as suggested by the petitioners should be put upon the expression "estate". (See the observations of Kennedy L. J. in *Vexatious Actions Act*, 1896 *In re. Boaler* *In re. (Supra)* at p. 31 and the observations of this Court in *Raja Sri Sailendra Narayan Bhanja Deo v. The State of Orissa*⁸). Even if there was any ambiguity in the expression, the wider significance should be adopted in the context of the objectives of the Act as stated above.

We are, therefore, of opinion that the expression "estate" had the meaning of any interest in land and it was not confined merely to the holdings of landholders of alienated lands. The expression applied not only to such "estate" holders but also to land holders and occupants of unalienated lands.

It was, however, contended on behalf of the petitioners that the Bombay Land Revenue Code was not a law relating to land tenures in force in the State of Bombay and, therefore, the definition of the expression "estate" contained therein would not avail the respondent. It was urged that the Code was passed by the State Legislature in order to consolidate and amend the law relating to Revenue Officers, and to the assessment and recovery of Land Revenue, and to other matters connected with the Land Revenue Administration in the Presidency of Bombay and was merely concerned with the collection of land revenue by the State and had nothing to do with land tenures as such. This argument, however, ignores the various provisions of the Code which define the status as also the rights and obligations of the occupant who has been defined in s. 3(16) of the Code to mean the holder in actual possession of unalienated lands other than a tenant provided that where the holder in actual possession is a tenant, the landholder or superior landlord, as the case may be, shall be deemed to be

the occupant. Chapter VI deals with the Grant, Use and Relinquishment of unalienated lands and s. 65 thereof prescribes the uses to which an occupant of land for purposes of agriculture may put his land. Under s. 68 an occupant is entitled to the use and occupation of his land for the period therein prescribed on fulfilling the conditions therein mentioned and under s. 73 occupancy is stated to be transferable and heritable. Section 73, as it was enacted in 1879, read as follows:

"The right of occupancy shall subject to the provisions contained in section 56, and to any conditions lawfully annexed to the occupancy and save as otherwise prescribed by law, be deemed an heritable and transferable property."

Certain amendments have been made in this section by various Bombay Land Revenue Amendment Acts, (Bom. VI of 1901 and Bom. IV of 1913) and the section as it stands at present reads:—

"An occupancy shall, subject to the provisions contained in section 56, and to any conditions lawfully annexed to the tenure, and save as otherwise prescribed by law, be deemed an heritable and transferable property."

This goes to show that an occupant holds the land under a tenure and occupancy is a species of land tenures. The provisions contained in s. 73(A) relating to the power of the State Government to restrict the right of transfer and the provisions in regard to relinquishments contained in ss. 74, 75 and 76 also point to the same conclusion. These and similar provisions go to show that occupancy is one of the varieties of land tenures and the Bombay Land Revenue Code, 1879, comes within the description of "existing laws relating to land tenures in force" in the State of Bombay within the meaning of art. 31A(2)(a). Baden-Powell has similar observations to make in regard to these provisions in his Land Systems in British India, Vol. 1, at p. 821:—

"Nothing whatever is said in the Revenue Code about the person in possession (on his own account) being 'owner' in the Western sense. He is simply called the 'occupant', and the Code says what he can do and what he cannot. The occupant may do anything he pleases to improve the land, but may not without permission do anything which diverts the holding from agricultural purposes. He has no right to mines or minerals.

These are the facts of the tenure; you may theorize on them as you please; you may say this amounts to proprietorship, or this is a dominium minus plenum; or anything else."

There is no doubt, therefore, that the Bombay Land Revenue Code, 1879, was an existing law relating to land tenures in force in Bombay at the time when the Constitution (Fourth Amendment) Act, 1955, was passed and art. 31A in its amended form was introduced therein and the expression "estate" had a meaning given to it under s. 3(5) there viz., "any interest in land" which comprised within its scope alienated as well as unalienated lands and covered the holdings of occupants within the meaning thereof.

The 1948 Act was passed by the State Legislature in order to amend the law which governed the relations between landlords and tenants of agricultural lands, the object sought to be achieved being as hereinbefore set out. Section 2 of the Act defined the expressions "to cultivate personally" [s. 2(6)]; "landholder" [s. 2(9)]; "protected tenant" [s. 2(14)] amongst other expressions and provided in s. 2(21) that words and expressions used in this Act but not defined shall have the meaning assigned to them in the Bombay Land Revenue Code, 1879, and the Transfer of Property Act, 1882, as the case may be. This brought in the definition of the expression "estate" which had the meaning assigned to it in that Code, viz., "any interest in land". The expression "landholder" in s. 2(9) above was defined to mean

"a zamindar, jagirdar, saranjamdar, inamdar, talukdar, malik or a khot or any person not hereinbefore specified who is a holder of land or who is interested in land, and whom the State Government has declared on account of the extent and value of the land or his interests therein to be a land-holder for the purposes of this Act."

The latter part of this definition is significant and shows that not only holders of alienated lands but also holders of unalienated lands were comprised there-

in provided, however, the extent and value of the land or their interests therein were such as to deserve a declaration in that behalf at the hands of the State Government. The only point to note here is that no distinction was made even in this Act between alienated lands and unalienated lands and all interests in land howsoever acquired were treated on a par so far as the holdings were concerned, necessarily implying that even an occupant would come within the description of landholder and his interests therein would come within the definition of "estate" as defined in the Bombay Land Revenue Code, 1879. Chapter III made provisions for protected tenants, their special rights and privileges and whoever came within the category of protected tenant was given the right to purchase from the landlord the land held by him as such protected tenant notwithstanding anything contrary in law, usage or contract subject to the provisions of sub-s. (6) which imposed restrictions on the holdings of landlords as well as tenants. These provisions were analogous to the provisions contained in ss. 32 to 32R of the impugned Act except that in the 1948 Act the protected tenant had the option to purchase the land whereas under the impugned Act there was a provision for compulsory purchase of the land by the tenant on a specified date subject to certain conditions therein mentioned. Section 34 of the 1948 Act gave the landlord the right to determine protected tenancy under certain conditions and was analogous to s. 31 of the impugned Act which empowered the landlord to terminate the tenancy for personal cultivation and non-agricultural purposes. Fifty acres of land were prescribed as the limit of the holding either by the landlord or the protected tenant which provision was analogous to the one found in the impugned Act in regard to ceiling area and economic holdings. Power was given to the State Government under s. 36 to reduce the limit of fifty acres by a notification in the official gazette and power was also given similarly to direct that the limits of fifty acres or the reduced limit specified in such notification shall comprise such kind or kinds of lands in the area as may be specified in the notification. This power was analogous again to the power given to the State Government under s. 7 of the impugned Act to vary the ceiling area or economic holding originally prescribed in ss. 5 and 6 of the Act.

These instances, culled out from some of the provisions of the 1948 Act, go to show that the agrarian reform which was initiated by that Act was designed to achieve the very same purpose of distribution of the ownership and control of agricultural lands so as to subserve the common good and eliminate the concentration of wealth to the common detriment which purpose became more prominent when the Constitution was ushered in on January 26, 1950, and the directive principles of State Policy were enacted *inter alia* in arts. 38 and 39 of the Constitution. With the advent of the Constitution these provisions contained in the 1948 Act required to be tested on the touch-stone of the fundamental rights enshrined in Part III thereof and when the Constitution (First Amendment) Act, 1951, was passed introducing arts. 31A and 31B in the Constitution, care was taken to specify the 1948 Act in the Ninth Schedule so as to make it immune from attack on the score of any provision thereof being violative of the fundamental rights enacted in Part III of the Constitution. The 1948 Act was the second item in that schedule and was expressly saved from any attack against the constitutionality thereof by the express terms of art. 31B.

The impugned Act, which was passed by the State Legislature in 1956, was a further measure of agrarian reform carrying forward the intentions which had their roots in the 1948 Act. Having regard to the comparison of the various provisions of the 1948 Act and the impugned Act referred to above it could be legitimately urged that if the cognate provisions of the 1948 Act were immune from attack in regard to their constitutionality, on a parity of reasoning similar provisions contained in the impugned Act, though they made further strides in the achievement of the objective of a socialistic pattern of society, would be similarly saved. That position, however, could not obtain,

because whatever amendments were made by the impugned Act in the 1948 Act were future laws within the meaning of art. 13(2) of the Constitution and required to be tested on the self-same touchstone. They would not be in terms saved by art. 31B and would have to be scrutinized on their own merits before the Courts came to the conclusion that they were enacted within the constitutional limitations. The very terms of art. 31B envisaged that any competent Legislature would have the power to repeal or amend the Acts and the Regulations specified in the 9th Schedule thereof and if any such amendment was ever made the *vires* of that would have to be tested. (Vide *Abdul Rahiman v. Vithal Arjun*¹⁰).

That brings us back to the provisions of art. 31A and to a consideration as to whether the impugned Act was a legislation for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights within the meaning of sub-article (1)(a) thereof. We have already held that the Bombay Land Revenue Code, 1879, was an existing law relating to land tenures in force in the State of Bombay and that the interests of occupants amongst others fell within the expression "estate" contained therein. That, however, was not enough for the petitioners and it was further contended on their behalf that even though the impugned Act may be a law in regard to an "estate" within the meaning of the definition contained in art. 31A (2)(a) it was not law providing for the acquisition by the State of any estate or any rights therein or for the extinguishment or modification of any such rights. The impugned Act was certainly not a law for the acquisition by the State of any estate or of any rights therein, because even the provisions with regard to the compulsory purchase by tenants of the land on the specified date transferred the title in those lands to the respective tenants and not to the State. There was no compulsory acquisition of any "estate" or any rights therein by the State itself and this provision could not help the respondent. The respondent, however, urged that the provisions contained in the impugned Act were enacted for the extinguishment or modification of rights in "estates" and were, therefore, saved by art. 31A(1)(a). It was on the other hand urged by the petitioners (1) that the extinguishment or modification of any such rights should only be in the process of the acquisition by the State of any estate or of any rights therein and (2) that the provisions in the impugned Act amounted to a suspension of those rights but not to an extinguishment or modification thereof. We shall now proceed to examine these contentions of the petitioners.

Article 31A(1)(a) talks of two distinct objects of legislation; one being the acquisition by the State of any estate or of any rights therein and the other being the extinguishment or modification of any such rights. If the State acquires an estate or any rights therein that acquisition would have to be a compulsory acquisition within the meaning of art. 31(2)(4) which was also introduced in the Constitution by the Constitution (Fourth Amendment) Act, 1955, simultaneously with art. 31A(1) thereof. There was no provision made for the transfer of the ownership of any property to the State or a Corporation owned or controlled by the State with the result that even though these provisions deprived the landholders of their property they did not amount to a compulsory acquisition of the property by the State. If this part of art. 31A(1)(a) is thus eliminated what we are left with is whether these provisions of the impugned Act provided for an extinguishment or modification of any rights in "estates". That is a distinct concept altogether and could not be in the process of acquisition by the State of any "estate" or of any rights therein. Acceptance of the interpretation which is sought to be put upon these words by the petitioners would involve the addition of words "in the process of the acquisition by the State of any estate or of any rights therein" or "in the process of such acquisition" which according to the well-known canons of construction cannot be done. If the language of the enactment is clear and

unambiguous it would not be legitimate for the Courts to add any words thereto and evolve therefrom some sense which may be said to carry out the supposed intentions of the Legislature. The intention of the Legislature is to be gathered only from the words used by it and no such liberties can be taken by the Courts for effectuating a supposed intention of the Legislature. There is no warrant at all, in our opinion, for adding these words to the plain terms of art. 31A(1)(a) and the words "extinguishment or modification of any such rights" must be understood in their plain grammatical sense without any limitation of the type suggested by the petitioners.

It, therefore, remains to consider whether the relevant provisions of the impugned Act were designed to bring about an extinguishment or modification of the landlord's rights in their "estates". These provisions are contained in ss. 32 to 32R of the impugned Act and are under the heading "Purchase of lands by Tenants". Section 32 provides that:

"On the first day of April 1957 (hereinafter referred to as 'the tillers day') every tenant shall, subject to the provisions of the next succeeding sections, be deemed to have purchased from his landlord, free of all incumbrances subsisting thereon on the said day, the land held by him as tenant..."

provided certain conditions are fulfilled. Under s. 32A the tenant shall be deemed to have purchased the lands up to the ceiling area and the tenant shall not be deemed to have purchased lands held by him as such tenant if he hold lands partly as owner and partly as tenant but the area of the land held as owner is equal to or exceeds the ceiling area (s. 32B). Section 32C empowers the tenant to choose the land to be purchased if he holds lands separately from more than one landlord and in spite of anything contained in the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (Bom. LXII of 1947) the tenant shall be deemed to have purchased even such fragments of the land held on tenancy (s. 32D). The balance of any land after the purchase by the tenant as above is to be disposed of as if it were land surrendered by the tenant (s. 32E); and the right of the tenant to purchase such land where the landlord is a minor, or a widow, or a person subject to any mental or physical disability or a serving member of the armed forces is postponed till one year after the cessation of disability. The price to be paid by the tenant is to be determined by the Tribunal as soon as may be after the tiller's day and the Tribunal is in the first instance to record in the prescribed manner the statement of the tenant whether he is willing or is not willing to purchase the land held by him as a tenant and if the tenant fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal is to declare by an order in writing that such tenant is not willing to purchase the land and that the purchase is ineffective (s. 32G). These provisions also apply to a sub-tenant of a permanent tenant who is deemed to have purchased the land subject to the conditions specified in ss. 32 to 32E (s. 32I). Section 32J provides for an appeal to the State Government against the decision of the Tribunal. Section 32K prescribes the mode of payment of price by the tenant; and the purchase price is recoverable as arrears of land revenue (s. 32L). Under s. 32M, on the deposit of the price in lump sum or of the last instalment of such price, the Tribunal is to issue a certificate of purchase to the tenant in respect of the land, which certificate of purchase shall be conclusive evidence of purchase. If a tenant fails to pay the lump sum within the period prescribed or is at any time in arrears of four instalments the purchase is to be ineffective and the land is to be at the disposal of the Collector and any amount deposited by such tenant towards the price of the land is to be refunded to him. Section 32N gives the landlord a right to recover rent when purchase becomes ineffective, as if the land had not been purchased at all. Section 32P gives the power to the Collector to resume and dispose of land not purchased by tenants. The amount of purchase price is to be applied towards satisfaction of debts (s. 32Q); and the purchaser is to be evicted from the land purchased by him as aforesaid if he fails to cultivate the land personally (s. 32R).

It is argued on the strength of these provisions that there is no effective purchase or effective sale of the land between the landlord and the tenant on the tiller's day or the alternative period prescribed in that behalf until certain conditions are fulfilled. To start with it is only an inchoate right which is given to the tenant to purchase the land which he can perfect on a statement being made by him before the Tribunal that he is willing to purchase the land. Even if he does so, the land does not vest in him because only on the payment of the purchase price either in lump or by instalments can he get the certificate of purchase from the Tribunal. If he commits default in payment, the purchase is ineffective and he gets no title to the land. These provisions, it is submitted, do not vest the title to the land in the tenant at all until all those conditions are fulfilled, and if any one or more of them is not fulfilled, the purchase becomes ineffective—in fact it is no purchase at all—with the result that the title to the land which is already vested in the landlord is not at all transferred to the purchaser. If that is so, there is no compulsory sale or compulsory purchase of the land in question on the tiller's day or the alternative period of time prescribed therefor and there is no extinguishment of the rights of the landlord. His rights in the land are merely suspended, and such suspension is certainly not an extinguishment of his rights therein nor a modification thereof within the meaning of the expression used in art. 31A(1)(a). Reliance is placed in support of this proposition on the observations of this Court in *Thakur Baghubir Singh v. Court of Wards, Ajmer*¹¹. In that case this Court considered the provisions of s. 112 of the Ajmer Tenancy and Land Records Act (XLII of 1950) which provided that if a landlord habitually infringes the rights of a tenant under the Act he would be deemed to be a landlord who is disqualified to manage his own property and his property would be liable to be taken under the superintendence of the Court of Wards. Mahajan J. (as he then was) observed at p. 1055:—

"Section 112 of the Act XLII of 1950, intended to regulate the rights of landlords and tenants, is obviously not a law providing for 'the acquisition by the State' of the estates of the landlords, or of any rights in those estates. It is also not a law providing for the extinguishment or modification of any such rights. The learned Attorney-General laid emphasis on the word 'modification' used in article 31A. That word in the context of the article only means a modification of the proprietary right of a citizen like an extinguishment of that right and cannot include within its ambit a mere suspension of the right of management of estate for a time, definite or indefinite."

These observations were confined to suspension of the right of management of the estate and not to a suspension of the title to the estate. Apart from the question whether the suspension of the title to the estate for a time, definite or indefinite, would amount to a modification of a right in the estate within the meaning of art. 31A(1)(a), the position as it obtains in this case is that there is no suspension of the title of the landlord at all. The title of the landlord to the land passes immediately to the tenant on the tiller's day and there is a completed purchase or sale thereof as between the landlord and the tenant. The tenant is no doubt given a *locus penitentie* and an option of declaring whether he is or is not willing to purchase the land held by him as a tenant. If he fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal shall, by an order in writing, declare that such tenant is not willing to purchase the land and that the purchase is ineffective. It is only by such a declaration by the Tribunal that the purchase becomes ineffective. If no such declaration is made by the Tribunal, the purchase would stand as statutorily effected on the tiller's day and will continue to be operative, the only obligation on the tenant then being the payment of price in the mode determined by the Tribunal. If the tenant commits default in the payment of such price either in lump or by instalments as determined by the Tribunal, s. 82M declares the purchase to be ineffective, but in that event the land shall then be at the disposal of the Collector to be disposed of by him in the manner provided therein. Here

also the purchase continues to be effective as from the tiller's day until such default is committed and there is no question of a conditional purchase or sale taking place between the landlord and tenant. The title to the land, which was vested originally in the landlord, passes to the tenant on the tiller's day or the alternative period prescribed in that behalf. This title is defeasable only in the event of the tenant failing to appear or making a statement that he is not willing to purchase the land or committing default in payment of the price thereof as determined by the Tribunal. The tenant gets a vested interest in the land defeasable only in either of those cases and it cannot, therefore, be said that the title of landlord to the land is suspended for any period definite or indefinite. If that is so, there is an extinguishment or in any event a modification of the landlord's right in the estate well within the meaning of those words as used in art. 31A(1)(a).

We have, therefore, come to the conclusion that the impugned Act is covered by art. 31A and is protected from attack against its constitutionality on the score of its having violated the fundamental rights, enshrined in arts. 14, 19, and 31 of the Constitution. That being so, the attack levelled against ss. 5, 6, 8, 9, 17A, 31A to 31D and 32 to 32B on the score of their being violative of the fundamental rights conferred upon the petitioners is of no avail to the petitioners. This being the true position it is not necessary for us to consider the interesting questions which were argued before us at some length, viz., the nature, scope and extent of the provisions contained in arts. 31(1) and 31(2) of the Constitution and the line of demarcation between them as also the impact of art. 31(1) on the fundamental right enshrined in art. 19(1)(f) of the Constitution. Suffice it to say that under the circumstances no fundamental right of the petitioners before us is infringed by the impugned Act or the provisions thereof and the petitions under art. 32 cannot be sustained.

The impugned Act being within the legislative competence of the State Legislature no question as to its being a piece of colourable legislation can arise. It is not a legislation resorted to by the State Legislature with a view to by-pass the provisions of List II of the Seventh Schedule to the Constitution, attempting to do something which it was otherwise not competent to do. The legislation being covered by Entry 18 of the said List is really a further measure for agrarian reform which it was well within its competence to enact. It is not an expropriatory legislation in the guise of one covered by Entry 18 in the said List. It only fixes the ceiling area for the holding of the landlord cultivating the land personally and transfers the excess holding to the tenant in actual cultivation thereof and there too the price of the land as fixed by the Tribunal has got to be paid by the tenant to the landlord. The tenant also is not entitled to hold land beyond the ceiling area and there is a balance sought to be struck between the interests of the landlord and those of the tenants so that the means of production are not concentrated in the hands of one party to the common detriment. The price payable is also either in lump or in such instalments as may be determined by the Tribunal and on default committed by the tenant in payment thereof the purchase becomes ineffective and the land deemed to have been purchased by the tenant reverts to the Collector to be dealt with in accordance with the provisions contained in the Act in that behalf. It may be that instalments may be spread over a particular period which may thus be determined by the Tribunal and unless default is committed by the tenant in payment of four instalments the purchase does not become ineffective. That, however, is not a provision which makes the payment of price in any manner illusory. The landlord is entitled to the rents of the land as if there had been no purchase of the land by the tenant and the payment of such rent is made the first charge on the land. There is, therefore, no scope for the argument that the provisions in this behalf contained in the Act were illusory or that the impugned Act is a piece of colourable legislation.

The only question that now survives is whether s. 7 of the impugned Act is bad by reason of excessive delegation of legislative power. Section 7 invests the

Government with the power to vary the ceiling area and economic holding have been prescribed in ss. 5 and 6 of the Act. Sections 5, 6 and 7 read as under:—

"5. *Ceiling area:* (1) For the purposes of this Act, the ceiling area of land

- (a) 48 acres of jirayat land, or
- (b) 24 acres of seasonally irrigated land or paddy or rice land, or
- (c) 12 acres of perennially irrigated land.

(2) Where the land held by a person consists of two or more kinds of land in sub-section (1), the ceiling area of such holding shall be determined on one acre of perennially irrigated land being equal of two acres of seasonally irrigated land or paddy or rice land, or four acres of jirayat land.

6. *Economic holding*—(1) For the purposes of this Act an economic holding

- (a) 16 acres of jirayat land, or
- (b) 8 acres of seasonally irrigated land, or paddy or rice land, or
- (c) 4 acres of perennially irrigated land.

(2) Where the land held by a person consists of two or more kinds of land in sub-section (1) an economic holding shall be determined on the basis applicable ceiling area under sub-section (2) of section 5.

7. *Power of Government to vary ceiling area and economic holding:* Notwithstanding anything contained in sections 5 and 6, it shall be lawful for the State Government if it is satisfied that it is expedient so to do in the public interest, to vary, by notification in the Official Gazette, the acreage of the ceiling area or economic holding, or the mode of determination of such ceiling area or economic holding, under sub-section (2) of section 5, regard being had to—

- (a) the situation of the land,
- (b) its productive capacity,
- (c) the fact that the land is located in a backward area, and
- (d) any other factors which may be prescribed."

It is contended that s. 7 does not fix any criteria for the guidance of the State Government and that the power which is given to the State Government to vary the ceiling area and economic holding is unguided and unfettered so that it is possible to exercise it at the sweet will and discretion of the Government even in favour of a single individual or in favour of politicians and the like. It is urged that no broad principle or policy is enunciated by the Legislature in this behalf and it would be open to the State Government to exercise this power arbitrarily and even in a discriminatory manner. Such entrustment of power to the State Government amounts to an abdication of legislative power and s. 7, therefore, must be held to be void.

The principles by which the Courts are guided in the determination of such questions are now well settled. In *The State of Bihar v. Maharaja Kameshwar Singh of Darbhanga*¹², Mahajan J. (as he then was) (at p. 954) :—

"...The Legislature applied its mind to the question of the method and mode of payment of compensation. It settled its policy and the broad principles. It gave to the Government the power to determine matters of detail after having settled its policy. It cannot be said that the Legislature did not apply its mind to the matter of legislation and did not lay down a policy. The proportion in which compensation was payable in cash or in bonds or whether the whole of it was to be paid in one instalment or in instalments and the period of redeemability of the bonds were also matters of detail which the executive could more appositely determine in exercise of its rule-making power. It cannot be said in this case that any essential legislative power has been delegated to the executive or that the Legislature did not discharge the trust which the Constitution reposed in it. If the rule-making Authority abuses its power or makes any law which makes the payment illusory the expropriated proprietor will not be without a remedy. If the Legislature settles the policy and the broad principles of

there is no bar against leaving the matters of detail to be fixed by the executive and such delegation will not amount to excessive delegation of legislative power such as to vitiate the enactment. In the case before us the preamble to the Act says what the policy of the impugned Act is, viz., further to amend the 1948 Act which, as we have already observed, sets out specific objectives to be achieved. Sections 5 and 6 prescribe the ceiling area and the economic holding which are fixed by the Legislature itself having regard to the normal conditions then prevailing within the State. The Legislature knew what were the different types of land, their situation and productive capacity and having regard to all the relevant factors determined the ceiling area as also the economic holding. There were, however, bound to be differences between district and district and one part of the State and another, and having, therefore, enunciated the broad principles and policy which were embodied in ss. 5 and 6 of the Act, the Legislature enacted s. 7 empowering the State Government to vary the ceiling area and the economic holding if it was satisfied that it was expedient so to do in the public interest, regard being had to the various criteria therein specified. The State Government was to be guided in arriving at its satisfaction in regard to the expediency thereof by (a) the situation of the land, (b) its productive capacity, (c) the fact that the land is located in a backward area, and (d) any other factors which may be prescribed. In so far as the situation of the land and its productive capacity were variable factors, more so if the land was located in a backward area, the State Government was enjoined to have regard to these factors as determining the variations one way or the other from the normal standard adopted by the Legislature in ss. 5 and 6 of the Act. "Any other factors which may be prescribed" would be factors *ejusdem generis* to the factors mentioned earlier in the section and could not be any and every factor which crossed the mind of the executive. The very terms of the section preclude any single individual being treated in this manner because it talks of the variation in the ceiling area and the economic holding being considered by the State Government to be expedient in the public interest and the satisfaction of any individual interest could hardly be said to be a matter of public interest. No doubt individuals would be benefited by the variations contemplated in s. 7 but for that purpose the State Government has got to be satisfied that it is expedient in the public interest to do so and no variation in regard to ceiling area of the economic holding of a single individual can ever be said to have been contemplated within the terms of s. 7. It appears, however, that this argument found favour with the Bombay High Court in its decision in *Parasram Damodhar v. State of Bombay*¹³ where the Court observed that the power to issue a notification may be exercised in favour of a single individual under the authority reserved under s. 7 and may lay the State Government open to a charge of favouritism. With great respect to the learned Judges of that High Court, we are of the view that no such thing is ever contemplated in the terms of s. 7 of the Act. There is also no warrant for the suggestion that the State Government might vary the ceiling area and the economic holding, say for instance, for benefiting the political sufferers within the State. If the situation of the land and its productive capacity as also the fact that the land is located in a backward area are the criteria to be determined before the State Government is satisfied that it is expedient to vary the ceiling area and the economic holding in the public interest and "any other factors which may be prescribed" are to be read *ejusdem generis* with the above as already observed, no question of benefiting political sufferers can ever enter into the picture. That would be an extraneous consideration. It does not come within the criteria specified in s. 7 of the Act on a true construction thereof. Such considerations, therefore, do not militate against the validity of the provisions contained in that section. In our opinion, the broad principles and policy have been laid down by the Legislature, the criteria have been fixed according to which the State Govern-

ment has to be satisfied that it is expedient to vary the ceiling area and economic holding already prescribed by the Legislature and the mere matter of working out the details having regard to those criteria which are specifically mentioned therein which has been delegated to the State Government does not amount to any excessive delegation of legislative power.

It is also to be remembered that this power of variation of the ceiling area and the economic holding is vested in the State Government and is left to its subjective satisfaction having regard to the criteria therein specified. As was observed by Kania C.J. in *Dr. N. B. Khare v. The State of Delhi*¹⁴ :—

"...this whole argument is based on the assumption that the Provincial Government when making the order will not perform its duty and may abuse the provisions of the section. In my opinion, it is not proper to start with such an assumption and decide the legality of an Act on that basis. Abuse of the power given by a law sometimes occurs; but the validity of the law cannot be contested because of such an apprehension."

These observations of Kania C.J. were quoted with approval by Patanjali Sastri C.J. in *The State of West Bengal v. Anwar Ali Sarkar*¹⁵ where it was stated (p. 301) :—

"...Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it."

The above observations of Kania C.J. were then quoted and the judgment proceeded :—

"On the contrary, it is to be presumed that a public authority will act honestly and reasonably in the exercise of its statutory powers..."

We may lastly refer to the observations of this Court in *Pannalal Binjraj v. Union of India*¹⁶ :—

"It may also be remembered that this power is vested not in minor officials but in top-ranking authorities like the Commissioner of Income-tax and the Central Board of Revenue who act on the information supplied to them by the Income-tax Officers concerned. This power is discretionary and not necessarily discriminatory and abuse of power cannot be easily assumed where the discretion is vested in such high officials. (Vide *Matajog Dobey v. H. S. Bhari*¹⁷). There is moreover a presumption that public officials will discharge their duties honestly and in accordance with the rules of law. (Vide *People of the State of New York v. John E. Van De Carr, etc.*,¹⁸). It has also been observed by this Court in *A. Thangal Kunju Musaliar v. M. Venkatchalam Potti*¹⁹ with reference to the possibility of discrimination between assesses in the matter of the reference of their cases to the Income-tax Investigation Commission that 'it is to be presumed, unless the contrary were shown, that the administration of a particular law would be done "not with an evil eye and unequal hand" and the selection made by the Government of the cases of persons to be referred for investigation by the Commission would not be discriminatory.'

This presumption, however, cannot be stretched too far and cannot be carried to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory treatment (vide *Gulf, Colorado, etc. v. W. H. Ellis*²⁰). There may be cases where improper execution of power will result in injustice to the parties. As has been observed, however, the possibility of such discriminatory treatment cannot necessarily invalidate the legislation and where there is an abuse of such power, the parties aggrieved are not without ample remedies under the law (vide *Dinabandhu Sahu v. Jadumony Mangaraj*²¹). What will be struck down in such cases will not be the provision which invests the authorities with such power but the abuse of the power itself."

It, therefore, follows that s. 7 of the Act cannot be impugned on the ground of excessive delegation of legislative power.

14 [1950] S.O.R. 519, 526.

15 [1952] S.O.R. 284, 301.

16 [1957] S.O.R. 233, 257, 258.

17 [1955] 2 S.O.R. 925, 932.

18 (1905) 199 U.S. 552; 50 Law. ed. 305.

19 [1955] 2 S.O.R. 1196.

20 (1897) 165 U.S. 180; 41 Law. ed. 686.

21 [1955] 1 S.O.R. 140, 146.

All the various contentions urged by the petitioners, therefore, fail and the result is that the petitions filed by the petitioners before us must be dismissed with costs. The State of Bombay which is the only respondent in all these petitions will however get only one set of costs therein.

Petitions dismissed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Tarkunde.

W. W. JOSHI v. STATE OF BOMBAY.*

States Reorganisation Act (XXXVII of 1956), Secs. 87, 88, 116—Constitution of India, Art. 311(2)—Meaning of word "liability" in Part VII of Act—Whether "liability" includes obligation to reinstate government servant wrongly dismissed—"Actionable wrong", meaning of expression in s. 88—Dismissal in contravention of art. 311(2) of Constitution whether actionable wrong within s. 88—Applicability of s. 88(b).

The word 'liability' used in Part VII of the States Reorganisation Act, 1956, includes not only a financial obligation but also obligations of every other kind, including one of reinstating a government servant wrongly dismissed.

The meaning of the term "actionable wrong" in s. 88 of the States Reorganisation Act, 1956, is an illegal or unauthorised act infringing a legal right of another affording him a ground for action in law. Therefore, where the petitioners, who were citizens of India, challenged the orders of their dismissal on the ground of infringement of art. 311(2) of the Constitution of India, the wrong complained of would be an actionable wrong within the meaning of s. 88 of the Act.

*The State of Tripura v. The Province of East Bengal*¹, referred to.

To call in aid cl. (b) of s. 88 of the States Reorganisation Act, 1956, it must be shown that the cause of action arose in its entirety within the territories which as from November 1, 1956, formed part of the territories of one of the successor States. Therefore, where the petitioners' claim is that their services had been wrongfully terminated in contravention of art. 311(2) of the Constitution of India, for the purposes of s. 88(b) of the Act they must establish that the entire cause of action, namely, the order for termination of their services and the consequence of that order i.e. the fact that they were removed from their services, had arisen within the aforesaid territories.

THE facts appear in the judgment.

M. R. Bobde, B. B. Ranade and G. J. Ghate, for the petitioners.

G. R. Mudholkar, Assistant Special Government Pleader, for the State.

TAMBE J. An important question of law arises out of a preliminary objection raised on behalf of the State of Bombay. The preliminary objection raised relates to the maintainability of the petition against the present State of Bombay. This decision will govern the preliminary objection raised in three cases, viz. Miscellaneous Petition No. 523/56, Miscellaneous Petition No. 470/56 and Special Civil Application No. 73 of 1957. The consideration of this question turns on the interpretation of ss. 87, 88 and 116 of the States Reorganisation Act, 1956, Act XXXVII of 1956, hereinafter called the Act.

The case in general that falls for our consideration is that the petitioners before us were in the service of the former State of Madhya Pradesh. Their services were terminated by the orders of the Government of the then State of Madhya Pradesh prior to the date the Act came into force. Two of the peti-

*Decided, November 19, 1958. Miscellaneous Application No. 73 of 1957, Petition No. 523 of 1956 (with Miscellaneous I [1951] S.O.R. 1, Petition No. 470 of 1956 and Special Civil

tioners were serving on the date of termination of their services in territories which now form part of the State of Bombay. Two of the petitioners challenged the orders of their dismissal by petitions under arts. 22 of the Constitution before the then High Court of Judicature at Nagpur on the ground of contravention of art. 311(2) of the Constitution. These were filed against the State of Madhya Pradesh. Their cases have been transferred before this Court on a certificate issued by the Chief Justice of the High Court of Judicature at Nagpur under s. 59(2) of the Act. On the admissions of these petitioners the State of Bombay is joined as a party to the petitions. The remaining petitioner has directly come to this Court after the States Reorganisation Act came into force. All of them claim that their termination is maintainable against the State of Bombay and that the State of Bombay is liable to reinstate them or give them such relief as is available to them by law, on the orders of dismissal being quashed by this Court. They ask whether they are entitled to the relief asked for by them against the State of Bombay.

There were also other cases pending before this Court arising out of the same set of facts. In one of those cases, viz. *Dr. Surjuprasad v. State of Madhya Pradesh*, a preliminary objection was raised on behalf of the State of Madhya Pradesh that no writ could be issued by this Court against the State of Madhya Pradesh in respect of the order of dismissal made by the former State of Madhya Pradesh prior to the date the Act came into force. This question was referred to a Bench of this Court and awaiting the decision of the Full Bench in these cases and other cases were kept pending. The Full Bench took the view that this Court could not issue a writ against the present State of Madhya Pradesh or any of its officers and it, therefore, directed that the name of the State of Madhya Pradesh and its officers (the Accountant General of Madhya Pradesh in that case) should be struck off the record. The Full Bench further directed that the petition should continue against the State of Bombay and be disposed of in accordance with law.

In the course of the judgment of the Full Bench the learned Chief Justice who delivered the judgment of the Court, observed (p. 1472):

"...If the complaint of the petitioner is that he has been dismissed by the State of Madhya Pradesh and that the State of Madhya Pradesh should reinstate him, it is easier than for him to file a petition in the High Court of Madhya Pradesh to get a writ from that High Court. If, on the other hand, the relief he seeks is that the Bombay Government should reinstate him, the Bombay Government being the Government of the Madhya Pradesh Government, then the petition is well founded and should be maintained in this Court and this Court can give him relief if he is entitled to relief."

It is the petitioners' case in all the three petitions that they are entitled to claim relief against the State of Bombay. As already stated, the principal objection of the present State of Bombay is that the petitioners cannot claim any relief against it and, therefore, the petitions are not maintainable. For the purposes of deciding this objection it will have to be assumed that the orders for termination of services made in Miscellaneous Petition No. 470/56 and Special Civil Application No. 470/56 were bad in law on account of the contravention of art. 311(2) of the Constitution of India.

The principal argument in these three petitions was advanced by Shri M. R. Bobde, learned counsel for the petitioner in Miscellaneous Petition No. 523/56. We, therefore, propose to deal with his argument first. He contends that the illegal and wrongful action of the then State of Madhya Pradesh in dismissing the petitioner from service was an actionable wrong and that the meaning of s. 88 of the Act. The liability, to redress the wrong done by the then State of Madhya Pradesh has under the provisions of cl. (2) of s. 88 of the Act become the liability of the present State of Bombay. In the

Shri Bobde contends that the dismissal of the petitioner being illegal, the petitioner, in Miscellaneous Petition No. 523/56, in the eye of law still holds his post at Arvi within the meaning of s. 116(1) of the Act and, therefore, it must be taken that from the date the Act came into force the petitioner is a servant appointed by the present State of Bombay from November 1, 1956, and in this view of the matter also the petition is maintainable against the present State of Bombay.

Shri G. R. Mudholkar, learned counsel for the State of Bombay, on the other hand, contends that neither s. 88 nor s. 116 of the Act is attracted to the facts of these cases. Admittedly, the petitioners were not, in fact, holding any post on the date the Act came into force. Section 116 of the Act has, therefore, no application. He further contends that the liability contemplated by s. 88 of the Act is a liability to pay damages. The claim made by the petitioners is not to recover damages but is for getting the impugned order quashed and reinstatement in the service. Such a claim does not fall within the scope and ambit of s. 88. According to him, the provisions that are attracted to the facts of these cases are those of s. 87 of the Act and under those provisions the reliefs claimed by the petitioners are not available to them against the State of Bombay.

It is a matter of common knowledge that Parliament in its wisdom considered it necessary to reorganise the existing States in India, and to provide for it and other matters connected therewith the States Reorganisation Act was passed by Parliament. As a result of reorganisation, the boundaries of various States changed. Some of the States merged into other States in their entirety, while some of the States got split and certain parts thereof merged into one State and other parts into another State. These events were bound to give rise, and did give rise, to various complex problems including the apportionment of assets and liabilities and distribution of service personnel of a former State between its successor States. We are here concerned with these questions relating to the former State of Madhya Pradesh. It comprised of two territories known as (i) Central Provinces and (ii) Berar. The capital of this State was located at Nagpur and its High Court also was located in Nagpur and was known as the High Court of Judicature at Nagpur. As a result of the Act, eight districts of the former Madhya Pradesh merged into the present State of Bombay and the remaining districts merged in the new State of Madhya Pradesh. The said eight districts are, Buldana, Akola, Amraoti, Yeotmal, Wardha, Nagpur, Bhandara and Chanda. From November 1, 1956, the date on which the Act came into force, these eight districts came under the jurisdiction of this Court. The High Court at Nagpur ceased to function at Nagpur and was removed to Jabalpur. Looking to the aim, scope and the object of the Act, in our opinion, the intention of Parliament clearly appears to be to provide for a solution of all problems arising out of the states reorganisation. Effect can only be given to this intention of Parliament by liberally construing its provisions so far as the language used would permit.

It cannot be doubted, and it has not been disputed before us, that on establishing their cases on merits the petitioners would have been entitled to the reliefs claimed against the then State of Madhya Pradesh if these cases had been disposed of by the Nagpur High Court prior to the date the Act came into force. Their cases, however, were not decided by that date. It is to be seen whether this liability of the State of Madhya Pradesh has been passed on to the present State of Bombay under any of the provisions of the Act.

Part VII of the Act, relates to apportionment of assets and liabilities; ss. 87 and 88 fall under this part. The word 'liability' in its widest import means an obligation or duty to do something or to refrain from doing something. We see no reason why any restricted meaning should be given to the word 'liability' used in this Act. In our opinion, Parliament intended to include in the word 'liability' not only a financial obligation but also obligations of every other kind, including one of reinstating a government servant wrongly dismissed.

Turning to the provisions of s. 87, they deal with the apportionment of rights and liabilities accrued or which may accrue under a contract between the existing States i.e. the States that existed prior to the reorganisation and any other person. It is the contention of Shri Mudholkar that it is this section that is attracted to the facts and circumstances of these petitions. According to him, the petitioners by their petitions seek to enforce their rights under their contract of service with the former State of Madhya Pradesh. The grievance of the petitioners, in substance, is that the tenure of their service has been illegally cut short. It is well settled that the tenure of service of a government servant does not form part of his contract of service. The office was formerly held by him during the pleasure of His Majesty and now under art. 310(1) of the Constitution it is held during the pleasure of the President or the Governor, as the case may be. It is undoubtedly true that under the Constitution there are certain limitations imposed on the exercise of this pleasure by the President or the Governor in terminating the services of a government servant. Those limitations are enshrined in certain articles of the Constitution, including art. 311 thereof.

The common law doctrine that a servant of a Crown holds office during the pleasure of the Crown and the limitations subject to which it has been accepted in India has been stated by the learned Chief Justice of India, who delivered the judgment of the Court in *P. L. Dhingra v. Union of India*². At page 40 he observes:

"Under the English Common Law all servants of the Crown held office during the pleasure of the Crown, and were liable to be dismissed at any time and without any reason being assigned for such dismissal. No action lay against the Crown in respect of such dismissal, even though it were contrary to the express term of the contract of employment, for the theory was that the Crown could not fetter its future executive action by entering into a contract in matters which concerned the welfare of the State." The limitations subject to which this doctrine is accepted in India in the words of the learned Chief Justice are (p. 41):

"...The opening words of Art. 310(1), namely, 'Except as expressly provided by this Constitution', reproduce the opening words of s. 240(1) of the 1935 Act, substituting the word 'Constitution' for the word 'Act'. The exceptions contemplated by the opening words of art. 310(1) quite clearly refer, inter alia, to Arts. 124, 148, 218 and 324 which respectively provide expressly that the Supreme Court Judges, the Auditor-General, the High Court Judges and the Chief Election Commissioner shall not be removed from his office except by an order of the President passed after an address by each House of Parliament, supported by the requisite majority therein specified, has been presented to him in the same session for such removal on the ground of proved misbehaviour or incapacity. There are clearly exceptions to the rule embodied in Art. 310(1) that public servants hold their office during the pleasure of the President or the Governor, as the case may be. Subject to these exceptions, our Constitution, by Art. 310(1), has adopted the English Common Law rule that public servants hold office during the pleasure of the President or Governor, as the case may be and has, by Art. 311, imposed two qualifications on the exercise of such pleasure. Though the two qualifications are set out in a separate Article, they quite clearly restrict the operation of the rule embodied in art. 310(1). In other words, the provisions of art. 311 operate as a proviso to art. 310(1)." This being the position in law, it is not possible for us to accept the contention of Shri Mudholkar that the tenure of office of a government servant is a matter of contract. Apart from this, the claim made by the petitioners is not one arising out of an alleged breach of any term of the contract between them and the State Government. On the other hand, the claim is founded on the alleged contravention of the provisions of art. 311 of the Constitution. This being the nature of the claim of the petitioners, it is not possible for us to hold that the cases of the petitioners are governed by s. 87 of the Act.

Section 88 of the Act reads as follows:

"Where, immediately before the appointed day, an existing State is subject to any

liability in respect of an actionable wrong other than breach of contract, that liability shall—

- (a) if there be only one successor State, be a liability of that State;
- (b) if there be two or more successor States and the cause of action arose wholly within the territories which as from that day are the territories of one of them, be a liability of that successor State; and
- (c) in any other case, be initially a liability of the principal successor State, but subject to such financial adjustment as may be agreed upon between all the successor States concerned, or in default of such agreement, as the Central Government may by order direct."

It is the contention of Shri Bobde that the provisions of cl. (b) of this section are attracted. To call in aid these provisions it is necessary for the petitioners to first establish that their claim relates to the 'liability in respect of an actionable wrong' of the former State of Madhya Pradesh. We have already held that the word 'liability' used in this Act has to be understood in its widest import and would include a liability to reinstate a government servant wrongly dismissed. We have also said that in the event the petitioners are able to establish their cases on merit, and for purposes of this decision we will have to assume that they would be able to establish their cases on merit, then the former State of Madhya Pradesh would have been liable either to reinstate them or to hold a fresh inquiry against them, as the case may be.

It has next to be seen whether that liability of the former State of Madhya Pradesh is in respect of "an actionable wrong other than breach of contract". Now, the term "actionable wrong" has not been defined in the Act; there is, therefore, no reason to give it a restricted meaning. We find useful guidance to construe this term in the majority view of their Lordships of the Supreme Court in *The State of Tripura v. The Province of East Bengal*³ wherein their Lordships have construed an identical term "liability in respect of an actionable wrong other than breach of contract" appearing in art. 10 of the Indian Independence (Rights, Property and Liabilities) Order, 1947. The problems with which the said Order dealt with are similar to the problems dealt with in the Act. It is a matter of history that in the year 1947 India was partitioned into two dominions, India and Pakistan. An Act to make provision for the setting up in India of two independent Dominions of India and Pakistan, was passed by Parliament (India Independence Act, 1947). Under the provisions of this Act from the appointed day, i.e. August 15, 1947, the former province of Bengal ceased to exist and its territories were divided into two new provinces to be known respectively as East Bengal and West Bengal. East Bengal formed part of the Dominion of Pakistan whereas West Bengal formed part of the Dominion of India. Section 9 of the Indian Independence Act empowered the Governor-General to make such provision by order as appears to him to be necessary and expedient for bringing the provisions of this Act into effective operation in respect of various matters mentioned therein. In exercise of the power conferred on him by s. 9, the Governor-General of India made an Order known as "The Indian Independence (Rights, Property and Liabilities) Order, 1947." Article 10 of this Order *inter alia* deals with apportionment of the liabilities of the former Province of Bengal in respect of an actionable wrong other than breach of contract between its two new successor provinces of East and West Bengal.

We now turn to the facts in the Supreme Court case in *The State of Tripura v. The Province of East Bengal*. They in brief are:

"The Income-tax Officer, Dacca, acting under the Bengal Agricultural Income-tax Act, 1944, sent by registered post a notice to the Manager of an Estate belonging to the Tripura State but situated in Bengal, calling upon the latter to furnish a return of the agricultural income derived from the Estate during the previous year. The notice was received by the Manager in the Tripura State. The State, by its then Ruler, instituted a suit in June 1948, against the Province of Bengal and the Income-tax Officer, in the

Court of the Subordinate Judge of Dacca for a declaration that the said Act in so far as it purported to impose a liability to pay agricultural income-tax on the plaintiff was *ultra vires* and void, and for a perpetual injunction to restrain the defendants from taking any steps to assess the plaintiff. The suit was subsequently transferred to the Court of the Subordinate Judge of Alipore. The partition of India under the Indian Independence Act took place on the 15th August, 1947, and the Province of East Bengal in which the Estate was situated, was substituted as a defendant in the place of the Province of Bengal on an application made by it, and in its written statement it contended that the Court of Alipore which was situated in West Bengal had no jurisdiction to proceed with the suit. The High Court of Calcutta, reversing the order of the Subordinate Judge of Alipore held that the provisions of the Indian Independence (Legal Proceedings) Order, 1947, and the Indian Independence (Rights, Property and Liabilities) Order, 1947, did not apply to the case...

The State of Tripura, therefore, took an appeal against the decision of the High Court to the Supreme Court and one of the contentions raised on behalf of the State was that its suit was maintainable against the Province of East Bengal under art. 10 of the aforesaid Order of 1947. The High Court had not accepted this contention as in its view the phrase "liability in respect of an actionable wrong" was synonymous with "liability for damages for a completed tortious act". The majority of the Judges of the Supreme Court constituting the Bench that decided this case did not accept this view of the High Court. At page 11 of the report Patanjali Sastri J., who delivered the judgment on behalf of Kania C.J. and Chandrasekhara Aiyar J. and himself, observed:

"...The learned Judges have placed much too narrow a construction on the phrase 'liability in respect of an actionable wrong'. They have assumed that the phrase connotes only a liability for damages for a completed tortious act... The intention being thus to provide for the initial distribution of rights, property and liabilities as between the two Dominions and their Provinces, a wide and liberal construction, as far as the language used would admit, should be placed upon the terms of the Order, so as to leave no gap or lacuna in relation to the matters sought to be provided for. There is no reason, accordingly, why the words 'liability in respect of an actionable wrong' should be understood in the restricted sense of liability for damages for completed tortious acts. We consider that the words are apt to cover the liability to be restrained by injunction from completing what on the plaintiff's case was an illegal or unauthorised act already commenced."

Expressing himself on the same question Mukherjea J. observed:

"...The High Court took the view that the expression 'actionable wrong other than a breach contract' is synonymous with 'tort'. It has held that the act complained of cannot be a tortious act and even if it is so, no action would lie upon it, it being an established proposition of law that the State is not answerable for any tortious acts of its officers done in the course of official duties imposed by a Statute. It seems to me that the learned Judges have attached a narrow and somewhat restricted meaning to the words of the article mentioned above and that the plain language of the provision read in the light of the context would demand and justify a wider and more liberal interpretation. In my opinion, there can be an actionable wrong which does not arise out of a breach of contract and at the same time does not answer to the description of a 'tort' as it is understood in English law; and if the plaintiff's allegations are correct, it is an actionable wrong precisely of that type which we have in the present case."

The word 'wrong' in ordinary legal language means and signifies 'privation of right'. An act is wrongful if it infringes the legal right of another, and actionable means nothing else than that it affords grounds for action in law." (pp. 44-45).

The meaning of the term "actionable wrong" deducible from this decision in our opinion is an illegal or unauthorised act infringing a legal right of another affording him a ground for action in law. It cannot be doubted that a citizen of India is entitled to protections and guarantees enshrined in the Constitution, and if these guarantees are infringed, it amounts to illegal and unauthorised act infringing the right of a citizen. He is on that ground entitled to protection at the hands of this Court under art. 226 of the

Constitution. Here the petitioners, who are citizens of India, are challenging the orders of their dismissal on the ground of infringement of art. 311(2) of the Constitution. For reasons stated above the wrong complained of by the petitioners in all the cases is, in our opinion, an actionable wrong within the meaning of s. 88 of the Act. As already stated, the liability to redress this wrong was initially the liability of the former State of Madhya Pradesh.

It is next to be seen whether it has now been transferred to the present State of Bombay under cl. (b) of this section. The successor States of the former State of Madhya Pradesh are more than one and they are the new State of Madhya Pradesh and the State of Bombay. Out of these two successor States under s. 2(m)(i) of the Act the new or the present State of Madhya Pradesh is "the principal successor State" of the former State of Madhya Pradesh. To call in aid this clause it must be shown that the cause of action arose in its entirety within the territories which as from that day November 1, 1956, formed part of the territories of one of the successor States, i.e. the present State of Bombay. The meaning of the term 'cause of action' as is generally understood is "every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court". The petitioners' claim is that their services have been wrongfully terminated. Undoubtedly, therefore, the fact that the order for termination of service was made would form part of a cause of action, and it would arise at the place the order is made. It is the contention of all the petitioners that once they establish that orders for the termination of their services have been made it was sufficient to entitle them to claim relief at the hands of this Court. All these orders were made in Nagpur, which at the material time was the seat of the Government of the former State of Madhya Pradesh. The cause of action, therefore, in its entirety arose at Nagpur which now forms the territory of the present State of Bombay. Clause (b) of s. 88 is thus fully attracted to the facts of all the three cases. It is not possible for us to concede that to sustain a challenge to the termination of services under art. 226 of the Constitution it is sufficient for the Government servant only to establish that an order for termination of his service has been made. That fact by itself alone cannot afford to him a ground to claim relief at the hands of this Court. He must further prove that the consequences of that order fell on him i.e. as a consequence of that order he, in fact, was removed from service. In our opinion, therefore, for a claim of this kind the cause of action would arise at a place where the order of termination of service was made and also at a place where its consequences fell on the servant. If this cause of action has in its entirety arisen within the former territories of the State of Madhya Pradesh which now form part of the State of Bombay, then the liability referred to in s. 88 of the Act of the former State of Madhya Pradesh would fall on the present State of Bombay under cl. (b) thereof.

In the light of these principles it will have to be seen to what cases cl. (b) of s. 88 is attracted. It is not in dispute that in all the three cases the orders of dismissal were made at Nagpur and were issued from that place. Nagpur is now a part of the territories of the present State of Bombay.

In Miscellaneous Petition No. 523 of 1956, the consequences of the order fell at Arvi and the petitioner in that case was relieved of his post at Arvi on November 21, 1955. Arvi is in the Wardha district and Wardha district is now one of the districts of the present State of Bombay. This petition, therefore, is maintainable against the State of Bombay.

In Miscellaneous Petition No. 470 of 1956, the consequences of the order for termination of the service of the petitioner fell at Drug. Drug does not form part of the present State of Bombay. This petition is, therefore, not maintainable against the State of Bombay.

It is necessary to notice one additional argument of Shri Ghata, learned counsel for this petitioner. He contends that the consequences of the order of dismissal of his client may have fallen at Drug, a place outside the territories

of the present State of Bombay and a part of the cause of action accrued outside the territories of the present State of Bombay, it does not preclude his client from claiming reliefs against the present State of Bombay. This case has come before this Court on a certificate of the former High Court of Judicature at Nagpur under s. 59(1). This shows that the Chief Justice at Nagpur had come to the conclusion that the cause of action which entitled the petitioner to claim relief accrued in the territories of the present State of Bombay. This order is binding on the State of Bombay, and it is not open now to the State of Bombay to say that the provisions of cl. (b) of s. 88 are not attracted. It is not possible for us to accept this contention of Shri Ghate. The certificate issued under s. 59(1) is not an order made on the judicial side of the Nagpur High Court, but it was made behind the back of the present State of Bombay, and it was made when the present State of Bombay was born. Such an order cannot be set aside by the present State of Bombay from raising a contention before this Court, nor can it, in any event, come in the way of this Court accepting the contention raised.

In Special Civil Application No. 73 of 1957, the consequence of the order of the Chief Justice at Nagpur fell in Nagpur. As already stated, Nagpur forms part of the territories of the State of Bombay. This application would, therefore, be maintained against the State of Bombay.

It is next to be seen how far the provisions of s. 116 of the Constitution are attracted to the petitioners. To attract the provisions of this section it has been held by the petitioners that they were holding or discharging any post immediately before the appointed day. The appointed day, as already stated, was November 1, 1956. From the facts stated above it appears that the petitioners' services stood terminated some time before November 1, 1956. It cannot, therefore, be said that the petitioners were, in fact, holding or discharging the duties of any post or office immediately before the appointed day. It is, however, contended on behalf of the petitioners that they might not be holding or discharging the duties of any post immediately before November 1, 1956, but their dismissal being wrongful in the eyes of the law, they continue to be in service and continue to hold the post which they were holding. Such an order of dismissal must, therefore, be completely set aside. It is not possible for us to accept this contention. It would be not only assuming that each of the orders made was in contravention of art. 311(2) of the Constitution, but it would also be assuming that the orders were made by an authority having jurisdiction to make an order. The order made, therefore, cannot be said to be *non est* or just a piece of paper. It cannot be said that the order is void by reason of its origin being bad. A distinction has to be drawn between an order of dismissal made by an authority which was not competent to make an order and an erroneous order of dismissal made by a competent authority. The former may be *non est* and can be completely ignored but such is not the case with the latter.

Further, even assuming for a moment that this contention of the petitioners is well-founded, it is of no further assistance to the petitioner in Special Civil Application No. 470 of 1956 because he could only be deemed to be a person employed in the State of Bombay at the time when he was appointed to that post. He cannot be deemed to have been appointed to that post by the Government of the State of Bombay as from November 1, 1956. Consequently he cannot claim any relief against the State of Bombay even under the provision of s. 116 of the Constitution.

In the result, therefore, in our judgment, Miscellaneous Petition No. 470 of 1956 and Special Civil Application No. 73 of 1957 are maintained against the State of Bombay; while Miscellaneous Petition No. 470 of 1956 is dismissed. We make no orders as to costs. The former two petitions will be heard for hearing on merits.

Order

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

STATE v. PUNDLIK BHIKAJI AHIRE.*

Prevention of Corruption Act (II of 1947), Sec. 4(1)—Indian Penal Code (Act XLV of 1860), Secs. 161, 165—"Gratification", meaning of expression—Person accused of offence under s. 161 proved to have taken gratification other than legal remuneration—Statutory presumption to be raised by Court under s. 4(1) of Prevention of Corruption Act—Burden of proof—Accused whether bound to prove that gratification not accepted as a motive or reward such as mentioned in s. 161—Nature of such proof.

The expressions "gratification" as used in s. 161 and "valuable thing" as used in s. 165 of the Indian Penal Code, 1860, are not mutually exclusive in their connotations. Acceptance of a valuable thing by a public servant may amount to acceptance of gratification within the meaning of s. 161 of the Code.

Promod Chander Shekhar v. Rex,¹ agreed with.

Section 4(1) of the Prevention of Corruption Act, 1947, not only dispenses with the proof by the prosecution of one of the essential ingredients of the offence under s. 161 of the Indian Penal Code, 1860, namely, that gratification was accepted or agreed to be accepted or attempted to be obtained as motive or reward for performing an official act, but the section imposes upon the person accused, when it is proved that he has accepted or obtained or agreed to accept or attempted to obtain gratification other than legal remuneration, the burden of proving that it was not as a motive or reward that the gratification was obtained. The Court is required to raise the statutory presumption subject to the limits prescribed by s. 4(3) of the Prevention of Corruption Act when it is proved that the public servant tried for an offence under s. 161 of the Indian Penal Code has received gratification.

The presumption is not one which is required to be rebutted by evidence establishing the defence of the accused beyond reasonable doubt. If the person accused shows a reasonable preponderance of probability enough to support a verdict in a civil action, that the gratification was not as a motive or reward for doing or forbearing to do an official act, the burden may be deemed to be discharged.

State v. Pandurang Lazman Parab,² *The State v. Vishnu Narayan Kulkarni*³ and *Dinkar Shanker Valhamare v. The State*⁴, distinguished.

The State of Madras v. A. Vaidyanatha Iyer,⁵ referred to.

THE facts appear in the judgment.

C. C. Vaidya, Assistant Government Pleader, for the State.

K. S. Daundkar, for the respondents (accused).

SHAH J. Pundlik Bhikaji Ahire, whom we will hereafter refer to as accused No. 1, and Fajitrao Damu Mahale, whom we will hereafter refer to as accused No. 2, were tried by the Special Judge, Ahmednagar, in Corruption Case No. 1 of 1958, for offences respectively under ss. 161 and 165A of the Indian Penal Code. The learned Special Judge acquitted the two accused, and against the order of acquittal this appeal has been preferred by the State of Bombay.

The material facts which give rise to the prosecution may be briefly stated. Chapter proceedings were started by the police against one Mohanlal Doshi in the Court of the Executive Magistrate at Sangamner. The proceedings were then transferred to the Court of the Special Executive Magistrate at Ahmednagar. Accused No. 1 was the Presiding Officer of the Court of

*Decided, December 4, 1958. Criminal Appeal No. 925 of 1958, against the order of acquittal passed by V. R. Paralkar, Special Judge, Ahmednagar, in Corruption Case No. 1 of 1958.

¹ [1950] All. 382.

² [1958] 60 Bom. L.R. 811.

³ (1956) Criminal Appeal No 1299 of 1955, decided by Gajendragadkar and Gokhale JJ., on September 4, 1956 (Unrep.).

⁴ (1958) Criminal Appeal No. 1034 of 1958, decided by Gokhale and Miahbhoj JJ., on November 18, 1958 (Unrep.).

⁵ [1958] S.O.R. 580.

the Special Executive Magistrate at Ahmednagar. Accused No. 2 is the son-in-law of accused No. 1 and was employed in the police force as a constable, and was posted at Rahata in the district of Ahmednagar. Before September 25, 1957, three witnesses on behalf of the State had been examined in the case against Mohanlal Doshi and the case stood adjourned till that date. On September 25 Mohanlal Doshi sent a telegram addressed to the Magistrate requesting that an adjournment be granted because his presence was required in another Court in another proceeding in which he was concerned. The prosecutor applied for the issue of a warrant for arrest of Mohanlal Doshi in view of the latter's absence from Court on the date fixed. Accused No. 1 granted that application. On September 26, 1957, Mohanlal Doshi appeared before accused No. 1 and requested him to discharge the warrant. Accused No. 1 complied with his request, and on the undertaking given by Mohanlal to appear before the Court on October 16, 1957, it was directed that the warrant be cancelled. The case then stood adjourned to October 16, 1957. On September 30, 1957, there was a fair at the village Korhale, and accused No. 2 was posted as a constable on duty at the fair. Accused No. 2 met Mohanlal at the fair and told him that he had a message from accused No. 1 about the Chapter proceedings. Accused No. 2 informed Mohanlal that accused No. 1 had asked him to inform Mohanlal that if the latter desired to be "acquitted" in the Chapter proceedings, he—Mohanlal—should pay Rs. 400 to accused No. 1. Mohanlal told accused No. 2 that the demand was excessive and offered to pay Rs. 100. Accused No. 2 told Mohanlal that Rs. 100 were inadequate, and that he was under orders of transfer and that Mohanlal may accompany him to the house of accused No. 1 and settle the figure directly with accused No. 1. Accused No. 2 had received orders of transfer on September 30, 1957, from Rahata to Ahmednagar. He left charge of his duties at Rahata on October 6, 1957, and proceeded to Ahmednagar by the evening motor bus on October 13, 1957, and joined duty at Ahmednagar on the next day. On October 13, 1957, accused No. 2 before he left Rahata had met Mohanlal and informed him that he was leaving for Ahmednagar in the evening and had asked Mohanlal to accompany him. In the evening of October 13, Mohanlal and accused No. 2 proceeded from Rahata and reached Ahmednagar at about 8 p.m. Mohanlal arranged to put up for the night at the Arya Nivas Hotel, and accused No. 2 left to ascertain whether accused No. 1 was at home. He returned after some time and informed Mohanlal that accused No. 1 had agreed to see Mohanlal. Accused No. 2 and Mohanlal then proceeded to the house of accused No. 1 at about 9 p.m. There was then a meeting between accused No. 1 and Mohanlal. Accused No. 1 told Mohanlal that he had sent word with accused No. 2 demanding Rs. 400 and should Mohanlal pay him Rs. 400 an order of discharge in the Chapter proceeding will be passed. Mohanlal protested that the amount was very large and he was unable to pay the same. Accused No. 1 then explained to him that Mohanlal was not likely to succeed in the case, and that even if he went in appeal, he may have to spend a large amount. After some discussion it was agreed that Mohanlal should pay to accused No. 1 Rs. 200 in consideration of the latter agreeing to discharge Mohanlal in the Chapter proceedings. It was agreed that the amount was to be paid on October 16, 1957.

At 11 a.m. on October 16, 1957, Mohanlal attended the Court of accused No. 1. Accused No. 2 met him and took him aside and asked him whether he had brought the money agreed to be paid. Mohanlal stated that he had brought some gold, but as it was a Wednesday and the local bazar was closed, it could not be sold and promised to secure the amount on the next day. Accused No. 2 then went into the chamber of accused No. 1 and he came out after some time and told Mohanlal that he may arrange for payment of the amount on the next day. The case was then adjourned to November 4, 1957, as some of the witnesses were not present.

After leaving the Court room Mohanlal thought of approaching the

Anti-Corruption Police at Ahmednagar, and he met one Patki, Sub-Inspector of Police, Anti-Corruption Branch, Ahmednagar, and narrated to him what had transpired. Patki recorded the complaint of Mohanlal and sent up a report to the Deputy Superintendent of Police, Anti-Corruption, Poona, requesting the latter to arrange for a trap. Patki asked Mohanlal to meet him on the next day. On October 17, 1957, the Deputy Superintendent of Police Mr. Kakeri arrived at Ahmednagar. He was accompanied by Divekar, Inspector of Police, and his police constables. Mohanlal met Patki at about 3 p.m. and he was taken to Kakeri some time later. The statement of Mohanlal was verified by Kakeri and Patki was requested by Kakeri to secure *panchas* for the trap. In the presence of the *panchas* Mohanlal repeated his story. Mohanlal was then searched and it was found that there was no money on his person. Thereafter currency notes of the value of Rs. 200 were handed over to Mohanlal. These currency notes were smeared with anthracene powder and were handed over to Mohanlal for being delivered to accused No. 1 if a demand for bribe was made by the latter. The signal to be given if the bribe was accepted by accused No. 1 was also settled. A *panchanama* about the delivery of the currency notes was prepared. Thereafter Mohanlal, three *panchas*, Kakeri and Divekar proceeded towards the house of accused No. 1 at about 8-45 p.m. Kakeri stood somewhere near the entrance to the street in which was the house of accused No. 1, while Divekar stood at some distance. Mohanlal proceeded to the house of accused No. 1, and found both the accused in the front apartment of the house. Accused No. 1 asked Mohanlal if he had brought the money and Mohanlal replied in the affirmative. Mohanlal then took out the currency notes and handed over the same to accused No. 1. Accused No. 1 counted the currency notes and put the same in the outer pocket of his bush coat. At that time accused No. 2 was standing in the room. Mohanlal said that accused No. 1 should "remember his work" and discharge him in the Chapter case. Accused No. 1 replied that Mohanlal need not worry about that. Mohanlal then proceeded to the gallery and lighted a cigarette which was the signal originally arranged between him and the police officers to signify that the bribe was given and accepted. Mohanlal then returned to the room, and immediately the raiding party consisting of Kakeri, Divekar and the *panchas* entered the house of accused No. 1. Kakeri disclosed his identity and asked accused No. 1 to show his hands. They were examined under the ultra violet light and found to be smeared with anthracene powder. Kakeri asked accused No. 1 whether he had received any bribe from Mohanlal. Accused No. 1 gave no reply and pointed out with his fingers to the pocket of his bush coat. The pocket of his bush coat was also found smeared with anthracene powder. On being asked, accused No. 1 produced the currency notes. On examination the currency notes were found to be the same which were handed over to Mohanlal for being given as bribe to accused No. 1. Accused No. 1 was then searched and no other amount was found on his person. The person of accused No. 2 was also searched and no incriminating articles were found. A search of the person of Mohanlal was also taken and beside a cigarette and a match-box nothing else was found on his person. A *panchanama* in respect of all the three searches was made. Thereafter Kakeri recorded the statements of several persons and after enquiries submitted the papers to the D.I.G., Anti-Corruption. A complaint was then lodged on November 9, 1957, against the two accused. The requisite sanction for prosecuting the two accused was obtained in March 1958, and the two accused were arrested and a charge-sheet was submitted against accused No. 1 for the offence under s. 161 of the Indian Penal Code and against accused No. 2 for the offence under s. 165A of the Indian Penal Code. The accused were tried before the Special Judge at Ahmednagar.

Before the Special Judge, the prosecution examined, beside Mohanlal and the *panchas*, Kakeri, Patki and the other police officers and the Prosecuting Jamadar attached to the Court of accused No. 1. Mohanlal substantially deposed to the story which we have set out as the prosecution case and his evi-

dence tallied with the story related by him in his complaint by Patki. His story was corroborated by the testimony of the police and the *panchas*.

Accused No. 1 in his statement denied that he had demanded illegal gratification from Mohanlal. Accused No. 2 also denied that any illegal gratification was given by Mohanlal and that he had not carried out any negotiations for procuring illegal gratification from Mohanlal. Accused No. 1 admitted that he had received Rs. 200 from Mohanlal, but he explained that six or seven months ago accused No. 2 had given Rs. 200 from him promising to return the same within 2 or 4 days. After accused No. 2 was transferred from Rahata to Ahmednagar on September 4, 1957, he returned by rail to Ahmednagar to join duty and when asked about the amount which was borrowed, accused No. 2 told him (accused No. 1) that he had given the amount to a resident of Rahata who would get the amount within 2 or 4 days, and the person to whom the money was given was Mohanlal, and that accused No. 2 told him that he would bring the money the same day. Thereafter, according to accused No. 1, on October 17, 1957, at about 8-30 p.m. when he was in his house, a stranger entered. Accused No. 1 stated that he asked the stranger who he was and why he had come, and the stranger stated that he had borrowed Rs. 200 from accused No. 2 and he would return the same, that in the meanwhile accused No. 2 told the stranger that the amount was taken from accused No. 1 the same day and he returned it to accused No. 1 and that accordingly the stranger gave the amount to accused No. 1. He stated that he counted the currency notes of Rs. 200 and the same and put them in the pocket of his bush coat and thereafter he went out on the pretext that he wanted to spit but he did not spit and did there and immediately the police and the *panchas* arrived and the currency notes of Rs. 200 were when demanded handed over to the police.

Accused No. 2 also related a similar story. He stated that when he was at Rahata, Mohanlal had through his cousin Uttam Bhikaji requested a loan of Rs. 200 and that even though he was originally unwilling to advance a loan on the request of Uttam Bhikaji the amount was advanced. He stated that he gave the amount to Mohanlal at Rahata on the latter's promise to return the same within two or three days; that he had borrowed the amount from accused No. 1 promising to return the same within 2 or 4 days. Mohanlal avoided repayment, he, accused No. 2, reprimanded Mohanlal and that thereafter there was "some tension" between him and Mohanlal and that thereafter he was transferred to the Cantonment Police Station. Before he gave up charge at Rahata he again demanded repayment from Mohanlal. He further stated that because Mohanlal promised to repay the debt at Ahmednagar, he gave Mohanlal the address of accused No. 2, his permanent residence at Ahmednagar, and told him that if he sent the money it may be handed over to accused No. 1 because he, accused No. 2, had borrowed the same from the former. He further stated that he came to Ahmednagar by the night train on October 13, 1957, and joined duty on October 14, and thereafter Mohanlal came on the night of October 14 and handed over the money to accused No. 1 at his direction because the money which was advanced to Mohanlal, was borrowed from accused No. 1 and not from Mohanlal.

The Special Judge was of the view that the story of the defence that a loan was advanced by accused No. 2 to Mohanlal and that the currency notes of Rs. 200 were given by Mohanlal to accused No. 1 in the house of the latter on October 17, 1957, could not be accepted. In the view of the Special Judge that story was 'unnatural', but that it was not correct to say that because the defence failed to establish its case about a loan advanced by accused No. 2 to Mohanlal.

ment thereof that the prosecution case was established. He observed:

"Such an approach to the question has always been objected to on the ground that it is for the prosecution to prove its case in a criminal trial and it is only while considering whether the prosecution has proved its case that incidentally and where necessary the criminal Court would have to consider the case made for the defence. If, therefore, the prosecution has not established its case beyond reasonable doubt by the evidence led, it would not be permissible to record a conviction merely because the defence theory appears to the Court to be unreasonable or does not appear to have been established."

The Special Judge then proceeded to consider the prosecution evidence and observing that on several important particulars the story of Mohanlal was not corroborated and further observing that Mohanlal was not a person "who could be said to be of an unimpeachable character whose evidence could be readily accepted," the learned Judge acquitted that accused. Against that order this appeal has been preferred.

There is no dispute that accused No. 1 in the presence of accused No. 2 received Rs. 200 from Mohanlal. The story that accused No. 1 had given a sum of Rs. 200 to accused No. 2 and that accused No. 2 advanced that sum of money to Mohanlal is not supported by any reliable evidence, and, in our judgment, appears to be entirely improbable. There is no evidence on the record to show that before accused No. 2 was posted at Rahata he knew Mohanlal. It is the case of accused No. 2 that he was introduced to Mohanlal who was a stranger to him by his cousin Uttam Bhikaji. Why accused No. 2 should be willing to advance Rs. 200 to Mohanlal has not been attempted to be explained in the evidence or before us. There is not even a scrap of documentary evidence which supports the case of the defence that a loan was advanced by accused No. 2 to Mohanlal. Evidently accused No. 2 is not a money-lender, and even if he was willing to advance a loan of a sum of money which was not negligible, he would at least have taken some writing from Mohanlal acknowledging receipt of the money and agreeing to repay the same. Accused No. 2 admits that he could not himself advance the loan. There was no adequate reason why he should borrow Rs. 200 from his father-in-law without disclosing the reason why he wanted the amount and advance the same to Mohanlal. There is, again, no reason suggested by accused No. 1 as to why on a mere request made by accused No. 2 he was prepared to part with Rs. 200 without even ascertaining the purpose for which the amount was required. The case sought to be made by the defence that accused No. 1 gave Rs. 200 to accused No. 2, and the latter advanced it to Mohanlal whose case was pending before accused No. 1, is not supported by any reliable evidence, and strikes us as extremely improbable. Even the date on which the amount was advanced by accused No. 2 to Mohanlal is not disclosed. Again, if accused No. 2 had made an advance of a loan to Mohanlal, there was no reason why he should have asked accused No. 1 to receive the amount from Mohanlal. Accused No. 1 must have realised, when Mohanlal entered his house, that the latter was a litigant who was concerned in a case before him; and if his story about a loan were true, he would as a prudent man not have accepted the money from Mohanlal, but would have asked accused No. 2 to settle his dealing elsewhere. The cousin of accused No. 2 Uttam has not been examined in the Court below, and beyond the bare statement of the two accused there is no evidence to show that in fact Rs. 200 were advanced by accused No. 1 to accused No. 2 and that accused No. 2 had advanced that amount to Mohanlal and in repayment of the loan Mohanlal paid Rs. 200 to accused No. 1 on October 17, 1957. On the evidence, we have no doubt that the learned trial Judge was right in holding that the story of the defence that the amount of Rs. 200 paid by Mohanlal to accused No. 1 was in repayment of the loan alleged to have been given to Mohanlal cannot be accepted.

The question which then falls to be determined is whether this payment of Rs. 200 by Mohanlal was illegal gratification given as reward or motive for

rendering service to Mohanlal, i.e. for discharging Mohanlal in the Chapter proceedings pending before accused No. 1, or whether it was for some innocuous purpose. As we have already observed, Mohanlal had on October 16, 1957, related before Patki a detailed story as to the various meetings and the conversation which he had with accused No. 2, and also a report about the conversation which he had with accused No. 1 on September 30, 1957. This story of Mohanlal is partially corroborated by independent evidence. We have the evidence of the Prosecuting Jamadar Sayyar Mir Akbar who stated that on October 16, 1957, accused No. 2 attended the Court of accused No. 1. He has also deposed to the circumstances in which the case against Mohanlal was adjourned on September 25, 1957. Again, the record of the Magistrate corroborates the testimony of Mohanlal about the various proceedings in the Chapter case. The record of the Police Department supports the story of Mohanlal that on the night of September 30, 1957, accused No. 2 was posted on duty at the Korhale fair, that accused No. 2 had been transferred from Korhale and that accused No. 2 joined duty at Ahmednagar on October 14, 1957. It is difficult to believe that if the movements of accused No. 2 were not known to Mohanlal and accused No. 2 had not met Mohanlal from time to time, Mohanlal could give in his complaint the details which he has given.

It is true that the antecedents of Mohanlal are not impressive. He has admitted that complaints were filed against him at the Shrirampur Police station wherein it was alleged that he had received stolen property and that complaints were also filed against him at Rahata Police station that he had committed offences under the Prevention of Gambling Act. It also appears that he had been convicted for consuming liquor without a permit; and Chapter proceedings were pending against him wherein it was alleged that he was habitually drinking and gambling and holding out threats to the police. It is, therefore, necessary to scrutinise the evidence of Mohanlal with some care. But after considering the evidence of Mohanlal, corroborated as it is by the circumstances which we have set out earlier, we see no reason to discard his testimony as the learned Judge in the Court below appears to have done. A person who lends himself to be a tool in the hands of the police in a trap may evidently be regarded as a partisan witness and his evidence requires corroboration. But if from the record it appears that the payment of the amount by Mohanlal could not on any other reasonable hypothesis be in satisfaction of some liability of Mohanlal to accused No. 1, in our judgment, an inference inevitably arises that the amount was paid to accused No. 1 as bribe.

But the decision, in our judgment, need not rest merely on the evidence of Mohanlal. Section 4 of the Prevention of Corruption Act, 1947, justifies in the circumstances of the case the raising of a presumption which comes to the aid of the prosecution. By sub-s. (1) of s. 4 of the Prevention of Corruption Act it is provided:

"Where in any trial of an offence punishable under s. 161 or s. 165 of the Indian Penal Code it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said s. 161 or as the case may be, without consideration or for a consideration which he knows to be inadequate."

On the plain words of the section, in trials for offences under s. 161 of the Indian Penal Code, from the acceptance or obtaining or from agreeing to accept or attempting to obtain any gratification which is other than legal remuneration or any valuable thing, a presumption arises that the person who received the gratification or agreed to receive or attempted to obtain the same or a valuable thing did it as a motive or reward such as is mentioned in s. 161 of the Indian Penal Code. The ambit of the presumption was recently explained by their Lordships of the Supreme Court in *The State of Madras v. A. Vaidya-*

*natha Iyer*¹. In delivering the judgment of the Court, Mr. Justice Kapur observed (p. 589):

"...Therefore where it is proved that a gratification has been accepted, then the presumption shall at once arise under the section. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. It may here be mentioned that the Legislature has chosen to use the words 'shall presume' and not 'may presume', the former a presumption of law and latter of fact. Both these phrases have been defined in the Indian Evidence Act, no doubt for the purpose of that Act, but s. 4 of the Prevention of Corruption Act is *in pari materia* with the Evidence Act because it deals with a branch of law of evidence, e.g., presumptions, and therefore should have the same meaning... It is a presumption of law and therefore it is obligatory on the Court to raise this presumption in every case brought under s. 4 of the Prevention of Corruption Act because unlike the case of presumptions of fact, presumptions of law constitute a branch of jurisprudence."

On the findings recorded by us, therefore, a presumption under s. 4(1) of the Prevention of Corruption Act arises that the amount received by accused No. 1 was received as a reward or motive for rendering service to the complainant Mohanlal. But Mr. Daundkar, who appears on behalf of the accused, contends that the amount received by the accused could not be said to be "gratification" other than legal remuneration, and unless the prosecution establishes by evidence that the payment was made and accepted as gratification other than legal remuneration, the presumption does not arise. We are unable to accept the contention of Mr. Daundkar. Accused No. 1 does not even claim that he has rendered any service to Mohanlal for which he was entitled to receive legal remuneration from the latter. Accused No. 1 was a public servant employed as an Executive Magistrate at the relevant time and normally the only legal remuneration which he could earn was his salary from the State for performing his official duties. It has not been suggested that the amount of Rs. 200 received by accused No. 1 was remuneration for the performance of any other duty and to which accused No. 1 was lawfully entitled.

Mr. Daundkar, however, contends that even if the payment received is not legal remuneration it is still not "gratification". The expression "gratification" is not defined in the Prevention of Corruption Act, and s. 161 of the Indian Penal Code states in the third paragraph that the word "gratification" is not restricted to pecuniary gratification, or to gratifications, estimable in money. That, strictly speaking, is not a definition of the expression "gratification". In its dictionary meaning, the expression "gratification", is inclusive of all satisfaction of desire or appetite, and we agree with the view of the Allahabad High Court in *Promod Chander Shekhar v. Rex*², that the expression is used in s. 161, Indian Penal Code, in the sense of anything which gives satisfaction to the recipient. *Prima facie*, therefore, voluntary acceptance of an amount of money or a valuable thing by a public servant will amount to acceptance of gratification.

Mr. Daundkar on behalf of the accused placed strong reliance upon a judgment of this Court in *State v. Pandurang Lazman Parab*³, in support of his contention that by merely proving that accused No. 1 accepted Rs. 200 given to him by Mohanlal it is not established that he accepted gratification within the meaning of s. 4(1) of the Prevention of Corruption Act. In that case, the complainant had given Rs. 8 to a public servant in pursuance of some arrangement, and the prosecution contended that a presumption under s. 4(1) of the Prevention of Corruption Act that the amount was received by the public servant as gratification arose upon proof of the fact of payment. Mr. Justice Datar in delivering the judgment of the Court observed (p. 813):

"...for the raising of the presumption under s. 4, it is, in our judgment, necessary for the prosecution to prove that not merely a payment of money or in kind was made

¹ [1958] S.C.R. 580.

² [1950] All. 382.

³ (1958) 60 Bom. L.R. 811.

over to the accused, but it must be further proved by the prosecution that the payment amounted to gratification other than legal remuneration. A payment without more would not, in our view, amount to gratification other than legal remuneration, and if it does not amount to gratification other than legal remuneration, there is no scope for raising the presumption under s. 4 of the Prevention of Corruption Act. Mr. Justice Datar also observed (p. 814):

"...We are disposed to think that acceptance of gratification other than legal remuneration gives rise to a presumption that that gratification was accepted as a motive, while the obtaining of a valuable thing gives rise to a presumption that it was obtained without consideration or for a consideration which the accused knows to be inadequate. Section 4 refers to two offences—one under s. 161 of the Indian Penal Code and s. 165 of the Indian Penal Code. The words 'any gratification' in the section must be read when we are considering the offence under s. 161 of the Indian Penal Code and the words 'any valuable thing' occurring in the section must be read when we are considering the offence under s. 165 of the Indian Penal Code."

If these observations were necessary for the decision in that case, we have respectfully followed them. But, in our view, the learned Judges have observed that they "were satisfied on the evidence that the prosecution failed to prove that amount of Rs. 8 which was got produced by the accused was any gratification other than legal remuneration". In our view the observations do not appear to be strictly necessary. In the expressions "gratification" as used in s. 161 and "valuable thing" as used in s. 165 of the Indian Penal Code are not mutually exclusive in their application. Acceptance of a valuable thing by a public servant may amount to acceptance of gratification within the meaning of s. 161. By s. 161 a public servant agreeing to accept or attempting to obtain gratification other than legal remuneration as a motive or reward for doing or forbearing to do an official act is penalised; by s. 165 mere acceptance by a public servant of a valuable thing without consideration or for consideration which he knows to be inadequate from a person concerned in a proceeding or business transacted by him as a public servant is penalised—the question of motive or reward being not relevant in s. 4 of the Prevention of Corruption Act in a trial of a public servant for an offence under s. 161, when it is proved that the public servant has accepted or attempted to accept any gratification or any valuable thing the law requires the court to raise a presumption, that he has accepted or agreed to accept any gratification as a motive or reward for doing or forbearing to do an official act. The essential ingredients of the offence under s. 161 of the Indian Penal Code are to be established by the prosecution that gratification was accepted or attempted to be accepted or attempted to be obtained as a motive or reward for doing an official act. By enacting s. 4(1) of the Prevention of Corruption Act the Legislature has not only dispensed with the proof of that ingredient in the prosecution, but has imposed upon the person accused, when it is proved that he has accepted or obtained or agreed to accept or attempted to accept any gratification other than legal remuneration, the burden of proving that he has accepted or obtained or agreed to accept or attempted to accept any gratification as a motive or reward for doing an official act. The law requires the court to raise the statutory presumption subject to the limits prescribed in cl. (3) of s. 4 when it is proved that the public servant tried for an offence under s. 161 of the Indian Penal Code has received gratification. If it is proved that the expression "gratification" is used in its primary meaning, the court may see what, beside voluntary acceptance by a public servant of a valuable thing which satisfies his desire or appetite, the prosecution is required to prove before the presumption under s. 4 may arise.

Reliance was also sought to be placed by Mr. Daundkar upon *Vishnu Narayan Kulkarni*⁴. In that case, Mr. Justice Gajendragadkar, in delivering the judgment of the Court observed:

"Before asking the Court to draw the statutory presumption under s.

⁴ (1956) Criminal Appeal No. 1299 of JJ., on September 4, 1956 (U. 1955, decided by Gajendragadkar and Gokhale).

prosecution must prove that money has been paid to a public servant in the first instance. A public servant is nevertheless a private individual and money may be paid to him not in his capacity as a public servant but in his capacity as a private individual. It would be unreasonable to assume that whenever money is paid to a person holding a public office it is paid to him as a public servant. In our opinion, the first essential fact which must be proved by the prosecution is that money has been paid to a public servant. It would also be necessary for the prosecution to show that the money which is paid is other than legal remuneration. In other words, the bare fact of the passing of the money from one hand to another would not raise the presumption if the receiving hand is the hand of a public servant without *prima facie* evidence to show that the money which has passed is other than legal remuneration; and in proving this part of the case the prosecution would inevitably in every case have to rely to some extent on evidence other than the payment of the money itself."

In that case, the Court was of the view that the evidence of the witnesses for the prosecution was unreliable and the bare fact established before the Court which could not be challenged was the passing of money from a private individual to a public servant, the former being prosecuted for the offence under s. 165A of the Indian Penal Code. It was in the context of those facts that the observations relied upon were made. With respect, we agree with the view that "mere passing of money" from one person to another without more may not establish giving of gratification to a public servant. We may observe that the Legislature has in framing s. 4(1) cast the net very wide. A charge for accepting or agreeing or attempting to obtain a bribe may lightly be made; but the Court cannot on that account, except in cases covered by cl. (3) of s. 4, refuse to raise the presumption. The presumption, it is true, is not one which is required to be rebutted by evidence establishing the defence of the accused beyond reasonable doubt. If the person accused shows a reasonable preponderance of probability enough to support a verdict in a civil action, that the gratification was not as a motive or reward for doing or forbearing to do an official act, the burden may be deemed to be discharged.

Reliance was also sought to be placed upon *Dinkar Shankar Valhamare v. The State*.⁵ In that case also the learned Judges were not satisfied on the evidence of the prosecution witnesses that it was proved that the accused had accepted any gratification. In that case even on the evidence of the main prosecution witnesses, the accused, who was charged for offences under s. 161 of the Indian Penal Code and s. 5(2) of the Prevention of Corruption Act, had some enforceable claim against the complainant. Mr. Justice Gokhale in delivering the judgment of the Court referred to *State v. Pandurang Lazman Parab* and also to *The State v. Vishnu Narayan Kulkarni*, and observed that the complainant's evidence was relied upon by the prosecution for showing that a ten rupee currency note was given to the accused by way of gratification, but that was not reliable evidence. The Court in that case appears to have taken the view that there was no reliable evidence other than the mere payment of money on which reliance could be placed. In our view, however, that case is also distinguishable from the present case.

On the view we take, there is the evidence of payment of Rs. 200 by Mohanlal to accused No. 1 on the night of October 17, 1957. That payment is, in our judgment, gratification; and even if the testimony of Mohanlal as to the previous negotiations and the agreement to pay the amount as consideration for discharging Mohanlal in the Chapter proceedings be regarded as somewhat weak, in our judgment, the prosecution is entitled to rely upon the presumption under s. 4(1) of the Prevention of Corruption Act to re-enforce that evidence. Accused No. 1 has not led any evidence to rebut that statutory presumption, and he must, therefore, be regarded as guilty of the offence under s. 161 of the Indian Penal Code.

Turning to the case of accused No. 2, it is true that he has not received the

⁵ (1958) Criminal Appeal No. 1034 of 1958, November 18, 1958 (Unrep.), decided by Gokhale and Miahbhoj JJ., on

monies; but his participation in the previous negotiations is amply established by the testimony of Mohanlal which is corroborated by the record of the police department as well as by the evidence of the Prosecuting Jamadar. Accused No. 2 was present at the time when the amount of Rs. 200 was paid by Mohanlal to accused No. 1. It is the case of accused No. 2 that he had asked Mohanlal to go to his father-in-law's house and to pay the amount of Rs. 200. It is true that it was the case of accused No. 2 that that payment was intended to be in repayment of the loan advanced by him to Mohanlal. The presence of accused No. 2 when payment was made and his full knowledge about the circumstances in which the amount was received by accused No. 1 and the relation subsisting between accused No. 1 and accused No. 2 are sufficient evidence, in our judgment, to justify the conclusion that accused No. 2 was privy to the demand for bribe by accused No. 1 and the giving of bribe by Mohanlal to accused No. 1 and that accused No. 2 assisted in the giving of the bribe. We are, therefore, of the view that accused No. 2 is guilty of the offence under s. 165A of the Indian Penal Code.

It is true that this is an appeal against an order of acquittal and there must be strong and compelling reasons which would justify this Court in interfering with the order of acquittal passed by the learned trial Judge. It appears, however, to us that the learned trial Judge ignored the presumption which arises under s. 4(1) of the Prevention of Corruption Act and expressed the view that merely because the defence story was unreliable, even if gratification was proved to be given by Mohanlal to accused No. 1, the prosecution case must fail. That view expressed by the learned Special Judge cannot be sustained. As we have already observed, the point of dispute in this case is limited. The prosecution case is that the amount of Rs. 200 was paid by Mohanlal to accused No. 1 as a bribe in pursuance of an arrangement previously made, whereas it was the case of accused No. 1 and accused No. 2 that the amount paid was in repayment of a loan given to Mohanlal. There was no dispute about the payment actually made; and if the learned Special Judge did not examine the facts proved in the context of the statutory presumption, we are unable to uphold that judgment.

We, therefore, set aside the order of acquittal passed by the learned Special Judge and convict accused No. 1 of the offence under s. 161 of the Indian Penal Code and sentence him to suffer rigorous imprisonment for nine months and to pay a fine of Rs. 500 and in default of payment of fine to suffer rigorous imprisonment for six months in addition. We also convict accused No. 2 for the offence under s. 165A of the Indian Penal Code and sentence him to suffer rigorous imprisonment for six months. Warrants to issue for the arrest of the two accused.

Order of acquittal set aside.

INCOME-TAX REFERENCE.

Before Mr. Justice K. T. Desai.

COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY

v.

MESSRS. CHUGANDAS & CO.*

Indian Income-tax Act (XI of 1922), Secs. 25(3), 26, 6, 9, 7—Securities constituting stock-in-trade of assessee firm which had paid tax on its business under Indian Income-tax Act, 1918—Dissolution of assessee firm—Assessee firm claiming benefit under s. 25(3) in respect of interest on securities—Whether assessee firm entitled to such benefit.

The words "income, profits and gains" appearing in s. 25(3) of the Indian Income-tax Act, 1922, refer to the income, profits and gains made in connection with a discontinued business under whatever head the same may have to be shown and they do not refer to any particular head of income, profits and gains with its varying nomenclature and varying content.

The expression business in s. 25(3) of the Act refers to the activity which is styled business. What has to be discontinued is that activity before the section can apply and the tax which is referred to in connection with that activity business refers to the tax charged under any of the heads under which the income, profits and gains made as a result of such activity may have been entered. If such income, profits and gains included interest on securities which constituted the stock-in-trade of that business, the tax paid under the head "Interest on securities" would be covered.

The assessee firm was a dealer in securities and securities constituted the stock-in-trade of its business. It received certain sums as interest on securities during the accounting year 1946 and the accounting period January 1, 1947, to June 30, 1947. The assessee firm was dissolved on June 30, 1947, and as it had paid tax in connection with its business under the Indian Income-tax Act, 1918, it became entitled to the benefit of the provisions of s. 25(3) of the Indian Income-tax Act, 1922. On the question whether the assessee firm was entitled to the benefit of s. 25(3) of the Act in respect of the interest on securities:—

Held, that the assessee firm was entitled to the benefit of s. 25(3) of the Act in respect of the interest on securities.

Gopi Mohan and Sons v. Commr. of Inc. Tax, U.P. & C.P.,¹ dissented from.

Ambalal Himatlal v. Commr. of Inc.-Tax, discussed.

Commr. of Inc. Tax, Madras v. K. Shrinivasan & K. Gopalan,² *Commr. of Income Tax, Bombay v. Polson*,³ *Indian Iron & Steel Co., Ltd. v. Commr. of Inc. Tax, Bengal*⁴ and *Commr. of Inc. Tax v. Ahmuty & Co. Ltd.*,⁵ referred to.

MESSRS. CHUGANDAS AND Co. (assessee) was a registered firm dealing in securities and securities constituted the stock-in-trade of its business. The assessee received a sum of Rs. 4,13,992 as interest on securities during the accounting year 1946, the assessment year being 1947-48 and a sum of Rs. 1,01,229 during the accounting period January 1, 1947, to June 30, 1947, the assessment year being 1948-49, also as interest on securities. The firm was dissolved on June 30, 1947. The assessee claimed benefit of the provisions of s. 25(3) of the Indian Income-tax Act, 1922, and disputes arose between the assessee and the Income-tax Department as to whether any exemption could be claimed in respect of interest on securities. The Department contended that interest on the securities which were the stock-in-trade of the assessee had to be assessed under s. 8 of the Act and could not form part of the business income which was assessable under s. 10, and, therefore, it could not, for any other purpose including that of exemption under s. 25(3), be regarded as income, profits or

*Decided, December 17/18, 1958. Income-tax Reference No. 27/X of 1954. (On a difference between Mr. Justice Tendolkar and Mr. Justice S. T. Desai.)

¹ (1947) 15 I.T.R. 220.

² (1951) 20 I.T.R. 280.

³ (1953) 23 I.T.R. 87.

⁴ (1945) 47 Bom. L.R. 737, P.C.

⁵ (1943) 11 I.T.R. 328.

⁶ (1954) 27 I.T.R. 68.

gains of the assessee's business. The Tribunal by a majority decision in favour of the assessee. The following question of law was referred to the High Court:—

"Whether on the facts and circumstances of the case interest received held by the assessee formed part of the assessee's business income for the purpose of claiming relief under s. 25(3) of the Indian Income-tax Act?"

The reference was heard by Tendolkar and S. T. Desai JJ. who followed the decision of the Supreme Court in *United Commercial Bank Ltd. v. Commissioner of Income-tax, West Bengal*, reframed the question as follows:—

"Whether the assessee is entitled to the benefit of s. 25(3) in respect of interest on securities?"

There was a difference of opinion between Tendolkar J. and S. T. Desai J. as regards the answer to be given to the above question. The following are their Lordships' judgments delivered on September 23, 1957:—

TENDOLKAR J. The question referred to this Court upon this reference was:—

"Whether on the facts and circumstances of the case interest received held by the assessee formed part of the assessee's business income for the purpose of claiming relief under section 25(3) of the Indian Income-tax Act?"

The facts necessary for the purpose of determining this question were:—The assessee held securities as his stock-in-trade and he received interest on these securities in the assessment years 1947-48 and 1948-49 in the sum of Rs. 4,13,992 and Rs. 1,01,229 respectively. It was held by the authorities that the assessee was entitled to the benefit of the provisions of s. 25(3), and if, therefore, interest on securities was within the scope of the benefit, this interest would not be taxable. If, on the other hand, interest on securities is outside the scope of the benefit conferred by s. 25(3), it would have to be taxed. The matter was dealt with by the Tribunal in two different views—one taking the view that interest on securities was taxable under s. 10 and another that it was taxable under s. 8. The matter was, therefore, referred to the President, who took the view that interest on securities was taxable under s. 10 and not under s. 8. One of the Members of the Tribunal, having held that interest on securities was taxable under s. 10, also held that it was exempt from taxation under s. 8. Out of these orders of the Tribunal the present reference arises.

Since the decision of the Tribunal, their Lordships of the Supreme Court in *United Commercial Bank Ltd. v. Commr. of Inc.-tax*¹, decided in 1957, have held that income from interest on securities which are stock-in-trade of a business is taxable under s. 8 and not under s. 10. Therefore, the question as framed does not now bring out the real controversy between the parties. The real dispute is whether, even if interest on securities is taxable under s. 8, such income is entitled to the benefit conferred by s. 25(3). We would, therefore, reframe the question as follows:—

"Whether the assessee is entitled to the benefit of section 25(3) in respect of interest on securities?"

Now, turning next to s. 25(3), it is in the following terms:—

"Where any business, profession or vocation on which tax was at any time levied under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), is discontinued, then, unless there has been a succession by virtue of which the provisions of section (4) have been rendered applicable, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an assessment has already been paid in respect of the income, profits and gains of the

tion shall be jointly and severally liable to assessment in respect of the income, profits and gains of the firm or association. Here again, obviously, the liability is in respect of the income of the firm or association which was liable to tax under whatever head the tax came to be charged. But in the case of both these sections, this result is brought about not by the mere words "income, profits and gains", but by the context in which they are used; and it does not follow therefrom that wherever the words "income, profits and gains" of a business, profession or vocation are referred to, they necessarily mean income, profits and gains under whichever head they are taxed.

Then Mr. Palkhivala contends that the language employed in s. 25(3) does not import any head at all; he says that it only deals with chargeability. That, no doubt, is true and the condition precedent to earning the exemption under s. 25(3) undoubtedly is that a business, profession or vocation was charged under the provisions of the Income-tax Act, 1918. Now, tax is charged under the income-tax law on income and not on the source of income. Business, profession or vocation is the source of income and not income itself; but since it is necessary to determine for the purposes of this sub-section what is the source of income that was taxed, that source must be the source of income falling within one of the classes enumerated in s. 5 of the Indian Income-tax Act of 1918. Class (i) is "salaries" and the source, of course, is service; class (ii) is "Interest on securities" and the source is securities; class (iii) is "Income derived from house property" and the source is house property; class (iv) is "Income derived from business" and the source is business; class (v) is "Professional earnings" and the source is profession, which includes a vocation by reason of s. 10, sub-s. (1), of the Act, which provides that the tax under the head "Professional earnings" shall be in respect of the profits of any profession or vocation; and class (vi) is "Income derived from other sources" and the source is obviously other sources. Therefore, if one were to determine the source of income on which tax is chargeable—and that is what one is required to do for the purpose of ascertaining whether the condition precedent to exemption being obtained under s. 25(3) is satisfied—then clearly tax is charged on business only under class (iv) and on profession or vocation under class (v) enumerated in s. 5 of the Act. This appears to me to lead to a very important consequence. Since the object of s. 25(3) was indisputably to grant relief in respect of double taxation of the same income, the relief could only be in respect of the same class of income on which tax was charged twice, that is, income charged under the corresponding "classes" which have been renamed "heads" in s. 6 of the Act of 1922; and the corresponding heads in s. 6 of the Act of 1922 were (iv) business and (v) professional earnings. Therefore, when s. 25, sub-s. (3) provides that no tax shall be paid in respect of the income, profits and gains of business, profession or vocation, it appears to me that it can only mean that no tax shall be payable on income falling under the two heads which I have just referred to.

Mr. Palkhivala next urges that the exemption attaches to business and is not conferred on an assessee; and from this he seeks to argue that whatever the nature of the income of that business and under whichever head it is taxed, it attracts the exemption. Now, in a sense, it is true that s. 25(3) appears to confer an exemption on a business, profession or vocation; but this must be understood in the context of income-tax law. A business, profession or vocation is not the unit of assessment under income-tax law. The tax is charged on income, profits and gains of the previous year under s. 3 of the Act of 1922; but the Legislature had to refer to a business, profession or vocation on which tax was charged under the 1918 Act because the object was that when such business was discontinued, whosoever was the owner of that business should get the benefit of the exemption under s. 25, sub-s. (3). Moreover, when we come to that part of the sub-section which deals with the exemption, it is quite clear that the business does not attract the exemption, but it is "income, profits and gains" of any business, profession or vocation that attracts the exemption.

The words are not that the business, profession or vocation shall not be charged; but the words are that the income, profits and gains, admittedly of any business, profession or vocation, shall not be charged.

Then Mr. Palkhivala urges that in point of fact there was no such head of income under the 1922 Act when it was enacted as "Income, profits and gains of a business, profession or vocation." Now, the actual heads in the 1922 Act were (iv) Business and (v) Professional earnings. But when one turned to s. 10(1) of the Act, it provided that the tax under the head "Business" shall be payable in respect of the profits or gains of any business, and s. 11, sub-s. (1) provided that the tax under the head "Professional earnings" shall be payable in respect of the profits or gains of any profession or vocation. Therefore, there was, no doubt, not one head, but there were two heads, which may, as a combined effect of the sections that I have referred to, be said to be, profits or gains of a business and profits or gains of any profession or vocation. These two heads were only combined into one by the Income-tax (Amendment) Act of 1939, and s. 6, sub-s. (iv) contains the combined head "Profits and gains of business, profession or vocation." The question as to whether there is one head or two heads appears to me to be of no significance in determining whether what is sought to be exempted under s. 25(3) is income falling under that head or heads. But then Mr. Palkhivala argues that, in any event, the head is "Profits and gains of business, profession or vocation" and not "Income, profits and gains of business, profession or vocation." This argument appears to me to have no substance in it, because any one familiar with the history of income-tax law knows that the words "income, profits and gains" do not in any manner add to what is taxable under the head "income". In *Income-tax Commissioner v. Shaw Wallace & Co.*² Sir George Lowndes, delivering the judgment of their Lordships of the Privy Council, pointed out (p. 212):—

"The object of the Indian Act is to tax 'Income', a term which it does not define. It is expanded, no doubt, into 'income profits and gains', but the expansion is more a matter of words than of substance."

Therefore, it seems to me futile to draw a distinction between "profits and gains" and "income, profits and gains". But, in any event, so far as s. 25(3) is concerned, there is absolutely no doubt that the words "income, profits and gains" are used in relation to business, profession or vocation as synonymous with profits and gains only. This appears from a proviso to sub-ss. (3) and (4) which is in these words:—

"Provided that sub-sections (3) and (4) shall not apply—

(a) to super-tax except where the income, profits and gains of the business, profession or vocation were assessed to super-tax for the first time either for the year beginning on the 1st day of April, 1920, or for the year beginning on the 1st day of April, 1921;..."

Therefore, it is clear that the words "income, profits and gains" are used in this section as meaning nothing more or less than the profits and gains of a business which are liable to super-tax. This view was taken in a decision of this Court, to which I was a party, in *Ambalal Himatlal v. Commr. of Inc.-tax*³. We were there dealing with s. 25, sub-s. (4), of the Indian Income-tax Act and held that the expression "income, profits and gains" in sub-s. (4) meant the profits and gains from the business, profession or vocation contemplated by s. 10 and nothing else. Chagla, C.J., in his judgment observes (p. 285):—

"...What the Legislature intended by using the expression 'income, profits and gains' was the profits and gains of the business or profession contemplated by section 10 and not the total income of the assessee..."

In the same judgment, in an earlier passage, the learned Chief Justice observes (p. 285):—

"...It is also clear that no relief was intended to be given by the Legislature to a

² (1932) L.R. 59 L.A. 208, s.c. 84 Bom. 3 (1931) 20 I.T.R. 280.
L.R.1033.

person who had paid tax on his property or on dividends received by him on shares and securities."

Therefore, in my opinion, the attempt to include anything in the expression "income, profits and gains" in s. 25(3) which is outside the scope of the words "profits and gains of business, profession or vocation" must fail.

Having dealt with the main objections of Mr. Palkhivala to the construction canvassed by Mr. Joshi, I must also point out what appears to me to be a matter of very great importance. Keeping in mind the fact that the Legislature set out to grant relief in respect of what I might describe as double taxation of the same income, in respect of not all but some only of such income, is it reasonable to assume that having a readymade classification of all taxable income under the income-tax law, the Legislature would proceed to invent a new classification for the purpose of such exemption? In my opinion, it would be reasonable to assume that the classification would be adhered to and the exemption conferred on any class or classes of that income. However, it appears to me that, strictly speaking, it would be more correct to say that the "income, profits and gains" of a business, profession or vocation which is exempt under s. 25(3) is such income as understood in the Income-tax Act rather than say that it is income under the head "Profits and gains of business, profession or vocation". No doubt this would bring in the head of income but it would also bring in general exemptions such as donations to charity under s. 15B.

The primary principle of construction of any statute is that the language used in it must be interpreted and understood in the context of that Act, and when it has a meaning in that context which happens to be different from its normal meaning, or its commercial meaning, or its legal meaning in other contexts, the meaning in the context of the Act must not be discarded unless there are compelling reasons for doing so; and, therefore, one would not be justified in discarding the meaning of the expression "income, profits and gains" of a "business, profession or vocation" in the context of the Income-tax Act and reading those words in their popular, commercial or legal sense, except for compelling reasons. There are not only no compelling reasons in this case, but, on the contrary, there are compelling reasons for adhering to the meaning of that expression in the Income-tax Act. Now, in the first instance, the words used are "income, profits and gains" and I must confess that I am not aware of any popular meaning of this combined expression, nor of a commercial or legal meaning of that expression, outside income-tax law. It is an expression that is used exclusively in income-tax law; and, therefore, to start with, it can have no meaning either in the popular or the commercial sense or any other legal meaning outside income-tax law. It is only if the words were treated as synonymous with profits of a business, profession or vocation that the word "profits" may have a popular, commercial or legal meaning different from the meaning in the context of the income-tax law. It must be noted that the profits of a business, profession or vocation have both a narrower and a wider meaning under the income-tax law than they have in the popular, commercial or legal sense outside the income-tax law; and this may be illustrated only by a few examples although they can be multiplied manifold. It has a narrower meaning in income-tax law in the sense of reducing profits brought to tax when, for example, s. 10, sub-s. (2)(vi)(b) allows a development rebate to be deducted or when various kinds of depreciation allowance permissible under the Act are deducted from profits in addition to ordinary depreciation which would be taken into account in ascertaining profits in a commercial sense. In addition to ordinary depreciation, the Act allows extra depreciation for double or multiple shift under r. 8, initial depreciation under s. 10(2)(vi)(b) and extra depreciation allowance for the first five years in respect of new buildings, machinery and plant under s. 10(2)(vi)(a). Neither the development rebate nor these items of depreciation will be taken into account in determining commercial or legal profits. Similarly, if the

business, profession or vocation has immovable property or interest on securities, which were its stock-in-trade, they will be taxed as separate heads of income and not as profits of the business although the income from property and interest on securities would be taken into account in arriving at the profits in a commercial sense. These are illustrations of cases where the profits in the income-tax sense of a business, profession or vocation are less than the profits in the commercial or legal sense.

Turning next to a few illustrations where the profits under the income-tax law are larger than the profits in the commercial sense or the legal sense, expenses incurred by a business may be disallowed in the computation of income for various reasons. For example, if a bonus was paid to the employees, it would be allowed under s. 10(2)(x) only to the extent to which it is reasonable and the rest will be disallowed; whilst in the commercial sense the entire bonus would be allowed. Similarly, an expenditure by a business may, in the commercial sense be treated as revenue expenditure and debited against the profits, whilst the income-tax authorities may treat it as capital expenditure and not allow its debit against the profits. Similarly, bad debts, although they would be debited against commercial profits, may be disallowed in the accounting year by the income-tax authorities if the conditions for the allowance of bad debts set out in the Act are not satisfied. Therefore, it is clear that there is a great diversity between the meaning of profits of a business, profession or vocation under the Income-tax Act and the popular, commercial or legal meaning of profits outside the Income-tax Act. If Mr. Palkhivala's argument were to be accepted and the word "profits" in s. 25(3) were to be interpreted in the commercial or legal sense, it would lead to the result that when the profits brought to tax in the Income-tax Act exceed commercial profits, exemption can only be claimed with regard to that part of the taxed profits which are commercial profits. This, surely, could not have been intended by s. 25(3). If the profits brought to tax are less than profits in the commercial sense, the exemption would comprise a larger amount of profits than the amount brought to tax—a result which the Legislature could not have contemplated, because no Act can seek to provide for an exemption higher than the taxable profit. When this position was realised in the course of arguments, Mr. Palkhivala modified his first argument that the profits should be interpreted to mean commercial or legal profits in this manner. He submitted that one should determine whether a particular income was profits in the commercial sense; having determined it, such income should be computed under the Act; and, lastly, the income so computed should be exempted from tax. Therefore, the process of determining what is exempt from tax is at the first stage to proceed on the footing that commercial profits were involved, and at the second stage to proceed on the footing that profits under the Act were involved. How or why the process is to be split up in this manner I am quite unable to see; and there can be no warrant, in my view, for the suggestion that merely for the initial purpose of determining whether any income is profits of a business, profession or vocation the commercial sense or the legal sense should be taken into account and for all other purposes the sense under the income-tax law.

Then Mr. Palkhivala drew attention to the iniquity or injustice that may be involved in the view that Mr. Joshi has canvassed. He says that if we adopt that view, what was exempt from tax at any given time may attract tax at another time if the Legislature chooses to alter the law. Taking one example, Mr. Palkhivala said that income from dividends from shares which were the stock-in-trade of a business were held to be taxable by a Division Bench of this Court in *Commr. of Inc.-Tax v. Ahmuty & Co. Ltd.*⁴ under the head "Profits and gains of business" and, therefore, such income would have been exempt from tax under s. 25(3) so long as the law remained as laid down in that case. But by the Finance Act of 1955 Parliament has amended s. 12, which is the

residuary section, and specifically provided in s. 12, sub-s. (1A) that dividends shall be taxable under the head "Other sources"; with the result that thereafter, for the application of s. 25(3) income from dividends, although the shares may be held by the business as its stock-in-trade, cannot be exempted under s. 25(3) if the view canvassed for by Mr. Joshi is adopted. This, no doubt, is true; but s. 25(3) does not guarantee any fixity as to what shall be included, at the time when there is a discontinuance of business, in the income, profits and gains of a business, profession or vocation, or what shall be excluded therefrom. Parliament has the right so to amend the law as to include or to exclude from tax any portion of the income of an assessee; and no argument on the basis of any iniquity involved in such process can be called in aid to induce me to interpret the section I have to consider in the manner in which Mr. Palkhivala wants us to interpret it.

Then Mr. Palkhivala contends that ss. 7 to 12 are computation sections only, and since they are computation sections, they do not help to determine whether the income computed under them was or was not from a particular source. In other words, the argument is that the income from a business, profession or vocation may be computed under different heads and yet remains the income of the business, profession or vocation. There has been a very strenuous argument before us as to whether in *United Commercial Bank Ltd. v. Commr. of Inc.-tax*, their Lordships of the Supreme Court have accepted the view which had been taken in *Kamdar In re*⁵ that these are computation sections or have taken the view that they are charging sections as well, Mr. Palkhivala contending that their Lordships have held that these are computation sections only and Mr. Joshi equally strenuously contending that their Lordships have held that they are not only computation sections, but taxing sections. I do not consider it necessary for the purposes of this reference to determine what view their Lordships have adopted, because I do not consider that any argument can legitimately turn on the question before us on the basis of whether these sections are computation sections or charging sections. Even assuming that they are computation sections, although it may be true to say that the income of a business, profession or vocation as understood in the popular, commercial or legal sense outside the context of income-tax law may be computed under different heads and charged to tax, yet the real question that we have to determine is whether the exemption under s. 25(3) is granted to what are profits in a commercial or legal sense or what are income, profits and gains in the sense in which those words are used in the context of the Income-tax Act.

There is one direct authority of the Allahabad High Court which lays down that s. 25(3) confers a benefit in respect of the income, profits and gains which fall under the head "profits and gains of business, profession or vocation" and that is the case of *Gopi Mohan and Sons v. Commr. of Inc. tax, U.P. & C.P.*⁶ In that case, the assessee had claimed exemption in respect of its income from property and the income-tax authorities had held that s. 25(3) did not apply so as to confer any such exemption. In upholding this view of the income-tax authorities, their Lordships, in their judgment, observe (p. 223):—

"...the matter is placed beyond any doubt, if reference is made to Section 6 and the following sections of the Income-tax Act. That section divides the various sources of income chargeable under the Income-tax Act under five heads enumerated in that section. 'Income from property' has been described separately and put under a different head from 'profits and gains of business, profession or vocation'. The method of computation of income from property has been laid down in Section 9, while that for the computation of income from business, profession or vocation has been described in Section 10. From this it is clear that the expression 'business, profession or vocation' used in Section 25(3) relates to that head of income, which has been dealt with in Section 10, and is quite distinct from the head of 'Income from property', which has been mentioned in Section 9."

With this view I am in respectful agreement. If the view that Mr. Palkhi-

vala has canvassed before us was adopted in respect of income from property and interest on securities, which may well be the income of a business, profession or vocation, the person who carries on the business, profession or vocation would be placed in a better position than other assesses who have income falling under the heads "income from property" or "interest on securities", because the former class would earn an exemption under s. 25(3) while the latter will not. No doubt, one cannot always look for logic or reason in income-tax legislation; but this anomalous position that would arise if we were to accede to the arguments of Mr. Palkhivala is only one additional ground for holding that the true interpretation of s. 25(3) is that income, profits and gains of a business, profession or vocation which are exempt from tax under s. 25(3) are income, profits and gains as understood in the Income-tax Act and not as understood in common parlance or in the commercial sense or in the legal sense outside the context of income-tax law.

Lastly, it was argued by Mr. Palkhivala that since we are dealing with an exemption clause, if there was any doubt as to the true interpretation of the exemption clause, the exemption should be liberally construed provided no violence is done to the language employed in the section. This, no doubt, has been held to be the proper canon of construction by the Calcutta High Court in *Commr. of Agri. Inc.-tax v. Raja Jagadish Chandra Deo*⁷, and by the Patna High Court in *Sir Kameshwar Singh v. Commr. of Inc.-tax*⁸, and we certainly accept that canon of construction. But I am not satisfied that the interpretation that Mr. Palkhivala canvasses for on this reference is a liberal construction at all. In the case of the present assessee, it would lead undoubtedly in benefiting him; but that is because this is a case in which the commercial profits or the legal profits are higher than the profits as understood in the Income-tax Act. But, as I have pointed out earlier in my judgment, there will be numerous cases in which the profits of a business, profession or vocation brought to tax will be higher than the commercial or legal profits, and in those cases the construction canvassed for by Mr. Palkhivala would only yield an exemption in respect of part of the income brought to tax and not the whole. Moreover, in the view that I take of the language of s. 25(3), I am not prepared to hold that without violence to that language the section can be construed in the manner in which Mr. Palkhivala wants us to construe it.

The result, therefore, is that, in my opinion, the question that we have re-framed should be answered in the negative.

S. T. DESAI J. I had the advantage of reading the judgment just delivered by my learned brother Tendolkar J. and have given it careful consideration. It is with the greatest reluctance that I am unable to agree with his view. This reference raises a rather important and interesting question as to the extent of relief that an assessee can claim where a business charged under the Income-tax Act, 1918, is discontinued. The point for determination depends wholly upon the true meaning and import of s. 25(3) of the Income-tax Act of 1922 to be gathered in the light of the general principles and rules of interpretation favoured by the Court in examining fiscal legislation.

The relevant facts are not in controversy and lie in a narrow compass though the history of the case is somewhat chequered. The assessee is a dealer in securities and received Rs. 4,13,992 in the assessment year 1947-48 and Rs. 1,01,229 in the assessment year 1948-49 as interest on securities. The securities on which interest was received, it is common ground, were the stock-in-trade of the assessee's business in securities. The assessee claimed benefit of the provisions of s. 25(3) which deals with assessment in case of discontinued business and the Department held that the assessee was entitled to claim exemption under those provisions. Dispute, however, arose whether any exemption could be claimed in respect of interest on securities, and the question that fell for determination was whether interest on the securities which were the

7 (1948) 17 I.T.R. 426, at p. 438.

8 (1954) 26 I.T.R. 121, at p. 132.

amount payable on the basis of such assessment, a refund shall be given of the difference."

In order to appreciate what was sought to be done by this sub-section, one must look at the history of income-tax law. Under the Income-tax Act of 1918, what was subjected to tax was the income of the current year under s. 14, sub-s. (2) of that Act. This basis of taxation was altered by the Income-tax Act, 1922, which provided by s. 8 thereof that the charge shall be in respect of income of the previous year. This led to the result that for the accounting year 1921-22 the income had already been subjected to tax under the Act of 1918, but was again subjected to tax under the Act of 1922 as the income for the assessment year 1922-23, the year 1921-22 being the previous year for the assessment year 1922-23. Therefore, the income of a single year had been subjected to tax twice over; and the object of s. 25, sub-s. (3) was to give relief in respect of this double taxation of the same income to the limited extent that the section prescribes. That relief took the form in s. 25, sub-s. (3) of providing that where a business, profession or vocation was discontinued no tax shall be payable in respect of the period between the end of the previous year and the date of such discontinuance, or, at the option of the assessee, the year previous to such period. But in order to earn this exemption, the essential first condition was:

"Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), is discontinued."

Therefore, the exemption could only be claimed provided there was any business, profession or vocation subjected to tax under the Income-tax Act of 1918 and not otherwise. It follows, therefore, that in so far as a tax was levied under the Act of 1918 which did not fall within the category of a tax charged on any business, profession or vocation, no relief was granted. Under the Act of 1918, s. 5 set out the classes of income chargeable to income-tax; they were: (i) salaries; (ii) interest on securities; (iii) income derived from house property; (iv) income derived from business; (v) professional earnings; and (vi) income derived from other sources. *Prima facie*, therefore, if any tax had been paid under (i), (ii), (iii), or (vi) of s. 5 of the Income-tax Act, 1918, no relief was granted by s. 25(3). Thus, for example, a person who had paid tax on property which was leviable under s. 8 of the Act of 1918, had to pay tax twice over and got no relief in respect thereof. This by itself is not disputed by Mr. Palkhivala for the assessee; but what is contended is that when s. 25(3) talks of business, profession or vocation being subjected to tax under the Act of 1918, it does not relate only to the tax levied under the heads "(iv) income derived from business" and "(v) professional earnings", but it also includes any other income of the business, profession or vocation in the commercial sense or in the legal sense, except in the context of the Indian Income-tax Act, although it may be subjected to tax under some other head. The merits of this suggested interpretation of the condition precedent to the exemption being earned under s. 25(3) I will later consider in another context, but they do not fall to be considered for the purpose of determining whether the condition precedent is satisfied in this case because it is common ground on this reference that the assessee carried on a business on which tax was charged under the provisions of the Income-tax Act of 1918. But the rival contentions with which we are concerned are in relation to the nature of the income that is exempted from tax. What is exempted from tax is "income, profits and gains" of the period mentioned in the sub-section; but obviously these income, profits and gains are of the business, profession or vocation which had been charged to tax under the Income-tax Act of 1918. Mr. Joshi for the Department urges that the words "income, profits and gains" of a business, profession or vocation in this sub-section only include, in the context of income-tax law, income taxed under the head of income, which is "profits and gains of a business, profession or vocation"; whilst Mr. Palkhivala for the assessee contends that the income, profits and gains of a business, profession or vocation include within their scope not

only income, profits and gains subjected to tax under the head "profits of a business, profession or vocation", but the income, profits and gains of a business, profession or vocation under whichever head taxed, if they are in fact the profits of the business, profession or vocation in the commercial sense or in the legal sense outside the context of the Income-tax Act. In other words, Mr. Palkhivala's contention is that although interest on securities may be taxed under a separate head, namely, interest on securities under s. 8, yet from the commercial point of view they are profits of the business if the securities were the stock-in-trade of the business. Even from a legal standpoint, except in the context of the Income-tax Act, the profits of a business would comprise the interest on securities held by the business as its stock-in-trade; and if there was, for example, an agreement to share the profits of the business, there can be little doubt that for the purposes of such an agreement the profits in a legal sense would include interest on securities. Similarly, if a business possessed immoveable property, it would be taxed on its profits, not under s. 10, but under s. 9. Nonetheless if the profits of that business had to be ascertained in a Court of law, undoubtedly the income from property would necessarily have to be taken into account, and so would that income be taken into account even in the commercial sense for ascertaining those profits. We have to consider which of these two rival contentions is the correct one.

Mr. Palkhivala has attempted to counter the argument of Mr. Joshi, that the income, profits and gains of a business, profession or vocation which are exempt under s. 25(3) are the income, profits and gains falling under the head "Profits and gains of business, profession or vocation" being head (iv) in s. 6 of the Income-tax Act, on various grounds. His first contention is that no head is referred to in s. 25(3) at all, and that no doubt is true; but it does not follow therefrom that the words "income, profits and gains" of a business, profession or vocation do not import into the section the concept of income, profits and gains under the head "Profits and gains of business, profession or vocation". But then Mr. Palkhivala argues that whenever the Legislature desired to refer to a head of income, it has in terms so stated, and he drew our attention to a string of sections in the Indian Income-tax Act strewn all over the Act where the expression used is "under the head..." whichever the head may be. To take only one or two examples, in s. 4, sub-s. (3), cls. (xi) and (xii), there is a reference to "income chargeable under the head 'salaries'" and "income chargeable under the head 'Income from property'" respectively; and his argument is that if the Legislature intended that income under the head "profits and gains of business, profession or vocation" was to be exempted from tax under s. 25(3), the Legislature would have used the words "under the head". No doubt, no difficulty would have arisen if such words were used; but it does not appear to me to follow, from the fact that such words are not used in s. 25(3), that if the context so requires, the words used cannot be interpreted so as to be applicable to the profits and gains of business, profession or vocation falling within that head of income under s. 6. Similarly, attention was also drawn to s. 26, sub-s. (2) and s. 44. Section 26, sub-s. (2) deals with succession to a business and provides that where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, in respect of the income, profits and gains of the previous year the taxability shall be apportioned between both the persons. Here obviously the words "the income, profits and gains of the previous year" refer to the entire liability of the person carrying on any business, profession or vocation to whom there has been a succession; and, obviously, they comprise not only tax payable by such person under the head "Profits and gains of business, profession or vocation", but any other income of the business, profession or vocation which is taxable under another head, such as property or interest on securities. The same appears to be the position under s. 44 which deals with the liability in case of a discontinued firm or association, which provides that upon discontinuance or dissolution partners of the firm or members of the associa-

stock-in-trade of the assessee was the income of the assessee's business under s. 25(3). The contention of the Department was that interest on the securities, which were the stock-in-trade of the assessee, had none the less to be assessed under s. 8 and, therefore, could not form part of the business income which was assessable under s. 10. And if it was not income assessable under the head of "profits and gains of business" under s. 10, it could not for any other purpose, including that of exemption under s. 25(3), be regarded as the income, profits or gains of the assessee's business. In support of this proposition reliance was placed on s. 6 which enumerates the various heads of income. The argument was that interest on securities and profits and gains of business had been given separate heads under s. 6, and since interest on securities had been given a specific head, interest on securities even though they may be the stock-in-trade of the assessee could not be regarded as the income of the assessee's business under s. 25(3). On the other hand the contention of the assessee was that when securities were held as stock-in-trade of the assessee's business interest on those securities could be considered as profits and gains of the business under s. 10. The further contention was that even if the income from securities held as stock-in-trade could be assessed under a separate head by virtue of s. 6(ii) and s. 8 as urged on behalf of the Department, that distinction had no bearing when a question arose under s. 25 as to what was the income, profits and gains of the discontinued business of an assessee. The Income-tax Officer and the Appellate Assistant Commissioner decided against the assessee.

When the case was carried in appeal to the Tribunal there was a difference of opinion between the two members constituting the Bench. The Accountant Member held that in the case of the assessee the receipt of interest formed part of the revenue receipt of the assessee's business in securities and fell under s. 10. He also stated that even if it may be held for any reason that interest on such securities had to be treated as income assessable under s. 8 it would still form part of the income, profits and gains of the assessee's business under s. 25(3) and the assessee was entitled to the relief claimed by him. The judicial Member took a contrary view on both the points. There was a Reference to the President of the Tribunal and the President found himself in agreement with the conclusion reached by the Accountant Member with the result that the case was decided in favour of the assessee.

The Commissioner of Income-tax required the Tribunal to state a case to this Court, and the following question of law has been referred to this Court for its decision:

"Whether on the facts and circumstances of the case interest received on securities held by the assessee formed part of the assessee's business income for the purpose of claiming relief under section 25(3) of the Indian Income-tax Act?"

Before proceeding to give an outline of the arguments very ably presented before us by learned counsel on both the sides I may digress a little and mention that by the time this Reference came up for hearing before my Lord the Chief Justice and my learned brother Tendolkar J. an appeal had been preferred to the Supreme Court in the case of *United Commercial Bank Ltd. v. Commr. of Inc.-tax*,¹ and the question raised in that appeal was as to the interpretation of ss. 8, 10 and 24(3) of the Act. In view of that appeal, the hearing of the present Reference was directed to stand over as one of the points arising for determination on this Reference related to the effect of ss 8 and 10. That appeal was decided by their Lordships of the Supreme Court in May 1957 and the view there taken is that

"both on precedent and on a proper construction, the source of income 'interest on securities' would fall under s. 8 and not under s. 10 as it is specifically made chargeable under the distinct head 'interest on securities' falling under s. 8 of the Act and cannot be brought under a different head even though the securities are held as a trading asset in the course of its business by a banker".

Since I have already digressed I may also add that learned counsel on either side have relied on various observations of their Lordships in this judgment in support of their arguments. Of this more hereafter. I may, however, here observe that the precise point which now remains for our decision did not arise for their Lordships' consideration. But there are general observations made in that judgment which, as I read them, do lend some support to the present contention of the assessee. True they are not made in the selfsame context and they cannot be read as directly leading to any conclusion we are asked to reach. The question of the true meaning and import of s. 25(3) remains to be decided by us and I shall refer to those general observations later on in my judgment as pointers and as instructive of the true approach to the question.

It has been contended before us by Mr. Palkhivala, learned counsel for the assessee, that the case clearly falls under s. 25(3). It is said that the assessee's business had admittedly been charged under the Act of 1918 and admittedly that business is discontinued and, therefore, no tax is payable in respect of the income, profits and gains of that business for the period between the end of the previous year and the date of such discontinuance. Briefly stated the argument is that on a plain reading of the section the exemption granted by s. 25(3) must extend to the whole income, profits and gains of the assessee's discontinued business and no notions of the mode or method adopted for the purpose of charging income-tax under the various heads of income enumerated in s. 6 can be introduced in this matter of exemption. The crux of the argument is that there is no reference whatever in s. 25 to the heads of income chargeable to income-tax and there is no warrant for introducing in this section the concept whereby distinction has for certain purposes to be made between interest on security on one hand and profits and gains of business on the other. It is argued that it is common ground that the securities, on which interest was received, were stock-in-trade of the assessee's business in securities, and that income neither in a commercial nor legal nor taxing sense ceased to be the income of the assessee's business simply because the total income of that business is computed under different heads. One principle on which the argument is grounded is that income-tax is only one tax and there are not as many taxes as there are heads of income. It was added in this context that an examination of all the provisions of the Act shows that wherever any 'head' of income is contemplated the Legislature has been at pains to use that expression and our attention was drawn to a number of sections and it was pointed out how that expression has been consistently and uniformly used throughout the Act. The deliberate non-user of that or any similar expression in s. 25, it has been said, goes to show that the exemption does not attach to any head of income as contended by the other side but embraces the total income of the assessee's business. The argument ran that the section does not say "Where the profits or gains of any business... on which tax was at any time charged" but explicitly states "where any business... on which tax was at any time charged." Stress has been laid on the latter expression which are the initial words of sub-s. (3) and it has been urged that there was nothing to prevent the Legislature from using the former expression or to mention the expression 'head' if the intention was to restrict the exemption in the manner contended by the Department. Reliance is placed on the expressions "Business, profession or vocation" in the context of "income, profits and gains" used in ss. 44 and 26A of the Act and it is contended that the identical expression should receive the same meaning in s. 25(3) as in the other two sections. It has been pointed out that in case of ss. 44 and 26A it is obviously not possible to give any restricted meaning to those expressions. Reliance is also placed by counsel on the rule of construction that an exemption in a taxing statute must be liberally construed.

It is contended on the other hand by Mr. G. N. Joshi, learned counsel appearing for the Revenue, that the crucial words are the initial words of sub-s. (3)

“where any business profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918” and that these words must be construed as referable to the head of “profits and gains of business, profession or vocation” mentioned in s. 6(4) and dealt with in s. 10. Reliance is also placed on the language of s. 10(1):

“The tax shall be payable by an assessee under the head ‘profits and gains of business, profession or vocation’ in respect of the profit or gains of any business profession or vocation carried on by him”

and s. 8:

“The tax shall be payable by an assessee under the head ‘Interest on securities’ in respect of interest receivable by him on any security...”

The contention is that the Supreme Court has now laid down in *United Commercial Bank Ltd. v. Commr. of Inc.-tax*, that the source of income “interest on securities” would fall under s. 8 and not under s. 10 as it is specifically chargeable under the distinct head “interest on securities” falling under s. 8 of the Act and cannot be brought under s. 10 even though the securities are held as a trading asset in the course of his business by a banker. The arch-stone of the whole argument is that the true meaning of the initial words in s. 25(3) quoted above is that the income profits and gains to which exemption is granted is only that which strictly falls under the head of “profits and gains of business” chargeable under s. 10 and cannot include any income made by the assessee’s business from interest on securities which is chargeable under s. 8. It is urged that you must think of the heads enumerated in s. 6 when you interpret s. 25(3). It is said that interest on securities has to be separately treated and that ss. 8 and 10 must be read as charging sections. It is also stressed that you must go to the language of the Act of 1918 and consider the scheme of that enactment. The section must be construed not in a popular sense but in a technical sense by confining and restricting the meaning of the initial words “Any business” in their context of “income profits and gains” in the sense in which s. 10 requires “profits and gains” of a business to be understood.

I shall at the outset permit myself to make a few general observations since much has been said at the Bar about the popular meaning of words, about commercial and legal connotation of terms and about technical expressions. The words I have to construe must, of course, be understood in their legal sense and technical words where I find them must have their technical sense attributed to them and not their popular sense—*uti loquitur vulgus*. The principle is of cogency when words in question represent legal conceptions. A rule firmly established is that the Court should avail itself, as an aid to construction, of the light thrown upon each of the expressions by the presence within it of the others. Another well established rule applicable to all statutes is the rule of construction *ex visceribus actus*. The Court is bound to see that every provision of a statute is construed with reference to the context and the other provisions of the statute. The Court is entitled, and even bound as far as possible, to see that the interpretation it puts on a particular provision makes a consistent enactment of the whole statute. In applying these rules the Court has to remember what has so often been emphasised—that as far as possible nothing can be read and nothing can be implied in a taxing statute. One can only look fairly at the language used. The indispensable starting point and the first step in case of any provision of the nature before us is to examine the words of the particular provision under consideration, of course, bearing in mind that it is not a detached enactment but one forming a connected scheme. Another rule having bearing on interpretation of a provision relating to exemption with which we are concerned is that the provision must, as far as possible, be liberally construed and in favour of the assessee, provided no violence is done to the language used. No safer rule can be followed than to start by assuming that the same meaning is implied by the use of the same expression in cognate sections and sections having interaction on one another. The object

and scheme of the provisions relating to exemption contained in a relevant consideration.

It is essential to note that now under s. 3 of the Act of 1922 the charge is not the income of the year of assessment, but the income of the previous year. This change was introduced by the Act of 1922. Prior to the Act of 1918 the subject of charge was the actual income of assessment. The result of this change was that, if a business was carrying on and earning income, profits and gains in the year 1921 when the Act of 1918 was in force, the owner of the business would pay income-tax on his income, profits, and gains of the business in 1921. It was necessary in the 1922 Act to differentiate for the purpose of discontinuances between those which had, and those which had not been charged under the Act of 1918.

Section 25 of the Act of 1922 deals with assessment in the case of a discontinued business. Sub-section (1) provides that where any business, profession or vocation to which sub-s. (3) is not applicable is discontinued in the year of assessment, assessment may be made in that year on the basis of the income, profits and gains of the period between the end of the previous year and the discontinuance in addition to the assessment, if any, made on the income, profits or gains of the previous year. The reference to this sub-section makes it clear that this sub-section is not applicable in the case of a business which falls under sub-s. (3). Therefore, sub-section (1) applies to the case of a business which had not been charged under the Act of 1918. It provides an exception to the rule laid down in s. 6 of the Act of 1918, as already pointed out, rules that the subject of charge is the income of the previous year and not the income of the assessment year. It gives the tax Officer an option to make an accelerated assessment on the income, profits and gains of the discontinued business in the year of discontinuance instead of in the usual financial year. No doubt the procedure provided in the sub-section being permissive, but the purpose of it is obvious, namely, to ensure that the tax of a business which is closed and wound up is not lost. The construction sought to be placed on behalf of the Revenue on sub-section (1) cannot be accepted, and if the identical expressions "business, profession or vocation" and "income, profits or gains" of the discontinued business are to be taken in the same sense in sub-s. (1) and sub-s. (3), this option given to the tax Officer to tax the income, profits or gains of a discontinued business in the year of discontinuance, permits him only to tax such part of the income, profits and gains of that business as strictly fall under the head "income, profits and gains of business" mentioned in s. 6(iv) and s. 10 and debar the business from taxing any interest on securities in the year of discontinuance even though the securities were the stock-in-trade of the business. This sub-section, of course, does not apply to the present case, but reference to it at this stage only for the purpose of showing the scheme of the whole section.

Sub-section (2) is an administrative provision. It casts an obligation on the person carrying on "any such business, profession or vocation" as visualised by sub-s. (1), to give notice of discontinuance to the tax Officer within fifteen days of the discontinuance and failure to do so invites imposition of the penalty mentioned in the sub-section. This provision also has no bearing on a case falling under sub-s. (3), but it is clear that the expressions "business" and "income, profits and gains" in sub-section (2) must have the same meaning that is to them in sub-s. (1).

But it is upon the meaning and import of sub-s. (3) that the question raised upon this Reference must turn. The relevant part of the Act is in the following terms:

"Where any business, profession or vocation on which tax was at any time payable under the provisions of the Indian Income-tax Act, 1918, (VII of 1918), is

then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period."

It is clear enough as was pointed out by their Lordships of the Privy Council in *Commr. of Income-tax, Bombay v. Polson*², that

"...the purpose and effect of this sub-s. (3) is to give relief to a tax-payer who but for it would in the aggregate be charged with tax once in respect of every year's income and twice in respect of one year's income."

The object and scheme of s. 25(3) which deals with exemption in case of a business which was discontinued was examined by Lord Simmonds in the above case and the scheme and object of s. 25(4) which deals with exemption in case of a succession to a business, was examined by the Supreme Court in *Executors of Estate of Dubash v. Commr. of Inc.-tax*³. I may, in passing, add that it has not been questioned, and indeed it could not be questioned, that the expression "business, profession and vocation" in the context of "income, profits and gains" must in all the sub-sections of s. 25 have the same meaning. In answer to me, learned counsel for the Revenue stated that the construction urged by him of the relevant expression in sub-s. (3) must be the same as that to be put upon the identical expressions used in sub-s. (4).

To turn to the language of sub-s. (3). Considerable stress has been laid by Mr. Joshi on the word "charged" in the initial part of this sub-section. The argument for the Revenue here was, that the business which is exempted from income-tax can only be a business which was 'charged' to payment of income-tax under the Act of 1918. The crucial word it is said is 'charged'. The scheme of the Act of 1922 is that profits and gains of a business are 'charged' separately under s. 10: And these profits and gains, as has now been laid down by the Supreme Court, cannot include interest on securities which must be charged under s. 8. Therefore, income, profits and gains of any discontinued business for which exemption is claimable does not mean anything more than profits and gains of that business strictly chargeable under s. 10. The accent was on the word 'charged' which it was urged was the key-word. The premises of this syllogism require careful scrutiny.

Now, s. 25 of the Income-tax Act, 1922, deals with assessment in case of discontinued business and sub-s. (3) gives relief by granting an exemption for payment of income-tax in respect of the 'income, profits and gains' of a discontinued business provided the following conditions concur:

(1) The business must be one on which tax was at any time charged under the Act of 1918;

(2) The case must be one which does not attract the application of sub-s. (4). (Sub-section (3) does not apply where a business has been discontinued and there has been a succession by virtue of which the provisions of sub-s. (4) are rendered applicable.)

(3) The business must be discontinued which means that there must be complete cessation of business.

The way I read the words in the initial part of the sub-section is that they lay down conditions (1) and (3) above. Condition (2) above is not material for the purposes of this case. The section operates as an exemption in case of income, profits and gains of a discontinued business. The word 'income, profits and gains' are also of importance. The words 'income, profits and gains' as also the words in the initial part of the sub-section require to be read in their structural sense and collocation and in their proper context. I shall begin with an examination of the initial part of this sub-section. The initial words, "Where any business...on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 is discontinued", it is

obvious, refer to two factors: (i) the existence of the business which was at any time charged under the 1918 Act and (ii) discontinuance of that business. Where these two facts are established, the income, profits and gains of that business are exempted from taxation in respect of the period between the end of the previous year and the date of its discontinuance. That the business of the assessee has been discontinued is not a fact in controversy. That income-tax was charged on that business under the provisions of the 1918 Act is also not in controversy. But the whole crux of the matter, it is said by Mr. Joshi, is that the expression 'business' in the present context must be understood not in the ordinary legal sense of that expression but with the technical meaning given to it when profits and gains of a business are charged to tax under s. 10 and by virtue of s. 6(iv). It could not be denied, and in fairness to learned counsel for the applicant I must add that it has not been denied, that we are asked to incorporate in s. 25(3) and the word 'business' used in the sub-section, the concept underlying s. 6 which deals with heads of income chargeable to income-tax and the restricted meaning attributable to the words "profits and gains of any business" in s. 10. But it was said that you must read s. 25(3) in the context of income-tax law and you cannot, therefore, read s. 25(3) without reference to s. 6 and ss. 8 and 10 and without bearing in mind the scheme of the whole Act. I agree that while interpreting s. 25 the Court must bear in mind the scheme of the Act. I also agree that the sub-section must be read *ex anteceditibus et consequentibus*.

The scheme of the Act has been reviewed in numerous decisions. I shall refer to the latest decision of the Supreme Court in *United Commercial Bank Ltd. v. Commissioner of Income-tax* where their Lordships had occasion to examine the scheme of the Act while considering ss. 8 and 10 and 24(3) of the Act. Before I refer to the scheme of the Act and some of the general observations made in the judgment of the Supreme Court, I may observe that one important plank in the argument of Mr. Palkhivala was that ss. 7 to 12 of the Act are not charging sections but are computation sections and, therefore, have no bearing on the construction of s. 25(3). The submission was that the mere fact that the aggregate income, profits and gains of a business falls to be computed under more than one heads of s. 6, as for example, under ss. 8 and 10 in the present case, affords no justification for importing the concept of those 'heads' and computation sections in s. 25(3). Mr. Joshi, on the other hand, has strongly urged that both ss. 8 and 10 are charging sections and not computation sections. There was considerable controversy before us as to what view their Lordships of the Supreme Court had taken of this aspect of the matter in the case of the *United Commercial Bank Ltd.* and it was submitted on behalf of the Revenue that their Lordships have held that ss. 8 and 10 were charging sections. I have carefully studied that decision, and as I shall presently point out, while referring briefly to the scheme of the Act, their Lordships have in express and explicit terms held that ss. 7 to 12 are not charging sections but are provisions for computation of total income. I may add that in a Full Bench case decided by this Court in *Kamdar* In re⁴, Kania J. and Chagla J. (as they then were) had taken the same view.

Section 2(15) defines 'total income' to mean "total amount of income, profits and gains... computed in the manner laid down in the Act." Chapter I of the Act deals with "charge of income tax". It consists principally of two ss. 3 and 4. Section 3 provides that:

"...income-tax shall be charged for any year at any rate or rates,... in accordance with, and subject to the provisions of this Act..."

Section 4 provides that

"...the total income of any previous year of any person includes all income, profits and gains from whatever sources derived..."

Chapter 3 deals with "Taxable income". Section 6 enumerates the heads of

income chargeable to income-tax. It says as under:

S. 6. "Save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, namely:—

- (i) Salaries.
- (ii) Interest on securities.
- (iii) Income from property.
- (iv) Profits and gains of business, profession and vocation.
- (v) Income from other sources.
- (vi) Capital gains."

The two heads (ii) and (iv) i.e. "interest on securities" and "profits and gains of business" are dealt with under ss. 8 and 10 of the Act respectively. According to the scheme of the Act income-tax has to be charged in respect of the "total income" of the previous year of every assessee and "total income" is defined under s. 2(15) to comprise all income, profits and gains from whatever source derived subject to certain exemptions. Chapter 3 which is entitled "taxable income" comprises ss. 6 to 17 (both sections, inclusive). Section 6 enumerates the various heads of income, profits and gains which are chargeable to income-tax. Each of these heads of income, profits and gains is dealt with under a separate section and these sections also give the details of allowances and exemptions in regard to each different head.

After an examination of the scheme of the Act in the case of *United Commercial Bank Ltd.* their Lordships of the Supreme Court cited with approval the decision of the Federal Court in *Chatturam v. Commr. of Inc.-tax, Bihar*⁵ and the decision of the Privy Council in *Wallace Bros. & Co. Ltd. v. Commr. of I.T.*⁶ in support of the view they were inclined to take that ss. 8 and 4 were the charging sections and ss. 7 to 12 were computing sections. After referring to the mandatory character of s. 6 their Lordships observed:

"So every item of income whatever its source, would fall under one particular head and for the purpose of computing the income for charging of income-tax the particular section dealing with that head will have to be looked at."

It is amply clear that it was this differentiation which led their Lordships to hold that 'interest on securities' was an exclusive head even when a banker's business income was being taxed and the securities were part of his stock-in-trade. It is to be noted that the purpose under consideration was the purpose of computing the income. A little later in the judgment appears the passage which is decisive of the point with which I am immediately concerned:

"A combined reading of ss. 3, 4, 6, 8, 10, 18 and refund section, s. 48 shows that income-tax is to be charged at the rate or rates prescribed in the Finance Act on the total income of the assessee as defined in s. 2(15) of the Act and computed in the manner given in ss. 7 to 12 which are not charging sections but are provisions for the computation of total income."

In the same passage later on their Lordships again stressed this aspect of computation. Mr. Joshi has drawn our attention to one or two sentences where their Lordships have used the expressions "chargeable under the head". I need not discuss the matter any more as it is to my mind abundantly clear that the passage cited by me above is decisive of the point that ss. 7 to 13 are only provisions for computation of total income and are not charging sections.

The scheme of the Act outlined above and the observations cited by me do lend support to the contention pressed before us by Mr. Palkhivala that there is no warrant for introducing in s. 25(3) the concept whereby distinction has for purposes of computation of income to be made between interest on security on the one hand and profits and gains of a business on the other. Learned counsel for the assessee was right when he said that the language of the sub-section does not import any head of income chargeable to income-tax and the sub-section deals only with exemption from chargeability. Section 10 as now

held by the Supreme Court is not a charging section but deals with computation of income under the particular head. It is extremely difficult for me, therefore, to accede to the argument urged on behalf of the Revenue that the meaning and scope of the expression "business" in sub-s. (3) must be confined strictly to what it bears when you deal with the head of "profits and gains of business, profession or vocation" mentioned in s. 6(iv) and s. 10. This meaning, it was strenuously urged by Mr. Joshi, followed, if s. 25(3) was not read by itself but in the context of other relevant provisions of the Act. I need not repeat the general observations I have made in prefacing this judgment. Of course the enactment is a Code and not an institutional exposition. Of course s. 25 cannot be read in isolation. Of course again, the Act, at least the cognate sections, should be read as a whole, forming a connected scheme. But it is not possible for me to see any reason why in the context of the provisions of the Income-tax Act, when exemption is claimed in respect of the income, profits and gains of a discontinued business, the expression "business" must be circumstanced and straitened by the language and import of ss. 8 and 10, which though valuable in their own setting are provisions relating to computation of income. Section 25(3) does not refer to any heads of computation of income either expressly or by implication of context. I am unable to incorporate in s. 25(3) the notion of the mode or manner of computation of income under various heads. In my judgment, in these words 'income, profits and gains' of a business which is discontinued, the expression 'business' must have, attributed to it, its proper legal meaning. "Business" as defined in the Act

"includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

It is well understood that unless there is anything repugnant in the subject or context the expression business has to be understood as one of wide import. Its content in the income-tax law is not to be readily confined. Mr. Joshi has leaned heavily on the expression "charged" in s. 25(3) in its context of a discontinued business. In effect he has asked us to take the view that the scheme of the Act and the context of income-tax law require that the business contemplated by s. 25(3) must be equated with and confined to the 'business' which is the subject-matter of s. 10. I fail to see anything in s. 25 read in the context of income-tax law which requires or even faintly indicates that the expression 'business' there used must be given any artificial conception distinct from and restrictive of its legal connotation.

In coming to a determination as to the meaning of a particular word or expression in a statute, it is permissible to consider two points—namely: (i) The external evidence derived from extraneous circumstances such as previous legislation and decided cases, (ii) The internal evidence derived from the statute itself. The identical expressions in s. 25(3) with which we are concerned in this Reference are used in ss. 26 and 44. Section 26 deals with change in constitution of a firm carrying on any business. I need not set out s. 26(1) but shall only observe that the income, profits and gains of a firm carrying on any business contemplated there must include the total income of the business of the firm regardless of any consideration of any head of computation. That income for instance can be the aggregate of profits and gains of the business, interest on securities forming part of the stock-in-trade of the business and also income from property belonging to the business. Section 26(2) is as under:—

"Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year."

Prior to Income-tax Amendment Act VII of 1937 no exemption under s. 25 was granted in case of a business which was not discontinued but in case of which there was succession. Both ss. 25 and 26 as they previously stood were

amended by the amending Act of 1937. Into s. 25(3) after the word "discontinued" were interpolated the words "then, unless there has been succession by virtue of which the provisions of sub-section (4) have been rendered applicable". The whole of sub-s. (4) was newly introduced. It says as follows:

"Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, (VII of 1939), carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period; and, if any amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

It will be seen that the language of sub-s. (3) and sub-s. (4) is *in pari materia*.

The scheme of the amendments in s. 25 and s. 26 came up for consideration before the Privy Council in *Commr. of Inc.-tax, Bombay v. Polson*⁷. At p. 741 of the report their Lordships observed:

"...Sections 25 and 26 no doubt form part of a single scheme and their interaction must not be ignored. But s. 26 is primarily directed not to the circumstances in which relief from taxation is given but to the apportionment of tax where relief is not given... It is sub-s. (2) of s. 26 as amended by the amending Act which applies, and, inasmuch as at the time of making the assessment i.e. in November 1939, the respondent had been succeeded in carrying on the business by the company, each of them became assessable in respect of his actual share, if any, of the income, profits and gains of the previous year."

The scheme of the amended ss. 25 and 26 was considered by their Lordships of the Supreme Court in *Executors of Estate of Dubash v. Commr. of Inc.-tax*⁸. At p. 185 of the report Kania C.J. observed:

"Section 25 of the Indian Income-tax Act, 1939, gives certain concessions in respect of a business where tax had been paid by the person carrying the business under the provisions of the Indian Income-tax Act, 1918."

After stating the material part of sub-s. (4) his Lordship observed:

"The Scheme of Section 25 read with the provisions of Section 26(2) appear to be to give relief, *inter alia*, to persons who were carrying on business in 1921 and had been taxed on their income under the Income-tax Act of 1918. By a change effected by the Income-tax Amendment Act of 1922 they were subjected to taxation twice on the income of 1921-22. The relief is intended against this levy of tax twice over."

In the same case Patanjali Shastri J. (as he then was) observed (p. 188):

"...the Indian Income-tax (Amendment) Act, 1939, (hereinafter referred to as the amending Act), having amended Section 26(2) so as to provide, in the case of a succession in business, profession or vocation, for the assessment of the predecessor and the successor, each in respect of his actual share of the profits of the previous year, the relief was extended, by enacting Section 25(4), to cases of succession occurring after the commencement of that Act, with the same object as in the case of discontinuance, namely, to redress the hardship of the business having been charged twice over on the income of 1921-22. In other words, the predecessor is given the same relief as if he had discontinued the business on the date of succession. It will thus be seen that the enactment of Section 25(4) is consequential on the amendment of Section 26(2), and the scope and meaning of the expression 'succeeded in such capacity by another person' in Section 26(2) must determine also its scope and meaning in Section 25(4)."

Needless to say I am fortified in the conclusion at which I have so far arrived by these weighty observations entitled to highest respect. The day after

⁷ (1945) 47 Bom. L.R. 737, F.C.

⁸ (1961) 19 I.T.R. 182, S.C.

we reserved our judgment, I drew the attention of Mr. Joshi, 1 for the Revenue, to these two decisions and particularly to the quoted above and learned counsel had little to say. All that that the observations were not made in the context of s. 25(3) while considering s. 25(4) and s. 26(2) and it was added that of sub-s. (3) supported the submissions he had already made. sel, however, agreed that the meaning and scope of the business in the initial parts of sub-ss. (3) and (4) was the same and the profits and gains of a business contemplated by sub-s. (4) must thing in sub-s. (3). Now, it is clear that these observations have bearing on the meaning and scope of s. 25(4). In terms it is Privy Council that ss. 25 and 26 form part of a single scheme a action cannot be ignored. Patanjali Shastri J. (as he then was out that s. 25(4) was consequential on s. 26. I do not intend on these observations, but have gratefully referred to them as throwing considerable light on the question of construction that has arisen for

Now it is to be noted that the amendments in ss. 25 and 26 were by the same Amending Act of 1939. Sub-section (2) was added sub-section (4) was added in s. 25. Not only that but at the same amendment was also made in s. 25(3). The Legislature must be to have been cognizant of the general character and scope of s stood, but also to have been fully apprised of the presence in significance of the expressions "income, profits and gains" and "profession or vocation on which tax was at any time charged under of the Indian Income-tax Act, 1918 (VII of 1918), is discontinued make any verbal change but on the contrary adopted the s. 25(3) in s. 25(4) except that since the same relief which was s. 25(3) was to be given in case of succession the sub-s. (4) has clearly that the exemption was given to the person whose business succeeded. When I examine s. 26(2) it rules that in case of succession both the person who is succeeded and the successor to the business be assessed in respect of the income, profits and gains of the business for the terminal period. It is obvious that the assessment would be the total income, profits and gains of the business derived from the business. The operation of the rule, however, is in express terms made "the provisions of sub-section (4) of section 25", with the result, as the exemption from liability is made commensurate with the liability by s. 26(2) and the proviso to s. 26(2). The presumption is used by the law-maker correctly and exactly and not loosely. The Legislature is always assumed to be aware of its own distinction as of the form of words which it has employed and the sense of them. It is also to be assumed that a form of words uniform intentional. And it is a favoured canon of construction that related sections and sections having interaction and having the same form of words, the same sense of the words is to be adhered to. This would lead to some absurdity or repugnancy or inconsistency. particular cogency when the Legislature amends an existing statute doing so chooses identical words and form of words in provisions of inter-connected matters. I have not so far made any reference to section which is part of the same scheme and can be distinctly s. 25(3). That is s. 44 which says:

"Where any business, profession or vocation carried on by a firm or persons has been discontinued, or where an association of persons or a person who was at the time of such discontinuance or dissolution a partner in a firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under section IV and for the amount of tax payable and all the provisions of Chapter IV shall apply to any such assessment."

The cognation is apparent. This section in its present form was substituted by the same Amending Act of 1939. The interaction of ss. 44 and 25(3) does not require to be stressed. It was not disputable and it has not been disputed before us that the liability of members of a firm whose business is discontinued is in respect of the total income, profits and gains of that business regardless of the heads of income chargeable to income-tax. Considerations which apply to ss. 25 and 26 in the present context are also applicable to ss. 25 and 44.

There is one more facet of this question. The heads of income chargeable to income-tax on which so much stress is laid on behalf of the Revenue, have varied at different times since 1918. I do not deem it necessary to examine these changes in any detail and will refer only to one head of income. Prior to the amendment of s. 12 by the Finance Act of 1955 income from dividend from shares which were the stock-in-trade of a business was all along held to be profits and gains of the business under s. 10. By amendment made in 1955 dividends now fall under s. 12(1A) as one of the "other sources" dealt with by s. 12. Mr. Palkhivala has relied on this amendment in support of his arguments. In my opinion this is an additional consideration which cannot be overlooked.

There is another aspect of the matter. It is sometimes said that the exemption in s. 25(3) is conferred on a business and not the person who carried on that business. Mr. Palkhivala also in the course of his arguments adopted this line for the purpose of showing that whatever the nature of the income of a business and under whichever head it is taxed it attracts the exemption. True s. 25(3) does not in terms state that the exemption is granted to the person and speaks of non-liability to pay tax in respect of the income, profits and gains of a discontinued business. But the way I read the sub-section is that the exemption from double taxation is conferred on the person—it may be a firm—who was carrying on any business which is discontinued and was charged to tax under the Act of 1918. Primarily charge of income-tax is directed to the person, natural or artificial, who earns income, profits and gains from whatever source rather than to the ownership or enjoyment or activity which is the source of it. This seems to me to follow from ss. 3 and 4. Take the case of a firm. A firm by virtue of these charging sections is taxed in respect of the total income of its business—to adhere to the words of s. 4—"including all income, profits and gains from whatever source derived". Speaking generally the tax is on the entity—the firm—in respect of its income. The assessment is made on the entity who is the assessee, and again speaking generally, collected from the assessee. This principle is the substratum of s. 3. Another basic principle on which the section rests is that the levy is to be on the total income of that assessable entity. Where that assessable entity is an individual or a firm carrying on business the charge is on the aggregate income, profits and gains derived from that business. And if exemption is given in respect of the income, profits and gains of that business on the principle of avoidance of double taxation, it would naturally and normally be a concession in respect of the aggregate income, profits and gains derived from that business by the assessable entity. It is these basic principles which lead me to the conclusion that the exemption is to the person, natural or artificial, whose income from that business is the subject-matter of s. 25(3). Section 25(4) in terms speaks of the person. Considerable support is to be derived for this proposition from the observations of the Privy Council and of Kania C.J. which I have already quoted before. The liability of that person, natural or artificial, to pay the tax is founded on ss. 3 and 4 of the Act. Therefore, when you consider a provision which enacts that the liability is exempt in case of discontinuance of the business carried on by that person in respect of the terminal period, you have to go to those sections to see what that liability was which attracts the exemption. The fundamental position was brought out in bold relief in the House of Lords case of *Whitney v. Inland Revenue Commissioners*⁹ where Lord

Dunedin, speaking with accredited accuracy as to these tax cases, stated (p. 52) :

"...Now, there are three stages in the imposition of a tax: There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment: That *ex hypothesi* has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly come the methods of recovery if the person taxed does not voluntarily pay."

This passage has become *locus classicus* and was cited with approval by the Federal Court in *Chatturam v. Commr. of Inc.-tax, Bihar*¹⁰, and very recently by the Supreme Court in *Chatturam Horilram Ltd. v. Commr. of Inc.-tax*¹¹. The exemption in s. 25(3) has to do with the incidence of liability. The subsequent provisions as to assessment and so on are machinery only. They enable the liability to be quantified. The liability is definitely and finally fixed by the charging sections. The stage of assessment is not yet. Therefore, when you say that the liability to pay tax is exempt, it is not in the context of that machinery but in the context of the first stage of liability which as Lord Dunedin pointed out *ex hypothesi* has already been fixed. It is this concept of imposition of the tax and exemption from such imposition which to my mind leads to the solution of the case. No tax is to be charged in a case falling under s. 25(3), and Chap. III, which deals with heads of income, does not enter into the scheme or meaning of s. 25(3). Sections 7 to 17 in that chapter are computing sections. They deal with the mode or manner of computation or ascertainment of the quantum of tax under various heads and come into operation only when tax has to be charged as enjoined by ss. 3 and 4. Therefore, in a section which lays down that no tax is to be charged in respect of the income, profits and gains of a discontinued business in respect of the terminal period, it is impermissible to implant either the concept or the language and meaning of any of the ss. 6 to 17.

All these considerations lead me to the conclusion that the 'business' contemplated in s. 25(3) is to be understood in the proper legal sense attributable to that expression without recourse to the artificial conception urged on behalf of the Revenue. Aid can, of course, be derived in considering a section from other sections of the statute so long as by doing so you do not alter the meaning of what is itself clear and explicit or diminish the efficacy of any express provision therein contained. In case of the section before us I am unable to see any reason for attributing to the word 'business' any modified and straitened meaning as pressed on behalf of the Revenue. Words of limitation are not as a rule to be read into a statute unless the subject-matter or context so requires. We are not dealing with any sweeping general words but an expression of ample legal content. We are asked to acquiesce in a non-legal construction which limits the operation of the sub-section, so as to make the exemption given by it, not commensurate with the income, profits and gains of a business as understood in the legal sense and as understood in other cognate provisions and provisions having interaction. It is not permissible in case of a provision of the nature under consideration, therefore, to read into it words by implication and make it smaller than what its terms express. Considerations grounded on the scheme of the Act, the scheme and object of s. 25(3), the principle of cogency which requires that relevant provisions of an enactment must as far as possible be read so as to harmonise them and other considerations which I have already discussed, are in my judgment abiding grounds for construing s. 25(3) as exempting the income, profits and gains of a discontinued business, without excluding from such income, profits and gains interest on securities where the securities are themselves stock-in-trade of the business. This is the only way I am able to read s. 25(3) after giving the words of the section their proper legal meaning and after reading the sub-section along with other cognate sections and in the context of income-tax

law by which latter expression I understand that the meaning and import of any provision in this fiscal enactment must be gathered in the light of general principles and the well-established rules of interpretation, that the true meaning of any passage is that which (being permissible) best harmonises with the subject and with every other passage of the statute and if you can do so without straining the language of a fiscal statute you must construe it in a manner which enables the smooth working of the system which it purports to regulate.

I have so far omitted from discussion the meaning and import of the words "income, profits and gains" in s. 25(3) without being unmindful of them. Learned counsel for the Revenue in the very opening of his argument stated that they were not germane to the question of construction of this sub-section. The submission also was that the expression meant nothing more than profits and gains of a business as understood in case of the head of income mentioned in s. 6(iv) and dealt with in s. 10. The whole case for the Revenue had to be based on this narrow foundation of s. 10. In my judgment it is ill-founded. Mr. Joshi has in effect asked us to treat the word 'income' used in s. 25(3) as tautologous and superfluous when he said that it meant the same thing as "profits and gains" and was synonymous with the latter expression. I am unable to agree. It is well established that in the context of the charging sections the expression 'income' has a very wide import—wider than profits and gains. And I see no reason for equating the words "income, profits and gains" used in s. 25(3) with "profits and gains". The word "income" itself is of such broad connotation that without adding anything to it you can cover the whole ground of chargeability but the words "profits and gains" are not of such elastic ambit. How wide is the import of the expression "income" used in the charging ss. 3 and 4, can be gathered from numerous decisions. I shall quote one passage from the judgment of my Lord the Chief Justice (Chagla J. as he then was) in *Kamdar* In re¹² where reference was made to the leading cases on the point (p. 769):

"In *Income-tax Commissioner v. Shaw, Wallace & Co.* Sir George Lowndes delivering the judgment of the Privy Council defined 'income' as a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. He likened 'income' pictorially to the fruit of a tree, or the crop of a field. He further points out that the expansion of 'income' into income, profits and gains is more a matter of words than of substance. In *Gopal Saran Narain Singh v. Commissioner of Income-Tax, B. & O.*¹³, the Privy Council went as far as saying that anything which can properly be described as income is taxable under the Act unless expressly exempted. Lord Wright in the judgment of the Privy Council in *Kamakshya N. Singh v. Commr. of Income-Tax*,¹⁴ appreciates the difficulty of defining 'income' and concedes that it is perhaps impossible to define it in any precise general formula, but he says that it is a word of the broadest connotation. He rather disapproves of Sir George Lowndes' pictorial language and sounds a note of warning against using picturesque similes to limit the true character of income in general."

In *Gopal Saran Narain Singh v. Commissioner of Income-tax, B. & O.*, their Lordships of the Privy Council held that in s. 12 the words "income, profits and gains" are used in a disjunctive sense and the word "income" is not limited by the words "profits" and "gains". It was there contended that these words as used in s. 12(1) must be construed as including only such income as constitutes or provides a profit or gain to the recipient i.e. that the word "income" was in some way limited by its association with the words "profits" and "gains". The contention was negatived and it was observed (p. 821):

"...The word 'income' is not limited by the words 'profits' and 'gains'. Anything which can properly be described as income, is taxable under the Act unless expressly exempted."

¹² (1945) 47 Bom. L.R. 743, F.B.

¹³ (1935) 37 Bom. L.R. 817, F.O.

¹⁴ (1943) 47 Bom. L.R. 545, F.O.

I have already observed that the concept of imposition of the tax on such income emerges from ss. 3, 4 and 25(3) reading the observations cited above their Lordships of the Privy Council. It appears to me, do broadly approve of this concept. In my judgment of the words "income, profits and gains" in the context of business is purposeful and connotes their amplitude and the support to the conclusion I have already arrived at that from this and gains you cannot exclude interest on securities in case of claims exemption on the ground that the interest was on securities themselves were the stock-in-trade of his business. But the Revenue claims the statutory right to impose tax on a person in respect of his business from whatever source derived, demands to his claim from double taxation under a provision in which also are to same words of wide import and asks us to put a narrow construction.

The whole contention on behalf of the Revenue here also has an insistence that inasmuch as the words "profits and gains of a business" have a restricted meaning in the scheme of ss. 6 to 12 they must construe of s. 25 and the words "income, profits and gains" there used read to mean no more than the profits and gains of a business in a restricted sense. How fragile this argument is, can be seen by s. 25(1) which says:

"Where any business, profession or vocation to which sub-section (3) is discontinued in any year, an assessment may be made in that year of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made in the previous year of the income, profits or gains of the previous year."

It is not disputable that the income, profits and gains of a business must mean the same thing in sub-s. (1) and sub-s. (3). As pointed out an accelerated assessment may at the option of the Assessing Officer be made in respect of the income, profits and gains of business under sub-s. (1) unless sub-s. (3) is applicable. Is this to be confined only to profits and gains of the business, in the case of s. 10 or is the assessment to be on the aggregate income, profit and gains of the business, that is, inclusive of income of the business from other sources? The answer must be that there can be one assessment and it is to be in respect of the entire income, profits and gains of the business as provided in ss. 3 and 4. In my opinion ss. 6 and 10, so much relied on by the Revenue, only lay down a method of its computation. It is little use dwelling on the fact that as my Lord the Chief Justice (Chagla J. as he then was) observed in the case, ss. 6 to 12 do not in any way control or limit the conditions of chargeability laid down in s. 4 and merely provide a machinery for computation for every species of income. In my judgment for reasons, they cannot be read as in any way controlling or limiting the conditions of exemption from that chargeability unless there is a clear authority for doing so.

In construing these words "income, profits and gains" in the case of a discontinued business, we must give them their ordinary legal meaning. The rule of construction requires that as far as possible these words in s. 25 should have the same meaning attributable to them in sub-s. (1) and in other cognate sections. Section 26A and s. 44 which have already made reference are instances in point. I have also pointed out the decisions of the Privy Council and the Supreme Court that form part of a single scheme and how s. 25(4) was said to be covered by s. 26(2). It would only be a compelling context which could induce us to impose upon these words "income, profits and gains" of a business a meaning which carves out a good deal from their ordinary meaning. The context supports the construction urged by the assessee and

to read the words in their legal sense and not in any restricted manner. For all these reasons, I am of the opinion that on a true construction of s. 25(3) interest on securities which form part of the stock-in-trade of a business is part of the income, profits and gains of that business and entitled to exemption under that sub-section.

So far I have dealt with the matter on principle and in the light of judicial pronouncements instructive of the principle but without reference to any authority on the construction of s. 25(3). Is there any authority which compels me to refrain from giving effect to the conclusions at which I have come?

I can find none in those that have been cited to us. The one more relied upon by Mr. Joshi was *Ambalal Himatlal v. Commr. of Inc.-tax*¹⁵. The head note to the report is not accurate and does not bring out the *ratio decidendi* of that case. Mr. Joshi has relied on certain observations from the judgment of my Lord the Chief Justice and my learned brother Tendolkar J. in that case. Now the way I approach any income-tax matter is that it should be my endeavour to appreciate and respectfully follow any direct observation made by this Court in another decision when I see that it was the reason which induced the Court to reach a conclusion. It is true that there is one observation made in that judgment which at first blush may seem to lend some support to the contention urged on behalf of the Revenue. But when you read that observation in its context you find that it was made only in refutation of an argument urged on behalf of the assessee who in that case had a Reference made to the High Court. When you examine the facts of the case and the submissions there made it becomes clear that the observation was made in the limited context of those facts and submissions. Before I refer to the same, it is necessary to state briefly the facts of that case. The assessee, a Hindu undivided family, was in 1943, when it was disrupted, carrying on three distinct and separate businesses:

- (i) money-lending business,
- (ii) running a ginning factory,
- (iii) a share business.

It was found, and this is important, that only the money-lending business had paid income-tax under the Act of 1918. On these facts the assessee claimed the exemption granted by s. 25(4) not only in respect of the total income, profits and gains of the money-lending business but curiously enough in respect of the total income, profits and gains of all the three businesses. There was only the money-lending business subsisting in 1921-22 and in the statement of case the Tribunal stated that this fact was not disputed. The Tribunal held that the assessee was entitled to relief only in respect of the money-lending business which was charged to income-tax under the Act of 1918. At the hearing of the Reference the ingenious argument urged on behalf of the assessee by Sir Jamshedji Kanga was, that when you look at s. 25(4) it is clear that the Legislature intended to give relief not merely in respect of the particular business which was assessed to tax under the Act of 1918, but the relief contemplated was in respect of the total income of the assessee whose business was succeeded to. The argument was based on the language used in sub-s. (4) to the effect that "no tax shall be payable by the first mentioned person in respect of the income, profits and gains for the period between the end of the previous year and the date of such succession." And it was in support of this argument, that it was pointed out that when you turn to s. 10 which deals with tax on business, profession or vocation the language used is "profits and gains of any business, profession or vocation". It is essential to note that the attempt was to show that s. 10 speaks of "any business" and therefore the exemption given by s. 25(4) should not be confined to the particular business which was charged to tax under the Act of 1918 but "any business"—meaning all the three businesses—of the assessee which at the time of disruption of the Hindu undivided family were being charged to income-

tax. Therefore, there was really an endeavour to introduce the concept and language of s. 10 in the ambit of s. 25(4). The contention was negatived as ingenious and the Court declined to accept the interpretation of s. 25(4) urged by the assessee which would have led to absurd results. In the course of his judgment the learned Chief Justice in examining the novel contention of the assessee, that he was exempted from payment of tax in respect of all the three distinct and separate businesses even though two of them did not even exist prior to 1922, observed at p. 285 of the report:

"...If that was the policy of the Legislature it is difficult to understand why relief should be given to a person whose business is succeeded to in respect of not only that business but also in respect of all sources of income."

Then in proceeding to examine the argument which sought to introduce the concept underlying the words "any business" in s. 10 and in s. 25(4) the learned Chief Justice observed:

"...If we were satisfied that the Legislature intended to use the expression 'income, profits and gains' not only for the purpose of indicating the profits and gains of the business as contemplated by Section 10 but also for the purpose of indicating the total income of the assessee then no doubt we would have to come to that conclusion, however reluctantly; but fortunately there is a clear indication in this sub-section itself. What the Legislature intended by using the expression 'income, profits and gains' was the profits and gains of the business or profession contemplated by Section 10 and not the total income of the assessee..."

It is the latter part of these observations that are relied upon by Mr. Joshi. The ratio of the judgment is to be gathered from the following observations at p. 286 of the report:

"...Further when you look at sub-section (4) as a whole, apart from the use of the expression 'income, profits and gains' it is clear that the conditions required for obtaining of relief under this sub-section are firstly, carrying on any business, profession or vocation; secondly, tax being charged on this business, profession or vocation under the Act of 1918; and, lastly, succession to any such business, or vocation in such capacity by another person. Therefore, such other person must not only succeed, he must also succeed in such capacity, which means, he must carry on the same business, profession or vocation which had been carried on by the assessee to whom relief is to be given. If these conditions are satisfied then no tax is payable by the first mentioned person who is the person to whom relief is intended to be given in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession."

It emerges, therefore, from the observations quoted immediately above that the *ultima ratio* of the decision is that the exemption is confined to the income of the particular business and did not embrace the total income of the assessee. It is confined to the income of the particular business which was charged to tax under the Act of 1918 and not to any other distinct and separate business which did not fulfil the conditions laid down in s. 25(4) and which conditions must be satisfied before the exemption could be attracted. I have already said the observation about s. 10 was made only in the context of the facts of the case and to negative the submission made on behalf of the assessee.

Needless to state that I would have dutifully and respectfully founded myself on the above decision if the ratio of it was as suggested on behalf of the Revenue. But that ratio clearly is different as I have pointed out above. If the observations are read in the context of the submission and the line of argument followed on behalf of the assessee in that case, and they must be so read, if I may respectfully make the observation, there is nothing in that decision from which the Revenue can derive any support. The case is clearly distinguishable.

The other decision relied upon by Mr. Joshi was *Gopi Mohon and Sons v. Commr. of Inc.-tax, U.P. & C.P.*¹⁶ The facts in that Reference before the

Allahabad High Court were that a certain Hindu undivided family which was assessed in respect of its income from property became divided in the previous year relevant to the assessment year 1941-42. It was held that there was a partition in the family as from January 31, 1941. An application was made claiming relief under s. 25(3) and it was rejected. It was not in dispute that the Hindu undivided family was assessed under the Act of 1918 but the assessment was made only in respect of income of the property and not any business. The Tribunal also rejected the second appeal. That was on the ground (1) that s. 25(3) applied only to a case where tax was charged under the Indian Income-tax Act, 1918, on business, profession or vocation and did not apply to a case where tax was charged on income from property, and (2) that from the very nature of the case, it could not be said that there was any discontinuance of a business charged to tax under the Act of 1918. The High Court on a Reference approved of the decision of the Tribunal as perfectly correct. It was, however, urged at the hearing of the Reference that it was an anomalous position that while relief was granted in respect of a business none was granted in case of income from property. The argument solely based on an anomaly was rejected by the Court as ill-founded. Reliance was, however, placed on the following observations in the judgment at p. 223 of the report:

"...The method of computation of income from property has been laid down in Section 9, while that for the computation of income from business, profession or vocation has been described in Section 10. From this it is clear that the expression 'business, profession or vocation' used in Section 25(3) relates to that head of income, which has been dealt with in Section 10, and is quite distinct from the head of 'income from property', which has been mentioned in section 9."

It may be pointed out that there was no question of any income, profits and gains of a business in that case; nor any question of any property owned on account of any such business. It is also clear that the learned Judges regarded ss. 9 and 10 as dealing with the method of computation. True, the learned Judges have observed that "the expression 'business, profession or vocation' used in s. 25(3) relates to that head of income, which had been dealt with in s. 10" and is quite distinct from the head of income mentioned in s. 9. Now, I agree that exemption under s. 25(3) is in respect of income from business, but, with great respect, I am unable to agree that s. 25(3) relates to that head of income which has been dealt with in s. 10. On the facts which I have summarised the decision could not have been different. It will be seen that the position there was quite different and the decision is clearly distinguishable.

For the reasons I have given I would answer the question in the affirmative.

TENDOLKAR J. As my learned brother and I are not agreed as to the correct answer to the issue which we have re-framed, the case would be heard by one or more of the other Judges of the High Court as the Chief Justice may direct under the proviso to s. 66A of the Income-tax Act. Costs of the Reference before us will be costs in the Reference to be so tried.

The reference was accordingly heard by K. T. Desai J.

G. N. Joshi, with R. J. Joshi, for the Commissioner.

N. A. Palkhivala, with Sir Jamshedji Kanga and B. A. Palkhivala, for the respondent-assessee.

K. T. DESAI J. Messrs. Chugandas and Co. (Securities), Bombay, a registered firm, hereinafter referred to as "the assessee", was a dealer in securities. Securities constituted the stock-in-trade of its business. It received a sum of Rs. 4,13,992 as and by way of interest on securities during the accounting year 1946, the assessment year being 1947-48. The assessee firm was dissolved on June 30, 1947. It received a sum of Rs. 1,01,229 during the accounting period January 1, 1947, to June 30, 1947, the assessment year being 1948-49, as interest on securities. The business carried on by the assessee was an old business. It had paid tax in connection with that business under the provi-

sions of the Indian Income-tax Act, 1918. That business having continued, the assessee became entitled to the benefit of the provisions contained in s. 25(3) of the Indian Income-tax Act, 1922. A question whether the benefit conferred by s. 25(3) extended to interest received by the assessee as aforesaid. At the instance of the Commissioner of Income-tax, Bombay City, I, the following question was referred under s. 66(1) of the Indian Income-tax Act:

"Whether on the facts and circumstances of the case interest received by the assessee formed part of the assessee's business income for claiming relief under section 25(3) of the Indian Income-tax Act?"

After the reference was made, the Supreme Court gave its judgment in the case of *United Commercial Bank Ltd. v. Commr. of Inc.-tax*¹. The Supreme Court held that where securities are held by a person as part of his trading assets in the course of his business, income from securities was required to be shown under the head "Interest falling under s. 8 of the Income-tax Act, 1922, and not under the head "Fits and gains of business, profession or vocation" falling under s. 10. Having regard to the decision of the Supreme Court, when the reference came before Mr. Justice Tendolkar and Mr. Justice S. T. Desai, the question was re-framed in order to bring out the real point in dispute between the parties. The re-framed question is as follows:—

"Whether the assessee is entitled to the benefit of section 25(3) in respect of interest on securities?"

There was a difference of opinion between Mr. Justice Tendolkar and Mr. Justice S. T. Desai as regards the answer to be given to the aforesaid question. Mr. Justice Tendolkar was of the opinion that the assessee was entitled to the benefit of s. 25(3) in respect of the interest on securities which were held by him. Mr. Justice S. T. Desai was of the opinion that the assessee was not entitled to the benefit of s. 25(3). The matter has now come up for hearing on that question before the Commissioner of Income-tax, Bombay City, I.

The provisions of s. 25(3), which have given rise to the controversy, are as follows:—

"Where any business, profession or vocation on which tax was at any time chargeable under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), then, unless there has been a succession by virtue of which the provisions of section 4 have been rendered applicable no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the period preceding the amount payable on the basis of such assessment, a refund shall be made of the difference."

The applicant contends that when the legislature used the words "business, profession or vocation on which tax was at any time chargeable" in the provisions of the Indian Income-tax Act, 1918 it referred only to income under the head "Income derived from business" falling under s. 8 of the Indian Income-tax Act, 1918, and not to income under the head "Fits and gains of business, profession or vocation" falling under s. 10 of the said Act. It is further contended that when the legislature in the year 1922 used the words "no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance" it referred only to income, profits and gains liable to be shown under the head "Income derived from business" under s. 8 of the Indian Income-tax Act, 1922, and not to income, profits and gains liable to be shown under the head "Professional earnings" under the repealed

said Act and that those words now refer to the income, profits and gains liable to be shown under the head "Profits and gains of business, profession or vocation" under the present s. 10 of the said Act. It is further urged that when the legislature used the words "and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period", the legislature was only referring to what was liable to be shown under the heads "Business" and "Professional earnings" referred to in ss. 10 and 11 of the said Act as first enacted and that those words now refer to what is liable to be shown under the head "Profits and gains of business, profession and or vocation" under the present s. 10 of the said Act. It is further contended that when the legislature used the words "the income, profits and gains" in the sentence "Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment a refund shall be given on the difference", the legislature was referring only to the income, profits and gains liable to be shown under ss. 10 and 11 of the said Act as first enacted in the year 1922 and that those words now refer to what is liable to be shown under the present s. 10.

Having regard to the decision of the Supreme Court in the case reported in *United Commercial Bank Ltd. v. Commr. of Inc.-tax*, the present position in law is that where an assessee derives income, profits and gains from a business carried on by him, such income, profits and gains may have to be shown under various heads. If securities constitute the stock-in-trade of his business, interest received in connection with those securities would have to be shown separately under the head "Interest on securities" covered by s. 8 of the Act of 1922. If the business consisted of purchase and sale of houses, the income derived from such houses would have to be shown separately under the head "Income from property" under s. 9 of the Act of 1922. If shares of joint stock companies constitute the stock-in-trade of such business, the dividend income derived therefrom would have to be shown separately under the head "Income from other sources" under s. 12 as it now stands after the amendment made in the year 1955 and it is only the residue which may remain thereafter which would have to be shown under the head "Profits and gains of business, profession or vocation" covered by s. 10. Even under the Indian Income-tax Act of 1918, if an assessee derived income, profits and gains from a business carried on by him, he was under an obligation to show the interest received by him from securities which constituted the stock-in-trade of his business under the head "Interest on securities" covered by s. 7 of the Act of 1918. If purchase and sale of house property constituted the business of such assessee, then the income derived from house property was liable to be shown separately under the head "Income derived from house property" under s. 8 of the Act of 1918. Only the balance of income, profits and gains of such business remaining thereafter was liable to be shown under the head "Income derived from business" under s. 9 of the Act of 1918. It is contended on behalf of the assessee that when the legislature used the words "Where any business...on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918" in s. 25(3) it referred to the tax which might at any time have been charged under the Act of 1918 under any of the three heads referred to by me above in respect of the income, profits and gains of the business carried on by the assessee. It is further contended on behalf of the assessee that where such business is discontinued, no tax is payable in respect of the income, profits and gains of such business for the period between the end of the previous year and the date of such discontinuance which may have to be shown under each of the four heads referred to by me above under the Indian Income-tax Act, 1922. It is further contended by the assessee that the words "and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, pro-

fits and gains of the said period" also refer to the income, profits and gains of such business which are required to be shown under each of the aforesaid four heads under the Act of 1922. It is also contended that when the legislature used the words "Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given on the difference", the legislature was referring to the income, profits and gains of such business liable to be shown under each one of the aforesaid four heads under the Act of 1922.

In order to adjudge which of these rival contentions is correct, it is necessary to look fairly at the language used by the legislature in s. 25(3) itself. That section speaks of "any business... on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918". It is common ground that a business was not a unit of assessment under the Indian Income-tax Act of 1918. What the legislature intended to convey was any business, on the income, profits and gains whereof tax was at any time charged under the Indian Income-tax Act of 1918. Section 2(4) of the Indian Income-tax Act of 1922 lays down that unless there is anything repugnant in the subject or context, the expression "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The expression "business" in s. 25(3) can only refer to the activity which is styled business. What has to be discontinued is that activity before the section can apply. If what is to be discontinued is the activity business, the tax which is referred to in connection with that activity business must of necessity refer to the tax payable in connection with the income, profits and gains derived from that activity business irrespective of the head or heads under which such income, profits and gains are required to be shown under the provisions contained in the Indian Income-tax Act, 1918. The expression "business... on which tax was at any time charged" on a plain reading of the section must refer to the tax charged under any of the heads under which the income, profits and gains made as a result of such activity may have been entered. If such income, profits and gains included interest on securities which constituted the stock-in-trade of that business, the tax paid under the head "Interest on securities" would be covered. There is no warrant for confining the tax to only one head. When the legislature thereafter uses the words "no tax shall be payable in respect of the income, profits and gains", the legislature is referring to the tax otherwise payable in respect of the income, profits and gains derived from the activity business referred to earlier. The income, profits and gains of business here referred to do not refer exclusively to income, profits and gains liable to be shown under the head referred to in s. 10 of the Act of 1922. The intention of the legislature is to completely exempt the income, profits and gains resulting from the activity styled 'business' for the period referred to in the section. When the legislature uses the words "and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period", the legislature is referring to the totality of income, profits and gains in connection with the activity styled 'business' under that sub-section and not merely to the income, profits and gains liable to be shown under s. 10. When the legislature uses the further words "where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period", it refers to all the income, profits and gains made in connection with the activity styled business in that section. When the legislature uses the further words "if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference", the legislature there again is referring to all the income, profits and gains of the activity termed business in that section. It seems to be a far-fetched construction of that section to say that what the legislature intended

was not the totality of the income, profits and gains of the activity termed business but was intending what was liable only to be entered under the provisions contained in s. 10. The term 'business' for the purpose of discontinuance cannot have one meaning and the same term "business" for the purpose of tax cannot have another meaning.

Sub-section (3) of s. 25 was enacted in order to mitigate the effect of double taxation levied in respect of the income, profits and gains of one accounting year having regard to the changes made in the Income-tax law by the Act of 1922. Section 14(2) of the Act of 1918 provided as follows:—

"Subject to the conditions hereinbefore set out, there shall be levied in respect of the year beginning with the first day of April 1918, and in respect of each subsequent year, by collection in that year and subsequent adjustment as hereinafter provided income-tax upon every assessee in respect of his taxable income in that year at the rate specified in Schedule 1."

Under the aforesaid provisions the income, profits and gains for the accounting year 1921-22 were liable to be charged to tax in the assessment year 1921-22 under the Act of 1918.

There was a material alteration in the aforesaid scheme of taxation made by the consolidating and amending Indian Income-tax Act XI of 1922. Under the Act of 1922 the tax had to be paid in the current assessment year in respect of the income, profits and gains of the previous year; with the result that during the assessment year 1922-23 tax was liable to be paid once again under the Indian Income-tax Act, 1922, in respect of the income, profits and gains for the accounting year 1921-22.

The question that I have to consider relates to the extent of the relief granted by the legislature. There appears to be no warrant for giving a very truncated and artificial meaning to the expression "income, profits and gains" used in that section in connection with 'business'. When the legislature says that no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, the legislature intended to exempt from tax all income, profits and gains derived from the activity 'business'. When giving the exemption the legislature, in my view, did not contemplate or intend that the assessee would nevertheless have to pay tax in connection with that part of the income, profits and gains made in connection with the activity 'business' which may consist of income from securities in a case where securities constituted the stock-in-trade of that business. It could not possibly be the intention of the legislature in giving the exemption that tax was intended to be charged by the legislature under three out of the four different heads under which the income, profits and gains derived from business is liable to be shown under the provisions of the Indian Income-tax Act, 1922. When the legislature enacted that "the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period", the legislature did not intend that the income, profits and gains of that business for the previous year should remain unaltered to the extent that the same are shown under the head "Interest on securities", "Income from properties" and "Income from other sources" and that only the residue thereof shown under the head referred to in s. 10 alone should be substituted. When the legislature provided for an assessment in connection with such business to be made on the basis of the income, profits and gains of the period referred to in that sub-section, the legislature did not contemplate the assessment to be made only under the head referred to in s. 10. What is provided is that the assessment shall be made "on the basis of the income, profits and gains of the said period". There is no warrant for adding thereto the words "liable to be shown only under section 10".

Section 25(3) being part of s. 25, it would not be out of place to consider the sense in which the Legislature has used similar words in other parts of the same section. As the marginal note to that section shows, it deals with assess-

discontinued business. Section 25(1) of the

Where any business, profession or vocation to which such assessment is applicable, is discontinued in any year, an assessment may be made on the basis of the income, profits or gains of the period between the end of the year and the date of such discontinuance in addition to the assessment, on the basis of the income, profits or gains of the previous year."

When the Indian Income-tax Act, 1922, was first passed in 1922, it contained the provision "Where any business, profession or vocation commenced after March 1922 is discontinued etc." By Act XI of 1924 for "commenced after the 31st day of March 1922" the words "on or after the 1st day of April 1922" were substituted. By Act XI of 1944 these words were substituted by the words "to which sub-section (3) applies" which now appear. This sub-section provides for assessment on the year of discontinuance itself on the basis of the income, profits or gains of the period between the end of the previous year and the date of discontinuance. Mr. Joshi, the learned counsel for the assessee, submitted that it seemed as if the expression "assessment" in this sub-section meant the assessment being made in respect of the totality of the income, profits and gains made in connection with the discontinued business referred to therein. He, however, stated that the language was different, and that in the context of the language used in this sub-section the expression "income, profits and gains" bore a different meaning. He stated that such difference arose by reason of the use by the legislature of the words "assessment may be made" contained in s. 25(1). His argument was pointed out that the legislature in sub-section (3) provides for the making of an assessment when the option given thereby is exercised by the assessee and that a difference in result is not warranted in the alternative argued that even so far as s. 25(1) is concerned, when dealing with discontinued business to the assessment made under the head referred to in s. 10 of the Act of 1922. In this connection it is not proper to give a truncated meaning to the expression "assessment" when the legislature says that assessment may be made on the basis of the income, profits and gains of the period referred to in the assessment has to be made in connection with the income, profits and gains of a business, you have to assess the totality of the income, profits and gains in connection with that business under whatever head the business is to be entered having regard to the provisions contained in the Act of 1922.

Section 25(1) of the Indian Income-tax Act, 1922, merely provides for assessment in the year of assessment itself. The effect of this section was observed in the case of *Commr. of Inc.-tax, Madras v. K. Shrinivasan & Co.* observed at p. 97 that all that the section authorises the Income-tax Officer to do is that it gives him an option to make a premature assessment of the income, profits and gains earned up to the date of discontinuance in the year of assessment itself instead of in the usual financial year. This section does not provide for splitting up of the assessment in two different years. It was observed that in the case of a discontinued business, the income, profits and gains in connection with that business have to be assessed in the year of discontinuance itself, and the income, profits and gains are liable to be shown under the head referred to in s. 10 of the Act in the year of discontinuance itself, and any interest on securities earned in connection with that business where securities constituted the stock-in-trade of that business on securities is to be assessed separately in a subsequent assessment. In my view, such splitting up was never intended or contemplated by the legislature when the Act was passed, and it is not possible to say that when the legi-

dering the question of assessment under s. 25(1) a part of the income of the discontinued business was to be assessed in one year and another part in another year. In my view, the alternative argument advanced by Mr. Joshi in connection with s. 25(1) viz., that it refers only to an assessment in connection with the head referred to in s. 10 is without any merit and without any foundation.

I shall now turn to s. 25(2). That section provides:

"25.(2) Any person discontinuing any such business, profession or vocation shall give to the Income-tax Officer notice of such discontinuance within fifteen days thereof, and, where any person fails to give the notice required by this sub-section, the Income-tax Officer may direct that a sum shall be recovered from him by way of penalty not exceeding the amount of tax subsequently assessed on him in respect of any income, profits or gains of the business, profession or vocation up to the date of its discontinuance."

This sub-section deals with the question of the imposition of the penalty, and the words "not exceeding the amount of tax subsequently assessed on him in respect of any income, profits or gains of the business, profession or vocation up to the date of its discontinuance" refer to the assessment made in respect of the totality of the income, profits or gains made in connection with the discontinued business, and not to that part of it which is liable to be entered under the head referred to in s. 10.

I will now turn to s. 25(4) as it was enacted originally by the Act of 1922. That sub-section provided as under:—

"25.(4) Where an assessment is to be made under sub-section (1) or sub-section (3), the Income-tax Officer may serve on the person whose income, profits and gains are to be assessed, or, in the case of a firm, on any person who was a member of such firm at the time of its discontinuance, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

The assessment referred to in sub-s. (4) is the assessment which is required to be made under sub-s. (1) or sub-s. (3). The assessment which is required to be made under sub-s. (1) or sub-s. (3) is the assessment in respect of the totality of the income, profits or gains made in connection with the activity business. The original sub-s. (4) of s. 25 has been renumbered as sub-s. (6) of s. 25 and the words "sub-section (1) or sub-section (3)" therein have been substituted by the words "sub-section (1), sub-section (3) or sub-section (4)". I may also refer to s. 26 of the Act of 1922. Section 26 is a section which is co-related to s. 25 and it forms an integral part of the scheme of the Act. The Privy Council recognised this fact in the case of *Commr. of Inc.-tax, Bombay v. Polson*³. The Privy Council there observed as follows (p. 741):—

"...Sections 25 and 26 no doubt form part of a single scheme and their interaction must not be ignored."

Section 26 as enacted in the year 1922 ran as follows:—

"Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted, or on the person engaged in the business, profession or vocation, as the case may be, at the time of the making of the assessment."

The part material for the purpose of the present case is as follows:—

"...Where any person has succeeded to any business..., the assessment shall be made...on the person engaged in the business...at the time of the making of the assessment."

Now, the word 'assessment' here clearly refers to the assessment made in connection with the totality of the income, profits and gains made in connection with such business. It does not refer merely to the head referred to in s. 10.

Mr. Joshi submitted that the expression "assessment" even here in connection with business referred only to the assessment that may be made under the head referred to in s. 10. In my view, it was never the intention of the legislature in enacting s. 26 that where there is a case of succession, the person who succeeds should be made liable only in respect of that part of the income, profits and gains of the business which is liable to be included under the head referred to in s. 10 and that as regards the rest, the person who has been succeeded would be assessed. In my view, this theory of assessment in compartments sought to be imported in the provisions of ss. 25 and 26 is without any basis or foundation. As regards s. 26 it has been observed by the Privy Council in the case of the *Indian Iron & Steel Co., Ltd. v. Commr. of Inc.-tax, Bengal*⁴, that s. 26 is not concerned with the computation of tax, but with the person upon whom the liability is imposed. In my view, reading s. 25 as a whole the words "income, profits and gains" appearing in sub-s. (3) refer to the income, profits and gains made in connection with business under whatever head the same may have to be shown.

There is another aspect of the matter to which I will now advert. Under the Act of 1918 as well as under the Act of 1922, various heads of income, profits and gains are mentioned. Section 5 of the Act of 1918 provided as follows:—

"Save as otherwise provided by this Act, the following classes of income shall be chargeable to income-tax in the manner hereinafter appearing namely,

- (i) Salaries;
- (ii) Interest on securities;
- (iii) Income derived from house property;
- (iv) Income derived from business;
- (v) Professional earnings;
- (vi) Income derived from other sources."

Section 6 of the Act of 1922 when first enacted provided as follows:—

"Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely:—

- (i) Salaries;
- (ii) Interest on securities;
- (iii) Property;
- (iv) Business;
- (v) Professional earnings;
- (vi) Other sources."

Section 6 of the Indian Income-tax Act, 1922, as it now stands provides as under:—

"Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely:—

- (i) Salaries;
- (ii) Interest on securities;
- (iii) Income from property;
- (iv) Profits and gains of business, profession or vocation;
- (v) Income from other sources;
- (vi) Capital gains."

It is clear from the above that the nomenclature of some of the heads has changed from time to time and that the legislature by legislation has amalgamated two heads into one. A scrutiny of some of the sections of the Act as they existed from time to time will show that what was included in some of the heads has changed. By an amendment made by s. 9 of the Finance Act, 1955, with effect from April 1, 1955, the head "Income from other sources" covered by s. 12 is to include dividends. The result is that in the case of a business where shares of joint stock companies constituted the stock-in-trade of the business, dividends received in respect of those shares, which were at one time liable to be shown under the head "Profits and gains of business, profes-

sion or vocation" referred to in s. 10 would now, after the amendment, have to be shown under the head "Income from other sources" referred to in s. 12. In this connection, I may refer to a decision of a division bench of this Court (*Commr. of Inc.-tax v. Ahmuty and Co., Ltd.*⁵). In that case, Chagla C.J. and Tendolkar J. held that in the case of an assessee company which was a dealer in shares which constituted the stock-in-trade of the business of the company, the dividend income received by the company was income from business chargeable under s. 10. This decision was given before the amendment of 1955. In view of the amendment made in the year 1955, this dividend income would now have to be shown under the head "other sources" covered by s. 12. Section 8 of the Act of 1918 provided that under the head "Income derived from house property" the bona fide annual value of any house property of which the assessee was the owner was required to be shown subject to certain allowances.

When we come to the Act of 1922 as first enacted s. 9(1) provided as follows:

"9. (1) The tax shall be payable by an assessee under the head 'Property' in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner other than such portions of such property as he may occupy for the purposes of his business..."

The present s. 9 provides as follows:—

"9. (1) The tax shall be payable by an assessee under the head 'Income from property' in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax..."

These different provisions in connection with property also indicate that what was liable to be included under a head has varied. Some of the heads do not include all that would ordinarily be covered by the words used in describing the head. For instance, under the head "Salaries" referred to in the present s. 7 of the Act of 1922 the salary received by a servant of a foreign Government is not liable to be shown under this head. Similarly as regards the head "Interest on securities", the interest on securities issued by a foreign Government is not liable to be shown under that head. In my view, when the legislature enacted s. 25 and legislated in connection with the discontinuance of a business and provided for certain reliefs in connection with the income, profits and gains of such business, the legislature was not contemplating any one particular head of income, profits and gains with its varying nomenclature and varying content. In this connection it would be pertinent to note that where the legislature intended to refer to a particular head of income, it has been careful enough to refer to the same by describing it as the "head", by using the specific words by which the head is known with the first letter thereof in capital and by putting those words into inverted commas so that no confusion may arise as regards the intention of the legislature.

I will refer in this connection to the provisions contained in the Act of 1922 as first enacted. Section 18 as first enacted provided as follows:—

"18. (1) Income-tax shall, unless otherwise prescribed in the case of any security of the Government of India, be leviable in advance by deduction at the time of payment in respect of income chargeable under the following heads:—

(i) 'Salaries' and

(ii) 'Interest on securities'.

(2) Any person responsible for paying any income chargeable under the head 'Salaries' shall, at the time of payment, deduct income-tax on the amount payable at the rate applicable to the estimated income of the assessee under this head..."

Section 21(a) provided as follows:—

"21. (a) the name and, so far as it is known, the address of every person who was receiving on the said 31st day of March, or has received during the year ending on that date, from the authority, company, body, association or private employer, as the case

may be, any income chargeable under the head 'Salaries' of such amount prescribed..."

Sub-section (5) of s. 46 provided as follows:—

"46. (5) If any assessee is in receipt of any income chargeable under the head 'Salaries', the Income-tax Officer may require any person paying the same to furnish a statement of the income so received. A reference may also be made in this connection to ss. 7 to 12 of the Act of 1922. Numerous such instances can be cited from the Act as amended. If we examine the provisions contained in s. 25(3) we have the words 'business, profession or vocation'. Under the Act of 1918 the word 'business' itself did not describe any head. The head under s. 9 of the Act of 1918 was 'Income derived from business'. The words 'profession or vocation' appearing in sub-s. (3) did not constitute the language of the head under s. 9 of the Act of 1918. The head under s. 10 of the Act of 1918 was 'Profits and gains of business, profession or vocation', though it included profits of any vocation. When the Act of 1922 was first enacted the word 'Business' represented the language of the head covered by s. 10. As regards the words 'profession or vocation' they did not represent any head under the Act of 1918 as enacted. The head under s. 11 as originally enacted was 'Profits and gains of business, profession or vocation'. As a result of the legislative amendments the head 'Profits and gains of business, profession or vocation' has now been completely abolished. By the amending Act of 1922 the head under s. 10 has been altered to 'Profits and gains of business, profession or vocation'. There is a temptation to equate the words 'business, profession or vocation' with the head 'Profits and gains of business, profession or vocation' now appearing in s. 10 of the Indian Income-tax Act after the amendment made in 1939, because the words 'business, profession or vocation' appear in juxtaposition, but when these words were used in the Act of 1922 at the time when that section was first enacted, the head like 'profits and gains of business, profession or vocation' when the legislature used the words 'business, profession or vocation' in s. 25(3) and referred to the income profits and gains thereof, it was referring to any particular head of income. If the legislature intended to refer to any particular head or heads, it would have done so in the language for the purpose as it has done in various other provisions of the Act."

In order to visualise the effect of what Mr. Joshi contends in the case of a company whose sole business was to deal in shares, let us suppose that the company constituted its stock-in-trade. If, whilst the Act of 1918 was in force, the company's assessable income for any year was computed at Rs. 15 lacs, and tax had been paid thereon and if the said sum of Rs. 15 lacs was computed by showing Rs. 24 lacs under the head "Interest on securities" and Rs. 9 lacs as loss under the head "Income derived from other sources", would it be possible to say that in respect of the business of the company tax has been charged under the Act of 1918 within the meaning of the Act of 1922? It would be an unrealistic and far fetched attempt to say that the company carried on business on which no tax was payable. In my view, it could not have been the intention of the legislature to give relief to such an assessee merely because its profits have been shown under a head other than that covered by s. 9 of the Act of 1918. Illustration: If the business of an assessee company consisted in the purchase and sale of shares of joint stock companies which constituted its stock-in-trade, under the present s. 12 the income from the dividends would be chargeable under the head "Income from other sources". That income, if it was chargeable, would be liable to be shown under the head "Profits and gains of business, profession or vocation" referred to in s. 10. If the assessee carried on such business under the Act of 1918 and the income was chargeable, could it be said that the assessee is not entitled to the benefit of s. 25(3) in respect of income from dividends merely because it is to be shown under s. 12 instead of under s. 10? In my view, the answer is no. When it referred to income, profits and gains in s. 25(3) in

advanced that a landlord who lives merely on rental income should be deemed to be exercising a vocation. In dealing with that argument the learned judges observed that the method of computation of income from property had been laid down in s. 9, while that for the computation of income from business, profession or vocation had been described in s. 10. They further observed as follows (p. 223) :—

“...From this it is clear that the expression ‘business, profession or vocation’ used in Section 25(3) relates to that head of income, which has been dealt with in Section 10, and is quite distinct from the head of ‘income from property,’ which has been mentioned in Section 9.”

To the extent that the judgment contains observations which are contrary to the view I have taken, with respect, I do not agree with the same.

The facts in respect of the case reported in *Ambalal Himatlal v. Commr. of Inc.-tax*, were the following: The assessee, a Hindu undivided family, carried on three separate businesses, viz. (1) money-lending, (2) running a ginning factory and (3) a share business. That family was disrupted in 1943 and the businesses were divided amongst its members. It was found that only in respect of the money-lending business the Hindu undivided family had paid tax under the Act of 1918. The assessee claimed the benefit of s. 25(4) in respect of all the businesses carried on by it up to the date of partition. The learned judges held that the benefit accrued only in respect of the business in connection wherewith tax had been paid viz., the money-lending business. In the course of his judgment Chagla C.J. observes as follows (p. 286) :—

“...Therefore, the whole emphasis in sub-section (4) is not upon the assessee so much as upon the particular business, profession or vocation which was carried on and which was subjected to tax under the Act of 1918. One might almost say that the relief contemplated to be given was not to the assessee so much as to the particular business...”

There are observations in that case which go to show that the learned judges considered that the legislature in s. 25(4) contemplated profits and gains of business, profession or vocation contemplated by s. 10. Mr. Joshi very strongly relied upon the words in that judgment which appear at p. 285 where Chagla C.J. observes:

“...What the Legislature intended by using the expression ‘income, profits and gains’ was the profits and gains of the business or profession contemplated by Section 10 and

large majority of business, the profits and gains of such business, would be liable to be included under the head "Profits and gains of business, profession or vocation" covered by s. 10. It is only in those cases where securities constitute the stock-in-trade of a business that the question arises of including the interest on securities which forms part of the profits of such business under the head "interest on securities" referred to in s. 8, and it is only in cases where the business consists of purchases and sale of houses that the question would arise of including the income from such houses which forms part of the profits of such business under the head "Income from property" referred to in s. 9 of the Act. The learned judges without any argument might well have thought that all profits and gains of business were liable to be shown under s. 10. In the absence of any argument as to the heads under which profits and gains of a business may have to be shown this judgment cannot be regarded as an authority for the preposition for which Mr. Joshi is contending. I cannot regard that judgment as a considered expression of an opinion on the matter with which I have to deal and I cannot regard it as having any binding authority on me, on the point which I have to decide.

In the course of the arguments advanced before me, there was a controversy between counsel as regards the section or sections which constituted the charging section or sections under the Act of 1918 and under the Act of 1922 as first enacted. There is no necessity for me to give any decision on that question in the present reference. Mr. Joshi had argued that in s. 25(3) the use of the words "on which tax was at any time charged" when read along with the provisions contained in the Indian Income-tax Act, 1918, indicated that what the legislature was referring to was the class of income specified in s. 9 of the Indian Income-tax Act of 1918. He urged that s. 5 of the Act of 1918 provided for various classes of income therein set out which were charged to income-tax and that the words "tax...charged under the provisions of the Indian Income-tax Act, 1918" referred to the class of income that was chargeable to income-tax under the provisions contained in the aforesaid s. 5. Mr. Joshi therefrom sought to deduce that the tax charged that is referred to in s. 25(3) is the one charged in respect of the classes of income falling only under the heads "Income derived from business" and "Professional earnings". There is no reason why the tax charged should not refer to other classes of income referred to in the aforesaid s. 5, if such income was derived from the activity business.

In the result, I answer the question as reframed in the affirmative.

Out of the three Judges including myself, who have dealt with this reference, Mr. Justice S. T. Desai and myself have answered the question in the affirmative whilst Mr. Justice Tendolkar has answered the question in the negative. The decision of the Court, having regard to the provisions of s. 66A of the Indian Income-tax Act, 1922, is that the question is answered in the affirmative.

The applicant to pay the costs. Costs to include the costs of the hearing before Mr. Justice Tendolkar and Mr. Justice S. T. Desai.

Answer accordingly.

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice V. S. Desai.

STATE v. DAHYALAL DALPATRAM.*

Indian Penal Code (XLV of 1860), Secs. 409, 405—Accused collecting amount of fine from landholder in his capacity as public servant—Accused misappropriating such amount—State not entitled in law to enforce fine—Whether accused had committed offence under s. 409.

Section 409 of the Indian Penal Code, 1860, merely requires that there must be entrustment of property to a public servant and breach of the trust committed by him in respect of the property entrusted. It is not necessary under the section that the property in respect of which the offence is committed must be shown to be the property of the State. Therefore, where the State is not entitled in law to collect an amount from the tax-payer, and the amount is received by a person acting as a public servant in exercise of his duties, he holds the amount for and on behalf of the State and in his hand it becomes part of the public fund and if he misappropriates that amount, he commits the offence of criminal breach of trust.

Section 405 of the Indian Penal Code, 1860, does not contemplate that the property in respect of which an offence of criminal breach of trust may be committed must be property which belonged to the complainant. Provided there is entrustment of property, it matters little whether the complainant on whose behalf the property is entrusted is the owner thereof or not.

The accused as a Talati employed under the revenue department was invested with authority to collect land revenue and fines ordered to be recovered under the Land Revenue Code from landholders. The accused pursuant to an order of the Mamlatdar collected a certain amount of fine from a landholder. The accused misappropriated this amount. It was found that the alleged liability of the landholder for the amount collected by the accused could not have been lawfully enforced by the State by revenue or other lawful process. On the question whether the accused had committed an offence punishable under s. 409 of the Indian Penal Code:—

Held, that as the accused was a public servant and had received in his capacity as a public servant the amount of fine, he was entrusted with that amount and he was bound to pay the same in the Government Treasury or to account for the same under the rules made in that behalf by the Land Revenue Code and as the accused had misappropriated the amount entrusted to him, he had committed criminal breach of trust in respect thereof.

In re Ram Soonder Poddar¹ followed.

Surendra Pal Singh v. State², Emperor v. John McIver³ and Lake v. Simmons⁴, referred to.

THE facts appear in the judgment.

Y. V. Chandrachud, Government Pleader, for the State.

N. R. Shah (appointed), for the accused.

SHAH J. This is an appeal by the State of Bombay against an order of acquittal passed by the Additional Sessions Judge, Mehsana, acquitting in appeal the accused Dahyalal Dalpatram, who was convicted by the Judicial Magistrate, First Class, Radhanpur, of an offence under s. 409 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two months and to pay a fine of Rs. 200.

The accused Dahyalal was employed in the Revenue Department of the State of Bombay as a Talati of the Piparala Seza which consists of four villages—

*Decided, January 5, 1959. Criminal Appeal No. 1186 of 1958, against the order of acquittal passed by M. M. Hakim, Additional Sessions Judge at Mehsana, in Criminal Appeal No. 35 of 1958, setting aside the order of conviction and sentence passed by D. A. Chhaya, Judicial

Magistrate, First Class, Radhanpur, in Criminal Case No. 13 of 1957.

1 (1878) 2 C.L.R. 515.

2 [1957] A.I.R. All 122.

3 [1936] A.I.R. Mad. 353, F.B.

4 [1927] A.C. 487.

Piparala, Roza, Madhatra and Gramdi in the Santalpur taluka of Radhanpur Sub-Division, District Banaskantha. One Vagha Ganga had unauthorisedly cultivated land near the village pond of Roza in the years 1951-52 and 1952-53. An enquiry was started by the Mamlatdar of Santalpur in that behalf and the Mamlatdar directed the accused to recover from Vagha Ganga Rs. 4 as fine for each year for unauthorised cultivation and Re. 1-12-0 as assessment. In enforcement of the order of the Mamlatdar, the accused recovered from Vagha Ganga Rs. 13-9-0 sometime between May 18, 1955, and July 1955, but he did not credit the amount in the revenue account. The accused was transferred to another village in the month of July 1955 and one Ganesh was appointed Talati of Piparala Seza. Ganesh inspected the revenue accounts and found that Vagha Ganga was shown as a debtor for the amount directed to be recovered from him as fine and assessment, and he, accordingly, called upon Vagha Ganga to pay the amount. Vagha Ganga appeared before Ganesh and showed him a receipt issued by the accused Dahyalal acknowledging receipt of Rs. 13-9-0 from Vagha Ganga. Thereafter an enquiry was started against the accused, and in the course of the enquiry the accused made two statements before the Prant Officer, Radhanpur. In his first statement, dated May 1, 1956, the accused told the Prant Officer that he had given the receipt for Rs. 13-9-0 to Vagha Ganga in acknowledgment of receipt of the amount, and that the amount was not credited in the Government Treasury nor was it credited in the Government accounts and it had remained with him "due to oversight" but he had not intentionally committed any default. In his reply to the notice issued to him, the accused informed the Mamlatdar that the amount which was recovered by him from Vagha Ganga was not recovered by him as "Government dues," that after he had recovered that amount from Vagha Ganga he had returned the same to the latter and that he had not misappropriated the amount and that he had obtained a receipt from Vagha Ganga for repayment of the amount. The accused was, thereafter, charged before the Judicial Magistrate, First Class, Radhanpur, for criminal breach of trust in respect of the amount of Rs. 13-9-0.

Before the learned Magistrate the accused contended that the State of Bombay was not entitled to recover from the cultivators of Jahagirdari lands assessment or fine for unauthorised cultivation and that the Jahagirdar of the village was entitled to recover the same till the Jahagir Abolition Act was brought into force on August 1, 1954, and that one Viramji Harbhanji Jahagirdar of the village Roza had asked him to recover the amount from Vagha Ganga and he had recovered the same from Vagha Ganga and had passed a receipt and subsequently the amount was returned to Vagha Ganga who paid over the same to the Jahagirdar and, therefore, he—the accused—had not committed any offence.

The learned trial Magistrate held that the accused had recovered Rs. 13-9-0 from Vagha Ganga and had misappropriated the amount, that the State of Bombay was entitled to recover the amount and that the story of the accused that he had returned the amount to Vagha Ganga was untrue. He, accordingly, convicted the accused of the offence charged against him.

Against the order of conviction an appeal was preferred by the accused to the Court of Session of Mehsana at Palanpur. The learned Additional Sessions Judge held on the evidence that some time before the month of July 1955 the accused had collected an amount of Rs. 13-9-0 from Vagha Ganga in enforcement of the order of the Mamlatdar, dated November 8, 1954, and that the amount was not credited by the accused in the revenue account maintained by him. But in the view of the learned Judge as the amount was not due from Vagha Ganga to the State of Bombay, by appropriating the same the accused did not commit an offence of criminal breach of trust even though, in his view, the defence of the accused that the amount had been returned to Vagha Ganga and the latter had paid it over to the Jahagirdar was not true. The learned Judge observed in the course of his judgment:

"...it must be held that when the accused recovered the amount from Vagha, Vagha was not liable to pay any amount to the Government. It is thus clear that the accused had recovered the amount from Vagha by misrepresenting the facts to him and the accused thus can be said to have committed the offence of cheating punishable under section 420 of the I.P. Code. The accused, however, cannot by any stretch of imagination be held to have committed the offence punishable under section 409 of the I.P. Code as he had not recovered any dues belonging to the government and as such he cannot be said to have been entrusted with the amount in his capacity as a public servant", and on that view he acquitted the accused. Against the order of acquittal the State of Bombay has preferred this appeal.

There is little dispute as to the facts found by the Courts below. That the accused was a Talati of Piparala Seza in 1954-55 and as such a public servant is not denied. He has also admitted that he had recovered Rs. 13-9-0 from Vagha Ganga in enforcement of the order of the Mamlatdar, dated November 8, 1954. It is also undisputed that this amount is not credited in the accounts maintained by the accused. That the amount of Rs. 13-9-0 was collected by the accused in his capacity as the Talati, i.e. as a public servant employed in the revenue department, is also undisputed. The trial Magistrate found that the accused had not returned the amount of Rs. 13-9-0 to Vagha Ganga and that the receipt, exh. 5/1, was a fabricated document. The Additional Sessions Judge agreed with that view, and no substantial argument has been advanced before us which may justify us in taking a different view on that question. The learned Judge has pointed out that if the accused had returned the amount of Rs. 13-9-0 to Vagha Ganga, there was no reason why he should not have called upon Vagha Ganga to return the receipt, which had already been issued by him to Vagha Ganga. The receipt exh. 21 on which reliance is placed by the accused does not bear the thumb mark of Vagha Ganga. He disbelieved the evidence of Viramji Harbanji that the amount of Rs. 13-9-0 was paid to him by Vagha Ganga. The amount is not shown as credited by Viramji in his books of account, and except the bare word of Viramji, there is no other evidence which supports that case. We, therefore, agree with the view of the learned Additional Sessions Judge that the amount of Rs. 13-9-0 was not returned by the accused to Vagha Ganga and was appropriated by him. The question which then falls to be determined is whether in appropriating the amount of Rs. 13-9-0 recovered in enforcement of the order of the Mamlatdar to himself the accused was guilty of the offence of criminal breach of trust.

In the view of the learned Additional Sessions Judge, the State of Bombay was not entitled to recover this amount from Vagha Ganga; and in support of that view he has relied upon exh. 10/5, which is a letter addressed by the Assistant Secretary to the Government of Bombay, Political and Services Department, to all Collectors in the Northern Division. That letter recites that for the Jagir villages in the Banaskantha district the Jahagirdars not having executed any agreement (relinquishing their interest), the orders treating properties like rivers, river-beds, mountains, etc., situated in the village of the Jahagirdars as State property "had no legal basis", and that specific provision in that behalf was made in the Bombay Merged Territories and Merged Areas (Jagirs Abolition) Act, 1953, and that in the circumstances the orders issued by the Government of Bombay by letters dated February 17, 1953, and August 5, 1953, should be treated as cancelled and that the question of recovering the income, if any, which the Jahagirdars may have realised from the said properties from the date of merger till the issue of the orders did not arise. It appears from this letter that the Government was advised that until the enactment of the Bombay Merged Territories and Merged Areas (Jagirs Abolition) Act, 1953, the State had no right to recover income from properties like rivers, river-beds and mountains situate in the villages of the Jagirdars in the Banaskantha district: and intimation in that behalf was given to the Collectors and to the Mamlatdars. It may, therefore, be assumed that the State

of Bombay had no right to recover assessment and fine from Vagha Ganga for unauthorised cultivation of land near the village pond of Roza.

The Additional Sessions Judge thought that, because the State was not entitled to enforce liability for recovering the fine and assessment in respect of the land, the accused had not committed an offence of criminal breach of trust in appropriating the amount recovered in enforcement of the order of the Mamlatdar, dated November 8, 1954, and that if at all, the accused may have committed an offence under s. 420, Indian Penal Code. But it was not the case of the prosecution nor of the defence that the accused had by a false representation persuaded Vagha Ganga to pay him the amount of Rs. 13-9-0. It was the case of the accused that he had recovered that amount in his capacity as Talati of the village Roza and that he issued a receipt in that behalf to Vagha Ganga. It was not even suggested that in recovering the amount from Vagha Ganga the accused was not acting as a public servant: and there is a finding by the Courts below that the amount was recovered by the accused in his capacity as a public servant. Does the fact that the alleged liability for the amount collected by the accused could not have been lawfully enforced by the State by revenue or other lawful process make any difference as to the consequence of appropriation of the amount collected by him? The learned Additional Sessions Judge was of the view that it did. In his view, the amount which was collected by the accused did not belong to the State and, consequently, it could not be regarded as entrusted to the accused. In para. 5 of this judgment he observed:

"The Talati was, however, not recovering the amount from Vagha which belonged to the Government and as such it cannot be said that the accused was entrusted with the funds which belonged to the Government or over which he had dominion or control in his capacity as a public servant;"

and in support of that view he relied upon a judgment of the Allahabad High Court reported in *Surendra Pal Singh v. State*¹.

We are unable to agree with the learned Judge. Section 405 of the Indian Penal Code defines the offence of criminal breach of trust, and in so far as it is material it states:

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property,.... commits 'criminal breach of trust'."

The accused as a Talati employed in the revenue department was invested with authority to collect land revenue and fines ordered to be recovered under the Land Revenue Code from landholders. When any amount is collected as a tax or fine by the accused as a Talati from a landholder, the money collected by him becomes public fund and the accused becomes entrusted with that fund. If liability for payment of any amount was lawfully enforceable against a landholder, and the amount was collected by the accused as a Talati, it is undisputed that when the amount reached his hand he became entrusted with that amount. When the accused collected the amount as tax alleged to be due by a landholder, though the liability whereof could not be enforced according to law, could it be said that he was then entrusted with the money? On this question the Allahabad High Court appears to have taken the view that a public servant collecting money claiming that it was due to the State but which in fact was not due to the State could not be regarded as entrusted with the money collected by him. But evidently s. 405 of the Indian Penal Code does not contemplate that the property in respect of which an offence of criminal breach of trust may be committed must be property which belonged to the complainant. Provided there is entrustment of property, it matters little whether the complainant on whose behalf the property is entrusted is the owner thereof or not. If authority be needed for that proposition, there is an old judgment of the Calcutta High Court in which it was held that s. 409 of the Indian Penal Code does

not require that property in respect of which criminal breach of trust is committed should be that of Government; it should have been entrusted to a public servant in that capacity (see *In re. Ram Soonder Poddar*²). The accused being a public servant and having received in his capacity as a public servant an amount of Rs. 13-9-0 from Vagha Ganga, in our judgment, he was entrusted with that amount and he was bound to pay the same in the Government Treasury or to account for the same under the rules made in that behalf under the Land Revenue Code. The accused having misappropriated the amount entrusted to him, it must be held that he has committed criminal breach of trust in respect thereof.

In *Surendra Pal Singh v. The State* it appears that the accused, who was an employee of the revenue department of Uttar Pradesh, collected Rs. 596-14-0 from certain cultivators as canal dues when only an amount of Rs. 398-4-6 was due from them. On the allegation that out of the amount collected by him the accused credited to the State Rs. 398-4-6 and appropriated the balance to himself, the accused was prosecuted for the offence of criminal breach of trust. It was observed in that case by the High Court that the balance of Rs. 198-9-6 which was appropriated by the accused to himself was never due to the State and it was, therefore, not the property of the State at any stage, and that when the accused realised that sum of money it did not become State property nor did the accused become its trustee on behalf of the State. It was also observed that when the amount was handed over by the cultivators to the accused he could not become the trustee of the money on behalf of the cultivators because the cultivators had purported to surrender all their rights in the money, their intention being that the money should go to the State and it was in pursuance of that intention and for its fulfilment that they handed over the money to the accused and, therefore, the money was not held by the accused as a trustee on behalf of the cultivators.

But the assumption that before an offence under s. 409 can be committed by an accused person the property in respect of which the offence is committed must be shown to be the property of the State does not, in our judgment, appear to be warranted by the plain words used in that section. The law merely requires that there must be entrustment of property to a public servant, or banker, merchant or agent, and breach of the trust committed by him in respect of the property entrusted. Even if the State was not entitled in law to collect the amount from the tax-payer, when the amount was received by the accused acting as a public servant in exercise of his duties, he held the amount for and on behalf of the State and in his hand it became part of the public fund and when he misappropriated that amount, in our judgment, he committed the offence of criminal breach of trust.

The decision in *Emperor v. John McIver*³, on which reliance was placed by Mr. Shah, has, in our judgment, no bearing on this question. In that case a charge was made against the person accused for offences under ss. 406 and 420 of the Indian Penal Code. Thereafter the accused compounded with the complainant for the offence under s. 420 and the Court acquitted the accused. An application in revision was filed to the High Court and the High Court directed a trial of the accused for the offence under s. 406, Indian Penal Code. A contention was then raised at the trial for the offence under s. 406, Indian Penal Code, that by virtue of the rule of *autrefois acquit* the accused could not be tried again on the same facts in respect of which there was outstanding an order of acquittal, and the matter was ultimately placed before a full bench of the Madras High Court. Mr. Justice Cornish and Mr. Justice Mockett held that the accused was entitled to the benefit of the rule of *autrefois acquit* because he had been acquitted of a charge under s. 420 of the Indian Penal Code which was raised against him on the identical facts on which the charge under s. 406 was sought to be pressed against him. Mr. Justice Lakshmana Rao disagreed with that view, but having regard to the majority decision, the accused was

ordered to be acquitted. But in that case the Court was not called upon to decide the question whether a person who as an agent had received money on behalf of his principal to recover which the principal could not have resorted to legal process and had misappropriated the same can be regarded as having committed an offence of criminal breach of trust. Nor did this question fall to be determined in *Lake v. Simmons*⁴, which was relied upon by Mr. Shah for the accused. That case was decided upon the interpretation of a policy of insurance. The view expressed by their Lordships was that loss of property by deception was not "loss by theft or dishonesty committed by a customer or broker" within the meaning of the clause contained in the policy.

In our view, the accused having received the amount in his capacity as a Talati from Vagha Ganga in satisfaction of an alleged liability of the latter to pay assessment and fine, the accused committed the offence of criminal breach of trust when he misappropriated that amount.

[The rest of the judgment is not material to this report.]

Appeal allowed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Kotval and Mr. Justice V. S. Desai.

BIDI LEAVES & TOBACCO MERCHANTS ASSOCIATION v. THE STATE OF BOMBAY.*

Minimum Wages Act (XI of 1948), Secs. 5(2), 5(1)(b), 2(h), 3, 4, 20—Notification issued under Act revising minimum rates of wages in respect of employment in tobacco manufactory in Vidharbha—Validity of provisions of notification—Power conferred on State Government to fix minimum rate of wage, how far can interfere with terms of contract between employer and employee—Whether Authority constituted under s. 20 can deal with every kind of wage dispute between employer and employee—Government whether can constitute tribunal to decide disputes relating to ascertainment and fixation of rate of wage payable to employee—Doctrine of implied powers under statute, scope and ambit of.

The second part of cl. 6, cl. 7 and the Explanation contained in the Schedule to the notification† No. MWA-1557-J, dated June 11, 1958, issued by the State of Bombay under s. 5(2) read with s. 5(1)(b) of the Minimum Wages Act, 1948, are *ultra vires* of the powers of the State Government. The remaining provisions of the notification are *intra vires* of the powers of Government and, therefore, valid and effective.

Sections 2(h), 3 and 4 of the Minimum Wages Act, 1948, cast a duty on the appropriate Government to fix a minimum rate of wage (which is only a bare subsistence wage) which should be paid to the employee in respect of his employment or in respect of the work done by him in such employment on his fulfilment of the terms of the contract of employment, express or implied. The power thus conferred on the appropriate Government includes the power to interfere with the terms of the contract between the employer and the employee so far as they relate to the fixation of the wage rate, and the appropriate Government has powers by necessary implication to do all acts necessary to so fix the minimum rate of wage as would effectively compensate or remunerate the employee in respect of his employment or in respect of the work done by such employee in his employment.

The powers conferred on the appropriate Government under the Act to interfere

⁴ [1927] A.C. 487.

*Decided, September 23, 1958. Special Civil Applications Nos. 205 and 214 of 1958.

†See Bombay Government Gazette, Part IV-A, p. 466, dated June 19, 1958. This

notification revised the minimum rates of wages in respect of the employment in any tobacco (including bidi making) manufactory in the Vidharbha region of the State of Bombay. It came into force from July 1, 1958.

with the terms of the contract between the employer and the employee are limited. Those powers are to interfere with the terms of the contract so far as they relate to fixation of wage for the work done in the employment. It is, therefore, not open to the State Government in fixing minimum rate of wages to interfere with the other terms of the contract between the employer and the employee.

*Express Newspaper Ltd. v. Union of India*¹, *Bijoy Cotton Mills Ltd. v. The State of Ajmer*,² *Thomas v. Travancore-Cochin State*³ and *P. C. Chakravarty v. Manager, D. T. Estate*,⁴ referred to.

The words "in any other case" in s. 20(3)(4) of the Minimum Wages Act, 1948, relate only to the three types of claims other than the fixed minimum rate of wage, mentioned in s. 20(1) of the Act. These words do not confer jurisdiction on the Authority constituted under s. 20 to deal with all and every kind of wage dispute arising between the employer and the employee, e.g. disputes relating to the ascertainment and fixation of minimum rate of wage payable to the employee.

In the absence of any provision in the Minimum Wages Act, 1948, for a decision of disputes between the employer and the employee relating to the ascertainment and fixation of minimum rate of wage payable to an employee, by necessary implication it has to be assumed that it is left to the State Government to constitute a tribunal for the said purpose wherever found necessary.

Section 3(3)(b)(iv) of the Minimum Wages Act, 1948, does not relate to a fixation of wage. It directs the appropriate Government to indicate the manner of calculation for purposes of conversion of the rate fixed by it per month into a rate per day and *vice versa*.

The doctrine of implied powers under a statute can be applied only where the following conditions are fulfilled:—

(1) There must be a duty imposed or power prescribed.
(2) On a reasonable construction of the statute there must be an impossibility in the exercise or fulfilment of that power, resulting in making its object or purpose nugatory.

(3) The impossibility must be such that it is not an impossibility in an individual case because then the law cannot permit powers by implication, but the impossibility must be of a general nature so that the purpose and object of the duty or power is rendered impossible of achievement in every case. It is only then that powers by implication can be inferred.

(4) The implication cannot contradict the expressed intent which must always prevail and where it becomes necessary to read an implication into an enactment the scope of the implication must be limited only to what is reasonably necessary and no more.

THESE were applications under arts. 226 and 227 of the Constitution of India made by the Bidi Leaves and Tobacco Merchants Association, Gondia, manufacturers of bidis in the city of Nagpur and others for quashing the Notification of the Government of Bombay dated June 11, 1958, made under the Minimum Wages Act, 1948, and directing the Government to take steps not to give effect to the Notification. The applications came on for hearing before a Nagpur Bench of the High Court composed of Mudholkar and Kotval JJ. Mudholkar J. was of the opinion that cls. 1 to 7 of the Schedule to the Notification were *intra vires* of the Act while Kotval J. was of the opinion that cls. 3 to 7 were *ultra vires* of the Act. The following were the opinions given by Mudholkar and Kotval JJ.

MUDHOLKAR J. This order will also govern Special Civil Application No. 214 of 1958. In these petitions the petitioners challenge the notification issued by the Government of Bombay in Labour and Social Welfare Department, dated June 11, 1958, under the Minimum Wages Act, 1948. That notification runs thus:

"No. MWA. 1557-J. In exercise of the powers conferred by sub-section (2) of section 5

1 [1958] A.I.R. S.O. 578.

2 [1955] 1 S.O.R. 752.

3 (1957) (2) Labour Law Journal 53. •

4 [1955] A.I.R. Assam 12.

read with clause (b) of sub-section (1) of that section of the Minimum Wages Act, 1948, (XI of 1948) and after consulting the Advisory Board and in supersession of the former Government of Madhya Pradesh Labour Department Notification No. 564-451-XXIII, dated February 23rd 1958, the Government of Bombay, hereby revise the minimum rates of wages in respect of the employment in any tobacco (including bidi making) manufactory in the Vidarbha region of the State of Bombay as mentioned in the Schedule hereto annexed and directs that this Notification shall come into force with effect from 1st July, 1958.

Schedule.

Subject to the other provisions of this Schedule, the revised minimum rates of wages payable to employees per thousand bidis (when leaves are supplied by the employer) shall be as follows:

Area.	Revised rate in Rs.
(i) Nagpur district	1.69
(ii) Bhandara district	1.62
(iii) Chanda, Akola, Buldana, Yeotmal, Amravati and Wardha districts	1.56

2. For all bidis in which 7 chataks or more of tobacco mixture is used and for those bidis which are known as 'Hathnakhun' bidis, there shall be an increase of 12 Naye Paise per 1,000 bidis in the rates mentioned above in all the areas.

3. It shall be within the discretion of the employer to decide which are "chhat" bidis or bad bidis, up to 5 per cent., of the bidis prepared by the employee. If the employer decides that any bidis are "chhat" or bad, the "chhat" or bad bidis up to 5 per cent. shall be destroyed forthwith by the employee and whatever tobacco is recovered from them shall be retained by the employer. If, however, the employer wants to retain these "chhat" or bad bidis, he shall pay full wages for the same to the employee.

4. If "chhat" or bad bidis are more than 5 per cent., but less than 10 per cent., and if there is any dispute between the employer and the employee as to whether the "chhat" or bad bidis is done properly or not, equal number of representatives of the employer and the employees shall inspect (sic) the "chhat" is done properly or not. If there is any difference of opinion among the representatives of the two sides, the majority shall prevail. If the opinion is equally divided and the employer wants to retain the "chhat" bidis, he shall pay wages for "chhat" bidis between 5 per cent. to 10 per cent. at half the rates fixed above. If the employer does not want to retain these bidis, the employee shall destroy them forthwith.

5. The employer shall nominate his representatives and the employees shall elect their representatives.

6. In the case of "chhat" above 10 per cent. the employee shall be entitled to full wages. It shall, however, be open to the employer to take suitable action against the employee if the "chhat" is more than 10 per cent. for 6 continuous working days in a calendar month.

7. The "chhat" shall be made once in a day only at any premises within a distance of not more than 2 miles from the premises where bidis are manufactured.

Explanation: For the purposes of this Schedule the expression "employer" includes his thekadar, contractor or agent as the case may be."

Petitioner No. 1 in Special Civil Application No. 205 of 1958 is an association of manufacturers of bidis in the Bhandara District. Petitioner No. 2 and petitioner No. 3 are proprietors of the concerns manufacturing bidis in Gondia. The petitioners in the other Special Civil Application are manufacturers of bidis in the city of Nagpur and in the Bhandara District. It is common ground that some of the manufacturers of bidis have factories in which the work of manufacturing bidis is carried on while some manufacturers distribute tobacco and tendu leaves to the workers living in villages who manufacture bidis and deliver them to the employers, or their agents or to the contractors working on behalf of the employers. The aforesaid notification purports to revise the rates for payment to workers who prepare bidis which were originally fixed by the Government of Madhya Pradesh by the notification dated January 11, 1951, and revised by that Government by the notification dated February 23, 1956.

It may be mentioned that in the two notifications issued by the Government

of Madhya Pradesh different rates were fixed for the urban area and for the rural area. No such distinction has been made in the notification issued by the Government of Bombay. There is one more point of difference between the notifications issued by the Government of Madhya Pradesh and that issued by the Government of Bombay and that point is that the notification of the Bombay Government contains some provisions dealing with "chhat". Now, it is common ground that the practice of "chhat" is prevalent in the bidi industry and in particular in the Bhandara District. The impugned notification purports to lay down the extent of "chhat" permissible to an employer.

Shri Phadke, who appears for the petitioners in Special Civil Application No. 205 of 1958, impugned this notification on three grounds. Those grounds are as follows:

(i) that the notification is *ultra vires* of the provisions of the Minimum Wages Act;

(ii) that the procedure prescribed by the Act has not been properly followed by the Government, and

(iii) that the rights of the bidi manufacturers under art. 19(1)(g) of the Constitution have been infringed by the notification inasmuch as the State Government has abused its powers to place restrictions on the fundamental rights of the bidi manufacturers to carry on their trade.

It will be convenient to take the second point first. Shri Phadke contended that the State Government omitted to follow the procedure laid down in sub-s. (2) of s. 5 of the Minimum Wages Act. Section 5 deals with the procedure for fixing and revising minimum wages. Under this provision the Government in fixing minimum rates of wages in respect of any scheduled employment or in revising minimum rates of wages can proceed in one of two ways: it may either appoint committees and sub-committees to hold enquiries and advise it in respect of such fixation or revision as the case may be, or it may publish its proposals by a notification in an Official Gazette for the information of persons likely to be affected thereby and specify a date, not less than two months from the date of the notification, on which the proposals will be taken into consideration. In the instant case the State Government has chosen to follow the latter procedure, that is to say, it published certain proposals in the Official Gazette and took the proposals for consideration two months after the publication of the notification. Under the proviso to sub-s. (2) of s. 5 where the State Government chooses to follow the kind of procedure which was followed in this case it has to consult the Advisory Board appointed under s. 7 of the Act. Shri Phadke's contention is that the Advisory Board for the Vidarbha area was appointed by the Government of Madhya Pradesh and that though the notification appointing the Advisory Board had not been superseded, the Government of Bombay instead of consulting that Advisory Board consulted the Advisory Board for the Bombay State and that there was thus non-compliance with the provisions of the proviso to sub-s. (2) of s. 5.

Shri Abhyankar, who appears for the State of Bombay, pointed out that by virtue of the notification dated November 1, 1956, issued by the State Government of Bombay under s. 122 of the States Reorganisation Act, 1956, the Advisory Board for the Bombay State became the Advisory Board even for Vidharbha and the Advisory Board appointed by the Government of Madhya Pradesh ceased to function even for Vidarbha as from that date. Shri Phadke then accepted this position, but contended that this Advisory Board did not contain any representative of the bidi industry in Vidarbha and that, therefore, it cannot be said that there was proper compliance with the provisions of law. The Act nowhere says that the representative from any particular region should be appointed on the Advisory Board in order that the Board should have jurisdiction with respect to that area. In the circumstances, therefore, Shri Phadke's argument that there was no proper compliance with the provisions of the proviso to sub-s. (2) of s. 5 of the Act cannot be accepted.

It may be mentioned that the Advisory Board before tendering its advice to

the Government appointed a committee for making enquiries into the conditions of the bidi industry in Vidarbha. This committee actually toured in the whole of Vidarbha, interviewed a number of persons including employers and representatives, examined such persons as appeared before it, considered the memorandum submitted to it by the interests concerned and then submitted a report to the Advisory Board. That report was taken into consideration by the Advisory Board before it tendered its advice to the Government.

Shri Qazi, who appears for the petitioners in Special Civil Application No. 214 of 1958, contended that the Advisory Board had no power to appoint a committee and that it could not base its advice upon the report of that committee. An Advisory Board is a very large body and it is certainly not convenient that the whole Board should hold an enquiry into a matter of this kind. It is surely open to it to appoint some of its members to conduct the enquiry and submit their report. After all the function of the Advisory Board is merely to advise and not to take a decision. That being the position, it is clearly open to the Advisory Board to devise its own procedure for obtaining information necessary for the purpose of discharging its duty of tendering advice to the Government. The argument of Shri Qazi cannot, therefore, be accepted.

Now, as regards the first point raised by Shri Phadke. His contention is that what the Government is authorised to do under the Minimum Wages Act is merely to fix the minimum rate of wages which is to be payable to a worker and that it is not competent to it to frame provisions like those contained in cls. 3 to 7 and the Explanation in the Schedule to the notification, which deal with different matters. According to him, what the State Government has done is to legislate upon a matter which is not within its purview. According to Shri Abhyankar, the Special Government Pleader, this is a conditional legislation and what the Government has done is merely to fulfil the conditions for bringing into effect the legislation, which it is permitted to do under the Act. He also contends that the Government possesses an express power to prescribe matters which are governed by cls. 3 to 7 and that even assuming that it has no express power under the Act it has an implied power to prescribe the matters which are to be found in cls. 3 to 7. As regards express powers reliance was placed by him on s. 12 of the Act which runs thus:

"Where in respect of any scheduled employment a notification under section 5 or section 10 is in force, the employer shall pay to every employee engaged in a scheduled employment under him wages at a rate not less than the minimum rate of wages fixed by such notification for that class of employees in that employment without any deductions except as may be authorised within such time and subject to such conditions as may be prescribed."

Now, Shri Abhyankar placed reliance upon the word 'authorised' occurring in this section and said that the deductions which are dealt with by the impugned clauses could be authorised under s. 12. It seems to me that the word 'authorised' necessarily means authorised by some other provisions of law and that it does not contemplate authorisation under s. 12 itself. This will be clear from the language of sub-s. (2) of s. 12 of the Act which refers to the provisions of the Payment of Wages Act. Section 7 of the Payment of Wages Act deals with deductions which could be made from wages. Where deductions are so made they could be deemed to be authorised deductions and it is deductions of this kind which the Legislature had in view when it used the word 'authorised' in s. 12 of the Minimum Wages Act. Shri Abhyankar, however, contended that the word 'authorised' will also cover deductions authorised by the notification in question. But the notification itself does not purport to authorise any deductions. On the other hand, what it does is to specify the mode for ascertaining the work which has to be paid for. Under the Minimum Wages Act power is given by s. 30(2)(d) to the Government to prescribe the time and conditions of payment of, and the deductions permissible from, wages. This has, of course, to be done by rules. The notification of the kind which we

have here cannot be said to contain any rules made under this provision and indeed no reference is made to s. 30 in the aforesaid notification. The argument of Shri Abhyankar cannot, therefore, be accepted.

Shri Dhabe, who was permitted to intervene on behalf of the employees, relied upon the provisions of s. 3(3)(a)(i) and said that since that provision gave Government a power to classify the work and fix the rates of wages, the Government cannot be said to have express power to make provisions of the kind we find in cls. 3 to 7. This provision reads thus:

"The appropriate Government shall, in the manner hereinafter provided,—

(3) In fixing or revising minimum rates of wages under this section,—

(a) different minimum rates of wages may be fixed for—

(i) ...

(ii) different classes of work in the same scheduled employment;"

According to Shri Dhabe, the Government has classified the work into 'good' and 'bad' and it had power to do so under this provision.

In the first place, that is not a classification which has been actually made by the Government. On the other hand, the effect of those clauses is to require an employer to pay for 90 per cent. of the work tendered to him by an employee irrespective of the quality of the work. With respect to the remaining 10 per cent. the provisions are these: Five per cent. of that work is required to be paid for at the full rate if that work is actually accepted by the employer. For the other five per cent. the provision is that if after following a certain procedure the work is found to be below the requisite quality the employer is bound to pay for it at half the rate fixed by the Government if he does not accept it, but at the full rates if he does. Surely, these provisions cannot be regarded as classification of work according to quality for fixing wages for that work. In the circumstances, therefore, it is clear, as already stated, that the State Government has not made a classification of this kind in the notification. Apart from that, it is doubtful whether the Act contemplates classification of work as good and bad for the purpose of fixing the minimum wage. No other provision of the Act was referred to as conferring express power on the Government to make provisions of the kind to be found in cls. 3 to 7.

What is therefore to be ascertained is whether the Government has implied powers to make provisions of this kind. Craies on Statute Law has stated at p. 239 of the 5th edn.:

"Grant of a right implies grant of the means necessary for its exercise. One of the first principles of law with regard to the effect of an enabling Act is that if the Legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for the purpose of carrying out the purpose in view, 'on the principle' as Parke B. said in *Clarence Ry. v. Great N. of England Ry.* (13 M. & W. 706) 'that ubi aliquid conceditur, conceditur etiam id sine quo res ipsa non esse potest'."

In *In re Corporation of Dudley*¹, Brett L.J. said that (p. 93):

"The general rule on this head of law is, that where the legislature gives power to a public body to do anything of a public character, the legislature means also to give to the public body all rights, without which the power would become wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only."

Maxwell on the Interpretation of Statutes, 10th edn., has stated the legal position thus at p. 361:

"Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution."

Crawford on Statutory Construction at p. 267 has stated:

"One may find numerous situations where statutes have been extended by implication. Thus, a statutory grant of a power, privilege or property carries with it, by im-

plication everything necessary to its enjoyment or exercise: So also the creation of a new duty or obligation or the prohibition of an act formerly lawful, carries with it, by implication, a corresponding remedy to assure its observance..."

On the basis of these statements of law Shri Abhyankar argued that the State Government had power to make the necessary provisions for making the minimum wages fixed by it effective. Shri Abhyankar pointed out that a practice is prevailing in the bidi industry under which employers reject a large quantity of bidis rolled by the employees, and though they actually sell those bidis in the market, they do not pay any wages to the employees for preparing those bidis. It is to prevent the workers or employees losing remuneration for the labour put in by them that the Government has made provisions of the kind to be found in cls. 3 to 7 of the notification. According to him, it will be meaningless to fix a minimum wage and to leave it to the sweet-will of the employers to reject as many bidis as they like, to utilise them by selling them in the market and to pay wages, even the minimum wages fixed by the Government, only for the work approved by them as up to the standard. Shri Phadke's argument is that if there is an evil of this kind there are other ways of remedying it and the Minimum Wages Act was not intended to provide a remedy for preventing a mischief of the kind alleged to exist by the State Government.

On the question of implied powers Shri Phadke referred to the following passage from *Fenton v. Hampton*². That is a decision of their Lordships of the Privy Council in which their Lordships have said:

"...After the fullest research which I have been able to bestow, I take the matter to stand thus: Whenever anything is authorised, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something else will be supplied by necessary intendment. But, if, when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists, that the power may be legally exercised without the doing that something else, or even going a step further, that it is only in some particular instances, as opposed to its general operation, that the law falls in its intention, unless the enforcing power be supplied, then, in any such case, the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a *casus omissus*."

He also referred to a decision in *The Trolly, Draymen and Carters Union of Sydney and Suburbs v. The Master Carriers Association of N. S. W.*³, where the above decision was followed by the High Court of Australia. In that case the question was whether the condition imposed by the Court of Arbitration, functioning under the Industrial Arbitration Act, that the employer should not be allowed to engage a servant without giving notice of his intention to do so was valid. Dealing with it the Chief Justice of the High Court of Australia said (p. 516):

"Such a condition would involve, of course, a remarkable interference with the liberty of the employer, that he should not be allowed to engage a servant without giving notice of his intention to do so. For, whether the prescribed notice was public or private, there would be no difference in principle. In considering the question whether such a provision is to be implied in the Act, it is important to bear in mind that, if it is, the discretion of the Court is unlimited and cannot be controlled. Is it a necessary inference from what the Legislature has said that it did intend to confer such a power? I confess that I cannot see any foundation for the argument... One condition has been laid down by the legislature in regard to the preference to unionists, that it may be ordered as between persons offering their labour at the same time. I am not aware of any principle upon which it can be held that the provision authorizes the Court of Arbitration to give any direction to employers that they shall give notice to one set of persons or another before they proceed to exercise their common law right of engaging any person they see fit. Except so far as they are empowered to do so

by the provisions of the Act, the Court cannot control the common law rights of the subject."

In the course of the judgment, the learned Chief Justice quoted the following passage from the decision of Lord Halsbury in *Rossi v. Edinburgh Corporation*⁴:

"...I can only look at the Statute itself and construe it, and when I construe the statute I find there is in the statute a plain prohibition with respect to certain things. The magistrates, of course, are not only empowered but bound to give effect to legislation which has been passed; but when it is argued that because they are given the power to restrict, within certain hours, the sale of ice-creams therefore they have implied power to do all that might be desirable or expedient with reference to the times and circumstances under which ice-creams shall be sold, it seems to me the argument entirely fails. What is sought to be done, whether directly by bye-laws, or indirectly by the language of the licence that is issued, is something that can only be done by the Legislature."

He has also referred to the opinion of Lord Robertson in the same case which is as follows (p. 30):

"...I can find no warrant in the Statute for forcing the dealer to close his premises at the hours during which he is forbidden to sell ice-cream, and I know of no principle upon which the magistrates can be held entitled to eke out what they may consider a weak prohibition by imposing an additional one."

It will be seen from all these decisions that implied power has been negatived only in the following circumstances: In the first place, the liberties or interests of others should be affected, secondly, there should be an impossibility for the exercise of the power conferred by the Legislature and, thirdly, that impossibility must be of a general kind and not restricted to particular instances. It is no doubt true, that in the instant case the liberty of contract of the petitioners is intended to be affected by the exercise of the implied power. But the Minimum Wages Act itself interferes with the existing contracts, at any rate, in the matter of fixation of rates of wages. The Legislature has clearly declared its policy that whatever the contract between the parties may be as to the rates of wages payable to persons engaged in a scheduled industry, the State Government will have the power to alter those rates and thus interfere with the contract between the parties. Now, in order to make the exercise of this power effective it will have to be said that the State Government has also the right to fix the basis upon which the wages should be fixed. If such power could not be implied in favour of the State Government, it seems to me that the effective exercise of that power will be rendered impossible. Now, the State Government does say that in the Nagpur district, for instance, the revised rate for bidis would be Re. 1 and 69 nP. per thousand bidis. The intention of the State Government to enable a bidi worker to get Re. 1 and 69 nP. for 1,000 bidis rolled by him would be frustrated if the employer were to reject 500 bidis out of those 1,000 rolled by him on the ground that they are below standard and then to utilize those very bidis himself by selling them in the market. If the State Government could have no power to prescribe some conditions of the kind to be found in cls. 3 to 7, it would not be able to make effective the rates of wages fixed by it. To my mind, here is a case where the exercise of the power granted by the statute could be rendered impossible not in individual cases but generally unless there was an implied power in the State Government to make ancillary provisions for fixing the basis on which the wages are fixed.

Shri Phadke, however, contended that an implied power to provide a basis on which the minimum wage should operate should be deemed to have been excluded by the Legislature because the Act which deals with various matters therein exhaustively has not given any power to the State Government to provide for such a basis. Now, the very concept of wages necessarily includes the basis with relation to which the wages are to be fixed. As has been pointed

4 [1905] A.C. 21, 25, 26.

out by Crawford at p. 266 of Statutory Construction :

"The implications and intendments arising from the language of a statute are as much a part of it as if they had been expressed."

Upon this principle, therefore, it must be held that the power for fixing a wage can also be laid down by the State Government while exercising its powers under s. 3 of the Minimum Wages Act.

Shri Phadke then referred to the provisions of cl. (a) of sub-s. (2) of s. 3 of the Act which deals with a minimum rate of wages for time work and pointed out that the Legislature has set out in detail the wage periods which could be fixed and also empowered the Government to specify the manner of calculating the wages for different wage periods. According to him, if there were any implied power to provide for these matters the Legislature would not have provided for them specifically. It seems to me that that is not the proper way of looking at the provisions of that clause. What the clause in effect does is to limit the power of the State Government in the matter of fixing wage periods by laying down that the minimum rates of wages may be fixed by the hour and not by any shorter period. It is, however, open to the State Government to fix a longer wage period such as "per day, per month or even a longer period". It is true that the section also says "where such rates are fixed by the day or by the month, the manner of calculating wages for a month or for a day, as the case may be, may be indicated". But it is possible that the Legislature made those provisions by way of abundant caution. Now, had the Legislature not made those provisions and had made provisions only for fixing the wage periods there might have been room for construing the Act in such a way as to exclude the existence of the power to provide for the manner of calculating wages.

Then Shri Phadke argued that the particular power given or exercised must receive a strict construction when it invades contractual rights or imposes new obligations. As a general proposition perhaps no exception could be taken to this statement, but if a particular power conferred by a statute cannot be exercised without an implied power for doing certain other things, the principle stated by Shri Phadke cannot be applied. In other words, the principle stated by him cannot be invoked for stultifying the power conferred and the duty imposed by a statute.

Then Shri Phadke said that an inference of implied power must be drawn slowly in the case of Government. He has not stated why the principle of construction of statutes should be different in the case of Government from that in the case of any other Authority or person. I am afraid I cannot accede at all to this proposition.

Then Shri Phadke said that when other statutes provide for a matter, implied power to do that thing cannot be imported by a statute which is silent about that matter. In other words, according to him, a statute cannot be so construed as to make the provisions operate as to invade the provisions of other Acts. Shri Phadke has not relied upon any Authority in support of his proposition and I feel it difficult to accept it. The reason is that the same topic may be the subject of various enactments but the matters dealt with under that topic may be different in different Acts. Now, it cannot be disputed that the Legislature has power to enact expressly on all matters which fall within its legislative competence. It will, therefore, follow that while construing the provisions of different laws made by the Legislature it will not only be open to the Court but it will be the duty of the Court to so construe those provisions as to effectuate the intention of the Legislature in enacting these laws. Now, where the Legislature has enacted a piece of conditional legislation, but has omitted to make express provisions in regard to certain matters and without implying such provisions the law cannot be brought into force by the Authority upon whom the Legislature has placed the duty to put the law into operation, it will have to be held that that Authority has the implied power to do everything to put the law into operation even though in

doing so the Authority may have to do something which is covered by the provisions of other statutes. I know of no principle—and none has been referred to by Shri Phadke—which precludes the Court from presuming in such cases in favour of the existence of an implied power. I will, however, examine the argument of Shri Phadke that the provisions of certain statutes have been invaded by the State Government by enacting cls. 3 to 7 of the Notification.

According to Shri Phadke the provisions of these clauses invade the provisions of the C.P. and Berar Industrial Disputes Settlement Act, the Standing Orders Act (XX of 1946), Central Industrial Disputes Act, 1947, and s. 20(2) of the Minimum Wages Act itself. Shri Phadke says that the provisions of cls. 3 to 7 really deal with a 'change' in an industrial matter which could be effected after following the provisions of the C.P. and Berar Industrial Disputes Settlement Act. Therefore, according to him, no power could be implied in the State Government to make those provisions. It is sufficient to say that the C.P. and Berar Industrial Disputes Settlement Act does not deal with matters which are comprised in the aforesaid clauses.

Then Shri Phadke says that the matter which is dealt with in these provisions could well be dealt with by framing a Standing Order under the Standing Orders Act, 1946. Now, the making of a Standing Order is not obligatory upon an industry or an industrial undertaking. Moreover, Standing Orders could well vary from one bidi factory to another.

Shri Phadke has not been able to show how the matters dealt with in cla. 3 to 7 of the Notification at all fall under the Industrial Disputes Act, 1947, and how the provisions of those clauses interfere with the operation of any of the provisions of the Industrial Disputes Act.

Finally as regards sub-s. (2) of s. 20 of the Minimum Wages Act. What s. 20 provides for is the machinery for enabling an employee for obtaining redress in respect of his claims. It does not confer any power upon the authorities specified in that section to deal with matters of a general nature, such as those dealt with in the aforesaid clauses. Shri Phadke did not refer to any other enactment, the provisions of which, according to him, could be said to have been invaded by cls. 3 to 7 of the Notification in question and it is difficult to see how the provisions of the four Acts to which he has referred could be said to have been invaded by cls. 3 to 7 of the Notifications.

Shri Phadke referred us to the definition of 'wages' contained in s. 2(h) of the Minimum Wages Act, which runs thus:

"In this Act, unless there is anything repugnant in the subject or context,—...

(h) 'Wages' means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment....",

and argued that the conception of wages itself involves the fulfilment of the terms of employment by the worker and one of such terms is to produce work to the satisfaction of the employer and that, therefore, there is no scope for laying down any conditions of the kind laid down by the State Government in the Schedule which would relieve the employee of the necessity of fulfilling those requirements or which will take away from the employer the right to reject the work on the ground that it is not up to the standard. Now, it has to be borne in mind that what is referred to by Shri Phadke is merely a definition and in a sense it is descriptive of the term wages. This definition cannot, in my opinion, be construed as limiting or taking away the implied power of the State Government to make provisions of the kind we find in the Schedule. If Shri Phadke's argument were to be accepted then, as already stated, the purpose of the Act would fail with respect to one of the scheduled industries to which the Act relates. What is more important is to give effect to the intention of the Legislature and not so much to preserve the sanctity of contracts which, as is well-known, is being interfered with time and again by the Legislature for promoting social justice.

The power to correlate the hours of work, the work-load and the basic wages can be exercised by the State Government while fixing minimum wages under s. 5 of the Minimum Wages Act appears to have been accepted by the Supreme Court in *A. M. Allison v. B. L. Sen*⁵. That decision has been understood by the Assam High Court to lay down the law that the State Government has such power. This would appear from the decision in *H. G. Henson v. M. Sultan, Deputy Commissioner*⁶. In the notification with which their Lordships of the Supreme Court had to deal the State Government had fixed As. 12 per day as the basic wages for the male labourers working in the tea garden and As. 11 per day for the female labourers working there. It may be mentioned that in the plantations in which the workers were employed the hours of work in the case of an adult were 9 per day subject to a maximum of 48 hours in a week. Under the contract it was provided that the male labourers were to get As. 8 per day for plucking 16 seers of green leaves and the female labourers were to get As. 6 per day for plucking 12 seers of green leaves. This was the work-load or task in respect of which the basic wages of As. 8 and As. 6 respectively were paid to the male and female labourers. Now, the Government by its notification raised its rate to As. 12 and As. 11 respectively but it also provided that the existing task and hours of work shall continue until further orders. That is to say, in place of the original contract whereunder a male labourer, for instance, was entitled to the wages of As. 8 per day for plucking 16 seers of green leaves and work for 9 hours and a female labourer to As. 6 per day for plucking 12 seers of green leaves and work for 9 hours a day, the Government Notification entitled the labourers to get As. 12 and As. 11 respectively for doing the same amount of work and for working for the same length of time. Thus, according to the original contract each labourer was entitled to 6 pies per seer for the leaves plucked by him. Now, the managers of these tea estates continued to pay to the labourers at the same rate even after the notification and demanded from them an additional out-turn for earning the enhanced wages. The validity of the clause in the Government Notification prohibiting the managers from altering the existing task and hours of work was challenged by the managers. Their contention, however, was negatived by their Lordships who observed in para. 11 of their judgment:

"It is argued that the continuance of the existing work-load or task which was thus provided for had no relation to the basic wages which were fixed for the male and female labourers respectively but was only intended to prevent the employers from increasing the existing work-load or task with a view to make up for the increase in basic wages. This argument, however, does not take count of the fact that there was existing at the date of the notification a work-load or task which was the basis of the payments used to be made to the labourers, the basic wages paid to them being calculated at the rate of 6 ps. per seer of tea leaves plucked by them. The labourers were thus being paid the basic wages of as. 8 for male labourers and as. 6 for female labourers for the work-load or task of plucking 16 seers and 12 seers of tea leaves respectively and the sole intention of the Government in issuing the notification was to increase these basic wages of as. 8 and as. 6 to as. 12 and as. 11 respectively while maintaining the same basic work-load or task assigned to the male and female labourers. If the intention was not to correlate these basic wages to the basic work-load or task which already existed and if the same state of affairs was to continue, viz., that the labourers would continue to be paid the basic wages on the computation of 6 ps. per seer of green leaves plucked by them, there was no sense whatever in increasing the basic wages from as. 8 to as. 12 for male labourers and from as. 6 to as. 11 for female labourers as was sought to be done by issuing the notification in question. The acceptance of the contention of the appellants would mean that no advantage whatever was sought to be conferred by the Government on the labourers engaged in plucking leaves in these tea estates which intention can scarcely be attributed to the Government. We are, therefore, of the opinion that what was fixed by the notification was not

merely 'a minimum time rate' irrespective of the existing work-load or task which used to be performed by the labourers but was a minimum wage which, though fixed for time work, was necessarily correlated to the work-load or task then being performed by these labourers so that whatever extra work was done by the labourers in excess of the existing work-load or task of plucking 18 seers of tea leaves in the case of male labourers and 12 seers of tea leaves in the case of female labourers had to be paid for in accordance with practice then prevailing, whether it was based on agreement or *tacca* or custom, at the rate of 6 ps. per seer."

Following this decision, the Assam High Court held in the case cited:-

"In an earlier case in C.R. Nos. 147 and 148 of 1952, dated 7-7-1953, this Court observed that all the three items, namely, the basic wage, the existing task and the hours of work had to be correlated in order to ascertain the minimum wage payable on the strength of the said Government Notification."

It is true that in the instant case the Government instead of stating that the existing task will be left unaltered or untouched has made some other provisions. But it is clear that what the Government has done is merely to fix the basis for the minimum wage provided for it. In the Assam case it was thought necessary to provide only for not altering the existing task in order to achieve the purpose which the Government had in view. Here, some other provisions had to be made for achieving the same purpose. The power under which the Government acted in the Assam case is however the same as that which is claimed in the instant case, i.e. the implied power.

We would proceed to examine the provisions to which objections have been taken. In so far as cl. 1 is concerned an objection is taken by Shri Qazi that the rates fixed by the Government did not take note of the cost of living index. He referred to the provisions of s. 4 and said that under this section the cost of living index number has to be borne in mind by the State Government while fixing the minimum rate of wages of a worker, and that here as the same rate of wages is fixed for persons working in urban areas as in rural areas, it is clear that the Government has not taken the index figure into consideration. He points out that after all the cost of living is higher in urban areas than in rural areas and asks how is it that the minimum wages could be the same for both the areas. A similar point was raised before a division bench of this Court in *Bhikusa v. Sangamner Bidi Kamgar Union*.⁷ In that case it was pointed out that the index figure is only one of the matters to be borne in mind by the State Government in fixing the minimum wages and that the law does not require that the minimum wages in the urban areas where the index figure is probably higher than in rural areas, should be higher than in rural areas. I respectfully agree with this view. I may also point out that though certain commodities are more expensive in urban areas than they are in rural areas it does not necessarily follow that the minimum expenditure for living in an urban area must always be higher than that in a rural area. It is well-known that certain commodities, for instance, salt, sugar and tea are more expensive in a rural area than in the urban area, and commodities like foodgrains are more expensive in an urban area than in a rural area. Therefore, it would not be correct to say that where the same minimum wage is fixed for an urban area as that fixed for a rural area, the fixation was arrived at without any reference to the index figure.

It was faintly contended that the rates have increased suddenly to a very considerable extent and the burden which an industry cannot bear has been cast upon it. Whether this is so or not it is difficult to say. But it may be pointed out that even if that is so, it is not a matter which we are entitled to look into for the simple reason that power has been given to the Government and the Government alone to determine what the minimum wages should be and the exercise of that power cannot be properly questioned in any Court.

Then we come to cl. 2. Here a little higher rate is provided for 'Hathnakhun' bidis. It is said that there is no definition of 'Hathnakhun' bidis and,

therefore, it may be difficult to give effect to this provision. In this connection we may refer to para. 8 of the return of respondent No. 2 which was not controverted by the petitioner.

Then it was said that there was no justification for fixing a higher rate for 'Hathnakhun' bidis. In the first place, as we have said, it is not our province to determine what particular rate of the minimum wage should be fixed by the Government. Secondly, we may point out that the 'Hathnakhun' bidis require some additional skill and probably a little longer time to make.

Then as regards cl. 3, the contention was that it was not open to the State Government to order destruction of bidis which were rejected by the employers. What is really provided for in this clause is that if the employer rejects bidis up to five per cent. he should destroy them *as bidis*, that is to say, to destroy their character as bidis. It does not say that he should burn them or do anything of the kind. On the other hand this provision clearly entitles an employer to recover tobacco contained in these bidis and retain it with him. I may also add that it does not prohibit him from retaining the tendu leaves in which the tobacco had been rolled, and using them in any way he liked. All that the provision requires is that the rolled bidis should be unrolled and their character as bidis be destroyed. Thus what is directed to be destroyed is the unpaid work put in by the employees and not any property of the employer. The object of this provision is to prevent an employer from rejecting bidis even up to 5 per cent. and selling them as bidis in the market and thus deprive a worker of his wages for making those bidis. That clause also provides that if an employer retains those bidis as bidis then he must pay full wages to the employee. It seems to me that the Government has clearly power to make a provision of this kind in order to ensure that a worker who has put in his labour gets paid for the labour.

Now cl. 4 at first sight appears to deal with matters which are outside the purview of the minimum wage fixation. However, if we examine that clause carefully it will be seen that all the provisions therein are intended only for securing one result and that result is to effectuate the payment of the minimum wage. Shri Phadke contended that those provisions appear to deal with an industrial dispute and not merely with wage fixation. But, as already stated, though the intention is to settle a matter of difference between the workers and the employers that matter has a bearing solely on the question of the fixation of minimum wages.

Clauses 5 and 6 are ancillary to cl. 4. Shri Phadke took exception in particular to the second part of cl. 6, which runs thus:

"It shall, however, be open to the employer to take suitable action against the employee if the 'chhat' is more than 10 per cent. for 6 continuous working days in a calendar month."

He said that by this clause his rights against the workers are limited and that, therefore, this interferes with the contract between him and the workers which is not warranted by the provisions of the Minimum Wages Act. As I look at this provision it only confers certain rights on the employer to proceed against the employees, but it does not in any way affect the employer's right either under the contract or under the standing orders for taking such action against employees as he likes for bad workmanship.

As regards cl. 7, it was urged by Mr. Phadke that the employer could not be restricted to make 'chhat' only once in a day; nor could he be required to make 'chhat' in or near the village where the workers carry on their work. This provision is intended to protect workers who do not work in factories but at their houses. Now, it is well-known that these workers are distributed in various villages. According to the practice of the trade, the agents of the employers (or their contractors as contended for by Shri Phadke) distribute leaves and tobacco to the workers in their villages and then take back bidis in exchange from them and while taking these bidis the agents or contractors, as the case may be, reject some bidis as being below standard. They, however,

even take away those bidis with them and then present all those bidis to the employer in his factory. Here the employer or his servant makes a second 'chhat' and rejects some more bidis out of those accepted by the agent or the contractor. Now, this second 'chhat' is invariably carried on behind the back of the employee. Usually, the second 'chhat' is also said to be quite considerable and, therefore, the result is that the employee does not receive any remuneration for a substantial quantity of work done by him. It is to prevent this, that a clause of this kind had to be enacted. As already stated, this clause also has a bearing on the question of the fixation of minimum wages and is, therefore, within the competence of the State Government to make this clause.

Lastly, an objection was taken to the Explanation and it was said that this Explanation goes beyond the definition of 'employer' given in the Act. Now 'employer' is defined thus:

"'employer' means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, and includes,..."

I fail to see how the Explanation goes beyond the definition. It merely says practically the same thing as is said in the definition though in somewhat different language. By merely giving this Explanation it cannot be said that the State Government has done something which contravenes the express provisions of the Act. In the circumstances, therefore, I am unable to hold that the Schedule is *ultra vires* of the powers of the State Government.

What remains to be considered is the last point urged by Shri Phadke and that was that art. 19(1)(g) is infringed by the notification. Article 19(1)(g) of the Constitution undoubtedly recognises the fundamental right of every citizen to carry on his trade; but I fail to see how that right is infringed by the making of a notification of the kind we have here. Under this notification, no restriction has been placed or prohibition created against an employer from carrying on his trade. All that the employers are required to do is to pay at certain minimum rates of wages those persons who roll bidis for them. The article does not place any restriction on the power of the Legislature to legislate on the matter and the notification, as already stated, does not transgress the provisions of the Act. I need not say anything further on the point because it was in fact not very seriously pressed in argument. The point which was seriously pressed was the one regarding the *vires* of the notification itself and with that I have already dealt quite fully.

In this view, therefore, I would dismiss both the petitions with costs.

KOTVAL J. These petitions under arts. 226 and 227 of the Constitution raise questions of far reaching importance to the bidi industry within the eight districts of the former State of Madhya Pradesh, which for the sake of convenience I shall hereafter refer to as the "Vidarbha Region".

The petitioners claim a writ of *certiorari* to quash the Notification dated June 11, 1958, published in the Bombay Gazette Extraordinary, dated June 14, 1958, and a writ of *mandamus* to the Government, directing it not to give effect to that Notification.

It is worthwhile reproducing the entire Notification for convenience of reference. It runs as follows:—

"No. MWA. 1537-J—In exercise of the powers conferred by sub-section (2) of section 5 read with clause (b) of sub-section (1) of that section of the Minimum Wages Act, 1948 (XI of 1948) and after consulting the Advisory Board and in supersession of the former Government of Madhya Pradesh Labour Department Notification No. 564-451-XXIII, dated February 23, 1953, the Government of Bombay hereby revise the minimum rates of wages in respect of the employment in any tobacco (including bidi making) manufactory in the Vidarbha region of the State of Bombay as mentioned in the Schedule hereto annexed and directs that this notification shall come into force with effect from July 1, 1958.

Schedule.

Subject to the other provisions of this Schedule, the revised minimum rates of wages payable to employees per thousand bidis (when leaves are supplied by the employer) shall be as follows: —

Area.	Revised rates in Rs.
(i) Nagpur district	1.60
(ii) Bhandara district	1.62
(iii) Chanda, Akola, Buldana, Yeotmal, Amravati and Wardha districts	1.58

2. For all bidis in which 7 chataks or more of tobacco mixture is used and for those bidis which are known as "Hatnakhun" bidis, there shall be an increase of 12 Naye Paise per 1,000 bidis in the rates mentioned above in all the areas.

3. It shall be within the discretion of the employer to decide which are "chhat" bidis or bad bidis, up to 5 per cent. of the bidis prepared by the employee. If the employer decides that any bidis are "chhat" or bad, the "chhat" or bad bidis up to 5 per cent. shall be destroyed forthwith by the employee and whatever tobacco is recovered from them shall be retained by the employer. If however, the employer wants to retain these "chhat" or bad bidis, he shall pay full wages for the same to the employee.

4. If "chhat" or bad bidis are more than 5 per cent. but less than 10 per cent., and if there is any dispute between the employer and the employee as to whether the "chhat" or bad bidis is done properly or not, equal number of representatives of the employer and the employees shall inspect the "chhat" is done properly or not. If there is any difference of opinion among the representatives of the two sides, the majority opinion shall prevail. If the opinion is equally divided and the employer wants to retain the "chhat" bidis, he shall pay wages for "chhat" bidis between 5 per cent. to 10 per cent. at half the rates fixed above. If the employer does not want to retain these bidis the employee shall destroy them forthwith.

5. The employer shall nominate his representatives and the employees shall elect their representatives.

6. In the case of "chhat" above 10 per cent., the employee shall be entitled to full wages. It shall, however, be open to the employer to take suitable action against the employee if the "chhat" is more than 10 per cent. for 6 continuous working days in a calendar month.

7. The "chhat" shall be made once a day only, at any premises within a distance of not more than 2 miles from the premises where bidis are manufactured.

Explanation:—For the purpose of this Schedule the expression "employer" includes his thekedar, contractor or agent as the case may be.

Prior to the reorganisation of States there were other notifications also issued under the provisions of the Minimum Wages Act (XI of 1958). These Notifications were No. III-132-XXIII dated January 11, 1951, and No. 564-451-XXIII, dated February 23, 1956. These Notifications were superseded by the impugned Notification.

It is to be noticed that the previous notifications exclusively concerned themselves with a fixation of rates of wages per thousand bidis. It is not in dispute between the parties that the standard size of bidis contained six chataks of tobacco per thousand bidis and that the earlier notifications fixed the rates with reference to that standard. The Notification of 1956 provided for additional payment in respect of bidis in which seven chataks or more of tobacco was used. It was also agreed that the same standard has been taken as the basis for the fixation of minimum rates of wages in the present notification.

It may be noted, however, that while cls. 1 and 2 of the Schedule to the present notification fix the minimum rates of wages, cls. 3 to 7 make elaborate provisions for several other matters which were not dealt with in the previous notifications and which constitute the real bone of contention in these petitions.

The attack was primarily directed against cls. 3 to 7 of the Schedule. It was also incidentally urged that the opening words of cl. 1 make cls. 1 and 2 "subject to the other provisions of this Schedule", and, therefore, cls. 1 and 2 cannot be extricated from cls. 3 to 7; and if cls. 3 to 7 are bad, then the whole notification must fail because it is not possible to disentangle the two

parts of the notification. This was the only manner in which it was stated that cls. 1 and 2 ought to be declared bad.

It will be seen that cls. 3 to 7 use the word "chhat" and makes elaborate provisions for "chhat". The word "chhat" it was explained, was a convenient substantive used in this particular industry and is derived from the Hindi word "छटन" which means 'to weed out or to pick out and separate'. It may conveniently be translated in English as the right to reject.

Now, curiously enough, the practice of *chhat* has not been explained in the petition, but the respondents in their returns have adverted to it and the affidavit of respondent No. 2 fully explains it in paras. 3, 4 and 5. There it is explained that for about the last 30 years the system of paying wages to workers employed in the manufacture of bidis is on the basis of piece rates. It was explained that in actual practice, however, the worker was not paid for all the bidis which he prepared. The bidis are subject to scrutiny on two occasions. After bidis are prepared by the workers, they are submitted to a scrutiny of a thekedar in bundles of 25 each. The thekedar rejects bundles which suffer from defect of workmanship and are not of the required standard. Then the thekedar takes the accepted bidis to the employer's factory where the employer scrutinizes the bidis a second time with reference to their quality and workmanship. It was alleged that when the second *chhat* (rejection) takes place, it is done in the absence of the worker. It was also alleged that the bidis rejected by the employer and not paid for are not returned to the worker but the employer sells them and makes a profit.

It appears from these returns that the bidi industry is mostly carried on as a cottage industry. There are two systems of work. Firstly, the manufacturer has established factories at important places in the areas where the industry is mainly concentrated, viz., Gondia Tahsil and Bhandara District. In these factories workers come and are given tobacco and tendu leaves and thread. They make the bidis and deliver them back each day before leaving the factory. In the case of these factories, the *chhat* (rejection) is admittedly made only once.

But this is a minor part of the industry. By far the larger part is carried on on a different basis. The employer has established convenient centres in or near the villages from where tobacco, tendu leaves and string are doled out to workers who take these home and manufacture as bidis. Thekedars are appointed to screen the bidis and do the first *chhat* and then bring the bidis accepted by them for the manufacturer's approval. Thus in this case there is a double *chhat*.

The practice of *chhat* as pleaded by the respondents has been admitted on behalf of the employers. At any rate they have not denied the same or the terms thereof and, therefore, the above statements of the respondents must be accepted. It was also admitted that in the case of manufacture at the employee's home (otherwise conveniently referred to as the "घरसाता") there is a double *chhat* and in respect of bidis manufactured at the factory there is only one *chhat*. It is clear from these pleadings that these were the terms and conditions on which the work used to be done and constitute the implied contract between the employer and the employees. The arguments of both sides proceeded on that basis.

The other allegations made against the employers regarding exploitation of employees were strongly controverted in the arguments. It was stated on behalf of the employers that they have had to resort to this system in order to provide employment not for any individual worker but for his whole family including his children. One member of the family takes the tobacco, tendu leaves and thread home and gets the bidis manufactured by his wife and children and is thus enabled to utilize the labour of his whole family which otherwise would not be able to earn anything. It was stated that most of these workers were really agriculturists and that they supplemented their meagre incomes from agriculture by this useful cottage industry. In support of this Mr. Phadke

also invited our attention to the fact that at one time so much of agricultural labour took to the manufacture of bidis that agriculture declined and the then Government of Madhya Pradesh had actually to intervene by getting legislation passed, prohibiting the migration of agricultural labour to the bidi industry. That was the C.P. and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act (LXIV of 1948), which was challenged before the Supreme Court of India in *Chintamanrao v. State of M. P.*¹ and declared *ultra vires* of art. 19(1)(g) of the Constitution by that Court.

It was urged on behalf of the petitioners that in such a system the standard of work is necessarily very low and leads to such damage and waste of materials supplied by the employers because if children and unskilled labour, male and female, work under conditions where there is absolutely no supervision, the work would necessarily not be of a high standard. Therefore it is essential that the employer should scrutinize with care the bidis manufactured because they have to sell their goods in a highly competitive market. What is more, it was stated that most of these "*Gharkhata*" workers dishonestly pilfer the tobacco, which is the most valuable ingredient in a bidi, put in less tobacco in the bidis offered to the employer, and out of the pilfered tobacco privately manufacture bidis and sell them, thus making illegal gain for themselves. This again is absolutely without restriction or supervision it was urged.

That these were the conditions under which the industry was functioning and gave rise to its own problems and disputes is clear from the documents placed on record on behalf of the Government itself, i.e. from Annexure A which is a report made by the Assistant Commissioner of Labour (Administration), Bombay, (of which date is not clear) and Annexure D, which is the report of the Committee appointed under s. 5 by the Advisory Board from amongst their members for enquiry into the revision of minimum wages. The rival points of view are neatly set forth therein under the heads "Employer's and Employees' points of view".

With the merits of these respective points of view we are not here concerned, but I have stated them at some length in order to show the conditions under which the impugned notification came into being and the peculiar problems which it intended and purported to solve.

There is no doubt that it was in order to check or control the employer's right of *chhat* and compel him to do the *chhat* only at a factory, that the provisions of cls. 3 to 7 of the Schedule to the impugned notification were made. This is clear from para. 7 of the affidavit on behalf of respondent No. 2 wherein, after reciting details of the system and its evils from the employees' point of view, it was stated—

"It was in order to avoid this arbitrary and capricious exercise of the powers of employer that the State Government have made provision in clauses 3, 4, 5, 6 and 7 of the Impugned Notification."

To the same effect is the return on behalf of respondent No. 1, State of Bombay. Paragraph 3(a) of their return is as follows:—

"There have been constant disputes among bidi employers and the bidi workers regarding the payment of minimum wages fixed in the Vidarbha region. It is complained that the employers do not pay full value of wages for the bidis prepared by workers. A certain percentage of bidis is rejected on the ground that it is of a sub-normal standard of quality. Constant disputes arise regarding the reasonable percentage of such rejection and the mode, time and place where this selection or rejection should take place. The State Government was, therefore, required to institute an enquiry into these complaints to find out whether it was necessary to revise the minimum wages payable under the Act and the mode of determining such wages."

A similar further statement is to be found in para. 4(e).—

"...it is denied that Government has no power to make provision to fix wages according to the work done in such employments. It is denied that the Government has

¹ [1951] A.I.R.S.C. 118.

no power to make provisions for deciding the extent to which the 'chhat' (Reduction) will be permissible or to give directions as to the action to be taken by the employers and the employees in case of disputes regarding the quality of bidis liable to such reduction or rejection. It is submitted that the Government is empowered and is duly bound to fix effective minimum rates of wages in any specified industry. In the bidi industry in Vidarbha region and especially in Bhandara district and factories in Gondia tahsil, there is a recognised practice of making payments on the basis of bidis accepted by employer as coming up to a certain standard of skill. The employers have insisted on their right in principle of rejecting the sub-normal or sub-standard bidis prepared by the employees."

In para. 6(g) it was stated—

"It is submitted that the clauses (3) to (7) of the Schedule makes provision for incidental and supplementary matters connected with the fixation of minimum rates of wages. The minimum rates of wages liable to be fixed under the Act ought to be effective rates of wages. The rates of wages which are paid according to work cannot be effective unless adequate and sufficient provision is made for determining the quantum of outturn liable to rejection on the basis of which the payment is made. Fixation of rates of minimum wages payable for sub-standard bidis or for their rejection is thus an ancillary part of scheme for fixation or revision of the minimum rates of wages in case of bidi manufacturers."

And in para. 6(h)—

"It is further submitted that it is fully within the competence of the authority entitled to fix rates of wages under the Minimum Wages Act, to make adequate provisions for resolution of disputes arising in the mode of calculation of such minimum wages for work done."

It will thus be clear that the notification was issued and is sought to be justified expressly on the ground that the employer's right of *chhat* had to be checked or controlled and that disputes between employers and employees had to be settled in regard to the right of *chhat*.

I have reproduced these pleadings at some length because one of the points argued was that these powers are absolutely essential in order to make the revision of the rates of minimum wages effective and that, therefore, they must be deemed to be conferred on the State Government by implication. The only point I may here stress is that it was not alleged by Government that the previous notifications operating till then had become wholly ineffective or nugatory because they did not contain provisions analogous to cls. 3 to 7 of the present notification. On the contrary, what is alleged is that several disputes continued to arise because of those notifications, which can only imply that they were partially effective. As I shall show hereafter, the whole foundation of the rule as to implied powers is the absolute necessity or essentiality for implying them.

The first two clauses of the Schedule to the notification lay down the revised minimum rates of wages for two classes of bidis. The rates are prescribed districtwise. In the notification which was operative immediately prior to the present notification the rates were fixed in greater detail, and, if I may say so, townwise or according to centres of business. The standard employed was also the same viz., thousand bidis containing 6 chhataks of tobacco. The difference in rates between better qualities of bidis containing 7 chhatakas per thousand was also the same viz., now 12 Naye Paise or (what is its equivalent) 2 annas.

These clauses are, in my opinion, a clear and legitimate exercise of the power to fix or revise minimum wages under the Act. Indeed, this much was virtually conceded on behalf of the petitioners. The only argument on which it was claimed that these clauses should be struck down was, as I have stated, that they had been inseparably linked with the remaining cls. 3 to 7 by virtue of the opening words of cl. 1 "Subject to the other provisions of this Schedule". Therefore, that argument would depend upon the view taken in respect of cls. 3 to 7.

Now, it was not disputed by either side that when the bidi is prepared the tendu leaf in which the tobacco is wrapped is more or less green and flexible. It is at this stage that the bidi must be wrapped. After a few days the leaf dries up and becomes brittle and, therefore, once a bidi is rolled it is impossible to salvage the tendu leaf. Therefore it is implicit in the provisions of cl. 3 that if the employer makes a *chhat* which can only be upto 5 per cent., and decides to accept the first option offered to him, he must lose 5 per cent. of the tendu leaves which he has doled out for the purpose of manufacture to the employee because it is impossible to unroll the tendu leaf after it is dry. It was also suggested that in the process of breaking up the bidi, the most valuable ingredient of the bidi, viz., the tobacco, could not all be retrieved, and that there must be a substantial percentage of wastage and also some mixture with tendu leaf particles and powder. Therefore, by the acceptance of the so-called option the employer stood the risk of (a) definitely losing 5 per cent. of the tendu leaves without payment, (b) getting back the tobacco which he is supposed to recover, of a slightly inferior quality, and (c) not of the identical weight but somewhat less. He may accept these consequences, otherwise he has the second option which only means that he must accept all the rejected bidis and pay full wages for them. The clause clearly controls the right of the employer to reject goods which are of bad workmanship or not marketable, or to pay for the goods according to quality, which was admittedly the system prevailing till the date of the notification.

Clauses 4 and 5 must be read together. Clause 4 deals with rejection of bad bidis of a percentage of more than 5 per cent. but less than 10 per cent. If there is a dispute as to the bidis rejected in this slab, then a sort of domestic tribunal has been set up to try the issue. The tribunal is to consist of equal number of representatives of employees and the employer who are to inspect whether the rejection was properly done or not, and in the event of difference of opinion, the opinion of the majority is to prevail. If the opinion of the tribunal is divided, then the employer has an option to retain the 5-10 per cent. *chhat* and pay half the rates fixed or an alternative option not to retain it, in which case the employees should destroy the bidis forthwith. Clause 5 deals with the manner of selection of the personnel of the domestic tribunal.

Incidentally, there was a short point raised as to the interpretation of the last paragraph of this clause. The learned Special Government Pleader urged that it could not be the intention of the clause that bidis should be wholly destroyed, but it must be read in terms of a similar provision in cl. 3, that is to say, that 5-10 per cent. *chhat* bidis *qua* bidis should be destroyed, but that the employer is to get back the tobacco. That may have been the intention of the framer of the notification, but the language used does not warrant such a construction. It says "If the employer does not want to retain these bidis the employee shall destroy them forthwith". The use of the word "them" can only refer to the bidis inclusive of the tobacco and not give the employer the right to retrieve the tobacco.

Now, it was urged that the provision for this so-called domestic tribunal is wholly illusory. Conditions being what they are, the representatives of the employer and the employees will never see eye to eye and, therefore, the employer must accept the goods paying half rates to them though they may be absolutely worthless or have the bidis destroyed entirely.

For the purposes of the decision of the questions arising in these cases, however, these contentions are not all germane. What it is necessary to emphasize is that cls. 4 and 5 of the Schedule to the notification again control the right of the employer not to pay for bad workmanship or at any rate to pay according to quality. These clauses also give power to set up domestic tribunal and to adjudicate a dispute which is essentially an industrial dispute. These powers will, therefore, have to be examined.

Turning to cl. 6, it provides that where the *chhat* is above 10 per cent. the employee shall be paid full wages. But here again the employer is given an

option. He can take action against a bad workman provided the *chhat* in the case of that workman is "more than 10 per cent. for 6 continuous working days in a calendar month". If he cannot take such action he is bound to pay for all the bidis above 10 per cent. even if they be of bad workmanship or contain little or no tobacco and whether they are suitable for purposes of smoking or not.

Now, it was argued that under law every seventh day must be a holiday. Therefore, under the second part of cl. 6 the workman can continue to do as much bad work as he likes for five days in a week provided he does good work on the sixth day, in which case the option cannot be availed of by the employer. I find much substance in this contention. The right of action given to the employer is wholly illusory. What action should be taken is also not shown. Presumably, it could only be action according to law, that is to say, under the Standing Orders which in their turn do not justify imposition of a penalty except for gross negligence which has to be established in a departmental enquiry. All this is provided where the "*chhat*" is more than 10 per cent. for six continuous working days in a calendar month, which will be a rare occasion.

Again I emphasize that with these minor details of the notification I am not immediately concerned. What is of importance to note is that cl. 6 of the Schedule to the notification virtually enjoins that the employer cannot reject goods above 10 per cent. In other words, it is clear that the employer has to pay for 90 per cent. of the bidis even though they are of bad workmanship, defective for any reason such as little or no tobacco in some of them or the leaves broken so that it cannot be smoked. I shall advert to this clause again. It was really on these cls. 3, 4 and 6 that the learned Special Government Pleader found the greatest difficulty in justifying the notification under the express powers conferred by the Act and was, therefore, impelled to support them under the doctrine of implied powers.

Clause 7 prescribes that *chhat* shall be made only once in a day by the employer and it shall be at any premises within two miles from the premises where bidis are manufactured. This is an incidental provision intended to hit the double right of *chhat* to which I have referred above—once by the thekedar and once at the factory—which the employer used to exercise in case of bidis manufactured by the employee at his home, and to stop the practice of *chhat* at any place other than a factory. The clause does not say this, but having regard to the existing conditions it was urged that it has that effect. The worker works in his home which is separate in every village and the factories or centres established by the employer are not within two miles of the majority of villages. So the employer can never do the second *chhat* at the factory (a) because the factory or centre is beyond two miles of the worker's home, and (b) because he cannot remove the goods from the home to the centre or factory within a day. The provision, therefore, inevitably and directly affects the existing terms and conditions of work and the right to reject goods of bad quality or workmanship or to pay only according to the quality of the work.

Then there is the explanation which defines "employer" and includes his thekedar, contractor or agent as the case may be. As to this clause it was urged that there is no power to define the very word which is defined by the Act. On behalf of the State, however, the learned Special Government Pleader supported the explanation by urging that it was not in conflict with the definition in the Act, and was merely in terms thereof. He urged that it may be regarded as mere surplusage. No doubt, comparing the two definitions of "employer" in the Act and in the notification, it could be said that the notification does not go beyond the definition in s. 2(e) of the Act. But there is a vital difference and that difference is brought out if we consider the opening words of the interpretation clause in s. 2 "Unless there is anything repugnant in the subject or context". Those crucial words are omitted in the notification and, therefore, so far as the definition in the notification is concerned, whether the context

otherwise implies or not, the word "employer" shall always include thekedar, contractor or agent. This is, in my opinion, a substantial departure from the provisions of the Act and in this light the power to do so will have to be examined.

To summarise, an analysis of the provisions of the notification shows the exercise of the following powers:—

(a) The power to compel the employer to accept all bidis up to 90 per cent. and so to circumscribe the employer's right to reject bad or worthless goods, not to pay for unsaleable goods or to pay only according to the quality of the work or goods. (Clauses 3, 4, 5 and 6 of the Schedule to the notification).

(b) To provide for the settlement of disputes (clauses 4 and 5).

(c) To constitute an arbitral tribunal for the settlement of those disputes (clauses 4 and 5).

(d) To prescribe the mode and place of rejection of goods, or in other words, the right of the employer to select the place where his business shall be carried on (clause 7).

(e) To alter the definition of the word "employer" as given in the Act. (the Explanation).

Mr. Phadke on behalf of the petitioners urged that none of these powers are conferred upon the State Government by the provisions of the Act and that, therefore, the notification in *ultra vires* of the powers under the Act. He also urged that the promulgation of this notification has affected the employer's right to carry on his occupation, trade or business under art. 19(1)(g) of the Constitution. He further urged that the procedure prescribed by the Act in s. 5 read with ss. 7, 8 and 9 had not been complied with and, therefore, the notification was bad. The learned Special Government Pleader on behalf of the State; Mr. M. N. Chandurkar on behalf of respondent No. 2, the Independent Labour Party's the C.P. and Berar Bidi Workers' Union, and Mr. S. V. Dhabe on behalf of the Intervenor, the M. P. Rashtriya Bidi Majdoor Sangh, controverted these points. Mr. Abhyankar raised an additional issue, namely, that even if the notification could not be justified under the express powers under the Act, those powers were implied. They must be regarded as ancillary to the powers under the Act and, therefore, the notification would be justified as a legitimate exercise of the implied powers of the Government. With the arguments of Messrs Qazi and Dhabe, my learned Brother has amply dealt, and I am in respectful agreement with his conclusions.

Thus, five points arise for decision in these cases:—

(1) Are any of the clauses of the Schedule to the notification *ultra vires* of the powers of Government under the Minimum Wages Act (XI of 1948)?

(2) If any of them cannot be justified under the express powers under the Act, can the notification or any of its provisions be justified under the implied powers under the Act?

(3) Is the notification *ultra vires* of art. 19(1)(g) of the Constitution?

(4) Was the procedure laid down by the Act for the promulgation of such a notification followed, and if not, what is its effect?

(5) If one or more clauses of the notification are found *ultra vires* what should be the effect?

So far as the first point is concerned, my learned Brother has held that none of the provisions of the notification or its Schedule can be justified under the express provisions of the Act. On this point I am, with respect, in complete agreement with him so far as cls. 3 to 7 of the Schedule to the notification are concerned. None of those clauses can be justified under the provisions of the Act. But, in my opinion, cls. 1 and 2 of the Schedule are good and directly flow from the express powers granted under the Act. My learned Brother has, however, held the entire notification valid and has justified it under the doctrine of implied powers. On both the questions it is, therefore, necessary to refer to the scope and object of the Act and to some of its important provisions.

In *S.I.E.L.R. Organisation v. Madras State*²—a case which was referred to by the Supreme Court of India in *Bijay Cotton Mills Ltd. v. The State of Ajmer*³—Venkatarama Aiyar J. traced the genesis of the Minimum Wages Act, 1948 (XI of 1948). He said that it was passed in consequence of the "Minimum Wage Fixing Machinery Convention" held at Geneva in 1928 and certain resolutions passed at the Convention which were embodied in arts. 223 to 228 of the International Labour Code, Vol. I, pages 167 to 174. He stated that—

"The object of these resolutions was to fix minimum wages in industries 'in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise, and wages are exceptionally low.' Article 224(1), p. 169. The Minimum Wages Act was passed for giving effect to these resolutions. The preamble to the Act states that 'It is expedient to provide for fixing minimum rates of wages in certain employments'; and they are specified in Part I of the Schedule. As remarked in 'Industrial Awards in India, an Analysis'

"The Act aims at making provision for the statutory fixation of minimum rates of wages in a number of industries wherein 'sweated labour' is most prevalent or where there is a big chance of exploitation of labour."

"Thus the object of the Act is to provide for fixation of wages in trades in which labour is not organised and that will be clear from the list of trades enumerated in Part I to the Schedule."

Now, a scrutiny of the provisions of the Act will indicate that it is just this and no more that the Act gives power to do. The power and indeed the duty on the part of the appropriate Government to fix minimum rates of wages in employments specified in parts I and II of the Schedule to the Act is laid down in s. 3(1)(a) and the proviso permits the appropriate Government to fix such rates for a part of the State or for any specified class or classes of such employments in the whole State or part thereof. Clause (b) of sub-s. (1) of s. 3 gives the power under certain conditions to review and revise the minimum rates if necessary. Sub-section (2) of s. 3 describes the kinds of rates that may be fixed. They are minimum rates of wages for

(a) Time work—called "a minimum rate."

(b) Piece-work—called "a minimum piece-rate".

(c) The minimum rate of remuneration in the case of employees employed on piece-work for the purpose of securing to them a minimum rate of wages on a time work basis—called "a guaranteed time-rate".

(d) In respect of over-time work—called "an over-time rate".

While the duty to fix rates under sub-s. (1) of s. 3 is preceded by the word "shall" and is, therefore, mandatory, the power to review and revise under cl. (b) of sub-s. (1) of s. 3 as also the power to fix different kinds of rates in sub-s. (2) of s. 3 are preceded by the word "may" giving a discretion to the appropriate Government. Then follow the provisions of s. 3, sub-s. (3), which are as follows:—

"(3) In fixing or revising minimum rates of wages under this section,—

(a) a different minimum rates of wages may be fixed for—

(i) different scheduled employments;

(ii) different classes of work in the same scheduled employment;

(iii) adults, adolescents, children and apprentices;

(iv) different localities;

(b) minimum rates of wages may be fixed by any one or more of the following wage periods, namely:—

(i) by the hour,

(ii) by the day,

(iii) by the month, or

(iv) by such other larger wages period as may be prescribed and where such rates

are fixed by the day or by the month, the manner of calculating wages for a month or for a day, as the case may be, may be indicated.

Provided that where any wage-periods have been fixed under section 4 of the Payment of Wages Act, 1936 (IV of 1936), minimum wages shall be fixed in accordance therewith."

Thus s. 3, sub-s. 3(b)(iv) expressly prescribes "the manner of calculating" wages in particular cases. The necessary implication is that in other cases e.g. in the case of piece rates, no power to prescribe the manner of calculation or mode of payment is granted.

Section 4 indicates the components of the minimum rates of wages that the appropriate Government has been empowered to fix depending on the cost of living index number and the cash value of concessions in respect of supplies of essential commodities at concession rates.

These provisions prescribing the duties and powers of the appropriate Government to fix, review and revise the minimum rates of wages are governed by the definition of "wages" in s. 2(h). That definition is as follows:—

"2. In this Act, unless there is anything repugnant in the subject or context,—

(h) 'wages' means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes house-rent allowance but does not include—

(i) the value of—

(a) any house-accommodation, supply of light, water, medical attendance; or

(b) any other amenity or any service excluded by general or special order of the appropriate Government;

(ii) any contribution paid by the employer to any Pension Fund or Provident Fund or under any scheme of social insurance;

(iii) any travelling allowance or the value of any travelling concession;

(iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(v) any gratuity payable on discharge;"

The definition is plenary and overriding. It defines wages with reference to the contract of employment, express or implied, and states that wages shall mean all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable etc. Therefore, the definition, in my opinion, indicates clearly that the Act does not intend to abolish or give a complete go-by to the terms of the contract of employment subsisting between the employer and the employee. The effect of this definition is on the other hand to recognize the contract except in so far as the provisions of the Act modify it. Thus, the Act seeks to establish within its scope and object, a balance between the rights under the contract and the statutory rights curtailing the contract. My learned Brother has in para. 24 of his opinion held that that the definition cannot be construed as limiting or taking away the implied power of the State Government to make provisions of the kind we find in the Schedule to the notification, and that "in a sense it is descriptive of the term wages."

With respect, I am unable to accept this interpretation which is, in my opinion, contrary to the very terms of s. 2(h). Section 2(h) says "Wages means" which can only connote that a definition is intended and not a description. I shall show hereafter that the implied powers can only flow from the express powers and then too by necessary intendment alone and that in no case can powers be implied which are contrary to the express provisions of the statute.

In both ss. 3 and 4 the words used throughout are "minimum rates of wages" and, therefore, a point was taken by the learned Special Government Pleader that the word "wages" which is defined in s. 2(h), has not the same connotation as the word "wages" in the expression "minimum rates of wages" and, therefore, the definition should not be incorporated into all the clauses of ss. 3 and 4 which speak of minimum rates of wages.

I am unable to accept this contention. In the first place, it will render the definition virtually nugatory because it will cease to apply to ss. 3(1)(a) and (b), s. 3(2) and s. 3(3), so that the very purpose for which the definition was incorporated would fail. In the second place, the argument advanced suggests that the expression "minimum rates of wages" is a term of art in contradistinction with the definition of "wages". The expression "minimum rates of wages" is not defined in the Act, and, in my opinion, there is no warrant for the suggestion that it has some peculiar connotation other than that implied by plain English. In my opinion, wherever the word "wages" occurs in the expression "minimum rates of wages" it must be read as defined in s. 2(h). Thus it seems clear to me that the duty and power of the appropriate Government (a) to fix, review and revise minimum rates [Section 3(1)]; (b) to fix the classes of rates [section 3(2)]; (c) to apply them to different employments in classes of work [section 3(3)]; and (d) to different wage periods [section 3(3)(b)]—are all subject to the contract between the employer and the employee. It is a fundamental provision under the Act, therefore, that the contract between the employer and the employee governs and shall continue to govern save and except that it is modified by the exercise by the appropriate Government of the express powers given under the Act. I stress this point here because it seems to me that it must have a most decisive effect on the question of the implied powers of Government.

Section 5, sub-a. (1) deals with the procedure for fixing minimum rates and the two methods to be followed by the appropriate Government viz. (a) either to appoint committees or sub-committees to hold enquiries and advise the Government in the fixation or revision of minimum rates of wages or (b) to publish its proposals for the information of persons likely to be affected thereby and specify a certain date—not less than two months from the date of the notifications on which the proposals will be taken into consideration. Sub-section (2) requires a notification to be issued by the appropriate Government fixing or revising the minimum rates of wages and makes provision for the coming into force of the notification. The proviso to sub-a. (2) of s. 5 makes it obligatory on Government to consult the Advisory Board when it has not appointed a committee or committees to hold enquiries and advise it. Upon the provisions of this section was founded the argument under point No. 4 mentioned above. Sections 7, 8 and 9 provide for the setting up and powers of the Advisory Board, the Central Advisory Board and the committees and sub-committees. Section 10 provides for correction of errors, omissions, and accidental slips in Government notifications. Then we come to s. 12 on which the greatest reliance was placed on behalf of the State to justify the provisions of their notification under the express powers conferred by the statute. I need not refer to its provisions because my learned Brother has fully dealt with that argument and negatived any power in the State Government to make provisions such as are contained in the Schedule under s. 12.

Then I turn to ss. 20 and 21 of the Act which, in my opinion, are again important. They run as follows:—

"20. (1) The appropriate Government may, by notification in the Official Gazette, appoint any Commissioner for Workmen's Compensation or any officer of the Central Government exercising functions as a Labour Commissioner for any region, or any officer of the State Government not below the rank of Labour Commissioner or any other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the Authority to hear and decide for any specified area all claims arising out of payment of less than the minimum rates of wages or in respect of the payment of remuneration for days of rest or for work done on such days under clause (b) or clause (c) of sub-section (1) of section 13 or the wages at the overtime rate under section 14, to employees employed or paid in that area.

(2) Where an employee has any claim of the nature referred to in sub-section (1) the employee himself, or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector, or any person act-

ing with the permission of the Authority appointed under sub-section (1), may apply to such Authority for a direction under sub-section (3):

Provided that every such application shall be presented within six months from the date on which the minimum wages or other amount became payable;

Provided further that any application may be admitted after the said period of six months when the applicant satisfies the Authority that he had sufficient cause for not making the application within such period.

(3) When any application under sub-section (2) is entertained, the Authority shall hear the applicant and the employer, or give them an opportunity of being heard, and after such further inquiry if any as it may consider necessary, may, without prejudice to any other penalty to which the employer may be liable under this Act, direct;

(i) in the case of a claim arising out of a payment of less than minimum rates of wages, the payment to the employee of the amount by which the minimum wages payable to him exceed the amount actually paid, together with the payment of such compensation as the Authority may think fit, not exceeding ten times the amount of such excess;

(ii) in any other case, the payment of the amount due to the employee, together with the payment of such compensation as the Authority may think fit, not exceeding ten rupees; and the Authority may direct payment of such compensation in cases where the excess or the amount due is paid by the employer to the employee before the disposal of the application.

(4) If the Authority hearing any application under this section is satisfied that it was either malicious or vexatious, it may direct that a penalty not exceeding fifty rupees be paid to the employer by the person presenting the application.

(5) Any amount directed to be paid under this section may be recovered—

(a) if the Authority is a Magistrate, by the Authority as if it were a fine imposed by the Authority as a Magistrate, or

(b) if the Authority is not a Magistrate, by any Magistrate to whom the Authority makes application in this behalf, as if it were a fine imposed by such Magistrate.

(6) Every direction of the Authority under this section shall be final.

(7) Every Authority appointed under sub-section (1) shall have all the powers of a civil Court under the Code of Civil Procedure, 1908 (V of 1908), for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such authority shall be deemed to be a civil Court for all the purposes of section 185 and Chap. XXXV of the Code of Criminal Procedure, 1898 (V of 1898).

21. (1) Subject to such rules as may be prescribed, a single application may be presented under section 20 on behalf or in respect of any number of employees employed in the scheduled employment in respect of which minimum rates of wages have been fixed and in such cases the maximum compensation which may be awarded under sub-section (3) of section 20 shall not exceed ten times the aggregate amount of such excess, or ten rupees per head, as the case may be.

(2) The Authority may deal with any number of separate pending applications presented under section 20 in respect of employees in the scheduled employments in respect of which minimum rates of wages have been fixed, as a single application presented under sub-section (1) of this section and provisions of that sub-section shall apply accordingly."

I have reproduced these sections verbatim in order to show that the Act has made the most detailed provisions for the settlement of all claims arising out of payment of less than the minimum rates of wages. It is impossible to overlook the amplitude of the powers conferred upon the Authority set up to hear and decide disputes regarding minimum wages.

The remedy provided for the employee is so simple that not only an illiterate employee but any legal practitioner, any official of a registered trade union, any Inspector, or even any person acting with the permission of the Authority could move in the matter. By cl. (i) of sub-s. (3) of s. 20, the Authority makes

a summary enquiry into a claim arising out of a payment of less than the minimum rates of wages, has the power to reimburse short payment to the employee together with such compensation as the Authority may think fit, not exceeding ten times the amount unpaid. It has also got the power under s. 20, sub-s. (3), sub-cl. (ii); to hear and decide a dispute in "any other case" and to order the payment of the amount due to the employee, together with such compensation as the Authority may think fit, not exceeding Rs. 10. Sub-section (5) of s. 20 gives the Authority the power to recover the amount ordered to be paid to the employee as if it were a fine imposed, or to entrust it to a Magistrate to recover it as such. Sub-section 6 of s. 20 makes every direction of the authority final. Section 20 permits one application to be made in respect of any number of employees and the Authority is given the power by sub-s. (2) of s. 21 to consolidate any number of separate pending applications in respect of employees and treat them as a single application.

Thus the Act has given the most anxious consideration to providing a very effective, speedy and cheap remedy for the enforcement of the rights of the employees to receive minimum wages and in "any other case" also. So wide are the powers of the Authority that it can adjudicate upon almost any and every claim in relation to wages and grant redress. It may do so not merely in the case of an individual employee, but, if need be, in the case of any number of employees. It is even possible to decide questions relating to the entire industry itself, by virtue of s. 21.

I shall show hereafter that almost everyone of the provisions of cls. 3 to 7 of the notification Schedule would fall within the provisions of ss. 20 and 21 and would really be questions which the Act says the Authority alone shall decide. By thus defining the power and jurisdiction of the Authority to whom special jurisdiction is given the sections necessarily delimit the power of the Government to decide or deal with the same questions by a mere notification. These considerations, in my opinion, have an important bearing on the question of implied powers.

The so-called doctrine of implied powers is, in my opinion, not a rule of substantive law. It is merely a rule of construction or interpretation. The leading case is *Fenton v. Hampton*⁴, an authority which my learned Brother has referred to and relied upon. At page 41 of the Revised Reports, after quoting the Latin maxim '*Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest*' (the equivalent of which Broom has translated for us 'Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect'—See pages 309 and 313 of Broom's Legal Maxims, 10th ed.) Pollock, C.B., states the rule thus:—

"It becomes, therefore, all important to consider the true import of this maxim, and the extent to which it has been applied. After the fullest research which I have been able to bestow, I take the matter to stand thus: whenever anything is authorized, and especially if, as a matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment. But, if, when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists, that the power may be legally exercised without the doing that something else, or even going a step farther, that it is only in some particular instances, as opposed to its general operation, that the law falls in its intention, unless the enforcing power be supplied, then, in any such case, the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a *casus emissus*." (Italics are mine.)

To the same effect are the observations in *The Trolly Draymen and Carters Union of Sydney and Suburbs v. The Master Carriers Association of N.S.W.*⁵ That was a case wherein an award made under the Industrial Arbitration Act (N.S.W.), 1901, by a Court of Arbitration appointed under the Act was called in question. Clause 27 of the Award prescribed that the employer shall employ

⁴ (1868) 11 Moore P.O. 359; 117 R.R. 32.

⁵ (1905) 2 O.L.R. 509.

members of the claimant Union in preference to strangers (that is to say persons who were not members of the Union) other things being equal, and it was argued on behalf of the employers that this meant that the employer had to give notice to the Union before they could engage a servant and amounted to an undue interference with the liberty of the employer to engage a servant without giving notice. This contention was sought to be met, on behalf of the Workers' Union, by suggesting that such a provision must necessarily be implied in order to make the Act and the award effective. Chief Justice Griffith, in delivering the judgment, negatived the implied power in the following words (p. 516) :—

"Such a condition would involve, of course, a remarkable interference with the liberty of the employer, that he should not be allowed to engage a servant without giving notice of his intention to do so. For, whether the prescribed notice was public or private, there would be no difference in principle. In considering the question whether such a provision is to be implied in the Act, it is important to bear in mind that, if it is, the discretion of the Court is unlimited and cannot be controlled. *Is it a necessary inference from what the Legislature has said that it did intend to confer such a power?* I confess that I cannot see any foundation for the argument... Except so far as they are empowered to do so by the provisions of the Act, the Court cannot control the common law rights of the subject." (Italics are mine.)

I may also here usefully refer to the following passages from Maxwell's Interpretation of Statutes (the italics are throughout mine) :—

At p. 361: "Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are *essentially necessary* to its execution."

At p. 362: "In the same way, when powers, privileges, or property are granted by statute, *everything indispensable to their exercise or enjoyment is impliedly granted* also as it would be in a grant between private persons."

But after stating these propositions Maxwell states a further qualification in the following words :—

At p. 364: "But when an Act confers such powers, it also impliedly requires that they shall be exercised only for the purposes for which they were given and subject to the conditions which it prescribes, and also with due skill and diligence and in a way to prevent a needless mischief or injury."

There is also the following powerful statement of the rule as to implications in Crawford on "Statutory Constructions" at page 266, Article 168 :—

"168. *Implications.*—The implications and intendments arising from the language of a statute are as much a part of it as if they had been expressed. But it is only necessary implications which may thus be read into the statute. Mere desirability or plausibility alone will not meet the test. And while the implication does not need to shut out every other possible conclusion, or be one from which there is no escape, it must be one, which, under all the circumstances, is compelled by a reasonable view of the statute, and the contrary of which would be improbable and absurd. In order to meet the test, the implication must be so strong in its probability that the contrary thereof cannot be reasonably supposed. Nor can implications contradict the expressed intent of the statute, for obviously the intent as expressed must prevail over the intent reached by implication. If the intent is expressed, there is nothing that can be implied. Nothing further is needed to reveal the legislative intent."

The reason for allowing the Court to give effect to necessary implications is quite apparent. Many matters of minor detail are often omitted from legislation. If these details could not be inserted by implication, the drafting of legislation would be an interminable process and the legislative intent would likely be defeated by a most insignificant omission. Consequently, these minor details are considered as if included in the general terms of the enactment as well as in the purpose sought to be achieved by the legislature, and therefore, are regarded as actually intended by the legislature. In a broad sense, true implications are as much a part of the language which makes up the statute as the meanings of the various words are a part of it. Viewed from this

standpoint, no exception is created to the general rule that the intent of the law-makers must be derived from the language used in the enactment. And the court in ascertaining a necessary implication is simply determining and making effective the legislative will."

It is, in my opinion, clear from these passages that the doctrine can be applied only where the following conditions are fulfilled:—

- (1) There must be a duty imposed or power prescribed.
- (2) On a reasonable construction of the statute there must be an impossibility in the exercise or fulfilment of that power, resulting in making its object or purpose nugatory.
- (3) The impossibility must be such that it is not an impossibility in an individual case because then the law cannot permit powers by implication but the impossibility must be of a general nature so that the purpose and object of the duty or power is rendered impossible of achievement in every case. It is only then that powers by implication may be inferred.

These points, I believe, are the same as my learned Brother has deduced from the decided cases and other statements of law. But with all respect to him, I would add a fourth condition which is also deducible from the statement of Maxwell at page 364 and the passage from Crawford. I would formulate the fourth condition as follows:—

- (4) The implication cannot contradict the expressed intent which must always prevail and where it becomes necessary to read an implication into an enactment the scope of the implication must be limited only to what is reasonably necessary and no more.

It is in the recognition of the 4th and the application of the last three conditions that my learned Brother and I differ.

Now, I have already indicated that the purpose and object of the Act is to provide minimum wages for employees and no more. For achieving this limited object the Act makes exhaustive provisions. It states what Government shall and shall not do in its duty to fix and in the exercise of its powers to revise and review minimum wages.

Government must initially have regard to the terms of the contract of employment. This is fundamental and implicit in the definition of "wages." Government can certainly affect and modify the contract so long as it exercises its express powers. Indeed, every time a minimum rate is prescribed the contract must be affected. But the right to affect or modify the contract is expressly limited to the powers under the Act. Government must confine itself to the four classes of rates specified in sub-s. (2) of s. 3. Government may prescribe different rates for different scheduled employments or for different classes of work in the same scheduled employment; or for different localities; it may prescribe different rates for adults, adolescents, children and apprentices; it may fix the rates by the hour, the day, the month or a longer period. But save and except these express powers the Act prescribes that the contract shall continue to operate. Therefore there is no scope for any implication. It is never assumed that the Legislature has given powers which would infringe existing rights, even though the Act would be inoperative without them—See Halsbury Vol. 31, page 545, Article 723. Government has not been given the power to modify the contract of employment to such an extent as to give them the power to order the employer to accept bad work and pay full wages for it as is done in cls. 3 to 6 of the Schedule to the notification; or to set up a domestic tribunal as is done in cl. 4; or to decide an industrial dispute (Clause 4 again); or to define "employer" in any manner different from the Act. Secondly, if the Legislature has intended to confer these powers on Government, it is reasonable to presume that they would have done so, in clear language, especially when they conferred several other powers. Therefore, in my opinion, there is no scope for implication of any further powers. The Act confers powers and delimits them itself by its express provisions.

The Legislature moreover was not unaware that consequent upon the provision of minimum rates of wages in any employment several incidental and

ancillary problems and disputes would arise. For these also the statute has made every provision. It has relegated all such problems and disputes for decision by the Authority constituted under s. 20. The Legislature was aware that such ancillary problems and disputes would arise and would be infinite in their variety. It is clear that the Legislature did not intend that Government should have the power to solve all such problems and resolve all such disputes through the simple expedient of a notification. If such power can be attributed to Government, even by implication, then the provisions of ss. 20 and 21 would be rendered largely nugatory and the wide jurisdiction conferred upon the Authority rendered practically useless. The very constitution of the Authority, the wide jurisdiction conferred upon it, the amplitude of its powers and the efficacy and expeditiousness of the remedies it can provide are indicative of no other intention but that the Authority alone shall be the forum where all such ancillary disputes and "claims" shall be decided. That necessarily excludes the inference of any power in Government to do so by notification.

The statute creates new duties and imposes new obligations and liabilities and at the same time prescribes a new remedy and creates a new forum for its enforcement. In such cases the general rule is "that no remedy can be taken but the particular remedy prescribed" and only before the particular forum. (See Article 740, page 551 of Halsbury's Laws of England, Vol. 31).

In *Barracrough v. Brown*⁶ Lord Watson stated the rule as follows (p. 622):—

"...The right and the remedy are given *uno flatu*, and one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to ~~assess~~ the amount of expenses to be repaid to the under-taker, but to determine by whom the amount is payable; and has therefore by plain implication, enacted that no other Court has any authority to entertain or decide these matters."

These remarks would *a fortiori* apply to a case where the question is whether a special quasi-judicial tribunal has a certain jurisdiction or whether it vests in executive Government to provide for the same matters by notifications.

The power to revise minimum wages has, in my opinion, been well and truly exercised by the State Government in cls. 1 and 2 of the Schedule to the notification. These clauses are justified under their powers under s. 3 read with s. 5(2). But the further argument is that unless the several provisions incorporated in cls. 3 to 7 of the Schedule are made, it will be impossible to give effect to cls. 1 and 2 and the duties and powers of Government under s. 3 of the Act. It was urged that having regard to the circumstances of this industry and the terms and conditions on which work was being done, these powers were absolutely necessary to be implied.

I have already adverted to the provisions of the Act and especially to ss. 20 and 21, and I have there shown that these sections were advisedly so widely expressed that the Authority has the power to investigate all claims arising out of payment of less than the minimum rate of wages. In view of the setting up of such an authority by the Act itself, was it really essential for Government to have made the provisions contained in cls. 3 to 7? If Government found that the employer was exercising his power of rejection to an unconscionable degree or was illegally taking the bad bidis and clandestinely selling them for gain, it was a clear case where the employer by these practices was depriving the employee of the minimum rate of wages prescribed by cls. 1 and 2; because under cls. 1 and 2, the employer would be bound to pay for all bidis, manufactured by the employee. Therefore, if the employer only accepted good bidis; took away free of charge the bad bidis and sold them, he did not pay for them. Therefore that would result in a non-payment or payment of less than the minimum rate of wages. That would immediately give rise to a claim that less than the minimum rate of wages has been paid and so give jurisdiction to the Authority. Similarly, if the employer unduly or excessively rejected bidis acceptable by the standards of any reasonable man, the employer was either not

paying or paying less than the minimum rate of wages. For all such claims the Act has provided a remedy and a forum for adjudication, in ss. 20 and 21.

But by the notification Government is virtually adjudicating the dispute which properly falls within the purview and powers of the authority under s. 20 in anticipation of its having arisen. It virtually assumes that the employer will continue to do excessive "*chhat*" and that a dispute on that score is bound to arise and therefore the notification proceeds to lay down that the employer shall not reject more than five per cent. If he rejects between five and ten per cent. it shall be adjudicated by the arbitral tribunal set up, and lastly that the employer shall in no case reject more than 10 per cent. and pay for 90 per cent. of the bidis whatever their quality. That in my opinion is the true meaning of cl. 6 though it may be couched in a language which may make it appear innocuous. The employer is enjoined to pay full wages in case of *chhat* above 10 per cent., which can only mean that he must accept the work even if bad. He has hardly an option of rejection when he must pay for it, in any case.

A notification is never an adequate substitute for an adjudication judicial or quasi-judicial. A notification is rigid and inelastic and can never have regard to the merits and demerits of individual cases or classes or categories of employments, whereas a tribunal can always take peculiar circumstances into account—circumstances which may be special to an individual or a class of workmen or to a class or classes of work. It is not surprising therefore that the Legislature advisedly chose to grant the latter remedy for adjudication of disputes and by implication negatived the former. In these very cases, to take an example, if in the case of an individual worker should the employer reject, say 50 per cent. of the bidis, it may be that the employer is right because work can be as bad as that in given cases. In such a case, under the Act the tribunal can adjudicate whether such a rejection is proper and fair, but the notification makes that impossible, and leads to the possible, but none the less alarming, result that all the bad work of whatever kind upto 90 per cent. must be paid for in full.

On behalf of the State the learned Special Government Pleader pointed out a number of difficulties in the implementation of cls. 1 and 2, in view of which, he said, cls. 3 to 7 became necessary. He urged that most of the labour is illiterate and uneducated, that they are left to the mercy of unscrupulous and scheming employers who have the means to litigate and harass the worker, and therefore the machinery set up under ss. 20 and 21 is in most cases rendered useless to make the rates of minimum wages effective. In my opinion, it is precisely for this reason that the Legislature made the powers of the Authority so wide and all embracing, and the procedure so simple that even an ignorant employee could easily avail of it, and what is more necessary to emphasize is that any Inspector could move on their behalf. Therefore, Government has merely to maintain vigilance and order the Inspector to take immediate action on behalf of the employees if any one or more of these practices continued, resulting in payment to employees of anything less than the minimum rate of wages. That is the way indicated by the Act and not by a notification which can hardly take into account the variety of cases that may arise. There is also in the industry a trade union which can move through any of its officers. There is no reason to suppose therefore that the rates of minimum wages fixed by cls. 1 and 2 of the Schedule to the notification will not be made effective without cls. 3 to 7. A similar attempt to prescribe the mode or procedure was made in a notification dealt with in the case in *P. G. Chakravarty v. Manager, Bewan Tea Estate*⁷ and was rightly struck down. The case is very apposite here.

But, as I have said, the question here is not a question of a nice balancing of probabilities. Having regard to the rule as to implied powers, the question here is whether it will be impossible to ensure the payment of minimum wages

prescribed by cls. 1 and 2 unless cls. 3 to 7 are there. I have already said that in my opinion all these are really questions which may only give rise to disputes and do not show that the rates would be impossible to enforce. Thus these questions fall within the purview of the authority under ss. 20 and 21, which provide a cheap, effective and adequate remedy. It seems to me then entirely unnecessary to concede such powers in favour of Government, quite apart from the fact that it would also be contrary to the clear intention of the Legislature.

In para. 14 of his opinion my learned Brother has stated that

"the intention of the State Government to enable a bidi worker to get Re. 1 and 60 nP for 1000 bidis rolled by him would be frustrated if the employer were to reject 500 bidis out of those rolled by him on the ground that they are below standard and then to utilize those bidis himself by selling them in the market."

With the greatest respect, I am unable to see how in the face of ss. 20 and 21 the intention of Government will be frustrated because the employer rejects 500 out of 1,000 bidis and then sells them privately. The Inspector of Government or the worker or any of the other agencies mentioned, has only got to lay the facts before the Authority and the question whether the employer rightly or wrongly rejected the 500 bidis would be immediately decided and the Authority can undoubtedly find that the employer cannot retain those bidis and not pay for them; it can order full payment if need be and what is more, order payment of some compensation also—so that the rate of minimum wages fixed could become at once effective and not be frustrated. Indeed, a mere notification cannot effectively do this because there may be a case where the employer may be right in rejecting even 500 out of a 1,000 bidis.

After the passage I have referred to above, my learned Brother has held that

"If the State Government could have no power to prescribe some conditions of the kind to be found in clauses 3 to 7, it would not be able to make effective the rates of wages fixed by it."

With all respect, I have already said that in my opinion the rates could be made effective by virtue of ss. 20 and 21. But I may also point out that the test for the grant of implied powers is not that the express power granted will become merely "ineffective" but that it will become "impossible" of enforcement. That, in my opinion, is a cardinal distinction. Of course, if "ineffectiveness" is the test, then it is so elastic a standard that I conceive that almost any power can be claimed to be implied as a result of the express power to fix minimum wages e.g. to control the managements of companies in various ways; to check their expenditure and profits and to order how they shall carry on the working. All these can be said to be matters which makes rates of minimum wages effective under conceivable circumstances. I do not think that that was the intention of the Legislature, when it passed the Minimum Wages Act.

My learned Brother has referred to two cases, namely, *A. M. Allison v. B. L. Sen*⁸ and *H. G. Beason v. H. Sultan, Deputy Commissioner, Lakhimpur*⁹. Both these cases arose out of proceedings taken under s. 20 of the Act. This itself will show that all such disputes could and actually were within the jurisdiction of the Authority under that section and could be decided by it. These cases were cited in order to show to what extent the contract between the employer and the employee can be interfered with by Government, but it is essential to emphasize that these cases themselves show that the proper remedy for the decision of such disputes is the Authority and not Government by issuing a notification.

None of the two cases moreover is an authority on the implied powers of Government. They do not consider the question of implied powers at all. They merely considered if the notifications in each case were justified under the Act. Thirdly, in neither case was the notification *in pari materia* with the

⁸ [1957] A.I.R.S.C. 227.

⁹ [1958] A.I.R. Assam 1.

notification in the present cases. In none of the notifications made in those cases were provisions analogous to cls. 3 to 7 incorporated. On the contrary, the notifications in each of these cases prescribed that the existing tasks and hours of work-load shall continue. In the present cases what was done is precisely the reverse. The existing tasks were directly and sweepingly interfered with.

In the Supreme Court case the managers of the tea gardens were paying their labour as follows:—

To males	—	at 8 annas	per day for plucking 18 seers of green leaves.
To females	—	at 6 annas	per day for plucking 12 seers of green leaves.

That was the work-load or task, in respect of which the basic wages were 8 annas and 6 annas respectively. The notification merely increased this basic wage to 12 annas and 11 annas respectively. There was no dispute about this fixation. But the dispute was about something else. If the labourers plucked larger quantities of green leaves, they used to be paid prior to the notification, by way of extra wages at the rate of 6 pies per seer in excess of 16 seers and 12 seers respectively. Now, as soon as the notification came, what the employers did was that they raised the quantum of work on the basis of which the extra payment was being made. In other words, they refused to make the extra payment to their labour on the old basis unless the green leaves plucked by them exceeded 24 seers and 22 seers respectively. Previously, be it noted, these figures were 16 seers and 12 seers respectively.

The notification as amended, after prescribing the minimum rates of wages had also prescribed that the existing tasks and hours of work shall continue until further orders, and the point that arose for decision was whether this was a proper exercise of the power to fix minimum wages. Their Lordships held that the sole intention of Government in issuing the notification was to increase the basic wages while maintaining the same basic work-load or task assigned to male and female workers. They observed that no doubt in the fixation of minimum wages there must necessarily be some interference with the work-load or task and they held that the basic wages fixed by that notification were merely "correlated to the existing work-load or task" and were, therefore, justified. This case was the basis for the decision of the subsequent Assam case referred to above.

Applying the principle of these decisions to the present case, there is no doubt that the task or work-load, or to put it generally the contract, can be interfered with in the performance of Government's duty to fix or revise minimum wages. There is also no doubt that in the fixation of minimum wages the rates may be correlated to the task or work-load. But in the present case the notification does much more than was indicated by their Lordships or was done by the notifications impugned in these cases. Here the notification interferes and directly seeks to control the relationship of employer and employee, the right of the employer to see to the quality of the work, and prescribes that the employer shall take 90 per cent. of such work as is proffered or tendered even though the bidis may be bad or defective or virtually no bidis at all, e.g. not containing any tobacco or much less than the normal quantity of tobacco. Similarly, it sets up a tribunal of adjudication; it directly purports to decide an industrial dispute and provides machinery to determine it; and it changes the definition of "employer" so as to make it applicable in some more instances than the Act contemplated. All this, it is claimed, can be done because of the implied powers. In my opinion, this cannot possibly be said to amount to correlation of wages to the existing work-load or task within the meaning of the principle laid down by their Lordships of the Supreme Court.

Mr. Dhabe in the course of his arguments on behalf of the interveners referred to the decision of a division Bench of this Court in *M. P. Min. Industry*

*Ass'tion v. Reg. Lab. Commr.*¹⁰ (to which I was a party) and he urged that there Mr. Justice Tambe and I had held that the Minimum Wages Act was a piece of social legislation. He, therefore, urged that we should give it a wide interpretation so that its beneficial object should be achieved and not be frustrated.

In that case the Division Bench was concerned with the question whether a person engaged in stone-breaking operations in a manganese mine could be deemed to fall within the entry "employment in stone-breaking or stone-crushing". In that case the question was one of interpretation of an express provision of law in regard to which there was doubt and we construed an entry in the Schedule in consonance with the object and purpose of the Act. There is no question here of the express powers under the Act. These express powers have been considered and negatived by my learned Brother and I am, with respect, in complete agreement with him. The ground that a legislation is a piece of social legislation cannot be germane in considering the *vires* of a notification or in considering the implied powers of Government to make one or more of the clauses of the notification. I do not think that in the name of social justice and social legislation we can alter the rule as to implied powers the scope of which I have already discussed above. Apart from the normal, well-established rules of interpretation, considerations of social justice are irrelevant. See remarks in *Central India Spg., Etc. Co. v. State Ind. Court.*¹¹

I have given my best consideration to the question whether it is not possible to uphold one or more of the provisions of cls. 3 to 7 and extricate them from the provisions which are bad. But looking at it from any point of view it seems to me that the provisions of cls. 3, 4 and 6 form part of one integrated scheme and are inextricably bound up together, so that it becomes impossible to cut out one or more sentences from those clauses without doing violence to the intention of the scheme and also rendering it in large measure incomprehensible.

The same, however, cannot be said regarding the first two clauses of the notification Schedule. They are, as I have already held, a proper exercise of the power to revise minimum rates of wages, and reading them alone it is clear that those rates can be given effect to.

No doubt, the first clause is preceded by the opening words "Subject to the other provisions of this Schedule." It was argued by Mr. Phadke that if cls. 3 to 7 are struck down, then cls. 1 and 2 must go because they are subject to cls. 3 to 7. In my opinion, however, cls. 1 and 2 are capable of enforcement by themselves and the striking down of cls. 3 to 7 will not render cls. 1 and 2 in the least bit ineffective or nugatory. It seems to me that it is immaterial whether I also hold that the words "Subject to the other provisions of this Schedule" should be removed from cl. 1 or not. The words would still operate at least so far as cl. 2 is concerned. I would, therefore, not interfere with any part of cls. 1 and 2 at all but would declare cls. 3 to 7 *ultra vires* and order them to be deleted from the notification.

In practice also I have already shown that cls. 1 and 2 are capable of enforcement. If the employer still persists in the reprehensible practice of excessive *chhat* the Authority can always be moved immediately, if necessary by the Government Inspector, not only on behalf of any individual but also on behalf of sections of the industry and so all the disputes referred to in the provisions of cls. 3 to 7 could be adjudicated, and the right of *chhat* effectively controlled, thus ensuring the payment of the minimum rates fixed.

I may now usefully summarise my conclusions as to why I hold that cls. 3 to 7 of the Schedule to the impugned notification are *ultra vires* of the implied powers of Government. The reasons are:

(1) That the Act is a comprehensive enunciation of the express powers and, therefore, the necessary inference is of the exclusion of implied powers.

(2) The Act itself makes an express provision in s. 3, sub-s. 3(b)(iv), re-

garding the manner of calculating wages and limits it to only two cases. Therefore there can be no power implied in calculating the rates of wages for work on piece-rate, as in the present case.

(3) The particular power claimed must be essential to the purpose and object of the Act, and in the present case it is impossible to hold that all these powers invoked to support cls. 3 to 7 are so necessary that otherwise the fixation of minimum wages would not be possible.

(4) Ample provision is made in ss. 20 and 21 of the Minimum Wages Act and other laws for the implementation of the rates fixed and for decision of all these questions which cls. 3 to 7 virtually decide. Therefore, implied powers cannot be conceded to Government to do so by a mere notification.

Upon this view, it is unnecessary for me to decide the third point set forth by me above regarding the notification being *ultra vires* of the powers under art. 19(1)(g) of the Constitution. As to the fourth point, I am in respectful agreement with the opinion of my learned Brother that the procedure laid down by the Act for the promulgation of the notification was substantially followed.

In the result I would partly allow the petitions and declare that cls. 1 and 2 of the Schedule to the notification are valid but that cls. 3 to 7 thereof are *ultra vires* of the powers of Government under the Minimum Wages Act. In view of the partial success and failure of either party I would make no order as to costs.

In view of this difference of opinion between Mudholkar and Kotval JJ. the matter was placed before Tambe J. under the orders of the Chief Justice. The following was the opinion of Tambe J. which his Lordship gave on September 12, 1958.

Spl. C. A. No. 205 of 1958.

M. N. Phadke and *V. M. Golwalkar*, for the petitioners.

N. L. Abhyankar, Special Government Pleader, for State (respondent No. 1).

M. N. Chandurkar, for respondent No. 2.

S. W. Dhabe, for intervener.

Spl. C. A. No. 214 of 1958.

M. Q. Qazi, for the petitioner.

N. L. Abhyankar, Special Government Pleader, for the State (respondent).

TAMBE J. On difference of opinion between Mr. Justice Mudholkar and Mr. Justice Kotval, these cases have been placed before me under the orders of my Lord the Chief Justice of date August 12, 1958.

The question raised relates to the vires of the notification dated June 11, 1958, issued by the State Government of Bombay (Labour and Social Welfare Department) in exercise of the powers conferred on it by sub-s. (2) of s. 5 read with cl. (b) of sub-s. (1) of that section of the Minimum Wages Act, 1948, (hereinafter called the Act). By this notification the State Government revised the minimum rates of wages in respect of the employment in any tobacco (including bidi making) manufactory in the Vidarbha region. The said notification reads as follows:

"Minimum Wages Act, 1948.

No. MWA. 1537-J—In exercise of the powers conferred by sub-section (2) of section 5 read with clause (b) of sub-section (1) of that section of the Minimum Wages Act, 1948 (XI of 1948) and after consulting the Advisory Board and in supersession of the former Government of Madhya Pradesh Labour Department Notification No. 564-451-XXIII, dated the 28th February 1958, the Government of Bombay hereby revise the minimum rates of wages in respect of the employment in any tobacco (including bidi making) manufactory in the Vidarbha region of the State of Bombay as mentioned in the Schedule hereinto annexed and directs that this notification shall come into force with effect from 1st July 1958.

SCHEDULE.

Subject to the other provisions of this Schedule, the revised minimum rates of wages payable to employees per thousand bids (when leaves are supplied by the employer) shall be as follows:—

Area	Revised rate in Rs.
(i) Nagpur District.	1.69
(ii) Bhandara District.	1.62
(iii) Chanda, Akola, Buldhana, Yeotmal, Amraoti and Wardha District.	1.56

2. For all bids in which 7 chataks or more of tobacco mixture is used and for those bids which are known as "Hathnakhum" bids, there shall be an increase of 12 Naye Paise per 1,000 bids in the rates mentioned above in all the areas.

3. It shall be within the discretion of the employer to decide which are "chhat" bids or bad bids, up to 5 per cent. of the bids prepared by the employee. If the employer decides that any bids are "chhat" or bad, the "chhat" or bad bids up to 5 per cent. shall be destroyed forthwith by the employee and whatever tobacco is recovered from them shall be retained by the employer. If, however, the employer wants to retain these "chhat" or bad bids, he shall pay full wages for the same to the employee.

4. If "chhat" or bad bids are more than 5 per cent. but less than 10 per cent. and if there is any dispute between the employer and the employee as to whether the "chhat" or bad bids is done properly or not, equal number of representatives of the employer and the employees shall inspect the "chhat" is done properly or not. If there is any difference of opinion among the representatives of the two sides, the majority opinion shall prevail. If the opinion is equally divided and the employer wants to retain the "chhat" bids, he shall pay wages for "chhat" bids between 5 per cent. to 10 per cent. at half the rates fixed above. If the employer does not want to retain these bids, the employee shall destroy them forthwith.

5. The employer shall nominate his representatives and the employees shall elect their representatives.

6. In the case of "chhat" above 10 per cent. the employee shall be entitled to full wages. It shall, however, be open to the employer to take suitable action against the employee if the "chhat" is more than 10 per cent. for 6 continuous working days in a calendar month.

7. The "chhat" shall be made once in a day only, at any premises within a distance of not more than 2 miles from the premises where bids are manufactured.

Explanation:—For the purposes of this Schedule the expression "employer" includes his thekadar, contractor or agent as the case may be.

By order and in the name of the Governor of Bombay.

Sd/- B. B. Brahmabhatt,
Deputy Secretary to Government."

This notification was challenged on various grounds. Only two out of them are material for purposes of this reference. They are:

(1) Clauses 1 to 7 of the schedule of the notification are bad as they are *ultra vires* of the Minimum Wages Act.

(2) In the alternative, clauses 1 to 7 are bad as they infringe on the rights conferred on the bidi manufacturers under art. 19(1)(g) of the Constitution.

Mr. Justice Mudholkar held that the Legislature in framing the Minimum Wages Act clearly declared its policy that whatever the contract between the parties may be as to the rates of wages payable to persons engaged in a scheduled industry, the State Government will have the power to alter those rights and thus interfere with the contract between the parties. In order to make the exercise of this power effective it will have to be said that the State Government has also the right to fix the basis upon which the wages should be paid. If such power could not be implied in favour of the State Government, the effective exercise of the power of fixing minimum wages would be rendered impossible. And in this view of the matter he held that the impugned clauses of the schedule of the notification were *intra vires* of the Act they being provisions for fixing basis on which the wages are fixed. He also further held that these

clauses did not infringe the rights conferred on the bidi manufacturers under art. 19(1)(g) of the Constitution of India. He, therefore, held that the petition should be dismissed.

Mr. Justice Kotval held that cls. 1 and 2 were *intra vires* of the Act and were not open to challenge. He, however, held that the Act does not authorise the Government to interfere with the contract save and except fixing the rate of minimum wages. Clauses 3 to 7 inevitably and directly affect the existing terms and conditions of the work and the right of the bidi manufacturers to reject bidis of bad quality and workmanship or to pay for those bidis according to the quality of the work. He further held that ample provisions are made in ss. 20 and 21 of the Minimum Wages Act and other laws for the implementation of the rates of wages fixed. The State Government, therefore, was not competent to constitute a domestic tribunal to decide the dispute between the employer and the employee as is done in cls. 4 and 5 of the schedule of the notification. He also held that sub-s. 2(b)(iv) of s. 3 of the Act makes express provision regarding the manner of calculating wages and limits it only in two cases, namely where such rates are fixed by the day or by the month. It, therefore, necessarily follows that such a power was not intended to be conferred on the State Government in fixing "minimum piece rate". And in this view of the matter, in the opinion of Mr. Justice Kotval, implied powers to make provisions as are made in cls. 3 to 7 of the schedule of the notification cannot be conceded in favour of the State Government. He, therefore, held that cls. 3 to 7 of the schedule of the notification are *ultra vires* of the Act. On the second question, namely, the notification being bad as infringing on the rights conferred on the bidi manufacturers under art. 19(1)(g) of the Constitution, he has expressed no opinion.

Thus, the difference of opinion between Mr. Justice Mudholkar and Mr. Justice Kotval relates to vires of cls. 3 to 7 of the schedule of the notification. According to Mr. Justice Mudholkar, the State Government had implied powers to make provisions as are made in cls. 3 to 7, while, according to Mr. Justice Kotval, such implied powers cannot be conceded in favour of the Government.

Mr. M. N. Phadke, learned counsel appearing for the bidi manufacturers in Special Civil Application No. 205 of 1958, and Mr. M. Q. Qazi, learned counsel appearing for the bidi manufacturers in Special Civil Application Nos 214 of 1958, attacked the vires of cls. 3 to 7 of the schedule of the notification generally on the reasoning adopted by Mr. Justice Kotval in his opinion, while Mr. N. L. Abhyankar, Special Government Pleader appearing for the State, contended that cls. 3 to 7 of the Schedule of the notification are *intra vires* of the Act generally on the reasoning of Mr. Justice Mudholkar. Mr. Phadke contends that under the contract which the bidi manufacturers had with their employees the bidi manufacturers had an absolute right of rejecting bidis which were found to be below the requisite standard without making any payment to the employees for such bidis; the employers had further a right to retain these bidis which are found to be below the requisite standard and sell them in market. He further contends that the employers have a right to do the business at a place of their own choice; as a result of cls. 3 to 7 of the schedule of the notification these rights of the employers have been seriously interfered with; the employers are now required to pay for 90 per cent. of the work of the employees irrespective of the qualities of bidis; as regards the remaining 10 per cent., even if the bidis are found to be below the requisite standard, the employers are required to make either full payment or half payment for the bidis retained; further the employers cannot do their business of inspecting the bidis at their own places of business but will have to inspect the bidis at places within two miles of the places where the employees work; this serious interference with the contractual and other rights of the employers by the State Government cannot be justified either under the express powers conferred on the Government by the statute or under the implied powers.

On behalf of the State Government, cls. 3 to 7 are justified on the ground that the State Government had implied power to make provisions which the State Government has made under cls. 3 to 7 of the schedule of the notification.

It is, therefore, necessary to see the scope and ambit of the doctrine of implied powers. The question has been elaborately dealt with by both Mr. Justice Mudholkar and Mr. Justice Kotval and the authorities relating to the question have also been fully discussed by them in their opinions. I do not, therefore, feel that any useful purpose will be served by going over the same grounds again. As regards the principles, I do not find that there is any material difference between both my learned brothers. Those principles have been summarised by Mr. Justice Kotval in para. 49 of his opinion, and those principles, in the words of Kotval J., are:

"The doctrine (the doctrine of implied powers) can be applied only where the following conditions are fulfilled:—

- (1) There must be a duty imposed or power prescribed.
- (2) On a reasonable construction of the statute there must be an impossibility in the exercise or fulfilment of that power, resulting in making its object or purpose nugatory.
- (3) The impossibility must be such that it is not an impossibility in an individual case because then the law cannot permit powers by implication but the impossibility must be of a general nature so that the purpose and object of the duty or power is rendered impossible of achievement in every case. It is only then that powers by implication can be inferred.

(4) The implication cannot contradict the expressed intent which must always prevail and where it becomes necessary to read an implication into an enactment the scope of the implication must be limited only to what is reasonably necessary and no more."

I am in respectful agreement with my learned brother Mr. Justice Kotval with the aforesaid summary of the doctrine of implied powers given by him. The question is as regards its application to the facts and circumstances of the present case. For that purpose it is first necessary to consider the extent and scope of the express powers conferred on the State Government under the Act. The Minimum Wages Act is enacted to provide for fixation of minimum rates of wages in certain employments mentioned in the schedule of the Act. It is well known that in certain employments the labour is exploited and an undue advantage is taken of them by the employers. The labour being not organised is incapable of fighting against their exploitation by the employers, and to secure to them a minimum wage, the Minimum Wages Act was enacted. The concept of the minimum wage is referred to by their Lordships of the Supreme Court in *Express Newspaper Ltd. v. Union of India*¹ in para. 53 of their Lordships' judgment in the following words (p. 601):

"The concept of the minimum wage:

The International Convention of 1928 prescribes the setting up of minimum wage-fixing machinery in industries in which "no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low"...

As a rule, though the living wage is the target, it has to be tempered, even in advanced countries, by other considerations, particularly the general level of wages in other industries and the capacity of industry to pay. This view has been accepted by the Bombay Textile Labour Inquiry Committee which says that "the living wage basis affords an absolute external standard for the determination of the minimum" and that "where a living wage criterion has been used in the giving of an award or the fixing of a wage, the decision has always been tempered by other considerations of a practical character."

In India, however, the level of the national income is so low at present that it is generally accepted that the country cannot afford to prescribe by law a minimum wage which would correspond to the concept of the living wage as described in the preceding paragraphs. What then should be the level of minimum wage which can be sustained by the present stage of the country's economy? Most employers and some Provincial

1 [1958] A.I.R. S.C. 578.

Governments consider that the minimum wage can at present be only a bare subsistence wage. In fact, even one important All India organisation of employees has suggested that "a minimum wage is that wage which is sufficient to cover the bare physical needs of a worker and his family." Many others, however...consider that a minimum wage should also provide for some other essential requirements such as a minimum of education, medical facilities and other amenities. We consider that a minimum wage must provide not merely for the bare sustenance of life but for the preservation of the efficiency of the worker. For this purpose, the minimum wage must also provide for some measure of education, medical requirements, and amenities."

Turning to the provisions of the Act, s. 3(1)(a) empowers the appropriate Government (here the State Government) to fix the minimum rates of wages payable to the employees employed in an employment specified in Part I and Part II of the Schedule of the Act in the manner hereinafter provided in the Act. Sub-section (2) provides that minimum rate of wages may be fixed for time work called "a minimum time rate" or piece work called "a minimum piece rate" or a minimum rate of remuneration to apply in cases of employees employed on piece work for the purpose of securing to such employees a minimum rate of wages on a time work basis called "a guarantee time rate" or overtime rate in respect of overtime work done by the employees. Sub-section (3) authorises the Government to fix different minimum rates of wages for different scheduled employments, for different classes of work in the same scheduled employments, for adults, adolescents, children and apprentices, for different localities. Provisions of s. 4 of the Act indicate that the minimum rate of wages fixed or revised under s. 3 may, at its best, consist of a basic rate of wages, a special allowance called "cost of living allowance", i.e. an allowance at a rate to be adjusted at such intervals and in such manner as the appropriate Government may direct to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers and cash value of the concessions in respect of supplies of essential commodities at concession rates, where so authorised.

Looking to the component parts of the minimum rate of wages mentioned in s. 4 of the Act it appears that the minimum rate of wage which is fixed under the Act is of the nature of securing to the employees a bare subsistence wage. There is hardly any scope in it to provide for some measure of education, medical requirements and amenities to the employees. It is next to be considered in relation to what work the minimum rates of wages are to be fixed. This brings me to the definition of "wages" contained in cl. (h) of s. 2 of the Act. That definition shows that a wage means a remuneration payable to the employee in respect of his employment or in respect of the work done by him in the employment when the terms of the contract of employment, express or implied, are fulfilled by him.

Considering the provisions of ss. 2(h), 3 and 4 of the Act together, in my opinion, the Act casts a duty on appropriate Government to fix a minimum rate of wage (which, as already stated, is only a bare subsistence wage) which should be paid to the employee in respect of his employment or in respect of the work done by him in such employment on his fulfilment of the terms of the contract of employment, express or implied. The power thus conferred on the appropriate Government must necessarily include the power to interfere with the terms of the contract between the employer and the employee so far as they relate to the fixation of the wage rate. It also must necessarily follow that the appropriate Government would have powers by necessary implication to do all acts necessary to so fix the minimum rate of wage as would effectively compensate or remunerate the employee in respect of his employment or in respect of the work done by such employee in his employment. In this connection, the observations from the judgment of the Supreme Court in *Bijay Cotton Mills Ltd. v. The State of Ajmer*² may usefully be cited (p. 755):

"It can scarcely be disputed that securing of living wages to labourers which ensure

not only bare physical subsistence but also the maintenance of health and decency, is conducive to the general interest of the public. This is one of the Directive Principles of State Policy embodied in article 43 of our Constitution. It is well known that in 1928 there was a Minimum Wages Fixing Machinery Convention held at Geneva and the resolutions passed in that convention were embodied in the International Labour Code. The Minimum Wages Act is said to have been passed with a view to give effect to these resolutions (vide *S. I. Est., etc. v. The State of Madras* [(1954) 1 M.L.J. 518, 521]). If the labourers are to be secured in the enjoyment of minimum wages and they are to be protected against exploitation by their employers, it is absolutely necessary that restraints should be imposed upon their freedom of contract and such restrictions cannot in any sense be said to be unreasonable. On the other hand, the employers cannot be heard to complain if they are compelled to pay minimum wages to their labourers even though the labourers, on account of their poverty and helplessness, are willing to work on lesser wages."

Now, the petitioners have not in their petition thrown any light on the circumstances prevailing in the industry at the time the notification was issued. The State Government, however, in its return, has mentioned those circumstances.

Before I proceed to those details it will be convenient to give in brief the general idea of the industry. The bidi manufacturers supply tendu leaves, tobacco and threads to the employee. He then rolls the bidi by putting the tobacco in the tendu leave. After it is rolled it is tied by the thread. The bidi manufacturers in some cases maintain factories where the labour goes every morning for doing the work. In the evening bidis rolled by the employees are inspected by the manufacturers. Bidis which are found to be sub-standard are rejected by the manufacturers and the labour is only paid for the accepted bidis. While in other cases the labour periodically goes to the place of the manufacturer, collects tendu leaves, tobacco and threads and then goes back to their respective places and rolls the bidis at their home. It appears that the work is not done by that man alone but the entire family members help him in rolling the bidis. It also appears that periodically the bidi manufacturer's men called *thekedars* or contractors go to the places of the workers, inspect the bidis, reject such bidis as they consider to be below the standard and thereafter collect both the rejected as well as accepted bidis and carry them to the place of business of the bidi manufacturers. There the second inspection is held by the bidi manufacturers themselves. They only inspect those bidis which, according to the contractors or *thekedars*, are of requisite standard. The bidi manufacturers also reject certain bidis out of those bidis which, according to them, are not up to the requisite standard. The labour is only paid for the bidis which ultimately are accepted by the bidi manufacturers. The latter part of operation, i.e. where bidis are rolled by the labour at their respective places, is called "*gharkhata*". It is not in dispute that a large percentage of work of rolling bidis is done in "*gharkhata*" and not in the factory. It is pertinent to note that though in both these kinds of operations certain number of bidis rolled by the labourers are rejected by the bidi manufacturers, yet they are not returned to the labour but are retained by the manufacturers and are also sold by them in the market though no payment is made to the labour in respect of these rejected bidis. This practice of rejecting bidis is popularly known as practice of "*chhat*". It is also not in dispute that though the former Madhya Pradesh Government had fixed minimum rates of wages under the Act, no provision was made thereunder to secure payment of remuneration to the labour in respect of the bidis rejected under the practice of "*chhat*".

Turning now to the material statements made by the State Government in its return, they are as follows:—

"Para 4(a) of the petition: ...In the bidi industry in Vidarbha region and especially in Bhandara district and factories in Gondia Tahsil, there is a recognised practice of making payment on the basis of bidis accepted by employer as coming up to a certain standard of skill. The employers have insisted on their right in principle of rejecting

the sub-normal or sub-standard bidis prepared by the employees. The complaint of the employees is that the employers reject an unreasonable proportion of bidis dubbing them as of substandard quality or sub-normal quality without paying anything for their labour spent in rolling such rejected bidis. *Such bidis are retained without paying for labour to the employees and they are sold by the employers in the market. Thus it is complained that while the employers get profit out of the rejected bidis sold by them in the market, the employees are deprived of any labour charges in respect of these bidis. It was also complained that the bidis are subjected to 'chhat' once by the Thekedar or the contractor and again by the employer for whom the Thekedar works. Thus an employee suffers considerably and does not get the benefit of even the minimum wages fixed under the Act on account of 'chhat' system...*

(F) In view of the nature of work done by the employees in making bidis and the mode in which the payments have been made in Vidarbha region, and the reduction of bidis to which the employees are subjected, it was necessary to fix minimum wages after making due provision regarding the problem of rejection of bidis. In some cases it was found that as much as 20% of the labour of the worker in preparing bidis is not paid for under one guise or the other by the employer. It was further found that the decision regarding the number of bidis to be rejected (Chhat) was taken arbitrarily by the employer without knowledge of the employee and in his absence." [Italics mine].

These averments made by the State Government in its return have not been controverted by the petitioners. The vires of the impugned clauses of the schedule of the notification therefore, in my view, will have to be judged in the light of the aforesaid facts stated in the return. The problem which the State Government had to meet was that the bidi manufacturers were in their own discretion rejecting certain number of bidis rolled by the workers on the ground that they were of sub-standard quality or of sub-normal quality. These rejected bidis were retained by the bidi manufacturers and were ultimately sold by them in the market, and yet no payment was made by the manufacturers to the workers in respect of the so-called rejected bidis. These facts clearly show that the conditions prevailing in the industry was that labour expended by the employees in the bidi industry in rolling the bidis, which ultimately were rejected by the bidi manufacturers, was not being paid for by the employers even though the product of their (employees') labour was retained and utilised by the employers to their benefit, and it is to meet this problem that the State Government claims that the impugned notification was issued. As already stated, in my opinion, the Act casts a duty on the State Government to fix minimum rates of wages in such a manner that the employees are compensated or remunerated for the work done by them, notwithstanding any contract to the contrary between the employer and the employee in that respect.

Turning now to the impugned clauses, it is next to be seen how far the State Government had acted within the limits of its powers in making the provisions it has made in cls. 3 to 7.

Clause 3 provides that the employer in his discretion could reject up to 5 per cent. of the bidis prepared by his employee without making any payment therefor to his employee, and it would be open to him to destroy them retaining the tobacco contained in those bidis with himself, but if he does not want to destroy them and keep them with himself then he has to pay full wages for these bidis to his employee. The provisions made in this clause clearly are for securing payment to the employees in respect of the work done by them when the same is retained by the employer. This clause, therefore, for reasons already stated above, in my opinion, is within the powers of the State Government and cannot be said to be *ultra vires* of the Act.

Clause 4 provides for two things. Firstly, it provides that if the employer wants to reject bidis which exceed the aforesaid 5 per cent. limit but are less than 10 per cent., then he has two options. The first option is that he may decide to retain those bidis. In that case he is required to pay half of the minimum rates fixed by the State Government. The other option given to him is that he may choose not to retain those bidis. In that event those bidis are to be

destroyed by the employee. In the second instance, this clause provides for the settlement of disputes between the employer and the employee as regards rejection of bidis between 5 to 10 per cent. If there is any dispute about it between the employer and the employees as regards the quality of work then the question is to be decided by a joint body of the representatives, in equal number, of the employer and the employees. The decision of the majority is to be final and binding on both the parties. In the event the decision of this body being equally divided then the employer is permitted to exercise either of the two options referred to above.

The provisions of cl. 4 are vehemently attacked by Mr. Phadke. He contends that the State Government had no jurisdiction under the Act to constitute a tribunal; if there is a dispute as regards the quality of work the employees must go to the Authority appointed under s. 20 of the Act. He further contends that the provision of s. 20 itself shows that the intention of the Legislature was that all the disputes between the employer and the employees relating to the payment of wages have to be decided by the Authority appointed under the Act; it necessarily follows that the Legislature never intended to confer on the State Government powers to constitute any other authority to decide the disputes between the employer and the employee; the constitution of such a body under cl. 4 of the schedule of the notification cannot, therefore, be justified under the doctrine of implied powers. I find it difficult to accept this contention. In my view, the disputes which are intended to be decided by the domestic tribunal constituted under cl. 4 of the schedule of the notification do not fall within the purview of the provisions of s. 20 of the Act, as they are disputes relating to ascertainment and fixation of wages, while the jurisdiction which is conferred on the Authority constituted under s. 20 of the Act is to decide four kinds of disputes which might arise between the employer and the employee subsequent to fixation of minimum wage payable to the employee. They are: Where the employee claims that (1) he has been paid less than the fixed minimum rate of wage, (2) he has not been paid remuneration for the day or days of rest, (3) he has not been paid for the work done by him on the days of rest, and (4) he has not been paid for the overtime work done by him at the overtime rate (sub-s. (1) of s. 20 of the Act). Sub-section (2) of s. 20 provides the period of limitation within which an application in respect of any one or more of the aforesaid four claims could be made and the person by whom such claims could be made. Sub-section (3) provides the procedure to be followed and the powers of the Authority in dealing with such applications. Clause (1) of sub-s. (3) deals with the claim relating to a payment of less than the fixed minimum rate of wage. Clause (iv) relates to the other three types of claims mentioned in sub-s. (1). In my view, the words "in any other case" in cl. (iv) relate only to the three types of claims other than the claims arising out of a payment of less than the fixed minimum rate of wage, mentioned in sub-s. (1) of s. 20. These words are not used with an intention to confer jurisdiction on the Authority constituted under s. 20 to deal with all and every kind of wage dispute arising between the employer and the employee. Thus, in my view, the provisions of s. 20 being limited in their scope, it cannot be inferred from those provisions that the legislative intentment was that the disputes between the employer and the employee relating to the ascertainment and fixation of minimum rate of wage payable to the employee should be decided by the Authority constituted under s. 20 of the Act. The Legislature has enjoined a duty and conferred a power on the appropriate Government to fix minimum rates of wages, and in the absence of any provision in the Act for a decision of disputes between the employer and the employee relating to the ascertainment and fixation of minimum rate of wage payable to an employee, by necessary implication it has to be assumed that the Legislature has left it to the State Government to constitute a tribunal for the said purpose wherever found necessary. The contention raised by Mr. Phadke, therefore, fails.

The other ground of attack by Mr. Phadke on this clause, namely 'cl. 4 of the schedule of the notification, was that this clause provides that where the employer decides not to accept the bidis, the employee has been given a right to destroy these bidis; the employer is not allowed to retain even the tobacco contained in the bidis. This, according to Mr. Phadke, is a very unjust provision and would work to the prejudice of the employer. On account of the bad workmanship of the employee the employer is not accepting the work. There is no reason why he should be made to lose his property also, i.e. the tobacco contained in the bidis. In my view, the construction which is sought to be put by Mr. Phadke on the sentence "If the employer does not want to retain these bidis, the employee shall destroy them forthwith" in cl. 4 of the schedule of the notification is not warranted. This sentence has to be read in its context. What is destroying the bidis has been explained in cl. 3 of the schedule of the notification and it means that the bidi qua-bidi is to be destroyed, but the tobacco contents thereof are to be retained by the employer, and it is in this sense that the aforesaid sentence in cl. 4 has to be understood. It is difficult to assume that the intendment of the State Government was that both the bidis qua-bidis as well as the tobacco contents thereof are to be destroyed by the employee. The second contention of Mr. Phadke also, therefore, fails. Thus the provisions of cl. 4 relate only to the question of ascertainment and fixation of minimum rate of wage payable to the employee and are, therefore, not *ultra vires* of the Act or the powers of the State Government.

Clause 5 of the schedule of the notification only deals with the constitution of the tribunal for the purpose of deciding the disputes between the employer and the employee referred to in cl. 4. For the same reasons as are given for upholding the validity of cl. 4, this clause also is upheld.

Clause 6 of the schedule of the notification is also in two parts. The first part of the clause debars the employers from rejecting bidis on the ground of bad workmanship beyond 10 per cent. of the total work done by the employee. In other words, this clause secures payment at the full rate fixed by the State Government in respect of 90 per cent. of work. These provisions and the provisions of cls. 3 and 4 are also very vehemently attacked by Mr. Phadke on the ground of interference with the right of the employer under the contract to reject the bidis which are, in his opinion, of bad workmanship. He contends that the State Government cannot force the employer to pay to the employee for the bad work at the rate fixed for good work done by the employee. He says that the contract between the employer and the employee was that the employer could, in his discretion, reject bidis which, according to him, were of bad workmanship. He has a further right to retain these bidis without making any payment to the employee. This right under the contract has been seriously interfered with by the aforesaid provisions contained in cls. 3, 4 and 6 of the schedule of the notification. Under the Act the State Government could fix the minimum rate of wages. It has no right to interfere with the terms of the contract and force the employer to pay at the full rate for bad workmanship. Now, in my view, it would not be correct to assume that the minimum rate of wage fixed by the appropriate Government is necessarily a rate fixed for any particular standard of work done by the employee. The rate fixed is the minimum rate of wage and that, as already stated by me, is a bare subsistence wage, which, the Government considers, should be paid to the employee for the work done by him for the employer during the course of the employment irrespective of whatever the contract between the employer and the employee was. And this is all what the State Government has done in the instant case. Now here what is claimed is that the employer has a contractual right not to pay for the bidis rejected by him, and yet retain them and sell them. Assuming for a moment that there was such a term in the contract between the employer and the employee, the State Government had full powers under the Act to interfere with that term of the contract and fix a minimum rate of wage which would include payment to the employee for the alleged

sub-standard work done by him during the course of his employment, when it is found that the alleged sub-standard bidis were retained by the employer and sold by him in the market to his benefit. What was happening in the industry really was that for a part of the work done by the employee during the course of his employment, the employer was making no payment to the employee, yet utilising the fruits of his labour to his (employer's) advantage. This undoubtedly was nothing but exploitation of labour, and the primary objective of the Act is to grant protection to the labour against exploitation and secure to them payment in respect of the work done by them. Further, I find it difficult to accept the contention of Mr. Phadke that there really was such a contract. No doubt the practice prevailed that no payment was made to the labour for the rejected bidis, but it is difficult to assume that the labour had voluntarily agreed that no payment need be made to them for such rejected bidis even though the employer was retaining and utilising those bidis. It is difficult to assume that the labour intended to deliver to the employer these bidis gratuitously allowing the employer to enjoy the benefits thereof. In the circumstances of this case, in my opinion, the employers were clearly liable under s. 70 of the Contract Act to compensate their employees for the labour expended by them in rolling the alleged sub-standard bidis. What the State Government has done in framing cls. 3, 4 and the first part of cl. 6 is to fix the amount which, in its opinion, should be paid to the employee in the bidi industry for the work done by him. The following sentence from the observations of their Lordships of the Supreme Court in *Bijay Cotton Mills Ltd. v. The State of Ajmer*, already referred to, is a complete answer to the argument raised (p. 755):

"...On the other hand, the employers cannot be heard to complain if they are compelled to pay minimum wages to their labourers even though the labourers, on account of their poverty and helplessness, are willing to work on lesser wages."

Thus, even assuming that the labour had voluntarily agreed to deliver gratuitously to the employer bidis rejected by him on the ground of bad workmanship, the State Government has full powers under the Act to make the employer pay for that work. The aforesaid contention of Mr. Phadke, therefore, in my opinion, fails.

The other attack of Mr. Phadke on the provisions contained in cls. 3, 4, 5 and the first part of cl. 6 is that what the State Government has provided in these clauses is the manner of calculating the wages. Under sub-cl. (iv) of cl. (b) of sub-s. (3) of s. 3, the appropriate Government is authorised to indicate the manner of calculation only when the minimum rate of wage is fixed by the day or by the month. According to Mr. Phadke, the necessary inference is that the appropriate Government has no power to indicate the manner of calculating the wage in other cases. I find it difficult to accept this contention of Mr. Phadke. In my opinion, cls. 3, 4, 5 and the first part of cl. 6 deal with the manner in which the minimum rate of wage payable to a particular employee is to be ascertained and fixed in respect of the particular work done by him. Section 3(3)(b)(iv) does not relate to a fixation of wage. What it does is to direct the appropriate Government to indicate the manner of calculation for purposes of conversion of the rate fixed by it per month into a rate per day and *vice versa*. This provision appears to have been made to meet the situations that are likely or bound to arise during the course of business. For example, minimum rate of wage is fixed per month; the employee remains absent for a certain number of days in a month; deductions are to be made from the wages for the period of absence; on what basis the deductions are to be made? This argument of Mr. Phadke, in my view, therefore, fails.

Mr. Phadke also contends that the provisions contained in cls. 3, 4, 5 and first part of cl. 6 cannot be justified on the ground of implied powers, because it has not been shown by the State Government that it was impossible for it to fix the minimum rate of wage in any other manner. He says that if really

the State Government had wanted that the employee should be paid for the rejected bidis then it had ample powers to do so by fixing a guaranteed time rate under s. 3(2)(c) of the Act. The State Government could also have achieved its objective by fixing one rate for the accepted bidis and another rate for the rejected bidis. It has not done so. What the State Government has done is to compel the employer to pay to his employee at least for 90 per cent. of his work irrespective of the quality produced by him. It is also not possible for me to accept this contention. Clause (c) of s. 3(2) reads as follows:

"The appropriate Government may fix a minimum rate of remuneration to apply in the case of employees employed on piece work for the purpose of securing to such employees a minimum rate of wage on a time work basis (hereinafter referred to as 'a guaranteed time rate')."

In my view, in the instant case it was not possible for the State Government to follow this course. As already stated, a majority of the work done by the employees is not done in any factory for any given number of hours. The work is chiefly done by the employees in their respective houses during their leisure time. Maybe that the State Government could have fixed a guaranteed time rate in respect of the employees who were working in the factory, but the percentage of work done in the factory being practically negligible, the problem facing the State Government could not have been solved by taking resort to the provisions of s. 3(2)(c) of the Act. Mr. Phadke next suggests that though the employees working in their respective homes were not working for any fixed hours Government could have fixed a guaranteed time rate even for them by laying down a scale, say for example, manufacturing 500 bidis would be equal to six hours work or eight hours work. Now, again that would not be a practical solution. Some workers may take five hours for rolling 500 bidis. Others may take eight hours for doing it. Some workers may do it within seven hours. Adopting such a course, therefore, would not have been a fair solution of the problem. In these circumstances, in my view, it does not appear that the alternative courses suggested by Mr. Phadke were open for the State Government to effectively secure to the employees remuneration for the work done by them which the employer had been retaining and utilizing to his advantage.

As regards the other part of the argument, I have already stated that the wage fixed by the State Government under the notification of June 11, 1958, is not a wage fixed for any particular standard of work. It is a minimum rate of wage, and that being so, it cannot be said that the State Government is compelling the employers to pay to their labour for the bad quality of work done by them at the rate fixed for a good quality of work done by them. This contention raised by Mr. Phadke also, in my opinion, therefore, fails.

The second part of cl. 6 reads as follows:

"It shall, however, be open to the employer to take suitable action against the employee if the 'chhat' is more than 10 per cent. for 6 continuous working days in a calendar month."

It is really difficult to understand what is meant by the words "suitable action". I asked Mr. Abhyankar, learned Special Government Pleader, who appears for the State, as to what is meant by the words "suitable action" and what powers really are intended to be conferred on the employer to take action against the employee. Mr. Abhyankar pointed out to me that the "suitable action" means the action which the employer can take against the employee under cl. (h) of the Standing Order framed under s. 30 of the Industrial Disputes Settlement Act of 1947 for the bidi factories. He has placed on record a copy of that Standing Order and has referred me to cl. (h) thereof relating to the "acts and omissions constituting misconduct". The clause reads:

"Gross neglect of work causing loss and damage to the employer."

Mr. Abhyankar says that the "suitable action" referred to in the second part of cl. 6 is the action which the employer can take against his employee for gross

neglect of work causing loss and damage to the employer. Now, when power had already been conferred under the aforesaid cl. (h) on the employer to take action against the employee for manufacturing bidis of bad workmanship which caused damage to him, then where was the necessity of making provision therefor in second part of cl. 6? Further in cl. (h) there are no limitations like those contained in second part of cl. 6. To prove gross neglect of work causing loss to the employer under cl. (h), it is not necessary for him to show that for six continuous working days in a week the sub-standard bidis manufactured by the employee exceeded 10 per cent. For example, he may show that in a month the employee has manufactured sub-standard bidis for say 15 days resulting in a loss to him. Those 15 days need not necessarily be continuous. There need be no period of six continuous days in those 15 days. The provisions of the second part of cl. 6, therefore, in my view, undoubtedly interfere with the rights of the employer conferred on him under the Standing Order. In fact, the second part of cl. 6 results in amending cl. (h) to a great extent and to the prejudice of the employers. In my opinion, it is not open to the State Government to do so purporting to act under the Minimum Wages Act. It amounts to interference with the terms of the contract other than the terms relating to the fixation of wages. The aforesaid second part of cl. 6 is, therefore, liable to be struck down as *ultra vires* of the powers of the State Government under the Act.

The seventh clause provides that the "*chhat*", i.e. the rejection of bidis on the ground of being of sub-standard or sub-normal quality, shall be made once in a day only, at any premises within a distance of not more than two miles from the premises where bidis are manufactured. Mr. Phadke contends that this clause interferes with the rights of the bidi manufacturers under the contract whereunder they had a right to inspect and reject the bidis at their places of business. In my view, this contention has a considerable force. As already stated, the rolling of bidis by the employees in certain cases is carried on in the factories of the bidi manufacturers, but that percentage is very low. In other cases bidis are manufactured by the employees at their respective places which is known as '*gharkhata*'. Where the bidis are manufactured in the factory itself, the *chhat* or the rejection takes place only once at the end of the day in the factory itself. This clause hardly affects such manufacturers. But in the other cases, i.e. in '*gharkhata*', the *chhat* is performed twice, once by the contractors or '*thekedars*' at the place of the employee and the second time by the bidi manufacturers at their respective places of business. The first *chhat*, i.e. *chhat* by contractors or '*thekedars*' being at the houses of the employees, themselves; it is done in the presence of the employees themselves, but the second *chhat* being at the place of business of the manufacturer which usually is at a far away distance from the houses of the employees usually takes place in the absence of the employees, and there is a good deal of agitation about it by the employees. The employees claim that the *chhat* must be done in their presence. Clause 7 is obviously intended to redress this grievance. Undoubtedly the grievance of the employees appears to be real. In fairness to the employees the *chhat* should take place in their presence, but the question that arises is whether the State Government has powers, either express or implied, to redress such a grievance under the provisions of the Minimum Wages Act. As already stated, in my view, the powers conferred on the appropriate Government under the Act to interfere with the terms of the contract between the employer and the employee are limited. Those powers are to interfere with the terms of the contract so far as they relate to fixation of wage for the work done in the employment. It is, therefore, not open to the State Government in fixing minimum rate of wages to interfere with the other terms of the contract between the employer and the employee. In framing cl. 7 the State Government has interfered with the contract between the parties as regards the place where the inspection of the work of the employee is to be made by the manufacturer. It has no direct bearing on the

fixation of wages. In my opinion, this clause, therefore, is *ultra vires* of the powers of the State Government and is, therefore, liable to be struck down.

At the foot of the notification, an explanation is given. It is in the following terms:

"Explanation:—For the purposes of this Schedule the expression 'employer' includes his *thekedar*, contractor or agent as the case may be."

Mr. Phadke contends that s. 2(e) of the Act itself defines "employer", and, therefore, it is not open to the State Government to define that expression differently. Mr. Abhyankar, on the other hand, says that the definition of "employer" as given in the explanation is the same as that given in s. 2(e) of the Act and is, therefore, not bad. I find it difficult to accept the contention of Mr. Abhyankar. If really the definition of "employer" given in the explanation is the same as given in s. 2(e) of the Act, it is not necessary to incorporate it in the Schedule. Further, reading the explanation and the definition of "employer" contained in s. 2(e) of the Act together, it appears that the definition of "employer" as given in the explanation is wider in terms than the definition of "employer" contained in s. 2(e) of the Act. It is intended to include *thekedars*, contractors and agents of the bidi manufacturers in the term "employer", irrespective of the fact as to whether such *thekedar*, contractor, or agent has, in fact, employed the labour or not; while the definition contained in cl. (e) of s. 2 of the Act shows that the employer is the person who employs labour either directly or through another person whether on behalf of himself or on behalf of any other person. The expression "employer" having been defined in the Act, it is not open to the State Government to enlarge its scope in absence of any provision to that effect in the Act. The explanation contained in the Schedule, therefore, is also liable to be struck down.

For reasons stated above, in my opinion, cla. 3, 4, 5 and first part of cl. 6 are good, while the latter part of cl. 6, cl. 7 and the explanation are bad and are liable to be struck down. The question then that arises is whether the parts which are liable to be struck down are severable from the parts which are good. The tests that have to be applied in deciding such question are, given by their Lordships of the Supreme Court in *R.M.D.C. v. Union of India*³. Applying those tests to the present notification, in my view, the parts thereof, which are held to be good by me, are clearly severable from the parts held to be bad by me. Clauses held to be good by me relate to the fixation of wages, while clauses held to be bad by me have no direct bearing on the question of fixation of wage but relate to matters other than the fixation of wage. They are intended, if I may say so, to confer additional benefits on the employees. It cannot be said that the State Government had no intention of securing to the employees payment at the minimum rate of wage fixed by it in the event it was not in a position to confer the said additional benefits on the employees. In my view, therefore, my conclusions in holding the latter part of cl. 6, cl. 7 and the explanation *ultra vires* of the Act or the power of the State Government under the Act cannot have the effect of striking down the entire notification.

It is next necessary to deal with the two decisions referred to by Mr. Phadke in the course of his argument. They are: *Thomas v. Travancore-Cochin State*⁴ and *P. C. Chakravarty v. Manager, D.T. Estate*.⁵ In *Thomas v. Travancore-Cochin State* (*supra*) it is held that the provisions of the Minimum Wages Act do not appear to confer any power on the appropriate Government to insist that an employer employing workers on time-rates should pay them on piece-rates. The principle enunciated in this case has hardly any application to the facts of the present case. I have already stated that under the Minimum Wages Act, the appropriate Government has powers to interfere with the contract between the employer and the employee only to the extent of its term relating to fixation of wages. It has no power to interfere with other terms.

³ [1957] A.I.R. S.C. 628, 636.

⁵ [1958] A.I.R. Assam 12.

⁴ (1957), 2 Labour Law Journal 53.

In insisting that the employer employing workers on time-rates should pay them on piece-rates, the State Government of Travancore-Cochin was interfering with the other terms of the contract between the employer and the employee.

In *P. C. Chakravarty v. Manager, D.T. Estate (supra)* it appears that on March 11, 1952, the State Government of Assam issued a notification in exercise of powers conferred by s. 3 read with sub-s. (2) of s. 5 of the Minimum Wages Act and fixed the minimum wages and dearness allowance of various classes of employees in the Tea Plantation. The schedule attached to the notification divided the workers into two classes—unskilled labour and the staff and artisans. On May 12, 1952, another notification was issued by the Government of Assam in modification of the earlier notification of March 11, 1952, by which the word “artisan” has been defined as meaning fitters, engine drivers, masons, electricians, black-smiths, carpenters, etc. By notification of September 24, 1952, the Government of Assam appointed the Principal of His Royal Highness the Prince of Wales Technical School, Jorhat, to be the authority to conduct necessary trade tests to decide doubtful cases arising out of the definition of the word “artisan” as defined in the earlier notification dated May 12, 1952. By another notification dated December 12, 1953, a committee was constituted for purposes of laying down the qualifications of artisans and providing the machinery, regional or otherwise, to undertake the trade tests. The petitioners in that case made an application under s. 20 claiming that they were entitled to get minimum rates of wages fixed for the artisan. The Deputy Commissioner of Kachar, who heard the application, held that the application was premature and the petitioners were not entitled to claim the minimum wages and the dearness allowance fixed by the Government under the notification of March 11, 1952, unless they were either admitted as artisans by the opposite party or they passed a trade-test held by the committee set up for the purpose. This order of the Deputy Commissioner was challenged before the High Court and it was contended that the notifications issued by the Government of Assam subsequent to March 11, 1952, were bad as the Government had no power to constitute a committee to decide who was artisan within the meaning of the notification and who was not. That power exclusively lay with the Authority constituted under s. 20 of the Minimum Wages Act. This contention was upheld by the High Court and the learned Judges held that the Authority appointed under the Act had to decide whether the petitioner was or was not entitled to any payment under the notification issued by the Government under s. 5 which had fixed the minimum wages. This power necessarily implies power to determine whether a particular employee falls within the category of artisan as defined under the notification. That power cannot be taken away by the State Government. This decision also, in my view, has no application to the facts of the present case. As already stated, the domestic tribunal constituted by the State Government is for purposes of deciding the disputes arising out of ascertainment and fixation of rate of minimum wage payable to the employee for his work and not for purposes of deciding the disputes that arise between the employer and the employee after the minimum wage payable to an employee is ascertained and fixed.

This brings me to the last contention raised by Mr. Phadke. He contends that even if it is held that the notification or any part thereof is *intra vires* of the Act, yet it is bad as it interferes with the fundamental rights conferred on the bidi manufacturers under art. 19(1)(g) of the Constitution. As already stated, the part of the notification held good by me relates exclusively to the question of fixation of minimum rate of wages and the State Government was acting within its powers conferred on it by the Act either expressly or by necessary implication. Their Lordships of the Supreme Court in *Bijay Cotton Mills Ltd. v. The State of Ajmer* have held that though the provisions of the Act interfere with the freedom of trade or business guaranteed under art. 19(1)(g) of the Constitution, the restrictions imposed are reasonable and

being imposed in the interests of general public are protected in terms of cl. (6) of art. 19. Their Lordships observed (p. 756):

"...In our opinion, the restrictions, though they interfere to some extent with the freedom of trade or business guaranteed under Article 19(1)(g) of the Constitution, are reasonable and being imposed in the interests of general public are protected by the terms of clause (6) of Article 19."

It necessarily follows that so long as the State Government acts within the limits of its powers conferred on it under the Act, its action is not open to challenge on the ground that it interferes with the rights conferred on the bidi manufacturers under art. 19(1)(g) of the Constitution. This contention also, therefore, fails.

In the result, in my opinion, cls. 1, 2, 3, 4, 5 and the first part of cl. 6 of the Schedule of the notification are *intra vires* of the Act, while the latter part of cl. 6, cl. 7 and the explanation are *ultra vires* of the Act. The case may now be placed before the appropriate Bench for further orders.

The matter was then placed before a bench composed of Kotval and V. S. Desai JJ. for passing formal orders in the petitions. Kotval J. delivered the following judgment.

M. N. Phadke, W. K. Sheorey and V. M. Golwalkar, for the petitioners.

N. L. Abhyankar, Special Government Pleader, and M. N. Chandurkar, for respondents Nos. 1 and 2.

KOTVAL J. We should have thought that after the decision of the third Judge we would be called upon to pass merely formal orders in these petitions, but Mr. M. N. Phadke on behalf of the petitioners has raised several contentions which it becomes necessary to deal with.

His first argument is founded upon the provisions of cl. 36 of the Letters Patent of this Court, and the point he takes is that it was necessary for the Division Bench which referred the matter to a third Judge to have formulated the point or points for decision by the third Judge, and that in the absence of any such point being formulated, the third Judge had no jurisdiction to give his opinion. In the first place it seems to us that the argument is founded upon a wrong interpretation of the order, referring the petitions for decision to the third Judge. At the conclusion of the hearing before the Division Bench Mr. Justice Mudholkar and I had announced (Mr. Justice Mudholkar in full and I, only the conclusion) our decision. According to Mr. Justice Mudholkar, all the clauses of the impugned notification were valid under the implied powers of Government. In my view, clauses 3 to 7 of the Schedule to the notification were *ultra vires* of the express and implied powers of Government. Thereupon Mr. Justice Mudholkar passed the following order:—

"In view of the difference of opinion between us, the matter will now have to go before a third Judge to be appointed by the Chief Justice."

It seems to us that it is clear upon that order of Mr. Justice Mudholkar that the matters in difference between my learned Brother and myself were referred. It was clear from the opinions delivered by either of us as to what were the points which called for decision by the third Judge. Moreover, both parties have clearly understood what the points of difference were and have fully argued them before Mr. Justice Tambe and the result is reflected in the opinion delivered by him. We do not think, with all respect to him, that there is any failure of jurisdiction in the third Judge giving his opinion.

The other contention raised by Mr. Phadke is based upon the decision given by Mr. Justice Tambe in para. 28 of his opinion read with paras. 8, 13 and 15. What Mr. Phadke says is that the only difference of opinion between the Judges of the Division Bench was on the scope and applicability of the implied powers of Government. But the decision of Mr. Justice Tambe hinges upon a consideration of the express powers and to that extent that was a point not referred to him and not within his jurisdiction to decide.

As we read the opinion of Mr. Justice Tambe, it is impossible to accede to the argument of Mr. Phadke. Mr. Justice Tambe no doubt considered the express powers under the Act. He did so only with a view to ascertain what were the implied powers which could flow from the provisions of the Act. This is clear from paras. 8 and 10 of his opinion. At no stage has he referred to the express powers directly in considering the validity of the notification; nor has he justified any of its provisions under any express power contained in the Act. The argument is founded upon a misreading of the opinion of Mr. Justice Tambe.

The third point raised is as to the decision which Mr. Justice Tambe gave upon the point arising under art. 19 of the Constitution. It was urged before the Division Bench that the notification was *ultra vires* under art. 19(1)(g). On that point it was contended that Mr. Justice Mudholkar decided that the notification was *intra vires*, but that I had considered it unnecessary to give an opinion and, therefore, it was not open to Mr. Justice Tambe to consider that question as there was no difference of opinion on the point.

In the first place, it seems to us that if one of the Judges of a Division Bench held the notification *intra vires* under the article, and the other Judge declined to give an opinion, that itself was a difference of opinion. Secondly, the point of difference between the Judges of the Division Bench was with regard to the validity of cls. 3 to 7 of the Schedule to the notification and the third Judge had to hear and decide the case on the point as to the validity of the said clauses. In pronouncing his opinion on that point the third Judge had to consider and decide the several arguments that were raised before him for and against the validity of the impugned clauses of the notification, and the argument under art. 19(1)(g) was one of such arguments which he had to consider and decide. Thirdly, the parties have argued their case before the third Judge on the basis that the opinion of the third Judge on the validity of the impugned clauses required also his decision on the question whether the said clauses were hit by art. 19(1)(g) of the Constitution. In these circumstances, we are of the view that no grievance can be made by Mr. Phadke that Mr. Justice Tambe's opinion on the point of the attack under art. 19(1)(g) is without jurisdiction.

The last point raised by Mr. Phadke is that there is a conflict of opinion on the question of the severability of cls. 3 to 7 of the impugned notification. On this point, of course, Mr. Justice Mudholkar having taken the view that the entire notification was *intra vires* could not, in the nature of things, pronounce any opinion. So far as my opinion was concerned, I held that it was not possible to extricate any of the provisions of cls. 3 to 7 from the portions of the notification which may be held valid except cls. 1 and 2; and, therefore, I declared the entire provisions of cls. 3 to 7 *ultra vires*. What is now sought to be argued is that Mr. Justice Tambe in para. 28 of his opinion has held that the second part of cl. 6, cl. 7 and the Explanation to the notification are clearly severable from the parts held good by him. To that extent the decisions conflict and, therefore, it is urged that cl. 36 of the Letters Patent which prescribes that the opinion of the majority of the Judges who have heard the case, including those who first heard it, shall prevail, cannot be given effect to. In our opinion, the portions of the opinion of Mr. Justice Tambe, to which Mr. Phadke has referred, do not contain the points in the case. They are merely the grounds or reasons which the learned Judge gave for coming to his ultimate conclusion that part of cl. 6, cl. 7 and the Explanation were *ultra vires*. That conclusion was directly upon the points in difference before the Division Bench; and, therefore, in compliance with cl. 36 of the Letters Patent. None of the contentions urged by Mr. Phadke, therefore, can be upheld.

We may also generally observe that none of these contentions were raised before Mr. Justice Tambe, but on the contrary it appears from his opinion that both the parties freely and without objection argued all the points before him. That being so, one of the parties cannot now turn round and urge that the

third Judge ought not to have decided a point or that he exceeded his jurisdiction in doing so, or had no jurisdiction to decide it. The first of the contentions of Mr. Phadke moreover ought properly to have been raised before the Division Bench itself, but no indication was given to the Division Bench that either party desired specific points to be stated.

Moreover, all these points have been argued before us as if we were sitting as an appellate Court which we are not. On the contrary, it seems to us that the conclusions reached by Mr. Justice Tambe are binding on us and we must give a decision in accordance therewith. We have already indicated that on a perusal of his opinion we have no doubt as to the conclusions reached by him. They have been made amply clear in the opinion itself.

In the net result, therefore, in accordance with the opinion of the third Judge,

(1) We hereby declare the following clauses of the Schedule to the notification, dated June 11, 1958, published in the Bombay Government Gazette of June 14, 1958 (Notification No. MWA-1557-J) to be *ultra vires* of the powers of the State Government—

(a) The following portion of cl. 6 of the Schedule:

"It shall, however, be open to the employer to take suitable action against the employee if the 'chhat' is more than 10 per cent. for 6 continuous working days in a calendar month."

(b) Clause 7 of the Schedule.

(c) The Explanation appended at the foot of the notification.

We prohibit the State Government from giving effect to any one or more of the above-mentioned provisions and order that they shall be deleted from the impugned notification.

(2) The remaining provisions of the notification are held *intra vires* of the powers of Government and, therefore, valid and effective.

(3) The petitions are thus partly allowed to the extent indicated in para. (1) above.

There then remains the matter of costs. The main justification offered in support of the notification at the hearing before the Division Bench was upon the express powers of Government under the Minimum Wages Act, and it was only when that contention failed that the implied powers were invoked. Even upon the implied powers some portions of the notification have now been held to be *ultra vires*. We think that in these circumstances the proper order to pass as regards costs is that each party shall bear its own costs.

Order accordingly.

[RAJKOT BENCH]

Before Mr. Justice S. T. Desai and Mr. Justice Patel.

DARBAR SHRI MERAMWALA BHAYAWALA v. BAI SHRI VALBAI SADUL.*

Saurashtra Barkhali Abolition Act (XXVI of 1951), Sec. 2(1)—Jiwal grant by subordinate Girassia—Whether grantee of such grant "Barkhalidar" within definition in Act.

A limited grant such as a grant as Jiwal by a subordinate Girassia is covered by the definition of "Barkhalidar" in s. 2(1) of the Saurashtra Barkhali Abolition Act, 1951.

*Khan Shri Nizam Mahomad Khanji Fais Mahomad Khanji v. The State of Bombay,*¹ distinguished.

Laxman Rana, Bhura Bhagwan, Mepa Manga and Patel Khoda Keshav applied in Form No. 11 for grant of occupancy certificate in respect of the lands

*Decided, December 10, 1958. Special Civil Applications Nos. 26, 27, 28 and 29 of 1958. of 1958, decided by M. C. Shah and Shelat JJ., on February 19, 1957, (Unrep.).

¹ (1957) Civil Special Application No. 12

in their respective possessions as tenants under the Barkhali Abolition Act, 1951. They had described Bai Valbai (opponent No. 1) as the Barkhalidar. The Mamlatdar granted the applications. D. S. Meramwala (applicant), who was not a party to the proceedings before the Mamlatdar, being aggrieved by this order, filed appeals before the Deputy Collector on the ground that the lands were *girasdari* lands comprised in his estate and, therefore, the four tenants who had applied in Form 11 for occupancy certificates as tenants were liable to pay six times the assessment etc. under the Saurashtra Land Reforms Act, 1951. The Collector remanded the cases to the Mamlatdar for re-inquiry ordering the joinder of the applicant as a party. Against this order of joinder of the applicant the tenants filed revision applications which were dismissed. The Mamlatdar thereafter held fresh inquiry and again ordered grant of occupancy certificates to the tenants on the basis that the lands were Barkhali. Against this decision appeals were filed by the applicant and the cases were again remanded to the Mamlatdar for re-inquiry and taking fresh evidence particularly as it was alleged that there was a Lekh by which the lands in question were given to Bai Valbai as "Jiwai". On remand the alleged Lekh was not produced but other evidence in support of the Barkhali nature of the tenure was adduced. The Mamlatdar held that as the Lekh was not produced there was nothing to show that the lands were held on a Barkhali tenure and that the tenants could not obtain occupancy certificates without payment of six times the assessment under the Land Reforms Act. Bai Valbai filed four appeals over this order of the Mamlatdar before the Deputy Collector who disposed of them by a single order holding that the lands were Barkhali tenure and, therefore, the tenants were entitled to occupancy certificates without the payment of six times the assessment under the Barkhali Abolition Act. Thereupon the applicant filed four Revision Applications before the Bombay Revenue Tribunal, Rajkot Bench. The Revenue Tribunal dismissed the revision application on the ground that the non-production of the Lekh was immaterial and that there was other sufficient evidence on record to establish the creation of a Barkhali tenure within the meaning of the Barkhali Abolition Act. It also held that as the finding of the Deputy Collector was a finding of fact the Revenue Tribunal could not interfere with the same. In answer to a further contention by the applicant that as Bai Valbai had abandoned the lands and left the village in 1950 the lands should be deemed to have been resumed by him as a Talukdar, the Revenue Tribunal held

"that a Talukdar loses his right of resumption after he has signed the Merger Agreement because the right of resumption could only be exercised as a Talukdar in the administration of the Taluka and such administration would vest in the Saurashtra Government formerly called the United State of Saurashtra under clause (5) of the Merger Agreement".

The applicant filed the present applications on the grounds *inter alia* that the Revenue Tribunal committed an apparent error of law in holding that the decision of the Bombay High Court in C.M.A. No. 24 of 1955 did not apply to the present case as the applicant in that case was himself a *girasdar* and the applicant in the present case is a Talukdar, a reasoning which was contrary to the definition of "Girasdar" which included a Talukdar as defined in s. 2(15) of the Land Reforms Act, and that as Bai Valbai had adduced no evidence to establish that she was a Barkhalidar as defined in s. 2(1) of the Barkhali Abolition Act, a writ of *certiorari* should be issued.

The applications were heard.

V. G. Hathi, for the applicant.

J. L. Doshi, for opponent No. 1.

PATEL J. These four Special Civil Applications arise out of proceedings under the Barkhali Tenure Abolition Act of 1951. The tenants made four separate applications for occupancy certificates under the provisions of this

Act, alleging that they were the tenants of the Barkhalidar Bai Valbai, and that under the provisions of the Act, they were entitled to occupancy certificates on payment of compensation provided under the Act. First, when these applications were made, the present applicant was not made a party to the proceedings. In his absence, the Mamlatdar dealing with these applications, made an order in favour of the tenants. The applicant filed an appeal to the Collector, and because he was not a party and an order was made in his absence in all these proceedings, the proceedings were remanded for retrial. Thereafter, after a finding was received, there was a further remand and it is after that remand that the matters came before the Deputy Collector in appeal and before the Revenue Tribunal in revision. It is from the order of the Tribunal dismissing the revision application of the applicant that the present petitions have been filed.

The contentions of the respective parties appear to be that Valbai alleged that she was a Barkhalidar in so far as these lands were assigned to her by the Talukdar while it is the case of the applicant that the lands were not given to her but they were given to her husband only for his life. It also appears that his contention was that even there, there was no grant of land but merely of the income of the properties, and after the death of the husband, this was being continued until Valbai left the place and went to Rampur in 1950. According to him, therefore, in any case, on and from that date, the lands reverted to the original grantor. He, therefore, contended that she could not be held to be a Barkhalidar nor were the tenants entitled to occupancy certificates under the Barkhali Abolition Act.

After the remand, the Mamlatdar held, as shown by his order dated June 28, 1957, on a consideration of the evidence, that Bai Valbai had not proved that she was a Barkhalidar. He, therefore, dismissed the applications. When the matter went before the Deputy Collector, he went into the evidence, as he should have done, and after considering the entire evidence, came to the conclusion that it was proved these lands were held by Valbai in Jiwai and they continued to be so held upto Samvat 2006. He also held that since 1950 the income was not paid to Valbai, but he said that as the Talukdar could not make any change in the nature of grant of land after the Revenue Orders 41/49 and 2/50 coming into force and could not resume the lands and amalgamate the same with his own lands in any manner, mere non-payment of the income after 1950 made no difference. In the result, he reversed the decision of the Mamlatdar and ordered that occupancy certificates should be issued to the tenants. In revision, the Tribunal, after considering the whole evidence while agreeing with the finding of the Deputy Collector, held that the question was one of fact and was not assailable before the Tribunal. It, therefore, dismissed the applications.

In these applications, the first ground that has been made before us by Mr. Hathi is that it was an error on the part of the Collector and the Tribunal to have considered this question afresh, because, according to him, at the time when the matter was remanded to the Mamlatdar by the Collector by his first order, the direction was that only the Lekh had to be proved, if it could be proved, with due regard to the provisions of s. 65 of the Indian Evidence Act. He says that it was not open to them to consider the whole question again. This contention has no substance. A reference to the order of remand dated December 26, 1956, shows that after summarising the arguments made by the learned advocate appearing before the Collector, he remanded the case for recording whatever evidence respondent No. 2 Bai Valbai may desire to adduce for proving that this grant was of Barkhali nature and directed him to take the same into consideration and hear both parties and give a fresh decision. Right or wrong, that order was made and is binding on the parties, and that being so, if after the decision of the Mamlatdar when the matter came up afresh before the Deputy Collector, he went into the merits of the question and decided

those facts for himself, it cannot be said that he had gone beyond his powers or beyond the order of remand which was made previously.

It is argued that the grant was merely a grant as Jiwai, and being in its nature unalienable and unhereditary, it would not be covered by the definition of 'Barkhalidar' under the Saurashtra Barkhali Abolition Act of 1951. Before I refer to the relevant provision of this section, it is desirable to consider the conditions in Saurashtra, which necessitated the enactment of that provision. It appears, at the opening of the 19th century all landed proprietors in Kathiawar from the Chief to the subordinate Girassia were in possession and exercise of uncontrolled power over the people of their Estates. It was in these circumstances that Col. Walker effected a permanent settlement of the tributes in 1807 and 1808. Many small proprietors, who freed themselves from the control of the superior States, were treated as separate tributaries and enjoyed that position after the Settlement. A few others were treated as subordinate Girasdars to one or the other principal Chiefs and were included in the tribute arrangement made with their lords.

It appears that there was a system of Girasdari in existence at the time of the Settlement and continued thereafter. The word 'Girasdari' had a definite connotation and that term included Talukdars, Bhagdars, Mulgirassias and Bhayats, who were considered to be landholders and had proprietary rights over their estates, big or small. There was another kind of tenure which was known as that of Barkhalidars. This term included within its fold Inamdars, Jiwaidars, Dharmada or Kherati grantees and holders of service tenures such as Chakariyats and Passaitas and they were entitled to the usufructs of the land granted to them. 'Barkhalidar' means a person holding land, who was in independent enjoyment of the produce and had not to carry the produce to the common Khala for being apportioned between the superior holder and himself.

It also appears from the accounts given by Col. Walker and decisions in Giras cases that the smallest Talukdar was as independent in the enjoyment of his estate as the biggest Chief. The classification of the full-powered States, semi-jurisdictional States and non-jurisdictional States and Talukas did not affect the natural autonomy in the land revenue administration and enjoyment of their landed possession. It also appears that the proprietary rights of the Subordinate Girasdars were not only recognised but also safeguarded. It also appears that subject to the payment of the tribute and various contributions referred to above, as the case may be, and subject also to the performance of various political and social obligations, a necessary consequence of the feudal system, Talukdars, Bhagdars, Mulgirassias and Bhayats, meaning thereby the subordinate Girassias, were entirely free in the administration and enjoyment of their lands.

The second category of landholders, the Barkhalidars, had evidently no proprietary rights in the estates. The lands were granted for enjoyment of usufructs either by the Paramount Power or the independent Chiefs or the subordinate Girassias. This included Inamdars, Jiwaidars, and Dharmada which included Kherati grantees and holders of service tenures. Some of the principal States of Kathiawar had their Alienation Settlement Rules and the interests and the respective obligations of all grantees were defined in accordance with those rules. It, however, does appear that in a far larger number of States and Estates there were no such rules. It also appears that the most common feature of these grants was that they were resumable by the grantor at will, though in actual practice grants were resumed under exceptional circumstances only, and it appeared these grants were, by their very nature, resumable. Jiwai grants were made for the maintenance of the grantees. These grants were also made as 'Hathgharna' grants to daughters at the time of marriage. Some of these grants ended with the life time of the grantees, while in some cases they were continued to the heirs of the grantees. It may also be mentioned that the subordinate Girassias were not entitled freely to make grants as they chose. They were free to make grants according to custom or usage or

in due consideration of service rendered; even so they were not free to fritter away their resources. In some cases, if the grants were unreasonable, they were liable to be modified by the Paramount Power.

In almost all these landed estates only a very small quantity of the estates were actually cultivated by the landholders themselves, whether they were Girassias or Barkhalidars. The condition of tenants was very miserable and far from satisfactory. It was, therefore, thought necessary to abolish these classes of tenures and make the tenant the direct occupant under the Government. The Commission that was appointed collected certain statistics and it appears that the percentage of Girasdar landholders whose holdings were less than 80 acres was 72.7 per cent, those who held between 80 and 800 acres was 24.4 per cent. and those who held more than 800 acres was about 2.9 per cent. It appears, therefore, that the Barkhalidars even of the subordinate Girassias could not have been too many, because small holders could not have made any sub-grants.

It is in this background that we must consider the provisions of the Barkhali Abolition Act and the Saurashtra Land Reforms Act, 1951. The Land Reforms Act was intended to deal with the Girasdars. It provided for their abolition and it also provided for land which would be allowable to a Girasdar for his personal cultivation. It was provided that if he had reserved any land for Gharkhed on or before a particular date, he was entitled to the reserved land. For the purpose of allotment of Gharkhed land the Girasdars were divided into three classes, A, B, and C, and provision was made for different acreage to be allotted to each class in proportion to his holding. Occupancy rights were given to the tenants on the land of a Girasdar.

The Barkhali Abolition Act dealt with the Barkhalidars. The word 'Barkhalidar' has been defined in s. 2 as follows:—

"(1) 'Barkhalidar' means a person who, holds a tenure as Barkhalidar, Jiwaitdar, Chakariyat, Kherati, or Dharmada and includes—

(a) any person who has been granted any such tenure;"

The rest of the section is not relevant for the purpose of this case. Section 8 makes a provision for allotment of land for personal cultivation. It clearly brings out the distinction between a Barkhalidar whose tenure was heritable and alienable and one whose tenure was inalienable and for life. It provides for allotment of land to a Barkhalidar in whose estate agricultural land is equal to two economic holdings or less and who is not a Chakariyat, Dharmada Institution or Jiwaitdar for life. Section 18 makes a provision for payment of cash annuity to Barkhalidar and appears to be in the nature of a rehabilitation grant in proportion to their holdings. It is also provided that in the case of a widow or a Hathgharna grantee, the payment was to be continued for the lifetime of the holder, since these grants were generally for the life of a grantee.

In these sections no distinction has been made between grantees of independent State or estate and subordinate Girasdar and none could have been apparently intended as it would lead to manifest injustice and contrary to the purpose for which the Acts were enacted. The Legislature must be presumed to have known the meanings of the different terms that they have employed, and the provisions in the sections leave no room for doubt that for the purposes of Barkhali Abolition Act even limited grants by a subordinate Girassia were included. A remedial statute cannot be cut down in its effect by limitation not imposed by the Legislature. There is, therefore, no substance in the contention raised by Mr. Hathi that the grant was not covered by the definition of "Barkhalidar" in the Barkhali Abolition Act and, therefore, was not subject to it.

Mr. Hathi has also relied on a decision of this Court in *Khan Shri Nizam Mahomad Khanji Fais Mahomad Khanji v. The State of Bombay*¹, wherein

¹ (1957) Civil Special Application No. 12 on February 19, 1957 (Unrep.).
of 1956, decided by M. C. Shah and Shelat JJ.,

lands were given by a subordinate estate-holder to Usmanbakhte Sahab for her pocket expenses under an agreement which also provided that in case the income of the village fell short of the sum of Rs. 2,500 a year, the grantor had to make good the amount. The tenants of the village had made applications for occupancy certificates. The tribunals below had granted those applications. It was held by the High Court that the grant to Usmanbakhte Sahab was not covered by the then Alienation and Settlement Rules of the Junagadh State and was, therefore, not covered by the definition of 'Barkhali Land' of the Junagadh Land Revenue Code. It was also held that the grant was given to her for her maintenance for life in which she had not heritable or alienable rights and that no tenure as a Jiwaidar was created in her favour, the lands remaining as Giras lands for all the time, and therefore she would not fall under the definition of 'Barkhalidar' in the Barkhali Abolition Act. The Court relied on s. 2(13) of the Land Reforms Act, which defined the word 'Estate' to mean all land of whatever description or undivided share thereof held by a Girasdar. It seems doubtful that merely because, for the purpose of computation of Gharkhed land to a Girasdar a grant of such a nature may be included in his holding, it must necessarily follow as a corollary that it could not fall within the definition of the Barkhali land in the other Act. No limitations of any kind are contained in the statute itself. In this case as held by the Deputy Collector and the Tribunal, the grant was given to the husband of Valbai and was continued to her. No limitations of any kind have been proved. The applicant is a Talukdar and he must necessarily have his record and they would have shown the actual nature of the grant. But none has been produced. Therefore, the decision referred to is clearly distinguishable and this case does not fall within the ratio of that case. In our judgment these lands are covered by the Barkhali Abolition Act and the tenants are entitled to the certificates.

A further argument has been made by learned counsel that since the land was not in possession of Valbai at least from 1950, the Act would not be applicable to this land. It appears from the judgment of the Tribunals below that Valbai became a widow at a very young age. It also appears that even during the life time of the husband of Valbai, the manager of the estate was managing these lands in the name of her husband, and as shown by the receipts, after her husband's death, the lands continued to be managed in the name of Valbai. It may be, as pointed out by the learned counsel, that since 1950, the income has not been paid. Even so, it cannot be said that the rights which she had in this property came to be extinguished merely by non-payment of the income by the manager to her. There is no order of resumption in this case. Even if it were permissible to resume the land, there being no order of resumption, merely because there is non-payment of income, it cannot be inferred that she was not in possession of the property. Possession in this case all along had been her husband's and thereafter hers. The property has been managed in their names by the manager of the estate.

The second answer to this argument is that after the merger agreement, the over-riding sovereign powers became vested in the State and they could not be exercised by the applicant. It is no doubt true that his proprietary rights are kept intact, but it cannot mean that it included a right of resuming lands once granted to others. The right of resumption was a right of the sovereign power, and the Girasdars being virtually independent exercised their power, if they did, only as sovereigns, whatever may be the limitations on their sovereignty. Even if, therefore, in this case there had been any resumption order, it could not have been valid. The present contention also must, therefore, fail.

The applications fail and are dismissed with costs.

Applications dismissed.

SUPREME COURT.

Present: The Hon'ble Mr. Justice S. R. Das, Chief Justice, Mr. Justice N. H. Bhagwati, Mr. Justice B. P. Sinha, Mr. Justice K. Subba Rao and Mr. Justice K. N. Wanchoo.

MAHARANA SHRI JAYAVANTSINHJI RANMALSINHJI v. THE STATE OF BOMBAY.*

Bombay Land Revenue Code (Bom. V of 1879), Sec. 117R—Gujarat Taluqdars' Act (Bom. VI of 1888), Secs. 22, 23(1)—Bombay Taluqdari Tenure Abolition Act (Bom. LXI of 1949), Sec. 5(2)—Expression "settlements of land revenue" in s. 117R, B. L. R. Code whether includes declaration under s. 22 or agreement of jama mentioned in s. 23(1) of Bom. Act VI of 1888.

The declaration under s. 22 of the Gujarat Taluqdars' Act, 1888, or the agreement of jama mentioned in s. 23(1) of the Act, is not a settlement of land-revenue within the meaning of s. 117R of the Bombay Land Revenue Code, 1879.

THE facts are stated in the judgment.

A. V. Viswanatha Sastri, with S. S. Shukla, for the appellants and the petitioners.

C. K. Daphtary, Solicitor-General of India, with H. J. Umrigar and R. H. Dhebar, for the respondent.

SUBBA RAO J. These are three appeals by Special Leave from the judgment of the High Court of Judicature at Bombay dismissing the petitions filed by the appellants for writs in the nature of prohibition restraining the respondents from realising from the appellants land revenue in respect of their estates at an enhanced rate for the year 1955-56. The petitioners in the two petitions also asked for similar relief against the respondents. The appeals as well as the writ petitions were heard together, as they raised a common question of law.

The material facts in Civil Appeal No. 254 of 1958 may be briefly stated: The appellant was a taluqdar owning several taluqdari villages situate in the Dholka Taluka of Ahmedabad district. In the year 1922-23 there was a revision settlement of land revenue of the lands situate in the said taluka including the said taluqdari villages. Under that settlement the aggregate of the land revenue payable in respect of the lands comprised in the said taluqdari villages was fixed in a sum of Rs. 62,627-2-6. In the year 1925-56, in exercise of the powers conferred under s. 22 of the Gujarat Taluqdars' Act, 1888 (Bom. VI of 1888) (hereinafter referred to as the Taluqdars' Act), the Government of Bombay ascertained and declared that a jama of Rs. 32,643-3-0 was payable in respect of the said taluqdari villages and the said declaration was to remain in force for a period of thirty years from the year 1925-56. In the year 1949, the Bombay Legislature passed the Bombay Taluqdari Abolition Act, 1949, hereinafter referred to as the Abolition Act, and it came into force on or about August 15, 1950. By s. 8 of the Abolition Act, the taluqdari tenure was abolished and all the incidents of the said tenure attaching to any land comprised in the taluqdari estate were extinguished. Under the Abolition Act, the appellant became an occupant of the lands. After the expiry of the thirty-year period, the talatis of the respective villages called upon the appellant to pay the full land revenue assessment in respect of the lands comprised in the said villages. The appellant contending that he was only liable to pay jama declared to be payable by him by the Government in 1925-26 filed a writ petition in the High Court of Bombay for the aforesaid relief.

The appellant in Civil Appeal No. 255 of 1958 was a taluqdar owning several taluqdari villages situate in Dholka and Dhandhulka talukas of Ahmeda-

*Decided, December 16, 1958. Civil Appeals Nos. 254 to 256 of 1958 (with Petitions Nos. 18 and 66 of 1957).

bad District. The facts in this case are similar to those given in Civil Appeal No. 254 of 1958 except in regard to the fact that the jama ascertained and declared to be payable by the appellant in this appeal by the Government in 1925-26 was about Rs. 5,734 as against the settlement amount of Rs.14,452-11-0.

The appellant in Civil Appeal No. 256 of 1958 was a taluqdar owning several taluqdari villages situate in Dholka taluka in Ahmedabad district. The facts in this appeal also are similar to those in the other two except in regard to the fact that in this case the Government ascertained and declared the jama payable by the appellant to be Rs. 21,877 as against the settlement amount of Rs. 44,551.

Writ Petition 66 of 1957 filed by the appellant in C. A. No. 254 of 1958 relates to the demand of enhanced revenue in respect of his Sanand estate. The facts in this petition are similar to those in appeals except that the Government ascertained and declared the jama payable by him at Rs. 20,886 as against the settlement amount of Rs. 48,247-18-0. The writ petition relates to the demand made for the year 1956-57.

Writ Petition No. 18 of 1957 was filed by Thakur Vikramsinhji Manhar-sinhji of Gumph Estate, Ahmedabad district, Bombay State, who was a taluqdar of Gumph Estate in Ahmedabad district comprising of seven taluqdari villages. The facts in this petition also are similar to those in the appeals. In this case the jama ascertained and declared was Rs. 16,499-4-0 whereas the assessment was fixed at Rs. 30,223-12-0. This writ petition also relates to the demand made for the year 1955-56.

The appellants in the appeals and the petitioners in the writ petitions afore-said will be, for the sake of convenience, described hereafter as the appellants.

Mr. A. V. Viswanatha Sastri, the learned counsel for the appellants, contends that the jama ascertained and declared to be due from the appellants for a period of thirty years was fixed at the revenue settlement, that by reason of s. 117B of the Bombay Land Revenue Code, 1879 (hereinafter referred to as the Code), they were liable to pay only the said assessment till there was re-settlement and that, therefore, the respondents have no right to make a demand for an amount higher than that declared to be due from them in 1925-26. The learned Solicitor General counters this argument by contending that under the Taluqdars' Act, there was an essential distinction between revenue settlement and the ascertainment and declaration of the jama; that after the Abolition Act, the amount of jama was payable only till the expiry of the thirty-year period and that thereafter the appellants who had become mere occupants would be liable to pay the entire land revenue assessment already fixed in respect of those lands. The question is which of the two contentions should prevail having regard to the relevant provisions of the Taluqdars' Act, the Abolition Act and the Code.

It will be convenient to read the relevant provisions from the two Acts. Gujarat Taluqdars' Act, 1888:

"2. (1) In this Act, unless there be something repugnant in the subject or context,—

(a) ...

(b) ...

(c) 'jama' means land-revenue payable by a taluqdar to the Provincial Government;...

4. It shall be lawful for the Provincial Government, whenever it may seem expedient, to direct a revenue survey or a revised revenue survey of any taluqdari estate, under the provisions of the Bombay Land Revenue Code, 1879, applicable to such surveys.

5. The settlement register prepared by the Survey officer under section 108 of the said Code on the occasion of making any such survey shall, unless the Provincial Government otherwise direct, contain, in lieu of the particulars specified in the said section, the following particulars (namely):—

(a) the area and the assessment of each survey-number;...

22. (1) If a taluqdar's estate, or any portion thereof, is not wholly or partially exempt from land-revenue and its liability to payment of land-revenue is not subject

to special conditions or restrictions, the jama payable to Government in respect of such estate or person thereof shall, if a survey-settlement has been extended thereto, be the aggregate of the survey-assessments of the lands composing such estate or such portion thereof, minus such deduction, if any, as Government shall in each case direct.

(2) The Governor in Council may declare the amount of jama so ascertained fixed for any term not exceeding thirty years."

Bombay Taluqdari Tenure Abolition Act LXII of 1949:

"3. With effect from the date on which this Act comes into force,—

(i) the taluqdari tenure shall wherever it prevails be deemed to have been abolished; and

(ii) save as expressly provided by or under the provisions of this Act, all the incidents of the said tenure attaching to any land comprised in a taluqdari estate shall be deemed to have been extinguished.

4. All revenue surveys or revised revenue surveys of taluqdari estates directed by the State Government under section 4 of the Taluqdars' Act and all settlements made shall be deemed to have been made under Chapters VIII and VIII-A of the Code and the settlement registers and other records prepared of such surveys shall be deemed to have been prepared under the corresponding provisions of the Code.

5. (1) Subject to the provisions of sub-section (2),—

(a) all taluqdari lands are and shall be liable to the payment of land revenue in accordance with the provisions of the Code and the rules made thereunder, and

(b) a taluqdar holding any taluqdari land or a cadet of a taluqdar's family holding any taluqdari land hereditarily for the purpose of maintenance, immediately before the coming into force of this Act, shall be deemed to be an occupant within the meaning of the Code or any other law for the time being in force.

(2) Nothing in sub-section (1) shall be deemed to affect—...

(b) the right of any person to pay jama only under any agreement or settlement recognised under section 23 or under a declaration under section 22 of the Taluqdars' Act so long as such agreement, settlement or declaration remains in force under the provisions of this Act.

17. The enactments specified in Schedule II are hereby repealed:

Provided that the repeal of the said enactment shall not in any way be deemed to affect,—

(a) ...

(b) ...

(c) any declaration made or any agreement or settlement recognised, any partition confirmed and any management of the taluqdari estate assumed under the provisions of any of the enactments hereby repealed,

and any proceedings connected with such partition or management instituted before the aforesaid date shall be continued and disposed of, as if this Act had not been passed."

The position emerging from the aforesaid provisions may be summarized thus: The Taluqdars' Act was enacted to make special provision for the revenue administration of the estates held by certain superior land-holders in the districts of Ahmedabad, Kaira, Broach and the Panch Mahals. Section 4 enabled the Governor in Council to direct a revenue survey or revised revenue survey of any taluqdari estate under the provisions of the Bombay Land Revenue Code. In regard to such an estate, survey would be made under s. 108 of the Code and the Settlement Officer would prepare a register to be called the "Settlement Register", which would contain the particulars mentioned in s. 5 of the Taluqdars' Act in lieu of the particulars specified in s. 108 of the Code. Under s. 22 of the Taluqdars' Act, the jama payable by a taluqdar would be the aggregate of the survey assessments of the lands composing such an estate or such portion thereof minus such deduction, if any, that the Government in each case should direct. Under sub-s. (2), the Governor in Council was empowered to declare the jama so ascertained fixed for any term not exceeding thirty years. In 1949, the taluqdari tenure was abolished by the Bombay Taluqdari Tenure Abolition Act. By s. 5 of the Abolition Act, the taluqdars became occupants within the meaning of the Code, i.e., they were deemed to be holders in actual possession of

unalienated lands other than the tenants; with the result that all the taluqdari lands became liable to the payment of land revenue in accordance with the provisions of the Code and the rules made thereunder. Sub-section (2) of s. 5 saved the right of any person to pay jama only under an agreement or settlement recognized under s. 23 or a declaration made under s. 22 of the Taluqdars' Act so long as such agreement, settlement or declaration remained in force. Shortly stated, the combined effect of the provisions was that the taluqdari tenure was abolished and that the taluqdar became the occupant with liability to pay land revenue in accordance with the provisions of the Code.

If there was no other relevant provision indicating a contrary intention, it is manifest from the aforesaid summary that the appellants would be liable to pay land revenue in accordance with the provisions of the Code after the period fixed in the declaration expired; i.e., from the year 1955-1956.

The learned counsel for the appellants contends that by reason of s. 117R of the Code, the declaration made by the Governor in Council fixing the amount of jama for a period of thirty years would continue to be in force even after the expiry of the said period till a revision settlement was made and, therefore, the saving clause would preclude the Government from demanding higher amount of revenue than the jama ascertained and fixed in the declaration till the date of the revised settlement. Section 117R of the Code reads:

"All settlements of land revenue heretofore made and introduced and in force at the date of the commencement of the Bombay Land Revenue Code (Amendment) Act, 1939, shall be deemed to have been made and introduced in accordance with the provisions of this Chapter and shall, notwithstanding anything contained in section 117E, be deemed to continue to remain in force until the introduction of a revision settlement."

If the declaration of the Governor in Council is a settlement of land revenue within the meaning of this section, it would continue to be in force till the introduction of the revision settlement. It is, therefore, necessary to ascertain the meaning of the words "settlement of land revenue" in the section. Settlement is defined by s. 117C(1) to mean the result of the operations conducted in a zone in order to determine the land revenue assessment. What is the scope of the operations conducted to arrive at the said result? The provisions of Ch. VIII-A lay down the successive steps to be followed by the authorities concerned to fix the land revenue. Under s. 117D, the Government may at any time direct a settlement of the land revenue of any land of which revenue survey has been made under s. 95 or not. It may also direct at any time a revised settlement of the land revenue of such lands. A settlement once made remains in force for a period of thirty years unless the State Government directs that it should remain in force for any period less than thirty years. In a case where a revised settlement of land revenue has not been made for one reason or other, the Government may extend the term of the settlement for such period as it may think fit. The land revenue assessment shall be determined by dividing the lands to be settled into different groups and fixing a standard rate for each group. Groups are ordinarily formed on a consideration of various factors such as physical configuration, climate, rain-fall, price and yield of principal crop and other relevant considerations. Land revenue of individual survey numbers and subdivisions shall be based on their classification and value in the manner prescribed. The Settlement Officer, who is entrusted with the duty of making the settlement, shall follow the prescribed procedure and fix a standard rate for each class of land in each group on a consideration of the relevant factors. A hierarchy of Tribunals are created for the persons aggrieved to take the matter in appeal. Finally the State Government passes orders approving the standard rates or varying them. After the State Government has passed orders and the notice of the same has been given in the prescribed manner, settlement will be deemed to have been introduced and land revenue according to such settlement will be levied from such date as the State Government may direct. It will be seen from the aforesaid summary of the scheme of land revenue settlement that

land revenue is fixed for each land, having regard to the group within which it falls. All such settlements of land-revenue made before the Bombay Land Revenue (Amendment) Code, 1939, will be deemed to remain in force until the introduction of a revised settlement.

Part II of the Taluqdars' Act provided for survey and settlement. Under s. 4 of the Taluqdars' Act, the Governor in Council might direct a revenue survey of the taluqdari estate under the provisions of the Code. The settlement register prepared under that Code was directed to contain particulars mentioned in s. 5 such as area and assessment of such survey-number etc. Presumably, under that Act a settlement was made in regard to the taluqdari estates and settlement registers were prepared fixing the assessment of each survey-number. That settlement would certainly be a settlement of land revenue within the meaning of s. 117R of the Code and that would continue to be in force till a resettlement was made.

Part IV of the Taluqdars' Act dealt with Revenue Administration. Section 22 laid down that in a case where survey-settlement had been extended to a taluqdari estate, the jama payable by the taluqdar to Government in respect of such an estate shall be the aggregate of the survey-assessments of the lands composing such estate or such portion thereof *minus* such deduction, if any, as Government shall direct in each case. Under sub-s. (2) of s. 22, the Governor in Council could declare the amount of jama so ascertained fixed for any term not exceeding thirty years. Under s. 23, nothing in the Act was deemed to affect the validity of any agreement thereto-before entered into by or with a taluqdar and still in force as to the amount of his jama, nor of any settlement of the amount of jama made by or under the orders of Government for a term of years and still in force. Sections 22 and 23 provided for the arrangements entered into or to be entered into with the Governor in Council in respect of the jama payable by the taluqdars. Section 23 saved the previous agreements or settlements in respect of the jama. Section 22 authorized the Government to fix the jama, having regard to the aggregate of the survey assessments of the lands and to declare the same fixed for a period of years not exceeding thirty. The declaration under s. 22 or the agreement or settlement of jama mentioned in s. 23(1) might be described broadly as a settlement entered into between the Government and a taluqdar but it was not a settlement of land-revenue within the meaning of s. 117R of the Code, for settlement of revenue was the result of operations carried on in respect of different classes of lands in the manner prescribed by Ch. VIII-A of the Code or the settlement in respect of such lands in accordance with the pre-existing laws. It was beyond the scope of Ch. VIII-A to ascertain the jama, though the rates fixed under such a settlement were taken as the basis by the Government in ascertaining the jama payable by the taluqdar. The jama payable by the taluqdar was distinct from the revenue assessment of the land comprised in the taluqdari estate and they could not be equated.

Section 17 of the Abolition Act repealed the Taluqdars' Act and expressly provided that the repeal of the said enactment shall not affect any declaration made or any agreement or settlement recognized in respect of the taluqdari estates. Section 5(2)(b) of the Abolition Act expressly saved the agreement or settlement recognized under s. 23 or a declaration made under s. 22 from the operation of the Act till such agreement, settlement or declaration remained in force. It is, therefore, manifest that the declaration made under the Taluqdars' Act enured to the advantage of the taluqdars, notwithstanding the repeal of the Taluqdars' Act, till such time it was in force. When the Abolition Act came into force, the time mentioned in the declaration in the cases before us, i.e., thirty years, had not run out and, therefore, the declaration made by the Government under the Taluqdars' Act continued to be in force till 1955-56. After the expiry of the time, the appellants would be liable to pay the entire land revenue according to the settlement register.

The entire scheme of the Abolition Act was that after the passing of that Act, the taluqdars became occupants with the result that they would be liable to

pay land revenue in accordance with the provisions of the Land Revenue Code. If sub-s. (2) was not inserted in s. 5, they would be liable to pay land-revenue under the Code, notwithstanding the declaration made or the agreement entered into by the Government with them in regard to the jama payable by them. Sub-section (2) was only enacted to preserve to them the concession till the period fixed had expired. We, therefore, hold that the declaration made by the Governor in Council in 1925-26 expired in 1955-56 and the appellants became liable to pay the entire land-revenue according to the settlement registers from the year 1955-56.

In the result, all the appeals and the writ petitions are dismissed with costs, the State of Bombay and the Collector of Ahmedabad, who are the respondents herein, getting one set of hearing costs in all.

Appeals and petitions dismissed.

Present: The Hon'ble Mr. S. R. Das, Chief Justice, Mr. Justice S. K. Das, Mr. Justice P. B. Gajendragadkar, Mr. Justice K. N. Wanchoo and Mr. Justice M. Hidayatullah.

THE WESTERN INDIA THEATRES LTD. v. THE CANTONMENT BOARD, POONA, CANTONMENT.*

Government of India Act, 1935 [25 & 26 Geo. V, Ch. 43], Sec. 100, Sch. VII, List II, entries 50, 46—Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 73—Whether entry 50 contemplates law restricted to imposing taxes on persons who receive or enjoy the luxuries or the entertainments or the amusements—Section 73 of Bom. Act XVIII of 1925 whether law with respect to matters enumerated in entry 46.

The words "taxes on luxuries or entertainments or amusements" in entry 50, List II, Seventh Schedule to the Government of India Act, 1935, have not a restricted meaning so as to confine the operation of the law to be made thereunder only to taxes on persons receiving the luxuries, entertainments or amusements. The entry contemplates luxuries, entertainments and amusements as objects on which the tax is to be imposed. Therefore, a law which imposes tax on the act of entertaining is within the entry whether it falls on the giver or the receiver of that entertainment.

*Navinchandra Mafatlal v. The Commissioner of Income Tax, Bombay City,*¹ referred to.

Section 73 of the Bombay Municipal Boroughs Act, 1925, is a law with respect to matters enumerated in entry 50 and not entry 46, List II, Seventh Schedule to the Government of India Act, 1935, and the Bombay Legislature had ample power to enact this law.

THE facts appear at 56 *Bombay Law Reporter* 46.

H. D. Banaji, with *R. A. Gagrai* and *G. Gopalkrishnan*, for the appellant.

H. N. Sanyal, Additional Solicitor-General of India, with *H. J. Umrigar* and *R. H. Dhebar*, for the respondent.

DAS C.J. This is an appeal from the judgment and decree of the High Court of Bombay dated February 10, 1953, setting aside the judgment and decree of the Court of Civil Judge, Senior Division, Poona, dated July 31, 1951, in Special Suit No. 89 of 1950 and dismissing the appellant's suit against the respondent with costs throughout. This appeal has been filed under a certificate of fitness granted by the High Court of Bombay.

The facts leading up to this appeal may shortly be stated. The appellant is a public limited company registered under the Indian Companies Act, 1913.

Decided, January 16, 1959. Civil Appeal 1 [1955] I S. C. R. 829, s.c. 57 Bom. L.R. No. 145 of 1955. 628.

It is a lessee of two cinema Houses known respectively as "West End" and "Capitol" situated within the limits of Poona cantonment area. It exhibits in the said two Houses cinematograph films, both foreign and Indian.

On March 20, 1947, a notice was issued by the respondent whereby, in exercise of the powers conferred on it by s. 60 of the Cantonments Act, 1924 (II of 1924), the respondent proposed to make, with the previous sanction of the Central Government, certain amendments in the notification of the Government of Bombay in the General Department No. 4160 dated June 17, 1918, and intimated that the draft amendments would be considered by the respondent on or after April 21, 1947, and invited objection in writing within 30 days from the publication of that notice. One of the items of amendments was as follows:—

"(H) 'V-Tax on Entertainments'

- | | |
|-------------------------------|---|
| 1. Cinemas, Talkies or dramas | { Rs. 5-0-0 per show.
Rs. 10-0-0 per show. |
| 2. Circus | Rs. 2-0-0 per show. |
| 3. Horse Races | Rs. 100-0-0 per day of race meetings. |
| 4. Amusement park | Rs. 20-0-0 per day. |

provided as follows:—

1. The said tax shall be levied at the rate of Rs. 10-0-0 per show in the case of the West End and Capitol Talkies and at the rate of Rs. 5-0-0 per show in other cases."

It appears that the Cinematograph Exhibitors Association of India submitted certain objections to the proposals. The Cantonment Executive Officer, Poona, by his letter dated July 8, 1947, informed the Secretary of the Cinematograph Exhibitors Association of India that the latter's letter had been submitted to the Government of India in original along with the respondent's proposals and that the imposition of the entertainments tax on cinemas had been approved by the Government of India, Defence Department notification No. 1463 dated May 7, 1947. On June 17, 1948, a notification was issued by the Government of Bombay to the effect that in supersession of the notifications of Government noted on the margin and of all other notifications on the same subject, the Governor-in-Council, with the previous sanction of the Governor General-in-Council, was pleased to impose certain taxes in the Cantonment of Poona with effect from July 15, 1948. One of the taxes thus imposed was as follows:—

"V-Tax on entertainments.

- | | |
|---|---------------------------------------|
| 1. Cinemas, Talkies or dramas | Rs. 10-0-0 per show. |
| in the case of the West End and Capitol | |
| In other cases | Rs. 5-0-0 per show. |
| 2. Circus | Rs. 2-0-0 per show. |
| 3. Horse Races | Rs. 100-0-0 per day of race meetings. |
| 4. Amusement park | Rs. 20-0-0 per day." |

The appellant paid the tax under protest and on or about April 19, 1950, filed a suit (being suit No. 89 of 1950) against the respondent in the Court of the Civil Judge, Senior Division, Poona, for a declaration that the levy, collection or recovery of the said tax by the respondent was illegal and invalid, for a permanent injunction restraining the respondent from levying, collecting or recovering the said tax, for refund of the sum of Rs. 45,802-0-0 being the total amount of tax collected from the appellant, for costs and interest on judgment. By its judgment dated July 31, 1951, the trial Court decreed the suit in full. The respondent preferred an appeal before the High Court against the said judgment and decree of the trial Court, and the High Court by its judgment and decree dated February 10, 1953, allowed the appeal and dismissed the appellant's suit with costs throughout. The High Court, however, granted to the appellant a certificate of fitness for appeal to this Court and hence this final appeal questioning the validity of the said tax.

At all times material to this appeal the respondent was governed by the Cantonments Act, 1924 (Act II of 1924). Section 60 of that Act runs as follows:—

"60. (1) The Board may, with the previous sanction of the local Government, im-

pose in any Cantonment any tax which, under any enactment for the time being in force, may be imposed in any municipality in the province wherein the Cantonment is situated.

(2) Any tax imposed under this section shall take effect from the date of its notification in the official gazette."

The enactment under which, shortly after the date of passing of the Cantonments Act, 1924, tax could be imposed by the municipal boroughs in the province of Bombay was the Bombay Municipal Boroughs Act, 1925 (Bom. XVIII of 1924). Therefore, the powers of the respondent to levy and collect taxes under the provisions of the Cantonments Act were co-extensive with the powers of the Borough Municipalities under the Bombay Municipal Boroughs Act, 1925. Section 73 of the last mentioned Act specified the taxes which might be imposed by a municipality. The relevant portions thereof, prior to its present adaptation, were as follows:—

"(1) Subject to any general or special orders which the Provincial Government may make in this behalf and to the provisions of sections 75 and 76, a municipality may impose for the purposes of this Act any of the following taxes, namely:—...

(xiv) any other tax (not being a toll on motor vehicles and trailers, save as provided by section 14 of the Bombay Motor Vehicles Tax Act, 1935) which under the Government of India Act, 1935, the Provincial Legislature has power to impose in the Province."

The question is whether the provincial Legislature of Bombay had power to impose the tax which is under consideration in this appeal.

Under s. 100 of the Government of India Act, 1935, read with entry 50 in Sch. VII thereto the provincial Legislature had power to make law with respect to "taxes on luxuries, including taxes on entertainments, amusements, betting and gambling". Learned counsel for the appellant contends that the impugned tax is not covered by this entry at all. This entry, according to him, contemplates a law imposing taxes on persons who receive or enjoy the luxuries or the entertainments or the amusements and, therefore, no law made with respect to matters covered by this entry can impose a tax on persons who provide the luxuries, entertainments or amusements, for the last mentioned persons themselves receive or enjoy no luxury or entertainment or amusement, but simply carry on their profession, trade or calling. Learned counsel urges that the impugned law is really one with respect to matters specified in entry 46, namely, taxes on professions, trades, callings and employments and, therefore, cannot exceed Rs. 100 per annum under s. 142A of the Government of India Act, 1935, and Rs. 250 per annum under art. 276(2) of the Constitution. We are unable to accept this argument as sound.

As pointed out by this Court in *Navinchandra Mafatlal v. The Commissioner of Income Tax, Bombay City*,¹ following certain earlier decisions referred to therein, the entries in the legislative list should not be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. It has been accepted as well-settled that in construing such an entry conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein. In view of this well established rule of interpretation, there can be no reason to construe the words "taxes on luxuries or entertainments or amusements" in entry 50 as having a restricted meaning so as to confine the operation of the law to be made thereunder only to taxes on persons receiving the luxuries, entertainments or amusements. The entry contemplates luxuries, entertainments and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments or amusements and both may, with equal propriety, be made amenable to the tax. It is true that economists regard an entertainment tax as a tax on expenditure and, indeed, when the tax

* 1 [1955] I S.O.R. 820, s.c. 57 Bom. L.R. 628.

is imposed on the receiver of the entertainment, it does become a tax on expenditure, but there is no warrant for holding that entry 50 contemplates only a tax on moneys spent on luxuries, entertainments or amusements. The entry, as we have said, contemplates a law with respect to these matters regarded as objects and a law which imposes tax on the act of entertaining is within the entry whether it falls on the giver or the receiver of that entertainment. Nor is the impugned tax a tax imposed for the privilege of carrying on any trade or calling. It is a tax imposed on every show, that is to say, on every instance of the exercise of the particular trade, calling or employment. If there is no show, there is no tax. A lawyer has to pay a tax or fee to take out a license irrespective of whether or not he actually practises. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the license chooses to do so. The impugned tax is a tax on the act of entertainment resulting in a show. In our opinion, therefore, s. 73 is a law with respect to matters enumerated in entry 50 and not entry 46 and the Bombay Legislature had ample power to enact this law.

The only other point urged before us is that the notification is violative of the equal protection clause of our Constitution in that it has picked out the appellant's cinema houses for discriminatory treatment by imposing on it a tax at the rate of Rs. 10 per show, while a tax of only Rs. 5 per show is imposed on other cinema houses. The meaning, scope and effect of the provisions of art. 14 of our Constitution have been fully dealt with, analysed and laid down by this Court in *Budhan Choudhry v. The State of Bihar*² and *Ram Krishna Dalmia v. Tendolkar J.*³ It appears, however, from the record that no issue was raised and no evidence was adduced by the appellant before the trial Court showing that there were other cinema Houses similarly situate as that of the appellant's cinema Houses. It may not be unreasonable or improper if a higher tax is imposed on the shows given by a cinema house which contains large seating accommodation and is situate in fashionable or busy localities where the number of visitors is more numerous and in more affluent circumstances than the tax that may be imposed on shows given in a smaller cinema house containing less accommodation and situate in some localities where the visitors are less numerous or financially in less affluent circumstances, for the two cannot, in those circumstances, be said to be similarly situate. There was, however, no material on which the trial Court could, or we may now come, to a decision as to whether there had been any real discrimination in the facts and circumstances of this case. It may be that the appellant may in some future proceeding adduce evidence to establish that there are other cinema houses similarly situate and that the imposition of a higher tax on the appellant is discriminatory as to which we say nothing; but all we need say is that in this suit the appellant has not discharged the onus that was on him and, on the material on record, it is impossible for us to hold in this case that there has been any discrimination in fact.

For reasons stated above this appeal must be dismissed with costs.

Appeal dismissed.

Present: The Hon'ble Mr. S. R. Das, Chief Justice, Mr. Justice S. K. Das, Mr. Justice P. B. Gajendragadkar, Mr. Justice K. N. Wanchoo and Mr. Justice M. Hidayatullah.

THE WESTERN INDIA THEATRES LTD. v. MUNICIPAL CORPORATION OF THE CITY OF POONA.*

Bombay District Municipal Act (Bom. III of 1901), Sec. 59(1)(xi)—Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 60(1)—Whether s. 59(1)(xi) unconstitutional as delegating to municipality legislative functions in excess of permissible limits—Expression "modify" in s. 60(1) of Bom. Act XVIII of 1925 whether means "to enhance".

Section 59(1)(xi) of the Bombay District Municipal Act, 1901, is not unconstitutional.

Section 59(1)(xi) of the Act lays down a principle and fixes a standard which the municipalities have to follow in imposing a tax and the Legislature cannot, in the circumstances, be said to have abdicated itself and, therefore, the delegation of power to impose any tax cannot be struck down as being in excess of the permissible limits of delegation of legislative functions.

The word "modify" in s. 60(1) of the Bombay Municipal Boroughs Act, 1925, means not only "to reduce" but means also "to enhance."

*Stevens v. General Steam Navigation Company,*¹ referred to.

THE facts appear at 56 *Bombay Law Reporter* 47.

H. D. Banaji, with *R. A. Gagrai* and *G. Gopalkrishnan*, for the appellant.

M. C. Setalvad, Attorney-General for India, with *S. N. Andley* and *J. B. Dadachanji*, for the respondent.

DAS C.J. The appellant is a public limited company registered under the Indian Companies Act, 1913. It is a lessee of four cinema houses situate within the municipal limits of Poona City known respectively as "Minerva", "The Globe", "Sri Krishna" and "The Nishat". It exhibits cinematograph films, both foreign and Indian, in the said four houses. The respondent, a body corporate, was governed by the Bombay District Municipal Act, 1901 (Bom. III of 1901) up to June 8, 1926, and from then by the Bombay Municipal Boroughs Act, 1925 (Bom. XVIII of 1925) up to December 29, 1949, and, thereafter, by the Bombay Provincial Municipal Corporation Act, 1949 (Bom. LIX of 1949). With effect from October 1, 1920, the respondent, with the sanction of the Government of Bombay levied on the owners and lessees of cinema houses within the limits of the erstwhile province of Bombay a tax of Rs. 2 per day as license fee. Rules for the levy and collection of the said tax were framed by the respondent. Those rules were amended on or about June 3, 1941, enhancing the tax from Rs. 2 per day to Re. 1 per show. The rules were again revised on or about June 9, 1948, under which the tax was enhanced from Re. 1 per show to Rs. 5 per show. At all material times the tax was being collected at the last mentioned rate.

Section 59 of the Bombay District Municipal Act, 1901, provided that subject to any general or special orders which the State Government might make in that behalf any municipality (a) after observing the preliminary procedure required by s. 60, and (b) with the sanction of the authority therein mentioned, might impose for the purposes of that Act any of the taxes mentioned in that section. After enumerating ten specific heads of taxes, which a municipality could levy, a residuary category was set forth in cl. (xi) in the words following:—

"any other tax to the nature and object of which the approval of the Governor in Council shall have been obtained prior to the selection contemplated in sub-clause (i) of clause (a) of section 60."

*Decided, January 16, 1959. Civil Appeal 1 [1903] 1 K.B. 890.
No. 146 of 1955.

Ever since the appellant became a lessee of the said cinema houses, the appellant has been making payments of the said tax under protest.

After giving the necessary statutory notice to the respondent, the appellant, on or about March 31, 1950, filed a suit in the Court of the Civil Judge, Senior Division, Poona, being Suit No. 76 of 1950, against the respondent for a declaration that the levy and imposition of the said tax with effect from October 1, 1920, were invalid and illegal; that the enhancement in the rates of the tax with effect first from June 3, 1941, and then June 9, 1948, was invalid and illegal and that the resolutions passed and rules framed in connection with the levy, imposition, enhancement and collection of the said impugned tax were invalid, illegal and *ultra vires*, for a permanent injunction restraining the defendants from levying or recovering and/or increasing and enhancing the said tax and for refund to the appellant of the amounts of the tax collected from it and for costs of the suit and interest. By its judgment dated November 30, 1951, the trial Court held that the said tax was validly levied and imposed, but that the increase and enhancement thereof in 1941 and 1948 were illegal and *ultra vires* and that the suit was not barred under the Acts governing the respondent. The trial Court decreed the suit in part by issuing an injunction restraining the respondent from levying, recovering or collecting the tax at the enhanced rate and passing a decree against the respondent for refund of a sum of Rs. 27,072 with interest and costs. The respondent preferred an appeal and the appellant filed cross objections. But the High Court by its judgment and decree dated February 10, 1948, reversed the judgment of the trial Court and dismissed the suit of the appellant with costs throughout. The appellant's cross objections were also dismissed. On December 10, 1953, the High Court granted leave to the appellant to appeal to this Court from the said judgment. Hence this final appeal questioning the validity of the impugned tax.

The first point urged in this appeal is that the law imposing this tax is not covered by entry 50 in List II of the Seventh Schedule to the Government of India Act, 1935, but is really a tax on the appellant's trade or calling referred to in entry 46 and that, therefore, the amount of tax cannot under s. 142-A of the Government of India Act, 1935, exceed Rs. 100 per annum. This point need not detain us long, for it is covered by us in the appellant's other appeal No. 145 of 1955. (*Western India Theatres v. C.B., Poona*)†

The second point urged before us in support of this appeal is that s. 59(1) (xi) is unconstitutional in that the Legislature had completely abdicated its functions and had delegated essential legislative power to the municipality to determine the nature of the tax to be imposed on the rate payers. Learned counsel for the appellant urges that the power thus delegated to the municipality is unguided, uncanalised and vagrant, for there is nothing in the Act to prevent the municipality from imposing any tax it likes, even, say, income-tax. Such omnibus delegation, he contends, cannot on the authorities be supported as constitutional. We find ourselves in agreement with the High Court in rejecting this contention.

In the first place, the power of the municipality cannot exceed the power of the provincial Legislature itself and the municipality cannot impose any tax, e.g., income-tax which the provincial Legislature could not itself impose. In the next place, s. 59 authorises the municipality to impose the taxes therein mentioned "for the purposes of this Act". The obligations and functions cast upon the municipalities are set forth in ch. VII of the Act. Taxes, therefore, can be levied by the municipality only for implementing those purposes and for no other purpose. In other words it will be open to the municipality to levy a tax for giving any of the amenities therein mentioned. The matter may be illustrated by reference to s. 54 which enumerates the duties of municipalities. The first duty mentioned in that section is that the municipality should make provision for lighting public streets and nobody can object if it imposes a lighting tax, which indeed, is item (ix) in s. 59(1). Take another example: It is the duty of

† See (1959) 61 Bom. L. R. 950.

the municipality to arrange for supply of drinking water and it may legitimately charge a water rate which, again, is item (viii) in s. 59(1). We do not for a moment suggest that the municipalities may only impose a tax directly in connection with the heads of duties cast upon it. What we say is that the tax to be imposed must have some reasonable relation to the duties cast on it by the Act. In the third place, although the rule of construction based on the principle of *ejusdem generis* cannot be invoked in this case, for items (i) to (x) do not, strictly speaking, belong to the same genus, but they do indicate, to our mind, the kind and nature of tax which the municipalities are authorised to impose. Finally, the provincial Legislature had certainly not abdicated in favour of the municipality, for the taxing power of the municipality was quite definitely made subject to the approval of the Governor-in-Council. Under the Indian Council Act, 1861 (24 & 25 Vic. c. 67) the Governor-in-Council might mean the Governor in Executive Council or the Governor in Legislative Council. If the reference in s. 59(1)(xi) is to the Governor's Legislative Council, then there was no improper delegation at all, for it was subject to the legislative control of the Governor in Legislative Council. The Governor's Legislative Council was composed of all the members of the Governor's Executive Council besides a few other persons. Therefore, if the reference was to the Governor in his Executive Council even then, from a practical point of view, the ultimate control was left with the Governor's Legislative Council. We need not labour this point any further, for on the first three grounds the delegation of legislative authority, if any, is not excessive so as to make the exercise of it unconstitutional. In our opinion the impugned section did lay down a principle and fix a standard which the municipalities had to follow in imposing a tax and the Legislature cannot, in the circumstances, be said to have had abdicated itself and, therefore, the delegation of power to impose any other tax cannot be struck down as being in excess of the permissible limits of delegation of legislative functions.

The last point urged by learned counsel for the appellant is that, under cl. (xi) of s. 59(1), the enhancements of the rates of the tax in 1941 and again in 1948 were illegal in that the municipality had no power to do so under the Bombay Municipal Boroughs Act, 1925. According to learned counsel for the appellant the judgment under appeal upholding the validity of such enhancements cannot be supported under s. 60 of that Act. That section runs as follows:—

"Power to suspend, reduce or abolish any existing tax.

60. (1) Subject to the requirements of clause (a) of the proviso to section 58 a municipality may, except as otherwise provided in clause (b) of the proviso to section 103 at any time for any sufficient reason, suspend, modify or abolish any existing tax by suspending, altering or rescinding any rule prescribing such tax.

(2) The provisions of Chapter VII relating to the imposition of taxes shall apply so far as may be to the suspension, modification or abolition of any tax and to the suspension, alteration or rescission of any rule prescribing a tax."

Reference is made to the marginal note where the words used are "power to suspend, reduce or abolish any existing tax". It is suggested that the word "modify" in the body of the section in between the words "suspend" and "abolish" should be construed in the sense of reduction. The marginal note, according to him, shows that the several words were used in the section to indicate a progressive diminution in the quantum of tax until it was completely gone. Reference is made to the root meaning of the word "modify" which is to reduce or make less but does not cover the idea of enhancement. In the first place, the marginal note cannot affect the construction of the language used in the body of the section if it is otherwise clear and unambiguous (see *Commissioner of Income Tax, Bombay v. Ahmedbhai Umarbhai & Co.*¹) In the next place, it should be borne in mind that s. 67 of the Bombay District Municipal

1 [1950] S.C.R. 335 at p. 353, s.c. 52 Bom. L.R. 719.

Act (Bom. III of 1901) which was formerly applicable to municipalities used the word "reduce" in between the words "suspend" and "abolish" and that that section had been reproduced in s. 60 of the Bombay Municipal Boroughs Act, 1925, but that in the process of such reproduction the word "reduce" was dropped and the word "modify" was introduced. In the marginal note, however, the word "reduce" was not substituted by the word "modify", apparently through inadvertence. If the word "modify" is to be read as "reduce", then there could be no point in the provincial Legislature substituting the word "reduce" by the word "modify". This change must have been made with some purpose and the purpose could only have been to use an expression of wider connotation so as to include not only reduction but also other kinds of alteration. Section 76 of this very Act also refers to "modification not involving an increase in the amount to be imposed" which makes the sense in which the word "modify" has been used in this Act perfectly clear, namely, that there may be a modification involving an increase. Reference may also be made to the decision of the Court of Appeal in England in the case of *Stevens v. General Steam Navigation Company*.² "Modification", according to Collins M. R. in his judgment at p. 893, implied an alteration and the word was equally applicable whether the effect of the alteration was to narrow or to enlarge the provision. In our opinion the dropping of the word "reduce" and the introduction of the word "modify" in the body of s. 60 of the Act under consideration clearly indicate an intention on the part of Legislature to widen the scope of this section and the High Court was right in so construing the same.

No other point was urged in this appeal and for reasons stated above this appeal must be dismissed with costs.

Appeal dismissed.

FULL BENCH.

Before the Hon'ble Mr. H. K. Chinnai, Chief Justice, Mr. Justice Mudholkar and Mr. Justice Patel.

NIVRUTTI LAXMAN KONDOBAHIRE v. SHIVDAYAL.
LAXMINARAYAN SARDA.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 70(b), 29, 85, 85A, 4, 74(1)—Application filed by landlord before Mamlatdar for declaration that opponent not his tenant under Act—Whether Mamlatdar can entertain and decide such application—"For the purposes of this Act", meaning of expression in s. 70.

Under the Bombay Tenancy and Agricultural Lands Act, 1948, the Mamlatdar can entertain and decide an application filed by a landlord for a declaration that his opponent, who claims to be his tenant, is not a tenant under the Act.

The words "for the purposes of this Act" in s. 70 of the Bombay Tenancy and Agricultural Lands Act, 1948, mean for the purposes of deciding any question relating to a matter, which is regulated or governed by the provisions of the Act.

*Maganbhai Patel v. Bombay Revenue Tribunal*¹ and *Dhondt Tukaram v. Dadoo Patil*², referred to.

ONE Shivdayal and another (respondents) on August 25, 1953, made an application to the Mamlatdar of Mangalwedha in Sholapur district for a declaration that Nivrutti (petitioner) was not their tenant in regard to four survey numbers of Mangalwedha and for removal of his name as tenant for the year 1952-53 from the revenue records. The petitioner resisted the application contending that he was a tenant of the respondents since thirty or forty years. The Mam-

² [1903] 1 K. B. 890.

*Decided, January 20, 1959. Special Civil Application No. 2359 of 1958 (with Special Applications Nos. 2659 and 2542 of 1958).

¹ (1957) Special Civil Application No. 278 of 1957, decided by Dixit and Shelat JJ., on July 18, 1957 (Unrep.).

² (1952) 55 Bom. L.R. 663.

latdar held that the petitioner was a protected tenant and dismissed the application. On appeal by the respondents the District Deputy Collector of Pandharpur set aside the order of the Mamlatdar, granted a declaration to the respondents that the petitioner was not a tenant of the lands and directed that his name appearing as a tenant in the record of rights of the year 1952-53 be deleted. The petitioner applied in revision to the Bombay Revenue Tribunal, and the Tribunal confirmed the order of the District Deputy Collector. The petitioner applied to the High Court under art. 227 of the Constitution of India against the order of the Tribunal. The application came up before Mudholkar and Datar JJ. who referred the following question to a larger bench:—

“Whether under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, the Mamlatdar can entertain and decide an application filed by a landlord for a declaration that his opponent, who claims to be his tenant, is not a tenant, under the said Act?”

In the course of his referring judgment, delivered on December 8, 1958, Datar J. observed as follows:—

DATAR J. The second point urged is whether under the provisions of the Bombay Tenancy and Agricultural Lands Act a landlord can apply for what Mr. Sukthankar calls a negative declaration that his opponent, who claims to be a tenant, is not a tenant. On this point there appears to be some conflict of decisions in this Court. In Special Civil Application No. 278 of 1957 a Bench of this Court consisting of Mr. Justice Dixit and Mr. Justice Shelat held that an application by a tenant for a negative declaration that opponent No. 2 was not his sub-tenant was misconceived. We are told that a similar view was taken by the same Bench in Special Civil Application No. 1322 of 1957, which was decided on August 2, 1957. A different view was, however, expressed by another Bench of this Court consisting of Mr. Justice Chainani (as he then was) and Mr. Justice Tarkunde in Special Civil Application Nos. 59 of 1958 and 539 of 1958. It was held in those applications that the Mamlatdar was competent to entertain and decide an application for a declaration that a person was or was not a tenant.

The question referred to was considered by a bench composed of Chainani C. J. and Mudholkar and Patel JJ.

K. S. Sukthankar, for the petitioner in Sp. C. A. No. 2339.

Y. V. Chandrachud, with *V. D. Malpani*, for opponents Nos. 1 and 2.

A. D. Desai, for *M. C. Shah*, for the petitioner in No. 2639.

Rajni Patel, with *I. C. Bhat*, for the petitioner in No. 2342.

CHAINANI C. J. The question referred to the Full Bench is whether, under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, the Mamlatdar can entertain and decide an application filed by a landlord for a declaration that his opponent, who claims to be his tenant, is not a tenant under the said Act.

There is no specific provision in the Act providing for such an application being made to the Mamlatdar. Section 70, however, provides:

“For the purposes of this Act the following shall be the duties and functions to be performed by the Mamlatdar...

(b) to decide whether a person is tenant or a protected tenant or a permanent tenant.”

It is, therefore, the duty and function of the Mamlatdar to decide whether a person is a tenant. The power to decide whether a person is a tenant, necessarily includes the power to decide that a person is not a tenant. This power is, however, to be exercised by the Mamlatdar, as stated in this section, for the purposes of the Act. In view of these words in the section, in *Maganbhai*

*Patel v. Bombay Revenue Tribunal*¹, the learned Judges were inclined to take the view that the Mamlatdar "will have authority to decide the question whether a person is or is not a tenant", if that question arises in an application made under the Act, such as an application under s. 29 of the Act. If this had been the intention of the Legislature, it would have used some such words as, "in any proceeding under the Act or in any application made under the Act." The words used "For the purposes of this Act" are very much wider. The other difficulty in accepting this view is the exclusion of the jurisdiction of the Civil Court in matters which, under the Act, are to be decided by the Mamlatdar. Section 85 of the Act provides that no Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar. The question whether a person is or is not a tenant can, therefore, only be decided by a Mamlatdar, and the jurisdiction of the Civil Court to determine such a question is ousted by s. 85 of the Act. If, therefore, in a civil suit, the question arises whether a person is a tenant or not, the Civil Court will have no jurisdiction to decide it. Section 85A of the Act, as amended in 1956, enables the Civil Court to refer such a question to the Mamlatdar for determination. This amendment came into force with effect from August 1, 1956. Before that date, the Civil Court had no authority to refer any question for determination to the Mamlatdar. The only course open to it was to ask one or the other of the contending parties to make an application to the Mamlatdar and obtain his decision in the matter. It was so held by a Division Bench of this Court in *Dhondi Tukaram v. Dadoo Piraji*². It was held in that case that in a suit filed against the defendant for possession of agricultural lands on the footing that he is a trespasser, if he raises a plea that he is a tenant or a protected tenant, the proper procedure to adopt would be to direct the party who raises such a plea to obtain a decision from the Mamlatdar within a reasonable time. For this purpose, the party would have to apply to the Mamlatdar and the application would be for a declaration that the applicant is a tenant. That a reference to the Mamlatdar is necessary in such cases was also recognised in *Maganbhai's* case. In the last but one paragraph of the judgment in that case, it has been observed that if an issue arises in a civil suit as to whether a person is or is not a sub-tenant (or a tenant), that issue would be one for the Mamlatdar to decide upon a reference by the Civil Court. The Mamlatdar can, therefore, decide this question, even if it arises in a proceeding other than a proceeding under the Tenancy Act. If the Mamlatdar has jurisdiction to decide the question, after it arises in a Civil Court, he will also have jurisdiction to decide it before it arises in the Civil Court. A party may frequently find it more convenient to approach the Mamlatdar before he files a civil suit. The Act also contains no provision under which the exercise of jurisdiction by the Mamlatdar is made dependent upon the issue arising in a civil suit, or in some other proceeding under the Act.

It follows that an application for a declaration that a person is a tenant can lie before the Mamlatdar. This view finds support in the provisions of ss. 4 and 74 of the Act. Section 4 provides that a person lawfully cultivating any land belonging to another person shall be deemed to be a tenant, except in the cases specified in the section. This section does not, however, contain any provision for an application to the Mamlatdar, for declaring a person to be a tenant. Sub-section (1) of s. 74 provides that an appeal may be filed to the Collector against an order of the Mamlatdar made under s. 4. Section 74, therefore, contemplates an application being made to the Mamlatdar under s. 4 and the Mamlatdar's making an order upon it. The necessary inference, therefore, is that the Mamlatdar is competent to entertain an application for a declaration that a person is a tenant.

It has, however, been urged that while an application may be made to a

1 (1957) Special Civil Application No. 278 July 18, 1957 (Unrep.).
of 1957, decided by Dixit and Shelat JJ., on 2 (1952) 55 Bom. L.R. 363.

Mamlatdar for obtaining a declaration that a person is a tenant, an application for a negative declaration that a person is not a tenant, is not competent. It has been contended that the object of the Act is to protect tenants and that it confers special rights upon them and that, consequently, where the owner of a land alleges that a person is not a tenant or that he is not entitled to the protection of the Act, the application cannot be said to be one for the purposes of the Act. There does not seem to us to be much force in this argument. The purposes of the Act are, as will be seen from the preamble, to regulate the relations of landlords and tenants of agricultural lands. While the Act confers extensive rights on tenants, the landlords are not deprived of all their rights. For instance, they can terminate the tenancies and resume possession of their lands in certain circumstances. Under s. 29, both the landlords and the tenants can apply to the Mamlatdar for obtaining possession of lands. Under cl. (b) of s. 70 of the Act, the Mamlatdar has jurisdiction to determine whether a person is a tenant. He can, therefore, also decide that a person is not a tenant. If he can decide this question on an application made to him by a tenant, it is difficult to understand why he should not be able to decide this question, when the application is made by the landlord. In either case, the question which the Mamlatdar will have to determine is whether the relationship of landlord and tenant exists between the parties. The jurisdiction to decide this question vests exclusively in the Mamlatdar and the Civil Court is not competent to decide it. This question will also have to be determined by reference to and in the light of the provisions of the Act as to who are and who are deemed to be tenants and as to how and in what circumstances a tenancy can be terminated. Such a determination will, therefore, be for the purposes of the Act. The words "for the purposes of this Act", in our opinion, mean for the purposes of deciding any question relating to a matter, which is regulated or governed by the provisions of this Act. If, therefore, the question raised before the Mamlatdar relates to a matter, which is to be decided by reference to the provisions of the Act, its determination by the Mamlatdar will be for the purposes of the Act and it is immaterial whether the application raising the question is made by the landlord or by the tenant.

We are accordingly of the opinion that a Mamlatdar can entertain and decide an application for a declaration that a person is or is not a tenant.

The reply to the question referred to the Full Bench will, therefore, be in the affirmative.

Answer accordingly.

APPELLATE CIVIL.

Before Mr. Justice Mudholkar and Mr. Justice Patel.

BHIKHU SAKHARAM KHARATE v. B. K. POTDAR.*

Bombay Village Panchayats Act (Bom. VI of 1933), Secs. 4(1), 7-B(1)(2), 7-C(2)(3)—Person elected from ward in list of voters pertaining to which his name does not appear as voter—Validity of such election.

Under the Bombay Village Panchayats Act, 1933, a person whose name appears in the list of voters of a particular ward can stand for election from that ward only and not from any other ward in which his name does not appear in the list of voters.

Ardeshtir Sorabji v. V. M. Bhatti, doubted and distinguished.

ONE Bhiku (petitioner) filed his nomination on November 13, 1957, for a general seat in Ward No. IV of the village Panchayat of Neral-Mamdapur. This nomination was scrutinized on November 15, 1957, the polling took place on December 26, 1957, and the result of the election was declared on Decem-

*Decided, January 21, 1959. Special Civil 1 (1958) 60 Bom. L.R. 803.
Applications Nos. 2504, 2384 and 2799 of 1958.

ber 28, 1957. The petitioner was declared elected to the general seat in Ward No. IV. One Ramanlal (respondent No. 2), who was a voter in Ward No. IV, applied to the Collector at Alibag for declaring the election of the petitioner null and void on the ground that the petitioner was not a voter of Ward No. IV but of Ward No. II. This application was forwarded to the District Deputy Collector at Panvel (respondent No. 1) for disposal. Respondent No. 1 allowed the application and declared the election of the petitioner null and void, observing in his order as follows:—

"The only controversial point in this case is whether the word 'list of voters' occurring in sub-s. 7C (2) denotes a particular ward or the whole village. The High Court has discussed this point at length in its above quoted decision [Civil Application No. 156 of 1958] and has observed that the word denotes the whole village and not a particular ward. The High Court has based this view on the strength of provision made in para. 2 of rr. 9 and 34 of the Bombay Village Panchayat Election Rules, 1948. Paragraph 2 of r. 9 runs as under:—

'When an election was held at or about the same time for two or more wards in the village one and the same person may stand for election in all or any number of such wards.'

Since there was a provision in the Village Panchayat Election Rules for seeking election to any number of wards simultaneously, the correct interpretation of words 'such list' would be the list of voters for the whole village and not for a particular ward.

This view of the High Court as mentioned is not applicable in this present case. The case before the High Court was in respect of one Village Panchayat Election held prior to the amendment of these Rules made under the Village Panchayats Act. The Government in their Notification No. VPA-1157-P of 25-9-1957 have deleted the provisions of r. 9, Para. 2 and r. 34. It is, therefore, clear that a person can stand for election from the ward in which he is a voter. The word 'such list' occurring in s. 7C(2) pertains to the ward and not to the list of the whole village. Thus it will be seen that the provisions that any voter could seek election from any ward has been discontinued."

The petitioner applied to the High Court under art. 227 of the Constitution of India for *inter alia* quashing the order passed by respondent No. 1.

The petition was heard along with two other petitions in which similar questions were involved.

Special C.A. No. 2304 of 1958.

V. K. Tembe, for the petitioner.

M. A. Rane, Assistant Government Pleader, for respondent No. 1.

A. T. Patil, with Mangaldas C. Shah and N. S. Mauskar, for respondent No. 2.

Special C.A. No. 2384 of 1958.

V. K. Tembe, for the petitioner.

M. A. Rane, Assistant Government Pleader, for respondent No. 1.

A. T. Patil, with Mangaldas C. Shah and N. S. Mauskar, for respondents Nos. 2 and 3.

Special C.A. No. 2799 of 1958.

A. T. Patil, with Mangaldas C. Shah and N. S. Mauskar, for the petitioner.

M. A. Rane, Assistant Government Pleader, for respondent No. 1.

PATEL J. These three petitions arise out of elections to the Village Panchayat of Neral in Kolaba District. Nominations were invited for elections to the Panchayat, and the last date for such nominations was November 13, 1957. Scrutiny was fixed for November 15, 1957, and polling was on December 26, 1957. The final results of elections were declared on December 28, 1957. An application was made by one of the unsuccessful candidates in Ward No. IV for setting aside the election of the petitioner elected from that ward, but whose name appeared in the list of voters for a different ward. The Prant

Officer, who had to deal with Election Petitions under the provisions of the Village Panchayats Act of 1933, held that the petitioner, being a voter in a different ward, could not be a candidate of the ward from which he was elected. He, therefore, declared the election of the petitioner null and void. It is from this decision that the present application has been brought to this Court under art. 227.

The main contention of the counsel appearing for the petitioner is that under the provisions of the Village Panchayats Act there is no limitation on the right of a voter to offer himself as a candidate for election from other ward. It is contended that even if his name appears as a voter in a particular ward, he could be a candidate for any other ward.

Examining the question without reference to authorities, the question does not seem to be a complicated one. Section 4(1) provides:

"The State Government may...declare any local area comprising a revenue village or a group of revenue villages...to be a village."

The next relevant section is s. 7-B(1), which provides that:

"The electoral roll of the Bombay Legislative Assembly prepared under the provisions of the Representation of the People Act, 1950, and for the time being in force...for such part of the constituency of the Assembly as is included in a ward or a village shall be the list of voters for such ward or village",

and under sub-s. (2),

"The officers designated by the Collector in this behalf shall maintain a list of voters for each such ward or village."

This provision shows that normally a ward is a unit, and in some cases, where a group of villages is declared to be a village under s. 4, it may be that a village may be a unit; and this position seems to be made further clear by a reference to the provisions of s. 7-C of the Act. It provides:

"(1) Every person whose name is in the list of voters shall, unless disqualified under this Act or any other law for the time being in force, be qualified to vote at the election of a member for the ward to which such list pertains."

This sub-section, therefore, makes a provision that a person, whose name is in the list, must vote for that particular ward, and not for any other ward. Sub-section (2) (so far as is relevant) provides

that every person whose name is in the list of voters shall, unless disqualified under this Act or under any other law for the time being in force, be qualified to be elected for any ward to which such list pertains.

There can be no doubt that under ordinary rules of grammar, the phrase 'to which such list pertains' must qualify the words 'for any ward', and if this is so, there can again not be the least doubt that when a person offers himself as a candidate, he must offer himself to be the candidate for the ward, in which his name appears in the list for that ward. Grammatically, therefore, there cannot be any doubt about the meaning of the section.

The contention, however, is that in sub-s. (2) of s. 7-C we have the words 'for any ward', and emphasis has been laid on the word 'any', and it is sought to be shown by reference to the words in s. 7-C (1), where the words are 'for the ward', that the intention was to enable a candidate to offer his candidature for a ward different from the one with regard to which, in the list, his name appears. Though the word used is 'any', it cannot however make any difference in the meaning. The immediately qualifying words are 'to which such list pertains', and if effect is to be given to the contention now advanced, we must disregard the words 'to which such list pertains'. It is not permissible to disregard the words of a statute, and the word 'any' is not such a word that we must disregard the word of the statute and give it a meaning which it does not necessarily possess. It appears to us that though the words are 'any ward', it must still be confined to the ward to which that particular list pertains.

There is nothing in the scheme of the Act also to justify this contention.

Section 4 of the Village Panchayats Act enables the State Government after inquiry to declare any local area comprising a group of revenue villages to be a village as also a revenue village a village for the purposes of the Act. If a group of villages is declared a village, then in that case it is no wonder that the unit will be each of such villages of the group, and when in s. 7-B(1) and (2) 'village' is referred to, it is in reference to such a village.

We have been referred to a decision decided by a Division Bench of this Court in the case of *Ardeskir Sorabji v. U. M. Bhatt*.¹ It appears that the same contention that was advanced here was made in that case. Their Lordships said at page 805:

"...On the basis that there is one list of voters for the whole of the village of Ud-wada, there is no difficulty in accepting the construction contended for by Mr. Banaji." With respect, it seems to be very doubtful to us if it is open to construe a legislative provision by reference to the understanding of the officers on whom falls the duty to carry out the provisions of the Act. It may be, that contrary to the provisions of the Act, instead of maintaining separate lists, one list is maintained; but that would not enable a Court to negative the words of the section, which in terms say that a candidate would be qualified to be elected for any ward to which such list pertains. If the list is not maintained as per the requirement of law, the whole election may become invalid. It also appears that construction was further supported by reference to r. 9 framed under s. 7 of the Act, which provided:

"When an election is held at or about the same time for two or more wards in the village, one and the same person may stand for election in all or any number of such wards."

It is again, with respect, doubtful if it is possible to cut down or modify the meaning of a section by reference to a rule prepared by another authority under the rule making powers. If the rule is not within the terms of the section, the rule itself will be *ultra vires*. It appears that their Lordships referred to s. 7-C, cl. (3), and said that since it refers only to the *list* of voters and not to the *lists* of voters, the construction of the section vouched for was justified. It must, however, be remembered that s. 7-C(1) starts with a list for a ward. Sub-section (2) refers to a list of a particular ward, and it appears to us that when the list of voters is referred to, it must mean 'list of voters for a ward'. It has no reference whatever to the list of voters in the whole village. It is somewhat surprising that though in s. 7-B there is a reference to the ward or village, in s. 7-C(3) there is no reference to the village at all, and if it is not there, we are not entitled again to put in a word and read the section in a different manner from its natural meaning. In any case, since one of the factors which contributed to the construction now contended for was r. 9 framed under s. 7 of the Act, and that rule has now been repealed, it appears to us that the case is clearly distinguishable from the present case.

If this is so, we must hold that the decision given by the Prant Officer is correct. The petition must fail and must, therefore, be dismissed with costs.

The same points are involved in the petition No. 2384 of 1958, and it is admitted that if the interpretation contended for cannot be accepted, then this petition must also fail. In addition, this petition refers to the by-election wherein it is said that the last date for the nomination was on July 27, 1958, and that the petitioner had not sufficient opportunity of offering his candidature for the purposes of the election, as the notice, according to him, was very short. It, however, appears that no ground is made in the petition itself, and that ground cannot now be entertained. This petition, therefore, also must fail and is dismissed with costs.

The third petition is also not pressed and is dismissed. The petitioner will pay the costs of the Government.

Petitions dismissed.

Before Mr. Justice Mudholkar and Mr. Justice Patel.

RAMSING RATANSING PARDESHI v. THE MUNICIPAL CORPORATION OF THE CITY OF POONA.*

Bombay Provincial Municipal Corporations Act (Bom. LIX of 1949), Secs. 10(1)(f), 10(2)(b)(v)—Close relationship, without more, with person having contract with, or employed by, municipality whether sufficient to disqualify candidate under s. 10(1)(f)—Applicability of s. 10(2)(b)(v) to case where disqualification from being elected as member comes up for determination.

Mere close relationship with a person having a contract with, or being in the employment of, a municipal corporation is not sufficient to disqualify a candidate under the provisions of s. 10(1)(f) of the Bombay Provincial Municipal Corporations Act, 1949.

M. M. Nandgaonkar v. Collector, Thana; Champaklal Chhotatal Parikh v. Mahendra Govindlal Chokshi; Dattatraya v. S. V. Bhave and England v. Inglis, referred to.

Section 10(2)(b)(v) of the Bombay Provincial Municipal Corporations Act, 1949, is applicable only to those cases where the question comes up for determining the qualification of a sitting member. Therefore, when s. 10(1)(f) of the Act has to be considered for the purpose of a disqualification from being elected as a member, s. 10(2)(b)(v) is not applicable to the case.

THE present applications arose out of elections to the Municipal Corporation, Poona, held in November 1957. Application No. 1816 of 1958 related to Ward No. 11 in which respondents Nos. 3 to 6 were declared elected. One Ramsing (petitioner), a voter in the said Ward, made an application under the Bombay Provincial Municipal Corporations Act, 1949, before the Judge of the Small Causes Court, Poona, challenging the election of respondent No. 3 on the ground that he was disqualified from being elected to the Corporation as his brother Chunilal Himatlal Agarwal was an employee of the Corporation. It was alleged that the two brothers, respondent No. 3 and Chunilal Himatlal Agarwal, were staying together in the same house and messing together; and, therefore, he had directly an interest in the employment of his brother. The Small Cause Court Judge held that Chunilal Himatlal was an employee of the Corporation, but held that he was separate from respondent No. 3 in interest and, therefore, he could not be said to be interested in the employment of his brother. He, therefore, dismissed the application.

The petitioner applied to the High Court under art. 227 of the Constitution of India for setting aside the order passed by the Small Cause Court Judge. This application was heard along with the two other applications.

H. R. Gokhale, for the petitioner.

A. S. B. Chari and *Rajni Patel*, with *G. S. Shah*, for respondents No. 3.

Mrs. S. B. Tarkunde, for respondents Nos. 1 and 2.

D. G. Karmarkar, for respondent No. 5.

C. N. Bhalerao, for respondent No. 7.

PATEL J. [His Lordship after stating the facts, proceeded.] It has been argued by Mr. Gokhale appearing for the petitioners in all these cases that s. 10(f) of the Bombay Provincial Municipal Corporations Act, 1949, is widely worded and that, when it says

"...a person shall be disqualified for being elected and for being a councillor if such person—

...has directly or indirectly, by himself or his partner any share or interest in any contract or employment with, by or on behalf of the Corporation;"

*Decided, February 2, 1959. Special Civil Application No. 1816 of 1958 (with Special Civil Applications Nos. 1817 and 1818 of 1958).

1 (1954) 57 Bom. L.R. 212.

2 (1955) Special Civil Application No. 1807

of 1955, decided by Chagla C. J. and Dixit J., on December 7, 1955 (Unrep.).

3 (1957) 60 Bom. L.R. 210.

4 [1920] 2 K.B. 636.

it means that his close relationship with an employee amounts to interest—may be indirect—in the employment of the Corporation and that construction is strengthened when one has regard to the words “directly or indirectly”; he says further that this provision is made for the purpose of maintaining purity of Municipal administration and that could only be done if a person is disqualified on the ground of very close and near relationship. Now this question has come before this Court in the past. In the case of *M. M. Nandgaonkar v. Collector, Thana*¹ a question arose in reference to s. 12(2)(b) of the Bombay Municipal Boroughs Act which is somewhat similar to the present section. It was there held that the interest contemplated by s. 12(2)(b) of the Bombay Municipal Boroughs Act, 1925, need not necessarily be a pecuniary interest; but the interest must be a material interest. It is not sufficient if the interest is purely sentimental or an interest arising out of a person having friendship with some one or being interested in his welfare. The position with reference to the near relationship was made further clear by Chagla C.J. and Mr. Justice Dixit in *Champaklal Chhotatal Parikh v. Mahendra Govindlal Chokshi*.² In dealing with s. 15(1)(f) of the District Municipal Act, 1901, which also is worded in similar language, it was observed that the interest contemplated by this sub-section need not necessarily be a pecuniary interest; on the other hand it must not be a sentimental interest, but it must be a substantial or material interest and the question was whether in the employment of his father as a lawyer of the municipality respondent No. 1 could be said to have an interest. Since the father and the son were living together, on an application of the test as accepted in the case of *M. M. Nandgaonkar v. Collector, Thana*, it was held that the son would have a material interest in the employment of his father. To the same effect are the observations in the case of *Dattatraya v. S. V. Bhavs*³, which was a case of husband and wife living together and the wife was an employee of the Municipal Corporation as a teacher under the School Board. It was found as a fact that the husband and wife were living together and thereafter applying the test it was held that the husband had material interest in the employment of the wife.

Mr. Gokhale, however, relies on certain observations at page 215 of this case wherein it is said:

“...But what is important is purity in municipal administration. If a person wants to be a municipal councillor, there is nothing to prevent him from seeking election to the Corporation, when he cannot possibly be accused of having any interest in the employment of a near relation of his. But one must realise that cases of conflict between interest and duty have got to be avoided. Otherwise, purity in municipal administration would be impossible to achieve. In our view, s. 10(1)(f) is a salutary provision and there is a possible scope and opportunity for a municipal councillor to show favour, especially when the relationship is that of husband and wife, and we are clear that on the facts of this case s. 10(1)(f) is attracted.”

He argued that this is sufficient to found his proposition that close relationship without more is sufficient in itself to disqualify a member or a candidate. It is not possible to accept this contention. It was made clear in the beginning of that paragraph that the Court was following the principle laid down in *Nandgaonkar's* case and in *Champaklal Chhotatal Parikh v. Mahendra Govindlal Chokshi* and on the facts of that case it was held that s. 10(1)(f) was attracted. The observations in a case must be taken in the context in which they appear. They have been limited to the facts of that case after accepting the principle laid down in the cases referred to. I may also refer to the case of *England v. Inglis*.⁴ It was observed by Salter J. (p. 639):—

“...An ‘interest’ within the meaning of the section must, I agree, be something more than a sentimental interest, such as arises from the natural love and affection of a man

1 (1954) 57 Bom. L.R. 212.

2 (1955) Special Civil Application No. 1807 of 1955, decided by Chagla C.J. and Dixit J.,

on December 7, 1955(Unrep.).

3 (1957) 60 Bom. L.R. 210.

4 [1920] 2 K. B. 636.

for his son; it must be a pecuniary or, at least, a material interest; but I do not see on what principle it must necessarily be a pecuniary advantage."

The other Judge accepted the same definition as being warranted by authorities and on the facts of the case it was held that the member came within the disqualification. It is clear, therefore, that mere close relationship with a person having a contract with, or being in the employment of, a municipal corporation is not sufficient to disqualify a candidate under the provisions of s. 10(1)(f) of the Municipal Corporations Act.

A further contention is made by the learned counsel for the petitioner on another aspect of the section. He says that s. 10(1)(f) must be read in the light of sub-s. (2) which qualifies sub-s. (1)(f) and he refers us to cl. (v) of sub-s. (2). He says that it is permissible to take into account contracts before the date of the candidature during the official year in which the election was held in order to consider the qualification or disqualification of a candidate for the purpose of election, since if sub-s. (2) applies the word "has" is capable of that construction. His argument is that though the words are "has any share or interest in any contract or employment", if one refers to cl. (v) of sub-s. (2) which speaks of "occasional sale of any article, in which he regularly trades not amounting to a value exceeding in any one official year Rs. 2000" would show that the words "has any interest in any contract or employment" must mean any interest in any contract or employment at least during the official year when he offers himself as a candidate. At first sight the argument does appear to be attractive. It is not possible, however, to accept it, as there are obvious difficulties in so construing the section. Section 10, sub-s. (1) which provides for disqualification, is intended to apply to two kinds of cases; (i) for being elected as a member and (ii) after election for being a councillor. In the first case the only period that can come in question is the period between the date of nomination and the date of the declaration of the results, while in the other case it would be immediately on his taking charge or declared a member, to the date when fresh elections take place and that would be a long period of at least 4 years. A person has an interest, if during the period to which the provision applies, he is interested in a contract. In the first case mentioned that would be the period between the nomination and the declaration of the results, while in the other case it will be the full period from the date of his being elected as a councillor to the date when he vacates his office in the ordinary course. From its very nature the provisions of cl. (v) of sub-s. (2) of s. 10 cannot apply to the first kind of cases and were never apparently intended to apply. There cannot be any official year nor any one official year in reference to such a case. It would further appear that, so far, no provision of this kind has been heard to have been applied in the manner suggested, and it would result in somewhat unusual construction of the section to hold that the period should be the official year. If once that interpretation is accepted there is no reason why that particular official year and not a period of five years should be taken. We think that cl. (v) of sub-s. (2) could only apply to the second kind of cases and was never intended to apply to the first kind of cases and it appears that when s. 10(1)(f) has to be considered for the purpose of a disqualification from being elected as a member it must stand by itself, sub-s. (2)(v) not being applicable.

The learned counsel appearing for the respondents has argued that s. 10(1)(f) is made subject to sub-s. (2) and, therefore, in every case the provisions of sub-s. (2) must be held to apply as an exception to the disqualification stated in cl. (f) of s. 10(1), as he stands to have the advantage of the value of the contracts being less than Rs. 2,000. I have already indicated that this sub-clause cannot from its very nature apply and can have no application. It is contrary to fundamental principles of election law to carry a so-called disqualification to previous years and then hold a candidate disqualified if his case does not come within the exception. However small the value of the contract may be, the candidate would be disqualified if he has an interest in the

same at the material time. As said before this provision is applicable only to those cases where the question comes up for determining qualification of a sitting member.

Therefore, if at the date when a person is offering himself for election and thereafter until election if he has got any interest directly or indirectly by himself or his partner in any contract or employment, whatever the value he must be disqualified, and there is no question of considering the value of the contracts since there are no years and no official year during that period. We must examine, therefore, all these cases from this point of view.

[The rest of the judgment is not material to this report.]

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Mudholkar and Mr. Justice Patel.

B.E.S.T. WORKERS' UNION v. STATE OF BOMBAY.*

Bombay Industrial Relations Act (Bom. XI of 1947), Secs. 13, 14, 16(3), 31—Two or more unions applying for registration as Representative Union in respect of same industry in a local area—Whether Registrar entitled to register one of these unions without deciding which of applying unions has larger membership of employees—Point of time referred to in s. 13(1) whether relevant for determining comparative strength between rival unions applying for registration.

Where more than one application for registration as a Representative Union is pending before the Registrar, he must refrain from registering any union until and unless he has discharged his duties under the third proviso to s. 14 of the Bombay Industrial Relations Act, 1946, i.e. unless he has decided which of the applying unions has the larger membership of employees employed in the industry concerned.

The point of time referred to in s. 13(1) of the Bombay Industrial Relations Act, 1946, is not relevant for determining the comparative strength between rival unions where applications are made for registration by the rival unions. In such cases the relevant time would be the time when an occasion arises for exercising the powers and performing the duties contained and laid down in the third proviso to s. 14 of the Act. Therefore, the point of time with reference to which the membership of rival unions applying for registration is to be considered is not the date of the application or the month of the application made by them but is the occasion when the claims of the other unions fall to be considered.

The facts appear in the judgment.

H. B. Gokhale, with *M. C. Bhandare*, for the appellant.

B. J. Joshi, for respondents Nos. 1 and 2.

D. H. Buch, with *C. L. Dudhia*, for respondent No. 3.

MUDHOLKAR J. This is an appeal under the Letters Patent against the judgment of Mr. Justice Shelat dismissing summarily the appellant's petition under art. 226 of the Constitution.

The facts which have led up to this appeal are briefly as follows. The petitioner is a registered union of workers of the B.E.S.T. Undertaking, and was registered as a representative union by the Registrar of Unions under s. 13(1) of the Bombay Industrial Relations Act, 1946. This union was for the local area of the city of Bombay. That area was altered by a notification of the Government dated April 16, 1958. Now, by reason of the alteration of the local area, it became necessary for the appellant union to make a fresh application for registration as a representative union, under s. 13(1) of the Act. It made such an application on October 30, 1958.

*Decided, February 5, 1959. O.O.J. Letters Application No. 24 of 1959.
Patent Appeal No. 2 of 1959: Miscellaneous

Prior to this application, respondent No. 3, which is also a trade union of employees employed in the same industry as the members of the appellant union, had also made an application to the Registrar under s. 13(1) of the Act for being registered as a representative union of the workers engaged in that industry. This application was made on August 30, 1958. The Registrar commenced to inquire into this application. After the appellant union filed its application, its representatives approached the Registrar for inquiring into both the applications, that is, the appellant's application and that of respondent No. 3, side by side with one another. Some discussions took place between the representatives of the appellant union and the Registrar, and some correspondence also passed between them. Eventually, the appellant realised that the Registrar was disinclined to deal with its application till the application of respondent No. 3 was disposed of, and it, therefore, made a petition to this Court under art. 226 of the Constitution for issue of an appropriate writ to the Registrar directing him to hear both the applications together, and also forbidding him from registering respondent No. 3 under s. 14 of the Act before dealing with the appellant's application.

Along with the writ petition, the appellant also made an application for issue of an interim injunction restraining the Registrar from proceeding further with the inquiry into the application made by respondent No. 3. Mr. Justice Shelat, before whom the matter came, did not issue a rule in the writ petition, but merely granted an ad-interim injunction to the appellant and issued a rule returnable within two days to the Registrar to show cause why the injunction should not be granted. At the hearing of this matter, not only the Registrar, who is respondent No. 2 before us, but also respondent No. 3 appeared and opposed the grant of an interim injunction. After hearing them, Mr. Justice Shelat not only dissolved the ad-interim injunction granted by him, but dismissed the petition of the appellant under art. 226 of the Constitution.

It was contended before us that the ground on which Mr. Justice Shelat dismissed the appellant's petition was that the appellant was guilty of laches, and there was undue delay in making the petition under art. 226. It was also urged that where there is a delay in making a petition, the Court has discretion in the matter of condoning the delay, and where the Court has exercised the discretion in a particular way, it would not be open to the appellate Court to interfere with the exercise of its discretion.

What we have got to ascertain at the outset is, whether there was at all any delay on the part of the appellant in making its petition to this Court. It was pointed out to us that the Registrar informed the appellant's representatives as early as on November 29, 1958, that he proposed to proceed with the hearing and disposal of the application of respondent No. 3, and that he would take into consideration the appellant's application only after he had disposed of the application made by respondent No. 3. On the basis of this fact, it is contended that the appellant should have presented its petition under art. 226 within a reasonable time from that date. But instead of doing so, it waited till January 19, 1959, for presenting the petition. It is also pointed out to us that in the meanwhile the Registrar had made considerable progress in the inquiry into the application made by respondent No. 3, and that if it is ordered that both the applications, that is, that of respondent No. 3 and of the appellant, should be heard together, a good deal of work which has been done by the Registrar would be thrown away. To this the answer of the appellant is that it does not want to question anything that the Registrar has done so far in the matter of the application of respondent No. 3. What it wants is that an inquiry of the kind, which the Registrar is making with respect to the qualification of respondent No. 3 for being registered as a representative union, should also be made with respect to it, and that this inquiry should not be postponed till final orders are passed upon the application of respondent No. 3. In this connection, Mr. Gokhale, who appears for the appellant, has referred us to the scheme of the Act, and in particular to ss. 13 and 14

thereof. Section 13(1) reads thus:

"Any union which has for the whole of the period of three calendar months immediately preceding the calendar month in which it so applies under this section a membership of not less than fifteen per cent. of the total number of employees employed in any industry in any local area may apply in the prescribed form to the Registrar for registration as a Representative Union for such industry in such local area."

Then follow sub-ss. (2) and (3), with which we are not concerned. The provisions of s. 14 run as follows:—

"On receipt of an application from a union for registration under section 13 and on payment of the fee prescribed, the Registrar shall, if after holding such inquiry as he deems fit he comes to the conclusion that the conditions requisite for registration specified in the said section are satisfied and that the union is not otherwise disqualified for registration, enter the name of the union in the appropriate register maintained under section 12 and issue a certificate of registration in such form as may be prescribed:

Provided—

Firstly, that in any local area there shall not at any time be more than one registered union in respect of the same industry...

Thirdly, that where two or more unions fulfilling the conditions necessary for registration apply for registration in respect of the same industry in any local area, subject to the provisions of the second proviso, the union having the largest membership of employees employed in the industry shall be registered:

Fourthly, that the Registrar shall not register any union if he is satisfied that the application for its registration is not made *bona fide* in the interest of the employees but is made in the interest of the employers to the prejudice of the interest of the employees:

Fifthly, that the Registrar shall not register any union if at any time, within six months immediately preceding the date of the application for registration or thereafter the union has instigated, aided or assisted the commencement or continuation of a strike or stoppage which has been held or declared to be illegal..."

Now, Mr. Gokhale pointed out that what the Registrar has to do in the first instance is to make a preliminary inquiry for satisfying himself whether the union, which has made an application before him for being registered, has membership of not less than fifteen per cent. of the total number of employees employed in the particular industry during the period specified in sub-s. (1) of s. 13. It is only after he has made such inquiry and is satisfied that the applying union fulfils the conditions specified in this section that the Registrar need consider further the question of registering the union. Mr. Gokhale concedes that the appellant will have no *locus standi* thereafter in so far as such a preliminary inquiry is concerned. Similarly, according to him, respondent No. 3 will not be concerned with an inquiry into the qualifications of the appellant union for being registered as a representative union. Then Mr. Gokhale referred us to the provisions of the third proviso to s. 14, and said that where there are two applications before the Registrar from unions for being registered as representative unions, the question which the Registrar has to decide is, which of the two unions is entitled to get registered. Now, under the third proviso, it is the union having the largest membership of employees employed in the particular industry which is entitled to be registered. Therefore, according to him, when the stage of deciding this question is reached that all the unions which have applied for being registered would have an interest in the matter, which the Registrar has to decide, and that, therefore, from that stage onwards the applications of all the applying unions must be heard together. Since that stage has not arrived yet, Mr. Gokhale contends that the lapse of time between November 29, 1958, when the Registrar informed a representative of the appellant union about what he proposed to do, and January 19, 1959, on which day the appellants preferred their petition, cannot be construed as an undue delay in the matter of making the application. He emphasises the point that the appellant union had no interest in the inquiry which has gone on so far before the Registrar with respect to the matter referred to in s. 13(1) of the

Act, and that merely because the appellant union stood by and allowed that inquiry to go on without challenging its validity or propriety in this Court cannot be deemed to be laches on the part of the appellant union. In our opinion, Mr. Gokhale's contention is correct, and must be upheld. There is no doubt that the appellant union was not directly interested in the inquiry under s. 13(1), which was made by the Registrar in respect of the application of respondent No. 3. What the appellant union is interested in doing is to prevent respondent No. 3 union from being registered as a representative union, and so long as the appellant approached this Court before the Registrar could or did register it, there was no question of delay whatsoever on the part of the appellant. Now, here, as already stated, the Registrar is merely conducting the inquiry into the application of respondent No. 3. We are informed by the counsel appearing for the Registrar and for the union in this case that the inquiry is almost complete. That may be so, but the fact remains that the Registrar has not registered the union yet. Indeed, he was restrained from doing so by an order of Shelat J. in the first instance, and then by an order of a Division Bench of this Court after the appeal was preferred. In our opinion, therefore, there was no question whatsoever of delay in making the petition, out of which this appeal arises, and consequently, the question for exercise of discretion in condoning delay never arose. The learned single Judge has not stated any reasons for dismissing the writ petition; but if we assume that the main reason for dismissing it was as stated on behalf of the respondent, we must, with respect, hold that that view was not correct.

The next point which we have to consider is whether the Registrar would be entitled to follow the procedure indicated by him, or whether he must follow some other procedure. Now, it is plain from the affidavit of the Registrar and from the arguments which were advanced on his behalf by Mr. Joshi that what the Registrar proposes to do is to decide not only the preliminary point which is required to be decided, but also other points. If he holds in favour of respondent No. 3 on the preliminary point, and then proceeds to register the union, Mr. Gokhale contends that this would be illegal, because at the moment there are in point of fact two applications for registration pending before the Registrar, and that, therefore, as required by the third proviso to s. 14, he must consider which of the two applications he must grant; that is to say, which of the two rival unions is entitled to be registered as representative union. It seems to us that the language used by the Legislature in the third proviso to s. 14 is quite clear, and it does require the Registrar to decide which of the two applying unions has the larger membership of employees employed in the industry concerned. It will not be possible for him to perform this duty if, even though two applications are pending before him, he chooses to decide only one, and after holding that the union which has made the application fulfils the requirements of s. 13(1), registers that union. If he does that, then the application of any other union pending before him at that time would not survive by virtue of the provisions of the first proviso to s. 14. It would clearly follow from this that where more than one application for registration is pending before the Registrar, he must hold his hands and refrain from registering any union, until and unless he has discharged his duties under the third proviso to s. 14.

It was contended before us by Mr. Joshi that the Registrar need only consider those applications for registration which were made to him in the same calendar month, and that where one application was made in one month and the other in a subsequent calendar month, the Registrar was not bound to consider the latter, till he disposed of the former. He bases his argument on the opening words of sub-s. (1) of s. 13, and those words are:

"Any union which has for the whole of the period of three calendar months immediately preceding the calendar month in which it so applies under this section, etc."

He says that the 'three calendar months' must be the same with respect to each of the applying unions, and this can happen only where the applications are

made by those unions in the same calendar month. He further points out that where the Registrar has to decide as to which of the applying unions has the largest number of employees in its register, he must make the comparison with reference to the same point of time or period. Such a comparison will be possible only where the figures before him relate to the same period of three calendar months with respect to the different applying unions. Where one union has applied in one month, and another in a subsequent month, the period of three calendar months with respect to these two unions would not coincide, but would be different, and therefore, according to Mr. Joshi, it will not be possible for him to make the kind of comparison which is referred to in the third proviso to s. 14. Since such a comparison becomes impossible with respect to applications made in different calendar months, Mr. Joshi argued that the provisions of the third proviso to s. 14 would apply only when the applications pending before the Registrar for registration were made in the same calendar month.

In our opinion, there is no substance in this argument. The inquiry which is contemplated by sub-s. (1) of s. 13 is in the nature of a preliminary inquiry, and the object of making that inquiry is to find out whether the union, which has made the application to it for being registered as a representative union, has on its register a certain minimum number of employees working in the particular industry. No doubt, if a union, which has made the application to the Registrar, satisfies the requirements of sub-s. (1) of s. 13, it will, in the absence of any disqualification and in the absence of any application for being registered by another union, be entitled to be registered as a representative union straightaway. But it does not mean that the point of time referred to in sub-s. (1) of s. 13 is the one recognised by the Act as relevant for determining the comparative strength between rival unions, where applications are made for registration by rival unions. In such cases, the relevant time would be the time when an occasion arises for exercising the powers and performing the duties contained and laid down in the third proviso to s. 14. The point of time with reference to which the membership of rival unions applying for registration is to be considered cannot be the date of the application, or the month of the application made by them, but it must necessarily be the occasion when the claims of the other unions fall to be considered.

Mr. Joshi has referred us to sub-s. (3) of s. 16 and stated that the provisions of this sub-section would show that the point of time with reference to which the strength of rival unions should be ascertained for the purpose of registration is the date of the application for registration. Section 16 deals with registration of another union in place of existing registered union. Sub-section (3) thereof reads as follows:—

"If, on the expiry of the period of notice under sub-section (1), after holding such inquiry as he deems fit, the Registrar comes to the conclusion that the applicant union complies with the conditions necessary for registration specified in section 13, and that its membership was during the whole of the period of three calendar months immediately preceding the calendar month in which it made the application under this section larger than the membership of the registered union, he shall subject to the provisions of section 14 register the applicant union in place of the registered union."

In our opinion, this provision, instead of assisting Mr. Joshi, assists the appellant union. It is evident from this provision that where the Legislature thought it fit to require the membership to be determined as it stood on the date of the application for registration, it has done so in clear terms. It was indeed necessary to enact such a provision in sub-s. (3), because under this provision a union making an application for being registered in place of an existing union makes certain claims based on its strength. For considering such a claim, it is but appropriate that its strength as it obtained on the date on which it lodged that claim should be considered in preference to its strength on any other occasion.

On behalf of respondent No. 3, Mr. Buch relied upon the provisions of s. 31. That section reads thus:

"Notwithstanding anything contained in this Act, if there is any alteration in any local area or areas notified for the purposes of this Act,—

(a) a registered or representative union entitled under this Act to appear or act as a representative of employees in an industry immediately before the alteration in the local area or areas concerned, or

(b) where more than one registered or representative union are entitled to appear or act as representative of employees in an industry under this section, the union having the largest membership of employees employed in the industry, whether by agreement of the other registered or representative unions or as determined by the Registrar after such inquiry as he thinks fit,

shall be entitled to appear or act for the altered local area or areas, as the case may be, for a period of twelve months from the date on which such alteration is effected, or if an application under section 13 is made within such period by such union or any other union in the altered local area or areas, until the disposal of such application by the Registrar."

Now, Mr. Buch particularly relied upon the concluding words of the section 'until the disposal of such application by the Registrar', and said that this provision clearly contemplates determination of one application only under s. 31 at a time by the Registrar. For one thing, reading the section as a whole, the word 'application' must be deemed to include several applications, where more than one application is made, because the ordinary rule of construction is that unless there is something repugnant to the context, a singular would include the plural. Then, it is difficult to understand what relation this provision has to a matter which arises only under s. 13. Section 13, as we have seen, relates to applications for registration of unions. Section 31 deals with the question of the right of representation of a union, which was registered as a representative union for one local area in respect of the same industry in an altered local area. The Legislature has in this section, apart from preserving the right of a union to function as a representative union, also provided for two points of time upto either of which such a right could be exercised. The first point of time is twelve months from the day of the alteration of the local area. The other point of time is the date of disposal of an application made under s. 13 by the same or any other union for registration. This section does not even purport to deal with the procedure to be followed in dealing with an application made under s. 13, and indeed there was no question of dealing therein with the procedure in respect of such applications, because it is already dealt with in s. 13. We cannot, therefore, accept the argument of Mr. Buch.

Finally, it was said that upon the view which we take as to the point of time with reference to which the relative strength is to be determined, a practical difficulty will be created, and the Registrar would not be able to dispose of the applications for registration expeditiously. It may be that a certain amount of delay would be caused, because the Registrar may have to examine the claims of several unions. But that is not a ground or reason for refusing to construe the provisions of the Act according to the language used by the Legislature. It is not as if it will be impossible for the Registrar to perform his duties. Where a construction placed on a provision were to result in such an impossibility, then, of course, that construction would not be proper, and the Court would be precluded from putting such construction. Merely because the construction would create difficulties, that construction, if it is otherwise justifiable, cannot be rejected.

We accordingly hold that the Registrar is bound to consider the application of the appellant before he makes any final orders disposing of the application made by respondent No. 3, that is to say, before he decides to register respondent No. 3 union.

Before concluding, we would like to advert to one more objection raised by

the Registrar in his affidavit. It is this, that the appellant has other remedies open, and, therefore, it is not competent to it to make an application to this Court under art. 226 of the Constitution. These other remedies are: (a) appeal to the Industrial Court under s. 20, and (b) an application to the Registrar under s. 16. Now, no question of an appeal to the Industrial Court arises, because only a party to the proceeding before the Registrar can prefer such an appeal. The appellant is not a party to the proceeding before the Registrar initiated by respondent No. 3. In so far as the remedy provided by s. 16 is concerned, that remedy can only be availed of against a registered union. The appellant is not a registered union, and, therefore, this remedy was not in existence on the date on which the appellant preferred its petition to this Court under art. 226 of the Constitution.

We are, therefore, of the opinion that the appeal be allowed, and accordingly we allow it with costs. The appellant will also get Rs. 75 by way of costs of the petition before the learned single Judge. A writ shall issue to the Registrar, respondent No. 2, directing him to hear the application for registration made by the appellant and prohibiting him from registering respondent No. 3 union without following the provisions of the third proviso to s. 14. Liberty to the appellant's attorneys to withdraw the amount of security furnished.

Appeal allowed.

Solicitors for the appellant: *Nanavati Tijoriwalla & Co.*

Solicitors for the respondent: *Bhaishankar Kanga & Girdharlal: Little & Co.*

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Mody.

VYARA MUNICIPALITY v. FULCHAND GANPATLAL SHAH.*

Bombay District Municipal Act (Bom. III of 1901), Secs. 96A, 96(2)—Municipality refusing permission to alter, add to or reconstruct building—No resolution passed by municipality proposing to acquire land on which applicant desiring to alter, add to or reconstruct building—Applicant constructing building in contravention of refusal of permission by municipality—Whether applicant could be penalised under s. 96(5)—Condition requiring house-owner not to build on area proposed to be built upon whether a condition prescribed by s. 96(2).

Section 96A of the Bombay District Municipal Act, 1901, is not restricted in its application to cases where permission to erect a building is refused absolutely. The section also contemplates cases where there is refusal to sanction permission for construction on a part of the land on which the building is proposed to be constructed. Therefore, if the municipality refuses permission to alter, add to or reconstruct a building, the refusal must be accompanied by a resolution to acquire the land on which the building stands. Where, therefore, the municipality does not pass such a resolution and refuses permission which is applied for under s. 96(1) of the Act, the refusal is invalid and construction of a building in contravention of that refusal is not penalised by s. 96(5) of the Act.

A condition requiring a house-owner not to build on the area proposed to be built upon is not one of the conditions prescribed by s. 96(2) of the Bombay District Municipal Act, 1901.

*Manaklal Hirabhai v. Land Acquisition Officer, West Khandesh,*¹ referred to.

THE facts appear in the judgment.

*Decided, February 12, 1959. Criminal Appeal No. 1387 of 1958, against the order of acquittal passed by R.G. Idnani, Judicial Magistrate, First Class, Vyara, in Summary Case No. 861 of 1957. I (1959) 39.Bom.L.R. 142.

B. A. Pandya, for the appellant (original complainant).

G. S. Barot, for the accused.

V. T. Gambhirwala, Assistant Government Pleader, for the State.

SHAH J. This is an appeal by the Municipality of Vyara under s. 417(3) of the Code of Criminal Procedure against an order of acquittal passed by the Judicial Magistrate, First Class, Vyara, District Surat. On a complaint filed by the Vyara Municipality, the respondent Fulchand was tried before the Judicial Magistrate, First Class, Vyara, for an offence under s. 96(5) of the Bombay District Municipal Act. The learned Magistrate acquitted the accused and against the order of acquittal the Vyara Municipality has obtained special leave to appeal to this Court.

The facts which gave rise to the complaint are briefly these. The respondent is the owner of a building No. 1657 in the town of Vyara. He desired to repair the building and to construct a kitchen, a bath room and a lavatory at the rear thereof and accordingly he submitted an application to the Municipality of Vyara for permission to carry out the repairs and to put up the proposed construction. With the application the respondent submitted the plans required by the rules framed by the municipality. The municipality granted sanction to the respondent to carry out the repairs and to make the construction subject to three conditions: (i) that the respondent shall not put up any construction in the area shown in red colour in the plan, exh. 7, submitted by the respondent; (ii) that all the construction shall be made in the area to the west of the blue line shown in the plan; (iii) that the construction shall be carried out in accordance with the plan sanctioned by the municipality. The respondent ignored the first and the second conditions imposed by the municipality and put up a structure on the area "shown in red colour" in the plan. This breach having come to the notice of an Inspector of the municipality, a complaint was filed against the respondent for an offence under s. 96(5) of the Bombay District Municipal Act III of 1901 in the Court of the Judicial Magistrate, First Class, Vyara. The respondent contended *inter alia* that a sanction to prosecute as required by s. 161 of the Bombay District Municipal Act was not granted by a competent authority, that the complaint was barred because it was not filed within six months from the date on which the offence was alleged to be committed, and that the conditions imposed by the municipality refusing permission to build upon the area "shown in red colour" in the plan, exh. 7, were illegal and not binding upon him and accordingly in putting up a construction upon that area he did not contravene the provisions of the Bombay District Municipal Act. The learned trial Magistrate upheld the contentions raised by the respondent as to the validity of the sanction and the right of the municipality to impose the impugned conditions and acquitted the respondent.

The Vyara Municipality is governed by the Bombay District Municipal Act III of 1901. Section 96 of the Bombay District Municipal Act provides by the first sub-section in so far as it is material:

"Before beginning to erect any building...or add to any existing building...the person intending so to build...shall give to the Municipality notice thereof in writing, and shall furnish to them at the same time if required by a bye-law or by special order to do so,

(a) the sanad, if any, in force relating to the site of such proposed building... and

(b) a plan showing the levels, at which the foundation and lowest floor of such building are proposed to be laid, by reference to some level known to the Municipality, and all information they may require regarding the limits, design, ventilation and materials of the proposed building..."

By sub-s. (2) of s. 96 it is provided:

"Save as otherwise provided in this Act or the rules and bye-laws thereunder, the Municipality may either give permission to erect, alter, add to or reconstruct the building according to the plan and information furnished or may impose in writing such conditions as to level, drainage, sanitation, materials or to the dimensions, and cubical

contents of rooms, doors, windows and apertures for ventilation or to the number of storeys to be erected, or with reference to the location of the building in relation to any street existing or projected or the purpose for which the building is to be used, as they think proper, or may direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building and any such street have been decided to their satisfaction."

Sub-section (5) of s. 96 penalises any person who begins any construction, alteration, addition or reconstruction without giving the notice required by sub-s. (1) or without furnishing the documents or affording the information prescribed in that sub-section.

Admittedly in this case the respondent had submitted an application to the municipality for permission for making repairs and for making additions to his building. That application was accompanied by the requisite plans as required by the bye-laws. On this application by the respondent, the municipality gave him permission to build, but subject to the condition that the respondent was not to build within the area "shown in red colour" in the plan. The respondent challenges the authority of the municipality to refuse permission to build on any part of the area of the land belonging to him. Under sub-s. (2) of s. 96, subject to the provisions of the Act and the rules and bye-laws thereunder, the municipality has the power to give permission to erect, alter, add to or reconstruct the building according to the plan and information furnished or to impose certain conditions or to direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building have been decided to its satisfaction; and the conditions which can be imposed may be "as to level, drainage, sanitation, materials or to the dimensions and cubical contents of rooms, doors, windows, and aperture for ventilation or to the number of storeys to be erected, or with reference to the location of the building in relation to any street existing or projected or the purpose for which the building is to be used." Evidently a condition requiring a house-owner not to build on the area proposed to be built upon is not one of the conditions prescribed by s. 96(2). Provided the proposed construction does not contravene the rules and the bye-laws of the municipality and the provisions of the Act, it appears implicit in s. 96(2) of the Act that the municipality shall on an application which supplies the requisite information give permission to construct subject to condition in respect of matters specified therein or ask for further information with regard to the location of the building if such information has not been furnished; and a power to refuse permission to build either on the whole or on a part of land belonging to the applicant is not conferred upon the municipality by s. 96(2). That was so decided by this Court in *Manaklal Hirabhai v. Land Acquisition Officer, West Khandesh*.¹

The municipality is, however, invested with authority to refuse permission applied for under s. 96(1). It is provided by s. 96A(1) of the Bombay District Municipal Act:

"When a person has given notice to the municipality under sub-section (1) of section 96 in regard to his intention to build, alter, add to or reconstruct a building, it shall be lawful to the municipality to refuse the permission applied for if the municipality passes a resolution proposing to acquire the land on which any building is proposed to be erected or any building situated on which is proposed to be altered, added to or reconstructed."

Section 96A(1) contemplates those cases where consistently with the rules and the bye-laws framed by the municipality an application is submitted for permission to construct or add to or alter a building by a house-owner and the municipality intends to refuse the permission applied for. But the refusal by the municipality will, by the express words used in s. 96A(1) of the Act, be valid only if the municipality passes a resolution proposing to acquire the land on which the applicant desires to erect a building or to alter, add to or reconstruct any building situated on the land. If the municipality does not

pass a resolution proposing to acquire the land and refuses permission which is applied for under s. 96(1), the refusal is invalid. In the present case, there is no evidence on the record to show that the Municipality of Vyara had passed any such resolution proposing to acquire the land on which the building of the respondent stood. The refusal by the municipality is, therefore, invalid, and construction of a building in contravention of that refusal is not effectively penalised by sub-s. (5) of s. 96 of the Act.

Mr. Pandya, who appears on behalf of the municipality, contends that s. 96A of the Bombay District Municipal Act contemplates an absolute refusal by the municipality to permit erection of a building and does not contemplate cases where there is refusal to sanction permission for construction on a part of the land on which the building is proposed to be constructed. We are unable to accept that contention. If the municipality refuses permission to alter, add to or reconstruct a building, by the express words used in the statute, the refusal must be accompanied by a resolution to acquire the land on which the building stands. It is, therefore, evident that s. 96A of the Act is not restricted in its application to cases where permission to erect a building is refused absolutely. In our judgment, refusal to permit construction on a part of the land proposed to be built upon will be effective only if the municipality resolves to acquire the land which is required or ordered to be kept unbuilt upon.

Mr. Pandya says that he is instructed to state that in fact a resolution to acquire the land under s. 96A of the Bombay District Municipal Act was passed by the Municipality. But no such resolution has been produced in the Court below and we are unable to proceed upon the assumption that such a resolution must have been passed.

On the evidence, we have no doubt that the restricted sanction given by the municipality on the application submitted by the respondent did not prevent the respondent from making a construction upon that area of his land which is "shown in red colour" in the plan, exh. 7. On the view taken by us, it is unnecessary for us to consider the other contentions which were raised in the Court below and which appealed to the learned trial Magistrate.

We, therefore, confirm the order of acquittal passed by the learned Magistrate in favour of the respondent and dismiss this appeal.

Order of acquittal confirmed.

ORIGINAL CIVIL.

Before Mr. Justice Mudholkar and Mr. Justice Patel.

MANILAL (MANIBHAI) GOPALJI DESAI v. THE UNION OF INDIA.*

Indian Bar Councils Act (XXXVIII of 1926), Sec. 4(3)—Constitution of India, Art. 14—Whether s. 4(3) and resolution passed by Bombay High Court in pursuance of that section violate art. 14—Constitution whether guarantees right of franchise and right to be elected to political institution—Power of High Court to strike down law enacted by Parliament on ground that it violates fundamental right.

Section 4(3) of the Indian Bar Councils Act, 1926, and the resolution passed by the Bombay High Court on April 10, 1952, in pursuance of the provisions of that section cannot be challenged on the ground that art. 14 of the Constitution of India is violated by them.

Where the right conferred on a person is not guaranteed by the Constitution and does not flow from it and is neither a fundamental right, nor a common law right, nor a natural, inherent or unalienable right, but a franchise dependent upon the law and is thus merely a creature of a statute, it can be asserted only to the extent and subject to the conditions specified in the statute creating it. Therefore, where

*Decided, February 18, 1959. Miscellaneous Petition No. 498 of 1958.

the Legislature brings into existence a political institution and makes any provisions concerning its constitution or composition, the provisions of the law which bring that institution into existence cannot be challenged under art. 14 of the Constitution, on the ground that the various interests concerned are unequally represented thereon.

*Breedlove v. Suttles*¹ and *Snowden v. Hughes*,² relied upon.

Sheoshankar v. The State,³ *Charanjit Lal v. Union of India*,⁴ *Barbier v. Connolly*,⁵ *Minnesota Ex Rel. Pearson v. Probate Court*,⁶ *Madden v. Kentucky*,⁷ *Tigner v. Texas*,⁸ *Prince v. Commonwealth of Massachusetts*,⁹ *Hayes v. Missouri*,¹⁰ *Pembina Con. Silver Mining et., Co. v. Pennsylvania*,¹¹ *Lindsay v. Natural Carbonic Gas Co.*,¹² *Plessy v. Ferguson*,¹³ *The State of West Bengal v. Anwar Ali Sarkar*¹⁴ and *MacDougall v. Green*,¹⁵ referred to.

The power of the High Court to strike down the provisions of a law enacted by the Parliament, if it finds that the impugned provision as enacted violates a fundamental right claimed by a petitioner, is not in any way limited by the fact that the impugned law was enacted by Parliament and not by the State Legislature.

THE facts appear in the judgment.

The petitioner in person.

H. M. Seervai, Advocate General, with B. J. Joshi, for the respondents.

MUDHOLKAR J. The petitioner is an advocate of this High Court. Respondent No. 1 is the Union of India, and respondent No. 2 is the Bar Council of this High Court. Upon the petition made by the petitioner under art. 226 of the Constitution, Mr. Justice K. K. Desai issued a rule on November 4, 1958, against the respondents to show cause why the provisions of sub-s. (3) of s. 4 of the Indian Bar Councils Act, (Act XXXVIII of 1926), and also all the resolutions and rules made thereunder or in conformity therewith should not be declared illegal and *ultra vires* of the Constitution, and further why an appropriate writ or order or direction should not issue against the respondents or any of them restraining them from holding any elections on the basis of the reservation of seats as contemplated by sub-s. (3) of s. 4.

It is common knowledge that as a step towards establishing an autonomous bar, the Indian Bar Councils Act was enacted in the year 1926, and Bar Councils were established for certain High Courts including this High Court. The composition of the Bar Councils is dealt with by s. 4 of the Act, which runs thus:

"4. (1) Every Bar Council shall consist of fifteen members, of whom—

- (a) one shall be the Advocate-General;
- (b) four shall be persons nominated by the High Court, of whom not more than two may be Judges of that Court; and
- (c) ten shall be elected by the advocates of the High Court from amongst their number.

(2) Of the elected members of every Bar Council not less than five shall be persons who have for not less than ten years been entitled as of right to practise in the High Court for which the Bar Council has been constituted.

(3) Of the elected members of the Bar Councils to be constituted for the High Courts of Judicature at Fort William in Bengal and at Bombay such proportion as the High Court may direct in each case shall be persons who have, for such minimum period as the High Court may determine, been entitled to practise in the High Court in the exercise of its original jurisdiction, and such number as may be fixed by the High Court out

1 (1937) 302 U.S. 277, 82 Law. ed. 252.

2 (1944) 321 U.S. 1, 88 Law. ed. 497.

3 [1951] Nag. 646.

4 [1951] A.I.R.S.C. 41.

5 (1885) 118 U.S. 27, 28 Law. ed. 923.

6 (1940) 309 U.S. 270, 84 Law. ed. 744.

7 (1940) 309 U.S. 83, 84 Law. ed. 591.

8 (1940) 310 U.S. 141, 84 Law. ed. 1124.

9 (1944) 321 U.S. 158, 88 Law. ed. 645.

10 (1887) 120 U.S. 68, 71, 80 Law. ed. 578.

11 (1888) 125 U.S. 181, 31 Law. ed. 650.

12 (1911) 220 U.S. 61, 78, 55 Law. ed. 389,

377.

13 (1898) 163 U.S. 537, 41 Law. ed. 256.

14 [1952] S.O.R. 284.

15 (1948) 235 U.S. 281, 93 Law. ed. 37.

of the said proportion shall be barristers of England or Ireland or members of the Faculty of advocates in Scotland."

Then follows sub-s. (4) which deals with a matter with which we are not concerned. We do not, therefore, reproduce it. In pursuance of the provisions of sub-s. (3) of s. 4, this High Court passed the following resolution on September 25, 1928:

"It is hereby resolved that of the ten elected members of the Bar Council to be constituted for the High Court of Judicature at Bombay, one half shall be persons who have, for the minimum period of ten years, been entitled to practise in the High Court in the exercise of its original jurisdiction, and four, out of the said one half, shall be barristers of England or Ireland or members of the Faculty of Advocates in Scotland."

This resolution was amended on April 3, 1944, by reducing the number of barristers from 4 to 3 and increasing the number of advocates on the Original Side from 1 to 2. A further alteration in the number of representatives of persons entitled to practise in this High Court was made on April 10, 1952, as a result of which the reservation of seats for persons practising on the Original Side has been reduced from 5 to 4, and that for barristers from 3 to 2. Reading the resolution along with the provisions of s. 4, the composition of the Bar Council for this High Court now is (a) Advocate General, (b) four persons nominated by the High Court, (c) 10 persons elected by the advocates of whom 4 will be persons entitled to practise on the Original Side of the High Court and out of these 4, 2 will be barristers of England or Ireland or members of the Faculty of Advocates in Scotland.

In pursuance of the rules framed under the Act, elections for filling five seats were ordered to be held on December 12, 1958. The petitioner, who had offered himself as a candidate at those elections, therefore, had sought, in addition to the relief or declaration concerning the validity of sub-s. (3) of s. 4 and the rules *ab initio* made thereunder, an interim injunction restraining the Bar Council from holding any elections as then notified. The injunction was refused, and elections have taken place.

The petitioner has alleged in his petition that at the date of the elections, 8,000 advocates were on the roll of the Bar Council, out of whom only 800 are entitled to practise on the Original Side. He has pointed out that whereas 7,200 advocates who are entitled to practise on the Appellate Side cannot send more than 6 representatives to the Bar Council, 800 advocates entitled to practise on the Original Side can send at least 4 representatives to the Bar Council. This, he contends, is an unjustifiable discrimination. During the arguments at the Bar, he said that the number of barristers which form part of the 800 advocates entitled to practise on the Original Side is only 200. To entitle such a small group of persons separate representation on the Bar Council by electing two persons is nothing short of favouritism. Relying upon the provisions of art. 14 of the Constitution, his argument is that the reservation made by the High Court in its resolution is unconstitutional and that the power whereunder the High Court has acted has been rendered void by the operation of art. 13 of the Constitution. We may also mention here that the petitioner referred to the resolution passed by the High Court on October 24, 1949, abolishing the distinction between Advocates (O.S.) and Advocates (A.S.), and contended that after the passing of that resolution, the class of advocates entitled to practise exclusively on the Original Side has ceased to exist as a separate entity, and for this reason also no reservation of seats for the now non-existing class can be permitted.

The learned Advocate General, as Ex-Officio President of the Bar Council, appeared before us on behalf of the Bar Council. He contended that even if we were of the opinion that the provisions of sub-s. (3) of s. 4 have violated art. 14 of the Constitution, we should not grant the declaration sought for by the petitioner, because the Act is an All India Act, and the impugned provision applies to the Calcutta High Court also. He further pointed out that even under the Constitution, legislation with respect to persons entitled to

practise before the High Court is placed in the Union List and as such it is exclusively within the legislative competence of the Parliament. It is true that the impugned provision applies also to the Calcutta High Court, and the Bar Council Act deals with a subject which is exclusively within the legislative competence of the Parliament. But these facts are not relevant for considering whether we should give the appropriate relief to the petitioner or not. If we find that the impugned provision as enacted violates a fundamental right claimed by the petitioner, it is our bounden duty to give redress to him, even if that involves the striking down of the provisions of a law enacted by the Parliament, or of a law which must be deemed to have been enacted by the Parliament. The powers of Courts in this regard are not in any way limited by the fact that the impugned law was enacted by Parliament and not by the State Legislature.

The learned Advocate General then contended that the provisions of sub-s. (3) of s. 4 are not discriminatory and further that they only confer a discretion on the High Court, which is the highest Judicial Tribunal in the State, to provide for appropriate reservation for certain class of lawyers, if the High Court was satisfied that it was necessary to do so.

It seems to us that the provisions of sub-s. (3) of s. 4 which confer, as they do, a power on the High Court to make provisions for reservation of seats for certain classes of lawyers, are not themselves discriminatory. It is open to the High Court to exercise the discretion conferred by the Legislature in any way it likes, and it may decide upon making any reservations, or it may decide not to make any reservations at all. We may further point out that the provisions empower the High Court to make a reservation only in respect of advocates who have practised for a certain minimum period and thus presumably possess some additional qualifications. It further specifies the classes of advocates in respect of whom the reservation is permitted to be made. Persons belonging to these classes are regarded by the Legislature to possess special qualifications. Therefore, the provision is not open to challenge on the ground that it confers an arbitrary or a naked discretion on the High Court. Finally, the discretion is conferred on the highest judicial authority in the State which can be trusted to exercise it judiciously.

Apart from that, we think that where the Legislature brings into existence a political institution and makes any provisions concerning its constitution or composition, the provisions of the law which bring that institution into existence cannot be challenged under art. 14 of the Constitution, on the ground that the various interests concerned are unequally represented thereon, for, in bringing a political institution into existence, the Legislature has ample discretion in the matter of providing for representation thereon of the interests concerned. In such a case, the right of representation granted to persons or interests would merely be a creature of the statute creating the institution. Where the right conferred on a person is not guaranteed by the Constitution and does not flow from it and is neither a fundamental right, nor a common law right, nor a natural, inherent or unalienable right, but a franchise dependent upon the law and is thus merely a creature of a statute, it can be asserted only to the extent and subject to the conditions specified in the statute creating it. The Bar Council is an institution which is the creature of the Act creating it. It confers a right on Advocates, among other things, to elect representatives from their own class to the Bar Council. This is neither a fundamental nor a common law right. The Act similarly empowers this High Court to provide for the special reservation of seats in the Council to advocates entitled as of right to practise on the Original Side and to Barristers, provided they have a certain minimum standing at the Bar. The right of being a member of the Bar Council is also not a fundamental or a common law right, but is one conferred by the Act alone.

Part III of the Constitution deals with fundamental rights. It guarantees the right to freedom, the right against exploitation, the right to freedom of

religion, right to property, and a right to constitutional remedies. It also guarantees cultural and educational rights and a right to equality; but it does not guarantee the right of franchise nor a right to be elected to a political institution. Part XV of the Constitution deals with elections. Article 325 occurring in that Part provides:

"...no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll...on grounds only of religion, race, caste, sex or any of them."

But this article deals with elections to the Houses of Parliament and to the State Legislatures, and not to each and every institution. Similarly, art. 326 provides for adult franchise; but that franchise relates to elections to Parliament or the State Legislature. The general law of the land also does not recognise the right of a citizen to exercise a franchise or to be a candidate for the election. As has been already pointed out, these rights are not natural or unalienable rights of a citizen. The only sources of such rights in India with respect to political institutions other than the Parliament and the State Legislatures are the statutes bringing those institutions into existence.

There are several decisions of the Supreme Court of the United States and the Supreme Courts of the various States in that country, which have dealt with this question. They are referred to in para. 458 at pages 171 to 177 of *Corpus Juris Secundum*, Vol. 16A. We, however, refer in particular to two of them. In *Breedlove v. Suttles*,¹ a State statute providing for the collection of a poll-tax of 1 dollar as a pre-requisite to the right to register and vote at the election was challenged on the ground that it violates the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment, because that law applied only to persons between the ages of 21 and 60. Negating this contention, the Supreme Court observed (p. 283):

"To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate...The privileges and immunities protected are only those that arise from the Constitution and laws of the United States and not those that spring from other sources."

In *Snowden v. Hughes*,² the petitioner, a citizen of Illinois, claimed damages from that State for injury to property and for deprivation of a right or privilege of a citizen of the United States. The privilege or right to property, according to the petitioner, was the right to stand as a candidate for the State office. According to him, this was denied to him by the provisions of the Electoral law. Dealing with the matter, Stone C.J., who delivered the judgment of the Court, observed (p. 6):

"Three distinct provisions of the Fourteenth Amendment guarantee rights of persons and property. It declares that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'"

The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law... The right to become a candidate for state office, like the right to vote for the election of state officers,...is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause."

Article 14 of the Constitution corresponds to some extent with the Fourteenth Amendment to the Constitution of the United States. No doubt, as has been

¹ (1937) 302 U.S. 277, 82 Law. ed. 252.

² (1944) 321 U.S. 1, 88 Law ed. 497.

pointed out in *Sheoshankar v. The State*³, art. 14 involves two concepts, a positive one, and a negative one. One is "equality before the law", and the other is "equal protection of the laws". As has been pointed out by the Supreme Court in *Charanjit Lal v. Union of India*⁴, the two expressions in substance mean one and the same. We would, therefore, be justified in relying upon the American decisions in support of our view. The principles aforesaid would also apply to the Bar Council, because it is also a political institution, inasmuch as the State has social interest in the administration of justice and, therefore, it can exercise its regulatory powers for bringing the Bar Council into existence; see Willis Constitutional Law, page 750. It would, therefore, follow from this that it is not open to the petitioner to challenge the validity of s. 4(3) of the Act.

Apart from that, we do not think that the Legislature, in reserving seats for certain classes of advocates, did something which is prohibited by art. 14 of the Constitution. No doubt, art. 14 lays down that no person shall be denied equality before the law or the equal protection of the laws. But it also presupposes that the persons to be granted equality before the law and equal protection of the laws must themselves be a class. This article does not say that there shall be absolute equality amongst men in all circumstances and in all conditions. That is a physical impossibility. Nor does this article mean that things which are different shall be treated as if they were same. What it does mean is denial of any special privilege by reason of birth, creed or the like, and also the equal subjection of all individuals and classes to the ordinary law of the land. As has been observed in *Sheoshankar's* case,

"there is no denying the fact that it is impossible for any law to make or regard two things different in themselves as the same. What is meant by equality of status is that rights of the same kind are to be treated equally, i.e., in the same way, as between different individuals."

Robeson in his book on Justice and Administration Law, 1947, says at page 264:

"This leads us to the principle of equality in that when a given set of facts or a particular group of individuals have been thrown into their appropriate legal categories, the judge must apply to the individual concerned the law that governs the entire class of objects or persons situated in those circumstances. All petitioners for divorce must be subjected to the same rules of law, adultery cannot be excused in one respondent because of his laudable war record; or because he and the judge have a mutual friend. This disinterested treatment of each member of a legal category on similar lines, regardless of race, religion, antecedents, physical appearance, intellect, public spirit or occupation is the foundation of judicial impartiality. In this sense equality before law may be said to have a real existence."

Acting on this principle, it has been held in scores of cases by the Supreme Court of the United States that making reasonable classifications by law is not a denial of equal protection. One of the leading cases on the point is *Barbier v. Connolly*⁵, where it was pointed out that what the constitutional guarantee forbids is class legislation but not classification which rests upon reasonable grounds of distinction. Amongst the recent cases which take the same view are the following: *Minnesota Ex Rel. Pearson v. Probate Court*,⁶ *Madden v. Kentucky*⁷, *Tigner v. Texas*⁸, *Snowden v. Hughes*, and *Prince v. Commonwealth of Massachusetts*⁹. It is clear from all these decisions that the Constitution does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. As observed in *Hayes v. Missouri*¹⁰,

"...It merely requires that all persons subjected to such legislation shall be treated

3 [1951] Nag. 646.

4 [1951] A.L.R.S.C. 41.

5 (1885) 113 U.S. 27, 28 Law. ed. 923.

6 (1940) 309 U.S. 270, 84 Law. ed. 744.

7 (1940) 309 U.S. 83, 84 Law. ed. 590.

8 (1940) 310 U.S. 141, 84 Law. ed. 1124.

9 (1944) 321 U.S. 158, 83 Law. ed. 645.

10 (1887) 120 U.S. 68, 78, 30 Law. ed. 578,

alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

Then, again, as pointed out in *Pembina Con. Silver Mining et., Co. v. Pennsylvania*,¹¹ what is prohibited by the Constitution is deliberately treating a person or a class of persons in a prejudicial way.

The classification permissible by the State extends to all kinds of activities and the State has wide discretion in the matter. It is only where there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory. But even then, as held in *Lindsley v. Natural Carbonic Gas Co.*¹² and *Plessy v. Ferguson*,¹³ it is the duty of the Court to sustain the classification if any state of facts can reasonably be conceived in justification of the classification. Further, the burden is upon the person who assails the classification to show that it does not rest upon a reasonable basis.

As observed by Willis at p. 580—

"Many different classifications of persons have been upheld as constitutional. A law applying only to one person or one class of persons is constitutional if there is sufficient basis or reason for it."

Now, here we have two bases for classification. Those bases are: the length of practice as an advocate of the Original Side, and the possession of a special professional qualification. The Legislature has, in its wisdom, deemed it necessary to make a reservation of seats in favour of these two classes, and this the Legislature, was entitled to do. It may be pointed out that this differentiation is not based on grounds of race, religion, sex, etc., but solely on the ground of qualifications. It may be that the Court may think that the qualifications are not sufficiently high or distinctive to merit a separate treatment; but that cannot be a ground for a Court to refuse to uphold the classification made by the State. That is a matter which is particularly within the competence of the State to determine, and it is not open to the Court to substitute its own judgment for that of the State in this matter. The classification which the State has made is not arbitrary, and there appears to be a reasonable basis for it. It fulfils the two tests laid down by Das J. (as he then was) in *The State of West Bengal v. Anwar Ali Sarkar*¹⁴. There his Lordship observed (p. 334):

"...In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (2) that the differentia must have a rational relation to the object sought to be achieved by the Act."

Thus, whichever way we look at it, it would follow that the reservation of seats permitted by sub-s. (3) of s. 4 cannot be regarded as unconstitutional.

It may not be out of place to refer here to *MacDougall v. Green*¹⁵, where the provisions of a State statute which was challenged provided that candidates for Statewide office should have support not limited to a concentrated locality, which, in a sense, is the converse of the case before us. In this U.S. case the facts were as follows: In the year 1935 a clause was added to a State statute of Illinois which required that a petition to form and to nominate candidates for a new political party be signed by at least 25,000 qualified voters, provided that included in the aggregate total of 25,000 signatures, were signatures of 200 qualified voters from each of at least 50 counties within the State. The effect of the statutory requirement was that the electorate in 49 of the counties with 87 per cent. of the registered voters could not, but 25,000 of the remaining 13 per cent. of the registered voters, properly distributed among the 53 remaining counties, could form a new party. A contention was, therefore, raised that this statute offended the provisions of the Fourteenth Amendment of the Constitution. Negating this contention, the majority of the Court observed (pp. 283-284):

"...It is allowable State policy to require that candidates for state-wide office should

¹¹ (1898) 125 U.S. 181, 31 Law. ed. 650.

¹³ (1896) 163 U.S. 537, 41 Law. ed. 256.

¹² (1911) 220 U.S. 61, 78, 56 Law. ed. 369.

¹⁴ [1952] 8 C.R. 284.

377.

¹⁵ (1948) 335 U.S. 281, 98 Law. ed. 3.

have support not limited to a concentrated locality. This is not a unique policy... To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former."

Upon this view, it would follow that neither sub-s. (3) of s. 4 nor the resolution passed by the High Court on April 10, 1952, can be challenged, on the ground that art. 14 is violated by them.

We would, however, like to mention that the learned Advocate General referred us to the position in England in regard to the organisation and constitution of the Bar Council, and to the Report of the All-India Bar Committee of 1953, and stated that according special treatment to advocates practising on the Original Side and the barristers cannot be regarded as an act of favouritism. He further pointed out that the training received by this class of lawyers was of a special kind and intense, and that undergoing such a training is not obligatory for persons who start practice on the Appellate Side or in the mofussil. Further, according to him, there was, till the year 1949, a real distinction between persons practising on the Original Side and those on the Appellate Side. He then pointed out that though the distinction between the Original Side and the Appellate Side has been swept away, the persons who are today obtaining the benefit of special representation are those who have been practising on the Original Side for 10 years or more, that is, they are persons who have received the benefit of special and intensive training. He further pointed out that as a result of the abolition of the distinction between the Appellate Side and the Original Side on November 7, 1949, every advocate is, as from that date, entitled to practise on the Original Side. Those persons who were already practising as advocates on the Appellate Side on November 7, 1949, will also be entitled to the benefit of the special reservation for advocates practising on the Original Side after November 7, 1949. The question, therefore, whether there is any point in continuing the special representation would arise for consideration thereafter, and that it is not necessary to consider it now.

We may point out that till 1949 the Prothonotary and Senior Master of this High Court used to maintain a separate roll of advocates practising on the Original Side. After the abolition of the distinction between the Appellate Side and the Original Side, this roll is no longer being maintained. At one stage of the argument, we felt that this would create some difficulty in ascertaining the class of persons who would be entitled to special reservation. We, however, find that in the list maintained by the Bar Council the relevant information is given against the names of advocates who were as of right entitled to practise on the Original Side prior to November 7, 1949, and those who are barristers. No practical difficulty, therefore, arises for giving effect to the resolution of the High Court.

The petitioner, Mr. Desai, did not suggest that the High Court made any purposeful discrimination in fixing the various proportions in its resolution dated March 31, 1952. His only attack was on the provisions of sub-s. (3) of s. 4 of the Act. It is, therefore, not necessary for us to consider whether the discretion conferred on the High Court has been exercised arbitrarily or in a capricious manner.

Upon this view, we dismiss the petition, but we make no order as to costs.

Petition dismissed.

APPELLATE CIVIL.

Before Mr. Justice Vyas.

SARDARSING AMARSING GAHERWA v. RAKARAN RAMNATH
UPADHAYA.*

Indian Limitation Act (IX of 1908), Art. 182—Application to set aside award decree rejected—Appeal against order of rejection dismissed—Darkhast filed to execute award decree—Whether period of limitation runs from date of award decree or date on which appeal against application dismissed—Word “appeal” whether restricted to appeal from order or decree sought to be executed.

The word “appeal” in column 3 of art. 182 of the Indian Limitation Act, 1908, is not restricted to an appeal from an order or decree which is sought to be executed, but includes an appeal from an order having direct and immediate connection with the decree which is sought to be executed.

In a suit filed by the plaintiff to set aside a sale-deed in respect of property valued at about Rs. 17,000, an award decree was passed on October 19, 1950, for Rs. 4,000. The plaintiff then filed an application to set aside the award decree praying that the decree should have been passed for an amount of Rs. 17,000 and odd. This application was rejected, and an appeal from this order of rejection was dismissed by the High Court on July 8, 1953. The plaintiff on November 11, 1954, filed a darkhast to execute the award decree. On the question whether the darkhast was in time:—

Held, that the order which was passed on the plaintiff's application had a direct and immediate connection with the award decree sought to be executed,

that the starting point of limitation was, therefore, July 8, 1953, on which date the High Court dismissed the appeal filed by the plaintiff from the order rejecting his application, and

that, therefore, the darkhast was in time.

Nagendra Nath Dey v. Suresh Chandra Dey,¹ followed.

Mahadeo Bhimashankar v. Fatumtiya,² dissented from.

Bhawanipore Banking Corporation, Ltd. v. Gouri Shankar Sharma,³ *Nagappa v. Gurushantappa*,⁴ *Narayan v. Radhabai*,⁵ *Narmadabai Narayanshet v. Hidayatali*,⁶ *Rameshwar Prasad v. Parmeshwar Prasad*,⁷ *Jacinto v. Fernandez*,⁸ *Fakir Chand Mandal v. Daiba Charan Parai*⁹ and *Shivaramachari v. Anjaneya*,¹⁰ referred to.

THE facts appear in the judgment.

V. B. Begs, for the appellant.

R. G. Samant, for N. M. Konkar, for respondent No. 1.

Ramnath Shivilal, for respondents Nos. 2, 3, 5 to 8.

VYAS J. This first appeal arises out of an execution proceeding and it raises a question under cl. (2) of art. 182 of the Indian Limitation Act. The question is as to the construction of the word “appeal” in cl. (2) of art. 182. Does the word mean an appeal from the decree which is sought to be executed or would it include an appeal from an order having direct and immediate connection with the decree which is sought to be executed? This interesting point arises upon the following circumstances:—

The appellant-plaintiff filed a suit, being Suit No. 15 of 1948, to set aside a certain sale-deed which was passed by his father. The value of the property that was the subject-matter of the sale-deed was Rs. 17,187-8-0. The dispute was referred to arbitration and the arbitrator made an award upon which a decree was based. The award decree was passed on October 19, 1950, and it

*Decided, August 12, 1953. First Appeal No. 40 of 1950, from the decision of Bashiruddin Ahmad, Civil Judge, Senior Division, Sholapur, in Special Suit No. 15 of 1948.

¹ (1932) 34 Bom. L. R. 1065, p.c.

² (1947) 50 Bom. L. R. 221.

³ [1950] 8 C. R. 25.

⁴ (1932) 35 Bom. L. R. 432.

⁵ (1935) 38 Bom. L. R. 215.

⁶ (1946) 50 Bom. L. R. 696.

⁷ [1951] A. L. R. Pat. 1, p.n.

⁸ (1939) 41 Bom. L. R. 921.

⁹ (1927) I.L.R. 54 Cal. 1052.

¹⁰ [1951] A.I.R. Mad. 962, p.n.

was for the amount of Rs. 4,000. The plaintiff filed a Miscellaneous Application, being Miscellaneous Application No. 272 of 1949, whereby he challenged the award decree dated October 19, 1950. He sought to have the award decree set aside. The above-mentioned Miscellaneous Application No. 272 of 1949 was rejected on October 10, 1950. From the said order of rejection, the plaintiff appealed to the High Court and the High Court dismissed the appeal on July 8, 1953. The present darkhast to execute the award decree was filed by the plaintiff on November 11, 1954.

Now, the question arising for consideration is as to what is the starting point of limitation upon the above facts. Would the starting point be October 19, 1950, the date upon which the award decree was passed, or would the limitation commence to run from July 8, 1953, the date upon which an order was made by the High Court dismissing the appeal of the plaintiff from the order rejecting his Miscellaneous Application No. 272 of 1949?

The question of construction of art. 182, cl. (2), has been the subject-matter of considerable discussion in several cases. But, in my view, all doubts upon the question of construction of the word "appeal" occurring in cl. (2) of art. 182 have been set at rest by the decision of the Privy Council in *Nagendra Nath Dey v. Suresh Chandra Dey*.¹ That was a case in which a mortgage decree was passed on June 24, 1920. One of the decree-holders, a man named Madan Mohan, was dissatisfied with the order of the learned Subordinate Judge disallowing his claim to be substituted by any one of the decree-holders whose rights he (Madan Mohan) claimed to have acquired. Madan Mohan appealed to the High Court and his appeal purported to be against the order of the Subordinate Judge dated June 24, 1920, rejecting his claim against his co-plaintiff. It may be noted that in the appeal which Madan Mohan made to the High Court, he did not join the judgment-debtors. In other words, the quarrel in the appeal which was filed in the High Court by Madan Mohan was a quarrel between the two plaintiffs. Madan Mohan stated in his appeal that no decree had been drawn up in the case and, therefore, he was appealing against the order of the Subordinate Judge. That, however, was not true. The appeal, though irregular in form and insufficiently stamped, was admitted by the High Court and it was heard in due course and was dismissed. Subsequently, in execution of the original decree that was passed by the Subordinate Judge, a question arose whether the *terminus a quo* was the date of the decision of the irregular appeal or the date of the original decree in suit, namely, June 24, 1920. Upon the matter going before their Lordships of the Privy Council, their Lordships observed (p. 1070):

"...the question must be decided upon the plain words of the article: 'Where there has been an appeal', time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of period of limitation must always be to some extent arbitrary and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

Their Lordships then proceeded to observe:

"...It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage." (p. 1071).

It is clear, therefore, that their Lordships did not read the word "appeal" in cl. (2) of art. 182 subject to restriction of cls. (1), (3) and (4) of the said article and they were not prepared to import into the word "appeal" any consideration which would narrow down the plain meaning of that word. When their Lordships observed that it was at least an intelligible rule that so

long as there was any question *sub judice* between any of the parties, those affected should not be compelled to pursue the so often thorny path of execution, which, if the final result was against them, might lead to no advantage, it is clear that they did not divorce the connotation of the word "appeal" from any question which might be *sub judice* between any of the parties to the litigation. As cl. (2) of art. 182 follows close upon cl. (1), it might, perhaps have been more natural to construe the word "appeal" occurring in cl. (2) so as to mean "appeal from the decree or order" referred to in cl. (1). But this consideration did not weigh with their Lordships of the Privy Council when a question arose before them of construing the word "appeal" in cl. (2). They, in terms, pointed out that the fixation of the period of limitation cannot always be a natural fixation, but must be to some extent arbitrary and it might frequently result in hardship either to one party or to the other. It is significant to remember in this context that when the Legislature used the word "appeal" in cl. (2) they did not, in terms, say that the appeal was to refer to the decree or order mentioned in cl. (1). It is clear that the Legislature did not intend to import any qualification in the connotation of the word "appeal" when they used that word in cl. (2), for instance, qualification that it should be an appeal from the decree that was sought to be executed. Following, with great respect, the principle laid down by their Lordships of the Privy Council in *Nagendra Nath Dey v. Suresh Chandra Dey*, the principle being that the words used by the Legislature must be construed to mean just what they say, I must uphold the contention of the learned advocate Mr. Bege appearing for the appellant-plaintiff that the starting point of limitation in this case would be the date "8th July 1953," upon which date the High Court dismissed the plaintiff's appeal which was filed by him from an order rejecting his Miscellaneous Application No. 272 of 1949, which was made for setting aside the award decree.

In *Bhawanipore Banking Corporation, Ltd. v. Gouri Shankar Sharma*², a preliminary decree on a mortgage was passed *ex parte* on August 21, 1940. The judgment-debtor made an application under s. 36 of the Bengal Money-lenders Act for re-opening the decree and the application was dismissed for default of appearance on December 20, 1941, and an application under O. IX, r. 9, Civil Procedure Code, for restoration of this application was also dismissed on June 1, 1942. In the meanwhile on December 22, 1941, a final decree was passed. The judgment-debtor preferred an appeal from the order dismissing his application under O. IX, r. 9, Civil Procedure Code, and this appeal was dismissed for non-prosecution on July 3, 1944. On April 9, 1945, the decree-holder applied for the execution of the decree. It was held by the Supreme Court that the words "where there has been an appeal" in cl. (2) of art. 182 must be read with the words "for the execution of a decree or order" in the 1st column of the article and, therefore, the fact that there was an appeal from the order dismissing the application under O. IX, r. 9, made in connection with the proceeding under s. 36 of the Money-lenders Act, could not give rise to a fresh starting point for limitation under art. 182, cl. (2). In the body of the judgment delivered by their Lordships, they observed (p. 29):

"...however broadly we may construe it (their Lordships were referring to the expression 'Where there has been an appeal' occurring in cl. (2) of art. 182), it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution."

It must follow by necessary implication from these observations that if an appeal is made from an order which has a direct or immediate connection with the decree under execution, that appeal would be covered by the expression "appeal" in cl. (2) of art. 182. Now, in the present case it could not be disputed that the order which was passed in Miscellaneous Application No. 272 of 1949, which was filed by the plaintiff, had a direct and immediate connection

with the award decree. The award decree was passed for the amount of Rs. 4,000. It is clear that the plaintiff's prayer in Miscellaneous Application No. 272 of 1949 was that the decree should have been passed for an amount of Rs. 17,000 and odd. The plaintiff's grievance in his Miscellaneous Application No. 272 of 1949 was in respect of the award decree which was passed only for Rs. 4,000. It is, therefore, perfectly plain that the order which was passed in plaintiff's application No. 272 of 1949 was directly and immediately connected with the decree under execution, namely, the award decree, which is sought to be executed in the present darkhast filed by the plaintiff on November 11, 1954. From the order rejecting the plaintiff's Miscellaneous Application No. 272 of 1949 there was an appeal in the High Court and that appeal was dismissed by the High Court on July 8, 1953. It is clear, therefore, that the order in appeal made by the High Court was also an order which had a direct and immediate connection with the decree sought to be executed in the present darkhast filed by the plaintiff on November 11, 1954. In these circumstances the present case would be covered, by necessary implication, by their Lordships' observations:

"however broadly we may construe the expression 'Where there has been an appeal', it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution."

In *Nagappa v. Gurushantappa*³ the trial Court was dealing with a suit for partition. The trial Court passed a decree in favour of defendants Nos. 1 and 2 and against defendant No. 3 on December 14, 1925. Defendant No. 2 appealed to the High Court against the decree and defendant No. 3 applied to the trial Court for review. The trial Court reviewed the decree on June 18, 1926. Defendants Nos. 1 and 2 appealed to the High Court against the order granting review. The High Court dismissed both the appeals on October 29, 1928. An application to execute the decree was made on September 2, 1929. It was held by a division bench of this Court consisting of Mr. Justice Patkar and Mr. Justice Barlee that the execution application dated September 2, 1929, was within time, as under art. 182, cl. (2) of the Limitation Act, 1908, the period of limitation commenced to run from October 29, 1928, i.e., the date of the decree or order passed by the High Court in Appeal No. 65 of 1926. It may be noted that the Appeal No. 65 of 1926 which was decided by the High Court was an appeal made by defendants Nos. 1 and 2 against the order of the Court below granting the review application. As I have just mentioned, the High Court held that the limitation would begin to run from the date of the order made by the High Court in Appeal No. 65 of 1926. This decision is directly contrary to the contention pressed before me by the learned advocate Mr. Samant for respondent No. 1 that the word "appeal" in cl. (2) of art. 182 must relate to an appeal from a decree or order sought to be executed. In the body of the judgment delivered by Mr. Justice Barlee in *Nagappa's* case Mr. Justice Barlee pointed out that the question which had arisen for consideration was as to the plain meaning of the words used in cl. (2) of art. 182. Mr. Justice Barlee negatived the argument that an appeal to fall within the meaning of art. 182 must be an appeal from an original decree. Mr. Justice Barlee followed the principle laid down by the Privy Council in *Nagendra Nath Dey v. Suresh Chandra Dey* that nothing must be added to the words of the article so as to narrow down the connotation of the word "appeal" used in cl. (2) of art. 182.

In *Narayan v. Radhabai*⁴ also, it was held by this Court that cl. (2) of art. 182 would cover an appeal from an order granting a review and that the word "appeal" was not confined to an appeal from a decree or order sought to be executed.

It may be noted in this case that it was contended by Mr. Adarkar, who appeared for the appellant, that an appeal from an order granting a review was not an appeal which would fall within cl. (2) of art. 182. Mr. Justice

Barlee, who decided the case, negatived this contention and he observed that he was bound by the decision of this Court in *Nagappa's* case. I have already pointed out above that in *Nagappa's* case it was decided that cl. (2) of art. 182 did not refer exclusively to the appeals from decrees that were to be executed. Mr. Justice Barlee pointed out that the decision in *Nagappa's* case was based on the Privy Council case of *Nagendra Nath Dey v. Suresh Chandra Dey* and held that the question must be decided upon the plain words of the article and that where there had been an appeal of any sort, time was to run from the date of the decree of the appellate Court.

In *Narmadabai Narayanshet v. Hidayatalli*⁵ also it was held by Mr. Justice Gajendragadkar that an appeal preferred by the defendant against the order dismissing his application to set aside an *ex parte* decree passed against him fell within the word "appeal" in clause (3) of art. 182 and that, therefore, in such a case limitation would commence to run from the date of the final decree or order of the appellate Court. A contention similar to the one advanced by Mr. Samant in the present case was advanced in that case also. But it was negatived by Mr. Justice Gajendragadkar and he observed (p. 701):

"It seems to me that in view of the Privy Council decision in *Nagendra's* case and in view of the later decision of this Court in *Nagappa's* case it must be held that the word 'appeal' in col. 3 of art. 182 includes an appeal against an order rejecting the defendant's application for setting aside the *ex parte* decree."

It is clear that Mr. Justice Gajendragadkar did not accept the contention that the word "appeal" as used in cl. (2) of art. 182 was restricted to an appeal from the decree that was sought to be executed.

On behalf of respondent No. 1 my attention is invited by Mr. Samant to a decision of this Court in *Mahadeo Bhimashankar v. Fatumiya*⁶. In this case the plaintiff had obtained a preliminary mortgage decree on June 27, 1933. The defendant preferred an appeal from that decree, and the Appellate Court made an order on November 16, 1935, declaring the appeal to have abated. The preliminary decree was made final on March 7, 1935. On March 30, 1935, the plaintiff filed a darkhast to execute the final decree and it was disposed of on September 14, 1935. On November 16, 1938, the assignees of the decree filed another darkhast to execute the decree. The defendant's heirs contended that this darkhast was not filed within 3 years from the previous darkhast and that, therefore, it was barred by limitation. The assignees, relying on art. 182, cl. (2), submitted that the darkhast was filed in time as it was filed within three years from November 16, 1935, on which date the Court declared that the appeal had abated. It was observed by a division bench of this Court consisting of Mr. Justice Bavdekar and Mr. Justice Dixit that as there was no appeal from the final decree which was the decree sought to be executed, time should be computed from the date of the final decree and not from the date on which the appeal from the preliminary decree was declared to have abated and that, therefore, the darkhast was barred by limitation. Now, with respect, it must be pointed out that the view taken by the Court in this case was opposed to the principle laid down by their Lordships of the Privy Council in *Nagendra Nath Dey's* case and it was also not in conformity with the view taken by a division bench of this Court in *Nagappa v. Gurushantappa*. As I have mentioned above, the principle laid down by the Privy Council in *Nagendra's* case is that the connotation of the word "appeal" as used in cl. (2) of art. 182 is not to be restricted or confined to an appeal from a decree or order which is sought to be executed. With this principle the decision of this Court in *Mahadeo Bhimashankar's* case is not in conformity and with great respect I am unable to follow the decision in *Mahadeo Bhimashankar's* case. If the defendant in *Mahadeo Bhimashankar's* case had succeeded in his appeal to the High Court from the preliminary decree, it would, in the words of their Lordships of the Privy Council, have been of no advantage at all to him to be compelled to pursue "the thorny path of execution of the final decree." In my

view therefore—and I am saying this with great respect—the case of *Mahadeo Bhimashankar v. Fatumiya*, conflicting as it did with the *dictum* of the Privy Council in *Nagendra Nath Dey's* case, was not correctly decided.

The next case to which my attention is invited by Mr. Samant appearing for respondent No. 1 is the full bench case of the Patna High Court *Rameshwar Prasad v. Parmeshwar Prasad*⁷. The learned Judges of the Patna High Court observed in this case that the word “appeal” in column 3 of cl. (2) of art. 182 of the Indian Limitation Act did not include “an appeal preferred from an order refusing to set aside an *ex parte* preliminary decree in a suit for partition.” They said that the word “appeal” in cl. (2) of art. 182 meant an appeal only from the decree or order sought to be executed. It is clear that the learned Judges of the Patna High Court, in coming to the decision to which they came in this case, put a narrow and restricted meaning on the word “appeal” which their Lordships of the Privy Council in terms discouraged in *Nagendra Nath Dey's* case.

In *Sivaramachari v. Anjaneya*⁸, which is a full bench case of the Madras High Court, it was held by the learned Judges that the word “appeal” in cl. (2) of art. 182, which is no doubt a general word, must bear a meaning restricted by its context and it means an appeal from a decree or order of the nature mentioned in cls. (1), (3) and (4), that is to say, an appeal from the original decree or order, an appeal from a decree following a review of judgment and an appeal from an amended decree. The learned Judges said:

“the true test is that the decree of the appellate Court in the appeal must be the decree which is sought to be executed.”

Once again I may point out, with great respect, that this restriction which was put upon the meaning of the word “appeal” occurring in cl. (2) of art. 182, namely, that it must be read in the context of cls. (1), (3) and (4) of art. 182, was a restriction which was discouraged by the Privy Council in *Nagendra Nath Dey's* case when their Lordships observed that the words of the article were plain and without any qualification either as to the character of the appeal or as to the parties to it.

In *Jacinto v. Fernandez*⁹ it was held by a division bench of this Court consisting of the learned Chief Justice and Mr. Justice Wadia (p. 923):

“...the words ‘Where there has been an appeal’ in the last column of article 182 (of the Indian Limitation Act, 1908), mean an appeal from the decree sought to be executed, and not an appeal from another decree, though made in the suit.”

In that case there did not arise for consideration a position analogous to the position in the present case. In the present case an appeal was made by the appellant from an order refusing to set aside the award decree and this feature of the case was absent in *Jacinto's* case. That being so, with great respect, the decision in *Jacinto's* case would not be attracted by the facts of the present case.

In *Fakir Chand Mandal v. Daiba Charan Parni*¹⁰ it was held:

“Where an appeal has been preferred from a decree, the period of limitation commences from the date of the decree on appeal... ‘decree on appeal’ means decree on appeal from the decree to obtain execution of which the application is made.”

It was further held:

“An application to set aside a decree does not ‘keep the decree open’, and is not to be regarded as an appeal from the decree itself.”

This decision would be of no assistance to Mr. Samant for the simple reason that the question of construction of cl. (2) of art. 182 did not arise in that case.

For the reasons stated above I must accept the contention of Mr. Rege pressed before me for the appellant-plaintiff that the starting point of limitation in the present case would be the date July 8, 1953, on which date the High

7 [1951] A.I.R. Pat. 1, F.B.

8 [1951] A.I.R. Mad. 962, F.B.

9 (1939) 41 Bom. L.R. 921.

10 (1927) I.L.R. 54 Cal. 1052.

Court dismissed the appeal filed by the plaintiff from an order rejecting his application No. 272 of 1949. As the limitation would commence from July 8, 1953, the present darkhast filed by the plaintiff on November 11, 1954, to execute the award decree would be in time. I accordingly set aside the order made by the learned Judge below, allow the appeal and remit the darkhast to the Court below for disposal according to law. So far as the costs of the appeal are concerned, respondent No. 1 will bear his own costs and will also pay the costs of the appellant.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice K. K. Desai.

RATILAL VIRCHAND SHAH v. THE STATE OF BOMBAY.*

Bombay Land Requisition Act (Bom. XXXIII of 1948), Secs. 5(1), 6, 9(1)—Premises derequisitioned under s. 9(1)—Whether State Government can make fresh requisition order under s. 5(1) in respect of such premises.

The State Government has jurisdiction to make a fresh requisition order under s. 5(1) of the Bombay Land Requisition Act, 1948, in respect of premises which have been derequisitioned under s. 9 of the Act.

THE facts appear in the judgment.

F. S. Nariman, for the petitioner.

B. J. Joshi, for the respondent.

K. K. DESAI J. This is a petition under art. 226 of the Constitution challenging the validity of a requisition order dated May 30, 1958, made in pursuance of the Bombay Land Requisition Act and for appropriate reliefs in that connection.

The premises in question are plot No. 6, 2nd floor of building known as "Durga Villa", situate at 77-B, Ranade Road, Dadar, Bombay. The petitioner's case is that he had been a tenant of the premises since 1943 and had been residing at the premises continuously right up to the date of the impugned order. In June 1957 the petitioner was called upon to give information regarding these premises to the Accommodation Department. In August 1957, a show cause notice in connection with the enquiry contemplated under the Act was served on the petitioner. In pursuance of that notice, the petitioner gave such information as was required to the Department. By an order dated February 8, 1958, a copy whereof is annexed as exh. A to the petition, after the recital that on enquiry it was found that the petitioner had not actually resided in the premises for a continuous period of six months immediately preceding the date of the order, a declaration was made that the petitioner had not actually resided in the premises for a continuous period of six months immediately preceding the date of the order and the premises were requisitioned. By subsequent correspondence and representations made at an interview with the Deputy Minister for Revenue, the petitioner contended that the requisition order should not be given effect to. By an order dated March 24, 1958, being exh. B to the petition the premises were derequisitioned.

Another notice dated April 28, 1958, was served on the petitioner for showing cause against the requisition of the premises. In May 1958 the petitioner submitted his written statement and also gave his statement to the authorities in connection with further enquiries which were being made for requisitioning the premises. The petitioner's case is that though in fact he was continuously residing in the premises as intimated to the Accommodation Officer the

*Decided, November 6, 1958. O.C.J. Miscellaneous Petition No. 311 of 1958.

petitioner left for Sanad and Mount Abu on May 8, 1958. He, within a week thereafter, returned to Bombay and had resided with his son at an immoveable property which had been purchased in April 1957 by and in the name of the petitioner's wife. This property is situate at Khar. In May 1958 one of the petitioner's sons and his wife (i.e., petitioner's daughter-in-law) were residing in a flat in that property. The petitioner's case is that his daughter-in-law was pregnant, and in delicate health and the petitioner had for that reason to return to Bombay and on return having regard to the delicate condition of the health of his daughter-in-law resided at the property at Khar. The respondent's case is that in connection with the first requisition order the petitioner had made representations that he had no other accommodation and it was only for that reason on sympathetic grounds that the derequisition order dated March 24, 1958, was made. The first order was made in pursuance of information received by Government that the premises were subject matter of suppressed vacancy. After the derequisition order, having regard to the information again received, further enquiries were made and the Government then discovered that the petitioner had in the name of his wife purchased the aforesaid property at Khar, that the petitioner had alternative accommodation and representations made by him were false and that the petitioner's case that he had temporarily gone to reside at Khar with his son was false. It was also ascertained that the petitioner's telephone had been removed from the premises to Khar property some time in July 1957. Having regard to these facts and having held further enquiries the second requisition order dated May 30, 1958, was made. That order contains also a declaration that the petitioner had not actually resided in the premises for a continuous period of six months immediately preceding the date of the order. The petitioner has filed this petition and made diverse contentions challenging the validity of the requisition order dated May 30, 1958.

The grounds which are pressed before me are contained in sub-paras. 8(a) and 8(e) of the petition. The other grounds are not pressed seriously before me. In para. 8(a), after reciting the derequisition order dated March 24, 1958, it is submitted that the effect of the derequisition order was to effectively efface and wipe out the requisition made under the requisition order dated February 8, 1958, and the respondent ceased to have any jurisdiction to issue a fresh order of requisition on the basis of continuous non-residence for a period of six months prior to February 8, 1958. The ground in sub-para. 8(e) is that the effect of the derequisition order was that the authorities had come to the conclusion that there was no case for requisitioning the said premises or that there was no actual non-residence for a continuous period of 6 months of the petitioner in the premises and that it was not permissible for the authority to come to a different conclusion, once having decided the question in issue viz. that of residence of the petitioner in the premises for a period of six months prior to the date of the order.

Before referring to the contentions raised as aforesaid and developed before me, it is convenient to point out that jurisdiction of the authority to make the order in question is to be considered with reference to the provisions of s. 5 of the Act. These provisions have been construed often by this Court. It has been held and it is well established that the jurisdiction is to be found in cl. (1) of s. 5 and that the jurisdiction cannot be exercised if a case falls within the proviso to cl. (1). The jurisdiction is very wide and in the words of s. 5(1)

"If in the opinion of the State Government it is necessary or expedient so to do, the State Government may by order in writing requisition any land for any public purpose."

On a true construction of the provisions of s. 5 the conditions precedent necessary for making the requisition order are only two: (1) existence of a public purpose, and (2) a declaration as is contained in cl. (2) of s. 5. That declaration directly relates to the facts as mentioned in proviso to cl. (1) of s. 5.

The effect of these provisions is that the Government has jurisdiction to make a requisition order in all cases where the landlord or the tenant had not actually resided in the premises and there existed a public purpose. Along with these wide powers and/or wide nature of jurisdiction it is further provided that the declaration made by the Government shall be conclusive evidence that the owner, landlord or the tenant had not actually resided in the premises for a period of six months immediately preceding the date of the order. It is not denied and it cannot be denied that such a declaration is contained in the impugned order. It is now well settled that a declaration made under the provisions of s. 5(2), unless it is challenged on the ground of mala fides, cannot be questioned by Court. The declaration contained in the impugned order has not been challenged on the ground of mala fides or on any other ground in the petition before me. I am, having regard to the provisions of the Act, bound to proceed on the basis that the facts mentioned in the declaration are true facts. Having regard to this position, it is certainly very difficult to see how it can be contended that in making the order in question the authority had no jurisdiction as is sought to be contended by the petitioner.

Mr. Nariman for the petitioner developed his case by enunciating in his words the following propositions:

1. A release from requisition under s. 9 of the Act operates as liberation of the property from requisition and from all the incidents which justify the making or continuance of requisition.
2. That on a true construction of the provisions of the Act it should be held that the Legislature intended finality as regards all questions of facts and that the finding made by derequisition order dated May 30, 1958, amounted to a finding that the petitioner was residing in the premises and that finding could not be again reconsidered for the purpose of making a fresh requisition order.
3. On a true construction of provisions of s. 9 of the Act the release from requisition leads to prevent an exercise of power for making a fresh requisition order since otherwise absurd results would follow.
4. That the provisions of s. 9(1) for derequisition cannot be used for correction of unintentional mistakes made in connection with existing requisition orders; and in such a case the powers which ought to be exercised are to be found in s. 21 of the Bombay General Clauses Act, i.e., in such cases orders should be rescinded from inception and/or as from the date of the order. I have recited these contentions because in my view giving all due considerations to them I cannot come to the conclusion that the jurisdiction of Government to make requisition under s. 5(1) was in any manner affected by the provisions of s. 9 of the Act.

It is true that under cl. (2) of s. 9 on a derequisition order being made possession of the requisitioned premises is to be restored to the appropriate party and there is liability to pay compensation for deterioration if any. Under s. 9 an enquiry also has to be made as to the person to whom possession is to be restored and machinery is provided for the purpose of crystallising the rights and liabilities of Government on the one hand and the party entitled to possession on the other as regards the requisitioned premises. It is, of course, a serious thing that jurisdiction under s. 5 of the Act is available to the Government in respect of derequisitioned premises when liability is created to restore possession to the party concerned under the provisions of s. 9. Mr. Nariman contends that power, if any, in the Government to proceed under s. 5 could not be exercisable in respect of derequisitioned premises until the expiry of six months from the date of the derequisition order. That he says is clear if both the sections are read together. He submits that I should not read s. 5 separately from s. 9 and should give effect to the provisions of these sections by reading them together. Mr. Joshi has pointed out that under the provisions of s. 6 of the Act release of the premises from requisition constitutes a vacancy entitling the Government to make a requisition order of

derequisitioned premises immediately upon derequisitioning the same. He in my view rightly submits that it is impossible to construe the provisions of s. 6 so as to hold that Government had no jurisdiction to make a requisition order in respect of derequisitioned premises on the date of derequisition or immediately thereafter. If I upheld the contention of Mr. Nariman, it would be impossible to give effect to the provisions of s. 6 in the matter of requisition of a property where vacancy occurs by reason of the release of the premises from requisition.

As regards the contention that derequisition resulted only from the finding that the petitioner was continuously residing in the premises for a period of six months immediately preceding the date of the requisition order, I do not find any evidence of any kind. It is the case of the respondent that the derequisition order was made not because the petitioner was residing in the premises but on sympathetic ground, viz., that the petitioner's representation that he had no alternative accommodation at that date was accepted by the authorities. The question of the Government reconsidering the finding that the petitioner had not in fact resided in the premises for six months did not arise and the contentions raised on that footing cannot be accepted.

It is not necessary for me to consider whether in a case where there is a mistake the Government is not entitled to proceed under s. 9 to derequisition the premises and is bound to rescind the requisition order made. Such a question according to the respondent never arose in this case. They had not made any mistake and they had only on sympathetic ground made the derequisition order. I have no reason to disbelieve the statement made in the affidavit in reply in that connection. I cannot hold in this matter that it was necessary for the Government to proceed to rescind the first requisition order as contended by Mr. Nariman.

I have come to the conclusion that the fresh requisition order is validly made. The petition is, therefore, dismissed and rule discharged.

Mr. Joshi applies for costs in excess of the fixed costs. I have refused that application.

Petition dismissed.

Solicitors for the petitioner: *Bhaishankar Kanga & Girdharlal.*

Solicitors for the respondent: *Little & Co.*

Before Mr. Justice K. K. Desai.

BAWALKHAN LELANIKHAN v. B. C. SHAH.*

Foreigners Order, 1948, Cl. 11(2)—Foreigners Act (XXXI of 1946), Sec. 3—Whether under cl. 11(2) of Order civil authority has jurisdiction to order foreigner to report to police every day—Connotation of word "movements" in cl. 11 (2).

Under sub-cl. (2) of cl. 11 of the Foreigners Order, 1948, the civil authority is empowered to give directions to a foreigner to report to the Inspector of Police, Registration of Foreigners Branch, at his office at a specified time every day.

General conditions as to activities or a particular condition with reference to any activity of a foreigner can be validly imposed under cl. 11 of the Foreigners Order, 1948.

THE facts appear in the judgment.

D. H. Buch, with *A. A. Rizvi*, for the petitioner.

R. M. Kantawala, for the respondent.

K. K. DESAI J. This is a petition under art. 226 of the Constitution challenging the validity of an order dated November 1, 1958, made by the respondent in pursuance of cl. 11 of the Foreigners Order, 1948. The relevant facts are as follows:

*Decided, December 3, 1958. O.C.J. Miscellaneous Petition No. 310 of 1958.

The petitioner is a foreigner and is a national of Afghanistan. By an order dated June 8, 1957, made by the Deputy Secretary to the Government of India in exercise of the powers conferred by sub-s. (2) of s. 3 of the Foreigners Act it was directed that the petitioner shall not remain in India and that he shall depart from India by land-route and thereafter shall not re-enter India. According to the respondent the petitioner has been involved in six criminal cases a list whereof is annexed as Ex. 1 to the affidavit in reply. The petitioner has never denied the binding character of the order of deportation dated June 8, 1957. The Government, however, has not been able to deport the petitioner out of India because the petitioner has to go to Afghanistan by land-route and since the date of the order visa has not been available to enable the petitioner to be sent through Pakistan. At present steps are being taken by the Government for renewing petitioner's passport for his return to Afghanistan. It appears that in the meanwhile, having regard to the opinion which the respondent had formed regarding the petitioner on his having been involved in criminal cases mentioned in Ex. 1 the order in question was made on November 1, 1958. The relevant part of the order dated November 1, 1958, runs as under:

"You are hereby ordered under the powers vested in me under para 11 of the Foreigners Order 1948.

(a) To report to the Inspector of Police, Registration of Foreigners Branch, Special Branch, II C.I.D., at his office at 3 P.M. every day.

(b) Not to change your address without permission in writing previously obtained from the Deputy Commissioner of Police,...

(c) Not to leave the limits of Greater Bombay without permission in writing..."

The petitioner has argued this petition before me by contending that under cl. 11 of the Foreigners Order referred to in the impugned Order, there is no power of any kind in the respondent to give directions as contained in cl. (a) in the order, viz. to report to the Inspector of Police, Registration of Foreigners Branch, Special Branch, II C.I.D., at his office at 3 P.M. every day. The petitioner has contended that as there is no such power contained in cl. 11 of the Foreigners Order, this part of the Order is without jurisdiction and there should be a writ of *mandamus* directing the respondent to forbear from enforcing that order.

In connection with the arguments advanced on behalf of the petitioner and the respondent, it is relevant to refer to certain provisions of the Foreigners Act and the Foreigners Order. The relevant provisions in the Foreigners Act are as follows:—

"3. Power to make orders:—(1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigners, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner—

(a) shall not enter India or shall enter India only at such times and by such route...

(b) shall not depart from India, or shall depart only at such times and by such route...

(c) shall not remain in India or in any prescribed area therein;

(cc) ...

(d) shall remove himself to, and remain in, such area in India as may be prescribed;

(e) shall comply with such conditions as may be prescribed or specified—

(i) requiring him to reside in the particular place;

(ii) imposing any restrictions on his movement;

(iii) ...

(iv) ...

(v) ...

(vi) . . .
 (vii) . . .
 (viii) . . .
 (ix) otherwise regulating his conduct in any such particular as may be prescribed or specified;

(f) ~~shall~~ enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions;

and make provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act."

Now, before referring to the Foreigners Order enacted in exercise of the powers contained in s. 3 of the Act it is relevant to point out that from s. 3 above the object of the Act appears to be to provide for prescribing, regulating and restricting amongst other things the presence and continued presence of a foreigner in India. What appears to have been intended is to confer power on the executive authority to prescribe and specify conditions for continuance of a foreigner in India. Extremely wide kind of or unlimited restrictions and prohibitions and regulations can be validly prescribed and specified. The Legislature intended to give widest possible powers to the Government for obvious reasons.

A foreigner is not entitled to any guarantees or fundamental rights as a citizen is entitled to under the Constitution. A foreigner can be dangerous to security of India, his presence may be undesirable for security of India. His presence may be undesirable for any reason of any kind, and it appears to have been intended by the Legislature to leave the whole matter of the foreigner's presence in India to the executive discretion of the Government. The provisions as contained in s. 3 make this object of the Act abundantly clear. The last words in sub-s. (2) of s. 3 of the Act show the wide character of the powers intended to be conferred on the Government. The power is given to make provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters which may be deemed expedient or necessary by the Government for giving effect to the Act. I have accordingly no doubt that under the several items mentioned in sub-s. (2) of s. 3 there is wide power vested in the Central Government including the power to direct a foreigner in connection with his residence in India to report every day to the police authority as mentioned in cl. (a) of the impugned order. It is not as if there is no jurisdiction under the Act to make such an order. Even if I come to the conclusion that there was under cl. 11 of the Foreigners Order referred to in the impugned order no power in the respondent to direct the petitioners to report every day to the police authority I would be justified in holding that such power was intended to be conferred on the Central Government and that if not under cl. 11 such power was otherwise also vested and I should not, having regard to the antecedents of the petitioner, be justified in giving him the relief which he wants by way of writ.

The relevant part of cl. 11 of the Foreigners Order runs as under:

"11. Powers to impose restrictions on movements etc.:—The civil authority may, by order in writing, direct that any foreigner shall comply with such conditions as may be specified in the order in respect of:—

- (1) his place of residence;
- (2) his movements;
- (3) . . .
- (4) . . ."

Mr. Buch has contended that I must give effect to the marginal note and/or the heading of this clause and also to the word "movements" as used in cl. 11. He says that the word "restrictions" has been used in the marginal note in the same sense as the same has been used in the Act in s. 3(2)(e),(ii). He says

that the word "restrictions" imports directions of a negative character and not of a positive character such as to report to the police authorities as contained in the impugned order. Mr. Kantawala for the respondent has contended that the provisions of cl. 11 are clear, and that I should not at all look to the marginal note or the heading of that clause for the meaning of the word "movements" as used in sub-cl. (2) of cl. 11. He has pointed out by referring to Murray's Oxford Dictionary the meaning of the word "movement" [as mentioned in the 2nd column of page 728 of Vol. 6 in Murray's English dictionary] under sub-heading (d) where it is stated as follows: "Chiefly pl.: Actions, activities, doings of a person or body of persons". He has contended that having regard to this meaning of the word "movements" and having regard to the object of the Act as already mentioned by me above the true meaning of cl. 11 (2) of the Foreigners Order is that the civil authorities can place any conditions on "actions, activities or doings" of a foreigner. He has contended that the reporting to the police authority is directly a condition on the actions or activities or doings of the petitioner and, therefore, the respondent had jurisdiction to make the impugned order.

In my view it is important to bear in mind that the word used is plural, viz. "movements" and not "movement". Conditions which relate to movements, i.e., activities of a foreigner may be specified in an order made under cl. 11(2). The condition to report to the Inspector of Police relates to activity of the petitioner. It is not something foreign to activity of the petitioner. I do not accept the contention of Mr. Buch that a condition relating to movements must be with reference to the movements of a foreigner from one place to another. General conditions as to activities or a particular condition with reference to any activity of a foreigner would be justifiable under the provisions of cl. 11. I must admit that I have come to this construction with certain hesitation. But having regard to the general scheme of the Act and the object as aforesaid of the Act, I must give the widest possible meaning to the cl. 11 in the Foreigners Order and hold that the same is intended to empower the civil authorities to take action of the kind contained in the impugned order. It is for this reason that I have given general meaning to the word "movements" and come to the conclusion that the respondent had jurisdiction to make the impugned order and was justified in imposing the condition as contained in cl. (a) of the impugned order. I do not agree that the condition imposed must be negative and cannot be of positive kind.

Having regard to my aforesaid finding, the petitioner is not entitled to any relief. The petition is dismissed with costs. Rule discharged.

Rule discharged.

Solicitors for the respondent: *Little & Co.*

Before Mr. Justice Mody.

MESSRS BRINDALAL v. MESSRS GOKAL AND HOFFMAN LTD.*

Court-fees Act (VII of 1870), Sec. 6(1)—Government of India Act, 1935 [25 & 26 Geo. V; Ch. 42], Secs. 292, 100(3); Seventh Schedule, List II, Item 1—Constitution of India, arts. 327(1), 248(3), 266; Seventh Schedule, List II, Items 3, 66—Court-fee paid on plaint filed in Court at Delhi—Plaint after its return by Delhi Court presented in Bombay High Court—Whether fresh Court-fee payable in Bombay Court in respect of plaint.

The provision in s. 6(1) of the Court-fees Act, 1870, about payment of Court-fees mean payment to the Government of the State within which State the particular Court in which the Court-fee is payable is situated.

The United Provinces v. Atiq Begum,¹ referred to.

*Decided, December 4, 1953. O.C.J. Delhi 1 [1940] F.O.R. 110.
Revenue Case No. 393D of 1955.

THE facts appear in the judgment.

Miss H. P. Shamdasani, for the plaintiffs.

H. M. Seervai, Advocate General, for the State of Bombay.

MODY J. The point for consideration concerns court-fees. This plaint was presented to the Prothonotary of this Court. The plaint has been made out on papers which bear court-fee stamps of the aggregate value of Rs. 2,360. These court-fee stamps bear the imprint thereon "Delhi". This plaint was originally filed in the Court of the Senior Subordinate Judge, Delhi, and after certain proceedings in Delhi the same was returned to the plaintiffs for being presented to the proper Court on the ground that that Court had no jurisdiction to entertain and try the suit. Under those circumstances, this plaint was thereafter presented in the office of the Prothonotary and the office raised a contention that the plaint could not be accepted and filed in this Court unless proper court-fees had been paid to the office which payment would be made to the office on behalf of the State of Bombay. The only question for determination, therefore, is whether, even on the assumption that the amount of the court-fees paid by way of court-fee stamps to the Delhi Court was the proper amount, such payment is a sufficient compliance with the requirements of the Court-fees Act, 1870. As this point concerned the revenues of the State of Bombay, I desired that notice should be given to the State of Bombay. Such notice has been given and the Advocate General has appeared and argued on behalf of the State of Bombay and Miss Shamdasani has appeared and argued on behalf of the plaintiffs.

The relevant provisions are contained in the Court-fees Act, 1870. Section 6 provides:

"No document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, . . . unless in respect of such document there has been paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document".

It cannot be disputed that a proper court-fee has to be paid in respect of this plaint which is sought to be filed in this Court. The only question is as to what is the meaning when the said s. 6(1) provides that no document shall be filed unless in respect of such document a proper fee has been paid. The question is, paid to whom? Miss Shamdasani contended that there is but one Court-fees Act prevailing in the whole of India, and that once the proper amount of court-fee has been paid in a Court in any part of India, the requirement of the Court-fees Act has been complied with and no fresh court-fee is payable even if the plaint is presented in a Court in another State in India. On the other hand, the Advocate General contended that although the Court-fees Act, 1870, was originally an Act of the Central Government, the same must, since the Government of India Act, 1935, came into force, be deemed to have continued in operation as an Act of the various Provinces of India and later of the various States in India and that, therefore, court-fee is now payable to the State wherein the Court in which the plaint is sought to be filed is situated. He contends that, therefore, on this plaint which is now sought to be filed in this Court, court-fee must be paid into this Court on behalf of the State of Bombay before the same can be filed here.

Originally the Court-fees Act was an Act of the Central Government and, therefore, the court-fee was payable to the Central Government. If there was any provision in any Act which was in force before the Government of India Act, 1935, came into operation which required or authorised that court-fee should be paid otherwise than to the Central Government then of course court-fee could have been paid in accordance with the provisions of such Act. I am, however, not concerned with the position that prevailed before the Government of India Act, 1935, came into operation. The Government of India Act, 1935,

or at least the provisions thereof which are material to this case came into operation in 1937 and it is sufficient for me to consider what was the position that ensued thereupon.

Section 292 of the Government of India Act, 1935, provided as follows:

"Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

The Court-fees Act, 1870, was a law in force in British India immediately before the commencement of Part III of the Government of India Act, 1935, and, therefore, by reason of the said provisions of the said s. 292 it continued to be in force in British India. Now, under the Government of India Act, 1935, legislation could be either of the Centre or of a Province and the question arises whether the Court-fees Act, which was originally a Central Act, continued to be in force under the provisions of the said s. 292 as a Central Act or was it to be deemed to have continued in force as a Provincial Act passed by the Provincial Legislatures of the respective Provinces.

Now, the said s. 292 provided that the existing legislation, which in this case was the Court-fees Act, was to continue in force in British India until altered or repealed or amended by a competent Legislature and, therefore, one must find out which was the competent Legislature which was entitled to so alter, repeal or amend the Court-fees Act. The relevant provision is contained in s. 100 of that Act. Under sub-s. (1) of the said s. 100 the Federal Legislature has been given the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to that Act and it has been made clear that in respect of those matters a Provincial Legislature has no such power. Sub-section (2) of that section provides that subject to the provisions of sub-s. (1) a Provincial Legislature also has power to make laws with respect to any of the matters enumerated in List III in the said Schedule and sub-s. (3) of that section provides that the Federal Legislature has not the power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule. The appropriate item about court-fees was item No. 1 in List II in the Seventh Schedule and that item included fees to be taken in all Courts except the Federal Court. Therefore, the Legislature competent to legislate in connection with court-fees was a Provincial Legislature and not the Federal or Central Legislature because of the provisions of sub-s. (3) of s. 100. "Court-fees" was very clearly within the exclusive legislative powers of a Provincial Legislature after the coming into operation of the Government of India Act, 1935, and the Federal Legislature did not have any such power. It is quite clear that it was a Provincial Legislature alone which could alter, repeal or amend the Court-fees Act after the coming into operation of the Government of India Act, 1935. The provision as regards the powers of a competent Legislature to alter, repeal or amend an existing Act contained in s. 292 was considered by the Federal Court in *The United Provinces v. Atiq Begum*,¹ and it was held that s. 292 did not prevent the appropriate Legislature, which was in that case the Provincial Legislature, from giving even retrospective effect to legislation passed by it. Therefore, there are two significant facts to be observed about the effect of the Government of India Act, 1935, upon the Court-fees Act. The first is that since the enactment of the Government of India Act, 1935, as the subject of Court-fees fell within the said List II, the Provincial Legislatures alone had and the Central Legislature did not have the power to legislate in respect of court-fees, and the second is that the Provincial Legislature had the power to alter, repeal or amend the Court-fees Act, 1870, which included the power to do so with retrospective effect. It is, therefore, clear that although originally the Court-fees

Act was a Central Act, since the coming into operation of the Government of India Act, 1935, it ceased to have the essential characteristics of a central legislation and complete plenary powers of legislation, including the power to legislate retrospectively, with regard to Court-fees vested in the Provincial Legislatures. Therefore, since the date of the coming into operation of the Government of India Act, 1935, the Court-fees Act must be deemed to have continued to be in operation in the various Provinces of India as a Provincial Act passed by the appropriate Provincial Legislature and not as a Central Act because the Provincial Legislature alone had the power to legislate in respect of Court-fees.

The next position is the one arising under the Constitution of India after the same came into operation. So far as the question under consideration is concerned, art. 372(1) provides that notwithstanding the repeal by the Constitution of the Government of India Act, 1935, all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. This provision in the said art. 372(1) is, for the purposes of the present consideration, identical with that of s. 292 of the Government of India Act, 1935, and the Court-fees Act which, because of the reasons already stated, must be deemed to have been a Provincial Act before the coming into operation of the Constitution has, because of the said provisions of art. 372, continued in force as Legislation passed by the appropriate State Legislatures. As the Court-fees Act cannot be deemed to have continuing as a Central Act when the Constitution came into operation it cannot, after the coming into operation of the Constitution, be considered to be an Act of the Union of India. What is more, under art. 246(3) the Legislature of a State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule to the Constitution, and item No. 3 of the said List II includes fees taken in all Courts except the Supreme Court. The position, therefore, is the same as that under the Government of India Act, 1935, and it is the State Legislature alone which has the exclusive power to legislate in respect of court-fees payable in that particular State. Article 266 of the Constitution provides that all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State." It is clear, therefore, that court-fees in respect of which the State Government has the exclusive power to legislate under the Constitution would form part of the Consolidated Fund of the State which is to be deemed to have passed the Court-fees Act for that particular State and which levies and recovers the court-fees. It is, therefore, clear that the provision in s. 6 of the Court-fees Act about payment of court-fees must mean payment to the Government of the State within which State the particular Court in which the court-fee is payable is situated. That payment of court-fee is to be made to the appropriate State is also clear because of another reason. Since the coming into operation of the Government of India Act, the Provincial Legislatures, and since the coming into operation of the Constitution the State Legislatures have the power to alter and amend the Court-fees Act, 1870. The various Provinces or States may, in exercise of that power, increase or decrease the rates of court-fees as leviable within that province or State and the court-fee payable in respect of the same item may vary from province to province and State to State. In such a state of affairs, the adequacy of the amount of court-fee payable in a particular State must be judged in accordance with the Court-fees Act as amended and applicable in the particular State. Moreover, under the Court-fees Act, 1870, even without reading therein the amendments made by any of the Provinces or States, there are provisions for the refund of Court-fees paid, e.g. when a decree is obtained by consent of parties before

issues are framed in the suit. Let me now consider what would be the effect if such a contingency were to arise in the present case. Court-fee has been paid in the Delhi Court, and if none was payable in Bombay and if occasion hereafter arises for refunding any part of the court-fee paid by the plaintiffs in this case, it would be this Court which would make the necessary order and thereupon how can the State of Bombay make any refund when the court-fee was initially paid not in Bombay but in Delhi? This again shows that the court-fee is payable to the State in whose territory the Court where the court-fee is payable is situated, and that the reason for the same is that the Court-fees Act is a legislation of that State and the revenue derived thereunder is to form part of the Consolidated Fund of that State.

Miss Shamdasani, the learned counsel for the plaintiffs, at one stage contended that court-fees do not fall within List II of the Seventh Schedule to the Constitution. She argued that undoubtedly court-fees in Courts other than the Supreme Court would fall under item No. 3 of List II. She pointed out that item No. 66 of the said List II provides for fees in respect of any of the matters in that List but excludes therefrom fees taken in any Court. Her argument was that the words "but not including fees taken in any Court" occurring in the said item No. 66 make court-fees an exception not only to the provision contained in the preceding part of the said item No. 66 but also to the provision about court-fees contained in the said item No. 3. In my opinion this is a clumsy way of correlating the said two items 66 and 3 in List II. The provisions of the said two articles are quite simple, clear and logical. Item No. 3 of List II specifically mentions "fees taken in all courts except the Supreme Court." The first part of item No. 66 reads "Fees in respect of any of the matters in this List" and is a general provision providing for fees in respect of the various matters mentioned in the various items in that List. Now, if item No. 66 merely mentioned "fees in respect of any of the matters in this List" it would have necessarily included fees in respect of matters mentioned in item No. 3. But item No. 3, unlike the various other items in that List, itself provides for fees taken in all Courts except the Supreme Court. Therefore, in order to avoid confusion and in order to avoid provision being made for fees taken in Courts at two places—one specifically under item No. 3 and the other generally under item No. 66—fees taken in Courts were specifically excepted from the general item being item No. 66 because the same had already been provided for specifically under item No. 3. Even on a simple reading of the said two items that appears to be the clear meaning and, therefore, there is no reason to read or construe the second part of item No. 66, as contended for by Miss Shamdasani.

Under the circumstances, I hold that before this plaint can be filed in this Court the plaintiffs are bound to pay the proper amount of court-fee in this Court on behalf of the State of Bombay.

Miss Shamdasani asks for some time being given to the plaintiffs for payment of the necessary court-fees here. I, therefore, direct that the plaintiffs may be given time to pay the necessary court-fees up to December 18, 1958.

Solicitors for the State: *Little & Co.*

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Mody.

UMER SAHEB BURA SAHEB INAMDAR v. STATE.*

Criminal Procedure Code (Act V of 1898), Secs. 222(2), 234, 233, 537, 530—Charge framed contravening proviso to s. 222(2)—Whether such contravention cured by s. 537—Trial held on such charge whether vitiated.

A charge framed relating to criminal breach of trust or dishonest misappropriation of money and which covers a period exceeding one year between which the offence is alleged to have been committed and thereby contravenes the proviso to s. 222(2) of the Criminal Procedure Code, 1898, is an illegal charge and a trial held on such a charge is vitiated.

An infringement of a provision as to the manner of a trial cannot be cured by s. 537 of the Criminal Procedure Code, 1898, but an infringement of a provision which prescribes even mandatorily a matter relating to the conduct of a trial can be cured by s. 537 of the Code, if there be no prejudice caused to the accused. The proviso to s. 222(2) of the Criminal Procedure Code, 1898, relates to the manner in which the trial is to be held, and if there is an infringement of its provisions, the infringement cannot be cured by s. 537 of the Code.

Subrahmanya Ayyar v. King-Emperor,¹ applied.

Abdul Rahman v. The King-Emperor,² *Palakuri Kotayya v. King-Emperor*,³ *Willie (William) Slaney v. State of M. P.*,⁴ *Emperor v. Nurmahomed Kadarbhai*⁵ and *Emperor v. Munshi Lal*,⁶ referred to.

IN December 1941 a co-operative society was floated in the name of "The Nandurbar Agricultural Co-operative Purchases and Sales Union, Ltd.," which will be referred to hereafter as "the Society". The Society consisted of fifteen founder-members. These founder-members decided to adopt the model bye-laws contained in a leaflet issued by the Co-operative Department of the Government of Bombay. The Society was registered on February 9, 1942, with an authorised share capital of Rs. 25,000. The shares were of the face value of Rs. 5 each. For becoming a member of the Society, an agriculturist residing within the limits of the Nandurbar, Navapur and Taloda talukas had to purchase at least two shares, and a non-agriculturist could become a member by purchasing a minimum of five shares. The bye-laws provided that the affairs of the Society were to be conducted by a managing committee consisting of 11 persons, some of whom were to be elected and the remaining nominated. One of the members of the managing committee was a nominee of the Bombay Provincial Co-operative Bank Ltd. The Chairman of the managing committee was to be elected annually at its first meeting. The day-to-day administration of the Society was to be under the supervision of a "Shop Manager" to whom was given the assistance of other paid staff. The shop manager was responsible for the cash of the Society, and to write the account books and the minutes of proceedings of the managing committee and the general body meetings and also to remain in charge of the property belonging to and pledged with the Society. Regulations were framed concerning the granting of loans to the members of the Society and they were contained in bye-laws Nos. 48 and 49. Under bye-law No. 48 a loan not exceeding Rs. 50 could be advanced to a member for "crop finance" under certain conditions. Bye-law No. 49 permitted advances against the pledge of agricultural produce to agriculturist-

*Decided, February 10/11, 1959. Criminal Appeal No. 1023 of 1958 (with Criminal Appeals Nos. 1048 and 1049 of 1958), against the order of conviction and sentence passed by C.A. Phadkar, Assistant Sessions Judge, West Khandesh, Dhulia, in Sessions Case No. 23 of 1958.

1 (1901) I. L. R. 25 Mad. 61, P.C., s.c. 3

Bom. L. R. 540.

2 (1926) L.R. 54 I. A. 96, s.c. 29 Bom. L.R. 813.

3 (1947) L. R. 74 I. A. 65, s.c. 49 Bom. L.R. 508.

4 [1956] S.C.J. 182.

5 (1930) 83 Bom. L. R. 1279.

6 [1948] All. 80.

members of the Society not exceeding 70 per cent. of the market value of the produce specifically given in possession of the Society. The advances were not to be given for a period exceeding six months, and if the advances were not repaid within the period of six months, the shop manager had to take steps for recovery of the arrears. It was expressly provided by bye-law No. 49 that the loans were to be advanced only to agriculturist-members of the Society on the security of the agricultural produce which was to be given by them in the possession of the Society and that the loans were not to be advanced on the security of goods purchased by a member for doing business. If any loss was suffered in the recovery of loans advanced by the Society, the shop manager was personally responsible if he was found negligent.

Umer Saheb and Jayaram (accused Nos. 1 and 2) were the original founder-members of the Society. Accused No. 1 was a prominent resident of West Khandesh district and took an important part in the propagation of the Co-operative Movement in the district. For many years he was an Honorary District Organiser of the Co-operative Movement and also the Registrar's nominee. For some years he was the chairman of the advisory body of the Bombay State Co-operative Bank. He was also a forest contractor and took forest contracts in his own name. He was also engaged in the business of taking contracts from the Public Works Department. He and his sons were also interested in motor transport business. He became a founder-member of the Society by taking five shares in his name, and from the inception he was the Chairman of the managing committee and continued to remain so till March 20, 1949. Accused No. 2 was also a founder-member of the Society and held two shares. He was a member of the managing committee from its inception till August 20, 1952. He became the Chairman of the managing committee on April 14, 1949, and continued to remain so till he resigned that office on January 17, 1952. Accused No. 2 also was carrying on the business of a forest contractor. Ramrao (accused No. 3) was the shop manager of the Society between the years 1942 and 1945 and between July 1, 1948, and April 2, 1950. On April 2, 1950, he was relieved by the Society of his office as the shop manager, his resignation having been accepted on February 6, 1949. One Shreenath Devkrishna Tipari was the accountant and cashier working under accused No. 3; and on April 2, 1950, when accused No. 3 was relieved of his office as shop manager, Tipari was promoted to the office of shop manager. Sayyad (accused No. 4) was admitted to the membership of the Society in July 1945, when he purchased two shares. He was a forest contractor and a timber merchant, and was one of the three partners of a firm which carried on business in timber under the name and style of "Sayyad Hamid Hussein Mir Masud Alimiya and Company." Iqbal, son of accused No. 4, was interested in a motor transport undertaking. Even though accused No. 4 was personally a member of the Society, the firm of which he was a partner did not become a member of the Society.

Between March 6, 1949, and June 30, 1950, many advances were made to accused No. 4 which aggregated to Rs. 2,16,810. Out of this amount, Rs. 28,150 were advanced during the time when accused No. 1 was the chairman of the managing committee of the Society; Rs. 2,875 were advanced after accused No. 1 submitted his resignation of the office of Chairman but before accused No. 2 was elected Chairman; and the balance of Rs. 1,85,785 was advanced during the tenure of office of accused No. 2. Out of the amount of Rs. 2,16,810, Rs. 1,98,310 were advanced when accused No. 3 was the shop manager and the balance of Rs. 18,500 was advanced when Tipari was the shop manager.

The four accused were, on a complaint filed by the Co-operative Department of the State of Bombay, charged with having committed offences under ss. 120B, 406, 408, 467, 477A and 109 of the Indian Penal Code. It was the case for the prosecution that all the four accused in collaboration with Shreenath Tipari (who was granted pardon and examined as an approver at the trial) entered into a criminal conspiracy with the intention of defrauding the Society.

The object of the conspiracy, according to the prosecution, was to make wrongful and unauthorised use of the funds of the Society for the benefit of the partnership of which accused No. 4 was a partner and also to benefit the four accused dishonestly and wrongfully by creating an appearance that the funds were borrowed for the benefit of the partnership of accused No. 4. The advances, according to the prosecution, were made in violation of the law and in contravention of the bye-laws of the Society which prescribed the mode in which the funds of the Society were to be dealt with and advanced. According to the prosecution, the first three accused had dominion over and were entrusted with the funds of the Society at the relevant time, the first two accused in their capacity as Chairman and the third accused in his capacity as the shop manager of the Society, and when the three accused were so entrusted with and had dominion over the funds of the Society, advances were made by them from time to time to the firm of which accused No. 4 was a partner, and these advances were made in contravention of the bye-laws of the Society in that the partnership not being a member of the Society no advances could be made and the advances were made against security of property which did not in fact exist and in any event the advances were made on the security of timber contrary to the bye-laws. It was further the case for the prosecution that accused No. 4 executed promissory notes acknowledging receipt of the monies alleged to have been advanced to him, but the promissory notes were not executed by him at the time when the advances were made but on dates long after the advances and that some of the promissory notes even did not bear the signature of accused No. 4 for a long time, and all this was done because accused No. 1 was a relative of accused No. 4 and was intimately associated with him in the dealings and business of accused No. 4. It was again the case for the prosecution that some of the advances made by the Society to the firm of which accused No. 4 was a partner during the period between March 1949 and June 1950 were in fact made to the first three accused and not to accused No. 4, and these amounts were received by the first three accused and were utilised by them towards payment of instalments due under a forest contract taken by accused No. 1, for purchasing a house by accused No. 2 and for meeting the household expenses of the father of accused No. 3; and satisfaction in part of the outstanding amount under a hypothecation *khata* of the firm of accused No. 4 was made by the first three accused from out of their own funds either by tendering the amount in cash or by endorsing cheques in favour of the Society or by instructing adjustment entries in the account books. It was also the case for the prosecution that the first three accused had wilfully kept the members of the managing committee of the Society in the dark about the Society's dealings with the firm of accused No. 4, and in particular by not keeping the subject on the agenda of the meetings, by not offering opportunity to the members to discuss the same, by making interpolations in the proceedings book by making entries therein about the transactions subsequently and by misrepresenting that the timber of the firm of accused No. 4 was hypothecated with the Society. It was further the case for the prosecution that even though accused No. 1 had ostensibly retired from the membership and the chairmanship of the managing committee of the Society, he used to attend the meetings of the managing committee of the Society and take a prominent part in the conduct of the affairs of the Society, and he was looked upon by the members of the Society and the officers of the Bombay Provincial Co-operative Bank and of the Co-operative Department as representing the Society and also as a spokesman on behalf of the firm of which accused No. 4 was a partner. It was also the case for the prosecution that at the instance of the first two accused, accused No. 3 or Tipari had wilfully falsified the cash book of the Society on or about November 20, 1950, by falsely showing a credit of Rs. 8,000 in the hypothecation *khata* of the firm of accused No. 4 when no such amount was in fact received from the firm of accused No. 4, and that accused Nos. 1, 2 and 3 had forged

or abetted the forging of two receipts, dated November 21, 1950, to show dishonestly a credit of Rs. 8,000 in the hypothecation *khata* of the firm of accused No. 4 with the object of covering up a fictitious transaction relating to the purchase of two motor trucks by the Society.

All the four accused denied having committed the offences charged against them. Accused No. 4 stated that he himself and for his own purposes borrowed the monies from the Society and that he was responsible for repayment of the same. Accused Nos. 1, 2 and 3 denied the charges of conspiracy and misappropriation of the funds of the Society and also of fabrication of the accounts and the receipts in respect of the amount of Rs. 8,000.

The Assistant Sessions Judge convicted all the four accused of the charges relating to conspiracy and criminal breach of trust. He, however, acquitted the accused in respect of the charges under ss. 477A and 467 of the Indian Penal Code. Against the order of conviction and sentence the present appeals were preferred to the High Court.

A. A. Peerbhoy, with V. J. Desai, for accused No. 1.
A. A. Peerbhoy, with A. A. Bhojani, for accused No. 4.
G. N. Vaidya, with B. B. Naik, for accused No. 3.
Y. V. Chandrachud, Government Pleader, for the State.

SHAH J. [His Lordship after stating the facts of the case, proceeded.] It is urged that the second head of the charge infringed the express provision contained in the proviso to s. 222(2) of the Code of Criminal Procedure, and on that account the trial held before the Court of Session was illegal. Originally the charge related to a period between March 6, 1949, and March 31, 1951. It appears that the attention of the learned trial Judge was invited on June 2, 1958, to the fact that after June 30, 1950, no advances were made to accused No. 4 or to his firm and, therefore, the charge should have been restricted to a period between March 6, 1949, and June 30, 1950. The learned Judge then amended the charge by striking out the figures "31-3-1951" and substituting therefor the figures "30-6-1950" in the second head of the charge and proceeded with the trial. It appears that by that time a large number of witnesses were examined for the prosecution, but no objection was raised on behalf of the accused to the amendment of the charge because it was in substance a formal amendment. But it is urged that even after the amendment of the charge the period covered exceeded one year and that the charge therefore infringed s. 222 of the Code of Criminal Procedure.

Section 222(1) of the Code of Criminal Procedure provides that particulars as to time, place and person relating to the offence alleged are to be set out in the charge. By sub-s. (2) it is provided:

"When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234:

Provided that the time included between the first and the last of such dates shall not exceed one year."

This provision was incorporated for the first time when the Code of Criminal Procedure, 1898, was enacted. Under the Code of 1882 there was no provision similar to sub-s. (2) of s. 222, and in cases where there was a charge of criminal misappropriation or criminal breach of trust it was necessary to frame a distinct charge in respect of each item of money misappropriated, and a charge specifying an aggregate sum alleged to have been misappropriated when the sum misappropriated consisted of separate items misappropriated on different occasions was held by some Courts to be illegal. The Legislature then intervened and enacted sub-s. (2) whereby a charge against an accused

person for the offence of criminal breach of trust or dishonest misappropriation of money specifying the gross sum in respect of which the offence was alleged to have been committed, but not specifying the particular items or the exact dates on which the amounts were misappropriated fulfilled the requirements of s. 222(1). But the Legislature by the proviso to sub-s. (2) provided that the period between the first and the last dates shall not exceed one year. For the purpose of s. 234 of the Code of Criminal Procedure, a charge in respect of a gross sum is to be regarded as a charge of one offence. Section 234 by the first sub-section enables the Court to try a person accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, where the offences do not exceed three in number. Evidently in this case the period for which the charge was framed originally by the learned Judge and even after it was amended covered a period exceeding one year, and *prima facie* the charge contravened s. 222(2) of the Code of Criminal Procedure.

In *Subrahmanya Ayyar v. King-Emperor*¹, their Lordships of the Privy Council held that an indictment which contravened the provisions of ss. 233 and 234 of the Code of Criminal Procedure and which did not fall within the provisions of s. 235(1) of the Code was bad and the trial held on such a charge was illegal. The Judicial Committee held that the trial Court having disregarded an express provision of law as to the mode of trial, it was not merely an irregularity such as could be remedied by s. 537 of the Code of Criminal Procedure, and, therefore, the conviction should be set aside. In that case, there were 41 charges against the accused for extortion and bribery extending over a period of two years. This, the Lord Chancellor stated, was

"...plainly in contravention of the Code of Criminal Procedure, section 234, which provided that a person may only be tried for three offences of the same kind if committed within a period of twelve months". (p. 96)

It was observed by their Lordships that the defect in the trial was not cured by s. 537 of the Code of Criminal Procedure. Their Lordships observed (p. 97):

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment..."

The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity."

This view was taken by their Lordships of the Privy Council on the terms of s. 537 of the Code of Criminal Procedure before that section was amended by Act XXVI of 1955. As we will presently point out, the amendment has made no substantial difference except on one matter to which we will advert.

Under cl. (a) of s. 537 of the Code of Criminal Procedure, as it stood before the amendment by Act XXVI of 1955, no finding, sentence, or order passed by a Court of competent jurisdiction was liable to be reversed or altered under Chapter XXVII or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Code. But their Lordships held that the disobedience of an express provision as to a *mode of trial* was not a mere irregularity but it amounted to an illegality in trying the case, and that a trial of an accused person in a manner contrary to an express provision made in the Code did not come within the description of error, omission or irregularity

within the meaning of s. 537 of the Code of Criminal Procedure. In that case, it is evident that contrary to the provision of s. 234 of the Code there were as many as 41 charges and those 41 charges were spread over a period exceeding one year, and their Lordships held that the trial which contravened the provision of s. 234 was vitiated by an illegality and as the trial "was prohibited in the mode in which it was conducted" the conviction should be set aside. By parity of reasoning, in this case also it must be held that when the trial was prohibited in the mode in which it was conducted in the Court below, viz., by framing a charge in respect of a period exceeding one year, the conviction recorded at the trial must be set aside.

But the learned Government Pleader urged before us that since the judgment in *Subrahmania Ayyar's* case was delivered the Privy Council itself has taken a different view as to the true effect of the mandatory provisions contained in the Code of Criminal Procedure, and this Court may not be justified in extending the rule in *Subrahmania Ayyar's* case to cases not governed by s. 234 of the Code; and our attention was invited to two subsequent judgments of their Lordships of the Privy Council. In *Abdul Rahman v. The King Emperor*,² the contravention which was relied upon was the non-reading of depositions of witnesses, in the presence of the accused and his pleader. It was held by the High Court at Rangoon that the failure to read the depositions of the witnesses examined at the trial in the presence of the accused and his pleader amounted to an irregularity within the meaning of s. 537 of the Code of Criminal Procedure, and that as no failure of justice was occasioned s. 537 saved the conviction from challenge. Their Lordships of the Privy Council observed in dealing with the question whether there was compliance with the terms of s. 360 of the Code of Criminal Procedure (p. 107):

"....it is dangerous in cases of criminal law to accept equivalents, and except in cases where reading over to the witness would be absurd, as, for example, with a stone deaf person, the provision should be complied with."

They then considered whether the non-compliance vitiated the trial. After a consideration of the case law and the statutory provisions, they observed that the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, was not enough to warrant the quashing of a conviction, which in the view of the Judicial Committee may be supported by the curative provisions of ss. 535 and 537 of the Code. This case is evidently an authority for the proposition that a breach of every mandatory provision does not render the trial of an accused person illegal, however regrettable it may appear that the breach should have occurred.

These two cases were considered in a subsequent judgment reported in *Pulukuri Kotayya v. King-Emperor*.³ Sir John Beaumont in delivering the judgment of the Judicial Committee observed (p. 75):

"...When a trial is conducted in a manner different from that prescribed by the Code (as in *N. A. Subramania Iyer's* case), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under s. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code."

In that case there had been a breach of the proviso to s. 162 of the Code of Criminal Procedure, in that the accused were not supplied with copies of the statements of witnesses made before the police to enable the counsel for the accused to cross-examine the witnesses, and when the same were supplied at a late stage they were not of much use. It is clear from the judgment in *Pulukuri Kotayya's* case that there is a clear distinction between provisions which prescribe

² (1926) L. R. 54 I. A. 96, s.c. 29 Bom. L. R. 813.

³ (1947) L. R. 74 I. A. 65, s.c. 49 Bom. L. R. 508.

the manner of a trial and provisions which provide for the conduct of the trial. An infringement of a provision as to the manner of a trial cannot be cured by s. 537 of the Code of Criminal Procedure, but an infringement of a provision which prescribes even mandatorily a matter relating to the conduct of a trial can be cured by s. 537, if there be no prejudice caused to the accused. In the present case, it cannot be said that s. 222(2), proviso, relates merely to the conduct of the trial. In our judgment, it is one relating to the manner in which the trial is to be held, and when there is an infringement of a provision which prescribes the manner of the trial, such an infringement cannot be cured by s. 537 of the Code of Criminal Procedure, and in so holding we are amply supported by *Subrahmanya Iyer's case*.

Our attention was invited by the learned Government Pleader to certain observations made by their Lordships of the Supreme Court in *Willie (William) Slaney v. State of M.P.*⁴ In that case the accused was convicted of an offence of murder. At the trial, the appellant Slaney and another person were charged under s. 302 read with s. 34 of the Indian Penal Code. The trial Court acquitted the co-accused and, therefore, against Slaney s. 34 could not be called in aid. But the Court of First instance holding that the appellant had inflicted the fatal blow and was, therefore, directly responsible for the murder of the victim, convicted him of the offence of murder, even though no charge was expressly framed in that behalf. It was held by the Supreme Court that an omission to frame a separate charge in the alternative under s. 302 simpliciter was "a curable irregularity" if no prejudice was caused to the accused by the omission. Interrupting the narrative of the case, it may be observed that on the evidence before the Court a charge under s. 302 read with s. 34 of the Indian Penal Code, and, in the alternative, under s. 302 of the Indian Penal Code, against the accused could by the terms of s. 236 of the Criminal Procedure Code have been framed. But the charge framed was only under s. 302 read with s. 34 of the Indian Penal Code against Slaney and his co-accused; and it was on those facts that the Supreme Court held that even though there was no alternative charge against the accused under s. 302 simpliciter, that was an irregularity which was curable, no prejudice being caused to the accused, by the omission to frame the alternative charge. Mr. Justice Bose, who delivered the principal judgment of the Court, observed after referring to the judgment of their Lordships of the Privy Council in *Subrahmanya Iyer's case* and *Pulukuri Kotayya's case* (p. 186):

"We prefer this way of stating the law, for the distinction that was once sought to be drawn between an express prohibition and an equally express provision positively stated strikes us as unreal. The real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to substantial denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice'."

Referring to s. 537 of the Code of Criminal Procedure, Mr. Justice Bose observed that the true intent and purpose of s. 537(a) covered every proceeding taken with jurisdiction in the general phrase "or other proceedings under this Code", and it was for the Court in all such cases to determine whether there had been prejudice to the accused, and in doing so to bear in mind that some violations were so obviously opposed to natural justice and the true intentment of the Code that on the face of them and without anything else they must be struck down, while in other cases a closer examination of all the circumstances will be called for in order to discover whether the accused had been prejudiced. After entering upon a detailed analysis of the provisions of Chapter XLV of the Code and also the provisions relating to the framing of charges, Mr. Justice Bose observed (p. 194):

"...Broad vision is required, a nice balancing of rights of the State and the protection of society in general against protection from harassment to the individual and

the risks of unjust conviction. Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done, what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one."

His Lordship then held that in that case the conviction resulted in no prejudice to the accused, and on the evidence the conviction under s. 302 of the Indian Penal Code was justified. With that view, the learned acting Chief Justice agreed.

But Mr. Justice Chandrasekhara Iyer, with whom Mr. Justice Jagannadhas agreed, appeared to approach the case from a somewhat different angle. Their Lordships observed (p. 206):

"...The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted."

They then observed that (p. 206):

"...the provisions of section 535, [Criminal Procedure Code], would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged."

Their Lordships then observed (p. 208):

"...lack of competency of jurisdiction, absence of a complaint by the proper person or authority specified, want of sanction prescribed as a condition precedent for a prosecution, in short, defects that strike at the very root of jurisdiction stand on a separate footing, and the proceedings taken in disregard or disobedience would be illegal. The difficulty arises only when we have to consider the other provisions in the Code which regulate procedure and which are found in a mandatory form, positive or negative. It is in this class of cases that the distinction becomes important and material."

After referring to the provisions relating to the framing of a charge and the power to alter or add to the charge, it was observed that where there was no charge, it was for the Court to determine whether there was any failure of justice, but where there was a mere error or omission in the charge, the Court was also bound to have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. On that view, Mr. Justice Chandrasekhara Aiyar held that failure to frame a charge *per se* was not fatal, even though it was a grave defect which should be vigilantly guarded against.

Mr. Justice Imam expressed the view that (p. 208):

"...a total absence of a charge from start to finish in a case where the law requires a charge to be framed, is a contravention of the provisions of the Code as to the mode of trial and a conviction of the accused of an offence in such a case is invalid and the question of prejudice does not arise.... On the other hand, there may be cases where failure to frame a charge affects the mode of trial or it is such a substantial contravention of the provisions of the Code relating to the framing of charges that prejudice may be inferred at once and the conviction which was *prima facie* invalid continued to be so."

His Lordship, however, observed that where the contravention of a provision of the Code was substantial the Court should not treat what was an invalid trial as a valid trial by resorting to the provision of s. 535 of the Code, on the assumption that there had been no failure of justice. It appears that

Mr. Justice Imam was willing to accept the view which appealed to Mr. Justice Chandrasekhara Aiyar and Mr. Justice Jagannadhas.

The question which falls to be determined in these appeals is not the one which fell to be determined in *William Slaney's* case. That was a case in which even though on the evidence a charge could have been framed against the accused under s. 302 of the Indian Penal Code it was not so framed, and the prosecution proceeded to bring the accused to trial for an offence under s. 302 read with s. 84 of the Indian Penal Code, and the accused was ultimately convicted of the offence under s. 302. The Supreme Court held that no prejudice having resulted in consequence of the failure to frame an express charge under s. 302, Indian Penal Code, the trial was not vitiated. In the present case, however, we find that there has been a disregard of a mandatory provision in the Code of Criminal Procedure, which has been enacted with a view to avoid a possible hardship to the prosecution in being required to prosecute an accused person in respect of every individual misappropriation or criminal breach of trust. An exception has been engrafted by the Legislature upon what is supposed to be the normal rule: and, in our judgment, in order that the case may be brought within the exception, all the requirements prescribed by the Legislature to attract the exception should be strictly complied with. It will not be sufficient to say that there may not have been prejudice caused to the accused even if the requirements of the various components which go to make the exception effective have not been strictly complied with. In *Subrahmanya Iyer's* case the Privy Council held that failure strictly to comply with the terms of s. 234 of the Code of Criminal Procedure was not an error or omission or irregularity within the meaning of s. 537 of the Code; and if that view be correct, it is impossible to hold that a charge which is framed in flagrant violation of the terms of sub-s. (2) of s. 222 of the Code can still be regarded as resulting in a mere error, omission or irregularity.

The learned Government Pleader invited our attention to two other cases, one of the Bombay High Court and the other of the Allahabad High Court, in support of the contention that not every infringement of a mandatory provision of the Code of Criminal Procedure may vitiate a trial irrespective of the question whether there has been failure of justice occasioned thereby. These two cases are *Emperor v. Nurmahomed Kadarbhai*⁵ and *Emperor v. Munshi Lal*⁶. In *Nurmahomed's* case, the trial Court had used statements recorded by the investigating officer in a manner not justified by s. 162 of the Code of Criminal Procedure, and it was held by a division bench of this Court that the procedure merely resulted in an irregularity which had not occasioned a failure of justice and that irregularity was cured by s. 537 of the Code. It may at once be observed that the use of statements recorded under s. 162 of the Code of Criminal Procedure was (before the amendment of the Code) prohibited, except at the instance of the defence. But if contrary to the terms of s. 162 of the Code of Criminal Procedure evidence is brought on the record which is inadmissible, the Court is always entitled to ignore that evidence and to decide the case on the evidence which is admissible. Admission of evidence which in law is inadmissible does not affect the validity of the trial: it is not an infringement of a law which lays down the manner of a trial. *Nurmahomed's* case, therefore, does not justify the contention that every infringement of a mandatory provision contained in the Code of Criminal Procedure, especially a provision enacted in the form in which the proviso to s. 222(2) has been enacted, may be regarded as an irregularity which may be rectified by the provision of s. 537 of the Code.

In *Munshi Lal's* case, a trial which should have been held by the Magistrate as a summary trial was held in the manner of a regular trial. Under the Hoarding and Profiteering Prevention Ordinance, the trial of the accused who was arraigned for breach of that Ordinance, had to take place in the manner of a summary trial unless otherwise ordered by the District Magistrate, but

⁵ (1930) 32 Bom. L. R. 1279.

⁶ [1948] All. 90.

the accused did not raise any objection at the trial as to the form in which the evidence was recorded and it was held that the irregularity was cured by s. 537 of the Code. The only substantial difference between the procedure followed in a summary trial and the procedure followed in the case of an ordinary warrant trial is that in the former case the Magistrate is not obliged to maintain any record of the evidence, whereas in a regular trial he has to maintain a complete record of the evidence led before him. That, again, does not affect the manner of a trial prescribed by the Code. If in a summary trial the Magistrate for reasons of his own maintains a full and detailed record, he does not thereby act irregularly or illegally. It would then be difficult to hold that there was even an irregularity committed by the Court in maintaining a full record of the evidence when it was not bound to do so. We are, therefore, unable to hold that the principle of the case in *Emperor v. Munshi Lal* has any application to the facts of the present case.

Chapter XIX of the Code of Criminal Procedure deals with the form of charges and the joinder of charges. The charge in a criminal case where the statute prescribes that a charge "shall be framed" is the very foundation of the trial. It is true that a mere error or omission or irregularity in a charge, in the absence of any prejudice to the accused arising out of the error, omission or irregularity, may not justify a Court of appeal in setting aside the conviction otherwise duly recorded. But it cannot be said that every infringement of the provisions contained in Chapter XIX of the Code which are mandatorily framed amounts to an error, omission or irregularity within the meaning of s. 537. In s. 234 of the Code, which is an exception to s. 233, it is enacted that a person who is accused of more offences than one of the same kind committed within the space of twelve months may be charged with and tried at one trial; provided the number of offences does not exceed three. Even though in terms s. 222 is not made an exception to s. 233, by the incorporation of s. 234 in sub-s. (2) of s. 222 it must substantially be regarded as an exception to s. 233; and if a charge which contravenes s. 234 of the Code be regarded as illegal and the trial on such a charge is vitiated we fail to see any reason for holding that a contravention of the provisions of s. 222(2) is rectified by the curative provisions of s. 537.

Our attention was invited by the learned Government Pleader to the amendment which has been made in s. 537 of the Code by Act XXVI of 1955. It was urged that the earlier authorities must be regarded as superseded by the amendment made in s. 537. Under cl. (a) of s. 537 as it stood before the amendment, by reason of an error, omission or irregularity *inter alia* in a charge, a judgment of a Court of a competent jurisdiction was not liable to be reversed or altered in appeal or revision. By Act XXVI of 1955, the word "charge" was deleted from cl. (a) of s. 537 and a new cl. (b) was enacted as follows:

"(b) of any error, omission or irregularity in the charge, including any misjoinder of charges."

In substance, by the amendment it is provided that a misjoinder of charges is to be regarded merely as an irregularity and not an illegality. To that extent, the cases decided before the amendment may be regarded as superseded. But where a trial has been held on a charge which is vitiated not on account of misjoinder, but on the score of failure to comply with an express direction concerning the manner of holding the trial, the provisions of s. 537 will not be attracted thereto.

The learned Government Pleader also urges before us that s. 529 sets out the irregularities which do not vitiate the proceedings and s. 530 sets out the irregularities which vitiate the proceedings, and that it is not provided in s. 530 that an infringement of s. 222 (2) vitiates the proceedings in which it occurs. The learned Government Pleader, therefore, urges that the Legislature having failed expressly to provide that an infringement of the provisions of s. 222(2) is an irregularity which vitiates the proceeding, the Court would not be justified in holding that it has that effect. But a contravention of s. 234

of the Code is not one of the contraventions referred to in s. 530, and it was still held by the Privy Council that the contravention vitiated the trial. We are, therefore, unable to accept the argument of the learned Government Pleader based on s. 530 of the Code of Criminal Procedure.

It was also urged by the learned Government Pleader that the trial for the offence of conspiracy was severable from the trial for the offences under ss. 406 and 408 of the Indian Penal Code, and, therefore, this Court, notwithstanding the illegality committed in the trial for the offences under ss. 406 and 408 of the Indian Penal Code, can still maintain the conviction of the accused for the offence of conspiracy under s. 120B of the Indian Penal Code. We are again unable to accept that contention. The accused have been tried on a composite charge, and the charge of criminal conspiracy and the charge of criminal breach of trust are so inextricably connected with each other that it is impossible to separate the trial and hold that the trial in so far as the offence under s. 120B of the Indian Penal Code is concerned is not vitiated even though the trial for the offences under ss. 406 and 408 of the Indian Penal Code is vitiated.

[The rest of the judgment is not material to this report.]

Order of conviction set aside.

SUPREME COURT.

Present: Mr. Justice Syed Jaffer Imam, Mr. Justice S. K. Das
and Mr. Justice J. L. Kapur.

WAMAN SHRINIWAS KINI v. RATILAL BHAGWANDAS & CO.*

Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Secs. 15, 13(1)(e)—Indian Contract Act (IX of 1872), Sec. 23—Agreement between landlord and tenant permitting tenant to sub-let premises—Enforceability of such agreement—Waiver—Agreement to waive an illegality—Whether such agreement enforceable.

Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, expressly prohibits subletting and, therefore, a contract to the contrary cannot neutralise its prohibitory effect. Therefore, an agreement between a tenant and his landlord whereby the tenant was permitted to sub-let the premises is void under s. 15 of the Act and s. 23 of the Indian Contract Act, 1872, and is unenforceable.

The non-obstante clause in s. 15 of the Act means that even if any other law allowed subletting, e.g. s. 106 of the Transfer of Property Act, 1882, the subletting would, because of s. 15, be unlawful. This would apply to contracts also as all contracts would fall under the provisions of the law relating to contracts i.e. the Indian Contract Act.

P. D. Aswani v. Kavashah Dinshah and *Cooper v. Shrivastav Cambata*,* referred to.

An agreement to waive an illegality is void on grounds of public policy and is unenforceable.

Surajmull Nargoremull v. Triton Insurance Co.,* *Dhanukdhari Singh v. Nathima Sahu*,* *Botm makers, Ltd. v. Barnet Instruments, Ltd.*,* *Oscanyan v. W. R. Arms Co.*,* *Stackhouse v. Barnston*,* *Fairbairn v. Gilbert** and *Norwich Corporation v. Norwich Electric Tramways Company, Limited*,* referred to.

The facts appear in the judgment.

*Decided, February 16, 1959. Civil Appeal No. 647 of 1957.

1 (1953) 56 Bom. L.R. 467.

2 (1948) 50 Bom. L.R. 718.

3 (1924) L.R. 52 I.A. 126, 128, s.o. 27 Bom. L.R. 770.

4 (1907) 11 O.W.N. 848, 852.

5 [1945] 1 K.B. 65, 72.

6 (1881) 103 U.S. 261, 268; 26 L. Ed. 539.

7 (1805) 10 Ves. 453, 466; 32 E.R. 921.

8 (1787) 2 T.R. 171; 100 E.R. 91.

9 [1906] 2 K.B. 119, 124.

Purshottam Tricumdass, with *Rameshwar Nath* and *S. N. Andley*, for the appellant.

H. J. Umrigar, *Ratnaparkhi Anant Govind* and *W. P. Oka*, for the respondent.

KAPUR J. This is an appeal by special leave against the judgment of the High Court of Bombay confirming the order of ejectment passed by the Assistant Judge, Thana. The tenant who was the defendant in the suit is the appellant and the landlord who was the plaintiff is the respondent.

The facts giving rise to this litigation shortly stated are that the appellant was a tenant for about 20 years in the premises known as "Fida Ali Villa" in Kalyan. This building was purchased by the respondent who gave notice to the appellant to vacate, as he wanted to construct a new building on the site of the old building. The appellant agreed to vacate and the respondent let to him a portion of his new building which was not far from "Fida Ali Villa". The appellant had four sub-tenants, three of them also shifted to the new premises which were let to the appellant by the respondent. Although it was disputed, the Courts below have found that they occupied the same position *qua* the appellant. The fourth, a Bohri, was fixed up by the respondent in some other place. There was some dispute as to the date when these new premises were let to the appellant, the appellant alleging that they were let on July 1, 1948, and the respondent that they were let on June 1, 1948. The trial Court found that they were let on June 1, 1948. The terms of the lease are contained in a document dated June 7, 1948, which is a letter in Marathi written by the respondent to the appellant and contains the following term as to sub-tenancy:

"In the shops in the old chawl which are with you you have kept sub-tenants. We are permitting you to keep sub-tenants in the same manner, in this place also."

The parties were not agreed as to the correctness of the translation of this term. The submission of the appellant was that the word 'sub-tenant' should be in the plural and of the respondent that it should be in the singular, but whether it is in the singular or plural it does not make any difference to the principal argument advanced in this Court. On January 3, 1949, the respondent gave notice to the defendant to vacate the premises on the ground of non-payment of rent and sub-letting which it was alleged had resulted in the termination of the tenancy.

On April 20, 1949, the respondent brought a suit for ejectment on the ground of non-payment of rent and sub-letting of the premises. The defence of the appellant was that under the terms of the lease he had the right to sub-let the premises. As to the claim on the ground of non-payment of rent he deposited the arrears of rent in Court. The trial Court held that sub-letting was lawful in spite of s. 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bom. LVII of 1947). He also held that the appellant did not occupy the premises on the same terms and conditions on which he occupied the old premises in "Fida Ali Villa". He passed a decree for Rs. 445 on account of rent remaining due and dismissed the respondent's suit for ejectment. On appeal the Assistant Judge at Thana reversed the decree holding that s. 15 of the Act completely prohibited sub-letting and under s. 13(1)(e) of the Act the landlord had the right to evict the tenant on account of sub-letting. The appellant then went in revision to the High Court of Bombay, but it affirmed the order of ejectment. The appellant has come to this Court by special leave.

Counsel for the appellant urged that there was no new tenancy after the coming into force of the Act and therefore ss. 13(1)(e) and 15 of the Act did not apply; (2) that the tenant had not sub-let the premises to the sub-tenants and they were merely licensees of the landlord; (3) that no new sub-tenancy had been created; (4) that s. 15 was confined to 'any other law'; it did not apply to contracts between the landlord and tenant and, therefore, it did not preclude an agreement between the parties as to sub-letting; (5) that the parties were *in pari delicto* and, therefore, the plaintiff-respondent could not succeed. He also raised a new ground which had not been raised in the Courts

below or in the grounds of appeal or in the statement of case in this Court; that the respondent had waived his right in regard to the prohibition against sub-tenancy and the provision in s. 13(1)(c) was for the protection of his rights which he was entitled to waive.

The Courts below have held that the tenancy by the letter of June 7, 1948, was a new tenancy and not a continuation of the old and that the sub-tenants were tenants of the appellant and not licensees of the respondent and in this Court no serious argument was addressed on these points. The previous tenancy was of a different building called 'Fida Ali Villa' which came to an end when the appellant vacated those premises and entered into a new agreement of lease in regard to the premises in dispute. There was no privity between the respondent and the sub-tenants of the appellant and they could not be termed his licensees. These contentions are without substance and have rightly been rejected.

It was then argued that under s. 15 of the Act there is no prohibition against a contract of subletting, the *non-obstante* clause being confined to other laws. The section when quoted runs as follows:—

"Notwithstanding anything contained in any law, it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein:

Provided that the (State) Government may, by notification in the *Official Gazette*, permit in any area the transfer of interest in premises held under such leases or class of leases and to such extent as may be specified in the notification."

This section prohibits sub-letting and makes it unlawful for a tenant to assign or to transfer his interest in the premises let to him. The *non-obstante* clause would mean that even if any other law allowed subletting, e.g. s. 108 of the Transfer of Property Act the subletting would, because of s. 15, be unlawful. This would apply to contracts also as all contracts would fall under the provisions of the law relating to contracts i.e. Contract Act. An agreement contrary to the provisions of that section (s. 15) would be unenforceable as being in contravention of the express provision of the Act which prohibits it. It is not permissible to any person to rely upon a contract the making of which the law prohibits. (s. 23 of the Contract Act).

Counsel for the appellant contended that the view of the Bombay High Court in *P. D. Arwani v. Kavashah Dinshah*¹ was erroneous and that the correct rule was laid down by that Court in *Cooper v. Shiavax Cambata*². That was a case under s. 10 of Bombay Rents, Hotel and Lodging House Rates (Control) Act (Bom. VII of 1944) which in express terms allowed subletting as follows:—

"Notwithstanding anything to the contrary in any law for the time being in force, a tenant may sub-let any portion of his premises to a sub-tenant, provided he forthwith intimates in writing to his landlord the fact of his having so sub-let the premises and also the rent at which they have been sub-let."

It was contended that the *non-obstante* clause in s. 10 of Act VII of 1944 and of s. 15 of the Act being similar in language must be similarly interpreted. The *non-obstante* clause has to be read in conjunction with the rest of the section. Section 10 of the Act of 1944 permitted subletting on certain conditions. By s. 9 of that Act provision was made for a contract between the landlord and the tenant prohibiting subletting and in *Cooper v. Shiavax Cambata* the two provisions were reconciled by saying that a contract under s. 9 prevailed over the permission given by s. 10. But s. 15 expressly prohibits subletting and, therefore, a contract to the contrary cannot neutralise its prohibitory effect. The *non-obstante* clause of the two sections, s. 10 of the Act of 1944 and of s. 15 of the Act, therefore, cannot be said to have the same effect.

The respondent's suit for ejectment was brought under s. 13(1)(c) which provides:

"Notwithstanding anything contained in this Act (but subject to the provisions of

section 15), a landlord shall be entitled to recover possession of any premises if the Court is satisfied...

(e) that the tenant has, since the coming into operation of this Act, sub-let the whole or part of the premises or assigned or transferred in any other manner his interest therein;..."

It was contended that s. 13(1)(e) had to be read separately and not in conjunction with s. 15 of the Act. The section itself makes it quite clear that it is subject to the provision of s. 15 and the two sections must, therefore, be read together. The appellant pleaded that under the agreement between him and the respondent he was entitled to sublet the premises. Such an agreement, in our opinion, is void because of the provisions of s. 15 of the Act and s. 23 of the Contract Act and enforcement of the agreement would produce the very result which the law seeks to guard against and to prevent, and by sustaining the plea of the appellant the Court would be enforcing an agreement which is prohibited and made illegal.

The appellant relied on the maxim *in pari delicto potior est conditio possidentis* to support his plea that the respondent could not enforce his right under s. 13(1)(e). But this maxim "must not be understood as meaning that where a transaction is vitiated by illegality the person left in possession of goods after its completion is always and of necessity entitled to keep them. Its true meaning is that, where the circumstances are such that the Court will refuse to assist either party, the consequence must, in fact, follow that the party in possession will not be disturbed". (Per Du Pareq L. J. in *Bowmakers, Ltd. v. Barnett Instruments, Ltd.*³) The respondent in the present case did not call upon the Court to enforce any agreement at all. When the instrument of lease was executed and possession given and subletting done it received its full effect; no aid of the Court was required to enforce it. The respondent's suit for ejectment was not brought for the enforcement of the agreement which recognised subletting but he asked the Court to enforce the right of eviction which flows directly from an infraction of a provision of the Act (s. 15) and for which the Act itself provides a remedy. There is thus a manifest distinction between this case where the plaintiff asked the Court to afford him a remedy against one who by contravening s. 15 of the Act has made himself liable to eviction and those cases where the Court was called upon to assist the plaintiff in enforcing an agreement the object of which was to do an illegal act. The respondent is only seeking to enforce his rights under the statute and the appellant cannot be permitted to assert in a Court of justice any right founded upon or growing out of an illegal transaction. *Gibbs and Sterrett Mfg. Co. v. Brucker*.⁴ In our opinion, s. 15 of the Act is based on public policy and it has been held that if public policy demands it even an equal participant in the illegality is allowed relief by way of restitution or rescission, though not on the contract.

It was next contended that s. 13(1)(e) is a provision for the protection of private rights of the landlord, and unless there is in the Act itself any provision to the contrary, such rights as far as they were personal rights may be parted with or renounced by the landlord. In other words, the right of the respondent to sue for ejectment on the ground of subletting being a personal right for his benefit, the landlord must be taken to have waived it as by an express contract he had allowed the tenant to sublet and, consequently, he could not evict the appellant under s. 13(1)(e) of the Act.

The plea of waiver was taken for the first time in this Court in arguments. Waiver is not a pure question of law but it is a mixed question of law and fact. This plea was neither raised nor considered by the Courts below and, therefore, ought not to be allowed to be taken at this stage of the proceedings. But it was argued on behalf of the appellant that according to the law of India the duty of a pleader is to set up the facts upon which he relied and not any legal inference to be drawn from them, and as he had set up all the circumstances from

³ [1945] 1 K.B. 85, 72.

534, 535.

⁴ (1884) 111 U.S. 597, 601, 28 Law. ed.

which the plea of waiver could be inferred, he should be allowed to raise and argue it at this stage even though it had not been raised at any previous stage not even in the statement of case filed in this Court and he relied upon *Gouri Dutt Firm v. Madho Prasad*.⁵ Assuming that to be so and proceeding on the facts found in this case, the plea of waiver cannot be raised because as a result of giving effect to that plea the Court would be enforcing an illegal agreement and thus contravene the statutory provisions of s. 15 based on public policy and produce the very result which the statute prohibits and makes illegal. In *Surajmull Nargoremull v. Triton Insurance Co.*,⁶ Lord Sumner said:—

"...No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset: *Nixon v. Albion Marine Insurance Co.*' The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible."

In the instant case the question is not merely of waiver of statutory rights enacted for the benefit of an individual but whether the Court would aid the appellant in enforcing a term of the agreement which s. 15 of the Act declares to be illegal. By enforcing the contract the consequence will be the enforcement of an illegality and infraction of a statutory provision which cannot be condoned by any conduct or agreement of parties. *Dhanukdhari Singh v. Nathima Sahu*.⁸ In *Corpus Juris Secundum*, Vol. 92, at p. 1068 the law as to waiver is stated as follows:—

"...a waiver in derogation of a statutory right is not favoured, and a waiver will be inoperative and void if it infringes on the rights of others, or would be against public policy or morals;..."

In *Bowmakers, Ltd. v. Barnet Instruments, Ltd.* the same rule was laid down. Mulla in his *Contract Act* at p. 198 has stated the law as to waiver of an illegality as follows:—

"Agreements which seek to waive an illegality are void on grounds of public policy. 'Whenever an illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. A stipulation of the strongest form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches, it destroys'."

This, in our opinion, is a correct statement of the law and is supported by high authority. Field J. in *Oscanyan v. W. R. Arms Co.*⁹ quoted with approval the observation of Swayne J. in *Hall v. Coppell*¹⁰:—

"...The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim *Ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys."

Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied. Chitty on Contract 21st edn., p. 381: *Stackhouse v. Barnston*.¹¹ But an agreement to waive an illegality is void on grounds of public policy and would be unenforceable.

5 [1943] A.L.R. P.C. 147.

6 (1924) L.R. 52 L.A. 128, 128, s.c. 27 Bom. L.R. 770.

7 (1867) L.R. 2 Ex. 338.

8 (1907) 11 C.W.N. 848, 852.

9 (1881) 103 U.S. 261, 268, 26 Law. ed. 539

10 (1868) 7 Wallace 542.

11 (1805) 10 Ves. 453, 466; 32 E.R. 921.

In *Fairtitle v. Gilbert*¹² Ashurst J., said (p. 93):—

"Besides, there is still further reason why the trustees should not be estopped; for this is a public Act of Parliament, and the Courts are bound to take notice that the trustees under this Act had no power to mortgage the toll-houses. This deed therefore cannot operate in direct opposition to an Act of Parliament, which negatives the estoppel."

Vaughan Williams L. J., in *Norwich Corporation v. Norwich Electric Tramways Company, Limited*¹³ said:—

"The case is not like that of a provision in an agreement which is for the benefit of one of the parties and which he may waive. This is a provision in an Act of Parliament, which, though to some extent it may be for the benefit of the parties to the difference, must be regarded as inserted in the interest of the public also."

In that case there was a provision made by the Legislature that disputes mentioned in the section of the Act were to be determined by an Expert nominated by the Board of Trade and it was contended that though not in the strict technical sense estoppel, it was a waiver of the provisions introduced into the statute for the benefit of private rights. No doubt that was a case which proceeded on a question of jurisdiction, but the judgment proceeded on the principle of waiver of a statutory provision inserted in public interest. Thus the plea of waiver is unsustainable.

In our opinion, therefore, the judgment of the High Court is sound and the appeal must, therefore, be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Gokhale and Mr. Justice Mody.

SASTRI YAGNAPURUSHDASJI v. MULIDAS BHUDRADAS VAISHYA.*

Civil Procedure Code (Act V of 1908), Secs. 110, 109—Constitution of India, Art. 133(1)—Amount or value of subject-matter in dispute in Court of first instance less than twenty thousand rupees—Judgment and decree of High Court, on appeal, involving directly or indirectly claim or question respecting property of value of twenty thousand rupees or upwards—Whether party entitled to certificate under art. 133(1)(b).

Under s. 110 of the Civil Procedure Code, 1908, read with art. 133(1) of the Constitution of India, a party would be entitled to a certificate under art. 133(1)(b) of the Constitution provided his case falls under that clause even though the amount or value of the subject-matter in dispute in the Court of first instance is less than twenty thousand rupees.

Govindbhai v. Dahyabhai,¹ *Subramania Ayyar v. Sellamma*² and *Amarsingh v. Karnail Kaur*,³ referred to.

The facts appear in the judgment.

N. K. Desai, with *S. A. Wale*, for the petitioners.

A. D. Desai, for opponent No. 1.

GOKHALE J. This is an application by original plaintiffs Nos. 1, 2, 4 and 5 for leave to appeal to the Supreme Court against the decision of this Court in *State of B'bay v. Shastri Yagna Purushadasji*¹, dismissing the petitioner's suit. The suit was filed for a declaration *inter alia* that the Swaminarayan Temple of Shree Nar Narayan Dev at Ahmedabad and all the temples subordi-

¹² (1787) 2 T.R. 171, 100 E.R. 91.

¹³ [1906] 2 K.B. 119, 124.

*Decided, February 23, 1959. Supreme Court Civil Application No. 3456 of 1958 (with Civil Application No. 3140 of 1958).

¹ (1936) 39 Bom. L. R. 332.

² (1915) I. L. R. 39 Mad. 843.

³ [1956] A. I. R. Rajasthan 169.

¹ (1958) 61 Bom. L. R. 700.

nate thereto were not temples within the meaning of the Bombay Harijan Temple Entry Act, 1947 (Bom. Act. XXXV of 1947) as amended by Bombay Act LXXVII of 1948, and to restrain defendant No. 1 and other non-Satsangi Harijans from entering the said temples. The trial Court had granted the said declaration and injunction, and against that decision the State of Bombay as well as original defendant No. 1 had filed First Appeal No. 107 of 1952. When the appeal was heard by this Court on March 8, 1957, the appeal, so far as it was filed by the State of Bombay, came to be dismissed, and by a further order dated March 25, 1957, there was a remand to the trial Court to record a finding whether the Swaminarayan Temple at Ahmedabad and the temples subordinate thereto were Hindu religious institutions within the meaning of art. 25(2)(b) of the Constitution. The trial Court returned an affirmative finding on this issue and the appeal was then argued on the merits. Two points were raised on behalf of the appellants in the appeal: (1) that the Swaminarayan Sampraday was a religion different from the Hindu religion, and (2) even assuming that the followers of the Sampraday were Hindus by religion and the suit temples were Hindu religious institutions, within the meaning of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956, which repealed the Bombay Harijan Temple Entry Act, 1947, that Act would be *ultra vires* art. 25(1) of the Constitution of India and, therefore, plaintiffs would be entitled to the reliefs claimed by them. These contentions were negatived and the appeal was allowed; the decree of the trial Court was set aside and the plaintiffs' suit was dismissed with costs throughout. That is why the petitioners have filed this application for leave to appeal to the Supreme Court.

On behalf of the petitioners it is prayed that the Court should grant them leave both under art. 133(1)(b) as well as (c) of the Constitution of India, in that the judgment and decree of this Court involve directly or indirectly some claim or question respecting property of the value of twenty thousand rupees or upwards and also that the case is a fit one for appeal to the Supreme Court.

On behalf of the opponents, on the other hand, it was contended, in the first instance, that the petition for leave to appeal was very vague and was not properly worded so as to cover grant of leave under art. 133(1)(b). As against this, it was argued on behalf of the petitioners that the claim for such a certificate would be covered by sub-para. (18) to para. 18 of the petition as well as para. 20(a) of the petition. Under sub-para. (18) to para. 18 of the petition it is stated:-

"That the amount of the value of the subject-matter of the dispute in the Court of the first instance and still in dispute on appeal was and is less than 20,000 rupees and the judgment and decree involve directly or indirectly claim or question respecting property of the value of over Rs. 20,000 and that the case is a fit one for appeal to the Supreme Court. The learned Judges in appeal have reversed the judgment and decree of the trial Court and (the Court) should be pleased to give the leave on that ground also."

Paragraph 20(a) states:

"That your Lordships' petitioners therefore pray that your Lordships be pleased to grant them leave to appeal to the Supreme Court."

It is undoubtedly true that the petition is not happily worded and we allowed the petitioners to clarify the petition and correct clerical mistakes therein which they have done by filing an affidavit dated January 23, 1959. It was faintly contended on behalf of the opponents that without an application for amendment of the petition itself this clarification should not be allowed. But in view of the fact that the wording of sub-para. (18) of para. 18 of the petition would cover a prayer for a certificate under art. 133(1)(b) of the Constitution, we have allowed the petitioners to make the necessary clarification and corrections by means of an affidavit.

Then it was further contended that the petitioners would not be entitled to get leave under art. 133(1)(b) of the Constitution because the case does not

satisfy the requirements of s. 110 of the Civil Procedure Code. It is pointed out that the plaintiffs had originally valued their claim in the plaint at Rs. 5,250 and in the First Appeal also the said valuation was retained both for the purposes of Court-fees as well as advocate's fees. It is not disputed even by the appellants, as is clear from sub-para. (18) of para. 18 of the petition, that the amount or value of the subject-matter of the dispute in the Court of first instance and in the First Appeal was less than Rs. 20,000. Mr. A. D. Desai argues that if that be so, the requirements of para. 2 of s. 110 of the Civil Procedure Code will not be satisfied. Now, s. 110 of the Civil Procedure Code reads as follows:—

"In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be twenty thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to the Supreme Court must be the same sum or upwards,

or the judgment, decree or final order must involve directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the judgment, decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."

In the present case, this Court has allowed the appeal and set aside the decree of the trial Court and, therefore, para. 3 of s. 110 would not apply. But Mr. A. D. Desai contends that para. 2 of s. 110 cannot be read independently of the first part of para. 1 of s. 110; and Mr. Desai's contention is that even in the case of para. 2 of s. 110 the condition that the amount or value of the subject-matter in dispute in the Court of first instance must be Rs. 20,000 or upwards must be satisfied. In support of his argument, he has referred us to the case of *Govindbhai v. Dahyabhai*² where Mr. Justice Broomfield expressed his agreement with the view of the Madras High Court in *Subramania Ayyar v. Selammal*³ where it was held that the second para. of s. 110 applied only to cases which involved some claim or question to or respecting property, additional to or other than the actual subject-matter in dispute in appeal and to be taken into account therewith in making up the appealable value. Now, it has to be observed, in the first instance, that in the Bombay case the plaintiffs had claimed a declaration respecting certain property and it was observed by Mr. Justice Broomfield that the declaration could only be valued on a notional basis and the plaintiff was not estopped nor barred from saying that the value of the subject-matter of the suit and appeal was Rs. 10,000 or over within the meaning of s. 110 as it stood then, and therefore the plaintiff was held entitled to a certificate to appeal to the Privy Council under s. 110, para. 1, of the Civil Procedure Code. Secondly, since the enactment of the Constitution of India, both s. 109 and s. 110 of the Civil Procedure Code have been amended and the first para. of s. 109 states that an appeal shall lie to the Supreme Court under cls. (a), (b) and (c) of that section, subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India. It is clear, therefore, that s. 110 which refers to cls. (a) and (b) of s. 109 must be read subject to the provisions in Chapter IV of Part V of the Constitution. Now, art. 133(1) of the Constitution which is in Chapter IV of Part V reads as follows:—

"(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) that the case is a fit one for appeal to the Supreme Court; and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law."

Now, the wording of the three clauses of art. 133(1) would indicate that these are independent and self-contained clauses. Each of these clauses starts with the conjunction "that" and cls. (a) and (b) end with the conjunction "or" which would be indicative of their independence *inter se*. Clause (b) of art. 133(1), which corresponds to the second para. of s. 110 of the Civil Procedure Code, cannot therefore be read as an alternative to the latter part of cl. (a) referring to the amount or value of the subject-matter still in dispute on appeal. In view of the wording of this article, therefore, subject to which ss. 109 and 110 of the Civil Procedure Code will have to be read, in our view, the second para. of s. 110 of the Civil Procedure Code also cannot be construed as an alternative to the latter part of the first para. of that section. In our judgment, reading s. 110 of the Civil Procedure Code with art. 133(1) of the Constitution, a party would be entitled to a certificate under art. 133(1)(b) of the Constitution provided his case falls under that clause even though the amount or value of the subject-matter in dispute in the Court of first instance is less than twenty thousand rupees. In this connection, Mr. N. K. Desai has drawn our attention to a case of the Rajasthan High Court, *Amar-singh v. Karnail Kaur*⁴, where a similar view has been taken as to the construction of para. 2 of s. 110 of the Civil Procedure Code. The argument of Mr. A. D. Desai, therefore, that the petitioners are not entitled to a certificate under art. 133(1)(b) on the ground that admittedly the subject-matter in dispute in the Court of first instance and still in dispute on appeal was and is less than Rs. 20,000 cannot be accepted.

Then it is contended by Mr. A. D. Desai that the judgment and decree of this Court do not involve directly or indirectly some claim or question respecting any property. Mr. Desai contends that the principal question argued in the appeal was whether the Swaminarayan Temples were Hindu religious institutions within the meaning of the Bombay Hindu Places of Public Worship (Entry Authorization) Act, 1956, which repealed the Harijan Temple Entry Act, 1947, and that this does not involve any claim or question to or respecting any property. We are not prepared to accept this argument. The suit was instituted by the plaintiffs because non-Satsangi Harijans wanted entry into these temples. It is true that the questions involved in the appeal do not affect the ownership or management of these temples. But, that in our view, cannot mean that the question involved is not in respect of any property. The judgment of this Court has taken the view that the Swaminarayan Temples are Hindu religious institutions and has negatived the claim of the petitioners to obtain a declaration and injunction which would have enabled them to prevent effectively the entry of non-Satsangi Harijans into these temples. It does, therefore, indirectly involve a question respecting property.

Lastly, it was faintly urged that there was no evidence on the record to show what the value of these temples would be. We gave an opportunity to the petitioners to file an affidavit on this point and the affidavit discloses that the value of the Nar Narayan Deo Temple at Ahmedabad alone is more than 25 lakhs and that of the 14 big temples of the northern diocese and other smaller temples would be more than a crore of rupees. In the affidavit in reply, the opponents have vaguely stated that this valuation is not correct. We were prepared to give Mr. A. D. Desai's client an opportunity to challenge the valuation by referring the matter to the trial Court. But it has been frankly and, in our opinion, rightly conceded that in view of the vague statement in the affidavit in reply that the valuation was not correct, it would be open to us to accept the valuation made in the affidavit filed by the petitioners on this point. As we

have already stated as the judgment and decree of this Court has set aside the decree of the trial Court, the last para. of s. 110 of the Civil Procedure Code that the appeal must involve some substantial question of law would not be applicable, nor will a certificate to that effect of this Court be necessary under the last portion of art. 133(1) of the Constitution. In our opinion, therefore, the petitioners will be entitled to a certificate under art. 133(1)(b) of the Constitution.

The petitioners have also prayed for a certificate under art. 133(1)(c) of the Constitution that the case is a fit one for appeal to the Supreme Court. It is contended by Mr. A. D. Desai that the petitioners would not be entitled to such a certificate. According to him, no substantial question of law arises, as this Court has decided the question as to whether the followers of Swaminarayan sect are Hindus by religion on a consideration of oral and other evidence on the record. As regards the other question whether Bombay Act XXXI of 1956 would be *ultra vires* of art. 25(1) of the Constitution, Mr. Desai says that that question would be governed by the decision of the Supreme Court, *Venkataramana Devaru v. State of Mysore*.⁵ Now, the circumstances under which a certificate of fitness can be granted are fairly well settled. A mere substantial question of law arising between the parties is not sufficient. In *Radhakrishna Ayyar v. Swaminatha Ayyar*⁶ it was observed (p. 33):

"...it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money,"

and sub-s. (c) of s. 109 of the Civil Procedure Code contemplated such cases. This observation of the Privy Council has been never treated as exhaustive but merely illustrative. In *Hirjibhai v. Jamsheджи*⁷ this Court took the view that what was contemplated in cl. (c) of s. 109 of the Civil Procedure Code was a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measurable in terms of money, it is of great public or private importance; and a mention was made in this connection of the case of the Udwađa Fire Temple, *Navroji v. Kharsedji*,⁸ in which Jenkins C.J. had granted leave to appeal on the ground that the point in dispute, though not measurable by money, was of considerable importance because it related to the extent of control acquired by one who had built the Fire Temple. In the present case, the question involved is undoubtedly of very great importance from the point of view of the Swaminarayan Sampraday which claims lacs of adherents and on whose behalf it was contended in appeal before this Court that they are not Hindus by religion. The question is also of importance from the point of view of non-Satsangi Harijans represented by the contesting defendants, who claim a right of entry into these temples. Besides, the decision as to whether the followers of Swaminarayan Sampraday are Hindus by religion depends not merely on appreciation of oral evidence but also on the interpretation of some of the sacred scriptures of the sect and other evidence on the record. In our view, therefore, the case would be a fit one for appeal to the Supreme Court even under s. 109(c) of the Civil Procedure Code read with art. 133(1)(c) of the Constitution.

The result is that a certificate will issue in favour of the petitioners both under art. 133(1)(b) and (c) of the Constitution. Costs will be costs in appeal.

Certificate granted.

⁵ [1958] A. I. R. S. C. 255.

⁶ (1920) L. R. 48 I. A. 31, s. o. 23 Bom. L.R. 718.

⁷ (1913) 15 Bom. L. R. 1021.

⁸ (1904) 6 Bom. L. R. 286.

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Mody.

STATE v. L. C. PATEL.*

Factories Act (LXIII of 1948), Secs. 21(1)(iv)(b), 22—Degree of safety by position of transmission machinery—Whether such safety should be absolute safety—Such absolute safety whether should be against only reasonably foreseeable risks and dangers—Provision against danger arising by reason of shifting or repairing machinery whether contemplated by s. 21(1).

Under s. 21(1)(iv)(b) of the Factories Act, 1948, the safety contemplated either by securely fencing the transmission machinery or by its position or by its construction is absolute safety but such absolute safety must be only against reasonably foreseeable risks and dangers of coming into contact with the transmission machinery.

Section 21 of the Factories Act, 1948, gives protection not merely to the careful, the vigilant and the conscientious workman, but to the careless, the indolent, the inadvertent, the weary, and even perhaps in some cases, the disobedient. But the carelessness, the indolence, the inadvertence, the weariness and even the disobedience of a workman are things which an occupier of a factory can and is expected to reasonably foresee and should, therefore, provide against. Such risks and dangers are foreseeable and must under s. 21 of the Act be provided against. But s. 21 cannot be given the meaning that it imposes a duty upon an occupier of a factory to provide for safety against even unforeseeable risks and dangers.

Section 21 of the Factories Act, 1948, does not contemplate a provision being made for the safety of an employee who is assigned the work of repairing machinery or of shifting machinery or of installing new machinery.

Some carding machines in the carding department of a mill, which was a factory within the meaning of the Factories Act, 1948, were being shifted to some other place during the recess time, when the machinery was not in motion. Instructions were issued to do the shifting only during the recess when the shaft and pulleys were not in motion. One of the carding machines had been stopped working as it was to be shifted on the following day. On this day a few minutes before the recess a workman placing a ladder against a steam pipe stood up on it and attempted to take a belt of this carding machine which was lying idle on a hanger on the other side of the shaft and pulley which were in motion. In doing so the workman was entangled in the belt and the moving shaft and died as a result of the injuries sustained by him. On these facts the accused, who was the manager of the mill, was charged under s. 21(1)(iv)(b) of the Factories Act, 1948, for having failed to securely fence the shaft and pulleys of the carding department of the factory which formed part of the transmission machinery. The prosecution contended that the safety aimed at by s. 21(1)(iv) of the Act, whether by fencing or by position or by construction, is absolute safety and that the shaft and pulleys in the instant case were not, by their position, absolutely safe to every person employed in the factory. The accused contended that the safety provided by s. 21(1)(iv), though absolute, could be only against foreseeable risks and dangers and not otherwise and that, therefore, the shaft and pulleys did not require to be fenced as they were in such a position as to be safe to every person employed in the factory as they would have been if they were securely fenced:—

Held, that in the circumstances of the case, the risk from the unfenced overhead shaft and pulleys was not a foreseeable risk, and

that, therefore, there was no breach of the provisions of s. 21(1)(iv)(b) committed by the accused.

*Decided, March 4, 1959. Criminal Appeal No. 1247 of 1958, against the order of acquittal passed by D.H. Patel, Judicial Magistrate,

First Class, 8th Court, Ahmedabad, in Summary Case No. 3712 of 1957.

Burns v. Joseph Terry & Sons Ltd.,¹ observations of Lord Somervell J. in, applied. *Atkinson v. London and North Eastern Ry. Co.*,² *Chasteney v. Michael Nairn & Co.*,³ *Walker v. Bletchley Flattens*,⁴ *Findlay v. Newman, Hender & Co.*,⁵ *Carrol v. Andrew Barclay & Sons, Ltd.*⁶ and *Carr v. Mercantile Produce Co. Ltd.*,⁷ referred to.

THE facts appear in the judgment.

Y. V. Chandrachud, Government Pleader, for the State.

M. P. Amin and A. H. Mehta, with *Payne and Co.*, for the respondent-accused.

MODY J. This is an appeal by the State against the order of acquittal passed in Summary Case No. 3712 of 1957 on the file of the Judicial Magistrate, First Class, 8th Court, Ahmedabad, against the respondent who was the accused in that case and was charged under s. 21(1)(w)(b) of the Factories Act, 1948. The case against the accused was that he being the Manager of the Jubilee Mills, a factory as defined by s. 2(m)(i) of the Factories Act, 1948, failed to securely fence the shaft and pulleys of the carding department of the said factory which formed part of the transmission machinery and thereby contravened the provisions of s. 21(1)(w)(b) of the Factories Act and committed an offence punishable under s. 92 of the said Act.

In the last week of March 1957 some carding machines in the carding department of the said Mills were being shifted to some other place during the recess time from 11 a.m. to 11-30 a.m. when the machinery was not in motion. The carding machine No. 108 had been stopped working since March 29, 1957, as it was to be shifted on March 30, 1957. The belt of the said machine was lying idle on the hanger which was over 12' above the ground level. The pulley which was to be shifted was also 12' above the ground level. Below the hanger there was a steam pipe which was about 7'-3" from the ground level. Instructions had been issued to do the work of shifting only during the recess when the shaft and pulleys were not in motion. About two or three minutes before the recess on March 30, 1957, one workman named Gulab Punja placed a ladder against the steam pipe, climbed the ladder and sat on the steam pipe when the shaft and pulleys were in motion and in breach of the said instructions he stood up on the steam pipe and attempted to take the belt which was lying idle on the hanger on the other side of the shaft and the pulley and in doing so he was entangled in the belt and the moving shaft. He was taken out from the shaft by cutting the belt and removed to the Civil Hospital where he died within half an hour.

Sub-section (1) of s. 21 of the Factories Act provides as under:

- "(1) In every factory the following, namely:—
- (i) every moving part of a prime mover and every fly wheel connected to a prime mover, whether the prime mover or fly wheel is in the engine house or not;
 - (ii) the headrace and tailrace of every water-wheel and water turbine;
 - (iii) any part of a stock-bar which projects beyond the head stock of a lathe; and
 - (iv) unless they are in such position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced, the following, namely,—
 - (a) every part of an electric generator, a motor or rotary converter;
 - (b) every part of the transmission machinery; and
 - (c) every dangerous part of any other machinery, shall be securely fenced by safeguards of substantial construction which shall be kept in position while the parts of machinery they are fencing are in motion or in use.

Provided that for the purpose of determining whether any part of machinery is in such position or is of such construction as to be safe as aforesaid, account shall not

1 [1950] 2 All E. R. 987.

2 [1926] 1 K. B. 513.

3 [1937] 1 All E. R. 376.

4 [1937] 1 All E. R. 170.

5 [1937] 4 All E. R. 58.

6 [1948] A. C. 477.

7 [1949] 2 K. B. 601.

be taken of any occasion when, it being necessary to make an examination of the machinery while it is in motion or, as a result of such examination, to carry out any mounting or shipping of belts, lubrication or other adjusting operation while the machinery is in motion, such examination or operation is made or carried out in accordance with the provisions of section 22."

It was not disputed, nor can it be disputed, that the shaft and the pulleys formed part of "the transmission machinery". The charge against the accused was that he had failed to securely fence the shaft and the pulleys as required by the said s. 21(1)(iv)(c). It was common ground that the shaft and the pulleys were not fenced at all.

The respondent pleaded not guilty and his defence was that the said shaft and the pulleys did not require to be fenced because they were in such a position as to be safe to every person employed in the factory as they would be if they were securely fenced.

On behalf of the prosecution one P. T. Shah, the then Senior Inspector of Factories, was examined. He stated that he was an Inspector of Factories for the area in which the Jubilee Mills was situated, that he had visited the said factory on March 30, 1957, to inquire into the case of the fatal accident to worker Gulab Punja employed as a coolie in the Engineering Department of the said factory, that the worker was entangled in a belt driving the card No. 108 on the moving shaft driving the rows of cards, that the accident occurred at about 10-57 a.m. on March 30, 1957, that on enquiring into the accident, he found that re-arrangement of cards was being done, that for that work every day a few cards were stopped and re-erected in new position, that the pulleys driving those cards were also being shifted on the main shafts, that the said work was being done during the recess period from 11 a.m. to 11-30 a.m., and that a gang of workers was kept ready with the necessary tools and ladders just before the stopping time of the factory. He further stated that on March 30, 1957, the deceased Gulab Punja was assigned that work along with some other fitters, that the deceased had rested a ladder on a steam pipe just below the overhead shaft and the pulley which was to be shifted, that the shafting was in motion, that the deceased went up and sat on the pipe and tried to shift the belt of the card lying on the belt-hanger to the other side of the pulley while the shafting was in motion and that while doing so, he got entangled in the belt and the moving shaft and as a result thereof, received the said injury. He stated that no supervisory staff was present at the time of the said work, that the overhead shaft, the pulleys and the belt which formed part of the transmission machinery were not safe to the worker who died and that the said parts of the transmission machinery were not securely fenced. In his cross-examination he stated that he had been a factory Inspector for ten years preceding the date of the said accident, that he had been a Senior Factory Inspector for the last three of the said ten years and that prior to his joining the factory department, he was working as an Engineer in a mill for about seven years. He further stated that the work of shifting cards in the Jubilee Mills was going on for one week prior to his visit on March 30, 1957, and that the said work was being done during the recess time. He stated that during his inquiry it transpired that the work of shifting the pulleys was to be done during the recess time when the machinery was not in motion and that he had no evidence to show that the deceased worker was instructed by the accused or anybody else to start the work when the machinery was in motion. He admitted that during his tenure as an Engineer in a mill and as a Factory Inspector he had not come across any fencing having been done of shafts and pulleys in the carding department of any mill. He further admitted that there was no specific rule providing for the fencing of shafts and pulleys in the carding department of a mill. He also admitted that unfenced shafts and pulleys overhead are not ordinarily unsafe or dangerous to the workers doing their ordinary work in the carding department, that he had not heard of any fencing being done of overhead shafts and pulleys in the carding de-

partment of any mill in India and that he had never suggested to any mill to provide such fencing, although there were about 60 or 65 mills within his jurisdiction in Ahmedabad. He further admitted that by their position the shafts and pulleys overhead were quite safe to the workers working in the carding department. In his cross-examination he stated that he had visited the Jubilee Mills on March 30, 1957, to inquire into the case of the said fatal accident to Gulab Punja and had entered his "inquiry" into the Inspection Book, a true copy of which is exh. 4 on the record of this case, and that he had thereafter on April 17, 1957, made further remarks, a true copy of which has been produced as exh. 5. In his said inspection notes, exh. 4, he has made no mention about the said breach about fencing having been committed and the same was also admitted by him in his cross-examination. In his said further remarks, exh. 5, however, he has stated that the overhead shaft and the pulleys of the carding driver were not securely "fixed" when Gulab Punja approached the same, that the shafting and the pulleys were in motion and "the same was also not securely fixed." The word "fixed" used at these two places appears to be a mistake for "fenced" as appearing from what is stated in exh. 5 immediately thereafter, viz., that not securely fencing the overhead shaft and the pulleys which formed part of the transmission machinery was a breach of s. 21(1) (iv) (b) of the said Act. As regards the further remarks exh. 5, he stated in his cross-examination that he made them on April 17, 1957, because it struck him on that day that that breach also had been committed and that it was after discussion with his superior officer (The Deputy Chief Inspector) that it struck him that that breach also had been committed. In his cross-examination he further stated that mounting of belts had to be frequently done.

In his statement under s. 342 of the Criminal Procedure Code, in addition to stating that the shaft and pulleys were safe by position, the respondent contended that it was not practically feasible to provide guards or fencing to the overhead shafts and pulleys, that in the normal working of the mills there would be several occasions when the belts would go out of position and they had to be readjusted or mounted, that at the time of mounting, the guards would have to be removed and re-fitted involving great loss of time and that that would naturally hamper production and keep the machinery idle.

The learned Magistrate held that, as admitted by the Factory Inspector, by position the shafts and pulleys were quite safe for workers working in the carding department. After considering various authorities cited before him, he held that

"machines are required to be fenced so that the workers working on them may not come in contact with them. If the machinery is accessible to workers carrying on their ordinary work, there is, no doubt, an absolute duty to fence it. But when it is in a wholly inaccessible position the duty to fence it is not absolute for it may be safe by reason of its position and if the workers in the ordinary course of their work are not likely to come in contact with it, it is not required to be fenced."

He further held that in the case before him the conduct of the deceased worker was not reasonably foreseeable and it had not been established that in reasonably foreseeable circumstances the overhead shaft with the pulleys was not as safe as it would be if securely fenced. As regards the argument of the prosecution that sometimes the belts go off the pulleys and some worker may try to replace them and in so doing may come in contact with the overhead machinery, he held that in such a case a fencing, if provided, would have to be removed for replacing the belts on the pulleys and thus the fencing would be meaningless and that the only alternative in such cases was to ask the employers to stop their machines while carrying out such work, and if it be held that even the overhead shaft with the pulleys which was not within the reach of the workers working in the ordinary course of their work was

also required to be fenced, the exception provided by the opening words of s. 21(1)(iv), viz.,

"unless they are in such position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced" would be rendered nugatory. He, therefore, held that the offence with which the accused was charged was not proved and ordered the accused to be acquitted under s. 245(1) of the Criminal Procedure Code.

Now, in this case it is not disputed by the respondent that the Jubilee Mill was a factory within the meaning of the Factories Act, 1948, and the shaft and pulleys in question were a part of the transmission machinery within the meaning of the Act. It is, therefore, clear that by reason of the provisions of s. 21(1)(iv) the shaft and pulleys ought to have been securely fenced unless they were in such a position as to be safe to every person employed in the factory as they would be if they were securely fenced. It is not contended that they were safe by construction. What is contended is that they were safe by position. Section 21(1)(iv) in terms provides that the safety ensured by position must be the same which would result from a secure fencing. The degree of safety to be ensured whether by securely fencing or by position or by construction is identical. What the appellant contends is that the safety aimed at by s. 21(1)(iv), whether by fencing or by position or by construction, is absolute safety and that the shaft and the pulleys in this case were not, by their position, absolutely safe to every person employed in the factory. It is not disputed on behalf of the respondent that the safety provided for by s. 21(1)(iv) is absolute safety. But what is contended is that that safety, though absolute, can be only against foreseeable risks and dangers and not otherwise. In support of their respective contentions both the parties have cited several decided cases. All these cases, however, are of the English Courts but arising under parallel factory legislation in England. No Indian case has been cited, presumably because there is no such reported case.

The first case relied upon by the appellant is that of *Atkinson v. London and North Eastern Ry. Co.*¹ In that case, in the respondents' factory, there was a tube-cutting machine driven by a pulley fixed on a horizontal shaft about 13 feet above the floor. The belt for driving the machine being off the pulley, one Cresswell, a person employed in the factory, attempted to move the belt from the shaft to the pulley while the shaft was running, and in attempting to do so, he was injured. The shaft and pulley were about 13 feet from the floor of the shop and when attempting to put on the belt, Cresswell climbed a ladder and stood on a beam which was about 7 feet from the floor. The shaft and pulley were not in any way fenced or guarded. The respondents were prosecuted on a charge under s. 10(1)(c) of the Factory and Workshop Act, 1901, the charge being that a part of the mill gearing, namely the said shaft with the pulley on it, was not securely fenced nor in such position or of such construction as to be equally safe to every person employed or working in the factory as if it had been securely fenced. The respondents' defence was that the shaft and pulley were safe by position and, therefore, need not be fenced and that Cresswell had acted contrary to the regulations of the factory in attempting to move the belt from the shaft to the pulley while the engine was running. The Justices came to a decision that they were of the opinion that any fence would have been useless owing to the shaft being 13 feet from the ground and dismissed the case against the respondents. An appeal was filed against that decision, and that appeal was heard by Lord Hewart C. J. and Avory and Sankey JJ. It may be noted that the relevant section of the English Factory and Workshop Act, 1901, was s. 10(1)(c) which provided as follows:

"With respect to the fencing of machinery in a factory, the following provisions shall have effect:—...

¹ [1926] 1 K. B. 313.

(c) All dangerous parts of the machinery and every part of the mill gearing must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced."

The provision contained in s. 10(1)(c) is for our purposes the same as that contained in s. 21(1)(iv)(c) of the Indian Act. The decision of the appeal Court in that case turned mainly upon the interpretation of the said finding of the Justices and the appeal Court held that the said finding did not amount to a finding that the particular part of the mill gearing, viz., the shaft and the pulley, was by reason of its position or construction equally safe to every person employed or working in the factory, as it would have been if it had been securely fenced. Lord Hewart C. J. came to the conclusion that the said finding of the Justices was not a finding of fact that the particular part of the mill gearing was never approached by any person employed by the respondents except for such an occasional and temporary purpose as this, of moving the belt from the shaft to the pulley, and, secondly, it was not a finding of fact that, if fencing there had been, no ingenuity could have devised a type of fence which on the occasion of such an emergency as arose in that case would not have had to be removed. He further held that there was nothing in the said section or elsewhere in the said Act which granted a dispensation from the obligation to fence because the mill gearing was 13 feet above the ground. Avory J. also came to the conclusion that the mere fact that an unfenced shaft was 13 feet above the ground was not sufficient to show that it was in such a position as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced. From the judgments delivered in the said appeal it appears that as there was no specific finding recorded by the Justices that the particular mill gearing, though unfenced, was safe by position, the order of the Justices was held to be not correct and was, therefore, reversed.

The next case relied upon by the appellant is that of *Chasteney v. Michael Nairn & Co.*² In that case the respondents were charged with having failed to have pinion-wheels of parts of their machinery securely fenced so as to be safe to every person employed or working in their factory, in consequence of which one of their workmen was injured while engaged in greasing the machinery while it was in motion. The respondents had put up a notice in the factory as follows: "Do not put your hands in the machinery while it is in motion. Persons disregard this notice at their own risk." The pinion-wheels, although usually stopped, were occasionally allowed to remain in motion, for the purpose of greasing. The Magistrate dismissed the charge, holding that the pinion-wheels were not dangerous parts of the machinery unless in motion, when it was not usual for greasing to be done. The appeal Court consisting of Lord Hewart L. C. J., Swift and Goddard JJ. held that as the wheels were dangerous part of the machinery, they ought to have been securely fenced, despite the fact that greasing was not usually done while the machinery was in motion, as it cannot be assumed that every person will always exercise necessary care, and that the offence charged was, therefore, proved. The said case also arose under the provisions of s. 10(1)(c) of the Factory and Workshop Act, 1901. The point for decision in that case, however, was whether the machinery in question was dangerous machinery within the meaning of the said section or not. There was no contention in that case that the machinery did not require to be securely fenced on the ground that the same was safe by position. The only point involved in that case was whether the pinion-wheels were dangerous parts of the machinery or not. That case does not lay down any principle concerning the proposition as to when a machinery can be said to be safe by position.

Another case referred to is that of *Walker v. Bletchley Flettons*³. That case also involved a determination as to what could be said to be dangerous machinery within the meaning of s. 10(1)(c) of the said Factory and Workshop Act,

² [1937] 1 All E. R. 376.

³ [1937] 1 All E. R. 170.

1901. But the test applied by Du Parcq J. in that case for determining the same is useful. The learned Judge has laid down that in considering whether machinery is dangerous, it must not be assumed that everybody will always be careful. A part of a machine is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur. For the purposes of determining what is a dangerous part of a machine Du Parcq J. has in this case enunciated the principle of reasonable foreseeability of danger resulting from the machine. It was not contended in that case that the particular machinery was securely fenced; nor was it contended that it was safe by position or construction and the judgment in that case is, therefore, of no other importance.

The next case relied upon, and strongly relied upon, on behalf of the appellant is that of *Findlay v. Newman, Hender & Co.*⁴ In that case the respondents were charged with having failed to have certain mill gearing in their factory securely fenced, or in such position or of such construction as to be equally safe to every person employed or working in their factory, in consequence of which one of their workmen was injured. The mill gearing consisted of a countershaft, 12½ feet from the ground, to which a belt was attached, and the workman was injured in replacing the belt. There was a notice put up by the factory prohibiting the workmen from putting on belts between the main shaft and the countershaft unless the engine was stopped or slowed down, but the workman had acted in disobedience of those instructions. The countershaft and the belt were not fenced in any way, but the respondents contended that the same were safe by position. The Justices dismissed the charge. An appeal was preferred against the same which was heard by Lord Hewart, L. C. J., Du Parcq and Atkinson JJ. That case also was under s. 10 of the said Factory and Workshop Act, 1901. Lord Hewart, L. C. J., came to the conclusion that as the shaft was revolving at 190 revolutions a minute and was accessible to persons who, for example, wished to replace the belt, not in any sense whatever fenced, it could not be said to be safe by position because the essential purpose of the section was to provide absolute safety, so far as fencing could provide it. It may be noted that Lord Hewart, C. J., lays down the test of absolute safety, but in his judgment he has not laid down as to against what risks such absolute safety was to be ensured. It may be further noted that in that case the very fact that the said notice had been put up by the factory indicated that the management had foreseen that the persons employed in the factory may be exposed to risk if the terms of the notice were not complied with. Lord Hewart, C. J., does not, in his judgment, at all take into consideration the aspect whether the risk was foreseeable, but the same has been taken into consideration by Du Parcq J. as is clear from the following passage from his judgment (p. 62):

"...The magistrates may possibly have thought that it was negligence; they may have thought that it was serious negligence and disobedience to orders by the man who was injured. But, even if that be so, if the occupier of the factory could have foreseen that workmen would do what this workman did, or if any reasonable person could have foreseen such a thing's happening, it is impossible to say that the machinery was safe. Here the injury was undoubtedly suffered; it was suffered by a man doing something which, clearly, from the finding that there had been a notice warning the workmen, the employers had understood might happen. The proper way to safeguard employees is not by putting up notices, is not by saying 'Do not touch,' or 'Keep clear,' or 'Keep away,' but by so fencing or by so constructing your machinery that the dangerous part ceases to be anything but secure."

The third judgment in that case is that of Atkinson J. which also, like the judgment of Lord Hewart C. J. lays down the principle that the obligation to securely fence the countershaft was an absolute obligation but does not at

all deal with the aspect dealt with by Du Parcq J. that such absolute obligation was only in respect of foreseeable risks.

The next case is that of *Carrol v. Andrew Barclay & Sons, Ltd.*⁵, relied upon by Mr. Amin, the learned counsel for the respondent. That case was under s. 13(1) of the English Factories Act, 1937, which provides:

"Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

In that case the belt connecting the shaft and the motor in the factory broke when it was running and injured a workman who was standing at that time about 6½ feet away from the motor. The workman sued for damages on the ground that the accident was caused by a failure to fence the belt adequately and securely in breach, *inter alia*, of s. 13 of the said Factories Act, 1937. The case turned on the question as to against what dangers was the fencing mentioned in s. 13(1) intended to be a safeguard, whether against the risk arising by reason of a workman making contact with the machinery when in motion or against dangerous material ejected from the machinery and it was held that the requirement of the said section that 'every part of the transmission machinery shall be securely "fenced"' imposed on occupiers of factories a duty to erect a barricade to prevent any employee from making contact with the machinery, and did not in ordinary cases oblige them to erect an enclosure to prevent broken machinery from flying out and injuring him. Although the point for decision in that case was different from the point for our decision in this case, certain observations of Du Parcq J. from his judgment in that case have been relied upon by Mr. Amin. Du Parcq J. has observed in his judgment that the words "securely fenced" may well mean "so fenced as to give security from such dangers as may be reasonably expected". These observations reiterate what Du Parcq J. had already stated in his said two earlier judgments, viz. that fencing was to give security from such dangers as may be reasonably expected, i.e., which may be reasonably foreseen. These remarks are undoubtedly in a slightly different context, but they are general, and on a point of construction they are equally applicable, not only to the case of a broken part of machinery flying out and hurting a workman, but also to the case of a workman coming in contact with the machinery.

Another case relied upon is that of *Carr v. Mercantile Produce Co. Ltd.*⁶ The real point for decision in that case was whether the part of machinery in question was "a dangerous part of any machinery" within the meaning of s. 14 of the said Factories Act, 1937, and it was held that the same was not. That case is, therefore, of no assistance for the decision of the point involved in this case. But what the learned Government Pleader appearing for the appellant relied upon was a passage from the judgment of Stable J. as appearing at page 608 of the said report which is as follows:

"The Factory Acts are there, not merely to protect the careful, the vigilant and the conscientious workman, but human nature being what it is, the careless, the indolent, the inadvertent, the weary, and even perhaps in some cases, the disobedient."

In our opinion, that passage merely reiterates, in an amplified form, the principle laid down by Lord Hewart C. J. that the relevant provision of the Factories Act provides for absolute safety without at the same time laying down, as Du Parcq J. has earlier laid down, that such absolute safety is to be achieved only against reasonably foreseeable risks or dangers.

The last case relied upon by Mr. Amin is that of *Burns v. Joseph Terry & Sons, Ltd.*⁷ In that case the facts were that the plaintiff, who was seventeen years old at the time of the accident, claimed damages for breach by the defendants of the statutory duty under the Factories Act, 1937. The plaintiff alleged *inter alia* that his injury was due to a breach of s. 13(1) of the Factories

⁵ [1948] A. C. 477.

⁶ [1949] 2 K. B. 601.

⁷ [1950] 2 All E. R. 987.

Act, 1937, on the basis that the machinery by which the plaintiff was injured was transmission machinery and that it had not been securely fenced. The machinery being transmission machinery had to be securely fenced unless it was safe by position or construction. The machinery had in fact been fenced, but the plaintiff's contention was that the fencing was not adequate. Hilbery J., who tried the case in the first instance, held that it was securely fenced and that there was, therefore, no breach of the defendants' duty under the Act. In considering whether the machinery was securely fenced, Hilbery J. applied what may be described as the test of reasonable foreseeability, viz. was the machinery securely fenced having regard to the circumstances which could reasonably be foreseen. The plaintiff appealed and the appeal was heard by Somervell, Cohen and Denning, L. JJ., and it was held (Denning L. J. dissenting) that the test whether machinery was 'securely fenced' within the meaning of s. 13(1) of the said Act was whether it was so fenced as to give security from such dangers as might reasonably be expected and that in the said case the machinery was securely fenced according to that test. The appeal was consequently dismissed. This case appears to be the latest case on the subject in England. Numerous previous decisions of the English Courts on the subject were cited and discussed in the judgments of the Appeal Court. The following passage from the judgment of Somervell L. J. is extremely useful (p. 990):

"I do not think there is any decision on the point binding on this Court. I think the balance of *dicta* is slightly against the plaintiff. On the face of them the words used by Lord Hewart, C.J., are in his favour, but Lord Hewart, C.J., did not, I think, have in mind the issue whether the 'absolute safety' was to be against foreseeable risks. Lord Du Parcq and Lord Normand were clearly addressing their minds to the point in issue, and *Voules v. Armstrong Siddley Motors, Ltd.* is very nearly a direct authority against the argument. I will, however, consider the question of construction on principle. In the first place, I think that in this group of sections the same test should be applied in deciding whether machinery is 'securely fenced' as is applied in deciding whether it is 'dangerous'. To an allegation that machinery which has, in fact, caused injury, is dangerous it is admittedly a good answer to prove that it was not dangerous in any reasonably foreseeable circumstances. I see no difficulty in applying the same test to the question whether machinery is securely fenced, and would respectfully adopt the form in which the question is formulated on this basis by Lord Du Parcq and Lord Normand. I think also that this construction fits in with the later words of sub-s. (1) of s. 13 of the Factories Act, 1937. They contemplate that the position of the transmission machinery may be such that there is no necessity to fence at all. If, no accident having happened, one imagines a prosecution based on these words, I would have thought the prosecution would have to establish that in reasonably foreseeable circumstances the machinery was not as safe as it would be if securely fenced. If one has to consider unforeseeable circumstances the legislature should and would, in my opinion, have provided that all transmission machinery must be completely encased. It also fits in with the later words from another angle. The later words contemplate that the position may make any fencing unnecessary. That being so, the 'position' might well be such as to make fencing, for example, on one side only necessary."

Then again (p. 991):

"...The question was not whether what the plaintiff actually did was reasonably foreseeable, but whether the occupier should have reasonably foreseen the possibility of an accident... The question is whether a prosecution would have succeeded before the accident which leads to the claim has happened. On the other hand, if, an accident having happened, no one can suggest other circumstances which would have led to an accident, the issue may, in fact, narrow itself to the question whether the circumstances which led to the accident were reasonably foreseeable... I do not think Hilbery, J., confined himself to considering the foreseeability of the plaintiff's conduct. He referred to the fact that the factory inspector had seen this fencing many times,

and that there was evidence of no previous accident over the twenty years or so of its life. He considered the possibility of someone putting a hand up underneath the mesh. He said:

"I personally cannot see, if you test the question by what was reasonably foreseeable, that it can be said that the lack of a return guard over it from the face guard rendered this insecure fencing."

It is only after this that he proceeds to consider whether the employers could have foreseen what the plaintiff actually did."

In our opinion, this latest case explains the test, as laid down by Lord Hewart, C. J., about absolute safety and approves the earlier *dicta* of Lord Du Parc, J. that such absolute safety was to be against foreseeable risks.

On a construction of the provisions of s. 21(1)(iv), there is no doubt that transmission machinery must be securely fenced unless the same, by reason of its position or construction, is safe to every person employed in the factory as it would be if it were securely fenced. The transmission machinery can be said to be secure by position only if the safety afforded by the position is the same as would be provided if it were securely fenced. The degree of safety either by securely fencing it or by position or by construction of the machinery is the same. There can be no doubt that the safety aimed at is absolute safety. The aim is to provide absolute safety to every person employed in the factory from the risk and danger of coming into contact with the transmission machinery but that risk or danger as contemplated by this section must reasonably be foreseeable. The Legislature could not have intended that the occupier was to provide safety for the persons employed in the factory against risks which could not even be reasonably foreseen. The risks and dangers resulting from a person coming into contact with machinery can be so complex and varied that all possible risks or dangers cannot be reasonably foreseen or anticipated. Section 92 of the Factories Act imposes a penalty if the requirements of s. 21(1)(iv)(b) are not complied with. Surely, the Legislature could not have contemplated to penalise an occupier of a factory for not providing for safety against a risk or danger which he could not reasonably foresee or anticipate. Section 21 is undoubtedly for giving protection, to use the words of Stabile J., not merely to the careful, the vigilant and the conscientious workman, but human nature being what it is, to the careless, the indolent, the inadvertent, the weary, and even perhaps in some cases, the disobedient. But the carelessness, the indolence, the inadvertence, the weariness and even the disobedience of a workman are things which an occupier of a factory can and is expected to reasonably foresee and should, therefore, provide against. Such risks and dangers are foreseeable and must under the provisions of s. 21 be provided against. But s. 21 cannot be given the meaning that it imposes a duty upon an occupier of a factory to provide for safety against even unforeseeable risks and dangers and much more so, because his omission to do so would expose him to a penalty. The provisions of s. 21(1)(iv)(b) are, so far as the same are relevant to this case, substantially the same as, if not identical with, the parallel provisions in the said two English Acts. We are in respectful agreement with the observations of Lord Somervell J. in the said case of *Burns v. Joseph Terry & Sons, Ltd.*, and, in our opinion, the same are equally applicable to the consideration of our s. 21(1)(iv)(b).

Applying the same test which has been contemplated by Lord Somervell J. in *Burns v. Joseph Terry & Sons, Ltd.* we have to ascertain whether the prosecution in the case before us would have succeeded before the accident to Gulab Punja occurred. What is the foreseeable risk or danger which could have emanated from the shaft and pulleys in this case against which the respondent has failed to provide a secure fencing? The prosecution has been able to point out none. On the contrary, the Factory Inspector, the only witness examined on behalf of the prosecution, has admitted that unfenced shafts and pulleys overhead are not ordinarily unsafe or dangerous to the workers doing their ordinary work in the carding department. The learned Government Plea-

der argued that this part of the testimony of the witness is of a limited character, because it refers to the workers doing their ordinary work in the carding department. He pointed out that the witness has not stated that the shaft and the pulleys overhead were not ordinarily unsafe or dangerous to the workers in the carding department doing other than their ordinary work or to persons employed in the factory other than the workers in the carding department. There is, however, no evidence to show that any risk or danger could be reasonably foreseen from the shaft and the pulleys to the workers in the carding department doing other than their ordinary work or to any person employed in the factory otherwise than in the carding department. On the contrary, the Factory Inspector Shah has stated that he had never heard of any fencing of the overhead shafts and pulleys in the carding department in any of the mills in India. He has worked in a Textile Mill as an Engineer for seven years and he has been a Factory Inspector for ten years. Moreover, he has stated that he had about 60 or 65 mills within his jurisdiction in Ahmedabad. Ahmedabad is known to have large and varied types of textile mills. The Factory Inspector has admitted that he had never suggested to any mill to provide fencing for the overhead shafts and pulleys. He stated that by position the shafts and pulleys overhead were quite safe to the workers working in the carding department. If with his long and varied experience the Factory Inspector had never suggested to any mill to provide fencing for the overhead shafts and pulleys, the only conclusion to be drawn is that the overhead shafts and pulleys are safe by position and no risk or danger can be reasonably foreseen to ensue to a person employed in the mill not only while doing his ordinary work in the carding department but even otherwise.

The learned Government Pleader argued that it is possible to foresee some risks or danger from the overhead shafts and pulleys to persons employed in the factory who may be assigned the work of repairing the shafts or pulleys or other machinery in the carding department connected with the shafts or pulleys. In the first place, as already pointed out, there is no evidence to show that such risk or danger can be reasonably foreseen or anticipated. But what is more, in our opinion, s. 21 does not contemplate a provision being made for the safety of an employee who is assigned the work of repairing machinery or of shifting machinery or of installing new machinery. In this connection the proviso to s. 21 and the provisions of s. 22 of the said Act which are co-related are very pertinent. The proviso enacts that for the purpose of determining whether any part of machinery is in such position or is of such construction as to be safe as aforesaid, account shall not be taken of any occasion when, it being necessary to make an examination of the machinery while it is in motion or, as a result of such examination, to carry out any mounting or shipping of belts, lubrication or other adjusting operation while the machinery is in motion, such examination or operation is made or carried out in accordance with the provisions of sub-s. (1) of s. 22. The occasions excluded by the proviso are the occasions when it becomes necessary to make an examination of the machinery while it is in motion or to carry out any mounting or shipping of belts, lubrication or other adjusting operation while the machinery is in motion. Such occasions must arise in the ordinary working of the machinery and may arise frequently. But in spite of the same, the said occasions have been excepted from the operation of the said sub-s. (1). Occasions for shifting the machinery itself or for repairing the same cannot be said to be normal operations in the working of the machinery. The occasions of shifting or repairing the machinery while in motion have not been provided for in the said proviso. It cannot be said that such occasions were not at all contemplated by the Legislature; nor can it reasonably be said that the Legislature, having in the said proviso, excepted the occasions mentioned in the said proviso, did not want to except the occasions of shifting or repairing the machinery from the operation of the said sub-s. (1). The only conclusion to be drawn is, therefore, that sub-s. (1) was never inten-

ded to provide for safety as mentioned therein against risks and dangers in connection with the shifting or repairing of machinery. As already observed, the prosecution can succeed in this case if it could possibly have succeeded before the accident to Gulab Punja occurred. But it is possible to argue, although it has not in fact been argued by the learned Government Pleader, that from the very fact that the management of the factory had issued instructions to shift the card No. 108 and the relative pulleys during recess time when the machinery was not in motion the same must of necessity indicate that a possibility of danger was foreseen if the card and the pulleys were shifted when the machinery was in motion. But even if such a danger could reasonably be foreseen, in our opinion, s. 21(1) does not contemplate that the occupier of the factory should provide against danger arising by reason of the shifting or repairing of machinery.

Another argument of the learned Government Pleader was that even if s. 21(1) (iv) (b) be construed to provide for safety only against foreseeable risks and dangers, there was a foreseeable risk in the present case inasmuch as belts may have to be mounted on the pulleys when the shaft and the pulleys were in motion. So far as this aspect of the case is concerned, it has to be borne in mind that the charge against the respondent is for not securely fencing only the shaft and pulleys and does not extend to not securely fencing the belts. It is, therefore, quite clear that the respondent cannot, in this case, be held responsible for not securely fencing the belts. The charge is confined to "not securely fencing of the shaft and pulleys". There is, however, no evidence in this case whether any risk could be reasonably foreseen to result from the operation of mounting the belt while the shaft and the pulleys were in motion only by reason of the non-fencing of the shaft and the pulleys without taking into consideration the risk or danger resulting from the non-fencing of the belt itself. Whether any risk or danger would result by the non-fencing of the shaft and the pulleys, irrespective of the non-fencing of the belt, is not a matter which we feel we are competent to decide in the absence of the necessary evidence. The relevant evidence on this point is only one sentence in the evidence of the Factory Inspector which reads: "Mounting of belts has to be frequently done." What the consequence of such mounting of belts would be and what danger or risk it would entail have not been deposed to by him. He has not deposed whether by reason of such mounting of belts any risk or danger can be foreseen to result from the shaft and the pulleys irrespective of the belt. Accepting this part of his evidence, it must be inferred that the mounting of belts must be a frequent operation not only in this particular mill, viz. the Jubilee Mill, but in all the other mills in Ahmedabad, which were within his jurisdiction, and in other parts of India. In spite of the same, the Factory Inspector has deposed that he had never suggested to any mill to provide fencing for the overhead shafts and the pulleys. What is more, he inspected the shaft and the pulleys on March 30, 1957, immediately or shortly after the accident to Gulab Punja occurred. He thereafter wrote out his report, exh. 4. But even in that report he has never envisaged any danger or risk resulting from the unfenced shaft and the pulleys. As admitted by him, it was only after some discussion he had with his superior officer (the Deputy Chief Inspector) that it occurred to him that there may possibly be some risk from the unfenced shaft and the pulleys. If a Factory Inspector with the experience of seven years as an Engineer in the Textile Mill and ten years as a Factory Inspector could not foresee any risk from an unfenced overhead shaft and pulleys, we think we are safe in concluding that such risk or danger could not be reasonably foreseen. Therefore, even apart from the fact that there is no evidence in this case in this behalf, we are further of opinion that the risk from the unfenced overhead shaft and pulleys was not a foreseeable risk and that, therefore, there was no breach of the provisions of s. 21(1) (iv) (b) committed by the respondent.

Under the circumstances, in our judgment, the respondent is not guilty of the offence with which he has been charged and he has been rightly acquitted of that offence by the learned Magistrate. We, therefore, confirm the order of acquittal and dismiss the appeal.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Shelat.

THE SPECIAL LAND ACQUISITION OFFICER, BOMBAY

v.

LAKHAMSI GHELABHAI.*

Indian Evidence Act (I of 1872), Secs. 43, 11, 13—Judgment in Land Acquisition Reference not inter partes and relating to property in vicinity of land subject of Land Acquisition Reference—Whether such judgment admissible as an instance from which market value of land in question can be deduced—Such judgment whether transaction or instance within cls. (a) & (b) of s. 13—Whether such judgment relevant as fact under s. 11.

A judgment in another Land Acquisition Reference not inter partes and with reference to another property situate in the vicinity of the land in question is not admissible as an instance from which the market value of the land in question can be deduced.

Such a judgment is neither a transaction nor an instance under cls. (a) and (b) of s. 13 of the Indian Evidence Act, 1872, and it is not a fact which would be relevant under s. 11 of the Act, but is a mere opinion as to the existence or otherwise of a fact.

*Madan Mohan v. Secy. of State*¹, *Secy. of State v. Amulya Charan*² and *Pribhu Dyal v. Secy. of State*³ dissented from.

*Secretary of State for India v. India General Steam Navigation and Railway Company*⁴ and *Atmaram v. Collector of Nagpur*⁵ explained.

*Ram Ranjan Chuckerbutty v. Ram Narain Singh*⁶ distinguished.

*Dinomoni Chowdhurani v. Broj Mohini Chowdhurani*⁷, *Lakshman v. Amrit*⁸, *Govindji v. Chhotalal*⁹, *Dharnidar v. Dhundiraj*¹⁰, *Mahomad v. Husan*¹¹, *Guffu Lal v. Fattah Lal*¹², *The Collector of Gorakhpur v. Palakdhari Singh*¹³ and *Government of Bombay, In the matter of: Karim Tar Muhammad, In the matter of*¹⁴ referred to.

THE Municipal Commissioner for Greater Bombay by his letter dated October 31, 1950, requested the Government to acquire C. S. No. 43 of Sion Matunga Division admeasuring 3648 square yards, belonging to one Lakhamsi Ghelabhai (claimant), for a Municipal Combined Market at Matunga. The land was notified under s. 4 of the Land Acquisition Act on January 22, 1951, and it was finally notified for acquisition under s. 6 of the Act by notification dated July 17, 1951. The Special Land Acquisition Officer was directed under s. 7 to take order for the acquisition of the land. The Special Land Acquisition Officer made his award under s. 11 on September 11, 1954, under which the total amount payable to the claimant was declared to be Rs. 2,62,200 at Rs. 62-8-0 per square yard.

*Decided, April 27, 1959. O.C.J. Land Acquisition Reference No. 10 of 1956. L.R. 167.

1 [1925] A.I.R. Cal. 481.	8 (1900) 2 Bom. L.R. 386.
2 [1927] A.I.R. Cal. 874.	9 (1900) 2 Bom. L.R. 651.
3 [1931] A.I.R. Lah. 364.	10 (1903) 5 Bom. L.R. 230.
4 (1909) L.R. 36 I.A. 200, s.c. 11 Bom.	11 (1906) 9 Bom. L.R. 65.
L.R. 1197.	12 (1880) I.L.R. 6 Cal. 171.
5 [1929] 31 Bom. L.R. 728.	13 (1889) I.L.R. 12 All. 1, r.B.
6 (1894) L.R. 23 I.A. 60.	14 (1908) I.L.R. 33 Bom. 325, s.c. 10 Bom.
7 (1901) L.R. 29 I.A. 24, s.c. 4 Bom.	L.R. 660.

On October 5, 1954, possession of the land was handed over under s. 16 and the amount of compensation was received by the claimant under protest. As the claimant was dissatisfied with the award as regards the amount of compensation, he applied for reference to the Court under s. 18. The matter was accordingly referred to the High Court and it came up before Shelat J. At the hearing counsel for the claimant sought to include in evidence the judgment of Tendolkar J. delivered on July 6, 1953, in certain Land Acquisition References relating to some plots situate near the land concerned in the present Reference, and to deduce from their value as determined by Tendolkar J. the market value of the land in question.

M. P. Laud, for the claimant.

H. M. Seervai, Advocate General, with *J. M. Thakore*, for the Special Land Acquisition Officer.

SHELAT J. The question raised by Mr. Laud is one of importance under the Evidence Act. Mr. Laud urged that the judgment in L.A. Reference Nos. 2, 3, and 4 of 1949 decided by Mr. Justice Tendolkar on July 6, 1953, relating to plots Nos. 66 to 69 situate near the land concerned in this Reference is admissible as evidence to establish (i) the value of those plots and (ii) to regard those plots as instances and to deduce from the value thereof as determined by Mr. Justice Tendolkar the market value of the plot in question. The learned Advocate General has objected to that judgment being admitted as evidence on the ground that it is not relevant under any of the provisions of the Evidence Act. The question has been argued at considerable length and it being one on which there is hardly any reported precedent of our Court, both sides have requested me to give reasons for my decision.

Now the parties concerned in those References were different except that one side in all those References is always the Land Acquisition Officer representing Government. The acquisition of those lands took place in January 1946 which was the date as of which the value of those lands had to be ascertained whereas the notification under s. 4 of the Land Acquisition Act in this case is of January 22, 1951. Tendolkar J. valued those plots on several instances of sale and other evidence led before him. Neither those instances nor that evidence on which that learned Judge came to his conclusion are before me. The point for consideration, therefore, is whether a judgment in another Land Acquisition Reference not *inter partes* and with reference to another property, even if situate in the vicinity of the land in question, is admissible as an instance from which the market value of the land in question can be deduced.

The Advocate General contended that the only provisions under which a judgment in another case is admissible are those contained in ss. 40 to 43 of the Evidence Act, and that the judgment of Tendolkar J. does not come within anyone of those sections and, therefore, cannot be admitted. Section 40 enacts that the existence of a judgment which by law i.e. by the provisions of the Code of Civil Procedure or Code of Criminal Procedure constitutes *res judicata* or *autre fois acquit* or *autre fois convict*, is a relevant fact. In such cases, however, the judgment is *inter partes*. Section 41 deals with judgments which are called judgments *in rem*, that is judgments which are conclusive not only against parties thereto but against all persons. Section 42 makes those judgments relevant which relate to matters of public nature, though they are not *inter partes*. Mr. Laud conceded that none of these three sections would be applicable, but he relied on s. 43 which provides that a judgment other than those mentioned in ss. 40 to 42 is irrelevant unless the existence of such a judgment is a fact in issue or is relevant under some other sections, e.g. ss. 8, 11, 13, 54 (Expl. 2) etc. Sections 8 and 54 (Expl. 2) have obviously no application to the question before me and therefore need not be considered. The question then is whether either s. 11 or s. 13 applies.

Section 13 enacts that where the question is as to the existence of any right or custom, any transaction by which that right or custom was created, claimed, modified, recognised, asserted or denied or which is inconsistent with its existence or any particular instance in which such right or custom was claimed, recognised or exercised or in which its exercise was disputed, asserted or departed from is relevant. Now, the right or custom referred to in this section is not confined to public right or custom but includes all sorts of rights and customs, though they must relate to property in respect of which a subsequent litigation has arisen. But even where in such subsequent litigation the question of right or custom arises, the view as expressed in *Gujju Lall v. Fatteh Lall*¹ at one time was that a judgment, if it did not fall within ss. 40 to 42, would not be relevant. But the Privy Council in *Dinomoni Chowdhrami v. Brojo Mohini Chowdhrami*² disagreed with that view and held that certain orders passed under s. 145 of the Criminal Procedure Code were admissible both under general principles and under s. 13 to show the fact that they were in fact made and that such orders would be evidence also on the question as to who the parties to the dispute were, what the land in dispute was and who were declared entitled to retain possession. Relying on this decision it has been held since then in a number of decisions that a judgment, even if not *inter partes*, is admissible to prove the fact of a claim to a right having been previously made and the legal effect of such a judgment.

But in order to determine whether a particular judgment, not *inter partes* of course, is admissible, the test laid down in cls. (a) and (b) of s. 13 have to be borne in mind. The judgment must be in a litigation in which a right or custom is created, claimed, asserted, denied etc. If it is relied on as an instance it must be one in which again a right or custom was claimed, recognised, exercised etc. Thus a judgment in a previous litigation to which one party in the subsequent litigation was not a party can be admissible for corroboration of a fact asserted by the other party in oral evidence, viz. that that party had asserted a claim, for instance, over the disputed land at some period. Thus in *Lakshman v. Anriti*³, the question was whether a partition-deed relied on by one of the parties was a genuine document. Ranade J. held that though the decision in the former suit where the same document was dealt with, would not amount to *res judicata*, still the record and the judgment in that suit would be relevant to show the conduct of the parties therein and their admissions. At p. 393 of the report he observes:

"...Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property."

Similarly in *Govindji v. Chhotalal*⁴ Jenkins C. J. and Candy J. held that where a judgment not *inter partes* is in a suit brought by certain creditors against the same defendants in which the existence of partnership, denied in the subsequent suit, was asserted with success, the judgment in the previous suit is admissible, though it is not conclusive on that question. Likewise in *Dharnidar v. Dhundiraj*⁵ Jenkins C. J. and Batty J. held that for a judgment to be admissible it is not necessary that it should be one *inter partes* or a judgment *in rem*. See also *Mahomed v. Husan*⁶, where a previous judgment, though not *inter partes* was held admissible to prove that a sale-deed relied on by the plaintiff was disputed as non-genuine in the previous litigation. A judgment not *inter partes* may not be proof of facts therein stated, yet it is admissible for the purpose of explaining the character in which possession of a property has been enjoyed and matters of that class. It is thus a settled rule that judgments not *inter partes* and though not falling under ss. 40 to 42 are relevant for certain pur-

1 (1880) 1 L.R. 6 Cal. 171, at p. 185.

2 (1901) L.R. 29 I.A. 24, s.c. 4 Bom. L.R. 167.

3 (1900) 2 Bom. L.R. 386.

4 (1900) 2 Bom. L.R. 651.

5 (1903) 5 Bom. L.R. 230.

6 (1906) 9 Bom. L.R. 65.

poses under s. 13 where they are relied on as establishing the fact of a right or custom having been previously created, claimed, modified, recognised, asserted or denied.

The next section on which reliance is placed is s. 11, which enacts that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. The contention is that a decision which has determined the value of a property in the vicinity of the property in question is relevant for showing that a certain value claimed for the property in question is a highly probable fact. The question is whether such determination of the value of such a property is a fact.

Though s. 11 is expressed in wide terms, a series of decisions have expressed the view that it is not to be widely construed. The sort of facts the section is intended to include are those which either exclude or imply more or less distinctly the existence of facts sought to be proved. But there is a distinction between the existence of a fact and a statement as to its existence. It is the former only that is relevant under s. 11. The words "highly probable" in s. 11 point out that the connection between the fact in issue and the collateral fact sought to be proved must be so mediate as to render the co-existence of the two highly probable. The admissibility of a particular piece of evidence that is offered must, therefore, be so closely connected with and in fact must depend on the weight to be attached to that piece of evidence if it is taken into consideration.

Is a judgment then a fact which would be relevant under s. 11? Section 2(9) defines "judgment" as a statement given by a Judge of the grounds of a decree or order. In *Gujju Lall v. Fattah Lall*⁷, Garth C. J. said that a judgment is no more than an opinion. The same view has also been expressed by a Full Bench of the Allahabad High Court in *The Collector of Gorakhpur v. Palakdhari Singh*⁸. Since s. 11 talks about collateral facts only as being relevant, a judgment, not being a fact, could not have been intended to be relevant under that section. Section 11, therefore, has no reference to judgments which are opinions in regard to the existence or non-existence of certain facts in dispute between parties. So far as s. 13 is concerned a judgment, not *inter partes*, can be relevant only if it falls under cls. (a) and (b) thereof and not otherwise. It is neither a transaction nor an instance. It is not relevant also under s. 11 as it is not a fact but a mere opinion as to the existence or otherwise of a fact.

But it is argued that although a judgment determining the value of another property may not fall either under s. 11 or s. 13 of the Evidence Act, it would still be admissible on general principles, for it would be illogical to admit evidence of a sale of another property and not to admit a judgment which has decided the value of another such property. Such a judgment, it is argued, may not be conclusive even with regard to the value of the property with which it is concerned; nonetheless it is relevant as a piece of evidence showing the value of that property. There are, however, difficulties in acceding to these arguments. The first difficulty is, as argued by the learned Advocate General, that whereas evidence as to a sale is subject to the test of cross-examination, a judgment is not. The second difficulty is that since such a judgment is not conclusive as it is conceded even by Mr. Laud, all the evidence on which that judgment depends must become evidence in a subsequent case and has to be subjected to the scrutiny of cross-examination. If a claimant relies on a previous judgment all that he would have to do would be to produce it, and although the burden of proof of showing a certain value of the property in question is on him, that burden in every case where such a judgment is produced would shift on the other side to establish that the determination of the value of the

property involved in that case was not correct or valid. The third difficulty is that since such a judgment is admittedly not conclusive it would have to become subject to a review by another Court of an equally co-ordinate jurisdiction. Such a result could not have been intended by the draftsman of s. 11 or s. 13 of the Evidence Act.

But Mr. Land urged that a judgment in a Land Acquisition Reference must be admitted in evidence as an instance as it is a solemn determination of the value of the property involved in it by a competent Court and has consequently a better sanctity than evidence of a sale effected by private parties. He argued that such a judgment would be both a transaction and an instance within the meaning of s. 13 of the Evidence Act and has been so held in a number of decisions.

In support of this argument Mr. Land first relied on *Madan Mohan v. Secy of State*⁹, where a Division Bench of the Calcutta High Court held that previous decisions in land acquisition cases are relevant in a subsequent land acquisition case where the market value of land in the same neighbourhood is in issue. There the question as to admissibility of a previous judgment arose in an appeal against an award passed by the Calcutta Improvement Tribunal whose President had disallowed the claimant to adduce evidence with regard to compensation paid to him in respect of other properties belonging to him under previous judgments. It was contended that such judgments were admissible and that the ruling given by the President of the Tribunal was erroneous. Dealing with this contention, the learned Judges observed that in assessing the market value of a certain land, price paid in transactions relating to other lands in the neighbourhood must be of some value, and though what their value is, it is for the Court to decide, a previous judgment for that reason cannot be rejected. For the view taken by them they relied on the decision of the Privy Council in *Secretary of State for India v. India General Steam Navigation and Railway Company*¹⁰, stating that that was a clear authority for the proposition that previous decisions in land acquisition cases are relevant in a subsequent case, where the market value of land in the same neighbourhood is in issue. Another decision relied on is that in *Secy. of State v. Amulya Charan*¹¹, where it was again held, relying on the same decision of the Privy Council, that prices, which are given by the Collector to persons whose lands are acquired and who accept them without protest, constitute valuable evidence in assessing the market value of the property in suit. Similarly in *Prithu Dyal v. Secy. of State*¹², decided by Tekchand and Walker JJ. certain awards made by the Collector in other acquisitions by Government were allowed to go in as evidence. Relying on these cases Mr. Land urged that awards made by the Collector and accepted by parties and previous judgments in respect of other properties in the neighbourhood of the property in question are admissible.

Now, the question as to admissibility of awards stands on a different footing than the one relating to judgments and, therefore, I will first deal with the question of awards. It is well-settled that an award made by a Land Acquisition Officer is not an admission binding on Government for the purposes of a Reference under s. 18 of the Land Acquisition Act. The Land Acquisition Officer occupies no better position than that of an agent of Government for the purpose of making an offer. That offer may be accepted or rejected by a claimant, who, if dissatisfied with it, may ask for a Reference. When the matter comes before the Court on such a Reference, it is the Court who has to determine the question of valuation on evidence and evidence alone. The award thus being a mere offer, it is difficult to see how it can become evidence in another case in which different parties and different properties are concerned. Besides, an offer is at best opinion evidence, which cannot become admissible, unless the person making the offer gives evidence about it. The decision re-

⁹ [1925] A.I.R. Cal. 481.

¹⁰ (1909) L.R. 36 I.A. 200, s.c. 11 Bom. L.R. 1197.

¹¹ [1927] A.I.R. Cal. 874.

¹² [1931] A.I.R. Lah. 364.

ported in *Prabhu Diyal v. Secy. of State*, gives no reasons why such an award amounts to evidence binding on a person who is not a party to that award, nor does it mention any of the provisions of the Evidence Act under which it becomes relevant evidence. Allowing an award as evidence, besides, is inconsistent with its very nature for it is nothing which is final. It is at best an offer which is not binding either on the claimant or Government and is subject to its being set aside by a Court. The fact that it was accepted by a claimant without asking for a Reference is also immaterial for a claimant might not seek a Reference for fear that it would involve him into litigation involving costs and time. With great respect to the learned Judges who decided that case, it is not possible for me, therefore, to agree with the principle they are said to have laid down that an award is admissible evidence.

With regard to the question as to judgments not *inter partes* and dealing with other properties, it is necessary to observe that the two Calcutta decisions relied on by Mr. Laund also do not mention any of the provisions of the Evidence Act under which they are relevant. It is clear from the reports of these two decisions that the learned Judges who decided them relied solely on the decision in *Secretary of State for India v. India General Steam Navigation and Railway Company* as an authority. It becomes, therefore, necessary to see if that decision really lays down the principle which the two Calcutta decisions lay down. Though the Privy Council judgment is reported in 36 I.A. 200, a fuller report of it is to be had in *Secretary of State for India v. India General Steam Navigation and Railway Company*.¹³

The case arose out of acquisition of 53 bighas of land situate on Garden Reach Road bearing numbers, 6, 7 and 8. The land was acquired for improvement of the Kidderpore Docks at the instance of Port Commissioners of Calcutta. The Special Land Acquisition Judge of the 24 Parganas in a Reference made to him under s. 18 of the Land Acquisition Act estimated the value of the land at Rs. 500 per *cottah* against which an appeal was filed in the High Court claiming Rs. 1,000 per *cottah* and challenging the method of valuation adopted by the Special Judge. The High Court rejected the valuation placed by the Special Judge and awarded higher rates against which the Secretary of State appealed to the Privy Council. From the judgment of the High Court which is included in the report it appears that among other evidence two previous judgments of the High Court dealing with other lands in the vicinity were relied on by the claimant. At p. 971 of the report the High Court observed as follows:

"...But basing our valuation on the evidence given in this case on both sides and taking into consideration such evidence, as to rates of rent, sales and awards, we are inclined to value the land at very much the rates given by the learned Chief Justice and Mr. Justice Geldt for the land taken up at the corner of the Watganj and Garden Reach Roads. This land is very near, if it is not the nearest land, to the subject of this Reference, of the value of which we have evidence."

It is thus manifest that the High Court did take into account at least one of the two previous judgments admitted in evidence, viz. the one of the learned Chief Justice and Geldt J. and relying on it together with the other evidence raised the compensation. Before the Privy Council, Cohen K. C. who appeared for the Secretary of State argued that (p. 972):

"...The judgment in the previous case relied on by the High Court was not evidence in the present case of the value of the land in dispute. The land to which that judgment related had, by reason of its position in a highly congested business area at the junction of two traffic thoroughfares, a special and extraordinary value, and it had nothing in common with the land now in question which could form the basis of comparison between the two in estimating their respective values."

He argued further that the High Court had disregarded evidence relating to other lands which were more similar to the land in question and that the High

* 13 (1909) I.L.R. 36 Cal. 967, s.c. 11 Bom. L.R. 1197.

Court had erred in setting aside the method of valuation adopted by the Special Judge and in ignoring the fact of his special knowledge in connection with such valuation. Mr. Land contended that from the summary of arguments it appeared that counsel for the Secretary of State did raise the question as to the admissibility of a previous judgment in another acquisition case and that the Privy Council assumed that such a judgment was relevant and did not, therefore, expressly answer that argument. That is not correct. If such a contention was in fact raised, counsel of the eminence of Sir R. Finlay, who appeared for the claimant, could not have remained silent over it. Lord Collins, who delivered the judgment of the Board, was also bound to deal with such an important contention. It appears, on the contrary, from the arguments of counsel that the contentions raised were mainly; (1) that the High Court erred in relying on valuation made in the previous judgment in respect of a property which was not comparable and which had special advantages and (2) that it also erred in discarding the method of valuation adopted by the Special Judge in view of his special knowledge of such cases.

As I read this judgment it is clear to me that the question whether such a previous judgment or award was admissible under the Evidence Act or not was not argued before the Privy Council and, therefore, the Board was not invited to decide that question. This is clearer still from the judgment itself. At p. 974 of the report, Lord Collins deals with the contentions of Cohen K. C. as follows:

"It seems to their Lordships that there is no question of principle involved in this appeal. In fact, the main argument of the appellant is a practical denial of the right of the High Court to review the findings of the Special Judge, whose great experience in such cases, they suggested, ought to outweigh all other considerations. Indeed, when one comes to close quarters with their objection to the decision, it seems to resolve itself to no more than this, that the Court gave undue weight to the prices paid on the sale of a particular piece of land in the vicinity as affording a guide to the compensation to be awarded in the case before them. It is by no means clear to their Lordships that there is any good ground for this suggestion."

I do not see either in this passage which deals with the contentions raised on behalf of the Secretary of State or anywhere else in the judgment Lord Collins either assuming or laying down the principle that a previous judgment in another acquisition case is admissible. That question was not raised before the Board and the Board did not answer it as it was not called upon to do so. With great respect to the learned Judges who decided the cases reported in *Madan Mohan v. Secy. of State* and *Secy. of State v. Amulya Charan* it is difficult to see how the decision in the *Secretary of State for India v. India General Steam Navigation and Railway Company* can be regarded as an authority for the proposition they laid down.

Another decision of the Privy Council to which my attention was drawn is to be found in *Atmaram v. Collector of Nagpur*,¹⁴ where some 258 acres of land belonging to 25 owners including the appellant were acquired. The Collector treated the entire land as purely agricultural and awarded Rs. 60 per acre. The other owners accepted the award but the appellant asked for a Reference asserting that the lands should be valued as building sites. The District Judge rejected the Collector's award holding that the lands should be valued on the basis of their being "problematical building sites in an undeveloped form" and valued them at Rs. 300 per acre. Against this decision Government filed an appeal before the Judicial Commissioner's Court of Nagpur in which the Collector emphasised as his main contention the inference to be deduced from the acceptance of the awards made by him by the owners of lands other than the land of the claimant. The claimant objected to this plea and claimed the right to cross-examine those owners and thereupon the Judicial Commissioners remanded the case to the District Judge to take evidence.

Evidence was taken accordingly but strangely those other owners, vouched by the Collector, were left to be called by the claimant and were cross-examined therefore not by him but by the Collector. Even so, the evidence was that they accepted the awards not because they were satisfied with them but because they did not wish to involve themselves in litigation or because they did not have the necessary funds to launch such litigation. Ignoring this fact and the rest of the evidence, the Judicial Commissioners relied only on the fact of the acceptance of the awards by those other owners, and reversed on the strength of that fact the decision given by the District Judge and restored the award of the Collector. The Privy Council held that the Judicial Commissioners erred in ignoring all the considerations pertinent to the claimant's own lands and in founding themselves exclusively on the evidence of the price accepted for other plots by those other owners, the conditions of which were not fully before them.

Now it is true that the awards made in respect of lands other than that of the claimant and the fact of their having been accepted were admitted in evidence. Mr. Laud relied, therefore, on this decision and argued that in this case also the Privy Council did not observe that the awards were not admissible or that they had been wrongly allowed to go in evidence. But that is a wrong way of viewing this decision. The mere fact that the Privy Council did not say that the awards were wrongly inserted in evidence does not mean that their Lordships therefore laid down the proposition that such awards were admissible as canvassed by Mr. Laud. It is clear from the judgment of the Privy Council that that question was again not raised before their Lordships nor was it dealt with by them. That question was not raised on behalf of the claimant probably because on merits there was clear evidence that those other owners had accepted the awards made in respect of their lands not because they considered them to be satisfactory but because of want of funds to proceed further and because of their unwillingness to involve themselves in litigation. Since acceptance in such circumstances could not make those awards conclusive on the question as to the market value of the claimant's lands, the Privy Council interfered and set aside the judgment of the Judicial Commissioners. The point whether awards in respect of other lands are relevant has thus not been dealt with in this decision. Therefore this decision again cannot be taken as an authority on that point.

The last case referred to me was *Ram Banjan Chuckerbutty v. Ram Narain Singh*¹⁵. The principle deducible from this decision is that certain decrees previously passed, to which the plaintiff's predecessors-in-title were not parties but which sustained the defendants' claim to hold the lands in dispute at certain fixed rents relating to which the plaintiffs had filed the present suits for ejectment, were admissible in evidence as showing ancient possession and assertion of title many years ago and those decrees taken along with other evidence showed defendants' possession at a uniform rate for so long a period as to raise a presumption that the tenure was of a permanent nature. It is thus clear that the decrees though not *inter partes* were admitted in evidence as showing the fact of the defendants having claimed as tenants the right to possession in the past and that right having been recognised. The ground of admission of these decrees in evidence is, therefore, quite different than the one submitted by Mr. Laud for admission of Mr. Justice Tendolkar's judgment. It was a ground which clearly fell under s. 13 of the Evidence Act.

In my view the Privy Council decisions relied on by Mr. Laud do not lay down the principle that a judgment not *inter partes* and relating to other land is admissible as either an instance or one from which the market value of the property in question can be deduced or inferred. Such a judgment cannot obviously fall under ss. 40 to 43 or under s. 11 or s. 13 of the Evidence Act. The decisions of the High Court of Calcutta cited by Mr. Laud cannot, with great respect, be accepted as authorities for the proposition that a previous judgment not *inter partes* and with reference to other land is admissible, for

those decisions are based solely on the Privy Council decision in *Secretary of State for India v. India General Steam Navigation and Railway Company*, which lays down no such principle. So far as the decision in *Prabhk Dyal v. Secy. of State* is concerned it is one which is contrary to the well-recognised concept of an award of a Land Acquisition Officer and, therefore, again with respect, I cannot follow it. On the other hand, I find myself supported in the view I take by the observations of Mr. Justice Macleod, as he then was, in *Government of Bombay, In the matter of: Karim Tar Muhamad, In the matter of*,¹⁶ where the learned Judge declined to take into consideration the amount awarded by a previous judgment of this Court for another property remarking that he could not obviously do so without considering all the evidence on which that judgment was founded and that the judgment by itself was no evidence for the market value of the property in question.

For the reasons aforesaid I have come to the conclusion that the judgment of Tendolkar J. sought to be included in evidence is not admissible and the contention of Mr. Laud must, therefore, be rejected.

Solicitors for the Claimant: *Thakordas Daru Hemany & Co.*

Solicitors for the Special Land Acquisition Officer: *Little & Co.*

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar.

BARI RAJESHWAR KUMBHAR v. TUKARAM LAHANU TELI.*

Custom—Whether custom should be in existence from time immemorial to be recognised by Court—Kumbhars of village taking earth from particular place for about thirty years for preparing earthen pots—Whether Kumbhars had acquired customary right to remove earth.

Where it was established that the *kumbhars* of a village used to take earth from the pit on the western side of a field, mix it with the earth of the village tank and then prepare earthen pots out of their mixture and that they had been doing so for about thirty years, held that this was a good custom which could be recognised by the Court on the ground that it had been in existence for a long time and, therefore, it could be held that the *kumbhars* of the village had acquired a customary right to take earth from the aforesaid pit.

Bholanath Nundi v. Midnapore Zemindary Company Limited,¹ *Lakshmidhar Misra v. Rangalal*,² *Musammam Subhani v. Nawab*,³ *Baba Narayan Lakras v. Sabooza*,⁴ *Kuar Sen v. Mamman*,⁵ *Lutchmeeput Singh v. Sadaulla Nushyo*,⁶ *Syed Ali v. Sarjan Ali*,⁷ *Abdul Hosain v. Sada Gobinda*,⁸ *Kunja Paria v. Nitya Nanda*,⁹ *Brajendra Kishore Roy Chowdhury v. Bama Charan Kalvarta*,¹⁰ *Arjun Kalbarta v. Manoranjan De Bhounik*¹¹ and *Rushi Bhiku v. Rushi Sheoram*,¹² referred to.

THE facts appear in the judgment.

C. J. Ghate, for the appellants.

D. T. Mangalmurti, for the respondent.

16 (1908) I.L.R. 33 Bom. 325, s.o. 10 Bom. L.R. 660.

L. R. 432.

*Decided, December 12, 1957. Second Appeal No. 414 of 1954, against the decision of N. M. Indurkar, Additional District Judge, at Chanda, in Civil Appeal No. 60-A of 1952, reversing the decree passed by P. V. Musumdar, Civil Judge, Class II, at Warora, in Civil Suit No. 14A of 1951.

4 [1943] Nag. 705, p.o., s.o. 46 Bom. L.R.

312, p.o.

5 (1895) I.L.R. 17 All. 87.

6 (1882) I.L.R. 9 Cal. 698.

7 (1913) 18 C.W.N. 735.

8 (1938) 42 C.W.N. 1102.

9 (1948) 53 C.W.N. 346.

10 (1932) 37 C.W.N. 18.

11 (1933) I.L.R. 61 Cal. 45.

12 (1927) 23 N.L.R. 192.

1 (1904) L.R. 31 I. A. 75.

2 (1949) 52 Bom. L.R. 458, p.o.

3 (1940) L.R. 68 I.A., 1, 31, s.o. 43 Bom.

L.R.—66.

MUDHOLKAR J. This is a second appeal by the plaintiffs and arises out of a suit instituted by them for a declaration that they have a right to take earth from field No. 111 of manza Shegaon Buzruk belonging to the respondent for preparing earthen pots and for a permanent injunction restraining the respondent from obstructing them from taking earth from this field.

It is common ground that this field was the banjar land of the lamberdar and was purchased from him by the respondent on December 13, 1948. The appellants' claim is that the kumbhars of the village have a customary right to remove the earth from the western side of this field and that there is actually in existence a pit on that side. The existence of this pit is admitted by the respondent, according to whom, its dimensions are 25' x 20' x 4'. The sole question to be determined in this case is whether the appellants have acquired a customary right to take earth from the aforesaid pit. Whether this custom exists or not is a mixed question of fact and law.

What has been established in this case is that the kumbhars of the aforesaid village used to take earth from the pit on the western side, mix it with the earth of the village tank and then prepare earthen pots out of their mixture and that they have been doing so for about 30 years. Could it be said that this is a good custom, and if so, whether it could be recognized by the Court on the ground that it has been in existence for a long time?

It may be mentioned at the outset that Shri Mangalmurti, who appears for the respondent, relying upon the decisions in *Bholanath Nundi v. Midnapore Zemindary Company Limited*¹ and *Lakshmidhar Misra v. Rangalal*² contended, in the first place, that a custom of this kind should have been in existence from time immemorial. In the first mentioned case, their Lordships mentioned the fact that the plaintiffs had claimed a right of pasturage over the waste lands on the ground that the right was enjoyed by them and their predecessors from time immemorial. Dealing with this point their Lordships observed in their judgment:

"...the right of pasturage claimed has been enjoyed by the plaintiffs and their predecessors from time immemorial—from the time of the Hindu Rajahs long before the Watsons had anything to do with the property."

From this it would be clear that the expression 'time immemorial' was understood by their Lordships not in the sense in which it was understood, i.e., prior to the year 1189, but in a different sense. No doubt, in the second mentioned case, their Lordships have observed (p. 59):

"...What the Courts have required of a custom, if the law is to uphold it as a right, is that it should be immemorial in origin, certain and reasonable in nature and continuous in use. It is by these tests that the appellants' claim in this case must be tried." The Courts referred to by their Lordships were the Courts in England. In that case, however, their Lordships have not considered what was exactly intended to be understood by the expression 'time immemorial'. Indeed, all that was established in that case appears to be that the right claimed was exercised from generation to generation and nothing more. In the circumstances and in view of other decisions of their Lordships, I do not think it will be proper to infer that the expression 'immemorial origin' is to be understood in India in the same sense as in England. In this connection I may refer to *Musammatt Subhani v. Nawab*³ in which their Lordships have observed:

"...It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district."

Again, in *Baba Narayan Lakras v. Saboosa*⁴ their Lordships have observed

¹ (1904) L. R. 31 I.A. 75.

L.R. 432, 438.

² (1940) 52 Bom. L.R. 458, F.C.

⁴ [1948] Nag. 705, F.C. at p. 711, S.C. 46

³ (1940) L.R. 68 I.A. 1, 31, S.C. 43 Bom. Bom. L.R. 812, at p. 315.

that in India a custom need not be immemorial, and all that is required is the evidence of long usage, and quoted with approval the following from *Kuar Sen v. Mamman*⁵:

"...The statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed." (p. 82).

I, therefore, do not accept the argument advanced on this point by Shri Mangalmurti.

Then Shri Mangalmurti says that the right exercised by the appellants cannot be upheld as a customary right inasmuch as what the appellants claim to have done was with the tacit approval and consent of the owner. In this connection he referred to an admission of the plaintiffs contained in the application made by them to the Tahsildar to the effect that they used to give some earthen pots to the malguzar. Now, in the first place, it is not clear from this whether such pots were given annually or at any fixed interval or otherwise; nor is it clear whether the pots were given by way of consideration for permitting the appellants to remove and utilise the earth from the field or merely as presents. It would not, therefore, be safe or proper to infer from this circumstance that the kumbhars removed the earth from the field with the approval and consent of the malguzar.

Then Shri Mangalmurti says that there is no certainty about the custom because the appellants are not themselves sure as to the exact portion of the field from which they could remove earth. No doubt, the plaint only says that the appellants have a right to remove the earth from the western half portion of the field and does not make any further specification as to the exact place from which they have the customary right to remove the earth. However, it has come in evidence that they exercised their right only over that portion of the field which is covered by the pit in question.

In *Mohidin v. Shivalingappa*⁶ a similar objection was taken. Dealing with it, the learned Judges observed (p. 670):

"...Here the defendants have, it is true, failed to set any limit to the space which they wish to use as a burial ground. But we must not confuse their wishes and their rights. They wish for the privilege of burial all over survey No. 1134. Their right according to custom as found by Assistant Judge seems to be to bury round about the darga. Because they fail to prove all they wish, there seems no reason for denying them the rights which they establish. A plaintiff may claim Rs. 1000, but if the evidence shows that he is only entitled to Rs. 100, he will get a decree for the latter sum albeit his claim as stated is not fully proved. What then is the uncertainty connected with this right of burial? There is no uncertainty as to the class of persons who have been in the habit of burying near the darga. It is not denied that the defendants belong to that class... The only point which can be said to be uncertain relates to the limits within which burials must be made. Those limits have not been defined. But we think that they are sufficiently indicated by the restriction of the right to a limited class and by the obligation to bury near the darga."

The learned Judges, therefore, upheld the custom, limiting it of course to that portion of the darga which was referred to in the evidence as having been used as the burial ground. The same can be done in this case.

Shri Mangalmurti then stated that the custom pleaded is not reasonable, because as a result of it the respondent will not be able to use this field for cultivation. Now, if the right is restricted to this pit, it is difficult to see how the respondent will be prevented from cultivating the field. In a case of this kind a direction similar to the one given by their Lordships in *Bholanath's* case could be made. In that case the villagers had claimed a right of pasturage over the waste lands belonging to the defendants. Their right was affirmed by their Lordships but they amended the decree of the Subordinate Judge in

terms providing that the plaintiffs should not prevent the defendants or their successors-in-title from cultivating or executing improvements upon the waste lands in question so long as sufficient pasturage is left for the plaintiffs and the other persons entitled to the right of pasturage claimed, with liberty to the parties, from time to time, in case of difference, to apply to the Subordinate Judge as they may be advised.

The last argument, and which is the strongest argument, urged is that the claim is in the nature of a right in *gross or profits a prendre*, and where such a right is claimed by a fluctuating body of persons, it cannot be acquired by a custom. According to Shri Mangalmurti, it could be acquired by dedication or grant. He points out that it has not been alleged by the appellants that their right originated in either of these ways. In support of his contention he relies upon a large number of cases, starting from *Lutchmeeput Singh v. Sadaulla Nushyo*⁷. The other cases are: *Syed Ali v. Sarjan Ali*⁸; *Abdul Hosain v. Sadai Gobinda*⁹; *Kunja Paria v. Nitya Nanda*¹⁰; *Brajendra Kishore Roy Chowdhury v. Bama Charan Kaivarta*¹¹; *Arjun Kaibarta v. Manoranjan De Bhoumik*¹²; and many other cases.

Indeed, it has been pointed out at page 9 in Joshi's Easements and Licenses, Second edn.:

"Though in England, as well as in India, customary rights in *gross in alieno solo* in favour of a fluctuating body of persons have been recognised freely, yet in England it may be taken as settled law that a fluctuating and uncertain body of persons cannot claim a *profit-a-prendre* by custom; for, such rights are deemed unreasonable, as they tend to destroy the subject-matter of the right itself. In the case of *Lutchmeeput Singh v. Sadaulla Nushyo* the Calcutta High Court refused to recognize fishery rights in favour of a fluctuating body of persons, and thus followed the principles of English law. A different view has however been taken by the Patna High Court in *Maharajahadur v. Gandhori Singh*¹³ where a right to hunt in a certain forest and to appropriate the game hunted therein was recognized in favour of a fluctuating body of persons. With submission it is suggested that the judgment of the Patna High Court in the last mentioned case, if as widely applied as proposed therein, would cause much hardship to private owners by making their tenements liable to subserve to the uncertain needs of a fluctuating body of persons. (*Brajendra v. Ishwar Kitabla*¹⁴)"

Therefore, if it is accepted that a fluctuating body of persons cannot acquire by custom a *profit-a-prendre*, it cannot be said that the villagers or a particular community in a village can be regarded as a fluctuating body of persons. In *Bholanath's* case the right to graze cattle on waste lands was claimed by the persons living in the village on the ground that all the villagers had such a right. It was not negatived on the ground that such body of persons must be regarded as fluctuating and, therefore, incapable of acquiring a customary right by long usage. Now, it may be mentioned that the right of pasturage claimed was not by way of an easement but it was claimed by way of a customary right. It seems to me, therefore, that this decision would afford a complete answer to the argument of the learned counsel Shri Mangalmurti.

In *Rushi Bhiku v. Rushi Sheoram*¹⁵ a right of this kind was claimed by the kumbhars of a particular village on the ground of custom and was upheld by the Court of Judicial Commissioner. It may be mentioned that in that case it was found that the right was exercised for a period of 20 years. In the present case, the right has been exercised for over 30 years. In the circumstances, therefore, I see no reason for not upholding the right.

Accordingly, I allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court. Costs throughout will be borne by the respondent.

Appeal allowed.

7 (1882) I.L.R. 9 Cal. 698.
8 (1913) 18 C.W.N. 785.
9 (1938) 42 C.W.N. 1102.
*10 (1948) 53 C.W.N. 346.
11 (1932) 37 C.W.N. 18.

12 (1933) I.L.R. 61 Cal. 45.
13 [1917] A.I.R. Pat. 640.
14 [1933] A.I.R. Cal. 539.
15 (1927) 23 N.L.R. 192.

Before Mr. Justice Mudholkar.

THE ORIENTAL METAL PRESSING WORKS (PRIVATE) LTD. v.
BHASKAR KASHINATH THAKOOR.*

Companies Act (1 of 1956), Secs. 312, 345, 2(13) & (28), 9—Transfer of office of managing director by will—Whether such transfer permissible.

Section 312 of the Companies Act, 1956, prohibits the assignment or transfer of the office of a director as well as a managing director, whether by a deed *inter vivos* or by a will.

ONE Dadoba Kashinath Thakoor, who was carrying on as sole proprietor a business of iron foundries and metal pressers in the firm name of Oriental Metal Pressing Works, sold this business to a private limited company named the Oriental Metal Pressing Works Ltd. (defendant No. 1) which was incorporated on May 26, 1955. The first directors of defendant No. 1 were Dadoba Kashinath Thakoor, his brother Bhaskar Kashinath Thakoor (plaintiff) and one of his sons Govind (defendant No. 2). On July 7, 1955, an agreement was entered into between Dadoba and defendant No. 1 whereunder Dadoba was appointed managing director of defendant No. 1 and he was entitled to hold that office for life. Under the agreement Dadoba was allotted a certain number of fully paid up shares of defendant No. 1. Clause 7 of the agreement was in the following terms:—

"Mr. Thakoor shall be entitled by deed *inter vivos* or by will or codicil to appoint any person to be a Managing Director in his place and stead and in default of such appointment the legal representatives of Mr. Thakoor shall be entitled to exercise the said power. Any appointee as aforesaid shall whilst holding office also be designated as a Managing Director and shall be entitled to be paid by the Company the same remuneration and to exercise the same powers and authorities as are vested in Mr. Thakoor and the appointee as aforesaid shall have a power of appointing any person to be Managing Director as his successor on the remuneration of not less than Rs. 1,000 (Rupees One thousand) per month and upon the same other terms and conditions as are herein contained."

The terms of the agreement were embodied in Article 109 of the Articles of Association of defendant No. 1, the relevant part of which was as follows:—

"Mr. Thakoor shall be entitled by deed *inter vivos* or by will or codicil to appoint any person to be Managing Director in his place and stead and in default of such appointment, the legal representatives of the said Shri Dadoba Kashinath Thakoor shall be entitled to exercise the power."

Dadoba died on January 14, 1957, leaving a will whereunder he appointed defendant No. 2 to be the Managing Director of defendant No. 1 from the date of his demise. By virtue of his appointment as Managing Director under Dadoba's will, defendant No. 2 began to act as Managing Director and the Chairman of the Board of Directors of defendant No. 1 and he also began to draw Rs. 3,500 per month as his salary.

The plaintiff challenged the validity of defendant No. 2's appointment as Managing Director and his right to convene meetings of the Board of Directors and refused to attend these meetings. In June 1957 the plaintiff received a letter from defendant No. 2 informing him that he had ceased to be a Director of defendant No. 1 under s. 283(g) of the Companies Act, 1956, and Article 85(F) of the Articles of Association of defendant No. 1, owing to his absence without leave at three consecutive meetings of the Board of Directors and/or at all such meetings for a continuous period of three months. Defendant No. 2 appointed one B. P. Sabnis (defendant No. 3) as Director in place of the plaintiff.

The plaintiff filed the present suit against the defendants *inter alia* for a

*Decided, January 30 and February 2, 1959.
(On a difference between Mr. Justice S. T. Desai and Mr. Justice K. T. Desai). First

Appeal No. 540 of 1958, against the decision of M. G. Chitale, Judge, Bombay City Civil Court, Bombay, in Suit No. 2935 of 1957.

declaration that he was and continued to be a Director of defendant No. 1, that the appointment of defendant No. 2 as Managing Director of defendant No. 1 was void, invalid and inoperative and that the appointment of defendant No. 3 as a Director was invalid, illegal and inoperative. The trial Judge decreed the plaintiff's suit, observing in the course of his judgment as follows:—

"...The question to be decided in the present case is whether the expression 'assignment' in s. 312 necessarily means only 'transfer *inter vivos*'. Wording of s. 312 does not throw light on the question whether the expression 'assignment' is used in a restricted sense. The word 'any' in s. 312 only indicates that all assignments are hit by s. 312, but the question is what is the scope of the expression 'assignment'. Is it used in a restricted sense? Section 2 of the Companies Act does not define the word 'assignment'. Where the Legislature intends to restrict or enlarge the meaning of a particular expression, it does so by defining that expression in the 'definition section'. If the object of the Legislature was to restrict the expression 'assignment' in s. 312 only to transfers *inter vivos*, it would have done so by defining that expression. In the Transfer of Property Act, s. 5 defines the expression 'transfer of property' and restricts it to 'transfer by acts *inter vivos*'. The relevant portion of s. 5 reads thus:

'In the following sections "transfer of property" means an act by which a living person conveys property at present or in future to one or more other living persons...' Thus the Legislature has made it clear that in the Transfer of Property Act, wherever the expression 'transfer of property' is used it means transfer by an act *inter vivos*. No such provision seems to have been made in the Indian Companies Act of 1956. If the object of the Legislature is not to allow a director to transfer his office to another person, and thus impose that person on the company as a director without consulting the company—and this object seems to be clear from the relevant provisions of the Companies Act—there seems to be no reason why the expression 'assignment' should be given a restricted meaning, and should be confined to transfer by act *inter vivos*. From the above quotations from Stroud's Judicial Dictionary and Iyer's Law Lexicon it is clear that it cannot be said that the expression 'assignment' can in no case refer to devise by a will. For the reasons stated above I am unable to accept the contention that the expression 'assignment' in s. 312 necessarily means only a transfer by an act *inter vivos*.

Mr. Banaji further urged that s. 312 uses the expression 'director' and not 'managing director', and hence s. 312 cannot apply to the facts of this suit. Section 2(26) defines 'managing director'. That definition clearly shows that 'the managing director' is necessarily a director, and there can be no doubt that the expression 'director' in s. 312 must necessarily include 'the managing director'. In my opinion s. 312 would apply to the assignment of the office of the 'managing director' as it necessarily includes the office of a 'director'.

It was further urged on behalf of defendants Nos. 1 to 3 that defendant No. 2 was and is 'a director' of defendant No. 1 company, and what was assigned to him by Dadoba is merely the additional powers of the managing director, and hence s. 312 would not apply. It is true that defendant No. 2 was already a director when he was nominated as the next managing director by the deceased Dadoba under his will, and also on the date when the provisions of the said will came into operation. But that would not help defendant No. 2, if in view of s. 312 read with s. 9, art. 109(b) and the corresponding clause in the agreement dated July 7, 1955, exh. 2 must be deemed to be void and hence non-existent in the eyes of the law from April 1, 1956, the date on which the Indian Companies Act of 1956 came into force. The relevant portion of art. 109(b) as well as the corresponding clause in the agreement dated July 7, 1955, read thus:

"The said Shri Dadoba Kashinath Thakoor may by deed *inter vivos* or by will or codicil appoint any person to be a managing director in his place and stead...' Thus art. 109(b) as well as the corresponding clause in the agreement dated July 7, 1955, authorised the said Dadoba Thakoor to transfer his office, which necessarily included a director's office, to 'any person', whether a director or not, by will or codicil or by deed *inter vivos*. It is obvious that this would be inconsistent with s. 312 of the Companies Act, and hence it must be held that the above-said provision in the articles of association and the agreement dated July 7, 1955, became void, and thus non-existent

in the eyes of 'law' since April 1, 1956, the date on which the Indian Companies Act, 1956, came into force. It is not disputed before me that the deceased Dadoba Thakoor exercised his powers under art. 109(b) and the corresponding clause in the agreement dated July 7, 1955, in appointing by his will, defendant No. 2 as the next managing director. The said will was made on August 18, 1956, i.e. after the Companies Act of 1956 came into force, the deceased Dadoba had no right to do so, and hence the appointment of defendant No. 2 as the next managing director under that will must be held to be invalid.

Mr. Bhatt for defendant No. 2 urged that defendant No. 2 does not want to claim any right under any of the provisions of the Companies Act with regard to a managing director, and therefore the definition in s. 2(26) would have no bearing. The question for determination is whether the appointment of defendant No. 2 by the deceased Dadoba by his will is valid or not. I have quoted above the relevant passage from Dadoba's will, and there can be no doubt that Dadoba exercised the power given to him by art. 109(b) and the corresponding clause in the agreement dated July 7, 1955, in appointing defendant No. 2 as his successor. Plaintiff relies on the definition given in s. 2(26) to show that the office of a managing director would necessarily include the office of a director and hence s. 312 would apply. The fact that defendant No. 2 does not in this suit claim or seek to enforce any of the provisions of the Act with regard to a managing director would not, in my opinion, be relevant while considering the question whether the expression 'director', rather 'any director' would include 'managing director' or not. While considering that expression reference to the definitions of 'director' and 'managing director' would certainly be permissible.

It was further urged on behalf of defendants Nos. 1 to 3 that the board of directors could delegate their power of appointing a managing director to the deceased Dadoba, they had done so, there is no prohibition in the Companies Act against such delegation, and hence appointment of defendant No. 2 as the managing director is valid. Article 105 of the articles of association lays down that the directors may from time to time appoint one or more of their body to be a managing director. If the board of directors had delegated to the deceased Dadoba only their power to appoint one of them as the managing director as his successor, that perhaps may have been valid. But that is not what has in fact happened. The relevant portion of deceased Dadoba's will quoted above clearly indicates that he exercised powers conferred on him by art. 109(b) and the corresponding clause in the agreement dated July 7, 1955, which—as I have said above—must be deemed to be void, non-existent in the eyes of law. Hence appointment made in exercise of power non-existent in the eyes of law must be held to be invalid. The mere fact that the 'appointee' i.e. defendant No. 2 happens to be a director cannot validate the appointment. Paragraph 5 of the deceased Dadoba's will quoted above does in no way indicate that he took into account the fact that defendant No. 2 was already a director, and he merely assigned his additional powers which he enjoyed as the managing director. In view of this I must hold that defendant No. 2's appointment as the managing director by the will of the deceased Dadoba Thakoor is invalid, and not binding on the plaintiff and defendant No. 1 company."

The defendants appealed to the High Court. The appeal was heard by S. T. Desai and K. T. Desai JJ. S. T. Desai J. was of the view that the plaintiff was entitled to the reliefs sought by him and that the appeal should be dismissed whereas K. T. Desai J. was of the view that the appeal should be allowed and the plaintiff's suit dismissed. Their Lordships referred the following points, on which they had differed, to one or more of the other Judges of the High Court as the Hon'ble the Chief Justice might be pleased to direct.

"(1) Whether the second appellant [defendant No. 2] was validly appointed Managing Director of the first appellant company,

(2) Whether the first respondent (plaintiff) ceased to be a director of the company, and

(3) Whether the third appellant [defendant No. 3] has been validly appointed a Director of the company."

Their Lordships' judgments, which were delivered on November 17 & 18, 1958,

were as follows:—

S. T. DESAI J. This appeal raises an important question of construction of s. 312 of the new Companies Act which section now imposes total prohibition against any assignment of his office by a director. The prohibition applies in case of both a public and a private limited company. The facts are not in dispute nor disputable. Appellant No. 1 (original defendant No. 1) is a private limited company incorporated on May 21, 1955. Prior to that Dadoba Kashinath Thakoor was the sole proprietor of a business of metal pressing works which he carried on in the firm name of Oriental Metal Pressing Works. Appellant No. 1 company acquired that business as a going concern. The agreement dated July 7, 1955, between Dadoba and the company states that Dadoba was appointed managing director of the company and was entitled to hold that office for life. Clause 7 of that agreement is as under:—

"Mr. Thakoor shall be entitled by deed *inter vivos* or by will or codicil to appoint any person to be a Managing Director in his place and stead and in default of such appointment the legal representatives of Mr. Thakoor shall be entitled to exercise the said power. Any appointee as aforesaid shall while holding office also be designated as a Managing Director and shall be entitled to be paid by the Company the same remuneration and to exercise the same powers and authorities as are vested in Mr. Thakoor and the appointee as aforesaid shall have a power of appointing any person to be Managing Director as his successor on the remuneration of not less than Rs. 1,000 (Rupees One thousand) per month and upon the same other terms and conditions as are herein contained."

Under the agreement Dadoba was to be allotted a certain number of fully paid up shares of the company. Article 109 of the articles of association of the company is material and is as under:

"109. (a) The said Shri Dadoba Kashinath Thakoor shall be the first Managing Director of the company at a remuneration of Rs. 2,500 per month subject to the said remuneration being increased by the Board of Directors of the Company. He shall be entitled to hold such office for life and will not be subject to clauses 87, 88 and 91 of these Articles;

(b) The said Shri Dadoba Kashinath Thakoor may by deed *inter vivos* or by will or codicil appoint any person to be a Managing Director in his place and stead and in default of such appointment, the legal representatives of the said Shri Dadoba Kashinath Thakoor shall be entitled to exercise the power;

(c) Any appointee as aforesaid shall, whilst holding office, also be designated a Managing Director and shall be entitled to the same remuneration and to exercise the same powers and authorities as were vested in the Managing Director in whose place and stead he is appointed;

(d) The appointee as aforesaid shall have a power of appointing any person to be a managing director as his successor on the remuneration of not less than Rs. 1,000 per month and with the same powers as are vested in Shri Dadoba Kashinath Thakoor." Dadoba died on January 14, 1957. By his will executed on August 18, 1956, he appointed his son, appellant No. 2 (original defendant No. 2) to be the managing director of the company from the date of his demise. Respondent No. 1 to the appeal (plaintiff to the suit) is the brother of Dadoba. Respondent No. 2 to the appeal (original defendant No. 4) is another son of Dadoba. The first directors of the company were (1) Dadoba; (2) Bhaskar; and (3) Govind, one of the sons of Dadoba. The same persons continued to be directors till January 14, 1957, when Dadoba died. At the time of Dadoba's death, the shares of the company were held as under:

Dadoba	.. ..	1,917 shares.
Plaintiff	.. ..	845 shares.
Defendant No. 2	.. ..	844 shares.
Defendant No. 4	.. ..	843 shares.

We are told that Dadoba died leaving 3 sons and his shares were inherited by his three sons as part of his estate.

Disputes arose between the plaintiff and defendant No. 2 soon after Dadoba's death when the latter assumed the managing directorship and chairmanship of the board of directors of the company on the basis of the appointment made by the will of Dadoba. Defendant No. 2 began to act as the managing director and the chairman of the board of directors of the company and also began to draw a salary of Rs. 3,500 per month. The plaintiff addressed letters to defendant No. 2 on March 23, 1957, and March 29, 1957, and contended that defendant No. 2 had no right to act as managing director and/or chairman of the board of directors of the company. He also contended that defendant No. 2 had no authority to call a meeting of the board of directors as he had purported to do and that the appointment of defendant No. 2 as managing director of the company by the will of Dadoba was not valid and not binding on the plaintiff or the company. Correspondence ensued in the course of which defendant No. 2 contended that he was the managing director and entitled to call meetings and conduct the business of the company as its managing director. The plaintiff contended that the power of Dadoba to appoint a managing director by his will given by the articles of association and the agreement was invalid, illegal and inoperative on the ground that in the meantime the new Indian Companies Act had come into force and the provisions of that enactment rendered any such power invalid and illegal. The plaintiff also contended that defendant No. 2 was acting in his own interest and in a manner detrimental to the interest of the company. He made reference to the agenda of a meeting dated May 13, 1957, which included an item viz. "To consider the provision for bonus to late Shri Dadoba Kashinath Thakoor in his capacity as the Managing Director". The plaintiff also contended that defendant No. 2 claimed to be the beneficiary under the will of Dadoba and his attempts were to add to the estate of Dadoba to the detriment of the company. In the last week of June, 1957, the plaintiff received a letter dated June 28, 1957, from defendant No. 2 alleging that the plaintiff had ceased to be a director of the company under s. 283(g) of the Companies Act and art. 85(f) of the articles of association of the company owing to his absence without leave at three consecutive meetings of the board of directors and/or at all such meetings for a continuous period of three months. The plaintiff brought a suit for a declaration that he was and continued to be a director of defendant No. 1 company and was entitled to act as such. He also sought a declaration that the appointment of defendant No. 2 as a managing director and/or chairman of the board of directors of the defendant No. 1 company was void, invalid and inoperative. He also sought a declaration that the appointment of defendant No. 3 as a director was invalid, illegal and inoperative. It seems that some time before the suit was filed, defendant No. 2 in the purported exercise of his powers had co-opted defendant No. 3 as a director of the company. The plaintiff also sought relief by way of certain injunction in that suit. He asked for an injunction restraining defendant No. 2 from acting as managing director of the company and for an injunction against defendant No. 3 restraining him from acting as a director of the company. He also sought a further injunction restraining the defendants from holding an annual general meeting of the company which was proposed to be held on November 28, 1957. In the suit, he impleaded the company as defendant No. 1. Defendant No. 3 to the suit (appellant No. 3), as I have already mentioned, was co-opted by defendant No. 2 as a director of the company. Various issues were raised by the learned Judge, City Civil Court, who tried the suit. It is not necessary for the purpose of the present narrative to state them and it will suffice to observe that the main question which had to be determined by the learned Judge was whether the appointment of defendant No. 2 as the managing director of the company by the will of Dadoba was invalid and ineffective in law by operation of s. 312 of the new Companies Act. That section, as I shall have occasion to point out little later, appears under the head-

ing "miscellaneous provisions" and is as under:

"Prohibition of assignment of office by a director.—Any assignment of his office made after the commencement of this Act by any director of a company shall be void." It will be convenient here to set out s. 9 of the new Companies Act which is as under:

"Act to override memorandum, articles, etc.—Save as otherwise expressly provided in the Act—

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be."

The expressions 'director' and 'managing director' are defined in the Act. I shall refer to those definitions a little later when examining one of the arguments urged on behalf of the appellants. It will be noticed that the marginal note to s. 312 suggests that the section lays down a prohibition of assignment of office by a director and the section is in terms of such prohibition. The learned Judge took the view that the object of the Legislature in imposing the prohibition laid down in s. 312 was that a director should not be clothed with the power to transfer his office to any person whether by an act *inter vivos* or by a testamentary instrument. He reached the conclusion that the expression "assignment" in the section should not be given a restricted meaning but must be read in a broad sense as applicable also to an appointment of any person as managing director of the company made by his will by a managing director to come into effect on his demise. He upheld the contentions of the plaintiff and gave the declarations and the injunctions sought by him. The Company and defendants Nos. 2 and 3 have now come to this Court in this appeal.

The first and the principal contention of the appellants pressed before us by Mr. Maneksha, learned counsel for the appellants, is that the appointment of defendant No. 2 as a managing director made by Dadoba by his will is not "an assignment of an office" within the meaning of that expression in s. 312. It is said that what art. 109 conferred on Dadoba is not any power of assignment but merely a power of appointment. It is also said that the word "assignment" means actual transfer. A transfer of office by a director, it is stressed, can only be by an act *inter vivos* and in no circumstances by a testamentary instrument. The greatest emphasis has been laid on the factor that on his death Dadoba naturally ceased to be a managing director. The argument has been stressed in the form of an interrogation: By will a person can bequeath any property; he can by an act *inter vivos* transfer any property. But how can a person transfer something which is non-existent?—something he ceased to hold immediately on his demise? It will be noticed that the argument is founded in the context of property and not of an office of a director which is purely personal and is not property. It is impossible to contend, says Mr. Maneksha, that there could be any assignment when Dadoba's appointment as managing director was only for his life and nothing was left for him to give at the point of time of his death. It is said that this is the most crucial question.

At first blush the argument, under the latter head, that a person cannot transfer what he has not got may perhaps seem somewhat attractive from a sheer legal point of view, however repugnant it may be to the object of the Legislature in laying down the absolute bar against the transfer of an office of a director. But on closer examination I think it defective even from the legal standpoint in paying too little attention to a number of relevant and material considerations, which, in my judgment, must weigh with the Court on this question of interpretation of the rule which aims to prevent use and

abuse of a power. The argument, if I may so describe it, asks us to apply to the situation before us the maxim *Nemo dat quod non habet*—you cannot give what you do not have; you cannot give what you do not have the right to give. The equivalent maxim is *assignatus utitur jure auctoris*—An assignee is clothed only with the right of his principal. Now, these maxims pithily express one of the leading rules as to titles and tersely state the well-known general rule that no man can transfer a greater right or interest in property than he himself possesses, and if he has none, he can give no title whatever to the property which is the subject-matter of the transaction.

The principle of these maxims is indubitably sound and it has bearing firstly on the quantity and secondly on the quality or nature of interest in property which can be assigned by the owner to another party. Now, what Mr. Maneksha contends for is the same principle but the contention assumes as a major premise an equivalence between the nature of a right or interest in property and the office of a director which by no stretch of argument can be termed as property or any interest or right in property. Such an equation, to my mind, is impermissible. We have nothing to do with any right or interest in property nor are we concerned with any question of title or transmission of a title which could or could not vest in Dadoba. The question before us is not whether a person can or cannot give what he has not got. The question is whether a director in a public or private company, who is empowered by the articles of association of a company to appoint another person in his place and stead by an act *inter vivos* or by his will, can be said to assign that office to the latter when he does so by an act *inter vivos* or by his will. It has not been possible for Mr. Maneksha to dispute that if this was done during the lifetime of the director by an act *inter vivos* it would be an assignment and hit by s. 312, though at one stage of the argument that position was not accepted. But that line had to be abandoned in view of the language of certain sections in the Act and particularly s. 86B of the repealed Act of 1913 and the proviso to the same to which I shall refer a little later. This present argument of learned counsel for the appellants is founded on certain observations of the learned editors of Gore-Browne's work on Companies Law, and it will be necessary for me to quote the same and examine them when I refer to s. 86B of our repealed Act of 1913. It will suffice here to state that those observations are made in the context of a private company and not a director of a public company, and even in the context of a director of a private company the opinion of editors of standard treatises on Companies law in England, as I shall point out, is to treat that point as one *in dubio*. Besides the point has little cogency since there is no section in the English law analogous to s. 312 of our Act of 1956.

We are concerned primarily and principally with the connotation of the expression "assignment of his office...by a director" and the legal inhibition contained in the section which is applicable in case of a director both in a public and a private company and the question is can he, if the articles of association permit it, appoint a person to be the director of the company in his place and stead by making such appointment by his will or is he prohibited by s. 312 from doing so notwithstanding such articles since s. 9 renders void any such articles which are repugnant to any provisions of the Act. Section 312 applies equally to a director in a public and a private company, and I have stressed that aspect because considerable emphasis was laid on behalf of the appellants on the fact that there are cases where an owner of a business transfers it to a private limited company and he is appointed a managing director of the company with powers to appoint any person in his place and stead by a deed or will as for instance in the case before us. I am not concerned with the object of giving such powers but with the validity of such powers, and the considerations relating to the object of conferring such powers in case of a private company would mostly be irrelevant in the case of a director of a public company. The prohibition in s. 312 is imposed for an object which I

shall point out little later can be gathered from the enactment itself. I prefer in the first place to examine the language of the section itself and shall turn to an enquiry as to its object only in so far as it is permissible and required by the well-known canon of construction that the meaning of the words of a statute is to be found not so much in strictly grammatical or in etymological propriety of language, nor even in its popular use, as in the subject, or in the occasion on which they are used and the object to be attained. Of this more hereafter.

The crucial consideration, therefore, is not that a person cannot transfer something which he has not got. But it must be as to what is the connotation of the expression "assignment" in the context of an office of a director which, indisputably, is not property or any right or interest in property. The Legislature has said that a director cannot assign his office, meaning thereby that he cannot transfer it to any other person. It is not questioned and could not be questioned that transfer of the office of a director in any shape or form is expressly prohibited by the statute. The crux of the matter, therefore, is what is it that is prohibited when it is enacted that you cannot assign the office of a director of a company. Now, one thing is clear that in case of a prohibition or restriction of this nature which is absolute and unqualified, the intention and object of the law-giver is to restrain and prevent a director from putting some one in his place and stead by any act on his part or doing any act which would have the same effect. The question, of course, must be: Has the intended object been carried out in appropriate language capable of bringing out that result? I put to myself the questions: Is this word "assignment" to be read in the narrow sense—in a sense wanting in breadth in which it is used in conveyancing language and by conveyancing men or in the context of rights in property where it may mean only a transfer by an act *inter vivos* or is to be understood in the broad comprehensive sense that the holder of the office is not to give it by any act of his *in presenti* and also not to give it to another by any testamentary disposition or direction or appointment. I have perhaps dwelt little longer than I need have done on the argument of learned counsel for the appellants that Dadoba could not transfer what he did not have at the point of time of his death because his office came to an end that very time and, therefore, the appointment by him of defendant No. 2 cannot be called an assignment of the office of a director. The argument would have cogency if there was any dispute about the quantity or quality or the nature of any interest or right in property when such consideration would certainly have had bearing on the enquiry. But in the context of an assignment of an office of the nature before us, it has little import.

The argument suffers from a patent weakness and it is this. It is indubitable that a right can be transferred by assignment of the nature of transfer *inter vivos* or by operation of law provided the transfer of that right is not prohibited by law and it is made in accordance with the requirements of law as to form such as writing, registration etc. In respect of a right not ordinarily transferrable, for instance one which involves personal element and which ceases on death or disablement, the law lays down that the right cannot be transferred unless other parties interested in the matter gave their consent to the transference of the right or imposes conditions subject to which alone the right may be transferred, as for instance in a case of a company if it is accepted in a meeting of the shareholders. In all such cases there is, in the first instance, no right of transfer either by an act *inter vivos* or by a testamentary instrument. But when the right is given and the condition necessary for the exercise of the power of transference is fulfilled as required by law, it is extremely difficult to see how it can be said that there cannot be a transfer of the right by testamentary disposition. To my mind, there is here no justification for any overrefined distinction between appointment and assignment. In the first place, we are not dealing with property. We are dealing with an office which can only be the subject-matter of an appointment. Whether

you call it an assignment or transfer or alienation or appointment, it has the same meaning and the effect is the same. I fail to see how in such a case it can be said that what is done is not a transfer because the right to transfer was not there. Of course, it was not there at the inception but it was there when the power to transfer the right was conferred. This, to my mind, is the weakness underlying the argument of learned counsel so strongly pressed for our acceptance.

To turn to the former head of the argument of Mr. Maneksha relating to the connotation of "assignment of an office" within the meaning of that expression as used in s. 312. Now, it is well understood that the expressions "assign" and "transfer" are often used in our statutes to convey the same meaning and the same sense and that the primary meaning of the word "assign" is to legally transfer or to legally make over any property or any right. It is equally well understood that the expression "transfer" is one of wide import and embraces both a transfer by an act *inter vivos* as well as a transfer by operation of law, that is by sale in execution, forfeiture, insolvency, intestate succession or testamentary disposition. In view of this connotation of the word 'transfer' the argument on behalf of the appellants was that a distinction must be drawn between an assignment of the office of a director and appointment of another person as a director by a person holding the office of director. Learned counsel, however, had to agree that if a director in a private company appointed for life and clothed with the power to appoint any other person in his place and stead were to exercise that power by an act *inter vivos* that would be an assignment of an office and hit by s. 312 even though it might be called an appointment. But it was said that appointment by a will in such a case would be wholly a different matter. It would not be within the ambit of the section because that would not be an assignment. The argument of necessity had to rest on the principle "one cannot give what one has not got." I have already examined that argument.

It has been argued by Mr. Khambatta, learned counsel for the respondents that there is no justification for giving a limited and narrow construction to the expression "assignment of office" which can mean passing of any right from one person to another. Counsel has referred to Law Lexicons and to Murray's English Dictionary. In Wharton's Law Lexicon, 14th edn., as to the verb "assign" it is stated that the verb is variously applied and the meaning given in that lexicon to the word "assign" is "generally to transfer property, especially personal estate, or set over a right to another, or appoint a deputy." It is common knowledge that the draftsmen of our Indian statutes do not prefer to use the expression "assign" in the context of property and have for a long time since the enactment of the Transfer of Property Act chosen to use the expression "transfer". Wharton defines "assignee" as a person appointed by another to do an act or perform any business. The expression "assignment" is defined as "transfer of an estate or interest in property". Mr. Khambatta has strongly relied on the meaning of the verb "assign" given in Murray's Dictionary and one of the meanings is "to appoint". He has also relied on the meaning of that verb given in that dictionary as "to transfer or formally make over to another." He has also relied on the meaning given there as "to appoint authoritatively" as also another meaning which is "to appoint, designate, ordain, depute". Counsel has also referred to certain provisions of the Transfer of Property Act. But I do not think it necessary to refer to those provisions because it has not been disputed and could not be disputed by Mr. Maneksha that the meaning of the expression "transfer" includes a transfer by an act *inter vivos* as well as by a testamentary disposition or direction. Great reliance has been placed by Mr. Khambatta on the meaning of the verb "assign" as "to appoint or to designate". Mr. Khambatta has also argued that the contention on behalf of the appellants in asking the Court to give a restricted meaning to the expression "assignment" ignores the existence of a third party viz. the company. It is said

that this is not a case of an ordinary assignment between an assignor and an assignee whereby some property is transferred by the assignor to the assignee. Here, what was being done, though called an assignment, was really an appointment to the post of the office of a director and which had the effect of imposing the will of one person on a third party and the third party was affected. This aspect of the matter, to my mind, cannot be ignored. It is not a bilateral act pure and simple with which we are concerned in this case. We are concerned with the office of a director in a company and one person is clothed with the power to appoint another person and the appointee is the third party. Therefore, the ordinary sense in which the expression "assignment" may be used in the context of transfer of property by an act *inter vivos* is a concept which need not be introduced in reading the expression "assignment" in s. 312. Learned counsel has also drawn our attention to the scheme of the Act. He has referred to s. 253 which lays down that only an individual can be a director of a public or a private company and not any body corporate or association or firm of partners; and he has also drawn our attention to s. 254 which requires that subscribers to the memorandum of any company can only be individuals and in default of and subject to any regulations in the articles of a company, subscribers of the memorandum who are individuals, shall be deemed to be the directors of the company until the directors are duly appointed under s. 255. He has also drawn our attention to s. 255(2). These sections have been referred to for the purpose of showing that the Act does not contemplate any continuity in the matter as must occur if the director could be a body corporate or an association or a firm of partners. It is urged that it is clear from various provisions of the Act that the intention of the Legislature was to prevent the mischief of any director introducing into the company any other person as a director at his own volition even though he might have been authorised by an agreement between him and the company to do so and even though the articles of association of a company may expressly permit that to be done. Numerous prohibitions have been laid down by the new Companies Act in case of managing agents, managing directors, managers and directors of the company and other officers of a company. It is not necessary for me to examine the scheme of the Act in any detail since it is now well understood that the new Companies Act aims at eradicating many serious mischiefs which the principle of perpetual management of companies had caused in the past. The argument of counsel is: Why permit that mischief to continue by reading s. 312 in a narrow sense by attributing any undue restricted meaning to the words "assignment of his office"? It is stressed that the real meaning of this expression and one to be gathered from the section itself is that a person cannot introduce another person as a director in that company even though authorised to do so by the articles of association of the company. This it is urged is the effect of reading s. 9 with s. 312. Then it is said that if the argument urged on behalf of the appellants were to be accepted, an inconsistent and incongruous position is bound to arise.

In my opinion, Mr. Khambatta is right when he says that an inconsistent and incongruous position must arise if the argument urged on behalf of the appellants is to be accepted by us. Of course, the Court will not attach any undue importance to this consideration, but any inconsistent or incongruous position that might arise has to be borne in mind even in interpreting a statute the language of which is plain and unambiguous. Moreover, it is not possible to say that the expression "assignment" is capable of only one meaning and one meaning alone nor has any such attempt been seriously made before us to suggest that the word "assignment" is capable of only one meaning. The inconsistent and incongruous position that can arise if the argument for the appellants is accepted is that while a director cannot during his lifetime appoint another person as a director in his place and stead, though authorised by an agreement between him and the company and the articles of association to do so, he can do so by an appointment which is to be effective immediately

on his demise. Of course, where the language of the section is plain, unambiguous and is not capable of more than one meaning, then ordinarily that meaning would have to be given by the Court. But in such a case, question of interpretation can hardly be said to arise. There will be no need of interpretation. The language itself being clear and manifest best declares the intention of the Legislature—*Absoluta sententia expositor non indiget*. But it is not possible to say that the expression “assignment” which is usually used in the context of property law and which has been pitchforked in a provision relating to the Companies Act in the context of a personal office which is neither an interest nor a right in any property and obviously is not an office of profit can be said to have a plain and simple meaning and which, as Wharton has said, is variously applied even in England.

Learned counsel for the respondents has also drawn our attention to s. 317 of the Companies Act. That section rules that a managing director of a company cannot be appointed for more than 5 years at a time. The argument has been that a managing director of a public company if clothed by any agreement between him and the company and the articles of association to appoint a successor would have power to make a will and appoint a successor, and in such a case, on his demise within the period of the allotted span of five years mentioned in s. 317, the appointee would step in as a managing director. The suggestion is that in case of a public company such a position would be inconceivable and intolerable. It is not necessary for me, however, to examine in any detail what would happen in case of a managing director clothed with any power as in the illustration suggested by learned counsel. But it does seem that such a strange and impermissible situation can arise and it does seem that the present argument lends support to the contention pressed on behalf of the respondents.

The next argument of Mr. Khambatta turns on the meaning and effect of art. 109. It is said that cl. (b) of that article authorised Dadoba to appoint any person to be a managing director in his place and stead, and in default of such appointment, the legal representatives of Dadoba were entitled to exercise the power. It is said that the appointment by Dadoba by an act *inter vivos* of any person as managing director in his place and stead would be within the mischief of s. 312, and if he appointed any person to be a managing director in his place and stead by a will or codicil, the appointment would be valid if the contention of the other side were to be accepted. The argument here is that there is no warrant for splitting art. 109 under two heads of ‘appointment by Deed’ and ‘an appointment by Will or Codicil’. It is said that if one part of art. 109 is bad, then the whole of art. 109 is bad. It is also said that not merely Dadoba but the legal representatives of Dadoba have also been given the power to appoint a managing director. The contention is that for this reason the whole of art. 109(b) must be treated as bad because it is not divisible. Now, this argument can have force only in case of matters which are not severable. I do not think that an appointment by a deed *inter vivos* and an appointment by a will or codicil are matters which are not severable. Therefore, there is little scope for the present argument urged before us by Mr. Khambatta. There is, however, considerable force in the argument of learned counsel that a restricted meaning should not be given to the expression “assignment” in the context of the personal office of a Director of a company under our Company law. Evidently, the construction pressed for our acceptance by learned counsel for the appellants relies—to put it in his own words—on ‘the rule of literal construction’. It has been strenuously urged that s. 312 must be literally construed, and so construed the expression “assignment” must be given the meaning pressed for our acceptance on behalf of the appellants. Not only that, but the argument asks us to put a restricted meaning on an expression ordinarily used in the context of property and rights and interest in property whereas in the section which we have to interpret, it is not used with reference to property but a personal

right involving confidence as a main element as well as the character, credit and substance of the person who is a director and who is sought to be appointed as a director in his place and stead. It also involves a third party viz. the company.

We have to construe an expression which is capable of a sufficiently flexible meaning as well as a restricted and narrow meaning. The elementary rule of literal construction, as has so often been said, is confined to cases where the language is precise and capable of but one construction or where neither the history nor the cause of the enactment, nor the context, nor the consequences to which the literal interpretation would lead, show that that interpretation does not embrace the real intention. It has also been repeatedly said that language is so often capable of being used in more than one sense and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. Words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with the intention of the law-maker. These are well settled principles of interpretation of a statute.

To turn to examine the object of the enactment. The expression "director" includes any person occupying the position of director by whatever name called and "managing director" means a director who is entrusted with any powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called. Only an individual can be a managing director of a company. It is plain from art. 109 that the right to appoint a director was given to Dadoba and the right could be exercised from generation to generation. A company is a perpetual body and the effect of accepting the construction pressed on behalf of the appellants would be that in this private limited company which is a perpetual body, the managing director was given a right to appoint the future managing director and if the right was not exercised by him, then his legal representatives could exercise that right so that the same process of appointment could continue from generation to generation. That, to my mind, is wholly foreign to the object and scheme of the new Companies law. I entertain no doubt that the object of the mandatory prohibition in s. 312 was to prevent any such appointment being operative in the lifetime of the director as well as after his death and the only doubt that must naturally arise is from the fact that my brother K. T. Desai J. holds a view different from mine. This type of perpetual management whether in the form of a director, manager, managing agent or managing director was an evil which had to be eradicated and the precise object of the whole Act read in the context of s. 9 was to eradicate that evil. I do not propose to burden this judgment by referring to the numerous sections of the Act which leave no doubt that such was the intent and object of the law-giver. I shall have occasion to refer a little later to s. 86B of the repealed Act of 1913 the language of which when compared with s. 312 does throw considerable light on this point. According to the argument of learned counsel for the appellant, the Legislature, although it has dealt with the matter of appointment of the nature before us made by a director in his lifetime, has not dealt at all with the matter of such appointment if it is to operate after death. It is said that if there is any lacuna in the Act, it is for the Legislature to remedy the defect. Of course, the Court cannot reach a *casus omissus* and no canon of construction permits the Court to cure a lacuna in a statute. That is simple. But it is equally true that omissions are not to be readily inferred. The Court, it is firmly established, will not wrest the language of a statute and will not lightly create or infer a lacuna. It will at the same time see

"that the true meaning of any passage is to be found not merely in the words of the passage, but in ascertaining also among other things what was the circumstance with reference to which the words are used, in what context they are used and what was the object which the Legislature had in view."

There is another aspect of the same question. We are not dealing with a codifying enactment but with an Act to consolidate and amend the law relating to companies and certain other associations. It is well settled that in an enactment of this nature, it is legitimate to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature. Many provisions of the Indian Companies Act of 1913 were adopted from analogous provisions in the English Companies Acts. A number of provisions in our Companies Act of 1956 have been adopted from the English Act of 1948. It is also true that there are numerous sections in which the language of the English enactment has only partially been adopted. There is no section in the analogous English enactment similar to s. 312 of our Act which, as I have already said, enforces prohibition of assignment of office of a director and that prohibition is absolute and unqualified. Under our repealed Companies Act, there was some analogous provision in s. 86B, the relevant part of which was as under:

"If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company:

Provided that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the directors are ordinarily held, if done with the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section:—"

That section was one of a group of sections 86-A to 86-I which were inserted in 1936 in the Companies Act of 1913. The corresponding provision in the English enactment was s. 151 of the Act of 1929. Section 204 of the English Act of 1948 was in *pari materia* with s. 151 of the earlier English enactment. Section 151 of the English enactment was as under:

"If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company."

It is noticeable and it is of some importance to observe that the first proviso to our s. 86-B, which I have quoted above, did not find place in s. 151 of the English Act of 1929 nor did it find place in the later English enactment of 1948. Section 86-B laid down certain restrictions on the powers of a director or a manager of a company to assign his office as such to another person. The restriction was that even though the articles of the company might have permitted it, no such power could be exercised unless and until the assignment was approved by a special resolution of the company. The proviso engrafted a material rule on the section. The effect of the proviso was that the power to make a temporary appointment of an alternate or substituted director to act for him which could be exercised by a director in favour of another person during his absence from the district could be exercised without any special resolution of the company and it was sufficient if the board of directors gave its approval to the same. Such a case, the proviso expressly stated, would not be deemed to be an assignment of office. It is clear from the language of the proviso that the Legislature took the view that there was ample scope for the suggestion that even such a temporary appointment of alternate and substituted director for a short period may be regarded as an assignment of office by a director. Therefore, one thing is clear from the language of that proviso read with the section that it was thought possible that a temporary appointment for a short period of a substituted director to act for

him during his temporary absence made by a director could fall within the meaning of the expression "assignment of office". It is implicit in the proviso that even though the articles of association may permit it, a director or a manager of a company had no right to put in his place and stead another person as a director even during his temporary absence. I have referred to that section to show what the intention of the Legislature was even under the provisions contained in s. 86-B. Although articles of companies do in some cases empower a director to appoint an alternate or a substituted director, the Legislature did not approve of any such right being created in favour of a director by an agreement between the director and the company or by recognising that right in the articles of association and laid down conditions which were restrictive of that right. It is a well-established principle of construction that when one finds a proviso to a section, the presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso. Of course, that presumption need not arise where it is clear that the proviso was inserted only *ex abundanti cautela*. A comparison of s. 86-B and the first proviso to the same with the language of s. 312 with which we are here concerned seems very instructive. In s. 312 the Legislature not being content with the restrictions imposed under the old section, decided to lay down an absolute and unqualified prohibition against the assignment of the office of a director in any circumstance and the only qualification that it has made is contained in s. 313, the relevant part of which is as under:

"313. *Appointment and term of office of alternate directors.*—(1) The Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint an alternate director to act for a director (hereinafter in this section called 'the original director') during his absence for a period of not less than three months from the State in which the meetings of the Board are ordinarily held."

Now, I have already pointed out that s. 86-B followed the language of s. 151 of the English Act of 1929 and s. 204 of the English Act of 1949 is in *pari materia* with s. 151, and neither that section nor the earlier s. 151 contained any proviso of the nature engrafted on s. 86-B of our Act of 1913. I have referred to the sections of the English enactment for the purpose of showing that the language of s. 86-B without the proviso had been borrowed from the English Act of 1929. I may observe that s. 204 of the English Act of 1949 does not impose any rigid bar on the assignment of his office by a director but the condition it imposes is that there should be a special resolution of the company. A curious and somewhat interesting position emerges if one turns to the standard text-books on the English Companies Act. The note of the editors of Palmer's Company Precedents under s. 204 of the Act of 1949 is as under (p. 874):

"The precise connotation of a power 'to assign office' as mentioned in the section is not clear. It is not thought that it would refer to a provision for the appointment of a successor; see, for example, paragraph (4) of Form 255, *ante*."

Now, Form 255 is in respect of a peculiar type of managing directorship and the person who holds that directorship is referred to in England as a governing director. It is not necessary for me to examine the Form 255 which is given in Palmer's Company Precedents. No clear opinion seems to have been expressed by the editors but they say that it is not thought that s. 204 would refer to a provision for the appointment of a successor by a governing director. They also say that the precise connotation of a power "to assign office" is not clear. Therefore, one thing is certain that the editors of that book were not inclined to state any definite opinion about the meaning of the expression "to assign office" in s. 204 and left the matter as one *in dubio*. Since the greatest reliance has been placed by Mr. Maneksha, learned counsel for the appellants, on certain observations made by the editors of the forty-first edi-

tion of Gore-Browne's Text-Book of Companies Law, I shall set out those observations *in extenso* (pp. 341-342):

"Where, in the case of a private company, the vendor of a business to the company is appointed a director by the Articles, he is frequently styled as 'governing director', and has conferred upon him all the powers of a board of directors, with a right from time to time to appoint a successor during his life, or by his will, or for his legal personal representatives to make such appointment after his death. In connection with such powers to appoint a successor the question whether its exercise constitutes an 'assignment' of the office within Section 204 may arise. That section renders the assignment of the office of director as such to another person of no effect unless and until it is approved by a special resolution of the company. It is difficult to see how a deceased person or his legal personal representatives could assign an office, and possibly in no case would the exercise of a power to appoint a successor under such an Article constitute an 'assignment' of the office, unless the appointment is made by the governing director during his life. The point is, however, a doubtful one, and it would be advisable for any person appointed as successor under such a power to obtain the support of a special resolution."

I do not think these observations are helpful in interpreting s. 312 of our Act of 1956. The argument on behalf of the appellants leans heavily on the very insecure foundation of these observations of the learned editors made in the context of a section (204) which does not contain any proviso similar to that under the repealed s. 86-B of our Act of 1913. What is more important is that s. 204 is not in *pari materia* with s. 312 with which we are really concerned and which lays down a stricter prohibition on the powers of a director. It is also noticeable that in England this point is not one of particular importance because there is no provision in the English Act similar to our s. 312 which imposes an absolute prohibition on the assignment of the office of a director. All that is required there is a special resolution of the company. None of the two statements of the learned editors of Palmer's Company Precedents or Gore-Browne's work claim the high authority of the illustrious authors of the works and the editors also have left the matter in doubt. It is well-known that Buckley who was later Lord Wrenbury was conservative in the matter of expressing his opinion and the editors of that work have been conservative in the matter of expression of opinions and that is one reason why Buckley's work has been very often referred to by Courts both in England and India. Now, the editors of the present edition of Buckley's work on Company law have made a significant note under s. 204 and the note is this (p. 401):

"*Quære*, what is meant by the expression 'assignment of office' used in this section which reproduces section 151 of the 1929 Act."

Mr. Manekshaw says that the expression "*quære*" only means that a question is put by the editors. To my mind, it is more than that. It is a question of the nature of objection. It is used at times to question accuracy of what has been said or written by another. In any case one thing is plain that the opinions of these editors expressed in the context of a rule which is different from the rule laid down in s. 312 would be slender support for the construction urged on behalf of the appellants.

We have here an express and unqualified rule in s. 312 which is manifestly intended to set at nought the mischief which must result if a director of a company public or private were to be permitted to exercise the power of introducing another person of his own choice as a director in his place and stead by assigning his office in favour of such person. The expression "assignment" so dear to the heart of English conveyancing lawyers is not used here in any context of conveyancing or transfer of any property or any right or interest in property, but in the context of making over of an office of director by one person to another. The expression is capable of being variously applied and I see no reason and no principle why its connotation should be confined to transference of any right by an act *inter vivos*. It is an expression of larger

import than that. In reference to something which is not property or right or interest in property it can certainly mean making over or setting over of any right by one person to another or appointment to an office by one person of another when the person holding the office makes it over to another by appointing him to hold that office. The argument pressed for our acceptance, as I have already mentioned, could not go to the length of suggesting that a director can during his lifetime make over his office to another person by calling it an appointment and not an assignment. It makes no difference to my mind whether he does it in his lifetime by an act *inter vivos* or by a will so that it operates from the date of his death. In either case it is an appointment to the office of director. In the course of the arguments I put it to learned counsel for the appellants if he could suggest any reason why the Legislature should deem it necessary to prohibit a director of a company from appointing another person as a director in his place and stead by an act *inter vivos*, that is, during his lifetime and should not deem it necessary to prevent him from doing so by a will. No answer was given save that it would be entering the region of speculation. It would be strange indeed to attribute to the Legislature the intention to create the anomalous position that must arise if it were to be accepted that s. 312 prohibits appointment by a director to his office of another person in his place and stead by an act *inter vivos* and yet permits such appointment to be made by him by his will. Moreover this incongruous position can arise not only in case of a director in a private company but also in case of a director in a public company if the construction urged on behalf of the appellants is to be accepted. To take the simple illustration of a case where by articles of association of a public company the promoters or managing agents are given the power to appoint one or more *ex-officio* directors for life. Such a power would be valid under s. 253 of the Companies Act so long as the number of such directors does not exceed one-third of the total number of directors of the company. Section 255 is as under:

"255. Appointment of directors and proportion of those who are to retire by rotation.—(1) Not less than two-thirds of the total number of directors of a public company, or of a private company which is a subsidiary of a public company, shall—

(a) be persons whose period of office is liable to determination by retirement of directors by rotation; and

(b) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(2) The remaining directors in the case of any such company, and the directors generally in the case of a private company which is not a subsidiary of a public company, shall, in default of and subject to any regulations in the articles of the company, also be appointed by the company in general meeting."

So, if the regulations in the articles of the company empower the promoters or managing agents to appoint a director or directors within the number permissible under sub-s. (2) for the lifetime of such director or directors, the appointment would be valid. Now, in such a case if the articles were to provide that a director or directors so appointed will have the power to appoint another person to his or their office of director by an act *inter vivos* or by will the position would be that the appointment by an act *inter vivos* would be void while the appointment by will would be valid if the construction which we are asked to put on the expression "assignment" were to be accepted. It is inconceivable to my mind that such is the object or effect of s. 312 of the Act of 1956. It seems indubitable to me that any such appointment of a director in a public company by will is within the prohibition imposed by the section. *Cadit questio* it is within the ambit of the prohibition in case of appointment of a director in a private company. The only answer to this suggested by learned counsel for the appellants was that s. 317 prevents appointment of a managing director of a public company for a term exceeding five years at a time. But that section has no bearing whatever on the present discussion

about assignment of his office by a director. It is extremely difficult for me to see why an intention should be attributed to the law-giver of laying down a rule the effect of which would be to rule that a director in a public or private company, authorised by the articles of the company, cannot make any such appointment five minutes before his death—that would be by an act *inter vivos*—and yet he can do it by inserting a clause to that effect in his will. It was, however, said that s. 255(2) has the effect of permitting appointment of a director in a public or private company being made by a third person who may be a total outsider and not a director of the company and the argument was that an appointment made by such third person cannot be called an “assignment” of the office of director. The argument ran that there was no difference between any such appointment made by a third party and an appointment made by a person who happens to be a director. The argument to my mind is not sound. The section speaks of assignment of his office by a director and the prohibition is evidently imposed on a person who is a director. It is the office held by a person as a director that is not permitted to be assigned by any act on his part. Therefore, there is a difference between an appointment made by a third party and one made by a director. In the former case it cannot be said that there is an assignment of his office by the person exercising the power. On a consideration of the whole matter it seems to me that having regard to the nature of the office of a director it cannot make any difference whether the act is called an assignment of his office by a director or transfer of his office by a director or appointment by such director of another person to that office in his place and stead either by a deed or will. I fail to see any reason why we should recognise the over-refined distinction sought to be made in case of an appointment by will by attributing any restricted and technical conveyancing meaning to the expression “assignment” of the nature suggested on behalf of the appellants. This is not a matter of doctrinaire technicalities but a matter to be considered on broad principles and rules of interpretation.

I have not yet made any reference to another argument urged before us by learned counsel for the appellants. It has been argued that s. 312 speaks only of a director and the prohibition imposed is against the assignment of office of a director and not against the assignment of office of a managing director. Section 312 is one of a group of three sections headed “miscellaneous provisions”. Chapter II of the Companies Act deals with directors. Learned counsel for the appellants has drawn our attention to certain sections where the Legislature has referred to a director and certain sections where reference is made to a managing director. The suggestion is that in respect of every provision of law affecting a managing director, the framers of the Act have taken care to lay down separate rules affecting them and where they have only referred to a director, the rule is only applicable to a director, though a managing director being a director the rule may also apply to him. But that, it is said, would be in a distinguishable capacity as a director and not as a managing director. An examination of the relevant provisions of the Companies Act would show that such is not the position. There are sections which apply to a director and are equally applicable to a managing director. Moreover, in sections which speak of a director the Legislature has taken special care to state necessary qualifications to the rule there stated if the section is not to apply to the case of a managing director. Before I examine one or two of such sections I should refer to the definitions of ‘director’ and ‘managing director’ which are as under:

“Sec. 2. (13) ‘director’ includes any person occupying the position of director, by whatever name called;”

“Sec. 2. (26) ‘managing director’ means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of Directors or, by virtue of its memorandum or articles of association, is entrusted with any powers of management which would not otherwise be exercis-

able by him, and includes a director occupying the position of a managing director, by whatever name called."

The definition of 'managing director' makes it abundantly clear that a managing director is necessarily a director entrusted with powers of management and that the expression managing director includes a director occupying the position of a managing director by whatever name called. In certain sections the Legislature has drawn a distinction between a director and a managing director by express words of qualification and it is impossible to say that the expression 'director' wherever it is used in the Act excludes a managing director. The definition of 'director' is rather comprehensive than restrictive. Now these expressions which are defined by the Legislature are always to be read in their context and as is usual in modern legislative practice s. 2 which gives definitions begins with the words "Unless the context otherwise requires". The expression "director" is not to be read in s. 312 or any other section as if it could apply only to a person who is a director and not to one who is also a managing director or to put it slightly differently as if it excluded *per se* a director who is also a managing director. When question arises whether the expression 'director' in any section is to be understood in a comprehensive or exclusive sense it would be necessary to examine the scope and ambit of the particular section and the nature and object of the rule and the context in which it is used. Now, as I have already pointed out, s. 312 is one of the sections under the heading of "Miscellaneous Provisions". That itself, to my mind, is some indication that the expression director is used in the sections under that head in a comprehensive and not an exclusive sense. What is more important is that there is ample support to be derived for the view that the expression director in these miscellaneous provisions is used in a general sense. Section 313 must evidently apply to a managing director although only the expression 'director' is used there. Then if s. 314 is scrutinised it is clear that the Legislature having used the expression director has expressly made reference to a managing director. Now one thing is quite clear that ss. 312 and 313 are to be read as dealing with a matter of the same nature and that the expression 'director' in those sections must have the same meaning. Section 307 also lends support to the same view and it is not possible to rule out consideration of that section by saying that a managing director is also a director, and that it must be read as applicable to a managing director only in his capacity of a director and not of a managing director. The point is whether the expression is always used in the exclusive sense contended for on behalf of the appellants. I may permit myself to refer to s. 86-B of the repealed Act for the purpose of examining the present argument. That section applied both to a director and a managing director. Section 2(24) of the Act of 1956 defines "manager" to mean:

"an individual (not being the managing agent) who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not;"

Section 86-B to which I have already made reference placed certain restriction on the powers of a director as well as a manager of a company. Section 388 of the Act of 1956 rules that the provisions of s. 312 shall apply in relation to a manager of the company as they apply to a director thereof. If we accept the argument urged on behalf of the appellants, the effect of the rule read with s. 312 would be that the manager of a company who is a paid employee or servant of a company can by his will appoint another person to occupy the post of manager after his death if the articles of association of the company authorises him to do so. It is extremely difficult for me to see that such could be the intention or object of the law-maker. The prohibition in s. 312 applies equally to a director as to a manager and not only in a private company but also in a public company. No reason whatever could be sug-

gested why the Legislature should have wanted to exclude a managing director and that too of a public as well as a private company from the salutary prohibition laid down in s. 312. Here also it was said on behalf of the appellants that s. 317 lays down that a managing director of a public company cannot be appointed for more than five years at a time and that it does not apply to a private company. I do not think that advances the contention urged on behalf of the appellants. I need not pursue the examination of some other sections which, to my mind, support the view that the expression 'director', when used without any qualifying words, is to be read in a comprehensive sense as inclusive of a managing director and not in the exclusive sense in which we are asked to read it. These considerations, in my judgment, lead to the result that the expression "director" in s. 312 includes a managing director of a public or a private company.

Another phase of the argument on behalf of the appellants on the question of construction of the expression "assignment" in s. 312 was that art. 109 only amounts to delegation of power by the directors to one of them viz. Dadoba. I have read the relevant arts. 105 to 109 of the articles of association of the company more than once and I see no support whatever in them for the present argument. There is nothing in those articles which even faintly suggests anything like delegation nor any exercise by Dadoba of any delegated power. The present argument must, therefore, fail.

For all these reasons, the conclusion seems to me inescapable that the expression "assignment of his office" cannot be read in the narrow restricted sense in which we have been asked to read it on behalf of the appellants and s. 312 must be read as applicable to a director including a managing director and in the comprehensive sense in which it would include appointment by any testamentary disposition or direction. In my judgment the learned Judge was right in the conclusion reached by him.

I now turn to examine another contention urged before us by Mr. Manekshaw. It has been argued that in any event the plaintiff ceased to be a director of the company because he failed to attend certain meetings of the directors and became disqualified from acting as a director by operation of art. 85(f) and s. 223(g). A few dates and facts are necessary to dispose of this contention. There was a meeting of the board of directors soon after the death of Dadoba which was in the nature of a condolence meeting and it was attended by the plaintiff. That was on February 13, 1957. On February 14, 1957, defendant No. 2 sent out a notice calling a meeting of the board of directors of the company for February 14, 1957. He sent that notice as chairman of the company. The next notice sent out by defendant No. 2 was signed by him as a director and was on March 19, 1957. By his letter dated March 23, 1957, the plaintiff protested against the notice of March 19, 1957, which had been sent out by defendant No. 2. A notice dated March 27, 1957, convening a meeting of the board of directors was sent by defendant No. 2 as a managing director of the company. A notice dated May 4, 1957, was also sent by defendant No. 2 describing himself as a managing director. A notice dated May 21, 1957, was also sent by defendant No. 2 as a managing director of the company. So also a notice dated May 23, 1957, was sent by defendant No. 2 as the managing director of the company. It will be seen that all but one of the notices relating to the convening of the meetings of board of directors were sent by defendant No. 2 as chairman or managing director and at all relevant period the plaintiff protested against the right of defendant No. 2 to convene any meeting in his capacity as managing director or chairman of the board of directors of the company. Since I have taken the view that the appointment of defendant No. 2 as the managing director was invalid and bad in law, it must follow as a necessary corollary to that conclusion that defendant No. 2 had in law no power to convene any meeting as a managing director of the company, and if he did so, those meetings were not duly and legally convened meetings and if they were not duly and legally convened

meetings, it cannot be said that the plaintiff absented himself from any properly convened meeting of the board of directors of the company. I must point out that it was also argued by Mr. Maneksha that in any event defendant No. 2 had continued all along to be a director of the company, and even if it be held by the Court that he had no right to convene the meetings as a managing director of the company, he had the right to convene those meetings as a director, and on that ground the plaintiff should be disqualified because he had failed to attend the meetings as required by the articles of association and by the provisions of law. I do not think this argument is tenable. In express terms, the meetings were called by defendant No. 2 in his alleged capacity as a managing director and there is nothing on the record to show that he called those meetings simply as a director of the company. It is not, therefore, necessary to examine this argument at any length. The meetings, being called by him in the exercise of a capacity which he did not have, were bad and it is not open to him now to fall back on his position as a director of the company. I may also refer to art. 94 of the articles of association of the company which deals with the question as to when a director may summon a meeting. That article lays down that the managing director may at any time and shall upon request of any director convene a meeting of the directors. The power to call a meeting of the directors is primarily with the managing director and defendant No. 2 in terms called those meetings as managing director. Mr. Maneksha has also drawn our attention to Form No. 184 from Palmer's Company Precedents and relied on the following observation:

"In the absence of any article otherwise providing or a contrary practice established by the directors it would seem that any director may summon a meeting."

There is nothing before us to show that any contrary practice has been established and art. 94 is the relevant article which must be taken into consideration in this matter. There is no other article in the articles of association of the company which can be said to deal with the matter. The present contention fails and must be negatived.

There remains to consider one more contention urged before us by Mr. Maneksha. It is said that the appointment of defendant No. 3 has been erroneously declared by the trial Court to be bad in law. It is not necessary to refer to what I have already said in my judgment about the appointment of defendant No. 2 as a managing director being invalid and bad in law. If his appointment was invalid and bad in law, he had no power to appoint defendant No. 3 as a director by co-option. That contention also must be rejected.

In the result I agree with the conclusion reached by the learned Judge that the plaintiff was entitled to the reliefs sought by him. I would hold that the appeal fails and should be dismissed with costs.

K. T. DESAI J. A point of law involving the construction of s. 312 of the Companies Act, 1956, arises in this appeal. The facts are few and are not in dispute. One Dadoba Kashinath Thakoor was carrying on business at Bombay under the name and style of the Oriental Metal Pressing Works. On May 26, 1955, a private limited company was floated named the Oriental Metal Pressing Works Ltd. The subscribers to its memorandum were Dadoba, his son Govind, who is defendant No. 2 in the suit, and his brother Bhaskar who is the plaintiff in the suit. One of the principal objects of the company was to acquire and take over as a going concern the business then carried on at Bombay by the said Dadoba Kashinath Thakoor under the name and style of Oriental Metal Pressing Works, and enter into an agreement in that connection and to carry into effect such agreement. After the company was formed, a meeting of the board of directors was held on July 7, 1955. At that meeting Dadoba was appointed as chairman of the board of directors for the period of his lifetime. At that meeting Dadoba was appointed as the managing director of the company for the period at the remuneration and upon the other terms

and conditions contained in the draft agreement which was placed before the meeting of the board of directors which was to be entered into by the company with Dadoba. It was resolved at that meeting that the company should enter into that agreement. On that very day, an agreement was entered into between the company on the one hand and Dadoba on the other in terms of the said draft. By cl. 1 of the agreement it was provided that Dadoba was appointed managing director of the company with powers and upon the terms and subject to the conditions thereafter set out. By cl. 2 of the agreement it was provided that he was to hold the said office of managing director for life from the date of the incorporation of the company. By cl. 4 of that agreement it was provided that Dadoba as such managing director shall be one of the principal officers of the company and subject to the control and supervision of the directors he shall have the general control and management of the business and affairs of the company. Clause 7 of that agreement, which is material for the purpose of the present appeal, runs as follows:—

"Mr. Thakoor (Dadoba) shall be entitled by deed *inter vivos* or by will or codicil to appoint any person to be a Managing Director in his place and stead and in default of such appointment the legal representatives of Mr. Thakoor shall be entitled to exercise the said power. Any appointee as aforesaid shall whilst holding office also be designated as a Managing Director and shall be entitled to be paid by the company the same remuneration and to exercise the same powers and authorities as are vested in Mr. Thakoor and the appointee as aforesaid shall have a power of appointing any person to be Managing Director as his successor on the remuneration of not less than Rs. 1,000 (Rs. one thousand) per month and upon the same other terms and conditions as are herein contained."

Article 109 of the articles of association of the company also provided as follows:—

"109. (a) The said Shri Dadoba Kashinath Thakoor shall be the first Managing Director of the company at a remuneration of Rs. 2,500 per month subject to the said remuneration being increased by the Board of Directors of the Company. He shall be entitled to hold such office for life and will not be subject to clauses 87, 88 and 91 of these Articles;

(b) The said Shri Dadoba Kashinath Thakoor may by deed *inter vivos* or by will or codicil appoint any person to be a Managing Director in his place and stead and in default of such appointment, the legal representatives of the said Shri Dadoba Kashinath Thakoor shall be entitled to exercise the power;

(c) Any appointee as aforesaid shall, whilst holding office, also be designated a managing director and shall be entitled to the same remuneration and to exercise the same powers and authorities as were vested in the managing director in whose place and stead he is appointed;

(d) The appointee as aforesaid shall have a power of appointing any person to be a managing director as his successor on the remuneration of not less than Rs. 1,000 per month and with the same powers as are vested in Shri Dadoba Kashinath Thakoor." The said Dadoba continued to be the managing director of the company right upto the date of his death. On August 18, 1956, the said Dadoba made his last will and testament. The relevant provision of that will, so far as it concerns the present appeal, is as under:—

"I am the Managing Director of The Oriental Metal Pressing Works Private Limited on the remuneration and subject to the terms and conditions contained in an Agreement dated the 7th day of July 1955 and made between the said Company of the one part and myself of the other. Under the Articles of Association of the said Company and under the said Agreement dated the 7th day of July 1955 I am entitled by deed *inter vivos* or by will or codicil to appoint any person to be a Managing Director in my place and stead. Accordingly, I hereby appoint my said son Govind Dadoba Thakoor to be a Managing Director of the said Company from the date of my demise."

The said Dadoba died on January 14, 1957. Govind Dadoba, defendant No. 2, claimed that he had been validly appointed as a managing director of the

company under the provisions contained in the will of the said Dadoba set out above. It is this appointment of Govind as the managing director of the company which is sought to be challenged by the plaintiff in the suit.

The plaintiff contends that this appointment is bad having regard to the provisions contained in s. 312 of the Companies Act, 1956. That section provides as follows:—

“Any assignment of his office made after the commencement of this Act by any director of a company shall be void.”

Reliance has also been placed upon the provisions contained in s. 9 of the Act. That section runs as follows:—

“9. Save as otherwise expressly provided in the Act—

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.”

It is not disputed that the appointment that was made by Dadoba by his will was an appointment that fell within the terms of art. 109 and the terms of the agreement referred to by me above. What is contended is that to the extent that this article and the agreement provide for such an appointment being made by a will, the provisions contained in the article and in the agreement are void in law and are inoperative and that the power thereby conferred cannot be exercised. It is urged that the expression “director” in s. 312 is wide enough to cover a managing director and that the appointment of defendant No. 2, who was already a director of the company, as the managing director was void by reason of the provisions contained in s. 312 of the Act. It may be mentioned here that Govind, defendant No. 2, is and has continued to be a director of the company since the date of its incorporation.

It is strenuously urged by Mr. Maneksha, the learned counsel for the appellants, that s. 312 of the Companies Act, 1956, has no application to the facts of the present case. He says that the only thing done by Dadoba by his will was to appoint Govind, who was already a director of the company, as the managing director and that the appointment was to take effect from the date of the demise of Dadoba. He says that in order to invoke the provisions of s. 312, it is necessary that there must be an assignor, that such assignor must be the holder of the office of a director and that he should assign his office as such director. He says that Govind was already a director of the company and that there cannot be an assignment of the office of a director to a person who already holds that office. He further says that there cannot be the assignment of his office by a director to operate after his death. The argument is that the office of a director is personal to the holder and that his office would, in any event, end with his death. Mr. Maneksha urges that the office of a director is by its very nature such that it must of necessity cease, so far as the holder is concerned, on his death, and that it is an office which cannot be assigned by will which can only operate on the death of the holder. He says that the words of the section read in their context must necessarily refer to an assignment of office by an act *inter vivos*.

As against these weighty arguments, it has been contended that the expression “assignment” is an expression of wide import. Diverse meanings of the expressions “assignment”, “assignee”, “assigns” appearing in various dictionaries and lexicons were cited at the Bar, and it was urged that as the word “assignment” would include an assignment by a will or a testamentary instrument, there was no reason why the ambit of the section should be confined to an assignment only by act *inter vivos*. It was further urged that this section

was enacted in order to prevent the ill effects which might result from the assignment of his office by a director and that if the expression "assignment" was wide enough to cover an assignment by a testamentary writing, full effect should be given to that expression. It is said that if persons are permitted to appoint others as directors by will, and if the persons so appointed could equally have the power to appoint others by will, there would result a perpetuity which it must have been the object of the Legislature to prevent. Reference in this connection was made to the provisions of law contained in s. 86B of the Indian Companies Act, 1913. Section 86B was introduced by the Legislature in the year 1936. That section provided *inter alia* as follows:—

"86B. If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company."

This provision was enacted as a remedial measure. This remedial measure being found insufficient, the Legislature when it passed the consolidating and amending Act of 1956 laid down by s. 312 that after the commencement of the Act the assignment of his office by any director would be void.

The question that falls for consideration in the present case is whether the assignment that is contemplated by the section is the assignment of his office held by a director whose term has not expired or whether it contemplates the appointment of a person to fill that office after the holder of that office is to cease to hold it by reason of lapse of time or by reason of his death. In my view, when the Legislature uses the expression "assignment of office", it is of the essence that the office was one which not merely the assignor was holding at the moment of the assignment, but was one which he would have continued to hold if the assignment had not been made. In the case of an appointment which is to take effect after the period of office of the assignor expires by reason of lapse of time or death, it would be inappropriate to use the expression "assignment of his office". If a person has the power to appoint another as a director after the appointor ceases to be a director by reason of lapse of time or death, it would be purely the exercise of a power of appointment and not an assignment of his office. In the present case, the appointment of Govind as a managing director was to take effect after the period of office of Dadoba was to expire on the death of Dadoba and it cannot be said that there is an assignment of his office by Dadoba within the meaning of s. 312.

In determining the meaning to be attached to the words "assignment of his office...by any director of a company" within the meaning of s. 312, one has to bear in mind the scheme of the Act. Under the Act the office of a director is personal to him. Section 253 of the Companies Act, 1956, in terms provides that no body corporate, association or firm shall be appointed director of a public or private company, and only an individual shall be so appointed. The Legislature has now confined the appointment of directors to individuals. Not merely that, but by s. 280 of the Companies Act, 1956, an age limit for directors is sought to be provided in the case of a public company and of a private company which is subsidiary of a public company except in cases provided by s. 281. When the Legislature was dealing with the question of the assignment by a director of his office as director in the context of the company law of 1956, it was only dealing with the assignment of an office which must of necessity in all events terminate on the death of the assignor. The assignment by a director of his office cannot possibly operate beyond the period for which the assignor could have held that office. If that period is limited to the life of the assignor, there is no scope for effecting an assignment by means of a testamentary instrument, which must of necessity operate on the death of the person executing that instrument. In this view of the matter, it is not necessary for me to examine the dictionary meaning of the expression "assign-

ment" and it is not necessary to consider whether an assignment in the abstract can or cannot be effected by a testamentary instrument.

Even if the expression "assignment" was wide enough to include an assignment by devise i.e. by means of a will or testamentary instrument, having regard to the context in which that expression is used, it cannot refer to any assignment that may be made by a testamentary instrument. It can refer only to an assignment by act *inter vivos*. It is urged that the expression "assignment" has not been used in the context of property law and that it is used in connection with an office. It is undoubtedly true that the expression "assignment" has been used in connection with an office. It is because it is used in connection with an office, which the assignor must cease to hold on his death, that it is possible to say that the section only contemplates an assignment by act *inter vivos*. The appointment of Govind as a managing director by Dadoba by his will does not fall within the ambit of s. 312.

It is then urged that the expression "assignment" may be equated with appointment, and that in the context in which that expression is used in s. 312 of the Companies Act, the parties involved are not merely the assignor and the assignee, but a third party viz. the company and that *quæ* the company the assignment must of necessity operate as an appointment to the office of a director. It is no doubt true that when an assignment by a director of his office is permitted by an agreement with the company or under the articles of association of the company, it must of necessity result in the appointment of the assignee as a director of the company. But that does not mean that every appointment must result in the assignment of his office by a director. The power of appointment can be exercised by a person who is not a director. Such appointments are contemplated under the Company law and do take place. The power may be reserved to third parties to appoint directors. See *British Murac Syndicate, Limited v. The Alperton Rubber Company Limited*.¹ Sometimes a vendor who sells his property to a company may be given a right to appoint directors by the articles. Sometimes a person who advances moneys to the company may be given a right to appoint his nominee on the board. It is usual for banking companies and finance corporations making loans to companies to acquire a right to appoint a representative on the board of directors to see to the proper utilisation of the funds for the purpose for which they are lent. Debenture holders are often given such a right. So far as the Act is concerned power is given to the Government in certain circumstance and in the case of certain companies to appoint directors. It is not every appointment that is covered by s. 312. The section is operative only when that appointment is made by a director by the assignment of his office.

It is urged by the learned counsel for the appellants that in the present case defendant No. 2 was the holder of the office of a director, that he had been a director since the date of the incorporation of the company and that there could not possibly be an assignment to him of the office of a director which he already held. It is urged that s. 312 is applicable to those cases where the office of a director is assigned by the holder of that office to a person who is not a director of the company. There is considerable force in this argument of Mr. Maneksha. It is urged on behalf of the respondents that the expression "assignment of his office...by any director" in s. 312 is wide enough to cover the case of the assignment of the office of a managing director. It is no doubt true that a managing director is a director. But the converse is not true. A director need not be a managing director. All cases of transfer of the office of a managing director are not covered by the section. It may be possible for a person, who is a managing director, to appoint another person who is a director to be the managing director of the company, he himself ceasing to be managing director and remaining only as a director. In such a case, there can only be an assignment of the office of a managing director without there being an assignment of the office of a director. The section, as

it is worded, is not wide enough to cover such an assignment. There are separate provisions in the Act dealing with directors and managing directors. A director is defined by s. 2(13) of the Act to include any person occupying the position of director, by whatever name called. A managing director is defined by s. 2(26) of the Act to mean a director who by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its board of directors or by virtue of its memorandum or articles of association, is entrusted with any powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called. Sections 267, 269, 316 and 317 deal with managing directors. It is not necessary for the purpose of the present case to consider the effect of these sections. It is sufficient to say that in a case where an assignment of his office by a managing director to another operates as an assignment by such managing director of his office as a director to another person, who does not hold any office as a director, it would fall within the ambit of the provisions contained in s. 312. In cases where there is no such assignment of the office of a director, they would fall outside the ambit of that section. In the present case, the person appointed was already a director. The person appointed was to hold office from the date of the demise of the person appointing and in my view it is not possible to say that there was any assignment of his office by a director within the meaning of s. 312 of the Act.

Some support for the conclusion to which I have reached may be derived from a statement by the editors of Gore-Browne's Hand-book on Joint Stock Companies, 41st edn., at pp. 341, 342 and of Palmer's Company Precedents, 17th edn., at p. 736. There the editors were dealing with the provisions contained in s. 204 of the English Companies Act, 1948. That section is in these terms:—

"204. If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company."

In connection with this section, editors of Gore-Browne's Hand-book on Joint Stock Companies observe at pp. 341 and 342 as follows:—

"Where, in the case of a private company, the vendor of a business to the company is appointed a director by the Articles, he is frequently styled a 'governing director', and has conferred upon him all the powers of a board of directors, with a right from time to time to appoint and remove other directors, and with a power to appoint a successor during his life, or by his will, or for his legal personal representatives to make such appointment after his death. In connection with such powers to appoint a successor, the question whether its exercise constitutes an 'assignment' of the office within Section 204 may arise. That section renders the assignment of the office of director as such to another person of no effect, unless and until it is approved by a special resolution of the company. It is difficult to see how a deceased person or his legal personal representatives could assign an office, and possibly in no case would the exercise of a power to appoint a successor under such an Article constitute an 'assignment' of the office, unless the appointment is made by the governing director during his life."

After expressing themselves in these terms, they further proceed to observe that the point was, however, a doubtful one and that it would be advisable for any person appointed as successor under such a power to obtain the support of a special resolution.

In Palmer's Company Precedents, 17th edn., at p. 874, the editors of that work observe in connection with s. 204 as follows:—

"The precise connotation of a power 'to assign office' as mentioned in the section

is not clear. It is not thought that it would refer to a provision for the appointment of a successor."

The editors of Buckley on the Companies Acts, 13th edn., have in connection with s. 204 merely observed at p. 401 as follows:—

"*Quære*, what is meant by the expression 'assignment of office' used in this section, which reproduces s. 151 of the 1829 Act."

The editors of Palmer's Company Precedents and Gore-Browne's Hand-book on Joint Stock Companies prefer to express their individual opinions on the subject. The editors of Buckley on Companies Acts have chosen to remain silent.

It is urged on behalf of the respondents that in construing the provisions of s. 312, which appear in a consolidating and amending Act, the Court must consider the mischief which was sought to be avoided and the evil which was sought to be remedied. It is well-known that persons when making advances to companies or persons when transferring properties to companies reserve to themselves the power to appoint directors by act *inter vivos* as well as by will. As observed by the learned editors in Palmer's Company Precedents, 17th edn., at p. 736:

"The most natural persons, by reason of their interest, to fill the office of director, as well as the most competent, are generally the original owners of the business, and accordingly the articles of a private company commonly provide that some or one of such owners shall be the directors. The terms of their tenure of office vary. Sometimes it is provided that the owner or owners shall be entitled to hold office, for instance, for so many years, or for life, provided he or they continue to hold a certain number of shares; sometimes an owner is empowered at any time, and from time to time, to act, so long and whenever he chooses, as sole director, and at his discretion to appoint and remove other directors. Occasionally an owner is empowered to authorise his executors or trustees, whilst holding a certain number of shares, to appoint directors, and to define and restrict their powers and give them their share qualifications."

Reservation of such powers had been so extensive and so common that in Form No. 255 contained in Palmer's Company Precedents, 17th edn., at pp. 734 to 736 there is an express clause which runs as follows:—

"If the said A B dies whilst he holds the office of Governing Director, he may by his will or any codicil thereto appoint any person to be Governing Director in his place, and direct and determine within the limit of this article what shall be the powers, authorities and discretions of such Governing Director, and his remuneration and qualification, and how long he shall be entitled to hold office, and in default of such direction and determination such appointee shall only have the powers of an Ordinary Director."

Now, what I have to consider in this case is the extent to which this was regarded as an evil by the Legislature and the extent to which the Legislature has sought to interfere with the freedom of persons to enter into contracts with companies when transferring properties to companies or lending moneys to companies. As I have already stated, it is well-known that powers of appointment were being conferred which could be exercised by a testamentary instrument. Is there anything in the Act to show that the exercise of such a power to appoint directors by testamentary instruments has been rendered void by the Legislature? Now, so far as the power to appoint a director by a person, who does not hold the office of a director, by will is concerned, one does not find a single section in the Act which prohibits such an appointment in toto. The restrictions which have been put by the Legislature on the powers of appointment of directors are contained in Chapter II. Section 255 which deals with appointment of directors provides as follows:—

"255. (1) Not less than two-thirds of the total number of directors of a public company, or of a private company which is a subsidiary of a public company, shall—

(a) be persons whose period of office is liable to determination by retirement of directors by rotation; and

(b) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(2) The remaining directors in the case of any such company, and the directors generally in the case of a private company which is not a subsidiary of a public company, shall, in default of and subject to any regulations in the articles of the company, also be appointed by the company in general meeting."

This provision makes it abundantly clear that so far as a public company and a private company which is a subsidiary of a public company are concerned, two thirds of the directors have to be appointed by the company in general meeting. There is a fetter imposed to that extent upon the powers of appointment. As regards the remaining one-third, it is provided that such appointments can be made in accordance with the regulations in the articles of the company, and it is only in those cases where there is an absence of a provision in the articles of the company that such appointments have to be made by the company in general meeting. As regards a private company, which is not a subsidiary of a public company, that section provides that all the directors of the company have to be appointed in accordance with the regulations in the articles of the company, and it is only in default of any provision therein contained that they are to be appointed by the company in general meeting. The result is that the power to appoint directors in accordance with the articles, whether it vests in a stranger or in the directors, whether it is exercisable by act *inter vivos* or by will has been kept intact and has been preserved *qua* a public company and a private company which is a subsidiary of a public company to the extent of one third of the directors, and *qua* a private company which is not the subsidiary of a public company, to the fullest extent. If such a power is so preserved, there is nothing in the policy of the Act or the scheme of the Act which can make me infer that when such a power of appointment is vested in a director, the same cannot be exercised by will. It is no doubt true that when as a result of the exercise of such a power by act *inter vivos* there is the assignment by the appointing director of his office as a director, then s. 312 will supervene and nullify the said appointment. There is nothing in the scheme of the Act which would lead to the conclusion that the Legislature by s. 312 sought to render a testamentary appointment by a director invalid.

As regards the scheme of the Act, it may be observed that there are various provisions in the Act dealing with the assignment of his office by the holder thereof. Section 312 is the section which deals with assignment by a director of his office. Section 343 is the section which deals with transfer of his office by a managing agent. That section provides as under:—

"A transfer of his office by the managing agent of a company shall not take effect unless it is approved both by the company in general meeting and by the Central Government."

In the case of transfer of his office by a managing agent there is no total prohibition, but safeguards are provided in the shape of an approval by the company in general meeting and an approval by the Central Government. So far as managers of companies are concerned, s. 388 provides that the provisions of s. 312 shall apply in relation to the manager of a company, as they apply to a director thereof. It is somewhat interesting to observe that when the Legislature was considering the case of a managing agent, it has thought fit to enact two other sections which deal with the question of succession to the office of a managing agent by inheritance or devise. Section 344 runs as follows:—

"Any agreement made by a company other than a private company which is not a subsidiary of a public company, with its managing agent after the commencement of this Act shall be void so far as it provides for succession to the office by inheritance or devise."

Section 345 runs as follows:—

"345. (1) Where the office of the managing agent of a company is held by an

individual at the commencement of this Act and the managing agency agreement provides for succession to the office by inheritance or devise, no person shall succeed to the office on the death of the holder thereof, unless the succession of such person thereto is approved by the Central Government; and that Government shall not accord such approval unless in its opinion, such person is a fit and proper person to hold the office of managing agent of the company.

(2) The provisions of sub-section (1) shall not apply to a private company which is not a subsidiary of a public company."

These provisions make it clear that the Legislature contemplated in the case of a managing agent the question both of transfer of his office by a managing agent and of the succession to that office by inheritance or devise. The Legislature in the case of a director of a company has not sought to legislate specifically for succession to the office by inheritance or devise. The question is whether the Legislature not having done so, the Court should so interpret s. 312 as to see in it the expression of the will or the intention of the Legislature to legislate also in connection with succession to the office of a director by inheritance or devise. I see no warrant for doing so. The words used in the section are not wide enough to include the case of appointment of a director by will or by a testamentary instrument and I do not see anything in the scheme of the Act which would enable me to give an extended meaning to those words in furtherance of what is stated to be the object of the Legislature which I, speaking for myself, am unable to see. The provisions contained in s. 312 are provisions which are intended to take away the rights hitherto exercised by directors of companies. If there is to be any interference with such rights and if any of such rights are intended to be taken away, the Legislature must use appropriate language. Where such language has not been used by the Legislature, it is not for the Court to speculate about the intention of the Legislature and attempt to give effect to it. In the view which I take of the matter, the appointment of defendant No. 2 as a managing director from the date of the demise of Dadoba is a valid appointment as a managing director and is not rendered void by s. 312 of the Companies Act, 1956.

Mr. Maneksha urged that s. 312 does not apply to private companies. I am unable to see how the operation of the provisions of s. 312 can be so excluded. Wherever the Legislature has thought it fit not to apply any particular provision of the Act to a private company or to apply a particular provision of the Act only to a public company or to a private company which is a subsidiary of a public company, it has expressly stated so. In the Chapter in which s. 312 appears s. 315 also appears. That section in terms says that ss. 316 and 317 shall not apply to a private company unless it is a subsidiary of a public company. There is no such reservation in connection with s. 312 and there is nothing in the language of s. 312 which would exclude its operation in relation to private companies.

It has also been urged by Mr. Maneksha that the provisions of art. 109 of the articles of association of the company amount to a delegation of the power of appointing a managing director by the directors of the company. Article 105 of the articles of the company provides that the directors may, from time to time, appoint one or more of their body to be managing director or managing directors of the company, either for a fixed term or without any limitation as to the period for which he or they is or are to hold such office, and may from time to time (subject to the provisions of any contract between him or them and the company) remove or dismiss him or them from office and appoint another or others in his or their place or places. The power conferred on Dadoba is an express power conferred by the articles of the association themselves and cannot be regarded as a power which arises by virtue of any delegation by the directors of their power. The instrument giving rise to the power of the directors to appoint a managing director and to the power of Dadoba to appoint a managing director is one and the same. The source of the power

being the same, it is not possible to say that the directors having derived their power under that instrument have thereafter delegated it to Dadoba.

It has been urged on behalf of the respondents that art. 109 contains provisions which are rendered void under s. 312. It is said that art. 109 deals with the power of Dadoba, who was the managing director for life, to appoint by deed *inter vivos* a managing director in his place and stead, that such appointment is rendered void under s. 312, and that if that be so, no other power under art. 109 can be exercised. In my view, this argument is not well-founded. The power to appoint by will is severable from the power to appoint by deed *inter vivos*. One power can be exercised without exercising the other.

The next point that has been urged on behalf of the appellants is that the plaintiff has ceased to hold his office as a director. Reliance has been placed for this purpose on s. 283(1)(g) of the Companies Act, 1956, and art. 85(f) of the articles of association of the company. Section 283(1)(g) runs as follows:—

“283. (1) The office of a director shall be vacated if—...

(g) he absents himself from three consecutive meetings of the Board of directors, or from all meetings of the Board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the Board;”

Article 85(f) is to the same effect. After the death of Dadoba various meetings of the board of directors of the company had been called by defendant No. 2. On March 19, 1957, defendant No. 2 purporting to act as a director of the company called a meeting of the board of directors on March 25, 1957. On March 23, 1957, the plaintiff addressed a letter to defendant No. 2 protesting against the action of defendant No. 2 in calling that meeting. He contended that under the articles of association of the company defendant No. 2 was not entitled to call a meeting of the board of directors of the company. In the course of the letter it was stated that as defendant No. 2 was neither the chairman nor the managing director, he was not entitled to call a meeting of the directors. The plaintiff did not attend that meeting. On March 27, 1957, defendant No. 2 purporting to act as the managing director of the company called a meeting of the board of directors of the company on April 2, 1957. On March 29, 1957, the plaintiff addressed a letter to defendant No. 2 contending that the notice convening the meeting on April 2, 1957, was invalid as defendant No. 2 was neither the chairman nor the managing director of the company and was not entitled to call a meeting of the directors without the consent or concurrence of the plaintiff. The plaintiff did not attend the meeting of the board of directors on April 2, 1957. On May 4, 1957, defendant No. 2 purporting to act as the managing director of the company called a meeting of the board of directors on May 13, 1957. On May 8, 1957, the plaintiff addressed a letter to defendant No. 2 reiterating his earlier stand. The plaintiff did not attend that meeting. On May 21, 1957, defendant No. 2 purporting to act as such managing director called a meeting of the board of directors on May 29, 1957. The notice was duly served on the plaintiff. On May 23, 1957, defendant No. 2 as such managing director issued another notice stating that the meeting of the board of directors of May 29, 1957, was postponed to May 31, 1957. The said notice was duly served on the plaintiff. The plaintiff did not attend that meeting. If these meetings had been validly convened, it is not disputed that the plaintiff would cease to be a director of the company having regard to the provisions contained in art. 85(f) and s. 283(1)(g) of the Companies Act, 1956. Article 94 of the articles of association of the company which deals with the summoning of meetings of the board of directors provides as follows:—

“94. The Managing Director may at any time and shall upon the request of any Director convene a meeting of the Directors.”

As I have already held that defendant No. 2 was duly appointed as a managing director of the company at the time when the notices for calling these meetings were given by defendant No. 2 and these meetings were called, he

had the right under the provisions of the articles to call such meetings. Such meetings were validly convened and held. The plaintiff absented himself from these meetings without leave of absence from the board of directors and in my judgment he ceased to be a director of the company. On June 28, 1957, a letter was rightly addressed by the company to the plaintiff stating that he had ceased to be a director of the company.

It is urged by Mr. Maneksha that even if the contention of the plaintiff was correct that defendant No. 2 had not been validly appointed as a managing director of the company, defendant No. 2 was admittedly a director of the company and had a right as such director to call a meeting of the board of directors of the company and that the meetings that had been convened by defendant No. 2 were validly convened meetings of the board of directors and that the plaintiff having absented himself therefrom had ceased to be a director. He strongly relies upon a passage in Palmer's Company Precedents, 17th edn., appearing at p. 581, where it has been stated that in the absence of any article otherwise providing or a contrary practice established by the directors it would seem that any director may summon a meeting. It is not anyone's case that there was any contrary practice established by the directors as regards the calling of the meeting of the board of directors. Apart from art. 94, there is no other article dealing with the calling of a meeting of the board of directors, and if in fact there had not been a validly appointed managing director, a director would have the right to call a meeting of the board of directors of the company. It is, however, urged on behalf of the respondents that the meetings other than the meeting called by the notice dated March 19, 1957, were meetings convened by defendant No. 2 in his capacity as the managing director of the company in the exercise of the powers conferred upon him under art. 94 of the articles of association and not in the exercise of his right as a director to call a meeting of the board of directors in the absence of the managing director and that the plaintiff was under no obligation to attend any meeting convened by defendant No. 2 purporting to act as a managing director of the company. Mr. Maneksha urged that if defendant No. 2 had a right as a director to call a meeting, a mere false description of his as a managing director would not render the notices convening the meetings bad. The plaintiff could very well have attended the meetings without prejudice to his contention that defendant No. 2 was not a managing director. There is considerable force in Mr. Maneksha's argument. However, in the view which I take of the matter that defendant No. 2 was a validly appointed managing director of the company, it is not necessary to determine whether if he had not been so appointed the meetings convened by defendant No. 2 as a managing director could be said to be validly convened.

The last point that arises for consideration is as regards the validity of the appointment of defendant No. 3. As the plaintiff ceased to be a director of the company, defendant No. 2 had a right to appoint a director in the place and stead of the plaintiff and the appointment of defendant No. 3 is valid in law.

In the view which I take of the matter, the decree would be that the appeal be allowed with costs and that the suit be dismissed with costs.

S. T. DESAI J. Since we are equally divided on certain points stated below by us, this appeal will have to be heard by one or more of the other Judges of this Court as the Hon'ble the Chief Justice may be pleased to direct. The points on which we are equally divided are:

- (1) Whether appellant No. 2 was validly appointed managing director of appellant No. 1 company.
- (2) Whether respondent No 1 (plaintiff) ceased to be a director of the company, and
- (3) Whether appellant No. 3 has been validly appointed a Director of the company.

THE matter was heard by Mudholkar J.

M. L. Maneksha, with *P. N. Bhagwati* and *B. P. Bhatt*, instructed by *Amarchand & Mangaldas*, for the appellants.

P. P. Khambatta, with *Mahendra Shah* and *P. C. Gawde*, for respondent No. 1.

H. S. Singh, instructed by *Cama & Jayakar*, for respondent No. 2.

MUDHOLKAR J. This matter has come before me under cl. 36 of the Letters Patent on a difference between Mr. Justice S. T. Desai and Mr. Justice K. T. Desai. I have to answer the points on which they have differed, and I shall presently state these points.

The appellants before me are original defendants Nos. 1 to 3. The suit was instituted by the plaintiff respondent No. 1 for obtaining three declarations: that he is and continues to be a director of defendant No. 1 company; that defendant No. 2's appointment as the managing director of defendant No. 1 company was void and that the appointment of defendant No. 3 as a director of the company is invalid, illegal and inoperative. The plaintiff has also asked for grant of injunctions restraining the defendants from preventing the plaintiff from acting as a director of the company and for restraining defendants Nos. 2 and 3 from acting respectively as managing director and director of the company. The suit was decreed by the City Civil Court, which held that defendant No. 2 was not validly appointed as managing director for defendant No. 1; that the plaintiff has not ceased to be a director of the company, and that the appointment of defendant No. 3 as a director of the company was illegal and ineffective.

Defendant No. 1 is a private limited company incorporated under the Indian Companies Act. Prior to the incorporation of the company, the business carried on by it was being carried on by Dadoba, the father of defendants Nos. 2 and 4 and the brother of the plaintiff, and this business was sold by Dadoba to the company. That was on May 21, 1955. On July 7, 1955, an agreement was entered into between Dadoba and the company, whereunder Dadoba was appointed Managing Director of the company. Clause 7 of that agreement which is relevant runs as follows:—

"Mr. Thakoor shall be entitled by deed *inter vivos* or by will or codicil to appoint any person to be a Managing Director in his place and stead and in default of such appointment the legal representatives of Mr. Thakoor shall be entitled to exercise the said power. Any appointee as aforesaid shall whilst holding office also be designated as a Managing Director and shall be entitled to be paid by the company the same remuneration and to exercise the same powers and authorities as are vested in Mr. Thakoor and the appointee as aforesaid shall have a power of appointing any person to be Managing Director as his successor on the remuneration of not less than Rs. 1,000 (Rupees One thousand) per month and upon the same other terms and conditions as are herein contained."

Under the agreement, Dadoba was to be allotted a certain number of fully paid-up shares of the company. The terms of the agreement are embodied in art. 109 of the articles of association of the company. The relevant part of that article is cl. (b), and it runs as follows:—

"The said Shri Dadoba Kashinath Thakoor may by deed *inter vivos* or by will or codicil appoint any person to be a Managing Director in his place and stead and in default of such appointment, the legal representatives of the said Shri Dadoba Kashinath Thakoor shall be entitled to exercise the power."

Dadoba died on January 14, 1957. Prior to his death, he had executed a will whereunder he appointed one of his sons, defendant No. 2, to be the managing director of the company from the date of his demise. It may be mentioned that Dadoba has left three sons: defendant No. 2 Govind, defendant No. 4 Harish, and one Deepak, who is a minor and is not a party to this suit. Dadoba held 1971 shares in the company, while defendants Nos. 2 and 4 held

844 and 843 shares respectively. The present plaintiff was also a Director of the company and holds 845 shares. The shares held by Dadoba have devolved, according to the plaintiff, on his three sons.

By virtue of his appointment as managing director under Dadoba's will, defendant No. 2 assumed managing directorship of the company and commenced to draw a sum of Rs. 3,500 per month as his salary, as provided for under the articles of association. The plaintiff challenged the validity of his appointment as a managing director and also of his right to convene meetings of the board of directors. The plaintiff refused to attend these meetings on the ground that defendant No. 2 was not validly appointed managing director and had no right to convene a meeting. Eventually defendant No. 2 informed the plaintiff that he ceased to be a director of the company because of his failure to attend three consecutive meetings of the board of directors and also because of his refusal to attend any meeting for three months. In his place defendant No. 3 Harish was appointed as director by defendant No. 2.

According to defendants Nos. 1 to 3 the appointment of defendant No. 2 is valid, because Dadoba who made the appointment was given a power to make that appointment both under the agreement entered into between him and the company and the articles of association of the company. They also asserted that the meetings of the board of directors were lawfully convened by defendant No. 2 and that the plaintiff, by his failure to attend three consecutive meetings as well as to attend any meeting for three months, had incurred a forfeiture of his rights to hold the office of the director under the articles of association. They further contended that because of the vacancy caused by the cessation of the plaintiff as director, defendant No. 3 was appointed a director by defendant No. 2 under the powers conferred on him by the articles of association and that his appointment is valid.

The learned Judge of the City Civil Court upheld the plaintiff's contentions and negatived those of defendants Nos. 1 to 3 on all these points and decreed the plaintiff's suit. At this stage, I may mention that defendant No. 4 not only did not contest the plaintiff's claim but actually supported it. That is also his stand in this appeal.

It is quite clear from cl. 7 of the agreement, as also from cl. (b) of art. 109, that Dadoba was empowered to appoint another person as managing director in his place. The fact that such power was conferred on Dadoba by the agreement and the articles of association is not disputed. It is, however, contended by the plaintiff that subsequent to the coming into force of the Companies Act, 1956, the assignment of the office of managing director is prohibited, and that, consequently, the assignment made by Dadoba of that office—which is alleged to have become effective upon Dadoba's death on January 14, 1957—in favour of defendant No. 2 in his will is void. In the second place the plaintiff contends that the will executed by Dadoba has not been proved; that caveats have actually been entered, and that until the executor of the will obtains the probate thereof, defendant No. 2 cannot be permitted to assert in this suit the right which he claims to have obtained under the will.

As regards the second point, it is sufficient to observe that though it was raised before the City Civil Court, it does not appear to have been raised before the division bench of this Court, which heard the appeal from the decision of the City Civil Court. The learned Judges of the division bench have differed on three points, which are as follows:—

- (1) Whether the second appellant was validly appointed Managing Director of the first appellant company,
- (2) Whether the first respondent (plaintiff) ceased to be a director of the company, and
- (3) Whether the third appellant has been validly appointed a Director of the company.

They have not set out any other points of difference. Under cl. 36 of the Letters Patent, I have to confine my opinion to these three points, and I do not

think that it is open to me to consider any point other than these three points. If the plaintiff thinks it fit so to do, he can raise the point before the division bench after my judgment containing the opinion on the points of difference goes back to it.

Coming to the main point in the case, the argument of the plaintiff is that s. 312 is very widely worded, and it has enacted a prohibition on the assignment of his office by a director, including that by a managing director, to any person, not only by a deed *inter vivos* but also by a will. Section 312 reads thus:

"Prohibition of assignment of office by director.—

Any assignment of his office made after the commencement of this Act by any director of a company shall be void."

Mr. Maneksha, who appears for the contesting defendants, (who hereafter will be referred as defendants), says that what is prohibited by this section is an assignment, that is, a transfer made *inter vivos*, and that the appointment or nomination of a person to an office by a will is not prohibited by it. Further, according to him, the prohibition enacted by this section relates only to the transfer of the office of a director, and not to that of a managing director. Also according to him, what the section forbids is the transfer of an office to a person who is not a director, and that consequently it cannot apply to the appointment by a managing director of a director to the office of the managing director.

The first question which falls for consideration is whether the word 'assignment' as used in s. 312 is to be construed widely, so as to include the transmission of an office of a managing director, by will, as contended for by Mr. Khambatta on behalf of the plaintiff, or narrowly, so as to mean only transfer *inter vivos*, as contended for by Mr. Maneksha. It was contended by Mr. Khambatta that the Courts must bear in mind the object which the Legislature had in view in enacting the section, and accord to the word 'assignment' an appropriate meaning so that the object which the Legislature had in view would be carried out and not frustrated. According to Mr. Maneksha, every statute which takes away the rights of a citizen must be strictly construed, and that the words used by it should not be construed unduly widely. It is no doubt true that a statute which curtails the liberty of the subject, or which takes away or restricts the rights of a citizen, has to be construed strictly. But it does not follow from that that the Courts are free to ignore the object which the Legislature had in view in enacting the statute. It is the primary duty of the Court to give effect to a law made by the Legislature, and when the language used by the Legislature is not clear it is open to the Court to look into the history of the legislation that led up to the enactment of that law or the particular provision which it has to interpret, and to construe the language used by the Legislature keeping in view the historical background. In this connection, I would point out that in the Indian Companies Act of 1913 as originally enacted there was no prohibition against transfer of an office by a director. It was for the first time that the Legislature by enacting the Amending Act of 1936 added s. 86-B, which places a restriction on the assignment of office by a director. The relevant portion of that section is as follows:—

"If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company:

Provided that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the directors are ordinarily held, if done with

the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section."

This provision was the predecessor of s. 312 of the present Act, whereunder the transfer of office by a director is completely prohibited. From the fact that the Legislature thought it fit to go further and to engraft an entirely new provision in the existing Act, it is clear that the Legislature had decided upon a certain policy, and that policy was to prevent wholly the transfer of an office of a director. It is this policy which the Courts must bear in mind and effectuate while construing the new provision.

It was, however, argued by Mr. Maneksha that though the Legislature may have thought it fit to prohibit the transfer of the office of a director, it may not have wanted to do likewise with respect to the office of a managing director. No doubt, the argument proceeded, the managing director enjoys much higher powers than an ordinary director, but so does a managing agent, and transfer of a managing agent's interest is not forbidden. Therefore, according to him, it would not be proper to place wide construction on the words 'director' as well as 'assignment'. Section 343 of the Act does show that a managing agent's office is capable of being transferred, but that section clearly provides that the transfer of that office cannot take effect, unless it is approved both by the company in general meeting and by the Central Government. Thus, though a transfer of this office is not prohibited, it is expressly subjected to certain restrictions. The object of these restrictions is to safeguard the interest of the company. Then again the managing agents have an interest in the company which is in the nature of property. Therefore, the right to transfer it, which is an ordinary incident of property, is attached to it. No one can be said to have property in an office, and ordinarily an office is not transferable. It has been observed by K. T. Desai J. that there are various provisions in the Act dealing with the assignment of office by the holder thereof, but this fact shows that the transferability of the office had to be provided for. No doubt this could be done by statute or by a contract which is not repugnant to the provisions of a statute or is not contrary to public policy. Here, the Legislature in its wisdom has enacted a total prohibition in respect of the transfer of the office of a director and has not made any exception with respect to the office of a managing director.

Then it was contended by Mr. Maneksha that since third parties are often given a right to nominate directors and managing director, the Courts need not look askance at a provision made in an agreement or in the articles of association of a company which permits an existing managing director to transfer his office to another. It is true that financiers, managing agents, Government, etc. are ordinarily given such power to safeguard their interest, but the object underlying the prohibition with respect to directors and managing directors is, apparently, to prevent the establishment of perpetual succession at the will of successive directors or managing directors. There is no danger of this being done where the power to nominate is exercised by a third party from time to time. Apart from that, even if the conferral of power in third parties to make such nominations is open to objection, it cannot be disputed that the Legislature, which is aware of the existence of several evils, has the right to select any of them and provide for their suppression though not of others.

Since it is the policy of the Legislature to prohibit the transfer of an office of a director, it follows that it will not be proper to construe the language of s. 312 in such a way as to give only a partial effect to the policy by holding that all that was prohibited by the section was a transfer *inter vivos* and that it did not apply to a transfer by a will. If we look at the proviso to s. 86-B, we find therein a reference to the 'power to appoint' a director. The main section, however, refers to the power "to assign the office of a director" and the 'assignment' of the office of a director. Reading the section and the proviso together, it is clear that the Legislature, when it spoke of such assignment or

power to assign, understood each of the expressions to include the 'power to appoint'. It did not use the words 'assign' or 'assignment' in this provision in the sense they are used in the law of property. The argument advanced on behalf of the defendants before the division bench that the power of assignment of an office must always be distinguished from the power of appointment or for nomination of another to an office, does not, therefore, appear to be sound.

A reference to Murray's Dictionary as well as to Wharton's Law Lexicon indeed shows, as was pointed out by Mr. S. T. Desai, J., that one of the meanings of the word 'assign' is 'to appoint, designate, ordain, depute'. One of the meanings of the word 'assignment' is 'appointment to office, nomination, designation'. The word 'assign', therefore, is not of a narrow connotation at all.

As I have already stated, the Legislature, when it used in s. 86-B the expressions 'assign his office' and 'assignment of office,' was fully conscious of the fact that the words 'assign' and 'assignment' include 'appointment' or 'power to appoint'. The Legislature consolidated the law relating to companies and amended certain provisions of the pre-existing law and enacted the Companies Act of 1956, and it used the same words 'assign' and 'assignment' in s. 312. It would, therefore, be reasonable to conclude that by repeating these words, the Legislature intended that they should be accorded the same meaning which was ascribable to them under the old law, viz. s. 86-B of the Act of 1913. Upon this view, the word 'assignment' used in s. 312 must not be construed in the narrow sense in which it is used in connection with the law of property, but in a wider sense.

It is, however, strenuously argued by Mr. Maneksha that the assignment by a director of his office by a will does not fall within the provisions of s. 312, because assignment must necessarily be of an existing interest only, and the interest of a director would automatically cease upon his death, and there is thus nothing left for him to transfer or assign. This argument, if accepted, would lead to further difficulties for defendant No. 2, because on that basis it could be held that even in the absence of a provision such as s. 312 of the Companies Act a director would not be able to appoint his successor by a will to *take his place*. With this part of the matter I shall deal presently. At the moment, however, it would be sufficient to say that the words 'assign' and 'assignment' would include appointment by any mode, whether by deed *inter vivos* or by a will. If the words are so construed, the question whether the appointer's interest subsisted when the appointment could take effect becomes immaterial.

I may mention that Mr. Maneksha referred me to s. 845 of the Companies Act and s. 31-A of the Insurance Act of 1938 for the purpose of showing that wherever the Legislature intended to prohibit something from being done by a will it has said so expressly, and that since the Legislature has not said expressly that the assignment prohibited by s. 312 includes also one made by will, it must be held that the appointment to an office made by a will is permissible though one made *inter vivos* may not be. In the first place, the Legislature has not referred in this section to the modes of transmission of office prohibited by this section. It is only upon the construction sought to be placed on the word 'assignment' that the argument is founded, and, as already stated, that construction is not correct. It may further be pointed out that even Mr. Maneksha conceded that the expression 'assignment of office' would also include appointment to the office, provided it was made *inter vivos* and was not to one who is a director. Once the concession is made as to the scope of the expression, the controversy must be deemed to have ended, because, as already pointed out, the mode of exercising the power is not in any way limited by s. 312, and, therefore, any mode permitted by law can be resorted to. As regards the person in whose favour the exercise of the power is prohibited, s. 312 makes no exceptions in favour of a director. It is true that

the appointment of a person who is already a director as a director will be meaningless, but such an appointment, if purported to be made, will fail not only because it is meaningless, but also because of s. 312, which enacts a total prohibition of transmission of a director's office. Thus the two limitations attached to the concession made by Mr. Maneksha must be left out of account. Finally, if this argument is accepted, it would lead to the curious result that what a person cannot do during his life he can, in a sense, do so after his death. I have no doubt that the Legislature could not have intended to bring about such a curious result.

Apart from these considerations, I may refer to the observations of Lord Goddard, C.J. in *Lines v. Hersom*¹ (p. 686):

"...A statute, as we know, has to pass through committee in both Houses of Parliament and amendments are moved from time to time, and it is quite possible to find that an amendment which is moved to an early section in the statute may be worded in one way, while an amendment which is moved to a later section having exactly the same idea is worded in another way; but it does not at all follow that the legislature intends something different because the language of the two sections is not exactly the same."

I may also refer to the following statement of law in Maxwell's Interpretation of Statutes, 10th ed., at p. 326:—

"But, just as the presumption that the same meaning is intended for the same expression in every part of an Act is, as we have seen, not of much weight, so the presumption of a change of intention from a change of language (of no great weight in the construction of any documents) seems entitled to less weight in the construction of a statute than in any other case, for the variation is sometimes to be accounted for by a mere desire to avoid the repeated use of the same words, sometimes by the circumstance that the Act has been compiled from different sources, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament. Though the statute is the language of the three estates of the realm, it seems legitimate in construing it, to take into consideration that it may have been the production of many minds and that this may better account for any variety of style and phraseology which is found than a desire to convey a different intention. Even where the variation occurs in different statutes, the change is often not indicative of a change of intention, though, where the variation occurs in two different statutes, the presumption of a change of meaning is rather stronger."

From these observations it would be clear that the omission to use the words 'by a will' in s. 312 does not indicate that assignment or transmission of office by will is not prohibited by s. 312. Had the words '*inter vivos*' been mentioned in the section, the matter would have stood differently. But the Legislature, as already stated, has contented itself by merely stating that "any assignment" is prohibited. These words are comprehensive enough to include every assignment or transfer of the office of a director or of the appointment by a director of a person to the office of a director in his place, whether by a deed *inter vivos* or by a will.

I will make a brief reference here to the opinion of text-book writers on the company law in England upon which reliance was placed before me by Mr. Maneksha, though he was at pains to explain, he had cited them before the division bench only upon the suggestion of the Judges constituting it. It may be mentioned that the provisions of s. 204 of the English Companies Act, 1948, to some extent correspond to s. 312 of the Indian Companies Act. In that section also the word 'assignment' has been used. While commenting on that section, Gore-Browne in his Hand-book on Joint Stock Companies observes as follows (pp. 341 and 342):—

"...That section (sec. 204) renders the assignment of the office of director as such to another person of no effect unless and until it is approved by a special resolution of the company. It is difficult to see how a deceased person or his legal personal

representatives could assign an office, and possibly in no case would the exercise of a power to appoint a successor under such an Article constitute an 'assignment' of the office, unless the appointment is made by the governing director during his life."

After making these observations, the editor of the book expressed the opinion that the question was a doubtful one and that it would be advisable for any person appointed as successor under such a power to obtain the support of a special resolution.

In Palmer's Company Precedents, 17th edn., at p. 874, the editors of that work observe while commenting on s. 204 as follows:—

"The precise connotation of a power 'to assign office' as mentioned in the section is not clear. It is not thought that it would refer to a provision for the appointment of a successor;..."

The editors of Buckley on the Companies Acts, 13th edn., have, while commenting on s. 204, stated as follows:—

"*Quære*, what is meant by the expression 'assignment of office' used in this section, which reproduces s. 151 of the 1929 Act."

As pointed out by Mr. Justice K. T. Desai, the editors of Palmer's Company Precedents and Gore-Browne's Hand-book on Joint Stock Companies prefer to express their individual opinions on the subject. The editors of Buckley on Companies Acts have chosen to remain silent.

In my opinion, the fact that a doubt is entertained by some of the authors as to the precise scope and meaning of the word 'assignment' and the fact that according to the editors of one of the books the word 'assignment' must be given a narrow meaning is not very relevant for the purpose of interpreting that word occurring in s. 312 of the Indian Companies Act. It may be mentioned that s. 204 of the English Companies Act does not enact a complete prohibition on a transfer of the office of a director. It merely places a restriction on such a transfer.

A reference was also made by Mr. Maneksha to Form No. 255 in Palmer's Company Precedents, 17th edn., at pp. 734 to 736, the relevant portion of which runs thus:—

"If the said A B dies whilst he holds the office of Governing Director, he may by his will or any codicil thereto appoint any person to be Governing Director in his place, and direct and determine within the limit of this article what shall be the powers, authorities and discretions of such Governing Director, and his remuneration and qualification, and how long he shall be entitled to hold office, and in default of such direction and determination such appointee shall only have the powers of an Ordinary Director."

It is no doubt true that in England the practice still prevails of conferring on a "Governing Director" (who corresponds to a managing director in India) power to appoint any person to be Governing Director in his place by a will. It is not possible to ascertain whether this form, which has no statutory authority, was evolved before the provisions of s. 204 were enacted or afterwards.

In these circumstances, I do not think that much assistance can be gained by reference to these opinions and this form.

The next question to be considered is whether the prohibition enacted in s. 312 is limited to the assignment of an office of a director only, or whether it also extends to the office of a managing director. Now, there is no doubt that a managing director enjoys greater powers than a mere director of a company. It would stand to reason that what is prohibited in the case of a director should also be prohibited in respect of a managing director. Indeed, there may be greater reasons and stronger grounds for prohibiting the assignment of an office which carries with it greater powers than one which does not carry with it such powers.

The word "director" has been defined in s. 2(13) of the Act as follows:—

"'director' includes any person occupying the position of director, by whatever name called;"

It is not disputed that managing directors are a species of directors. Therefore, the expression "managing director" would clearly fall within the definition of "director". It is no doubt true that the expression "managing director" has also been defined in the Act. The definition in s. 2(26) is as follows:—

"'managing director' means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of directors or, by virtue of its memorandum or articles of association, is entrusted with any powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called;"

But as this expression falls within the more general expression 'director', it is to be accorded its special meaning only when the context in which it is used so requires. From the fact, therefore, that the expression "managing director" is defined in the Act, it cannot be concluded that the definition of the word "director" is in any way curtailed and that it cannot be deemed to include a 'managing director'. It was contended by Mr. Maneksha that if it was intended that s. 312 should apply to managing directors also, the Legislature would have said so expressly. He also said that wherever the Legislature wanted to do so, it has mentioned both directors as well as managing directors in certain sections of the Act, and that the failure of the Legislature to mention expressly 'managing director' in s. 312 must be deemed to indicate that that section was not intended to apply to his case. In support of his argument, he has referred to ss. 269, 303, 305, 311 and 316. Section 269 deals with the appointment of managing or whole-time director. That section is clearly intended to apply only to that particular kind of directors and is not one which is intended to apply to directors in general. Section 303 deals with register of directors, managing agents, secretaries and treasurers etc. It provides that a body corporate shall maintain a register of its directors, managing director, managing agents, secretaries and treasurers etc. Here the provision requires that a managing director should also be shown *as such* (and not merely in his capacity of director), in the register, and that is why the Legislature did not limit itself to using the word 'directors' for including the word 'managing director'. Section 305 deals with the duty of directors etc. to make certain disclosure. Every director, managing director etc. must disclose certain particulars to the public relating to the office of any other body corporate which such person owns. But the reason why the Legislature uses the expression 'managing director' also in this section is that the disclosure has to be made by a person within 20 days of his appointment. In order to cover the case of a director who subsequently becomes managing director and has in the meanwhile acquired an interest in any other body corporate, it was necessary to make a special mention of 'managing director' also. As regards ss. 311 and 316, special mention is made of managing directors only, and the word 'director' is not used in those sections, because those sections are intended to apply only to managing directors and not to non-managing directors. On the other hand, it would be clear that the Legislature has in a number of sections contended itself by using the word 'director' only. It cannot be disputed that those sections are intended to apply to all directors including managing directors. In this connection, I may refer to ss. 253, 283, 290, 297, 300 and 312. Mr. Maneksha indeed conceded that in all these sections the word 'director' has to be construed so as to include the managing director also. Now, s. 2, the defining section, states: 'unless the context otherwise requires', every word or expression defined therein shall have the meaning given to it in the definition. In s. 312 the word 'director' alone appears, and therefore unless the context shows that it is to be given a narrower or different meaning, it must be given the meaning which is contained in the definition.

Mr. Maneksha has not been able to show from the context any reason why the word 'director' used in s. 312 should be accorded a meaning narrower than or different from the one given in the definition. He has, on the other hand, contended that the word 'director' should not be deemed to include managing director, unless there were good reasons for doing so. I am afraid there is no warrant for that proposition. It is not supported by any canon of construction. The rule of construction that a general provision must, when inconsistent with a special one, yield to the latter cannot be pressed in aid when the question is whether an expression defined in one Act is to be given its full meaning or not. I, therefore, hold that the prohibition enacted in s. 312 applies not merely to the assignment or transmission of the office of a director, but also to that of a managing director. I, therefore, come to the conclusion that s. 312 not only applies to managing directors but also prohibits the transmission of the office of a director as well as a managing director, whether *inter vivos* or by will.

The next question which falls for consideration is whether it prohibits the transfer of the office by a managing director to a director. As already pointed out, Mr. Maneksha has argued that a managing director being merely a director with some additional powers, the transfer by him of his office to a person, who is already a director, cannot be regarded as transfer of the office of the director, which would be meaningless but that it is only a transfer of the rights of a managing director of his right of management. He, therefore, contended that such a transfer would not be hit by s. 312, inasmuch as that section does not expressly prohibit the transfer of the right of management. It is no doubt true that a managing director is a director who has the right of management and who is charged with certain responsibilities. It is conceivable that a managing director purports to effect a transfer of only his right of management and nothing more, or he transfers all his rights: Whether he has done one or the other would depend upon the construction of the document by which he makes the transfer. Therefore, what we must ascertain here is whether Dadoba, when he assigned his office to defendant No. 2, merely assigned his right of management, or the totality of his rights as a managing director.

Before doing so, I would, however, like to make one observation, and it is this. Section 312 speaks merely of the assignor or the appointer, and not the assignee or the appointee. What it says in terms is that a director cannot assign his office. It does not say that a director cannot assign the office to persons belonging to a particular class and that it is open to him to assign his office to persons belonging to another class. What is, therefore, to be considered is, what is it that the director is prohibited from doing? That is to say, what is the kind of assignment which a director is precluded from making, and not what is the class of persons in whose favour he cannot make an assignment.

What has thus to be ascertained is the power which Dadoba was entitled to exercise under the agreement and under cl. (b) of art. 109, and what Dadoba did in the exercise of that power. The relevant words of cl. 7 of the agreement and cl. (b) of art. 109 are conferring the identical power, and, therefore, it is not necessary to consider these two clauses separately. I will, therefore, content myself by keeping in view cl. (b) of art. 109. Now, that clause says that Dadoba may, by deed *inter vivos* or by will or codicil, appoint any person to be a managing director in his place and stead. Now, the words 'appoint any person' are very important. By using these words an unrestricted or unlimited power was conferred on Dadoba in the matter of making an appointment to the office of managing director. This clause did not confine Dadoba's power to appoint only a director to the office of managing director. Now, if s. 312 is construed to prohibit the appointment of a person as managing director, who is not already a director, as contended for by Mr. Maneksha, even then the source of Dadoba's power to make an appointment must

be held to be repugnant to the provisions of s. 312. If, on the other hand, s. 312 is interpreted as prohibiting the appointment by a managing director of a director as a managing director in his place, then no further question arises.

Section 9 of the Act expressly provides that the provisions of the Act shall have effect notwithstanding anything to the contrary contained in the articles of a company, or in any agreement executed by it, and that any provision contained in the articles of the company, to the extent to which it is repugnant to the provisions of the Act, becomes void. Now, in order to consider whether a particular provision in an agreement or articles of association is saved or is rendered void because of any repugnancy to a provision of the Act, what the Court must examine is the provision itself. This provision, as I have already pointed out, is wide in its terms, and is, therefore, even on the argument of Mr. Maneksha, repugnant to the provisions of s. 312. Mr. Maneksha, however, argued that the provision would be rendered void only to the extent of the repugnancy, and that that part of the provision which is not repugnant to any of the provisions of the Act would be saved. He further said that though the conferral of any wide power to appoint any person as managing director may be repugnant to the provisions of s. 312, the power to appoint a director to the office of the managing director, which would fall within the power conferred on Dadoba under cl. (b) of art. 109, will not be repugnant to that section, and will therefore be saved. I am afraid this argument cannot be accepted, because it would involve reading in the clause some words which are not there. It would have been a different matter, if cl. (b) of art. 109 had read "appoint a director or any other person" to the office of the managing director. No doubt, the power to appoint any person conferred by this clause would include power to appoint a person, who happens to be a director. But that is not the consideration to be borne in mind, while deciding the question as to whether the power conferred by that clause is saved by s. 9, or is rendered void by it. We must read the clause as it is, and we must give the fullest meaning to what is said there, and then consider whether the clause as it exists is repugnant to any provision of the Act. Looking at the clause that way, it is clear that the unqualified or unlimited power conferred on Dadoba to appoint any person to be a managing director is wholly repugnant to the provisions of s. 312, and is, therefore, void. From this it would follow that on the date on which the new Companies Act came into force, the source of Dadoba's power to make an appointment dried up, inasmuch as the conferral of the power to appoint any person as managing director was rendered void. According to the defendants Dadoba exercised this power in appointing defendant No. 2 as a managing director in his place by will. As the source of the power had dried up Dadoba possessed no power which he could effectively exercise by his will.

At this place, it would be convenient to mention another argument advanced by Mr. Maneksha. He contended that cl. (b) confers two kinds of powers on Dadoba; one is to make an appointment by a deed, and the other, to make one under will or codicil, and that even though the power to make an appointment *inter vivos* is affected by s. 9 of the Act, that to make an appointment by will or codicil is not so affected. It would be mere repetition to state that s. 312 applies both to appointment *inter vivos* as well as to one by will or codicil. Apart from that, I am of opinion that cl. (b) does not confer two powers, but only one, and that is the power to make appointment. No doubt, it prescribes two modes in which that power can be exercised, that is, by deed *inter vivos*, or by will or codicil. But there is a difference between the conferral of a power to do a thing and prescribing ways or modes in which that thing could be done. Merely because a thing could be done in two or more different ways, it cannot be said that two or more different powers to do that thing were conferred.

•One more argument advanced by Mr. Maneksha must be considered. He

says that while interpreting cl. (b) of art. 109, we must also bear in mind the provisions of arts. 105 and 106, and that if these provisions are considered, it would be clear that only a director can be appointed as a managing director, and, therefore, the words "any person" used in cl. (b) must be interpreted to mean only a director. Article 105 deals with the power of the directors to appoint a managing director. It no doubt says that the directors' power will be confined to appoint only one of them as a managing director. This article deals with the powers of directors only, and not those of Dadoba, which are separately dealt with in cl. (b) of art. 109. There is nothing in the latter clause to indicate that the provisions thereof are in any way controlled by art. 105. This article, if I may say so, embodies the relevant terms of the agreement. The agreement makes no reference to the powers of the directors to appoint a managing director, and, therefore, it would not be correct to hold that what was not in the contemplation of the parties at the time of the agreement ought to be borne in mind while construing cl. (b) of art. 109. Article 106 specifies the provisions to which a managing director will be subject, and says that a managing director shall not be reckoned as a director for the purpose of determining the rotation of retirement of the directors, or in fixing the number of directors to retire. Here again, the article deals with the matter which is independent of art. 109, and there is no reason why the language used in cl. (b) of art. 109 should be deemed to be controlled by anything said in this article, art. 106.

Earlier in my judgment I have said that I shall deal with Mr. Maneksha's argument to the effect that where a managing director makes the appointment of another as managing director in his place or stead after his death, there can be no effective transmission of office by assignment, because whatever interest Dadoba had had ceased to exist at his death. In connection with this argument, Mr. Khambatta referred to a Madras case, which says that the law knows no vacuum, and that as soon as the managing director, who makes the assignment or appointment of another managing director, died, the assignee or the appointee takes his place and that there is no hiatus. Mr. Maneksha rightly pointed out that the maxim that law knows no vacuum applies to succession to property, and not to succession to office. I will, therefore, proceed on the basis that Dadoba's interest as a managing director ceased at the moment of his death, and that in a narrower sense he could not assign that interest to any one by will. But, as already stated, the word 'assignment' must be understood in a wide sense, so as to include the power to appoint another in one's place.

However, even if one proceeds on the basis of the argument of Mr. Maneksha, the result would be almost the same. Now, a will speaks from the death of the testator. The exercise by a person of a power to appoint by will becomes irrevocable only from the moment of death, inasmuch as the will is liable to be revoked till death. A power to make appointment by will cannot, therefore, be deemed to have been exercised effectively, until it has been so exercised or revoked. We have seen that the agreement and the articles of association empowered Dadoba to appoint another person "in his place and stead" as a managing director. The term in this regard, therefore, contemplates Dadoba's continuing to be a managing director, till he exercised the power to make the appointment. Dadoba was to be a managing director for life, and, therefore, he ceased to be one upon his death. Since, as already observed, the will operates from death, the powers are deemed to have been exercised effectively by Dadoba at the moment of his death. It is true, as contended by the defendants, that Dadoba had no interest left and held no office which he could transfer after the moment of his death. The term in art. 109, cl. (b), it must be remembered, allowed him to appoint another as managing director only "in his place and stead". This means that he was entitled to substitute another person for himself. Such a substitution is possible only when at the point of time the substitution came into effect Dadoba

continued to be a managing director. It was not within the competence of Dadoba to so make an appointment as to bring substitution into effect after he ceased to be a managing director. In my opinion, if the exercise of the power became effective only after Dadoba's death, there was nothing existing at the time of his death upon which that power could operate, because at the moment of death he ceased to be a managing director. The conclusion to be drawn from this, therefore, is that the substitution permitted by cl. 7 of the agreement and in art. 109, cl. (b) of the articles could be made only during the lifetime of Dadoba and while he continued to be a managing director. No doubt, the agreement does refer to the exercise of the powers to make an appointment by will or codicil; but by reason of the use of the words "in his place and stead", effect cannot be given to those words which gave him power to make an appointment by will or codicil. I, therefore, hold that though Dadoba has exercised his power by will, but no effect can be given to the exercise of his power, for the simple reason that at the moment the exercise of the power could become effective Dadoba had ceased to have any interest left.

For all these reasons, therefore, agreeing with S. T. Desai J. I hold that the appointment of defendant No. 2 by will as the managing director was invalid. Accordingly I answer the first question in the negative.

Now, coming to the second question on which the learned Judges of the Division Bench have differed, my answer is also in the negative..

The contention on behalf of the defendants is that the plaintiff, by his failure to attend certain number of meetings, has forfeited his office of director. Now, if the meetings are validly convened by someone who is empowered to convene them, a director by failing to attend them, may incur a forfeiture of the office of the director. But here the person who convened the meetings as managing director had no right as such to convene them. It is, however, contended by Mr. Maneksha that the meetings could be convened by any director, and that since all the meetings during the period in question were convened by defendant No. 2, who was at least a director then, the plaintiff, by his failure to attend those meetings, has incurred forfeiture. There is no provision in the Act or in the articles which entitles any director to call a meeting. Article 94 of the articles runs thus:

"The Managing Director may at any time and shall upon request of any Director convene a meeting of the Directors. It shall not be necessary to give notice of a meeting of the Directors to a Director who is not in Bombay. Questions arising at any meeting shall be decided by a majority of votes, and in case of an equality of votes, the Chairman shall have a second or casting vote."

It is implicit in this article that a meeting can be convened only by a managing director, and that when a director wants a meeting to be convened, he must request the managing director to convene it. This article thus negatives the right of a director to convene a meeting. Mr. Maneksha has said that if there is no managing director in existence, it would create an impasse if the Court were to hold that no meetings could be convened by a director. Perhaps, such a result would ensue; but even so there is no ground for holding that despite the provisions of art. 94, any director has a right to convene a meeting. Where there is no managing director, the remaining directors can, by acting jointly, convene a meeting. It may, of course, happen that there is a disagreement among the directors about this matter; but if there is such disagreement, the parties must necessarily have recourse to the Courts of law. This is what always happens where there is a conflict of rights and disagreement among the parties about any matter.

Since, in my opinion, the plaintiff has not forfeited his office of a director, it follows that no question arose for appointing another in his place. Furthermore, a vacancy in the office of the director could be filled either by a managing director making an appointment, or by the directors doing so. Here, as already stated, defendant No. 2, who purported to make the appointment of

or director, had no right to make the appointment. Accordingly, my answer to the third question is also in the negative.

The papers may now be sent back to the Division Bench with my answer. The matter will be dealt with further by the learned Judges constituting the Bench, including the question of costs.

Answers accordingly.

Before Mr. Justice Gokhale and Mr. Justice V. S. Desai.

M/S JASWANTLAL JAGJIVANDAS AND CO. v. "WESTERN
COMPANY, INDIA," BOMBAY.*

Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Secs. 28, 15, 13(1)(e), 5(3) & (11)—Applicability of s. 28—Suit not between landlord and tenant and in which no claim or question arises out of the Act or its provisions as disclosed in plaint—Defendant in suit contending that he is a tenant—Whether such suit covered by s. 28—Sub-tenancy as between tenant and sub-tenant whether unlawful under s. 15.

In order to decide whether a suit comes within the purview of s. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, what must be considered is what the suit as framed in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of a claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by s. 28 of the Act.

A suit which is essentially one between the landlord and tenant does not cease to be such a suit merely because the defendant denies the claim of the plaintiff. In the same way, a suit which is not between the landlord and tenant and in which judging by the plaint no claim or question arises out of the Act or any of its provisions does not become a suit covered by the provisions of s. 28 of the Act as soon as the defendant raises a contention that he is a tenant.

Govindram Salamatrai v. Dharampal¹ and *Babulal Bhurmal v. Nandram Shitoram²*, referred to.

Under s. 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, there can be no valid sub-tenancy after the coming into operation of the Act notwithstanding anything contained in any other law. Therefore, under s. 15 what has been made unlawful is not only a sub-tenancy as against the landlord but also a sub-tenancy as between the tenant and the sub-tenant.

Narayanrao Krishna Ghate v. Purushottam Kalidas³, agreed with.

THE facts appear in the judgment.

M. A. Sakhardande, S. Redis and P. B. Naik, instructed by *P. R. Gandhi* and *M. D. Pathak*, for the appellants.

D. P. Madan, with *N. S. Phatharphekar*, instructed by *Crawford Bailey & Co.*, for the respondents.

V. S. DESAI J. The respondents are a company incorporated in the State of Delaware in the United States of America and have a place of business in Bombay at Metro House, Mahatma Gandhi Road, Bombay 1. The respondents were the tenants of a godown situate at 51, Dockyard Road, Mazgaon, Bombay. On December 1, 1955, the respondents purported to create a sub-tenancy in favour of the appellants in respect of the eastern portion of the godown at 51, Dockyard Road, on certain terms and conditions as set out in the letter which they wrote

*Decided, February 11, 1959. Appeal No. 200 of 1957, against the decision of M. G. Chitale, Judge, City Civil Court, Bombay, in Suit No. 816 of 1956.

1 (1951) 52 Bom. L.R. 386.

2 (1958) 60 Bom. L.R. 954, S.C.

3 (1952) Civil Revision Application No. 128 of 1952, decided by Chagla C. J., on December 2, 1952 (Unrep.).

to the appellants on December 1, 1955. In respect of the goods stored in the godown there was an insurance effected by the respondents and they were paying certain insurance premium. It appears that as a result of the use made by the appellants of the portion sub-let to them the insurance premium which the respondents had to pay was increased. Therefore, on January 5, 1956, the respondents asked the appellants to remove storing of rice bags and also stop polishing of rice which they were alleged to be doing in the sub-let portion of the godown. The appellants denied the correctness of the facts alleged by the respondents with the result that the respondents informed the appellants by their letter dated January 30, 1956, that the purported sub-tenancy did not create any rights in their favour and they were, therefore, trespassers and called upon them to vacate the premises occupied by them by the end of February 1956. The appellants claimed protection under the Bombay Rent Act. This led to some further correspondence between the parties and a meeting was fixed to see if the matter could be settled. However, the meeting did not materialise and after some further correspondence the respondents filed a suit in the City Civil Court, out of which the present appeal arises, alleging that the appellants were trespassers having no right to continue in possession or in the alternative they were at best licensees in respect of the eastern portion of the godown and their licence was validly revoked and terminated by the respondents. In the suit which they filed, the respondents claimed to recover possession with mesne profits and costs.

The defendants resisted the suit contending that there was a valid contract of sub-tenancy subsisting between the parties; that the said sub-tenancy had not been legally and validly terminated and the plaintiffs were not, therefore, entitled to the relief of possession. They also contended that the suit was one which fell within the purview of s. 28 of the Bombay Rent Act and was not, therefore, capable of being entertained by the City Civil Court and could be entertained only by the Court of Small Causes, Bombay. The defendants denied that they were trespassers and contended that they had paid all dues payable by them up to and inclusive of May 1956. They further denied that they had committed any acts contrary to the terms of the sub-tenancy and also denied that there was any nuisance of rats because of the storage of rice. They also denied having polished the rice in the godown and that their acts were responsible for the increase in the premium rates. It was also contended by the defendants that even if the contract of sub-tenancy was unlawful, the plaintiffs were not entitled to sue them in ejectment by taking advantage of their own wrong. The defendants contended that the letter of December 1, 1955, did not create only a licence in their favour, and even if it created a licence in their favour, the said licence was not validly revoked nor had they committed any breach of the terms and conditions of the licence. They denied their liability to pay any extra premium and further contended that the sum of Rs. 1,200 which they had kept with the plaintiffs could not be treated as deposit because of the provisions of the Bombay Rent Act.

The trial Court held that it had jurisdiction to entertain and try the suit and that the existence of the contract of sub-tenancy dated December 1, 1955, did not disentitle the plaintiffs from maintaining their suit. It further held that the defendants were not sub-tenants of the plaintiffs in respect of the eastern portion of the godown in suit as contended by the defendants and the plaintiffs were entitled to eject the defendants from the premises in suit. The trial Court, however, did not think it necessary to consider the question whether the defendants were licensees of the plaintiffs in respect of the suit premises and whether there was any breach of the terms of the licence or whether the licence was validly revoked and terminated by the plaintiffs. In respect of the claim made by the plaintiffs for the increased amount of insurance premium or for past mesne profits, the trial Court took the view that those claims could not be allowed. It also appears that the plaintiffs did not press for those claims and stated to the Court that they were giving up those claims. In view

of these conclusions, the trial Court passed a decree in favour of the plaintiffs ordering the defendants to deliver possession of the suit premises to the plaintiffs and future mesne profits at the rate of Rs. 400 per month for a period of three years from the date of the decree or until delivery of possession, whichever event happened first. Plaintiffs were also awarded costs of the suit. Against this decree passed by the trial Court the defendants have come to this Court in the present appeal.

Mr. Sakhardande, who appears for the defendants-appellants, has urged before us that the lower Court has erred in holding that it had jurisdiction to try the suit. According to Mr. Sakhardande, this was a suit which fell within the purview of s. 28 of the Bombay Rent Act and was within the exclusive jurisdiction of the Court of Small Causes, Bombay. Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, so far as it is material, provides:

"Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction,

(a) in Greater Bombay, the Court of Small Causes, Bombay, ... shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply. . . and to deal with any claim or question arising out of this Act or any of its provisions and subject to the provisions of sub-section (2), no other Court shall have jurisdiction to entertain any such suit, . . . or to deal with such claim or question."

In order that the provisions of this section may apply, the suit must be between a landlord and a tenant. It must relate to the recovery of rent or possession of any premises to which any of the provisions of Part II of the Act apply and in which any claim or question arising out of the Act or any of its provisions must arise. Now, in the present case, the suit relates to the recovery of possession of premises to which the provisions of Part II of the Act apply. What must, however, be found is whether it is a suit between a landlord and a tenant. The words 'landlord' and 'tenant' are both defined under the Act, and we have to see whether the parties to the present suit are within those definitions. The word 'landlord' which is defined in s. 5(3) includes in respect of his sub-tenant a tenant who has sub-let any premises, and the word 'tenant' which is defined in s. 5(11) states, so far as is material for our purposes, that a

"tenant" means any person by whom or on whose account rent is payable for any premises and includes—(a) such sub-tenants and other persons as have derived title under a tenant before the coming into operation of this Act,..."

It will be seen from the provisions of the Act that a sub-tenant whose sub-tenancy is created after the coming into operation of the Act is not recognised at all. It is only those sub-tenants, who have derived their title as sub-tenants before the coming into operation of the Rent Act, i.e., before February 13, 1948, that are included within the inclusive part of the definition of the word 'tenant'. The word 'tenant' therefore, in s. 28 must mean, so far as sub-tenants are concerned, only a sub-tenant whose sub-tenancy is created prior to February 13, 1948. A person in whose favour a sub-tenancy is created after February 13, 1948, is not a tenant within the definition of the word 'tenant' in the Rent Act at all and no provisions of the Rent Act can apply to such a person. In the present case, it is admitted that the sub-tenancy on which the defendants rely has been created for the first time on December 1, 1955. They are, therefore, not a "tenant" within the meaning of the word as used in s. 28 and the suit against the defendants, therefore, is not a suit between a landlord and a tenant so as to be triable exclusively by the Court of Small Causes, Bombay. Therefore, the provisions of s. 28 do not apply to the present case, and the suit, is not within the exclusive jurisdiction of the Court of Small Causes, Bombay.

Moreover, the suit which has been filed in the present case is on the basis

of title by an owner against a trespasser or alternatively on the basis of a license by a licensor against a licensee. No doubt, the letter of December 1, 1955, which purports to create a sub-tenancy has been referred to in the plaint, but it has been referred to not with a view to admit that the plaintiffs are landlords and the defendants tenants but to emphasise that the defendants are trespassers or at best licensees. The suit, therefore, is a suit as against a trespasser or licensee, on the plaint which the plaintiffs have filed, and such a suit is certainly not one which is within the jurisdiction of the Court of Small Causes, Bombay. The jurisdiction of the Court has to be decided initially at the time of the inception of the suit, and on the plaint which the plaintiffs have filed, there is no doubt that the suit is within the jurisdiction of the City Civil Court. It is, however, contended that although the plaintiffs have filed their suit on the basis of a suit by an owner against a trespasser or alternatively on the basis of a suit by a licensor against a licensee, the defendants have set up a contention of tenancy and, therefore, the suit is one which is governed by s. 28 of the Bombay Rent Act. Now, the question whether a suit, in which the plaintiff alleges that the defendant is a trespasser or a licensee but the defendant contends that he is a tenant, is a suit which can be tried only by the Special Court under the Bombay Rent Act has been the subject-matter of decision of a division bench of this High Court in *Govindram Salamatrai v. Dharampal*.¹ In that case, a suit was filed on the Original Side of this High Court by the plaintiff alleging that the defendant was a licensee. The defendant contended that he was a tenant entitled to protection of the Rent Act. It was urged that the question whether the defendant was a tenant or a licensee was one which arose under the Bombay Rent Act, and since s. 28 of the Bombay Rent Act conferred exclusive jurisdiction on the special Courts under the Act to deal with any claim or question arising out of the Bombay Rent Act it was the Small Causes Court alone and not the High Court which had jurisdiction to deal with and dispose of the question whether the defendant was a tenant or not. In negating this contention the division bench held that when a plaintiff files a suit against a defendant alleging that the defendant is a licensee or a trespasser it is a suit which cannot be entertained by the Small Causes Court, because it is not a suit between a landlord and a tenant, and judging by the plaint no question arises out of the Rent Act or any of its provisions which would have to be determined on the plaint as it stands. The jurisdiction of a Court is normally and ordinarily to be determined at the time of the inception of the suit and a suit by a plaintiff against the defendant alleging that the defendant is a licensee or a trespasser is at its inception within the jurisdiction of the High Court or the City Civil Court and not in the Small Causes Court. The Court in which the suit is filed does not cease to have jurisdiction as soon as the defendant raises a contention that he is a tenant. The question which such contention raises is a jurisdictional question which has got to be determined in order to decide whether the particular Court in which the suit is filed has or has not jurisdiction to try the suit and s. 28 of the Rent Act does not deal with jurisdictional questions which have got to be decided *in limine* before matters arising under the Act can be decided by the Court. It was held that there was nothing in s. 28 of the Rent Act to warrant the contention that the High Court had been deprived of its jurisdiction in all suits for possession wherever the defendant took up the contention that he was a tenant. The jurisdiction was deprived in cases where the landlord filed a suit against a tenant and the tenant claimed protection under the Rent Act or in cases where although the plaintiff alleged that the defendant was a trespasser or a licensee but it ultimately turned out that the defendant was not a trespasser or a licensee but a tenant and that he was entitled to the protection of the Rent Act. In view of this decision, which is directly in point, Mr. Sakhardande's contention that the present suit was not within the jurisdiction of the City Civil Court cannot succeed.

1 (1951) 53 Bom. L.R. 386.

It is urged by Mr. Sakhardande that the authority of this decision is considerably shaken by a recent decision of the Supreme Court in *Babulal Bhurmal v. Nandram Shivram*.² We do not think that Mr. Sakhardande is right in this submission. On the other hand, the observations in this decision, to which Mr. Sakhardande has invited our attention, in our view, far from supporting his submission, go against his contention. In that case, a landlord after giving a notice to quit to his tenant on December 6, 1947, filed a suit against him in the Court of Small Causes, Bombay, joining to the suit two other persons who were alleged to be sub-tenants of the tenant. The landlord's case was that the tenancy of his tenant was validly terminated and he was entitled to evict his tenant; that the alleged sub-tenants of the tenant were trespassers who had no right to be on the premises. The suit succeeded in the Small Causes Court, the Court holding that the sub-tenants were not lawful sub-tenants, the sub-letting by the tenant to them being contrary to law. The Small Causes Court, therefore, passed a decree against the plaintiff and the alleged sub-tenants. Thereafter, the tenant as plaintiff No. 1 and the alleged sub-tenants as plaintiffs Nos. 2 and 3 filed a suit against the landlord in the City Civil Court for a declaration that plaintiff No. 1 was a tenant of the defendant and was entitled to protection under the Rent Act and that plaintiffs Nos. 2 and 3 were lawful sub-tenants of plaintiff No. 1 and were entitled to possession and occupation of the premises as sub-tenants thereof. A question was raised in the City Civil Court as to whether the City Civil Court had jurisdiction to entertain the suit. The City Civil Court held that it had jurisdiction to entertain the suit, but dismissed it on merits. In the appeal which was filed in the High Court, the High Court dismissed the appeal holding that the City Civil Court had no jurisdiction to entertain the suit and, therefore, the suit filed by the plaintiffs in the City Civil Court was not maintainable. It was from this decision of the High Court that an appeal was filed in the Supreme Court and the question which the Supreme Court had to consider was whether the suit, filed by the plaintiffs was within the jurisdiction of the City Civil Court. It was urged before the Supreme Court that the suit was maintainable under s. 29A of the Bombay Rent Act which provided that nothing contained in ss. 28 or 29 should be deemed to bar a party to a suit, proceeding or appeal mentioned therein in which a question of title to premises arises and is determined, from suing in a competent Court to establish his title to such premises. The Supreme Court held that a suit which was competent to establish title under s. 29A was a suit to establish title *de hors* the Bombay Rent Act and not a suit which sought to establish title which required to be established under the Rent Act itself. It was held:

"...It is possible to conceive of cases where in a suit under s. 28 of the Act a question of title to the premises which does not arise out of the Act or any of its provisions may be determined incidentally. Any party to the suit aggrieved by such a determination would be free to sue in a competent Court to establish his title to such premises by virtue of the provisions of s. 29A of the Act. On the other hand, in a suit where a question of title entirely arises out of the Act or any of its provisions, the jurisdiction to try such a suit is exclusively vested in the Courts specified in s. 28 and no other. That is to say, a title which could not be established outside the Act but which arose under the provisions of the Act by virtue of a claim made thereunder must be determined by a Court specified in s. 28 and a title *de hors* the Act may be determined in any other Court of competent jurisdiction. By enacting s. 29A the Legislature clearly intended that no finality should be attached to the decision of a Court trying a suit under s. 28 on a question of title *de hors* the Act."

It will thus be seen that the question which arose before the Supreme Court and was decided in this case related to the scope of suits which were permitted under s. 29A of the Rent Act and had no direct bearing on the question which was decided in the case reported in *Govindram Salamatrai v. Dharampal*. It is argued, however, that in deciding the question which was before them their

Lordships of the Supreme Court have construed the provisions of s. 28 of the Rent Act and discussed the scope of these provisions and the suits which fall within the purview of the said section, and the observations which their Lordships have made in that connection support the contention that a suit in which the plaintiff alleges that the defendant is a licensee or trespasser, but the defendant contends that he is a tenant, falls within the purview of s. 28 of the Rent Act and the jurisdiction to entertain and try such suits belongs exclusively to the special Courts as specified in s. 28. The observations on which reliance is placed occur firstly at p. 957 of the report in *Babulal Bhurmal v. Nandram Shivram*. Their Lordships have observed:

"...Do the provisions of s. 28 cover a case where in a suit one party alleges that he is the landlord and denies that the other is his tenant or vice versa and the relief asked for in the suit is in the nature of a claim which arises out of the Act or any of its provisions? The answer must be in the affirmative on a reasonable interpretation of s. 28." These observations do not lend support to the submission which is urged before us by Mr. Sakhardande. With great respect, it appears clear to us from these observations that in order to decide whether a suit comes within the purview of s. 28 what must be considered is what the suit as framed in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of a claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by s. 28. This is made abundantly clear by what their Lordships have observed immediately after the observations quoted above. Their Lordships have observed (p. 959):

"Suit No. 483/4400 of the Court of Small Causes, Bombay, was admittedly by a landlord. Eviction of the tenant and those to whom he had sublet the premises was sought on the ground that the latter were trespassers and the former was not entitled to remain in possession, that is to say, that none of the defendants to that suit were protected from eviction by any of the provisions of the Act. The suit, in substance, was a denial of the right of the defendants as tenants. The claim of the defendants was that they were protected by the provisions of the Act. In such a suit the claim of the defendants was one which arose out of the Act or any of its provisions and only the Courts specified in s. 28 and no other could deal with it and decide the issue."

Mr. Sakhardande has next relied on the observations at p. 958 of the report in *Babulal Bhurmal v. Nandram Shivram* where their Lordships have stated:

"...On a proper interpretation of the provisions of s. 28 the suit contemplated in that section is not only a suit between a landlord and a tenant in which that relationship is admitted but also a suit in which it is claimed that the relationship of a landlord and a tenant within the meaning of the Act subsists between the parties."

These observations also do not help Mr. Sakhardande for, here again the emphasis is on the suit as framed and on what the suit as framed in substance is. These observations occur in the context where their Lordships were considering the suit filed in the City Civil Court. Considering the suit filed in the City Civil Court, their Lordships pointed out that the suit was one relating to possession of premises to which the provisions of Part II of the Act applied and claims and questions arising out of the Act or any of its provisions were required to be dealt with in the suit. Independently of the Act, the plaintiff in the suit disclosed no cause of action. Their Lordships then observed (p. 958):

"...The suit, therefore, was essentially a suit between a landlord and a tenant. The suit did not cease to be a suit between a landlord and a tenant merely because the defendants denied the claim of the plaintiffs."

In view of these observations it is not possible to accept the contention which has been urged by Mr. Sakhardande. A suit which is essentially one between the landlord and tenant does not cease to be such a suit merely because the defendant denies the claim of the plaintiff. In the same way, a suit which is not between the landlord and tenant and in which judging by the plaintiff no claim or question arises out of the Rent Act or any of its provisions does not become

a suit covered by the provisions of s. 28 of the Act as soon as the defendant raises a contention that he is a tenant. As we have already observed earlier, the observations of their Lordships of the Supreme Court in *Babulal Bhurmal v. Nandram Shivram* on which Mr. Sakhardande seeks to rely far from supporting him go against his contention.

Mr. Sakhardande has then contended that the lower Court has erred in holding that the defendants are not the lawful sub-tenants of the plaintiffs. He argues that under s. 15 of the Bombay Rent Act what has been made unlawful is a sub-tenancy as against the landlord but not a sub-tenancy as between the tenant and the sub-tenant. Mr. Sakhardande says that reading s. 13(1)(e) together with s. 15 of the Act, it would be clear that sub-letting is not unlawful as between the tenant and the sub-tenant. Section 13(1)(e) provides that if a tenant sub-lets the whole or part of the premises, the landlord will be entitled to evict him. Section 15 states that it will not be lawful for a tenant to sub-let the whole or any part of the premises let to him. It is argued that if the meaning of s. 15 was that there could be no sub-letting in law at all, even if purported to be effected between the tenant and the sub-tenant, s. 13(1)(e) could not have used the word "sub-let". According to Mr. Sakhardande, the object in enacting s. 15 was that the sub-letting by the tenant to the sub-tenant should not avail as against the landlord and should not afford the sub-tenant any protection under the Rent Act. Now, if the object in enacting s. 15 was only that the sub-tenancy should not avail as against the landlord, we do not see why it was necessary to enact s. 15, because that provision had been made by s. 13(1)(e) itself, which provided that, not only would a sub-tenancy not avail as against the landlord but it would provide him with a ground to evict the tenant himself. If the object in enacting s. 15 was only to deprive the sub-tenant of the protection of the Rent Act, we do not see why the language of that section should have been in these general words.

An argument similar to the one which is advanced before us by Mr. Sakhardande was advanced before this Court in an unreported decision in *Narayanrao Krishna Ghate v. Purushottam Kalidas*.³ It was contended there that s. 15 was merely complementary to s. 13(1)(e) and no penal provision had been enacted and, therefore, notwithstanding s. 15 a valid sub-tenancy could be treated as between tenant and sub-tenant. This argument was negatived and it was observed:

"... S. 13(1)(e) deprives a tenant of the protection of the Rent Act who sub-lets the premises let out to him. It is difficult to understand why it was at all necessary to enact sec. 15 if the only object of enacting that section was to make it complementary to what the Legislature had already enacted in sec. 13(1)(e). Sec. 13(1)(e) is self-contained and its object is, as I said, to deprive a tenant of the protection of the Rent Act who has sublet the premises let out to him. The object of sec. 15 is entirely different. It embodies the policy of the law that after the Act came into force no sub-tenancy should be created, and, therefore, the Legislature has advisedly used the language which one finds in sec. 15, viz. that it shall not be lawful, after the coming into operation of the Act, for any tenant to sublet the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein."

With great respect, we are in complete agreement with the view taken in this case with regard to the interpretation of s. 15 of the Bombay Rent Act. It seems to us that in view of the clear language of s. 15, what is provided by that section is that there can be no valid sub-tenancy after the coming into operation of the Rent Act notwithstanding anything contained in any other law. We cannot, therefore, accept Mr. Sakhardande's contention that the defendants are entitled to rely on the sub-tenancy as a valid sub-tenancy as against the plaintiffs.

Mr. Sakhardande has then urged that the plaintiffs having been a party to

³ (1952) Civil Revision Application December 2, 1952 (Unrep.).
No. 128 of 1952, decided by Chagla C.J., on

this contract of sub-tenancy between them and the defendants, which is rendered unlawful by s. 15 of the Rent Act, and having put the defendants in possession in pursuance of this contract, cannot come to the Court and seek its assistance for obtaining back possession from the defendants. Now, it seems to us that if the plaintiffs had to rely on the unlawful contract for the purposes of obtaining the relief which they have claimed in the plaint, they would certainly not have been entitled to so rely and the Court would not have assisted them. But what the plaintiffs are relying upon in the present suit is not the contract which is unlawful or contrary to the policy of the law. What they are relying upon is their title, and they are seeking, on the basis of that title, to recover possession from persons who have no right to remain in possession. It is the defendants who have to set up the contract to resist the plaintiffs' claim for possession and in that sense it will be the defendants who seek to rely on it. Mr. Sakardande, however, argues that even though the plaintiffs have not sought to rely on the unlawful transaction or contract, the defendants have brought it to the notice of the Court and even in a case where the illegal contract has not been relied on by the plaintiffs in support of their claim or for the purposes of enforcing their claim, if the illegality is pointed out to the Court even by the other side, the Court will refuse to help the plaintiffs. In this connection, he has invited our attention to the observations in the case of *Guddappa Chikkappa v. Balaji Ramji*.⁴ It was held in that case that a Court will not allow itself to be used as an instrument of fraud, and by the application of rules of evidence or procedure it will not allow its eyes to be closed to the fact that it is being used as an instrument of fraud. Once the Court finds that the plaintiff is seeking its assistance to enable him to get the benefit of what is a fraud, it refuses to assist him. Beaumont C.J. observed (p. 691):—

"...I think the true rule is stated by Sir Grimwood Mears in *Vilayat Husain v. Misran* where he says (p. 396):—

"In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances embrace and include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the court to look into the matter, and if the court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff (who is asking the Court to give him some help) and that of the defendant, the duty of the Court is not to assist either party; in other words, the duty of the Court is to dismiss the claim, because the court having then in its knowledge that it has before it two persons equally guilty of fraud will not assist either of them."

The case with which their Lordships were dealing was a case where the defendants had executed in favour of the plaintiff a sale-deed without consideration, and it was a part of a fraudulent attempt on the part of the defendants to defeat their creditors. The possession, however, still remained with the defendants and the plaintiff sued on the basis of the sale-deed in his favour to obtain possession from the defendants. The defendants resisted the suit, pointed out the circumstances under which the sale-deed came to be executed, and the circumstances as contended by the defendants having been found to be established, the Court held that the Court would not assist the plaintiff to recover possession of the property on the basis of his title because it would mean assisting him to obtain the benefit of what is fraud. Now, in the present case, the title on which plaintiffs seek to recover possession is not in any way connected with any illegality or fraud. The observations, therefore, in the case referred to by Mr. Sakhardande will not be applicable to the present case. A contention similar to this was also raised before this Court in *Narayanrao Krishna Ghate v. Purushottam Kalidas*, which has been already referred to, and it was observed:

• "If it is necessary for a party to prove a contract which is prohibited by law in order

4 (1941) 43 Bom. L.R. 681, r.n.

5 (1923) I.L.R. 45 All. 396.

to obtain any relief from the Court, the Court will not permit such a contract to be proved."

It was observed that if in order to succeed, the tenant had to prove the contract of sub-tenancy, then he would not have been able to prove the same. It was also argued in that case that the defendant having brought the illegal contract to the notice of the Court, the Court had to go into the question. It was observed:

"It is true that if the attention of the Court is drawn to an illegal contract, the Court will not permit either party to prove it if it is necessary to go into that contract in order to enable the plaintiff to obtain any relief from the Court."

But where a plaintiff has not to rely on the illegal contract at all in order to succeed, the principle of *pari delicto* will have no application.

In another recent case reported in *Jivanjirao Scindia v. Muzammil*⁶ this argument has been again considered and negatived. After considering the position in law and the arguments advanced, Mr. Justice S. T. Desai observed (p. 1014):

"But no authority seems necessary for the proposition that the owner of any property can on general principle invoke the aid of the Court for the recovery of the same from another not in lawful possession of it so long as he is able to rest his cause of action on his own title and is not compelled to rely as part of his cause of action on any contract or transaction which is illegal or immoral or otherwise opposed to the doctrine of public policy. It is in cases of the latter categories that the Court acts on the principle underlying the maxim *Ex turpi causa non oritur actio* and refuses to lend its aid to support obligations or rights said to have arisen between the parties to such dealings. This is because no right of action can spring from them. But title and right to possession of property when relied upon in a case cannot be said to spring from any dealing with the property in permissible or impermissible exercise of that title or right; it is apart, and disturbance or denial of it gives rise to a cause of action independent of and unaffected by those dealings."

In that case, a plaintiff, who was a tenant of a flat, had created a sub-tenancy in favour of the defendant and put him in possession of the flat, and had thereafter filed a suit against the defendant alleging that the defendant was a trespasser. It was held that the suit was perfectly maintainable and the plaintiff was entitled to get back the possession of the flat from the defendant.

Mr. Sakhardande has urged that at any rate during the period of the sub-tenancy the plaintiffs should have been held disentitled to seek possession of the premises sub-let, and in support of this submission he has invited our attention to the following passage from Halsbury's Laws of England, third edn., Vol. 23, page 434, para. 1030.

"Where a lease has been granted but is unenforceable because it was made for an unlawful purpose, the tenant cannot be obliged to pay rent or perform his covenants but is entitled to remain in occupation until the expiry of the term granted by the lease unless the landlord can prove that the grant of the lease was induced by fraudulent misrepresentation on the part of the tenant. It seems, however, that the landlord might obtain an order for possession under the proviso for re-entry if the tenant committed a breach of covenant or if the tenant had successfully resisted an action for rent on the ground that the lease was void."

Mr. Sakhardande wants to rely on this passage for his submission that the landlord during the period of the lease will not be entitled to ask for eviction of a tenant. In the first place, the contention which Mr. Sakhardande wants to raise has not been raised in the Court below. What was urged in the Court below was that there was a lawful sub-tenancy and it was on the basis of the lawful sub-tenancy that the defendants were in possession. Secondly, whether the passage which Mr. Sakhardande has cited to us relates to a case like the one before us, where the cause of action of the suit of the plaintiff is based on his

title unconnected with any contract, lawful or unlawful, is not clear. There is no doubt that even if for the purposes of obtaining the relief which the plaintiffs are claiming they have still to rely on the illegal contract, they would certainly not be entitled to so rely and obtain relief. But where the plaintiffs' cause of action and the plaintiffs' claim spring from their right unconnected with any illegality, we do not see why they should not be able to enforce the same.

Mr. Sakhardande has also invited our attention to the foot-note (d) at page 347 of Principles of the Law of Contracts by Salmond, 2nd ed., which states:

"As to whether one who has illegally leased or hired property for a term can recover it back before the end of the term see (and the cases are mentioned). These authorities all support a right of recovery in the owner of the property. Such a right, however, seems contrary to principle. The lessor, pledgor or lienor seeking to recover inconsistently with the terms of the lease, pledge or lien can do so only by setting up the illegality of the transaction. It is not solely upon his ownership that he relies, but upon his ownership coupled with the illegality of the contract which *ex facie* limits it. That is, an essential element in his claim arises *ex turpi causa*."

It seems to us that the view expressed by the learned author appears to support Mr. Sakhardande's contention. It appears, however, that it applies to a case where the plaintiff's right, which is sought to be enforced in the suit, is not based solely on his ownership but on his ownership coupled with the illegality of the contract. In the present case, as we have seen, there is no such combination and the plaintiffs' claim is solely based on their title unconnected with any illegality. We do not propose to examine the contention raised by Mr. Sakhardande in greater detail, because even if we were to accept as correct in law his contention that in the case of an illegal transaction, if possession is delivered as for a term, at least during the continuance of the term the owner will not be entitled to rely on his title and seek to obtain back possession of the property, it seems to us that in the present case, that duration had clearly expired. We have on record an intimation given by the plaintiffs to the defendants (exh. A-3) inviting their attention to the illegal nature of the transaction and further pointing out to them that in view of the illegal transaction they acquired no right, their right to remain in possession had come to an end and they were required to vacate by the end of the month next after the expiry of the month when the intimation was given. The intimation was given on January 30, 1956, and the time by which the defendants were asked to vacate expired by the end of February 1956. The suit was filed on March 28, 1956, and consequently at the time when the suit was filed the duration of the illegal tenancy had come to an end.

In view of the reasons which we have discussed above and in view of the two decisions of this Court to which we have referred, we cannot accept Mr. Sakhardande's contention that the plaintiffs are disentitled from obtaining the assistance of the Court to recover possession of the suit premises on the principle of *pari delicto*.

Mr. Sakhardande has then urged that the lower Court ought to have dealt with the question as to whether the defendants were licensees of the plaintiffs and whether they had committed any breach of the terms of the agreement of licence and whether the licence had been validly terminated. Now, it is true that the plaintiffs alleged in the alternative that the letter of December 1, 1955, which had not the effect of creating a sub-tenancy, could at best be treated as creating a licence in favour of the defendants, and that the licence had been revoked by the plaintiffs. Defendants, however, contended that they were not licensees but were lawful sub-tenants and that the alleged licence by the plaintiffs was not revoked or terminated. It seems to us that there could not be a relationship of licensor and licensee in the present case. The document in terms purported to create a sub-tenancy, and if the sub-tenancy could not be validly created in law, then it would not have the effect of granting a licence

to the defendant. It is true that possession was taken by the defendants in pursuance of the agreement of December 1, 1955, and, therefore, the possession could not be said to have been taken against the will or in spite of the plaintiffs. However, the possession which the defendants obtained was referable to an interest in property which the parties purported to create by the transaction of December 1, 1955. If the transaction failed, the possession which the defendants took was not in pursuance of any legal transaction and would, therefore, be possession which would be wrongful or that of a trespasser. In a licence, as defined in s. 52 of the Easements Act, what is granted is only a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property. In granting a licence, therefore, no interest in property is contemplated to be created in favour of the grantee and the right to use which is given is with a consciousness that all interest in the property remains in the grantor and the grantee has only a personal right to use the property. If possession is given in pursuance of a transaction which is intended to convey interest in the property as, for example, by creating sub-tenancy, such possession cannot be said to have been given by way of licence. It is referable to the interest in property sought to be created, and if no interest is created because the transaction is illegal, the possession is without any right and, therefore, wrongful and that of a trespasser. In this view of the matter, the question as to whether the defendants were licensees need not be considered and consequently also the further question as to whether the licence was revoked.

The result, therefore, is that all the contentions which Mr. Sakhardande has urged before us in this appeal fail and the appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mudholkar and Mr. Justice Patel.

THE MUNICIPAL CORPORATION OF GRATER BOMBAY

v.

AKBAR S. SARELA.*

Indian Railways Act (IX of 1890), Sec. 135(1) & (2)—Railways (Local Authorities' Taxation) Act (XXV of 1941), Sec. 3(1) & (2)—Officer appointed to determine quantum of liability of Railway Administration to pay tax levied by local authority—Whether officer has jurisdiction to determine question as to existence of such liability—Plaint—Averment in plaint that Court has jurisdiction over subject-matter of claim made therein—Absence of such averment, effect of.

Section 135(2) of the Indian Railways Act, 1890, empowers the Central Government to appoint an officer only for the limited purpose of determining the quantum of the liability of the Railway Administration to pay the tax leviable by the local authority and not for determining the question of the liability of such Administration to pay a tax at all. It is, therefore, not competent to such an officer to consider, in a proceeding before him under s. 135(2) of the Act, the very factum of the liability of the Railway Administration to pay the tax of which the amount, if any, is required to be determined by it. The officer may, however, construe the notification issued under s. 135(1) of the Act or enquire into the existence of the notification. If he hold that there is no notification, he must straightaway proceed to dismiss the application made under s. 135(2) of the Act.

In every plaint the plaintiff has to aver that the Court in which it is filed has jurisdiction over the subject-matter of the claim made therein. In the absence of such an averment, the Court must reject it, unless the Court is satisfied from the other averments in the plaint that it has, *prima facie*, jurisdiction to entertain the plaint and that the plaintiff's omission to make the averment as to jurisdiction is a mere

*Decided, February 13, 1959. Special Civil Application No. 3680 of 1958.

clerical or accidental error. But where a plaintiff lodges his claim and denies the jurisdiction of the Court to entertain it, the Court must throw it out forthwith. The position is not different where an initial averment as to the Court's jurisdiction is withdrawn by the plaintiff, either expressly or by necessary implication, later on.

The facts appear in the judgment.

Ajit Mehta and *M. C. Bhatt*, with *A. M. Desai*, for the petitioner.

S. Baptista, with *Little & Co.*, for respondent No. 2.

S. Baptista, with *N. B. Vakil*, for respondent No. 3.

MUDHOLKAR J. This is a petition under art. 226 of the Constitution. The petitioner, the Municipal Corporation of Greater Bombay, have approached this Court for quashing an order of Mr. A. S. Sarela, District Judge, Thana, passed in an application made to him by respondent No. 2 under s. 135(2) of the Indian Railways Act, 1890, and s. 3(2) of the Railways (Local Authorities Taxation) Act, 1941. In that application the Western Railway Administration (hereafter referred to as Railway Administration) wanted the determination, if any, of a lump sum payable to the petitioner by way of taxes.

Certain facts must be stated. The Railway Administration owns some buildings situate at Malad, which is now within the limits of Greater Bombay. In the year 1908 the local area of Malad was made a notified area under the provisions of the Bombay District Municipal Act, 1901, and a committee known as Malad Notified Area Committee was constituted in respect of it. This committee, *inter alia*, possessed a power of assessment and recovery of taxes within the area. In the year 1950 the Government of Bombay made ss. 4 and 7 of the Bombay District Municipal Act, 1901, applicable to the local area of Malad, and directed that from April 1, 1951, a permanent municipal district shall be formed for the local area of Malad. By the Bombay Municipal [Further Extension of Limits and Schedule BBA (Amendment)] Act, 1956, (Bombay Act LVIII of 1956), the Malad Municipality was abolished and the local area which, prior to the coming into force of the said Act, was under the jurisdiction of the Malad Municipality, became subject to the authority of the Municipal Corporation of Greater Bombay. As a result of this notification, the buildings owned by the Railway Administration and situate at Malad are now within the limits of the Municipal Corporation of Greater Bombay.

We may mention here that a portion of the Railways which are now under the management of the Western Railway Administration were formerly owned by the B. B. & C. I. Railway. The assets of this company were taken over by the Government of India before the year 1951 and thereafter they vested in the B. B. & C. I. Railway Administration. These assets along with those of some other railway systems were amalgamated on November 6, 1951, and constituted into a single unit called the Western Railway Administration.

Under s. 135(1) of the Indian Railways Act, a railway administration shall not be liable to pay any tax in aid of the funds of any local authority, unless the Central Government declares by a notification the railway administration to be liable to pay the tax. In exercise of the powers conferred by this subsection, the Government of India issued a notification on August 23, 1911, of which the relevant part is as follows:—

"In pursuance of section 135 of the Indian Railways Act, 1890 (IX of 1890) and in supersession of all previous notifications on the subject the Governor General in Council is pleased to declare that the administration of Bombay Baroda & Central India (including Rajputana and Malwa) Railway shall be liable to pay in aid of the funds of the local authorities set out in the schedule hereto annexed, the taxes specified against each in the second column thereof."

Thereafter follows the schedule. In pursuance of this notification, the Malad Notified Area Committee, and thereafter the Malad Municipal Committee, recovered house and property tax from the B. B. & C. I. Railway Company, B. B. & C. I. Railway Administration and the Western Railway Administration

till the year 1952-53 in respect of the buildings owned by it in Malad. For the year 1953-54 the Malad Municipality increased the rateable value of the buildings belonging to the Railway Administration and called upon it to pay the house and property tax on the footing of the revised rateable value. It may be mentioned that till the year 1952-53 the Malad Municipality, and before it, the Notified Area Committee, recovered taxes from the Railway Administration only with respect to buildings constructed prior to April 1, 1937. The Railway Administration was not willing to pay these taxes.

It may be mentioned here that in the year 1941 a new law was passed by the Central Legislature dealing with the question of liability of railways to taxation by the local authorities. That law is the Railways (Local Authorities Taxation) Act, 1941. The provisions of s. 3(2) thereof are as follows:—

“While a notification under sub-section (1) is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or in lieu thereof such sum, if any, as a person appointed in this behalf by the Central Government may, having regard to the services rendered to the railway and all the relevant circumstances of the case, from time to time determine to be fair and reasonable. The person so appointed shall be a person who is or has been a Judge of a High Court or a District Judge.”

By its application dated March 23, 1956, the Western Railway Administration invoked the jurisdiction of the District Judge, Thana, as the authority constituted under s. 3(2) of the said Act, for determining “such sum, if any” payable by it as tax to the Bombay Municipal Corporation. This application was inquired into by the District Judge, Thana, as the particular area from which this dispute arises is within the limits of the District of Thana. The learned District Judge, after considering the statements filed both by the Railway Administration and the Corporation, came to the conclusion that the properties of the Railway Administration in Malad are not liable to pay any tax whatsoever to the Corporation, because no notification had been issued by the Central Government under sub-s. (1) of s. 3 of the Railways (Local Authorities Taxation) Act, 1941. Certain other questions which were raised on behalf of the Railway Administration were also answered by him; but we need not refer to them, because as we will show presently the application of the Railway Administration to the District Judge, Thana, was not at all maintainable.

In the first place, we would like to point out that an application under sub-s. (2) of s. 3 of the Act, Railways (Local Authorities Taxation) Act, 1941, can only be made by a Railway Administration with respect to which a notification has been made by the Government under sub-s. (1) of s. 3 of the Act. It is common ground that no notification whatsoever has been made by the Central Government under the aforesaid provision, whether in respect to the Western Railway Administration, or with respect to its predecessors, the B. B. & C. I. Railway Co. and the B. B. & C. I. Railway Administration. Indeed, that is the finding of the Authority itself.

There is, however, another provision, under which an application for determination of the tax could be made by a Railway Administration. That provision is s. 135(2) of the Indian Railways Act. The provisions of that sub-section are as follows:—

“While a notification of the Central Government under clause (1) of this section is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or, in lieu thereof, such sum, if any, as an officer appointed in this behalf by the Central Government may, having regard to all the circumstances of the case, from time to time determine to be fair and reasonable.”

These provisions are substantially the same as those of sub-s. (2) of s. 3. No doubt, the Railway Administration has stated in its application to the District Judge that it was invoking its jurisdiction under sub-s. (2) of s. 3; but in para. 9 of its application it has made a reference to the provisions of s. 135(2) of the

Indian Railways Act. We are, therefore, prepared to treat the application of the Railway Administration as one under both the provisions, that is, of s. 3(2) of the Railways (Local Authorities Taxation) Act, 1941, and s. 135(2) of the Indian Railways Act, 1890.

Now, in order to attract the provisions of sub-s. (2) of s. 135, not only must there be a notification of the Central Government under sub-s. (1) of s. 135, but there must be a liability upon the Railway Administration to pay a tax by virtue of the notification. In other words, it is only where the Railway Administration is made *prima facie* liable to pay a tax to a local authority that it can approach the appropriate authority for determining the quantum of such liability. We may mention that though in the original application made by the Railway Administration its liability to pay the tax by virtue of the notification issued under s. 135(1) was not disputed, in the written statement filed on its behalf subsequently that liability was questioned. It was for this reason that the learned District Judge thought it necessary to decide the question as to whether there was any liability on the Railway Administration to pay the tax at all.

There is, however, a material aspect of this matter which has been overlooked by the learned District Judge. That is the effect of the stand taken by the Railway Administration in para. 1 of its written statement on the submissions made by it in para. 10 of its application. In the latter paragraph it seems to proceed on the assumption that the notification of the year 1911 entitles the District Judge to determine 'such sum, if any,' as may be found payable by it and has elected to do so, if the District Judge finds that it would be fair and reasonable to order it to pay a particular sum. But in para. 1, this is what it says:

"The applicant respectfully submits that in view of the fact that there does not exist any notification of the Government of India either under the provisions of sec. 135(1) Indian Railways Act, 1890, or under sec. 3(1) of the Railways (Local Authorities Taxation) Act, 1941, declaring the liability of THE WESTERN RAILWAY ADMINISTRATION to the payment of any tax to the Malad District Municipality, the applicant administration is not liable in law to pay any tax whatever to the opponent municipality in the absence of any such notification. The applicant says that the only notification which was issued by the Government of India under sec. 135(1) of the Indian Railways Act, 1890, was dated August 24, 1941, and related to the former B.B. & C.I. Railway Administration. The liability which was declared by the said notification of the said B.B. & C.I. Railway Administration to the Malad (Notified Area) Committee was in respect of house and property tax. The said B.B. & C.I. Railway Administration as such ceased to exist with effect from November 6, 1951, on which date the said B.B. & C.I. Railway Administration along with the Administrations of the Saurashtra Railway, Jaipur State Railway, Rajasthan Railway and the Section Marwar Junction to Phulad forming part of the ex-Jodhpur Railway Administration, were integrated into one Unit known as the Western Railway Administration. The applicant, therefore, submits that the Western Railway is not just a change of name for the former B.B. & C.I. Railway Administration but is altogether a distinct, separate and independent unit formed out of the merger of the five different Railway Administrations. In the circumstances and as there does not exist any notification of the Government of India declaring the liability of the Western Railway Administration to pay any tax in aid of the funds of the opponent municipality, the applicant is not liable to pay any tax to the opponent municipality in respect of any of its properties situated within the limits of the opponent municipality."

No doubt, it has raised certain contentions on the merits also, but they being "without prejudice" to the main contention, cannot survive if the District Judge has no jurisdiction to entertain the application. By raising the contention as to the absence of notification the Railway Administration must be deemed to have amended its original application.

Now, where a person seeks from a tribunal an adjudication of a dispute, he must allege and, where disputed, prove that the tribunal has jurisdiction to entertain the proceeding in which the dispute is raised. Thus, in every plaint

the plaintiff has to aver that the Court in which it is filed has jurisdiction over the subject matter of the claim made therein. In the absence of such an averment, the Court must reject it, unless the Court is satisfied from the other averments in the plaint that it has, *prima facie*, jurisdiction to entertain the plaint and that the plaintiff's omission to make the averment as to jurisdiction is a mere clerical or accidental error. But where a plaintiff lodges his claim and denies the jurisdiction of the Court to entertain it, the Court must throw it out forthwith. The position is not different where an initial averment as to the Court's jurisdiction is withdrawn by the plaintiff, either expressly or by necessary implication, later on.

In our opinion, the quotation from para. 1 of the Railway Administration's written statement displaces the contrary submissions in its application, with the result that the Railway Administration must be held to deny the very jurisdiction of the learned District Judge to deal with the claims. In the face of this denial, there is nothing that the learned District Judge could have done but to dismiss the Railway Administration's application.

It is clear that sub-s. (2) of s. 135 empowers the Central Government to appoint an officer only for the limited purpose of determining the quantum of the liability of the Railway Administration to pay the tax leviable by the local authority and not for determining the question of the liability of such Administration to pay a tax at all. If we look to the language of sub-s. (2) of s. 135, it is clear that the existence of liability on the Railway Administration to pay a tax to the local authority is a condition precedent to the exercise of the jurisdiction to determine the quantum of liability under s. 135(2) of the Act. In other words, only a Railway Administration which accepts the position that it is liable to pay a tax that is entitled to approach the appropriate authority under sub-s. (2) of s. 135. It is, therefore, not competent to such authority to consider, in a proceeding before him under this provision, the very factum of the liability of the Railway Administration to pay the tax of which the amount, if any, is required to be determined by it.

Mr. Baptista, who appears for the Railway Administration, has strenuously urged that the words 'such sum, if any' which occur in sub-s. (2) of s. 135 clearly indicate that the authority appointed thereunder has jurisdiction to consider the question of the liability of the Railway Administration to pay tax. The opening words of sub-s. (2) of s. 135 are "while a notification of the Central Government under clause (1) of this section is in force". Now, once a notification is issued under the aforesaid provision, it would follow that the exemption of a Railway Administration from liability to pay a tax conferred by the opening words of sub-s. (1) of s. 135 is taken away or modified by that notification. That is a settled and indisputable fact and cannot be questioned before or by the authority approached under s. 135(2). The authority can construe the notification or enquire into the existence of the notification. If it holds that there is no notification, it must straightaway proceed to dismiss the application. It has no power to go into the question of the liability of the Railway Administration to pay a tax at all. Where it chooses to entertain the application, it must function only with respect to a matter which is covered by the notification. In other words, the position is that the District Judge can exercise his functions only in respect to a Railway Administration which is not wholly exempted from paying a tax. The function entrusted to him is a limited one, viz. the determination of the sum, if any, which is payable by a Railway Administration to a local authority by way of taxes. No other function is entrusted to him. The question as to the existence of liability is wholly beyond his jurisdiction to determine. There are also other words in sub-s. (2) of s. 135 which lead to the same effect. The concluding portion of the subsection to the effect that the officer indicated therein has to determine such sum as appears to him, 'fair and reasonable' are pertinent. Now, it may be that he may think that in the circumstances of a particular case it would not be fair

and reasonable to order that anything should be paid to a local authority. For covering such a case it was necessary to insert the words 'if any' in these provisions. We, therefore, do not think that the use of these words in this provision entitles the District Judge to determine the question as to the liability of the Railway Administration to pay a tax to a local authority by virtue of the notification of the Government under sub-s. (1) of s. 135.

Since that is our view, it would follow that the application of the Railway Administration to the authority was wholly misconceived. It was not obligatory upon the Railway Administration to approach the authority at all in this matter. Indeed, if they dispute the very fact of the liability, then the proper course for it is to go to the ordinary civil Court for redress and not to the authority appointed under the Railways Act. Since in our opinion the learned District Judge had no jurisdiction to entertain the application, it follows that his findings on the various questions raised by the Railway Administration are inefficacious.

Accordingly, we make the rule absolute in terms of the prayer and dismiss the application of the Railway Administration made to the District Judge, Thana. As the point concerning his jurisdiction was not taken by the petitioner before the District Judge, we make no order as to costs.

Rule made absolute.

[NAGPUR BENCH]

Before Mr. Justice Datar and Mr. Justice Naik.

STATE OF BOMBAY v. MATHURADAS BULAKIDAS MOHOTA.*

Diverted Lands Revision of Assessment Rules, 1952, Rule 1(2)—Central Provinces Land Revenue Act (II of 1917), Secs. 104-A, 106,† Chap. VI—Central Provinces Settlement Act (VI of 1929), Sec. 2—Central Provinces Tenancy Act (I of 1920), Sec. 36-A—Petitioner declared Malik-makbuza in respect of his holding not assessed at settlement under Chap. VI of C. P. Land Revenue Act and land-revenue fixed under s. 36-A of C. P. Tenancy Act—Proceedings under s. 104-A of C. P. Land Revenue Act started against petitioner for revision of assessment under Assessment Rules of 1952—Applicability of Rules to Malik-makbuza holding of petitioner.

The words "settlement" and "at settlement" occurring in r. 1(2) of the Diverted Lands Revision of Assessment Rules, 1952, mean the settlement under Chapter VI of the Central Provinces Land Revenue Act, 1917.

The petitioner who was the holder of a land as an occupancy tenant, on which no assessment was levied at the settlement under Chapter VI of the Central Provinces Land Revenue Act, 1917, was declared to be a Malik-makbuza in regard to his holding, and under s. 36A of the Central Provinces Tenancy Act a certain amount was fixed as land-revenue payable for the holding. Thereafter, proceedings under s. 104A of the Central Provinces Land Revenue Act were started against the petitioner for revision of the assessment levied on the land, on the ground that he had

*Decided, February 26, 1959. Letters Patent Appeal No. 93 of 1958, against the order passed by Mudholkar J., in Miscellaneous Petition No. 235 of 1955.

†The relevant sections are as under:—

S. 104-A. If in the opinion of the Deputy Commissioner the value of any land in any mahal is altered in consequence of its diversion from an agricultural purpose to a non-agricultural purpose or from a non-agricultural purpose to an agricultural purpose since it was last assessed, the assessment shall be liable to be revised and the land-revenue assessed by the Deputy Commissioner with reference to

the altered value of such land in accordance with rules made under section 108.

S. 108 (1) The Deputy Commissioner may, during the currency of a settlement,

(a) assess land-revenue on or in respect of lands which are liable to assessment, but have not been assessed, including plots of land the owners of which have been declared malik-makbuza.

(2) The State Government may, in supercession or modification of the provisions of Chapter VI, make rules for the purpose of carrying into effect the provisions of this section.

diverted his holding to non-agricultural purposes. The assessment was accordingly revised under the Diverted Lands Revision of Assessment Rules, 1952. On the question whether the Rules applied to the Malik-makbuza holding:—

Held, that although land-revenue came to be fixed by the revenue officer during the currency of the settlement under Chapter VI of the Central Provinces Land Revenue Act, the Malik-makbuza holding could not be regarded as having been assessed at settlement within r. 1(2) of the Assessment Rules, and that, therefore, the Rules did not apply to such holding and the revision of assessment in accordance with the Rules was illegal.

On August 16, 1941, one Mathuradas (petitioner) purchased 10.50 acres of land out of occupancy field No. 73/2 of mouza Chahalangadi, tahsil Hinganghat, and about two years later acquired malik makbuza rights therein. The land revenue assessed thereon was Rs. 14-8-0. After the purchase of the field, the petitioner planted fruit and ornamental trees therein and also a grove of flower garden in a portion of the field. He constructed a house, servant quarters, a reservoir, a tank and an engine room. 6.09 acres of land was covered by fruit trees and manure pits, 0.12 acres by the flower garden, 0.97 acres by houses for agricultural servants, a guest house, a tank and an engine room and 3.25 acres by fruit trees. On November 25, 1951, the patwari reported to the revenue authorities that the land was diverted to non-agricultural purposes. Acting on the report of the patwari, the assessment on the field was revised under the Diverted Lands Revision of Assessment Rules, 1952, and raised to Rs. 105 per annum. The petitioner appealed to the Deputy Commissioner against the revised assessment, but his appeal was dismissed. He preferred a second appeal before the Board of Revenue which was also dismissed. He then applied to the Nagpur High Court under art. 226 of the Constitution. The application was heard by Mudholkar J. who held that the order of assessment as revised was without jurisdiction and set aside the order, observing in his judgment as follows:

MUDHOLKAR J. Four points were urged on behalf of the petitioner before me. The first point was that the land has not been diverted by him to non-agricultural purposes, and in support of this contention he placed reliance upon the definitions of "agriculture" and "improvements" contained in the C. P. Tenancy Act, 1920. According to him, though this Act was passed subsequent to the Land Revenue Act, the definitions given therein should guide the Court in interpreting the provisions of the Land Revenue Act. The second point taken was that the rules under which the provision has been made do not apply to the field in question inasmuch as it was not Malik Makbuza land at the time of the last settlement. The third point was that r. 3 of the rules framed under s. 106(2) of the C.P. Land Revenue Act with s. 104-A is *ultra vires* to the extent to which it conflicts with the provisions of s. 104-A. Finally it was said that there was no legal basis for assessing the land at 2 annas per square foot.

It is not necessary for me to deal with all these contentions except the second. Sub-rule (2) of r. 1 is in the following terms:

"They shall apply in respect of the revision of assessment undertaken during the currency of settlement in respect of Malik-makbuza lands assessed at settlement as agricultural lands and diverted to a non-agricultural purpose during its currency."

It seems to me clear that the intention was to apply those rules for assessment of lands which were held in Malik Makbuza rights at the previous settlement, and were assessed as agricultural lands. The contention of Shri Adhikari is that these rules applied to all lands which are at this date Malik Makbuza lands provided they were assessed at the last settlement as agricultural lands. To my mind, that construction is not warranted by the language used. In the circumstances, I hold that the assessment made was without jurisdiction and quash it.

In passing I may add that the first contention of the petitioner derives support from the decision of the Division Bench in *Gopalrao v. Anandi*,¹ where

the learned Judges have accepted the definition of "agricultural" contained in the C.P. Tenancy Act for the purpose of interpreting the same word in the Berar Land Revenue Code.

THE State of Bombay appealed under the Letters Patent.

N. L. Abhyankar, Special Government Pleader, for the appellant-State.

M. N. Phadke, for respondent No. 1.

DATAR J. This is an appeal under the Letters Patent preferred on behalf of the State of Bombay against the petitioner who had filed an application under art. 226 of the Constitution in this Court. The learned Judge before whom the application came up for hearing allowed the application and held that the order of assessment as revised by the revenue authorities was without jurisdiction and, therefore, could not be sustained.

The facts that led to this appeal are these. One Rama Kunbi and his son were the occupancy tenants of field No. 73 which originally admeasured 36.84 acres. On August 16, 1941, the present petitioner purchased from them an area of 10.50 acres out of field No. 73, and the area purchased by him came to be numbered as 73/2. There was then no assessment levied either upon the entire field No. 73 or upon the strip No. 73/2 purchased by the petitioner.

On March 5, 1943, the petitioner who was thus the holder of the occupancy tenancy land, made an application praying that he may be declared to be a malik-makbuza in respect of his holding. The Deputy Commissioner, before whom the application came up for hearing, declared the petitioner to be a malik-makbuza in regard to his holding, and under the provisions of s. 36-A of the C.P. Tenancy Act and the rules made thereunder fixed the land-revenue at Rs. 14-8-0 payable for the petitioner's holding.

In December 1951, proceedings were started for the revision of the assessment levied on the land on the ground that the petitioner had diverted his holding to non-agricultural purposes. These proceedings appear to have been started under the provisions of s. 104-A of the C.P. Land Revenue Act, 1917. The assessment was revised and the land-revenue was assessed at Rs. 105 under the Diverted Lands Revision of Assessment Rules, 1952 (hereinafter referred to as the Assessment Rules). The petitioner thereafter appealed to the Deputy Commissioner and then to the Board of Revenue, but his appeals failed. Finally, as stated above, he approached this Court with an application under art. 226 of the Constitution for setting aside the order of revised assessment as passed by the revenue authorities.

The application came before Mr. Justice Mudholkar who held that the order of assessment as revised by the revenue authorities was without jurisdiction and accordingly he set aside the order passed in that behalf. The State has now come before us in appeal under the Letters Patent.

Under s. 104-A of the C. P. Land Revenue Act, if any land is appropriated to a non-agricultural purpose since it was last assessed, the assessment is liable to be revised and the land-revenue assessed by the Deputy Commissioner with reference to the altered value of such land in accordance with the rules made under s. 106 of the Act. It is the case of the State that in the present case the assessment came to be revised and the land-revenue assessed in accordance with the Assessment Rules. The question, therefore, is whether these rules apply to the malik-makbuza holding in respect of which the land-revenue was fixed by the revenue officers under the provisions of s. 36-A of the C. P. Tenancy Act. It may be noted that the argument that was advanced before Mr. Justice Mudholkar was different from what has been submitted before us by the Special Government Pleader. Before Mr. Justice Mudholkar, it does not seem to have been disputed that the settlement referred to in the rules meant only the general settlement which was in the present case made some time in the year 1910 or 1911 under Chapter VI of the C. P. Land Revenue Act and it was not argued that it would also refer to any settlement which may have

been arrived at, in respect of any individual holding as in the present case. The argument is that if after the general settlement of the year 1910 there has been an occasion—and indeed there had been an occasion in the present case—for fixing the land-revenue in respect of a land which is liable to be assessed to land-revenue, the fixation of such land-revenue must mean, under the circumstances, settlement for the purpose of the rules under which a revision of assessment will have to be made. Now, the Special Government Pleader referred us to cl. (a) of sub-s. (1) of s. 106 of the C. P. Land Revenue Act. That section says that the Deputy Commissioner may, during the currency of a settlement, assess land-revenue on or in respect of lands which are liable to assessment, but have not been assessed, including plots of land the owners of which have been declared malik-makbuzas. It is true that s. 106 gives power to the Deputy Commissioner to assess land-revenue in respect of lands which are liable to assessment and which have not been assessed so far; and if we regard a malik-makbuza holding as a plot of land liable to assessment and as a land which has not been assessed till 1943, then what was done by the revenue officer in the year 1943 may be regarded as having been done in the exercise of the power under cl. (a) of sub-s. (1) of s. 106. But can such fixation of land-revenue be termed as an assessment of the malik-makbuza holding at settlement? It is true that such assessment was levied during the currency of the settlement under Chapter VI of the C. P. Land Revenue Act. Although the assessment came to be levied, or to use the words of s. 36-A of the C. P. Tenancy Act the land-revenue came to be fixed by the revenue officer, during the currency of the settlement, still the malik-makbuza holding could not be regarded as having been assessed at settlement. Sub-rule (2) of r. 1 of the Assessment Rules says:

"They (rules) shall apply in respect of the revision of assessment undertaken during the currency of settlement in respect of Malik-makbuza lands assessed at settlement as agricultural lands and diverted to a non-agricultural purpose during its currency." The Special Government Pleader says that the word "settlement" in sub-r. (2) cannot be given any special meaning so as to refer only to the settlement under Chapter VI of the C. P. Land Revenue Act at which malik-makbuza lands were assessed as agricultural lands in 1910 or 1911. According to his submission, the word "settlement" is used in its ordinary, literal sense and whenever there is a fixation of land-revenue that fixation of land-revenue must be taken to mean settlement. If there was no definition of the term "settlement" probably there was some force in the contention made on behalf of the State. There is a definition of the term "settlement", which appears to be an exhaustive definition, in the C. P. Settlement Act, 1929. Section 2 of the said Act defines the term "settlement" as follows:

"A 'settlement' means the results of the series of operations in a local area regulated by this Act and Chapter VI of the Central Provinces Land Revenue Act, 1917; and the period during which such results are to be in force is called the 'term of the settlement'."

If this definition refers to the settlement as is made under Chapter VI of the C. P. Land Revenue Act, then we are of the view that the same meaning should be given to the words "settlement" and "at settlement" which are mentioned in the rule which we are now considering. The Special Government Pleader contended that sub-r. (3) of r. 1 stated that nothing contained in Chapter VI of the C. P. Land Revenue Act shall apply in respect of the revision of assessment on lands to which these rules apply. He also referred us to sub-s. (2) of s. 106 of the C. P. Land Revenue Act which says that the State Government may, in supersession or modification of the provisions of Chapter VI, make rules for the purpose of carrying into effect the provisions of this section. Even though Chapter VI of the Land Revenue Act is not to apply in respect of revision of assessment on lands to which the Assessment Rules apply, still it does not mean that the term "settlement" as used in that Chapter and as defined in the C. P. Settlement Act cannot be considered in construing sub-r. (2) of r. 1 of the Assessment Rules. It is true that the

Government has been given the power under sub-s. (2) of s. 106 to frame such rules either in supersession or in modification of the provisions of Chapter VI, but in the absence of any definition of the term "settlement" either in the C. P. Land Revenue Act or in the Assessment Rules, we think recourse must be had to the definition of "settlement" as given in the C. P. Settlement Act, and the words "settlement" or "at settlement" occurring in sub-r. (2) of r. 1 of the Assessment Rules must be construed accordingly.

Further, the opening words of s. 106 of the C. P. Land Revenue Act mention the words "during the currency of settlement". The word "settlement" occurring in s. 106 under sub-s. (2) of which the Assessment Rules are framed, must also be understood as meaning settlement under Chapter VI of the C. P. Land Revenue Act, apart from the definition of "settlement" in the C. P. Settlement Act.

We, therefore, hold that the words "settlement" and "at settlement" occurring in sub-r. (2) of r. 1 of the Assessment Rules must mean the settlement under Chapter VI of the C. P. Land Revenue Act. It is not disputed that the malik-makbuza holding in the present case had not been assessed at such settlement. If so, the Assessment Rules will not apply to such holding and the revision of assessment in accordance with such rules would be illegal. We, accordingly, confirm the judgment of Mr. Justice Mudholkar though for reasons which are slightly different from those which induced him to allow the application.

Accordingly, the letters patent appeal fails and must be dismissed with costs.

Appeal dismissed.

[NAGPUR BENCH]

Before Mr. Justice Datar and Mr. Justice Naik.

V. M. DORLIKAR v. CHIEF EXECUTIVE OFFICER, NAGPUR CORPORATION.*

Master and Servant—Suspension from service—Authority empowered to inflict penalty of suspension whether can pass order of suspension making it operative for period when servant has actually rendered service.

The authority empowered to inflict the penalty of suspension cannot make the penalty operative for a period during which the person upon whom the penalty is imposed was either in service or in law must be deemed to have been in service. Therefore, the authority cannot pass an order of suspension as a penalty so as to make it retrospective and operate for a period in the past when the servant on whom the penalty is proposed to be imposed has already either actually rendered the service or in law must be deemed to have been in service.

*Hemanta Kumar v. S. N. Mukherjee,*¹ *Abid Mohammad v. The State*² and *U. P. Government v. Tabarakh,*³ referred to.

ONE V. M. Dorlikar (petitioner) was working as a Sanitary Inspector under the Municipal Committee of Nagpur, which was constituted as a Corporation, with effect from February 2, 1951. A departmental enquiry was held against him on certain charges and a report was submitted by the enquiring officer on December 12, 1949, holding him guilty but recommending only a warning as punishment in view of extenuating factors. However, the Officer-in-charge of the Municipal Committee took a serious view of the matter and passed an order, dated February 22, 1950, terminating his services. As the petitioner held a specified post under the C. P. and Berar Municipalities Act, the approval of

*Decided, February 27, 1959. Appeal No. 92 of 1954 under the Letters Patent, against the order passed by G. P. Bhutt, J., in Miscellaneous Petition No. 828 of 1954.

1 [1954] A.I.R. Cal. 340.

2 [1958] A.I.R.M.P. 44.

3 [1956] A.I.R. All. 161.

the State Government was necessary to impose the penalty. The Board of Revenue, acting in exercise of the powers conferred on it by the State Government, was accordingly approached and granted the necessary approval. The order was thereafter communicated to the petitioner on April 27, 1951.

The petitioner went up to the High Court under art. 226 of the Constitution against the order and it was quashed by the High Court on the ground that under the City of Nagpur Corporation Act (II of 1950), which had come into effect on the date of the communication of the order, it was the Chief Executive Officer who alone could terminate his services. The Chief Executive Officer accordingly took up the matter and called upon the petitioner to appear in person in connection with the departmental enquiry. He also ordered that he would be treated as under suspension from the date of his relief, namely May 1, 1951. In the end he passed an order, dated November 27, 1952, dispensing with his services.

The petitioner thereon preferred two appeals to the Board of Revenue (1) against the order of suspension and (2) against the order dispensing with his services. The Board of Revenue held that in the circumstances of the case the punishment imposed on the petitioner was too severe. In this view, the learned Member of the Board passed the following order:—

"In view of these considerations, I feel that the order of the Chief Executive Officer dispensing with the services of the appellant is too drastic. I set aside the order and direct that he shall be reinstated in his post as Sanitary Inspector forthwith. The period from 1-5-1951 till the date of his reinstatement shall be treated as a period of suspension. That will be an adequate punishment for the acts of omission and commission that are proved against him in the departmental enquiry."

The petitioner applied to the Nagpur High Court under art. 226 of the Constitution for quashing the order of the Board of Revenue which had directed that the period of the petitioner's service from May 1, 1951, until the date of his reinstatement should be treated as a period of suspension. The application was heard by G. P. Bhutt J., who in the course of his judgment delivered on October 6, 1954, observed as follows:

BHUTT J. It will appear from the above that the suspension ordered by the Board of Revenue was by way of punishment which is prescribed under cl. (v), sub-s. (2), s. 53 of the City of Nagpur Corporation Act, as one of the punishments liable to be inflicted on the servants of the Corporation under the Act. Suspension is also ordered for the purpose of holding a departmental enquiry under the rules framed under s. 420 of the Act, which does not constitute punishment contemplated by s. 53. It was contended by the learned counsel for the petitioner that since he was suspended for the purpose of holding a departmental enquiry by the Chief Executive Officer, suspension could not be ordered by way of a substantive punishment by the Board of Revenue. It was also urged that the Board of Revenue could not inflict that punishment unless a show cause notice was served on the petitioner and fresh opportunity was given to him to defend himself as prescribed under the rules. It was further contended that as there was no departmental enquiry during the period May 1, 1951, until November 24, 1952, when it was taken up by the Chief Executive Officer, he could not be suspended during that period under the rules.

As regards the first contention, there is nothing in the City of Nagpur Corporation Act or the rules framed thereunder to show that the authorities entitled to punish a servant are not competent to treat the suspension ordered for the purpose of a departmental enquiry as a punishment. In fact, that would be a measure in the servant's own interest of which it would be incongruous to make a complaint. The Board of Revenue, as the appellate authority, has all the powers of punishment which the punishing officers possess under law. There is, therefore, no force in this contention.

Regarding the second contention, it does not appear that it is necessary to

issue a fresh show cause notice for a lesser punishment when the servant was already given a reasonable opportunity to defend himself as against a higher punishment. No authority was cited in support of the contention that is urged, which, in my opinion, is not well founded.

Coming to the last contention, what the rules prescribe is suspension "for the purpose of holding a departmental enquiry". It cannot, therefore, be urged that the suspension must be limited only to the period during which the departmental enquiry is actually under progress. Nor is there any provision prohibiting the period of suspension to commence from a back date. There is, therefore, no force in this contention as well.

The petition accordingly fails and is dismissed with costs.

The petitioner appealed under the Letters Patent.

K. B. Chandurkar, for the appellant.

A. S. Bobde for *S. M. Hajarnavis*, for respondent No. 1.

N. L. Abhyankar, Special Government Pleader, for respondent No. 2.

DATAR J. The appellant before us was originally a Sanitary Inspector under the Municipal Committee of Nagpur. A departmental enquiry was started against him, and on December 12, 1949, the Enquiry Officer submitted his report. The Enquiry Officer held that the appellant was guilty of the charges for which the enquiry had been started, but recommended that as there were extenuating circumstances, only a warning be given to the appellant by way of punishment. The Officer-in-Charge of the Municipal Committee, however, took a different view on the question of punishment to be awarded to the appellant and accordingly passed an order on February 22, 1950, terminating his services. It was necessary under the rules that this order of the Officer-in-Charge had to be approved of by the Board of Revenue. It appears that the Board of Revenue also approved of this order and the same was communicated to the appellant on April 27, 1951.

The appellant thereafter approached this Court by a special application under the provisions of art. 226 of the Constitution. On November 20, 1952, the High Court in its jurisdiction under art. 226 of the Constitution set aside the order of dismissal as it had not been passed by a proper authority under the provisions of the City of Nagpur Corporation Act, 1948.

After the High Court's order was communicated to the Chief Executive Officer, the Chief Executive Officer on or about November 24, 1952, called upon the appellant to appear before him on November 26, 1952, in connection with the departmental enquiry held against him. The Chief Executive Officer also informed him that pending final orders, he was "treated under suspension" from the date of his relief (May 1, 1951). On November 27, 1952, the Chief Executive Officer passed a final order to the effect that "the services of Shri V. N. Dorlikar (appellant), Sanitary Inspector (under suspension), City of Nagpur Corporation, are dispensed with, with effect from fore-noon of 27th of November 1952".

Two appeals were thereafter filed by the present appellant to the Board of Revenue. Appeal No. 39/XXIV-2-A of 1952 was filed against the order of suspension which, as stated above, had been passed by the Chief Executive Officer on or about November 24, 1952. Appeal No. 40/XXIV-2-A of 1952 was preferred against the final order dispensing with the services of the appellant passed by the Chief Executive Officer on November 27, 1952. These appeals were disposed of by the Board of Revenue, Madhya Pradesh, on May 11, 1954. The learned Member of the Board dismissed the first appeal on the ground that no objection could be taken in equity to the order of the Chief Executive Officer placing Dorlikar (appellant) pending inquiry, under suspension with effect from May 1, 1951. In the second appeal, however, the learned Member held that the order of the Chief Executive Officer dispensing

with the services of the appellant was too drastic, and he accordingly passed the following Order:

"I set aside the order and direct that he (appellant) shall be reinstated in his post as Sanitary Inspector forthwith. The period from 1-5-51 till the date of his re-instatement shall be treated as a period of suspension. That will be an adequate punishment for the acts of omission and commission that are proved against him in the departmental enquiry. With this modification, the second appeal is also dismissed."

Although the two appeals were disposed of by two different orders though contained in the same judgment, surprisingly enough the appellant came to this Court by a special application under art. 226 of the Constitution only against the order rejecting his appeal No. 39/XXIV-2-A of 1952. In the application he stated that he was aggrieved by the order rejecting his appeal No. 39/XXIV-2-A of 1952 and that he was moving for quashing the order of suspension passed by the Chief Executive Officer and confirmed by the Board of Revenue. In the prayer clause it was mentioned that the order of suspension passed by the Chief Executive Officer, Nagpur Corporation, and the Board of Revenue be quashed by issue of a writ of *certiorari* or such direction as will meet the ends of justice. This application came on for hearing before Mr. Justice G. P. Bhutt on October 6, 1954. On behalf of the applicant (appellant) three contentions were raised before him. It was stated that suspension could not be regarded as a punishment when the order of suspension had been directed to take effect from May 1, 1951. Secondly, it was urged that the order of suspension as passed by the Board of Revenue could not be passed without a proper notice being given to the petitioner before such order could be passed. Finally, it was urged that the order of suspension as passed by the Chief Executive Officer on or about November 24, 1952, making it retrospective from May 1, 1951, could not be sustained. The learned Judge rejected these contentions and dismissed the application. It is against the judgment of the learned Judge dismissing the special civil application that the petitioner (appellant) has come to this Court in appeal under the Letters Patent.

Mr. Chandurkar, who appears on behalf of the appellant, has, in the first place, contended that the order of suspension passed by the Chief Executive Officer was bad inasmuch as he directed that that order should take effect from an earlier date, namely from May 1, 1951. He drew our attention to the fact that on November 20, 1952, the High Court had declared that the order of dismissal as passed by the Officer-in-Charge of the Municipal Committee was illegal. Mr. Chandurkar contended that the effect of the High Court's judgment setting aside the order of dismissal was that the appellant was in service, and when he was lawfully in service the Chief Executive Officer could not pass an order of suspension so as to affect the period during which, in view of the High Court's judgment, the appellant must be deemed to have been legally in service. It may be noted that the order of suspension was passed by the Chief Executive Officer at the stage of enquiry, which, in view of the subsequent judgment of the High Court, could not have been regarded as finally disposed of. All what the High Court did was to declare the order of dismissal as being illegal. The result of it was that the matter could still be regarded as being at the stage of enquiry, and if at that stage the Chief Executive Officer, particularly having regard to the fact that the appellant had given up his charge on May 1, 1951, purported to pass the order of suspension operating from May 1, 1951, it could be held that it was an order passed during the stage of enquiry and the rules do not prohibit the passing of such order of suspension in the course of the enquiry. Whether the order could be retrospective if it was directed to take effect from a date previous to the date on which the enquiry started does not fall for consideration in the present case because before May 1, 1951, the enquiry had already started so far back as the year 1949. However, it is not necessary for our purpose to consider the propriety or the legality of this order. The final order came to be passed by the Chief Executive Officer himself. With the passing of the final order by the Chief Executive Officer,

it must be held that the order of suspension came to an end. Further, it is not this order against which the appellant could have any real grievance. It is the order which has been passed by the Board of Revenue in appeal against which the appellant could have any grievance at all. The order that was passed by the Board of Revenue by way of punishment was passed in appeal No. 40. But, as I have already stated, the appellant did not make any grievance against or challenge this order in his application filed in this Court under art. 226 of the Constitution. We do not think that Mr. Chandurkar is right when he says that it was not necessary for the appellant to challenge this order when the earlier order of suspension pending inquiry as passed by the Chief Executive Officer and confirmed by the Board of Revenue in appeal No. 39 had been duly challenged in his application. We may, however, assume that it is open to the appellant to impugn this order in the appeal and proceed to consider its propriety and legality.

Mr. Chandurkar contends that the Board of Revenue could not pass an order of suspension by way of punishment so as to make it retrospective in effect and operate from May 1, 1951. In support of his contention, Mr. Chandurkar has relied upon certain decisions of other High Courts. In *Hemanta Kumar v. S. N. Mukherjee*¹, there was an order of suspension passed during the enquiry and the question considered by their Lordships was whether the order so far as it covered the period between January 16, 1951, and April 28, 1952, was valid. The order came to be passed on April 29, 1952, and was made retrospective from January 16, 1951. In the course of the judgment, their Lordships held (p. 343):

"The antecedent period which an order of suspension with retrospective effect might be intended to cover, would ordinarily be a period during which the person concerned had already performed the duties of his office or held the relevant position. There can be no meaning in suspending a man from working during a period when the period is past and he has already worked or suspending a man from occupying a position or holding a privilege in the past when he has already occupied or held it." The same view was taken in a case reported in *Abid Mohammad v. The State*.² There also their Lordships were concerned with an order of suspension passed during the enquiry. Their Lordships referred to the dictionary meaning of the word 'suspension' and stated (p. 45):

"'Suspension' thus connotes temporary cessation of something as right, work or labour. This very concept of the word 'suspension' rules out a Government servant who is in service and who has in law performed the duties of his office during a certain period being placed subsequently under suspension for that period. When in law he has performed the duties then there can be no question of forbidding him from exercising the functions of his office in that period which is already past."

The same view has been expressed in *U. P. Government v. Tabarakh*.³ The reason underlying these decisions appears to us to be that you cannot suspend a person for a period during which he was actually in service or in law must be deemed to have been in service. If he was in service during a particular period of time, it is inconceivable and indeed impossible how he should be treated as being under suspension for that period which is already a matter of irrevocable past. It is true that in these decisions the question arose regarding the order of suspension passed during the enquiry against a servant, but we do not think how any distinction in principle can be made between an order of suspension passed during the enquiry and an order of suspension passed as a penalty, as in the present case. If the authority empowered to impose a penalty is inclined to impose the penalty of suspension, it is inconceivable how that authority can impose a penalty of suspension so as to make it retrospective in effect. We do not think that the authority empowered to inflict the penalty could make the penalty operative for a period during which the person upon

¹ [1954] A.I.R. Cal. 340.

² [1958] A.I.R. M.P. 44.

³ [1958] A.I.R. All. 151.

whom the penalty is imposed was either in service or in law must be deemed to have been in service. In the present case, there was already an order of the High Court in 1952 which stated that the order of dismissal passed by the Officer-in-Charge of the Municipal Committee was bad and was, therefore, inoperative. Again, the Board of Revenue in appeal held that the order of the Chief Executive Officer could not be sustained because it was too drastic and, therefore, it set aside that order. Therefore, at the time when the Board of Revenue considered the propriety of inflicting the penalty of suspension the position was that till the date on which the order imposing the penalty was passed, the appellant was legally in service, and if so, we do not think how that position could be undone by any retrospective order of suspension as passed in the present case. Mr. Bobde, learned counsel for respondent No. 1, urged that the decided cases were concerned with an order of suspension passed during the enquiry. It is true that those cases related only to such an order, but considering the matter on principle, it is difficult to conceive of an order of suspension passed as a penalty so as to make it retrospective and operate for a period in the past when the servant on whom the penalty is proposed to be imposed has already either actually rendered the service or in law must be deemed to have been in service. We, therefore, are inclined to accept the submission of Mr. Chandurkar and hold that the order of suspension passed as a penalty by the Board of Revenue was not strictly legal and could not be made operative as intended by the Board. However, since the matter has come to this Court under the provisions of art. 226 of the Constitution and now before us in appeal under the Letters Patent, we have to consider whether the passing of this order has caused any prejudice or injustice to the appellant. The Board of Revenue was inclined to hold that the petitioner (appellant) was guilty of negligence though it readily found that he was not guilty of preparing false muster rolls. It was on this account that the Board of Revenue thought it proper to award a lesser punishment; and if the Board of Revenue had passed a proper order of suspension, we do not think that any objection could have been taken to such an order. Further, the Board of Revenue considered the fact that from May 1, 1951, when the petitioner gave up the charge of his duties, he was not at all in service and had not rendered any service to the Corporation. The Board of Revenue probably in consideration of the future prospects which the petitioner might have in service as the Sanitary Inspector thought it desirable to make the order of suspension retrospective so that there should not be any break in his service, once he was reinstated in his post. If we accept the contention of Mr. Chandurkar it only means that the matter will have to be sent back to the Board of Revenue to pass an appropriate order in place of the order which it has passed, and we do not see that there would be any impediment in the way of the Board of Revenue in passing an order of suspension so as to make it effective from a future date. In this case, the Board of Revenue was anxious to see that the petitioner was reinstated in his post forthwith and that after such reinstatement there should not be any break in service and that was probably one of the reasons which induced it to make the order of suspension retrospective though, as we have already stated, the order was not strictly legal. Further, the petitioner did not in his application under art. 226 make any grievance against the order of suspension which had been passed against him by way of punishment by the Board of Revenue in appeal No. 40. Under these circumstances, we do not think any prejudice or injustice whatever has been caused to the petitioner (appellant) by the order which is now sought to be impugned before us.

For the reasons stated above, we dismiss the appeal. No order as to costs.

Appeal dismissed.

Before Mr. Justice Gokhale and Mr. Justice V. S. Desai.

JASIN TOMU DAMEL v. HARISCHANDRA PANDURANG MURANJAN.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 88(1)(c),† 89(2)(b), 43C—Greater Bombay Laws and the Bombay High Court (Declaration of Limits) (Amendment) Act (Bom. 8 of 1950), Sec. 6—Bombay General Clauses Act (I of 1904), Secs. 3(21), 7(b) & (c)—Greater Bombay Laws and the Bombay High Court (Declaration of Limits) Act (17 of 1945), Sec. 2(2)—Tenant acquiring protected tenancy rights by virtue of s. 3A of Tenancy Act of 1939 since November 8, 1947—Act 8 of 1950 making village where lands situated part of Greater Bombay on April 15, 1950—Section 88(1)(c) applicable to lands in village—Suit by landlord for possession of lands—Whether provisions of s. 88 such express provision as could affect the tenant's rights as contemplated in s. 89(2)(b).

The defendant, who was in occupation as tenant of certain lands since 1948, became a protected tenant by virtue of s. 3A of the Tenancy Act of 1939, under the Bombay Tenancy and Agricultural Lands Act, 1948. On April 15, 1950, by virtue of Bombay Act 8 of 1950 the village in which these lands were situated became a part of Greater Bombay and, therefore, s. 88(1)(c) of the Act became applicable to the village and none of the provisions of ss. 1 to 87 of that Act applied to the lands. In a suit filed on May 28, 1953, by the plaintiffs—landlords for possession of the lands, the defendant contended that he was a protected tenant of the lands by virtue of s. 89 of the Act and his rights as such protected tenant remained unaffected, he having become a protected tenant since November 8, 1947:—

Held, that the provisions of s. 88(1)(c) of the Act are an express provision in the Act as contemplated under s. 89(2)(b) of the Act, and,

that, therefore, after the village became a part of Greater Bombay on April 15, 1950, the protected tenancy right of the defendant ceased to have the protection of the provisions of ss. 1 to 87 of the Act.

Sakharam Narayan v. Manikchand Motichand,¹ followed.

Maganbhai Jethabai Patel v. Somabhai,² *Shivaram Narayan Bhide v. Shridhar Keshav Patwardhan*,³ *Moreswar Parasharam Phatak v. Vithal Krishna Joshi*⁴ and *Nanchand Amichand Gandhi v. Rama Malhari Pise*,⁵ referred to.

THE facts appear in the judgment.

K. Joseph, for the appellant.

P. K. Padhye, for the respondents.

GOKHALE J. This is an appeal by the original defendant against whom a decree has been passed by the Bombay City Civil Court in Summary Suit No. 1086 of 1953. The plaintiffs, who are members of a joint Hindu family, owned two pieces of unsurveyed Khoti land in the village of Paspoli situated in the suburbs of Bombay. In January 1946, the said lands were leased out to the present appellant for a period of three years ending on December 31, 1948, on a yearly rent of Rs. 260 and there is no dispute that the defendant took these lands for cultivating the same. The terms and conditions of the lease were recorded in an agreement dated January 15, 1946. Even after the expiry of the three years' period, defendant continued to hold the land on the same terms and conditions and it would appear that, in every December, plaintiff No. 1 agreed to extend the lease for one more year. In December 1952, it appears that the plaintiffs' family did not want to extend the lease and, therefore, by a letter dated December 11, 1952, defendant was called upon to vacate

*Decided, March 4/5, 1959. Appeal No 711 of 1957, against the decision of B. J. Divan, Judge, City Civil Court at Bombay, in Summary Suit No. 1086 of 1953.

†This section was replaced by s. 88 (b) by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1955 (XIII of 1956).

¹ (1954) 57 Bom. L.R. 223.

² (1958) 60 Bom. L.R. 1383, r.n.

³ (1953) First Appeal No. 166 of 1952, decided by Gajendragadkar and Chaimani JJ., on July 17, 1953 (Unrep.).

⁴ (1954) First Appeal No. 144 of 1951, decided by Gajendragadkar and Vyas JJ., on January 18, 1954 (Unrep.).

⁵ (1958) Special Civil Application No. 2882 of 1957, decided by Chagla C.J. and Datar J., on January 17, 1958 (Unrep.).

the lands and deliver quiet possession thereof to the plaintiffs. The defendant, however, replied by a letter dated December 22, 1952, alleging that he was a protected tenant and, therefore, not liable to be evicted. This claim of the defendant was denied by the plaintiffs by a letter dated December 29, 1952, and as the defendant did not deliver possession of the lands, the plaintiffs filed the present suit in the Bombay City Civil Court on May 26, 1953.

The suit was resisted by the defendant on several grounds, but for the purpose of this appeal it may be mentioned that the principal contention raised by the defendant was that he was a protected tenant of the lands and by virtue of s. 89 of the Bombay Tenancy and Agricultural Lands Act, 1948 (67 of 1948), which will hereafter be referred to as the Tenancy Act of 1948, his rights as such protected tenant remained unaffected, he having become a protected tenant since November 8, 1947.

The trial Court came to the conclusion, and that does not appear to have been disputed even on behalf of the plaintiffs, that the defendant was a protected tenant between the coming into force of the Tenancy Act of 1948 on December 28, 1948, and April 15, 1950, on which day the village of Paspoli became a part of Greater Bombay. We may observe that neither in the trial Court nor in the appeal before us, which has been argued at a fairly considerable length, was a point raised as to the jurisdiction of the City Civil Court to decide the question as to whether the defendant being a protected tenant could be evicted by the City Civil Court in the suit as framed by the plaintiffs. It appears that issue No. 3 which was raised, viz. whether the Court had jurisdiction to entertain the suit, was argued by Mr. Joseph, learned advocate appearing on behalf of the appellant who also appeared even in the trial Court, on the basis whether such a suit would be cognisable by the Presidency Small Cause Court and not by the City Civil Court, which contention was negatived by the trial Court and no arguments have been addressed to us on that point in this appeal. The trial Court held that the suit lands having become a part of Greater Bombay, the relevant provisions of the Tenancy Act did not apply to the defendant and after April 15, 1950, it was not open to the defendant to exercise any of the rights as a protected tenant because the provisions of ss. 1 to 87 of the Tenancy Act could not apply to any area within Greater Bombay including the village of Paspoli. In accordance with these findings, a decree was passed in favour of the plaintiffs ordering the defendant to quit and vacate the land in suit and restraining him by a perpetual injunction from entering upon the said land. It has to be mentioned that, as observed by the learned trial Judge, the suit had a very chequered career. On December 10, 1956, an *ex parte* decree had been passed against the defendant, though that *ex parte* decree was set aside on certain conditions on January 15, 1957. Execution, however, had been levied on the basis of the *ex parte* decree, so that on June 7, 1957, possession was in fact handed over to the plaintiffs in execution of the said *ex parte* decree. It is against the decree passed by the trial Court on July 10, 1957, that the present appeal has been filed by the original defendant.

The decision of the trial Court has been challenged by Mr. Joseph on behalf of the appellant on the ground that defendant's rights as a protected tenant under the Tenancy Act were not affected by any of the provisions of that Act as amended from time to time and, therefore, the decree for eviction passed against his client was erroneous. It is urged that defendant was let into possession as a tenant in January 1946 and continued in possession as a tenant till and after November 8, 1947, and by virtue of the Tenancy Act, he acquired the rights of a protected tenant. Paspoli, where the lands are situated, was not included in Greater Bombay when the Tenancy Act of 1948 came into force. It was by virtue of Act 8 of 1950 that the said village came to be included in Greater Bombay, but the defendant's rights as a protected tenant were not thereby affected or rendered illusory on account of s. 88(1)(c) of the Tenancy Act of 1948. That, in short, is the first branch of Mr. Joseph's argument on behalf of the defendant.

In order to examine the soundness of this argument, it is necessary to notice the relevant provisions of the Bombay Tenancy Acts with the amendments introduced therein from time to time. The first Tenancy Act is Bombay Act 29 of 1939 which came into force on April 2, 1940. Barring the amendments introduced in this Act, especially by Bombay Act 26 of 1946, this Act (29 of 1939) continued in force till December 28, 1948. We are not concerned with the provisions of this Act except with regard to one branch of Mr. Joseph's argument which will be referred to later. The Act of 1939 was repealed by what is known as the Bombay Tenancy and Agricultural Lands Act, 1948 (67 of 1948) which came into force on December 28, 1948. Section 2(14) of this Act defined a 'protected tenant' as meaning a person recognised to be a protected tenant under s. 31. Section 89(1) dealt with the repeal of the Bombay Tenancy Act, 1939, and provided that the said Act was repealed to the extent specified in the fourth column of the Schedule. It would be apparent from the Schedule that the whole of the Bombay Tenancy Act, 1939, came to be repealed except ss. 3, 3A and 4 as modified, these modified sections being set out in the fourth column. Under s. 31 of the Tenancy Act, it was provided that a person shall be recognised to be a protected tenant if such person has been deemed to be a protected tenant under s. 3, 3A or 4 of the Bombay Tenancy Act, 1939. Section 3A, as mentioned in the Schedule, provided that every tenant shall from the eighth day of November 1947 be deemed to be a protected tenant for the purposes of this Act and his rights as such protected tenant shall be recorded in the Record of Rights, unless his landlord had prior to the aforesaid date made an application to the Mamlatdar for a declaration that the tenant is not a protected tenant. The Explanation to this section provided that a person shall not be deemed to be a protected tenant if such person had been, on an application made by the owner of the land as provided in s. 3A of the Bombay Tenancy Act, 1939, declared by a competent authority not to be a protected tenant. Now, in the present case there is no dispute that the defendant continued in possession of the suit land as a tenant till and after November 8, 1947. The plaintiffs had not applied for a declaration that the defendant was not a protected tenant. It would be obvious, therefore, that since November 8, 1947, the defendant became a protected tenant under the Tenancy Act of 1948. Section 88 of this Act provided for certain exemptions in respect of certain lands and areas. By virtue of s. 88(1)(c), nothing in the foregoing provisions of the Act would apply to any area within the limits of Greater Bombay and within the limits of the municipal boroughs of Poona City and Suburban, Ahmedabad, Sholapur, Surat and Hubli and within a distance of two miles of the limits of such boroughs. The result of this provision would be that the provisions of ss. 1 to 87 of the Act would not apply to any area within the limits of Greater Bombay. This sub-section was substituted by s. 16 of the Amending Act 33 of 1952, which came into force on January 12, 1953. The original sub-s. (1)(c) of s. 88 was substituted by the following sub-clause:—

“(c) to any area within the limits of Greater Bombay, within the limits of the municipal corporations constituted under the Bombay Provincial Municipal Corporations Act, 1949, within the limits of the municipal boroughs constituted under the Bombay Municipal Boroughs Act, 1925, and within the limits of any cantonment.”

It would be clear, therefore, that the original exemption as regards the limits of Greater Bombay was confirmed by this substituted clause, and instead of certain municipal boroughs being mentioned, the new clause mentioned the limits of the municipal corporations constituted either under the Bombay Provincial Municipal Corporations Act, 1949, or the limits of municipal boroughs constituted under the Bombay Municipal Boroughs Act, 1925, and the limits of any cantonment also came to be included as an exempted area. It may be also mentioned that sub-s. (2) of s. 88, as it originally stood in the Tenancy Act of 1948 as well as after its amendment in 1952, empowered Government

to direct that any particular land or class of lands in any area shall not be exempt from all or any of the provisions of that Act.

The suit lands, as already stated, are situate in the village of Paspoli. The term 'Greater Bombay' has not been defined by the Tenancy Act of 1948. Section 3 of the Bombay General Clauses Act, I of 1904, gives certain definitions which are to be applicable to all Bombay Acts made after the commencement of that Act, and s. 3(21) of that Act provides that "Greater Bombay" shall mean the areas specified in Schedule A to the Greater Bombay Laws and the Bombay High Court (Declaration of Limits) Act, 1945 (17 of 1945). Section 2(2) of Act 17 of 1945 defines 'Greater Bombay' as meaning the areas for the time being specified in Schedule A, and this Act, came into force on August 15, 1945. The village of Paspoli is not mentioned in Schedule A to this Act. It is by virtue of s. 9 of this Act 17 of 1945 that the definition of 'Greater Bombay' to be found in s. 3(21) of the Bombay General Clauses Act was inserted in that Act. It is obvious, therefore, that when the Tenancy Act of 1948 came into force on December 28, 1948, the exemption under s. 88 did not apply to the suit lands situated in the village of Paspoli. The Greater Bombay Laws and the Bombay High Court (Declaration of Limits) Act, 1945, was itself amended by Bombay Act 8 of 1950 and, by virtue of s. 6 of this amending Act, 14 villages of the Bombay Suburban District including the village of Paspoli came to be inserted as Part III of the Schedule of Act 17 of 1945. This amending Act appears to have come into force on April 15, 1950, with the result that so far as the suit lands are concerned, as Paspoli became a part of Greater Bombay, s. 88(1)(c) of the Tenancy Act of 1948 became applicable to that village and none of the provisions of ss. 1 to 87 of that Act could apply to the said area. It was on this basis that the learned trial Judge came to the conclusion that the defendant was a protected tenant between the coming into force of the Tenancy Act of 1948 and April 15, 1950.

Mr. Joseph challenges the correctness of this finding in the first instance on the ground that if the defendant was a protected tenant after the coming into operation of the Tenancy Act of 1948, his right as a protected tenant could not be adversely affected by anything in s. 88 of the Act which admittedly, so far as his client is concerned, could apply, if at all, after Paspoli came within the limits of Greater Bombay on April 15, 1950. In support of his argument he has relied on the provisions of sub-s. (2)(b) of s. 89, which provides, so far as is material, that nothing in the Tenancy Act of 1948 or any repeal effected thereby shall, save as expressly provided in the Act, affect or be deemed to affect, any right, title, interest, obligation or liability acquired, accrued or incurred before the commencement of the Act. Mr. Joseph contends that his client had acquired the rights of a protected tenant and those rights could not be adversely affected by the provisions of s. 88. In short, Mr. Joseph's argument is that in the first instance s. 88 cannot be given retrospective operation so as to nullify the right of a protected tenant which has vested in his client since November 8, 1947, and secondly, the provisions of s. 88 are not such express provisions as could affect his rights as contemplated in s. 89(2)(b) of the Act. Now, as regards the nature of the right alleged to have been acquired by the defendant, Mr. Padhye, learned advocate appearing on behalf of the respondents, points out that the right cannot be regarded as a vested right because, it is the Tenancy Act of 1948 which conferred on the defendant the right of being a protected tenant and that by itself, says Mr. Padhye, would not be sufficient to make it a vested right. In support of his argument, Mr. Padhye has relied on a Full Bench decision of this Court in *Maganbhai Jethabhai Patel v. Somabhai*,¹ which was inclined to take the view that

"when one speaks of vested rights, those are rights which are not the creature of law or of an enactment, but those are rights which are acquired by a person claiming them by some action taken by him under the law."

In this connection the learned Chief Justice, who delivered the judgment of the Full Bench, further observed (p. 1387):—

“...The Tenancy Act, as it were, put a cloak of protection round the tenant and prevented the landlord from exercising his contractual rights. Can it be said that when that cloak was removed and the parties were left to their contractual rights and obligations, there were some vested rights which the tenant still possessed? The tenant had done nothing under the Tenancy Act which led to his acquiring any right. He had not changed his position; he had not entered into any contract or into any lease pursuant to the provisions of the Act. All that he acquired was the rights given by the Tenancy Act itself. The Legislature gave him certain rights and the Legislature took away those rights. Was it open to the tenant to contend that the protection given by the law was a vested right to which he was entitled and which could not be taken away from him by the Legislature unless the Legislature so expressly provided?”

Mr. Padhye says that these observations of the learned Chief Justice would indicate that the right that the defendant got under the Tenancy Acts of 1939 and 1948 was not a vested right, and if that was so, the provisions of s. 88 could apply retrospectively. It is true that the judgment of the learned Chief Justice shows that the Full Bench was inclined to accept the contention that the rights which a tenant gets under the Tenancy Act are not vested rights. But as the judgment itself shows, the Full Bench did not think it necessary expressly to decide that point, in view of the interpretation that the Full Bench put on the proviso to s. 43(c) of the Tenancy Act as amended in 1956. In our opinion, that question also need not be decided in the present case because, in our judgment, s. 88 of the Tenancy Act which in terms exempts lands falling within the limits of Greater Bombay from the provisions of ss. 1 to 87 of the Act, constitutes an express provision as contemplated under s. 89(2)(b) of the Act. In *Sakharam Narayan v. Manikchand Motichand*² a Division Bench of this Court held that a suit by a landlord to recover possession of agricultural lands situated within the limits of a Municipal Corporation, which lands are excluded from the operation of the Bombay Tenancy and Agricultural Lands Act, 1948, can lie in a Civil Court, even though the defendant sets up the plea that he is a protected tenant under the Bombay Tenancy Act, 1939. The facts of that case may be briefly stated. The plaintiffs there had filed a suit in the Court of the Joint Civil Judge, Junior Division, Poona, against four defendants, for a decree for possession of certain agricultural lands which were within the limits of the Poona Municipal Corporation. The defendants contended *inter alia* that the Civil Court had no jurisdiction to try the suit, as it was governed by the provisions of the Bombay Tenancy Act. That contention was negatived by the trial Court as well as by the appellate Court, and this Court upheld their decision on the ground that the effect of s. 88, sub-s. (1), cl. (c), of the Tenancy Act of 1948 was to exclude from the operation of ss. 1 to 87 of the Act those areas which are specified in that sub-section, and therefore, to land situate in the area specified in the sub-section, even if it be used for agricultural purposes, the provisions of the Act do not apply, and the rights of the parties to a dispute relating to that land are governed by the ordinary law of the land and are unaffected by the provisions of the Tenancy Act of 1948. It is true that this case was concerned with the question of jurisdiction of the ordinary Civil Court to try the suit. But that necessarily led to the consideration of the question raised by the defendants in that case, viz., whether they were entitled to set up their rights as protected tenants in respect of the lands so as to defeat the plaintiff's claim for possession of the lands which are excluded by s. 88 from the operation of the Act, in other words, whether the defendants were entitled to set up rights and privileges of the protected tenant acquired under the Act of 1939 in respect of lands which were no longer governed by the provisions of the Tenancy Act

of 1948. On this point, Mr. Justice Shah, who delivered the judgment in that case, observed as follows (p. 225):

"...But the Legislature has excluded from the operation of the Act of 1948 certain classes of leases, and also lands which are situate in specified areas. Once that exclusion is made, whatever rights may be deemed otherwise to have been conferred by s. 31 upon protected tenants must be regarded as ineffective, if the land is of the description mentioned in s. 88 or that the land is within the area specified in that section. It is true that the Legislature by sub-s. (2) of s. 89 has purported to protect the right, title and interest of persons who were governed by the Tenancy Act of 1939, notwithstanding the repeal of that Act; but it is provided that those rights and privileges will not be exercisable if there is an express provision to the contrary made in the Act. The Legislature has provided by s. 88 that the lands situate in certain areas will not be governed by the provisions of the Act of 1948, and that must be regarded as 'an express provision to the contrary', and the rights acquired under the Act of 1939 cannot be exercised if the lands in respect of which they are claimed are situate within the area specified in s. 88, sub-s. (1), cl. (c) of the Act of 1948."

In his judgment Mr. Justice Shah also referred to an unreported decision of a Division Bench of this Court, *Shivram Narayan Bhide v. Shridhar Keshav Patwardhan*,³ where it was held that the effect of s. 88 of the Tenancy Act is that in the case of lands which are governed by that section the provisions of the Act would not apply and the protection to the vested rights of the tenants would be rendered illusory because the suit in which that right had to be asserted has been instituted subsequent to the commencement of the Act and the bar to the jurisdiction of the Civil Court to entertain and decide the suit was removed by s. 88 which excluded certain lands from the operation of the Tenancy Act. In the present case, in case Mr. Joseph's argument is right that s. 88 cannot be operative so as to affect the protected tenancy rights of his client, the Bombay City Civil Court would not have jurisdiction to decide the present suit which is filed by the plaintiffs for possession of the suit lands, a contention which was not raised in the trial Court and not urged before us also. In our judgment, therefore, the ratio of the decision in *Sakharam Narayan v. Manikchand Motichand* would apply to the facts of the present case and it will have to be held that the provisions of s. 88(1)(c) of the Tenancy Act of 1948 are an express provision in the Act as contemplated under s. 89(2)(b) of the Act, with the result that after Paspoli became a part of Greater Bombay on April 15, 1950, the protected tenancy right of the defendant ceased to have the protection of the provisions of ss. 1 to 87 of the Tenancy Act.

Our attention has been invited to two other unreported decisions of this Court which are also referred to in the recent Full Bench case of *Maganbhai Jethabai Patel v. Somabhai*. The first of these decisions is the case of *Morashwar Parasharam Phatak v. Vishal Krishna Joshi*.⁴ In that case, the plot in dispute was situated within the municipal limits of Ratnagiri and s. 88 (1)(c) of the Tenancy Act of 1948 became applicable to the area by virtue of cl. (c) substituted by Bombay Act XXXIII of 1952 for the original cl. (c) of sub-s. (1) of s. 88. The contention raised in that case that this amendment should be held to be retrospective so as to affect the tenancy rights accrued in favour of one of the defendants was negatived and it was held that the amendment introduced by Act XXXIII of 1952 was not retrospective and did not apply to the case of tenants who were protected by the Act of 1948. As pointed out in the Full Bench case, the view taken by this Court in this unreported decision must be assumed to be on the basis that the rights of the tenants were vested rights. In that case, it does not also appear to have been argued that the provisions of s. 88 constituted an express provision to the contrary contemplated under s. 89(2)(b). In the present case, we are not

3 (1953) First Appeal No. 166 of 1952, decided by Gajendragadkar and Chinnani JJ., on July 17, 1953 (Unrep.).

4 (1954) First Appeal No. 144 of 1951, decided by Gajendragadkar and Vyas JJ., on January 18, 1954 (Unrep.).

concerned with the amendment introduced by Act XXXIII of 1952 and, as we have already pointed out, in the original Tenancy Act of 1948 itself s. 88 provided for exemption of lands falling within the limits of Greater Bombay by virtue of s. 88(1)(c). The other unreported decision, to which our attention was drawn and which is also referred to in the Full Bench decision, is *Nanchand Amirchand Gandhi v. Rama Malhari Pise*.⁵ In that case, the area with which the Court was concerned was the Municipal Borough limits of Pandharpur Municipality and it was by virtue of Act XXXIII of 1952 which came into force on January 12, 1953 that that area came to be exempted under s. 88(1)(c) from the operation of the Act. There again, the learned Judges held that the provisions of Act XXXIII of 1952 could not affect the rights which the tenant had acquired under the Tenancy Act of 1948. But it appears that this view was taken by that Bench on account of the provisions of s. 43(c) of the Tenancy Act of 1956. As the judgment in the Full Bench case of *Maganbhai Jethabai Patel v. Somabhai* has pointed out, in *Sakharam Narayan v. Manikchand Motichand*, the Court was not concerned with the Amending Act of 1952 but the question arose under the Tenancy Acts of 1939 and 1948. In the present case also, the exemption of the lands in suit is the result of s. 88(1)(c) as it stood even before the Amending Act XXXIII of 1952, and, in our view, the decision in *Sakharam Narayan v. Manikchand Motichand* will have to be followed so far as the point under consideration is concerned.

But then Mr. Joseph contends that when the Tenancy Act of 1948 came into force on December 28, 1948, the village of Paspoli was not included in the limits of Greater Bombay. It came only to be included within Greater Bombay on April 15, 1950, by virtue of the provisions of Bombay Act VIII of 1950, and Mr. Joseph argues that since the protected tenancy rights of the defendant continued unaffected till April 1950, s. 88(1)(c) cannot affect the land in suit which must continue to be governed by the Tenancy Act. We are not prepared to accept this argument either. Section 88(1)(c) provided for exemption of lands from the operation of the Tenancy Act within the limits of Greater Bombay. Sub-section (2) of s. 2 of Bombay Act XVII of 1945 defines 'Greater Bombay' as meaning the areas for the time being specified in Schedule A. When this Act was passed, the village of Paspoli was not included in that Schedule; but the definition of 'Greater Bombay' itself shows that the Legislature had contemplated that the limits of Greater Bombay would be fluctuating and expanding limits. Bombay Act VIII of 1950 which amended Bombay Act XVII of 1945 included the village of Paspoli in Schedule A and that village, therefore, came within the limits of Greater Bombay. But Mr. Joseph contends that when the Tenancy Act of 1948 was enacted the Legislature had in mind certain limits of Greater Bombay, and he argues that even assuming that s. 88(1)(c) was intended to affect rights already acquired, the Legislature could not have intended to give to cl. (c) an operation so as to affect rights in lands which came to be subsequently included within the limits of Greater Bombay. We do not think that that argument is sound. As already pointed out, when the Tenancy Act of 1948 was placed on the statute book in 1948, under s. 88(1)(c), the area within the limits of Greater Bombay was exempted from the operation of ss. 1 to 87 of the Act and by virtue of Act XVII of 1945 Greater Bombay was meant to include areas which would for the time being be specified in Schedule A of that Act. The limits of Greater Bombay were obviously intended, however, to be flexible and capable of extension. It cannot, therefore, be said that the Legislature had in mind only the limits of Greater Bombay as they existed on December 28, 1948, for the purpose of the exemption from the operation of the Act and could not have intended the widening of the scope of the exemption so as to affect rights within the enlarged limits also. Besides, if s. 88(1)(c) constitutes an express

⁵ (1958) Special Civil Application No. 2882 on January 17, 1958 (Unrep.). of 1957, decided by Chagla C.J. and Datar J.,

provision in the Act as contemplated by s. 89(2)(b) of the Tenancy Act of 1948, that clause would necessarily continue to have that effect even though the village of Paspoli and other villages are subsequently included in the limits of Greater Bombay.

Then Mr. Joseph contended that even assuming that ss. 1 to 87 of the Tenancy Act of 1948 do not apply to the lands in suit by reason of s. 88(1)(c), defendant's protected tenancy rights which arose under the Tenancy Act of 1939 cannot be affected because of the provisions of s. 89 of the Tenancy Act of 1948. It is contended that s. 89 of the Act retains three sections of the Tenancy Act of 1939, though the other provisions of that Act are repealed. If that be so, Mr. Joseph contends, his client, by virtue of the provisions of s. 3A of the Tenancy Act of 1939 and the Explanation to that section, would be deemed to be a protected tenant and that right cannot be adversely affected by anything in the provisions of s. 88. We are not persuaded to uphold this argument also. It is not disputed that if ss. 1 to 87 do not apply to the lands in suit, s. 2(14), which defines a protected tenant, as well as s. 31 would not have any operation so far as the suit lands are concerned. Though under s. 3A of the Tenancy Act of 1939 a tenant is to be deemed to be a protected tenant from November 8, 1947, he can only be recognised to be a protected tenant by virtue of s. 31 of the Tenancy Act of 1948. If s. 31 cannot apply, we fail to see how the rights of the defendant can be regarded as anything but illusory, even assuming that s. 3A of the Tenancy Act of 1939 stands independently of the provisions of the Tenancy Act of 1948. But, as already pointed out, s. 89(1) of the Tenancy Act of 1948 while repealing the Tenancy Act of 1939 has preserved three sections of the old Act, but the rights arising under those three sections can only be rendered effective by virtue of the other provisions of the Tenancy Act of 1948. We are not, therefore, prepared to accept the argument of Mr. Joseph that his client is entitled to defeat the plaintiffs' suit by virtue of his right as a protected tenant under the Tenancy Act of 1939 even though ss. 1 to 87 of the Tenancy Act of 1948 cease to have any operation by virtue of s. 88(1)(c) of the Act.

Then Mr. Joseph has raised a further contention on the basis of the amending Tenancy Act 13 of 1956. Now, Act 13 of 1956 came into force on August 1, 1956. Under that Act, the original s. 88 was considerably modified and the relevant section for our present purpose in the amending Act is s. 88(b). By virtue of the present s. 88(b), ss. 1 to 87 of even the amending Act would not apply to any area which the State Government may from time to time by notification in the Official Gazette specify as reserved for non-agricultural or industrial development. This Act came into force on August 1, 1956, and on that very day, in exercise of the powers conferred by cl. (b) of s. 88 the State Government issued a notification No. TNC 5156/101965-F specifying areas within the limits of Greater Bombay as being reserved for non-agricultural and industrial development. There is no dispute that on August 1, 1956, the village of Paspoli was within the limits of Greater Bombay. If that be so, by virtue of this notification the provisions of ss. 1 to 87 would continue to cease to have any operation with regard to the lands in suit. Mr. Joseph's argument is that a notification issued by the State Government could not destroy the protected tenancy rights of his client, because such a notification cannot be given retrospective effect. In support of his argument, Mr. Joseph has relied on the case of *Tamboli Boghalal v. Mohanlal Chumilal*⁶ where Mr. Justice Vyass took the view that the tenancy rights created in favour of a tenant before the coming into force of the Bombay Tenancy and Agricultural Lands Act, 1948, and enjoyed by a tenant after the Act came into force, are not affected as the result of a notification issued by the State Government under s. 88(1)(d) of the Tenancy Act of 1948, specifying the lands as reserved for urban, non-agricultural or industrial development. According to this decision, although competence is given to the State Government under s. 88(1)(d) of the Tenancy

Act of 1948 to issue a notification reserving certain lands for urban, non-agricultural or industrial development, the said competence is prospective and not retrospective and it does not extend to the taking away of the already vested valuable rights of the tenants. Now, it must be observed in the first instance that this decision is based on the view that the rights acquired by the tenant under the Tenancy Act are vested rights. That view cannot now be regarded as above question in view of the observations of the learned Chief Justice in the Full Bench case of *Maganbhai Jethabhai Patel v. Somabhai*, to which we have already made a reference, though the Full Bench has refrained from giving its final opinion on that point. In the case with which Mr. Justice Vyas was dealing, the lands were situated in the former State of Baroda which merged in the Bombay State on August 1, 1949. On the same day the Tenancy Act came into force in that area and the tenants became protected tenants from August 1, 1950, which was the date mentioned in the provisions of the Tenancy Act, as were made applicable to Baroda State, instead of November 8, 1947. Sixteen months thereafter, on April 24, 1951, the State Government issued a notification under s. 88(1)(d) reserving an area within the limits of the Municipal Borough of Baroda City and within a distance of two miles of the limits of the said Borough for urban, non-agricultural or industrial development. Mr. Justice Vyas held that as this area came to be within the exemption by virtue of the notification issued by Government, the notification could not be given any retrospective effect. In the present case, according to our view, from April 15, 1950, the defendant ceased to have any effective tenancy rights because as the village in which the suit land is situate came within the limits of Greater Bombay, the provisions of ss. 1 to 87 ceased to apply to the suit land. Till August 1, 1956, the original s. 88(1)(c) continued and that section came to be replaced by s. 88(b) of the Tenancy Act of 1948 as amended by Act 13 of 1956 and on the very day that the new Act came into operation on August 1, 1956, the Government issued a notification continuing the exemption in respect of the lands in Greater Bombay from the operation of ss. 1 to 87 of the Tenancy Act of 1948, as amended in 1956. It cannot, therefore, be said that the notification issued by the State Government on August 1, 1956, introduced any new exemption. All that it did was that it continued the exemption which was already in force under s. 88(1)(c) since April 15, 1950, so far as the suit land is concerned. We are not, therefore, prepared to accept the argument that the notification issued by the State Government on August 1, 1956, cannot affect the defendant's rights.

Then Mr. Joseph relied on the provisions of s. 7 of the Bombay General Clauses Act, 1904. He contended that s. 7(b) and (c) of that Act would prevent the protected tenancy rights of his client from being affected. Under s. 7 of that Act, where that Act or any Bombay Act made after the commencement of the Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not, under cl. (b) of s. 7, affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, or, under cl. (c) of the same section, affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. It is difficult to appreciate the argument that the defendant's rights continue to be protected by reason of these provisions as the Tenancy Act of 1948 is impliedly repealed regarding lands in Paspoli. For the purpose of this argument, Mr. Joseph has not relied on the repeal of the Tenancy Act of 1939. He contends that under s. 88 of the Tenancy Act of 1948 certain areas are exempted from the operation of ss. 1 to 87. When this Act came into operation on December 28, 1948, the limits of Greater Bombay did not include the village of Paspoli. It was only by reason of Act 8 of 1950 that the said village came within the limits of Greater Bombay, and, therefore, contends Mr. Joseph, Act 8 of 1950 must be taken to have impliedly repealed the Tenancy Act of 1948 so far as the lands situated in that village are concerned. We are not prepared to accept this argu-

ment as sound. Section 88 of the Act excludes certain areas from the operation of the Tenancy Act. That does not mean that s. 88 itself impliedly repeals a part of the Tenancy Act. Section 88(1)(c) referred to the exemption in respect of the area within the limits of Greater Bombay. The limits of that area were fluctuating and capable of extension and by virtue of Act 8 of 1950 the limits of Greater Bombay were extended and certain more villages including the village of Paspoli came to be included within the limits of Greater Bombay. But that cannot, in our opinion, constitute any implied repeal of the Tenancy Act itself by Act 8 of 1950. In our view, therefore, the essential condition for the application of s. 7 of the Bombay General Clauses Act, 1904, is not present in this case. It is also not possible to accept the submission, as already stated, that the Legislature, when it extended the limits of Greater Bombay by including the village of Paspoli and other villages in the limits of Greater Bombay, could never have intended that this inclusion should affect the operation of the Tenancy Act with regard to the lands in these villages. This contention of Mr. Joseph, therefore, must also fail.

Finally, Mr. Joseph contended that his client's right as a protected tenant was acquired by virtue of the provisions of the Tenancy Act of 1948 and that would be unaffected by anything in s. 88 because of the proviso to s. 43C enacted by Act 13 of 1956. The proviso to s. 43C states that

"...if any person has acquired any right as a tenant under this Act on or after the 28th December 1948, the said right shall not be deemed to have been affected by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952, or (save as expressly provided in s. 43D), by the Amending Act, 1955, notwithstanding the fact that either of the said Act has been made applicable to the area in which such land is situate."

The short argument of Mr. Joseph is that the defendant had acquired his right as a protected tenant and continued to be such a tenant till at any rate April 15, 1950, and that right would be saved by reason of the proviso to s. 43C. In support of this argument Mr. Joseph relied on the Full Bench case, already referred to, *Maganbhai Jethabhai Patel v. Somabhai*. Now, the Full Bench in that case was concerned with certain lands situated in the Borough Municipality of Baroda and by virtue of the amending Act of 1952 the lands in that case came to be excluded from the operation of the Tenancy Act of 1948 from January 1953. The landlord after giving notice to the tenant filed a suit for possession before the Mamlatdar and his suit was decreed. A revision was filed by the tenant before the Prant Officer. Pending the revision application, the Tenancy Act of 1948 was amended by the Amending Act, 1955 (Act 13 of 1956), and the Prant Officer set aside the order of the Mamlatdar relying on the proviso to s. 43C. On the question whether the effect of the proviso to s. 43C was such that notwithstanding the decree passed by the Mamlatdar, the tenant could claim protection under the Act of 1948 and resist the landlord's suit for eviction, it was held by the Full Bench that the right of the tenant under the Tenancy Act of 1948 was, by a legal fiction introduced by the proviso to s. 43C, continued and was not affected by the Amending Act of 1952 and that the proviso to s. 43C was applicable to the case as there was no final judgment against the opponent in the sense that the judgment given by the Mamlatdar was subject to revision, and the revisional Court was bound to take notice of the change in law effected by the proviso. On facts, the present case is distinguishable from the case which the Full Bench was considering. But before I deal with that distinction, it is necessary to note that even the legal fiction introduced by the proviso to s. 43C does not appear to be an absolute fiction which would save the rights of a tenant in every case. That seems to be clear from the subsequent decision of another Full Bench of this Court in *Dhondiraj Jayaram v. Dhonduraj Anaji*,⁷ where it was held that the legal fiction introduced by the proviso to s. 43C did not permit the tenant to claim rights which he did not have at the date when a litigation had finally ended by a decree for possession passed by a competent Court against him. In that case, the land-

lord of certain lands situated in a Municipal Borough had filed a suit in a Civil Court for ejectment against his tenant who was a protected tenant under the Tenancy Act of 1948. Previous to the coming into operation of the amending Act of 1956, a decree was passed in favour of the landlord on April 22, 1955, and in execution of that decree the landlord obtained possession on April 24, 1955. Thereafter, the amending Tenancy Act came into force and the tenant applied under s. 84 of the Act claiming possession from the landlord by virtue of the proviso to s. 43C. On these facts it was held by the Full Bench that a decree having been passed by a competent Court, the tenant could not claim any rights by virtue of the proviso to s. 43C. In the present case, the protected tenancy rights of the defendant have not been acquired under the Tenancy Act of 1948, but by virtue of s. 3A of the Tenancy Act of 1939. Further these rights are not affected by the amending Act of 1952 but were affected by virtue of the provisions of s. 88(1)(c) of the Tenancy Act of 1948 on April 15, 1950, when the village of Paspoli came within the limits of Greater Bombay. The proviso to s. 43C will not consequently be applicable. What is contemplated under the proviso to s. 43C is, in our opinion, the right which a tenant has acquired on or after December 28, 1948, and which continued to be intact and effective till the coming into force of the amending Act of 1952 or the amending Act of 1955 (Act 13 of 1956). In the present case, the tenancy rights were already affected in April 1950 and were not for the first time affected either by the amending Act of 1952 or by the notification issued by the State Government under s. 88(b) on August 1, 1956. In our judgment, therefore, Mr. Joseph's argument that the defendant's rights as a protected tenant cannot be deemed to have been affected because of the proviso to s. 43C of the amending Tenancy Act cannot also be accepted.

The difficulties experienced in putting a rational interpretation on the several provisions of the Bombay Tenancy Acts which have been amended and replaced from time to time have been the subject of frequent comments in this Court and the present case has proved no exception. In arriving at our conclusion we have not lost sight of the object which the Legislature has had in mind in enacting the agricultural tenancy legislation which is intended to ameliorate and better the economic conditions of the actual tillers of the soil. At the same time, it appears that the Legislature has also kept in mind other economic and social aspects, such as the development and expansion of large cities and towns, and non-agricultural and industrial development. That seems to be the basis of the original s. 88 of the Tenancy Act of 1948 which was first amended in 1952 and underwent radical alteration and substitution in 1956, and under s. 88(b) Government was given power to exempt from the operation of the Act any area which they would specify as being reserved for non-agricultural or industrial development by issue of a notification. Sub-section (2) of s. 88 of the Tenancy Act of 1948, as it originally stood, provided that notwithstanding anything contained in sub-s. (1), the Provincial Government may, by notification published in the Official Gazette, direct that any particular land or class of lands in any area shall not be exempt from all or any of the provisions of the Act. This sub-section has not been retained when the amending Act 13 of 1956 was enacted. To hold, therefore, that the notification issued by the State Government regarding Greater Bombay on August 1, 1956, should have only prospective operation is not, in our judgment, calculated to further the object which the Legislature had in view. On this ground also, we cannot accept the contention of Mr. Joseph that the notification dated August 1, 1956, can be given prospective effect only, though, as already stated, the only effect that that notification had in the present case was to continue the exemption which was already in operation regarding land situated within the limits of Greater Bombay.

The result is that all the contentions raised by Mr. Joseph fail and the appeal will have to be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mudholkar and Mr. Justice Mody.

RAO SAHEB ANANDRAO MAHAGAONKAR v. EKNATH DNYANOBA PATIL.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Sec. 27—Transfer of Property Act (IV of 1882), Sec. 108(j)—Tenant sub-letting portion of land held by him under lease—Whether such sub-letting entails forfeiture of lease.

Under s. 27 of the Bombay Tenancy and Agricultural Lands Act, 1948 (as it stood before its amendment)† sub-letting by a tenant of a portion of the lands held by him under a lease does not entail a forfeiture of the lease.

Chimnabai Rama Naik v. Ganpat Jagannath Naik,¹ differed from.

Church v. Brown,² *Grove v. Portal*,³ *Cook v. Shoemith*,⁴ *Esdaile v. Lewis*,⁵ *Swarnamayee Debee v. Afaraddi*,⁶ *Keshab Chandra v. Gopal Chandra*⁷ and *Venkataramana Bhatta v. Krishna Bhatta*,⁸ referred to.

Quære: Whether the Mamlatdar has power to grant relief against forfeiture where the tenant has sub-let any portion of the leased land without the permission of his landlord.

THE facts appear in the judgment.

Spl. C.A. No. 1328 of 1958.

M. V. Paranjape, for the petitioner.

H. B. Gokhale, for opponent No. 1.

B. V. Chavan, for opponents Nos. 11 and 12.

Spl. C. A. No. 8384 of 1958.

G. B. Madbhavi, for the petitioner.

G. N. Vaidya, for opponents Nos. 5 to 7.

MUDHOLKAR J. The petitioners in both these petitions under art. 227 of the Constitution are landlords of certain lands and had sought possession of those lands from the respective respondents in the two petitions on the ground that these respondents had forfeited the tenancies in their favour because they had sub-let all the lands or some of the lands, which were leased out to them.

It may be pointed out that in both the petitions before us a number of fields were leased out to the respective respondents in the two petitions by their landlords under a single lease one of which reserved a single rent with respect to the demised lands. In Spl. C. A. No. 8384 of 1958 the contention of the petitioner-landlord was that his tenants had sub-let all the lands leased out to them. The Tribunals below have, however, held that only a portion of the demised lands was sub-let by the tenants. In Spl. C. A. No. 1328 of 1958 the contention of the petitioner-landlord was that most of the lands were sub-let by the tenants and the Tribunals have upheld a part of this contention. We, therefore, proceed on the basis that only a portion of the demised lands was sub-let by the respondents-tenants, and the question which we have to consider is whether as a result of this the leases in favour of the respondents are liable to be terminated at the instance of the petitioners.

*Decided, March 13/16, 1959. Special Civil Application No. 1328 of 1958 (with Special Civil Application No. 3384 of 1958).

†"27.(1) No sub-division or sub-letting of the land or assignment of any interest held by a tenant shall be valid. Such sub-division, sub-letting or assignment shall make the tenancy liable to termination.

Provided that nothing in this sub-section shall prejudicially affect the rights of a permanent tenant or any tenant the duration of whose tenancy is presumed to be co-extensive with the duration of the tenure of the land-

lord under section 83 of the Bombay Land Revenue Code, 1879."

1 (1956) Special Civil Application No. 198 of 1956, decided by Shah and Vyas JJ., on June 21, 1956 (Unrep.).

2 (1808) 15 Ves. 258; 33 E.R. 752.

3 [1902] 1 Ch. 727.

4 [1951] 1 K.B. 752.

5 [1956] 2 All E.R. 357.

6 (1932) I.L.R. 60 Cal. 47.

7 [1937] A.J.R. Cal. 636.

8 (1924) 47 M. L.J. 307.

Section 27 of the Bombay Tenancy and Agricultural Lands Act, 1948, when the sub-leases were effected by the respondents stood thus:

"27. (1) No sub-division or sub-letting of the land or assignment of any interest held by a tenant shall be valid. Such sub-division, sub-letting or assignment shall make the tenancy liable to termination.

Provided that nothing in this sub-section shall prejudicially affect the rights of a permanent tenant or any tenant the duration of whose tenancy is presumed to be co-extensive with the duration of the tenure of the landlord under section 83 of the Bombay Land Revenue Code, 1879."

Then follows sub-s. (2) with which we are not concerned. The petitioners' contention is that the lease being one and indivisible, no sooner a tenant sub-let any portion of the demised property, the landlord became entitled to terminate the entire lease in favour of the tenant. On the other hand, it is contended on behalf of the respondents-tenants that the right of the landlord to terminate the tenancy of a tenant accrues under s. 27 only when the tenant makes a sub-division of the demised lands or sub-lets or assigns the entire demised lands. In support of the contention that the leases are liable to be terminated in their entirety Mr. Paranjape for the petitioner relies upon a decision of a Division Bench of this Court in *Chimnabai Rama Naik v. Ganpat Jagannath Naik*.¹ There the learned Judges observed:

"...If sub-letting of a part of the land involves termination of the tenancy, it is not open, in the absence of any express provision made by the Legislature, to impose upon the landlord a new contract in respect of the remaining land which is not sub-let. A contract of tenancy is one and indivisible and must stand or fall as a whole and when it is provided by the Legislature that a contract is to be terminated on account of some act on the part of the tenant it cannot be said that the termination is in respect of a part of the contract and not of the whole contract. If sub-letting involves the consequences of termination of the tenancy, having regard to the terms of sections 14 and 27 of the Act, we are of the view that it must amount to termination of the entire tenancy and not of the tenancy in so far as it relates to the land which has been sub-let."

We agree with the learned Judges that a contract of tenancy is one and indivisible and must stand or fall as a whole, unless, of course, the Legislature provides for termination of a part of a lease as it has done while enacting the provisions of ss. 13(1)(e) and 14 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. That, however, is not a point which falls for decision in the case before us. What we have to decide is whether the effect of sub-letting by tenants of portions of lands held by them under a lease brings about a forfeiture of their tenancies. This, of course, must depend upon the language used by the Legislature in s. 27 of the Act which is the only provision under which a landlord gets the right to terminate the tenancy of a tenant on the ground of sub-letting. The opening words of s. 27(1) show that what is prohibited and what is rendered invalid is the sub-division or sub-letting of the land leased out by the landlord to his tenant. This must necessarily mean the entire land which was leased out by the landlord to the tenant and not a portion of it. It must be borne in mind that under s. 108(j) of the Transfer of Property Act a lessee has, in the absence of a contract to the contrary, a right to transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the demised property. The provisions of this section are applicable to tenancies governed by the Bombay Tenancy and Agricultural Lands Act, 1948, because of the provisions of s. 3 thereof. The question is what is the extent to which a tenant's right under s. 108(j) of the Transfer of Property Act is limited or taken away by s. 27(1) of the Bombay Tenancy and Agricultural Lands Act, 1948. It has been held in a number of English cases that an undertaking not to sub-let or to assign the premises is not broken by a sub-lease or assignment of a part of those premises.

¹ (1956) Special Civil Application No. 198 of 1956, decided by, Shah and Vyas JJ., on June 21, 1956 (Unrep.).

The earliest case on the point is *Church v. Brown*² which is referred to at page 411 of Cheshire's Modern Real Property. In that case it was held that a covenant placing a restriction on the tenant's right to sub-let the premises must be construed very strictly. This view was followed in *Grove v. Portal*³ and also in certain Indian decisions to which we will advert presently. These decisions and several others were considered by the Court of Appeal in *Cook v. Shoesmith*⁴ and it was held that on its true construction, the undertaking in the agreement "not to sub-let" was not broken by sub-letting part of the premises, for the verb "to sublet" must have an object and its only possible object was the house which was the subject-matter of the agreement. In *Esdale v. Lewis*,⁵ the majority of Judges following the decision in *Cook v. Shoesmith* and the earlier cases construed the words "no sub-letting allowed without the written consent of the landlord" as prohibiting the sub-letting of the entire premises demised, and not of part of them.

The two earlier English decisions were followed by the Calcutta High Court in *Swarnamayee Debee v. Afaraddi*.⁶ In that case a lease provided (p. 48):

"We shall not be able to transfer the said *karsha* right in any way by gift or sale, or to grant any *karsha* settlement in respect thereof, or to encumber the same in any way. If we do so, your right of *khas possession* will accrue."

It was held that the forfeiture of the lease was to be incurred by the lessee and the right of re-entry was to accrue to the lessor in the event of the lessee's transferring or encumbering the entire leasehold and that a usufructuary mortgage of a part of the holding would not, therefore, cause forfeiture of the tenancy. This decision was followed by the same High Court in *Keshab Chandra v. Gopal Chandra*,⁷ where it was held that a restrictive covenant or a covenant entailing forfeiture of a tenancy in a case of alienation contained in a lease must be strictly construed against the lessor and that a covenant against alienation by a lessee must relate to transfer of the entire leasehold. In *Venkataramana Bhatta v. Krishna Bhatta*,⁸ following *Grove v. Portal* it was held that a clause in the lease prohibiting alienation by the lessee operated only with respect to the alienation of the whole of the demised premises and not with respect to partial alienation.

The question is whether the principle deducible from these cases should be applied to the present case, because here what we are considering are the provisions of an Act of the Legislature and not of a covenant in a contract between the parties. It seems to us that the fact that what we have to consider now is a statute does not make any difference. After all, we have to interpret the meaning of certain words used by the Legislature. It would, therefore, be relevant for us to bear in mind the interpretation placed on similar words by different Courts even though those Courts were considering not statutory provisions but covenants in contracts between the parties. Mr. Paranjape referred us to Craies on Statutory Law, page 6, and said that we were precluded from doing so. The passage on which he relies is as follows:

"Contracts. In the construction of a contract there cannot be said to be any rules of law applicable, but 'the governing principle is to ascertain the intention of the parties to the contract through the words they have used', which words 'are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found'. Lord Wright has recently said: 'I deprecate in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law...the decision as to each must depend on the consideration of the parties' contract read in the light of the material circumstances of the parties in view of which the contract is made'. It is seldom, in construing 'mercantile contracts, that any technical or artificial rule of law can be brought to bear on their construction; the question really is the meaning of the language', and 'the grammatical meaning is,

² (1908) 15 Ves. 258; 88 E.R. 752.

³ [1902] 1 Ch. 727.

⁴ [1951] 1 K.B. 752.

⁵ [1956] 2 All E.R. 357.

⁶ (1932) I.L.R. 60 Cal. 47.

⁷ [1937] A.I.R. Cal. 636.

⁸ (1924) 47 M. L. J. 307.

as in other cases, the meaning to be adopted, unless there be reason to the contrary'...

In *Reid v. Reid* the Court rejected as useless for the construction of the Married Women's Property Act, 1882, decisions as to the meaning of covenants in marriage settlements, on the ground that such cases must be approached with a presumption that they were intended to exclude the husband from acquiring the property of his wife if it should fall into possession during coverture; whereas, in dealing with the Act, no such presumption arose. And in *Midland Ry. v. Robinson*,⁹ in construing the word 'mines' in the Railways Clauses Act, 1845, Lord Herschell said: 'In dealing with this case, it must be remembered that all your lordships have to do is to interpret the words of the enactment, and not lay down, even if it were possible, any general rule as to the interpretation of the word 'mines'. I doubt whether much assistance is to be obtained from cases in which a construction has been put upon that word in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed.'

It is no doubt true that decisions based upon the construction of covenants in contracts ought not to be referred to for the purpose of construing the provisions of an Act, but it does not follow that the construction placed by the Courts upon certain words used in a document is not to be considered when it is necessary for a Court to construe the same words occurring in a statute. Indeed, that is not what is laid down in any of the decisions referred to by Craies. We cannot, therefore, accept the contention of Mr. Paranjpe.

The decisions on which reliance was placed by Mr. Gokhale were not cited at the Bar before Shah and Vyas JJ. in *Chimnabai Rama Naik v. Ganpat Jagannata Naik*. It cannot, therefore, be said that the learned Judges had occasion to examine the law on the point fully. That being the position, we think that it would not be improper for us to come to a different conclusion on the particular question which was also before the learned Judges. On the basis of the decisions of the Courts in India and in England, we, therefore, come to the conclusion that the mere fact that some of the lands covered by the lease were sub-let by the lessees does not entail a forfeiture of the lease.

If in fact there was a single lease by the landlords in both the cases as is contended for by the petitioners, then upon the view we have taken it would follow that the tenants would not incur forfeiture of their leases in so far as they concern those lands which were actually sub-let by them. We need not say anything more on that point, because the petitioners have secured relief with regard to these lands before the Revenue Tribunal and the tenants' petitions to this Court challenging the correctness of the decision of the Revenue Tribunal have been dismissed summarily by this Court.

An elaborate argument was advanced before us on behalf of the petitioners by Mr. Paranjape and on behalf of the respondents by M/s. Gokhale and Vaidya on the question as to whether the Mamlatdar has power to grant relief against forfeiture where the tenant has sub-let any portion of the leased land without the permission of his landlord. It is, however, not necessary for us to deal with this matter upon the view which we have taken on the other point.

Another point taken by Mr. Paranjape was that the order of remand passed in his case by the Revenue Tribunal was erroneous. In our opinion, it is not necessary to deal with this point either, because, assuming that the order of remand is erroneous, the point which has now been raised before us, viz., the effect of sub-letting only a portion of the demised lands, could have been raised before us even if the Revenue Tribunal had not thought it fit to remand the case.

Upon this view, therefore, we discharge the rules and dismiss these petitions. Costs of these petitions will be borne as incurred.

Petitions dismissed.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar.

HAJI SHEIKH HASANOO v. S. NATESA MUDLIAR ETC. & CO.*

Negotiable Instruments Act (XXVI of 1881), Sec. 84(1)—Draft drawn by one branch of bank on another branch thereof—Whether such draft a negotiable instrument—Applicability of s. 84(1).

Section 84(1) of the Negotiable Instruments Act, 1881, is limited in its application to cheques and it does not apply to every negotiable instrument.

A draft drawn by one branch of a bank on another branch thereof is not a negotiable instrument.

M. J. Rice and Atta Mills v. Firm Ramlal, dissented from.

THE facts appear in the judgment.

V. M. Kulkarni, for the appellant.

B. B. Banade, for the respondent.

MUDHOLKAR J. This is a plaintiff's second appeal from the dismissal of his claim for the recovery of Rs. 1,367-8-0 alleged to be due to him from the respondent.

It is common ground that the appellant is a fruit seller carrying on business at Narkhed. The respondent carried on business of a broker in Madras. The appellant sent 485 baskets of oranges to Madras sometime in the year 1949 for being sold through the respondent. The latter submitted an account to the appellant on March 22, 1949, showing that the oranges had been disposed of for a sum of Rs. 1,585, and that after deducting the usual charges, a sum of Rs. 1,417-8-6 was found due to the appellant. A draft dated March 31, 1949, drawn by the Exchange Bank of India and Africa, Madras Branch, on its branch at Nagpur for the aforesaid amount was sent by the respondent to the appellant. The appellant tried to cash the draft, three weeks or so after he received the draft; the Bank having gone in liquidation in the meanwhile, he could not cash it. He, therefore, proceeded to Madras and handed over the draft to the respondent. According to the appellant, the respondent accepted that draft, paid a sum of Rs. 50 and promised to send him the balance shortly thereafter. While the respondent admits that the appellant handed over the draft to him, he says that his only object in taking the draft was to see what could be realised from the Bank and send to the appellant whatever was realised by him from the Bank. He also says that he gave Rs. 50 to the appellant when he visited Madras, because the appellant said that he was short of fund and had no money even to pay his railway fare for the return journey.

The trial Court decreed the suit. The lower appellate Court dismissed it on the ground that the appellant was guilty of delay in the presentation of the draft, that this delay on his part caused injury to the respondent and that, therefore, the latter was protected by s. 84 of the Negotiable Instruments Act. Upon this ground it dismissed the suit.

Section 84(1) of the Act reads thus:

"Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheques paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or

*Decided, March 23, 1959. Second Appeal No. 613 of 1954, against the decision of K.L. Pandey, First Additional District Judge at Nagpur, in Appeal No. 19-B of 1953, from the

decision of S. R. Tiwari, Civil Judge, Class II, at Katol, in Civil Suit No. 6-B of 1952.

1 [1957] A. I. R. Assam. 133.

person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid."

This provision is limited in its application to the cheques. If it was the intention of the Legislature to make it applicable to every negotiable instrument or to drafts drawn by one branch of a bank on another branch thereof, there was nothing easier for the Legislature than to use appropriate expressions. Indeed, when the provisions of s. 84 were enacted, the difference between the position of the drawer of a cheque and of the drawer of a negotiable instrument was present in the mind of the Legislature. It has been pointed out in Aggarwal's *Law of Hundies and Negotiable Instruments*, (1954 edn.) (p. 287):

"The position of the drawer of a cheque is different from that of the drawer of a bill on demand in one respect. The drawer of a bill on demand has given consideration to the drawee against which he is entitled to draw the bill and if it is not paid on presentation he has a right to sue the drawee on the original contract. He has also a right against the holder to be informed of the dishonour by a notice of dishonour within reasonable time. The drawer of a cheque on the other hand knows that the banker will not pay unless he has money of his (i.e. drawer) to pay with. He has no recourse to the drawee if the cheque is not paid when the funds are not sufficient. He remains liable on the cheque as principal debtor and yet has no remedy against any one. He is therefore bound to keep money at his bankers to meet the cheque whenever presented and it would be unfair if by reason of delay in presentation of the cheque on the part of the holder he should suffer loss of the money he was keeping at the bankers to meet it. That is the underlying principle of sections 72 and 84." Then again, the same author has pointed out

"Cheques are generally intended for immediate presentation and not for general circulation. Cheques are drawn against funds of the drawer in his bank. If the holder delays presentation and bank fails in the meanwhile the drawer might be seriously prejudiced thereby. Nor can the drawer be expected to retain his money in the bank at his risk for an indefinite time."

Dealing with the question of delay in presentment, Byles on Bills of Exchange, 21st edn., at page 21, has observed:

"A cheque, nevertheless, is virtually an appropriation of a sum of money in the banker's hands to lie till called for; but by delay the holder takes the risk of the bank's failure, the revocation of bank's authority to pay owing to the drawer's death, countermand of payment by the drawer or the exhaustion of the balance of further drawings."

Thus, the main reason for drawing a distinction between a cheque and an instrument of other kind is that if a cheque is drawn by a drawer on a bank he is forced to keep sufficient funds in that bank for enabling the person in whose favour he has drawn the cheque to cash it. As he has to keep his money tied up in that manner, he cannot properly withdraw it even if he knew that the condition of the bank was not satisfactory. It is for this reason necessary that cheques should be presented for payment without undue delay. That, however, is not the case with respect to demand drafts. Where, as here, the draft is one drawn by one branch of a bank on another branch thereof it cannot, by any stretch of imagination, even be suggested that the draft is a negotiable instrument. Nor again, can it be said that it is an instrument under which there is a remedy against the 'drawer' because in fact the drawer and the drawee are the same person.

Shri Ranade, who appears for the respondent, has referred to a decision of a Division Bench of the Assam High Court in *M. J. Rice and Atta Mills v. Firm Ramlal*.¹ In that case, the principles of s. 84 were applied to drafts and it was stated that a demand draft, which is very nearly allied to a cheque, should be presented for payment as early as possible, because delay in presentation in commercial practice might lead to complications and cause some loss or damage to the parties concerned. With respect to the learned Judges, I

am unable to see how the provisions of s. 84 of the Negotiable Instruments Act could be extended to negotiable instruments other than cheques. Indeed, if the Court were to apply the provisions of s. 84 to negotiable instruments of other kinds, it would be legislating which, of course, it has no power to do. Again, as already stated, even if the principles underlying s. 84 could be applied to negotiable instruments generally, they certainly cannot be applied to a draft of the kind which we have in this case. As already pointed out, a draft drawn by one branch of a bank on another branch thereof is not a negotiable instrument at all. For all these reasons, disagreeing with the lower appellate Court, I hold that the delay in the presentation of the draft to the Nagpur branch of the Exchange Bank is not fatal to the appellant's suit.

It was next contended by Shri Ranade that the appellant having accepted the draft in payment of the amount due to him has no right of action for the price of oranges which he had sold through the respondent. Now, where money is due to a person from another, then the liability to pay that money can be discharged only by repaying it in cash unless the parties expressly agree to some other mode of discharging that liability. If the respondent's case was that the parties had agreed that the respondent's liability to pay the price would be deemed to have been satisfied by sending the draft to the appellant, the matter would have been different. There are no express pleadings of the respondent on the point. But even assuming that it can be deduced from the pleadings of the respondent that the appellant had agreed to accept, or had accepted, the draft in satisfaction of the amount due to him, no proof of this has been adduced by the respondent. In the circumstances, therefore, this contention fails.

Upon this view, I allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court. Costs throughout shall be borne by the respondent.

Appeal allowed.

APPEAL FROM ORIGINAL CIVIL.

Before the Hon'ble Mr. H. K. Chinnani, Chief Justice, and Mr. Justice S. T. Desai.

THE BOMBAY MUNICIPAL CORPORATION v. RAMCHANDRA LAXMAN BELOSAY.*

Bombay Municipal Corporation Act (Bom. III of 1888), Secs. 63(b) & (k), 36(k)—Resolution moved in Corporation to express regret and horror at execution of foreign dignitary and his associates in foreign country—Resolution inter alia describing such persons as fighters for freedom of their country—Whether Corporation competent to discuss and pass such resolution—"Likely to promote public instruction", ambit of expression in s. 63(k)—Expression "business" in s. 36(k), meaning of—Court's power to hold municipal action invalid and ultra vires when to be exercised.

A resolution was moved at a meeting of the Bombay Municipal Corporation by a councillor of the Corporation under which it was sought to express deep regret and horror at the execution of one Imre Nagy a former Prime Minister of Hungary and his three associates. The resolution drew attention to the fact that these persons were "fighters for freedom of their motherland, who by displaying great courage and steadfastness even at the cost of their lives in the cause of their country's freedom have upheld the dignity of man and rendered great service to the highest value of life, viz. 'Freedom'." The resolution stressed that the executions were contrary to the doctrine of 'Panchshila' enunciated by the Prime Minister of India and practised by India and accepted by other countries of the world. Finally, by the reso-

*Decided, April 3, 1959. O.C.J. Appeal No. 364 of 1958.
No. 67 of 1958: Miscellaneous Petition

lution the Union Government was requested to communicate the same to the families of the late Imre Nagy and his associates with an expression of the Corporation's sympathy in their sad bereavement. On the question whether the action of the Corporation in discussing and passing this resolution would be *ultra vires* the Corporation:—

Held, that the ultimate decision whether a resolution proposed to be moved before a meeting of the Corporation is likely to promote instruction is, under the Act, entrusted to the Corporation and as no appeal is provided against its decision, the Court will not interfere if the question is arguable or if two views are possible, and

that as in the instant case it was arguable that the resolution and the debate on it were likely to educate or instruct the public to love their country and to be ready to fight for its freedom, the resolution could not be said to be beyond the scope and ambit of the Act, and one which the Corporation could not discuss.

Daily Gazette v. Karachi Municipality,¹ referred to.

The expression "business" in s. 36(k) of the Bombay Municipal Corporation Act, 1888, includes only that business which can be said to relate to municipal administration or Municipal Government of Greater Bombay.

The Court will not hold a municipal action invalid and *ultra vires* the powers of the municipality if it entertains a reasonable doubt on the point and deems the question as fairly and reasonably arguable on the ground that there is room for holding different opinions on the point. It will decline to issue its mandate unless it is satisfied that it is plain and palpable that the act complained of clearly and manifestly transcends the powers conferred on the municipality by statute.

Per S. T. Desai J. The resolution in question and discussion relating to it fall within the ambit of the expression "likely to promote public instruction" in s. 63(k) of the Act, and, therefore, the Bombay Municipal Corporation was competent to discuss and, if the majority of its councillors so decided, to pass the resolution.

The general rule is that the Court will not inquire into the policy, expediency or propriety of a municipal act, and while it has undoubted jurisdiction to determine whether a municipal act is *ultra vires* or not, it will not, in reviewing the *vires* of the act complained of, probe into the motive or purpose of those initiating or voting on the same.

THE facts appear in the judgments.

C. K. Daphtary, Solicitor General, with *R. J. Joshi*, for appellant No. 1.

N. A. Palkhivala, for appellant No. 2.

Rajni Patel, with *Daniel Latifi* and *B. A. Desai*, for the respondent.

CHAINANI C.J. This is an appeal against the order passed by Mr. Justice K. T. Desai,† by which he directed the issue of a writ to appellant No. 1, the Bombay Municipal Corporation, hereinafter referred to as "the Corporation", requiring the Corporation to forbear from discussing a resolution, in regard to Mr. Imre Nagy and his associates, of which a notice had been given by a Councillor of the Corporation, Dr. R. N. Kulkarni. The resolution was in the following terms:

"That the Municipal Corporation of Greater Bombay have learnt with deep regret about the execution of Mr. Imre Nagy, a former Prime Minister of Hungary and his three associates contrary to the doctrine of 'Panchshila' enunciated by our beloved Prime Minister and practised by our country and accepted by other countries of the world. The Corporation hereby express their horror at the execution under peculiar conditions of those fighters for freedom of their motherland who, by displaying great courage and steadfastness even at the cost of their lives in the cause of their country's freedom have upheld the dignity of man and rendered great service to the highest value of life, viz. 'Freedom'. That the Mayor be requested to forward the Resolution through the State Government to the Union Government with a request to communicate the same to the Government of Hungary through the proper channels for being communi-

cated to the families of the late Mr. Imre Nagy and his associates, with an expression of the Corporation's sympathy in their sad bereavement."

It was moved at a meeting of the Corporation held on July 10, 1958. A point of order was then raised that the Corporation had no power to discuss the resolution, as it was of a political nature and related to international affairs and as it had nothing to do with civic duties, which, it was said, must necessarily relate to the life and welfare of the citizens of Bombay. Appellant No. 2, who was the Mayor of the Corporation at that time and who was the Chairman of the meeting, then gave a considered and well reasoned ruling, by which he held that the resolution was in order. Thereafter the meeting of the Corporation was adjourned. On July 18, 1958, the respondent, who is also a Councillor of the Corporation, filed a petition, in which he contended that the action of the Corporation in discussing and passing the above resolution would be *ultra vires* the Corporation. He, therefore, prayed for the issue of a writ of *mandamus* or prohibition or any other appropriate writ, direction or order, under art. 226 of the Constitution, against the appellants, restraining the Corporation from discussing or endorsing the said resolution. The petition was opposed by the appellants. They contended that the Corporation had the right and the power to discuss and pass the said resolution under cl. (k) of s. 36 and cl. (k) of s. 63 of the Bombay Municipal Corporation Act, hereinafter referred to as "the Act". The appellants' contentions were not accepted by Mr. Justice K. T. Desai. He came to the conclusion that the resolution proposed was beyond the ambit and powers of the Corporation. He, therefore, issued a writ restraining the Corporation from discussing the said resolution or passing the same. This order is being challenged in the present appeal.

The Bombay Municipal Corporation is constituted by the Bombay Municipal Corporation Act (Bombay Act No. III of 1888). Being a creature of statute, its powers are limited by the provisions of the Act, by which it is created. It can, therefore, exercise only such powers as are specifically conferred upon it by or under the Act, or as are consequential to or incidental to the exercise of such powers. This position was not disputed during the course of arguments. It is, therefore, not necessary to cite any authority. I may, however, refer to the following passage from Halsbury's Laws of England, para. 129 in Vol. IX, Third edn.:

"Statutory Corporations. The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited."

It is, therefore, necessary to consider the relevant provisions of the Act. The preamble to the Act states that it was enacted "to consolidate and amend the law relating to the municipal government of Greater Bombay." Section 4 of the Act specifies seven municipal authorities, which are charged with carrying out the provisions of the Act. Clause (a) mentions the Corporation as being one of these authorities. The powers and functions of each of these authorities are specified in different provisions of the Act. Sub-section (1) of s. 5 states that the Corporation shall consist of one hundred and thirty-one councillors. Sub-section (2) of this section provides:

"The corporation shall by the name of 'The Municipal Corporation of Greater Bombay', be a body corporate and have perpetual succession and a common seal and by such name may sue and be sued."

Section 36 states:

"The Corporation shall meet for the despatch of business and shall from time to time make such regulations with respect to the summoning, notice, place, management and adjournment of such meetings, and generally with respect to the mode of transacting and managing the business of the corporation including the submission, asking and

answering of questions under section 66A as they think fit, subject to the following conditions:—...

(k) any councillor who desires at any meeting to bring forward any business, other than any questions under section 66A or to make any substantive proposition, which is not already specified in the notice of such meeting, shall give written notice of the same to the municipal secretary at least three clear days before the day fixed for the meeting; and a supplementary announcement of the business or propositions, of which notice has been so given, shall be given by the said secretary in not less than one local daily newspaper not later than the day previous to the meeting;"

The appellants rely on this provision in support of their contention that the Corporation is entitled to discuss the said resolution. Chapter III of the Act contains provisions relating to the duties and powers of the municipal authorities. Section 61 gives a list of obligatory duties of the Corporation for which, it is, as stated in the section, incumbent on the Corporation to make adequate provision by any means or measures, which it is lawfully competent to them to use or to take. One of these duties, referred to in cl. (g) of the section, is to maintain, aid and suitably accommodate schools for primary education. Section 63 specifies what are called discretionary duties of the Corporation, in regard to which the Corporation have discretion. The section states:

"The corporation may, in their discretion, provide from time to time, either wholly or partly, for all or any of the following matters, namely:—...

(b) the furtherance of educational objects other than those mentioned in clause (g) of section 61;...

(k) any measure, not hereinbefore specifically named, likely to promote public safety, health, convenience or instruction.

And, with the previous sanction of the State Government, the corporation may make—

(l) such contribution as they think fit towards any public ceremony or entertainment in Greater Bombay."

The provision contained in cl. (k) is strongly relied upon by the appellants in the present appeal. Sub-section (1) of s. 64 provides that the respective functions of the several municipal authorities shall be such as are specifically prescribed in or under the Act. Sub-section (2) of s. 64 states that "except as in this Act otherwise expressly provided, the municipal government of Greater Bombay vests in the corporation." Sub-section (1) of s. 66A provides:

"Subject to any regulations made in this behalf under section 38, a councillor may question the Commissioner who shall answer any question concerning or connected with the administration of this Act or the municipal government of Greater Bombay."

This provision draws a distinction between the administration of the Act and municipal government.

The learned Solicitor General, who has argued this appeal on behalf of the appellants, has urged that the words "municipal government", for the carrying on of which the Corporation has been created, are very wide and that the Corporation is, therefore, concerned not only with providing physical comforts, such as sanitation, lights and water, but with all matters affecting the life and well-being of the persons residing in Greater Bombay. He has also contended that by the resolution it was intended to place before the people an example of a great fighter for freedom and that that by itself would be education or instruction to the people, within the meaning of cls. (b) and (k) of s. 63 of the Act. The words "educational objects" used in cl. (b) and "instruction" used in cl. (k) are words of very wide import. Webster's Dictionary defines "education" as totality of information and qualities acquired through instruction and training which further the development of an individual physically, mentally and bodily. In Murray's Dictionary, the word "instruction" is defined as meaning imparting knowledge or skill, education, information. The word "instruct" is defined as meaning to furnish knowledge or information, to train in knowledge or learning, to teach, to educate. Our notions, as to what constitutes education, have also changed. Formerly,

a person was regarded as educated, if he knew the three Rs—Reading, Writing and 'Rithmetic. Today, education embraces a much wider field. Any teaching or training, which furthers or brings about the physical, mental, moral or spiritual development of an individual, is regarded as education. Education may also be imparted in civic rights and responsibilities, or in order that people might cherish certain ideals or imbibe certain qualities. In a democratic country, it may well be regarded as part of education to teach people to love their country, to cherish freedom, to hate oppression and rule by foreigners and to be ready and willing to undergo hardship and suffering for maintaining the freedom of the country.

One of the recognised ways of educating people is to place before them examples of persons, who have achieved fame and distinction in life. School text books frequently contain stories or articles about lives of great men. These are taught, so that they may inspire the readers to acquire the same qualities and to try and reach the same heights. It is also not necessary that education or instruction should be imparted only in schools and colleges or other institutions. It may also be given through newspapers, cinema shows, public lectures, seminars and public debates. The meetings of the Corporation are open to the public under cl. (e) of s. 36. A debate on a matter of public importance in a Corporation may, therefore, also have an educative value.

The resolution, the validity of which has been challenged, describes the late Mr. Imre Nagy and his three associates as fighters for freedom for their motherland, as persons who even at the cost of their lives displayed great courage and steadfastness in the cause of their country's freedom, and as persons who upheld the dignity of man and rendered great service to the highest value of life, viz., freedom. By eulogising them and by expressing the Corporation's regret at their executions, the resolution places before the public examples and ideals which they may emulate. It is, therefore, urged that the resolution and the debate on it would educate the public and instruct them to cherish the ideals of freedom, to love their country and to be ever ready to sacrifice even their lives for the freedom of the country. I cannot say that this argument is without force.

The words in cl. (k) of s. 63 are "likely to promote instruction". The authorities competent to decide whether a resolution, proposed to be moved at a meeting of the Corporation, is likely to promote public instruction, are firstly the Mayor or the Chairman of the meeting, who has to determine whether the resolution is in order and thereafter the Corporation, which may pass or reject the resolution. The ultimate decision in the matter is entrusted by the Legislature to the Corporation. The Corporation is, therefore, the best judge of what is likely to promote public instruction. No appeal is provided against its decision. The Court will, therefore, not interfere merely because it takes a view different from that taken by the Corporation. If the question is arguable or if two views are possible, the Court will decline to exercise its powers, for it cannot then be definitely stated that the Corporation is transgressing the limits of its powers. The Court will intervene only when it is shown that the resolution, which the Corporation proposes to discuss or pass, cannot reasonably be said to be within the scope and ambit of the Act.

In this case it is at least arguable that the resolution and the debate on it are likely to educate or instruct the public to love their country and to be ready to fight for its freedom. The learned Judge has also observed in his judgment that the debate on the resolution may be educative. He however took the view that the resolution was outside the ambit of the Corporation's powers, as its object was political and not educational. With respect, it seems to me that the object or motive, which led the author of the resolution to propose it, is entirely immaterial. The Corporation consists of 131 councillors and different councillors may support the resolution for different reasons. What one is really concerned with is the effect of the resolution, whether it is

or is not likely to promote public instruction. If it cannot even reasonably be said that the resolution might promote public instruction, it would be outside the scope of the Act. But, as I have already stated, I do not think I can say that the argument that the resolution is likely to promote public instruction, is without substance. Consequently, the resolution cannot be said to be beyond the scope and ambit of the Act, or one which the Corporation cannot discuss. The order passed by Mr. Justice Desai cannot, therefore, be upheld.

The only reported case, in which a somewhat similar question came up for consideration, is *Daily Gazette v. Karachi Municipality*.¹ This case does not decide the question which we have to determine. There are observations in it on which either party might rely. In his judgment Rupchand Bellaram A. J. C. has observed as follows (p. 295)

"There is no doubt in my mind that the main object for which powers of Local Self-Government are transferred to Municipal Corporations under this Act is that the city fathers should look after the health of the city and the comfort and well-being of its residents. But I am not prepared to hold that for the attainment of public objects it may not in certain instances be necessary or in any case be not proper for them to discuss political subjects or that the discussion on such subjects is *ultra vires*."

With respect, I agree with these observations.

Mr. Rajni Patel pointed out to us that the Bombay Municipal Boroughs Act and the Bombay District Municipal Act contain provisions similar to those contained in cl. (k) of s. 63. I realise that the view, which I am taking, might result in the Municipalities spending their limited time and money on matters, with which they are not really concerned. If this, unfortunately, happens, it will be for the Legislature to consider whether some limitations should not be imposed on the powers of the Municipalities to discuss matters, which have no direct bearing on municipal administration.

In the view which I am taking, it is not necessary to deal with other questions, which have been raised before us. But as they have been argued, I will refer to them briefly. It was urged that under cl. (k) of s. 36 the Corporation is entitled to discuss a resolution on any subject, whether it relates or does not relate to municipal administration or municipal government. The heading of s. 36 is "Proceedings of the Corporation". It is a procedural section, which provides for the mode and the manner in which business may be brought before the Corporation and in which it is to be transacted. I agree with the view taken by Mr. Justice Desai that this is not a section to which reference can be made for the purpose of determining what is the business of the Corporation, or what are its powers and functions. The expression "business" will include only that business which can be said to relate to municipal administration or municipal government of Greater Bombay. A corporator cannot also ask the Corporation to discuss any resolution which he likes. The proposition, which he is entitled to make before any meeting of the Corporation, must also be such as relates to the business of the Corporation. It must, therefore, be on a subject, which has a bearing directly or indirectly on the municipal administration or municipal government of Greater Bombay.

Reference was made in the course of arguments to art. 12 of the Constitution. This is the first article in Part III, which contains provisions relating to fundamental rights, and it states that in this Part the "State" includes all local authorities. This definition is for the purpose of ensuring that even the local authorities, which perform certain functions of government, do not contravene the fundamental rights of citizens and for enabling citizens to obtain relief against the violation of these rights. This article has, therefore, no bearing on the question which we have to determine in this appeal. Article 51, to which also a reference was made, is also not of any assistance in this case.

The Solicitor General referred us to the compilation exh. No. 1, containing numerous resolutions passed by the Corporation on matters not connected with

municipal government. He urged that the practice followed by the Corporation over a number of years, in regard to the categories of matters which would fall under cl. (k) of s. 63, must be considered by us for the purpose of construing the general words used in this clause. We are unable to accept this argument. The Corporation cannot, by following a wrong practice, confer upon itself powers which it does not possess.

It was also urged that the Court can only interfere with an act of the Corporation and that until the resolution had been discussed and passed, it cannot be said that the Corporation had done any act, which it was not competent to do and which was *ultra vires*. This Court can, however, grant relief not only after damage has been done, but even when there is reasonable likelihood of damage being done. If, therefore, I had come to the conclusion that the said resolution was beyond the powers of the Corporation, I would have upheld the order passed by Mr. Justice Desai.

Mr. Rajni Patel urged that the resolution might embarrass Government in its relations with certain foreign States. He pointed out to us that the Bombay Municipal Corporation Act was passed in 1882 under the provisions of the Indian Councils Act, 1861, cl. (8) in s. 43† of which debarred the Governor-in-Council from making any law affecting relations with foreign States. There is, however, no provision in the Bombay Municipal Corporation Act, which debars the Corporation from discussing a matter, on the ground that it relates to an occurrence in a foreign State or on the ground that it might affect relations with foreign States. But every resolution must be within the scope and ambit of the Act. If, therefore, it can reasonably be said to relate to municipal government or municipal administration of Greater Bombay, its discussion cannot be prevented, merely because it may not be to the liking of some persons in some foreign States.

I would, therefore, set aside the order passed by Mr. Justice K. T. Desai and dismiss the petition filed by the respondent. As the case has been fought more or less as a test case and in order to obtain a decision in regard to the powers of the Corporation in certain matters, I would make no order as to costs of this appeal.

S. T. DESAI J. I agree that this appeal must succeed but prefer to found myself primarily on the ground that the resolution in question and discussion relating to the same fall within the ambit of the expression "likely to promote public instruction" in s. 63(k) of the Bombay Municipal Corporation Act. The facts in this rather extraordinary case are plain and it is unnecessary to recapitulate them. Nor is it necessary for me to restate the sections the relevant parts of which have been set out in the judgment just delivered by my Lord the Chief Justice. The question that arises for our determination lies in a narrow compass and we have to ascertain whether it was within or without the ambit and scope of the powers of the Bombay Municipal Corporation to discuss and if the majority of its councillors so decided to pass a resolution expressing deep regret and horror at the execution of Mr. Imre Nagy, a former Prime Minister of Hungary, and his three associates. The resolution draws attention to the fact that these persons were "fighters for freedom of their motherland, who by displaying great courage and steadfastness even at the cost of their lives in the cause of their country's freedom have upheld the dignity of man and rendered great service to the highest value of life, viz. 'Freedom'." The resolution stresses that the executions were contrary to the doctrine of 'Panchshila' enunciated by the Prime Minister of India and practised by our country and accepted by other countries of the world. Finally,

† "43. It shall not be lawful for the Governor in Council of either of the aforesaid Provinces, except with the sanction of the Governor General, previously communicated to him, to make regulations or to take into

consideration any Law or Regulation for any of the purposes next hereinafter mentioned; that is to say,...

8. Affecting the relations of the Government with Foreign Princes or States;"

by the resolution the Union Government is requested to communicate the same to the families of the late Mr. Imre Nagy and his associates with an expression of the Corporation's sympathy in their sad bereavement. The petitioner, who is one of the councillors of the Corporation, applied to the Court and sought relief by way of a writ of *mandamus* restraining the corporation from discussing and endorsing the resolution and his grievance was that his personal and other rights were threatened and would be seriously affected if the resolution were to be discussed and passed. His contention was that the Corporation had no right or power to discuss the resolution. The learned Judge has expressed the opinion that the debate on the resolution might be educative but that was not its object and purpose. In his view the main object of the resolution was to condemn the action of certain authorities outside India and was political and not educational and he has observed:

"What has to be seen in each case is the object of the resolution. If the object of the resolution falls outside the ambit of municipal government, then it cannot be brought within its ambit merely because there would be incidental instruction resulting therefrom."

The learned Judge reached the conclusion that this was a fit case for intervention of the Court and directed the issuance of a writ of *mandamus* requiring the Corporation to forbear from discussing the resolution at a meeting of the Corporation or passing the same and the Corporation and its Mayor have come before us in this appeal.

It has been contended for the appellants by the learned Solicitor General that the trial Court was in error in approaching the case by examining the motive and object of the resolution and he referred to the following observations of Lord Sumner in *Inland Revenue Commissioners v. Fisher's Executors*¹ (p. 411):

"...In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention, that the company has, is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance."

As a general rule, the motive or object of the governing body of a Corporation or the Corporation itself in passing a resolution does not affect its validity. There is no question here of there having been any fraud or mala fides. The general rule is that the Court will not inquire into the policy, expediency or propriety of a municipal act, and while it has undoubted jurisdiction to determine whether a municipal act is *ultra vires* or not, it will not, in reviewing the *vires* of the act complained of, probe into the motive or purpose of those initiating or voting on the same. But I need not dwell on the point at any length since Mr. Rajani Patel, learned counsel for the respondents, has not supported before us this line of approach and has confined his arguments to the meaning and effect of the resolution and construction of the relevant provisions and particularly s. 63(k) of the Act.

On the principal question relating to the power of the Corporation to discuss and adopt the resolution the arguments before us on either side have proceeded on the footing that the following statement in Halsbury's Laws of England correctly analyses the decisions of Courts in England on the subject and accurately summarises the legal position:—

"The powers of a Corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the Legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited." (Halsbury, 3rd edn., Vol. IX, p. 62).

The principal argument pressed before us on behalf of the appellants has been that the act of discussion and adoption of the resolution could be fairly regarded as incidental to the right and power to give instruction which is a matter within the competence of the Corporation under s. 63(k) of the Act. It has been urged by the learned Solicitor General that the question posed before the Court has to be approached from a wider angle. The municipal government with which the Corporation is charged is not to be confined to provision of physical comforts of the citizen and that civic rights and responsibilities and public instruction in a broad sense are as much of concern to the municipality. The argument proceeded that wide meaning should be given to the term "public instruction", and if this were done, there was no reason why the resolution should not be read as relating to an exemplar or parallel instance afforded by the conduct of persons who had displayed great courage and steadfastness and sacrificed their lives in the cause of their country's freedom and upheld the dignity of man. This, it was said, was the substance of the resolution, and if there was any verbiage in it, that could have been altered or amended by the Councillors in the course of the discussion on the same. The greatest stress was laid on the ambit of the words "any measure...likely to promote public instruction", and the argument proceeded that this was a matter to be provided for by the Corporation at its discretion and the Court should not take upon itself the burden of deciding the way in which that decision should be exercised by the Corporation. It was also urged that the writ of *mandamus* should not issue if it appeared to the Court that it was doubtful and reasonably arguable as to whether the discussion and passing of the resolution should be regarded as a measure likely to promote public instruction. In such a case the Corporation would be the right person to decide the point and it must be left to the Mayor or Chairman and ultimately to the Corporation to do so.

The contention pressed before us by learned counsel for the respondent was that powers of a statutory Corporation cannot be merely a matter of inference and must be gathered from the provisions of the statute creating it and that the powers must bear a fair relation to municipal government. Then it was said that even in matters of discretion there must be a reasonable exercise of the same; it must not be arbitrary or capricious. I agree that such is the undoubted legal position. The argument of counsel was that if the resolution had to come within the ambit of the powers of the Corporation in regard to public instruction, the effect of the resolution and the discussion on the same must have some relationship to public instruction. So far I am in agreement with learned counsel. Then he contended that the passing of the resolution did not at all lead to any public instruction. The argument was stressed in the form of an interrogation—Where is education? It was urged that the expressions 'education' and 'instruction' meant that there should be something systematic about the same and not anything casual. The argument proceeded that there was not even casual instruction and that the element of instruction was wholly lacking. It was something extraneous to public instruction and was characterised as public embarrassment.

With regard to the effect of the statute which gives powers to carry out some object or objects such for instance as municipal government which it is assumed will benefit the public at large, one of the most important rules indubitably is that the municipality or corporation must not exercise that power otherwise than for the purposes of the Act. It is its bounden duty to keep within those powers and not to be guided by any fanciful or capricious views of its own. The principle is sound and it is firmly established as emerges from the decisions cited under the statement of the law in Halsbury's Laws of England to which I have already made reference. It also emerges from those decisions that the doctrine of *ultra vires* ought to be reasonably understood and applied, and that whatever may be fairly regarded as incidental to or germane to those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction to be *ultra*

vires. In the present context the doctrine of *ultra vires*, which looms large in modern disputes must, in my judgment, turn upon the proper mode of applying this principle to the ramification of the public body.

In a democratic State there must of necessity be considerable regulation of human affairs by independent bodies such as municipal corporations on whom powers are conferred by statute and the Court would show liberality in upholding the exercise of such powers and would confine its interference to cases where the act complained of clearly and manifestly transcends those powers. The same principle which empowers the Court to issue a writ of *mandamus* and command a public body to whom it is addressed to perform some public or quasi public legal duty which it has refused to perform or to forbear from doing some specific act also requires that the *mandamus* must issue having regard to its purpose which is to supply defects of justice and to the end that justice may be done. The powers of the Court, as has so often been laid down, are indubitably very wide. The Court holds a strict hand in exercising those powers. But somewhat paradoxical though it may perhaps seem that is the very reason for staying its hand in exercising those powers except in cases where it is plainly and clearly incumbent on the public body to do or forbear from doing any specific act. There is more reason for the exercise of the restraint when the act of the public body in respect of which forbearance on its part is sought relates to a matter of discretionary powers. And there is, to my mind, all the more reason for the exercise of this restraint when in addition to forbearance from doing any specific act, aid of the Court is sought for the purpose of a command to such public body to refrain from any discussion whatever leading upto the act, to the legality of which objection is taken. If a public body is to function on democratic principles it must necessarily have the right of discussion to a relatively high degree. Of course, there are corresponding obligations to the exercise of this right of discussion which require respect for law and constitutional procedure. It is in the light of these few observations that I turn to examine the very short but important question which we have to determine in this appeal.

The main point of this appeal turns on the construction of a very few words in s. 63 of the Act. The relevant part of the section so strongly relied on by the learned Solicitor General is:

"The Corporation may, in their discretion, provide from time to time, either wholly or partly, for... any measure... likely to promote public... instruction."

Section 63(k) of the Act, as I read it, confers on the Corporation *inter alia* wide discretionary power to adopt any means or measure wholly or partly in respect of any matter which is likely to promote public instruction. The language used is of amplitude and wide import. The modern conception of public instruction or public education is not limited to the provision of schools or other educational institutions for traditional scholastic attainments nor is it confined to subjects on which knowledge was imparted in such institutions in the past. It comprises subjects and matters as varied as the needs of the individuals that make up a State and permits of freedom in methods and content.

At one time reference to dictionaries was deprecated by Courts for the reason that they were somewhat delusive guides in the construction of any term or expression in a statute. The more recent trend, however, is that in case of words which are to be interpreted in their ordinary sense, the Court can turn to well-known and standard dictionaries to gather their ordinary signification though it will not refer to them as authoritative exponents of the meaning of statutory expressions. 'Instruction' according to Webster means knowledge or discipline acquired by way of education. One of the meanings of 'Education' in that dictionary is the totality of the information and qualities acquired through instruction and training which further the development of an individual physically, mentally and morally.

The range of public instruction or education to-day is as wide as interests of mankind. In a modern democratic country anything which provides civilizing exposure through which the potential capacities of individuals are developed intellectually, culturally, morally or spiritually are within its range; and freedom and liberty are recognized under it as fundamental and inalienable rights. Our knowledge like our culture is a synthesis or at least an aggregation of all these and diverse other elements which throng the educational mould. It seems difficult, therefore, to give, even in the context of municipal law, a definition exclusive or inclusive which will aptly meet every particular act of public instruction that can be done by a public body and not fail in some circumstances; and it seems still more difficult to list measures which can or cannot be regarded as likely to promote public instruction. The method and content of these must necessarily vary and each case would turn on its own facts and other circumstances relevant to the inquiry and current standards of conformity. In deciding whether a particular act of a public body is likely to promote public instruction, within the meaning of that expression in s. 63(k) of the Act, the Court would take care to see that it does not extend to ground foreign to the purposes of the enactment. The Court would also have regard to the elasticity inherent in the language of that section and see that nothing is excluded from the operation of the enactment which on a fair reading of it is within the expansive range of that provision.

I do not, therefore, linger longer with the wide connotation which must be given to the sub-section under consideration in the context of municipal government. Imparting of knowledge or information pertaining to the cause of freedom or liberty (liberty of thought, expression, belief, faith and worship are enshrined in our Constitution) by any appropriate method would, in my judgment, be an act likely to promote public instruction. The resolution, to the substance of which I have made reference at the beginning of my judgment, shows sympathy with and eulogizes fighters for freedom who are said to have sacrificed their lives in the cause of freedom of their motherland. I may observe that the correctness of any of the facts mentioned in the resolution was not challenged by the petitioner in the petition and his sole grievance was that it was beyond the authority and jurisdiction of the Corporation to discuss the resolution. In the petition it has been alleged that the resolution related to international affairs. It was urged before us on behalf of the respondents on this aspect of the matter that foreign policy was within the exclusive purview of the Union Government. I agree that such is the sound constitutional position. It is well established that every statute should be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established principles of international law. A rule of international law may serve as an aid to construction of any ambiguous provision in a statute though, of course, it cannot control the plain meaning of an enactment. The Court, it has been said, may recoil, in case of ambiguity from a construction which would involve a breach of the ascertained and accepted rules of international law. No argument, however, has been advanced before us to show how the resolution, intermeddles with the foreign policy of our country or goes counter to any rule of international law. I need hardly observe that it would not be within the competence of a public body like the Municipal Corporation to discuss, under the guise of public instruction, the foreign policy of our country.

In the course of the arguments at the Bar in answer to a question put by me, learned counsel for the respondents agreed that it would be within the competence of the Corporation to establish an institution such as a school of international relations. One of the arguments urged on behalf of the appellants was that it was within the powers of the Corporation to hold an educational symposium in which international questions could be discussed by dignitaries from various foreign countries. To this illustration no objection could be taken by counsel on behalf of the respondents. The argument based on this illustration

was stressed in the form of an interrogation. If a foreign dignitary who had taken part in such educational discussions at the symposium were to sacrifice his life in the cause of liberty of his country, would it be beyond the competence of the Corporation to pass a resolution of condolence extolling his conduct? The argument was that a resolution of condolence expressing regret at the death of a foreign dignitary in the cause of freedom of his country and in praise of him would in any such or even otherwise (without there having been any such symposium) be within the powers of the Corporation and should be regarded by the Court as an act aimed at imparting knowledge and information and as one which would serve as an exemplar of sacrifice in the cause of liberty. There is to my mind substance in this argument. And the considerations postulated apart, I am of the opinion that the resolution under consideration is an exemplar or parallel instance of sacrifices in the cause of liberty and freedom of one's country made in other parts of the world. The method and content of a measure which is likely to promote public instruction must, as I have already pointed out, necessarily vary in different cases and the Court will have regard to the facts and circumstances of each particular case in deciding whether the resolution in question and discussions on the same can on a fair reading of the resolution be said to be beyond the range or domain of public instruction in the context of municipal law. Moreover, it is a vital consideration that in interpreting s. 63(k) we have to attach due and adequate importance to the word 'likely' in it. Having regard to all these considerations and for reasons I have already discussed I have reached the conclusion that the resolution under consideration and discussion on the same relate to a matter within the ambit of the expression "any measure likely to promote public instruction" and the ambit of the powers of the Corporation.

In the course of his arguments the learned Solicitor General stated that it was also one of the appellant's contentions that the Corporation had the power to discuss anything and everything under the sun and that he did not abandon that contention. He also stated that in the present case it was not necessary for him to go as far as that. I do not, therefore, feel called upon to repel that contention since no argument has been urged before us in support of the claim for such unlimited and unbridled powers. On the other hand it was said on behalf of the respondents that to give a wide interpretation to s. 63(k), such as I am inclined to do, would permit the Corporation to discuss anything under the guise of public instruction and intermeddle in affairs of the State and matters of foreign relations of our country. I am unable to share this apprehension because the act said to be likely to promote public instruction can only be upheld if it is not outside the matrix of municipal government. I need not repeat what I have already said on this aspect of the matter. Of course, I do not intend to be understood to say that the Corporation can under the guise of public instruction discuss matters, such for instance, as affairs of the State or of the Union or the foreign policy of the Union Government. It cannot encroach upon matters of this nature nor matters affecting the political foundations of the country. True, the ambit of s. 63(k) permits of discussion about many matters under the head "likely to promote public instruction". *Nemo constat* there are many matters which would clearly lie outside the scope of that provision on the ground that they do not bear a fair and reasonable relation to municipal government and the purposes of the Act.

There remains for consideration one more argument urged before us on behalf of the appellants. I agree with my Lord the Chief Justice that no *mandamus* would issue in respect of an act on which two views are possible for it cannot then be definitely stated that the Corporation is transgressing the limits of its powers. But as I have already observed I prefer to found myself primarily on the ground that the resolution in question and discussion relating to the same fall within the ambit of the powers conferred on the Corporation by s. 63(k) of the Act. Had I taken a different view on this question of construction I would have yet held that this was not a fit case for issuance of a writ of

mandamus. The Court will not hold a municipal action invalid and *ultra vires* the powers of the municipality if it entertains a reasonable doubt on the point and deems the question as fairly and reasonably arguable on the ground that there is room for holding different opinions on the point. It will decline to issue its mandate unless it is satisfied that it is plain and palpable that the act complained of clearly and manifestly transcends the powers conferred on the Municipality by statute.

It is not necessary for me to discuss some other arguments which were advanced before us and which have been indicated in the judgment delivered by my Lord the Chief Justice. I agree with the views expressed by him on those points. In the result I agree that the order passed by Mr. Justice K. T. Desai should be set aside. I also agree that there should be no order as to costs of this appeal.

Appeal allowed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Kotval.

SADASHEO JAGANNATH BARAPATRE v. HEMAJI HIRAMAN
BAKDE.*

Representation of the People (Second Amendment) Act (XXVII of 1956), Sec. 74(2) —Central Provinces and Berar Municipalities Act (II of 1922), Secs. 12(3) (d), 14(1), 15(3)—General Clauses Act (X of 1897), Sec. 6—Whether s. 74(2) of Act XXVII of 1956 retrospective in its operation—Section 12(3) (d) of Act II of 1922 whether refers only to disqualification imposed in respect of municipal elections or elections to local bodies.

Section 74(2) of the Representation of the People (Second Amendment) Act, 1956, was retrospective in operation and removed even the disqualifications incurred by a person prior to the coming into force of that Act on August 28, 1956.

The provisions of s. 12(3)(d) of the Central Provinces and Berar Municipalities Act, 1922, refer not only to a disqualification imposed in respect of municipal elections or elections to local bodies but also to a disqualification imposed in respect of elections to State Legislative bodies or to Parliament.

THE facts appear in the judgment.

V. M. Kulkarni, for the applicant.

B. B. Mandlikar, for the opponent.

KOTVAL J. This is an application for revision under s. 20A(5) of the Central Provinces and Berar Municipalities Act and it raises a somewhat interesting and important question as to the construction and effect of s. 74(2) of the Representation of the People Act (Act XXVII of 1956).

The question arises in the following circumstances. The applicant Sadasheo Jagannath Barapatre had at one time stood for election to the former Madhya Pradesh Legislative Assembly and had been disqualified under the then existing provisions of s. 143 read with s. 7, cl.(c), of the Representation of the People Act, 1950 (Act XLIII of 1951). The notification (No. 69-453), dated September 1, 1953, issued in this behalf by the Election Commission of India was published in the then Madhya Pradesh Gazette of September 10, 1953. The disqualification mentioned in the notification under the said sections read with r. 114, sub-r. (5), of the Representation of the People Rules, 1951, was from voting at any election for a period of five years from the date

*Decided, March 5, 1958. Civil Revision Application No. 885 of 1956. •

by which the return was required to be lodged. The date of the filing of the return as stated in the notification, was March 24, 1952, and, therefore, the applicant Sadasheo was, upon the notification, disqualified from voting till March 24, 1957.

After the incurring of this disqualification by the applicant, there were held municipal elections for filling up the membership of the Municipal Committee of Khapa in Saoner tahsil. The relevant dates of the election programme in connection with this election were as follows:—

The last date for nomination	.. .. .	28-9-55
The date for scrutiny of the nominations.	.. .. .	6-10-55
The last date for withdrawal	.. .. .	10-10-55

Before the date of withdrawal of nominations, the non-applicant Hemaji apparently withdrew his candidature, and, therefore, the applicant Sadasheo was declared elected. Shortly after the publication of the results, however, the non-applicant Hemaji filed an election petition under s. 20A(2) of the Central Provinces and Berar Municipalities Act, seeking to set aside the election of the applicant. Hemaji alleged that he had never withdrawn his candidature and that the so-called withdrawal application was a forged document. He, therefore, prayed that he had been wrongly declared to have withdrawn and the applicant could not have been declared elected. He also urged that the applicant had incurred a disqualification from voting by virtue of the notification of the Election Commission, referred to above, that, therefore, the applicant was not qualified to stand for election as a member at all and that his election should be declared void and the non-applicant Hemaji should be declared elected.

The election petition came up for hearing before the 1st Civil Judge, Nagpur, and the Civil Judge held that Hemaji's withdrawal application was a forged application and, therefore, his nomination was not validly withdrawn. The Civil Judge also held the other grounds urged in Hemaji's election petition in his favour, and held that the applicant Sadasheo had incurred a disqualification within the meaning of s. 12(3)(d) of the Central Provinces and Berar Municipalities Act, read with s. 15(j) thereof and that, therefore, his election was void and ought to be set aside. The Civil Judge declared Hemaji as having been duly elected as a member for Ward No. 8.

On behalf of Sadasheo, the applicant in revision, the finding as to the withdrawal of the nomination of Hemaji has not been challenged, but what has been challenged before me is the finding given that Sadasheo had incurred a disqualification for voting and so could not stand for election as a member and, therefore, his election was void.

In order to appreciate the contentions raised on behalf of the applicant it is necessary to state the relevant provisions of law. Section 12, sub-ss. (1) and (2), of the Municipalities Act prescribes the qualifications which entitle a person to vote at a municipal election. Sub-section (3) thereof prescribes the disqualifications and particularly sub-s. (3), cl. (d), is relevant in the instant case. Sub-section 3(d) runs as follows:—

"Notwithstanding anything contained in sub-section (1) or sub-section (2), no person shall be entitled to vote at any election if— . . .

(d) he is subject to any disqualification which may be imposed in this behalf by any law for the time being in force."

Section 14(1) requires that a candidate for election in a ward shall be a resident within the limits of the municipality and shall be qualified as a voter on the electoral roll of the ward of such a municipal committee. Therefore, if a candidate standing for election in a ward is not qualified to be a voter, he cannot stand for election.

Section 15(j) runs as follows:—

"No person shall be eligible for election or nomination as a member of a committee, if such person— . . ."

(j) is, under the provisions of any law for the time being in force, ineligible to be a member of any local authority;"

The Civil Judge held that by virtue of the provisions of s. 12(3)(d) read with s. 14(1), and the notification issued under s. 143 of the Representation of the People Act, 1951, the applicant was disqualified because that notification showed that a disqualification had been imposed upon the applicant. The order refers to s. 143 of the Representation of the People Act and the notification issued thereunder and holds that this disqualification was a disqualification imposed by the law for the time being in force within the meaning of s. 12(3)(d) of the Municipalities Act. The applicant was, therefore, disqualified for standing for election.

Mr. V. M. Kulkarni on behalf of the applicant has substantially raised two contentions against the order of the Civil Judge. His first contention has been that s. 12(3)(d) refers to a disqualification imposed "in this behalf" by any law for the time being in force, and according to Mr. Kulkarni "in this behalf" means a disqualification imposed "in behalf of the municipal elections or elections to local bodies", but it cannot mean a disqualification which may be imposed under law relating to elections to State Legislature or Houses of Parliament. Mr. Kulkarni then invited attention to the provisions of s. 74 of the Representation of the People (Second Amendment) Act, 1956 (XXVII of 1956) and he urged that by virtue of s. 74(2) the alleged disqualification against the applicant had ceased consequent upon the repeal of s. 143 of the Representation of the People Act of 1951, and, therefore, the Civil Judge was in error in holding the applicant disqualified on that ground.

To the second contention raised by Mr. Kulkarni Mr. Mandlekar on behalf of the non-applicant has raised a preliminary objection which may now be disposed of. Mr. Mandlekar urges that this contention, founded upon the provisions of s. 74 of Act XXVII of 1956, was available to the applicant before the date of the order of the Civil Judge in the election petition, but it was not raised before the Civil Judge and, therefore, could not be raised in revision. Secondly, Mr. Mandlekar urges that even in revision there is no ground raised upon which such a contention could be founded.

The Act XXVII of 1956 was assented to by the President on June 6, 1956, and it was published in the Official Gazette on June 8, 1956. By virtue of Notification No. S. R. O. 19311A, dated August 25, 1956, and published in the Gazette Extraordinary of the Government of India, part II, section 3, dated August 28, 1956, the Representation of the People (Second Amendment) Act, 1956, came into force on August 28, 1956. The order of the Civil Judge upon the election petition before him was passed on September 22, 1956. Therefore, Mr. Mandlekar is correct when he urges that it was open to the applicant to have raised this question before the Civil Judge. So far as the second preliminary objection of Mr. Mandlekar is concerned, I am unable to accept it because grounds nos. 1-A, 1-B and 2-D raised in the revision petition before me, in my opinion, sufficiently cover the contention raised on behalf of the applicant. These grounds give sufficient notice of the contention to the opposite side that the applicant was contending that s. 143 could not be invoked in the present case.

As to the objection that the ground was not raised before the Civil Judge, it is to be pointed out that the Act came into force only on August 28, 1956, and the order impugned was passed on September 22, 1956, and it is possible that neither party nor even the Court was aware of its provisions or its effect. At any rate, the question raised is a question which affects the very jurisdiction of the Civil Judge to pass the order which he has passed, and in my opinion, is of such fundamental importance that it ought to be allowed to be raised in revision. I am unable to accept the preliminary objections against the second contention raised by Mr. Kulkarni.

The first contention of Mr. Kulkarni may now be disposed of. According to Mr. Kulkarni, the provisions of s. 12(3)(d) of the Municipalities Act refer

only to a disqualification imposed in respect of municipal elections or elections to local bodies only and not elections to State legislative bodies or to Parliament. Mr. Kulkarni stressed the words "in this behalf" occurring in cl. (d), but if sub-s. (3) of s. 12 is read as a whole, it is clear that the words "in this behalf" in cl. (d) refer back to the opening words of sub-s. (3) "no person shall be entitled to vote at any election", and the words used in the opening clause are "any election" and not "any municipal election or election to a local body". Therefore, the subsequent words "in this behalf" can only refer to the words "any election". I am unable to read into the wording of sub-s. (3) the words "any election relating to municipal or local bodies" as Mr. Kulkarni would have it. This contention, therefore, fails.

There is, however, much substance in the second contention raised by Mr. Kulkarni. The provisions of s. 74 of Act XXVII of 1956 are as follows:—

"74. (1) Section 143 of the principal Act shall be omitted.

(2) It is hereby declared that any disqualification for voting incurred by any person under the said section for default in making a return of election expenses shall stand removed."

The effect of s. 74 was first of all to repeal s. 143 of the principal Act (The Representation of the People Act, 1951).

The rules of construction governing the effect to be given to a repealing statute are now well settled. The normal effect of repealing a statute is to obliterate it from the statute book as completely as if it had never been passed; it must be considered as a law that never existed. But to this rule an exception is engrafted by the provisions of s. 6 of the General Clauses Act. Clauses (a), (b) and (c) of s. 6 prescribe that notwithstanding the repeal, the repeal shall not (a) revive anything not in force at the time, or (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. Mr. Mandlekar urged that having regard to the cls. (a) to (c) of s. 6 of the General Clauses Act, the disqualification incurred by the applicant by virtue of the notification of the Election Commission would still continue.

The several clauses of s. 6 of the General Clauses Act are preceded by the words "unless a different intention appears", and Mr. Kulkarni submitted that in s. 74(2) of Act XXVII of 1956 such a different intention has been expressed. The crucial question, therefore, that arises for decision in this revision is what is the exact effect of the provision of s. 74(2) of Act XXVII of 1956. Mr. Mandlekar urged that the words "shall stand removed" in s. 74(2) can only mean shall stand removed from the date the section comes into force i.e. from August 28, 1956, and that the intention of the sub-section was not to remove the disqualification which has been incurred in the past, retrospectively. Mr. Kulkarni, however, pointed to the words "any disqualification" and to the generality of the expression and urged that any disqualification would include disqualification incurred in the past or the future, and, therefore, the effect of sub-s. (2) of s. 74 was retrospective.

In my opinion, the effect of sub-s. (2) is clear that all disqualifications, howsoever incurred, whether in the past or the present, were to be removed by virtue of its provisions. In the first place, it is to be remembered that sub-s. (1) of s. 74 repeals s. 143 of the Representation of the People Act of 1951, and, therefore, if that section was once repealed and sub-s. (2) of s. 74 uses the words "disqualification... under the said section", it must necessarily follow that in order to give it proper effect it must be construed to include past disqualifications. Otherwise, sub-s. (2) and the intent of the Legislature behind it would be rendered nugatory in a large measure, because with s. 143 repealed, there would be very few cases to which sub-s. (2) of s. 74 could apply. No doubt, the disqualification under s. 143 is for a period of five years and there may be cases where that period of five years has only partially elapsed and the disquali-

fication continued, but such cases were very few and it is difficult to believe that the Legislature when it enacted sub-s. (2) of s. 74, intended to apply it only to those cases. On the other hand, it seems to me that the Legislature advisedly used the very general words "any disqualification for voting incurred by any person under the said section" which necessarily includes any disqualification incurred in the past. Nothing turns upon the subsequent words "shall stand removed". They are equally capable of application to past disqualification as also to present or future disqualification.

The intention of the Legislature in removing s. 143 from the statute book was that s. 7(c) of the Representation of the People Act of 1951 was already on the statute book and it disqualified a person from standing for election to the membership of the Legislature of the State or of Parliament if he had not made a return of his election expenses. Therefore, it was unnecessary also to further disqualify such a person from voting, and with that object s. 143 was repealed. That being so, it seems to me that the same reason could as well apply to past disqualifications as also to present and future disqualifications. I hold that s. 74(2) of Act No. XXVII of 1956 was retrospective in operation and removed even the disqualifications incurred by a person prior to the coming into force of that Act on August 28, 1956. Therefore, in the instant case the only ground, upon which the applicant was disqualified and his election was declared void and set aside, was not a ground for disqualification and his election was not liable to be declared void or to be set aside.

The question then is what should be done in the instant case. Now, it is no doubt true that the non-applicant Hemaji was upon the findings of the Civil Judge, which have not been challenged before me, also held entitled to contest the election and could not do so because a forged withdrawal of nomination was filed before the Election Officer. In the result, therefore, both Hemaji and Sadasheo were entitled to contest another election. In view of these facts, I consider that it would be proper to declare under r. 18 of the Madhya Pradesh Election Petition Rules, 1957, that a casual vacancy has been created.

The application for revision is allowed. Mr. Mandlekar urges that he should not be saddled with costs. As the application for revision has been allowed on the ground which the applicant never raised in the trial Court, I think it fair to order that each party shall bear its own costs.

Application allowed.

ORIGINAL CIVIL.

Before Mr. Justice Shelat.

AMIRCHAND NARAYAN v. THE DIVISIONAL OFFICER,
BOMBAY DIVISION, BOMBAY.*

Motor Vehicles Act (IV of 1939), Chapters IV, IV-A; Sec. 68-C, 68-B—Chap. IV-A whether debar State transport undertaking from making application under Chap. IV—Whether such undertaking can make application for stage carriage permit only under Chap. IV-A—Section 68-C whether makes it compulsory for State transport undertaking to prepare scheme.

Chapter IV-A of the Motor Vehicles Act, 1939, does not debar a State transport undertaking from making an application under Chapter IV of the Act for a stage carriage permit.

Section 68-C of the Motor Vehicles Act, 1939, is merely an enabling section, and, therefore, it does not make it compulsory or mandatory for a State transport undertaking to prepare a scheme as envisaged in that section.

*Munna Lal v. H. R. Scott*¹ and *Julius v. Lord Bishop of Oxford*,² referred to.

*Decided, January 7, 1959. O. C. J. 1 [1955] A. I. R. Cal. 451, 458.
Miscellaneous Application No. 522 of 1958. 2 (1880) 5 App. Cas. 214.

THE facts appear in the judgment.

C. K. Jaisinghani, for the petitioner.

B. J. Joshi, for respondents Nos. 1 to 9 and 11.

M. J. Mistree, for respondent No. 10.

SHELAT J. This is a petition under art. 226 of the Constitution to set aside the two orders, copies of which have been annexed as exhs. B and C to the petition.

The petitioner carries on business of plying motor buses on a route known as Malad-Marve route. On May 11, 1955, the Regional Transport Authority granted to the petitioner a substantive permit for a period of three years to ply his buses on Malad-Marve route. The permit expired on May 11, 1958. Prior to its expiry, the petitioner applied in March 1958 for the renewal of the said permit. The application has not yet been disposed of. But the petitioner has been allowed to ply his buses on the said route under a temporary permit.

On May 11, 1955, the Bombay Electric Supply & Transport Undertaking was also granted a permit to ply its buses in Greater Bombay as it then existed. By Act LVIII of 1956 the limits of Greater Bombay were extended adding to its then area 34 villages which were till then situate in the District of Thana. These 34 villages included Malad and Marve. After the limits of Greater Bombay were thus extended, the B.E.S.T. Undertaking applied on April 9, 1957, for a permit to ply its buses in the area added to the limits of Greater Bombay by Act LVIII of 1956. In pursuance of the provisions of the Motor Vehicles Act IV of 1939 the application of the B.E.S.T. was duly published. The petitioner filed his objections. On November 29, 1957, the application of the B.E.S.T. dated April 9, 1957, came on for hearing before the Regional Transport Authority. Amongst other things, it was contended on behalf of the petitioner that the B.E.S.T. Undertaking being a State Transport undertaking within the meaning of s. 68A(b)(iv), the provisions of Chap. IV-A of the Motor Vehicles Act, which came in force in February 1957, were applicable to its said application. It was submitted that in the circumstances the B.E.S.T. Undertaking was not entitled to file any application under Chap. IV by reason of the over-riding effect given to the provisions of Chap. IV-A and the B.E.S.T. Undertaking not having made a scheme as provided for in s. 68-C contained in Chap. IV-A, its application was not maintainable. The Regional Transport Authority upheld this objection and rejected the application of the B.E.S.T. Undertaking.

Aggrieved by this decision the B.E.S.T. Undertaking filed an appeal before the State Transport Authority being Appeal No. 105 of 1958. By an order dated March 26, 1958, the State Transport Authority allowed the appeal holding that it was competent for the B.E.S.T. Undertaking to apply for a permit under Chap. IV. In that view the State Transport Authority set aside the order passed by the Regional Transport Authority. The petitioner lodged an appeal to the Government of Bombay against that order. By their order dated October 29, 1958, the State Government dismissed the appeal of the petitioner. It is against the orders passed by the State Transport Authority and the Government of Bombay that the petitioner has filed the present petition.

It may be observed that the petitioner was not at the material time a holder of a substantive permit. He was holding a temporary permit to ply his buses on the Malad-Marve route pending the decision of his application for the renewal of his permit. He, therefore, presented this petition not in his capacity as a permit-holder or having any vested rights in plying his buses on Malad-Marve route but only as an objector.

Mr. Jaisinghani for the petitioner contended that the application of the B.E.S.T. Undertaking dated April 9, 1957, was not maintainable and therefore should have been rejected. In support of his contention he has taken

me through several provisions of the Motor Vehicles Act. He has, however, mainly relied upon Chap. IV-A which, as I have said, came into force in February 1957, about two months before the B.E.S.T. Undertaking filed its application. There can be no doubt that if the provisions of Chap. IV-A were to be applicable to the said application then that application must be in consonance with that Chapter. It is admitted that by virtue of the definition contained in s. 68A(b)(iv) the B.E.S.T. Undertaking is a State Transport Undertaking. The provisions of Chap. IV-A are called special provisions relating to State Transport Undertakings and, therefore, if the application were to be filed under Chap. IV-A, Mr. Jaisinghani would be right in his contention that unless the provisions of Chap. IV-A are complied with, the application in question would not be maintainable.

In support of his contention as to the non-maintainability of the application in question, Mr. Jaisinghani has laid considerable stress on the provisions of s. 68-C contained in the new Chap. IV-A. It was argued that the application by the B.E.S.T. Undertaking fell under s. 68-C and, therefore, it was incumbent upon the B.E.S.T. Undertaking to have framed a scheme as envisaged in that section. The failure on the part of the B.E.S.T. Undertaking to make such a scheme and to have it approved by the State Government rendered its application incompetent. Mr. Jaisinghani has sought to argue that under s. 68-C a State Transport Undertaking has mainly to perform two things: (1) it has to come to an opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service it is necessary in the public interest that road transport services in general or in particular in relation to any area or route or portion thereof should be run and operated by the State Transport Undertaking; and (2) to prepare a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed and to have such scheme published in the Official Gazette and in such other manner as the State Government may direct. The submission made on behalf of the petitioner was that by reason of s. 68-C the petitioner acquired the right of challenging the scheme so framed by the State Transport Undertaking before the State Government and to persuade the State Government not to sanction such a scheme. The petitioner in that case would also have the right of objecting to the application made by the State Transport Undertaking before the Transport Authority. He contended that if the State Transport Undertaking were to be allowed to make an application without making such a scheme, the effect of that would be to deprive the petitioner of his aforesaid right. Mr. Jaisinghani also contended that Chap. IV-A contained special provisions relating to State Transport Undertaking, and that being so, those special provisions would have over-riding effect over the general provisions contained in Chap. IV. He, therefore, argued that it is only under Chap. IV-A that a State Transport Undertaking like the B.E.S.T. Undertaking can make an application and not under Chap. IV. In these circumstances he submitted that the application of the B.E.S.T. Undertaking was not maintainable and ought to have been rejected.

It would be expedient to dispose of the first contention raised by Mr. Jaisinghani before I turn to the several provisions of the Motor Vehicles Act to which reference was made in the course of the arguments. As aforesaid, Mr. Jaisinghani urged that the B.E.S.T. Undertaking before it made this application had fulfilled its first obligation under s. 68-C and, therefore, it cannot be heard to say that it would not perform its other obligation under s. 68-C, viz. to prepare a scheme as envisaged therein. In other words, the contention was that since the B.E.S.T. Undertaking had formed an opinion that for the purpose of providing an efficient, adequate, economical etc. transport service; it was necessary in the public interest that road transport service in Malad-Marve route should be run and operated by it, it was necessary that it should have fulfilled the other obligation set out in that section, viz. to frame a scheme.

That contention in my view has no substance. It was not the case of the petitioner either before the Regional Transport Authority or before the Appellate Tribunals that the B.E.S.T. Undertaking had come to the opinion as set out in s. 68-C and that, therefore, it must fulfil the other part of that section. That case has also not been in express terms set out in the present petition. The only case that was laid by the petitioner before the Transport Authorities was that because Chap. IV-A contained special provisions relating to a State Transport Undertaking, it was that Chapter which would be applicable to the B.E.S.T. Undertaking and not Chap. IV and that, therefore, the application should have been rejected.

The contention that after February 1957 when Chap. IV-A came into force, the Undertaking can apply only under Chap. IV-A and not under Chap. IV has also, in my view, no substance. Nothing has been pointed out to me either from Chap. IV-A or any other provision of the Motor Vehicles Act which would justify that contention.

In order to appreciate the contentions raised by Mr. Jaisinghani on the provisions of s. 68-C, it would be necessary to view in passing certain sections contained in Chap. IV. Section 42 provides for the necessity of permits and lays down that no owner of a transport vehicle shall use or permit the use of a vehicle in any public place save in accordance with the conditions of permit granted by a Regional or State Transport Authority. Section 43 lays down the power of the State Government to control road transport. Section 45 provides that every application for a permit should be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles. Section 46 deals with an application for stage carriage permit and lays down that an application for such a permit shall contain certain particulars laid down in that section. Section 57 then provides the procedure in applying for and in the grant of such permits. It provides that on receipt of an application for stage carriage permit, the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date, time and place at which the application and any such representations would be considered. The provisions of Chap. IV thus deal with applications to be made for a stage carriage permit, the procedure by which such applications have to be dealt with including the consideration of objections that might be made in connection with such applications. It may be observed that so far as Chap. IV is concerned, there is no distinction between an individual and a State Transport Undertaking making such an application. *Prima facie*, therefore, it would appear that under Chap. IV both an individual and a State Transport Undertaking are entitled to apply for a permit. In order to succeed, Mr. Jaisinghani, therefore, has to establish that on Chap. IV-A being enacted, the State Transport Undertaking, such as the B.E.S.T. Undertaking, has been debarred from making an application under Chap. IV and, consequently, the only Chapter under which such an application can be made would be Chap. IV-A. Broadly speaking, there is nothing either in Chap. IV or Chap. IV-A which expressly provides such a bar.

But then it was urged by Mr. Jaisinghani that s. 68-B expressly provides that the provisions of Chap. IV-A and the rules and orders made thereunder "shall have effect notwithstanding anything inconsistent therewith contained in Chapter IV of this Act or in any other law for the time being in force" and that the fact of the provisions of Chap. IV-A having been thus given an overriding effect over the provisions of Chap. IV would mean that a State Transport Undertaking can make an application only under Chap. IV-A and its right to make an application under Chap. IV has, therefore, been taken away by the special provisions contained in this new Chapter. It is not possible to accept this contention. Reading Chaps. IV and IV-A together and considering the

scheme set out in Chap. IVA, it is easy to see the object of the Legislature in enacting Chap. IV-A. As I have pointed out, an application under Chap. IV could be made either by an individual or by a State Transport Undertaking. Under that Chapter it would be the duty of the Regional Transport Authority to consider such applications together with the objections raised in respect thereof. Under Chap. IV it is in the discretion of the Authority to grant or refuse a permit applied for. Therefore it would be within the power of the Regional Transport Authority either to grant a permit or to refuse an application made by such an undertaking as the B.E.S.T. Undertaking. Chapter IV-A, on the other hand, takes away certain powers of the Regional Transport Authority where an application is made after complying with the provisions of that Chapter. Thus under s. 68-C, if a State Transport Undertaking, such as the B.E.S.T. Undertaking, were to come to the opinion that a road transport service in relation to any area or route or portion thereof should be run and operated by the State Transport Undertaking for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it may prepare a scheme as set out therein. Such a scheme, when framed, has to be published in the Official Gazette or in such other manner as the State Government may prescribe. Under s. 68-D, a person affected by such a scheme may, within thirty days from the date of the publication of the scheme, file objections thereto before the State Government, and the State Government after considering such objections and after hearing the objector and the State Transport Undertaking may approve or modify the scheme. When such a scheme is approved or modified by the State Government, it is again to be published in the Official Gazette and thereupon the scheme becomes final and would be called "an approved scheme." The area or the route to which such a scheme relates to would be called "notified area" or "notified route." Under s. 68-F where, in pursuance of an approved scheme, any State Transport Undertaking applies for a stage carriage permit (and it is somewhat important to note that such an application has to be in the manner specified in Chap. IV) in respect of "a notified area" or "a notified route," the Regional Transport Authority "shall issue" such permit to the State Transport Undertaking, notwithstanding anything to the contrary contained in Chap. IV. It is clear that the words "notwithstanding anything to the contrary contained in Chapter IV" in s. 68-F mean that where a scheme is approved of and notified and an area or a route is likewise notified under s. 68-D, it does not lie in the discretion of the Regional Transport Authority to refuse a permit though it has to be applied under Chap. IV. In other words, the power of the Regional Transport Authority to refuse the permit in such an application though made under Chap. IV has been taken away where the provisions of ss. 68-C and 68-D are applicable. Sub-section (2) of s. 68-F provides that for the purpose of giving effect to the approved scheme in respect of a notified area or route, the Regional Transport Authority may by its order either refuse to entertain an application for the renewal of any other permit or cancel any existing permit or modify the terms of any existing permit so as to render such permit ineffective beyond a specified date, reduce the number of vehicles authorised to be used under such permit or curtail the area or route covered by such permit in so far as such permit relates to the notified area or notified route. Sub-section (3) of s. 68-F then declares that no appeal shall lie against any action taken, or order passed, by the Regional Transport Authority under sub-s. (1) or sub-s. (2) of s. 68-F. Section 68-G provides for the holder of an existing permit to be entitled to compensation as laid down in sub-s. (4) or sub-s. (5) of s. 68-G. It is clear that what Chap. IV-A does is to confer certain additional rights to a State Transport Undertaking which such an Undertaking did not have before the enactment of Chap. IV-A. In my view, the contention that by the enactment of Chap. IV-A the State Transport Undertaking lost its right to make an application under Chap. IV cannot be accepted.

Mr. Jaisinghani, however, contended that the words "State Transport Under-

taking may prepare a scheme" in s. 68-C have a mandatory import and that I should construe the word "may" in the context as having the meaning of "shall". He contended that the power given to the State Transport Undertaking to prepare a scheme was coupled with its duty to come to an opinion that it must run a road transport service for the purpose of providing an efficient, adequate, economical and properly co-ordinated service and that that power being coupled with a duty cast upon the Undertaking, the provision as to the making of a scheme was mandatory and the word "may", therefore, has the effect of the word "shall". In that connection Mr. Jaisinghani relied upon the decision in *Munna Lal v. H. R. Scott*.¹ That decision, however, does not deal with the Motor Vehicles Act and, therefore, cannot be of assistance. The principles of construction where the word "may" can be construed as meaning "shall" are well-settled. "May" does not mean "must"; "may" always means "may". As stated at p. 212 in Craies on Statute Law, 5th edn., "May" is a permissive or enabling expression. There are, no doubt, cases in which for various reasons as soon as a person, who is within the statute entrusted with power, it becomes his duty to exercise such power. This rule is laid down in *Julius v. Lord Bishop of Oxford*² where Lord Cairns stated (p. 222):

"The question has been argued and has been spoken of by some learned Judges in the Courts below as if the words 'It shall be lawful' might have a different meaning, and might be differently interpreted in different statutes, or in different parts of the same statute. I cannot think that this is correct. The words 'It shall be lawful' are not equivocal. They are plain and unambiguous... They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

Lord Blackburn, who was also a party to that decision, thought that all the cases which held that a power of this kind must be used were to be supported on the principle that, although *prima facie* the donee of the power may either exercise it or leave it unused, yet

"...if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf. ...The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right." (pp. 241-244).

It is difficult to understand as to how the words "may prepare a scheme" used in s. 68-C can be said to be coupled with any duty such as is referred to in *Julius v. Lord Bishop of Oxford* and may, therefore, be construed as being of a compulsory or mandatory character. In my view, it is clear that s. 68-C is merely an enabling section. Where, therefore, a State Transport Undertaking wishes to take the benefit of the provisions of s. 68-F, it has the power to prepare a scheme, have that scheme approved by the State Government and have a route or an area notified as prescribed in s. 68-D. Where such a scheme is framed, certain benefits would seem to flow to a State Transport Undertaking such as (1) that the Regional Transport Authority cannot refuse the application so made as provided for under s. 8-F(1), (2) it might acquire in certain circumstances an exclusive right to ply buses in a notified area or route as provided for under s. 68-F(2), and (3) there would be no appeal against an order passed under s. 68-F(2) by the Regional Transport Authority either cancelling or modifying the terms of an existing permit held by a person other than the State Transport Undertaking.

In the view that I take, s. 68-C is merely an enabling section and there is nothing contained in that section which makes it compulsory or mandatory

¹ [1955] A. I. R. Cal. 451, 458.

² (1880) 5 App. Cas. 214.

for a State Transport Undertaking to prepare a scheme. Therefore, the contention that the application made by the B.E.S.T. Undertaking dated April 9, 1957, was not maintainable or was bad in law must fail.

For the reasons aforesaid, the petition must fail. The rule is discharged with costs. The petitioner will pay the costs of respondents Nos. 1 to 9 and 11 in one set, and to respondent No. 10 in another set.

Rule discharged.

Solicitors for respondents: *Crawford Bayley & Co.: Little & Co.*

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice S. T. Desai.

KESHAV GOVIND KULKARNI v. EXTRA ASSISTANT JUDGE,
SOUTH SATARA.*

Bombay District Municipal Act (Bom. III of 1901), Secs. 22, 15(1)(2)(3)—Election petition filed under s. 22—Whether in such petition validity of nomination can be challenged on ground of disqualification under s. 15(1)(ea).

In an election petition filed under s. 22 of the Bombay District Municipal Act, 1901, the petitioner can challenge the validity of the nomination of the opponents on the ground that they were disqualified from standing for election under s. 15(1) of the Act.

*Narayan Maruti v. District Judge, Kolaba*¹ and *V. A. Ransing v. Shankar Vithal*,² referred to.

THE facts appear in the judgment.

K. B. Sukthankar, for the petitioner.

R. A. Jahagirdar, with *B. E. Jahagirdar*, for opponents Nos. 3 and 4.

CHAINANI C. J. The petitioner is a resident of Islampur. An election for two seats in the Islampur Municipality was held on November 5, 1957. The petitioner and opponents Nos. 3 to 6 stood for the election. The nomination papers were filed on October 10, 1957. The petitioner objected to the nomination paper of opponents Nos. 3 and 4, Ganpat Sambhaji and Baburao Yeshwant. He contended that they were disqualified from standing for election under cl. (ea) of s. 15(1) of the Bombay District Municipal Act, which applies to the Islampur Municipality. Under this clause, no person may be a councillor, who fails to pay any arrears of any kind due by him to the Municipality within three months after a special notice in this behalf has been served upon him. The objection raised by the petitioner was overruled by the Returning Officer. Opponents Nos. 5 and 6 withdrew their candidature. At the time of the election there were, therefore, only three candidates. Opponents Nos. 3 and 4 received more votes than the petitioner. They were, therefore, declared to be duly elected. Thereafter, the petitioner filed an application before the District Judge, under s. 22 of the Act, in which he questioned the validity of the election of opponents Nos. 3 and 4. He challenged the election on several grounds, out of which we are concerned, in the present application, with only three. He alleged that these opponents were disqualified from standing for election under cl. (ea) of s. 15(1) of the Act. He also contended that some of the persons, whose names were shown in the voters' list, were disqualified to vote. He also alleged that some of the voters were not residents of Ward III, in which the election was held, and as such their votes should not have been taken into consideration. Opponents Nos. 3 and 4, on the other hand, contended that the decision given by the Returning Officer, accepting their nomination papers,

*Decided, March 17 1959. Special Civil
Application No. 8073 of 1958.

1 (1952) 55 Bom. L.R. 314.
2 (1954) 57 Bom. L.R. 254.

was final and could not be challenged in an election petition filed under s. 22. They also contended that questions about disqualification of particular voters could not be gone into in this petition. The learned Assistant Judge framed several issues, out of which he tried the following as preliminary issues:

I. (a) Whether it is open to the petitioner to challenge the validity of the nomination papers of opponents Nos. 2 and 3 (opponents Nos. 3 and 4 in the present application) in the present proceeding?

II. Whether it is open to the petitioner to contend that opponents Nos. 2 and 3 were disqualified under section 15(1) para. (ea) of the Bombay District Municipal Act to contest the election?

IV. Whether the petitioner can challenge that voters as mentioned in Schedule A were below the age of 21 on 1-3-1957, and, if so, whether he proves that they were below the age of 21 years on the said date and whether the votes recorded by them can be held as invalid votes?

V. Whether the petitioner can challenge that voters as mentioned in Schedule B were not entitled to be registered as voters in the voters' list for reasons mentioned in para. 3(e) of the petition and, if yes, whether he proves that they were not entitled to be registered as voters?

VI. Whether it is open to the petitioner to contend that persons whose names are given in Schedule C were not entitled to vote in the constituency in question, and, if yes, whether he proves the same?

The learned Assistant Judge answered all these issues in the negative. Against the findings recorded by him, the present Special Civil Application is preferred.

The first point, which has been urged by Mr. Sukthankar, who appears on behalf of the petitioner, is that the learned Assistant Judge was wrong in holding that the validity of the nomination papers, filed by opponents Nos. 3 and 4, cannot be challenged in the election petition filed under s. 22 of the Act. Sub-section (1) of s. 22 provides:

"If the validity of any election of a councillor is brought in question by any person qualified either to be elected or to vote at the election to which such question refers, such person may, at any time within ten days after the date of the declaration of the result of the election, apply to the District Judge of the district within which the election has been or should have been held."

Sub-section (2) of this section provides for an inquiry being held by a District Judge. This section, therefore, empowers a District Judge to investigate the question whether a councillor has been duly elected. One of the grounds, on which the election of a councillor may be challenged, is that he was not qualified to stand for election. Consequently in the absence of any other provision, which debar him from doing so, the District Judge would be competent to inquire into this question also under s. 22 of the Act. It has, however, been urged by Mr. Jahagirdar on behalf of the opponents that the District Judge cannot decide this question, by reason of the provisions of sub-s. (3) of s. 15, under which, according to him, the only competent authority to decide the question is the Collector. Sub-section (1) of this section begins with the words "No person may be a councillor." Thereafter, follow cls. (a) to (g), specifying the disqualifications, a person subject to any of which may not be a councillor. The words "No person may be a councillor" mean that no person may become a councillor, or, in other words, that he cannot even stand for election, if he is subject to any of the disqualifications mentioned in sub-s. (1). These words, therefore, refer to the period before the person has become a councillor. Mr. Jahagirdar has laid stress on the word "councillor" and has urged that this sub-section applies after a person has become a councillor. This argument ignores the words "may be" in sub-s. (1). The only meaning, which can reasonably be given to the words "no person may be a councillor", is that no person may become or can become a councillor. This sub-section, therefore, specifies the disqualifications, which debar a person from even standing for election as a councillor. That this sub-section applies, before a person has been elected

or appointed as a councillor, is made clear by sub-s. (2) of s. 15. This sub-section is in the following terms:

"If any councillor during the term for which he has been elected or appointed—

(a) becomes disqualified under sub-section (1), or

(b) ...to (e) ...

he shall, subject to the provisions of sub-section (3), be disabled from continuing to be a councillor and his office shall become vacant."

This sub-section, therefore, comes into play only after a person has become a councillor. If, therefore, a person becomes disqualified under sub-s. (1) after he has been elected, then under this sub-section he is disabled from continuing to be a councillor and his office becomes vacant. The words "continuing to be a councillor" also emphasise that this sub-section deals with disqualifications incurred after a person has been elected or appointed as a councillor. If, therefore, a person becomes subject to a disqualification specified in sub-s. (1) before the election is held or before the appointment is made, he will not be eligible to stand for election or for being appointed as a councillor. On the other hand, if he incurs the disqualification after he has been elected or appointed, then under sub-s. (2) he will cease to be a councillor. Then comes sub-s. (3), the relevant part of which is in the following terms:

"In every case, the authority competent to decide whether a vacancy has occurred under this section shall be the Collector... Until the Collector decides that the vacancy has arisen, the councillor shall not be disabled under sub-section (2) from continuing to be a councillor."

Sub-section (2) alone provides for an office becoming vacant when a councillor, during the term for which he has been elected or appointed, becomes disqualified. There is no similar provision in sub-s. (1) that a vacancy shall arise, if a person incurs a disqualification referred to in this sub-section. This sub-section deals with disqualifications arising before a person has become a councillor. Consequently, sub-s. (3) becomes applicable only when a vacancy has occurred under sub-s. (2), that is, when a councillor becomes subject to a disqualification after he has been elected. This inference is also suggested by the provision in sub-s. (3) that until the Collector decides that the vacancy has arisen, the councillor shall not be disabled under sub-s. (2) from continuing to be a councillor. A person can continue to be a councillor only after he has become a councillor. It follows that sub-s. (3) applies only when a councillor incurs a disqualification during the term of his office. In such cases, the only authority competent to decide whether a vacancy has occurred is the Collector. Where, however, a candidate was not qualified to stand for election, the question of a vacancy occurring in the office of the councillor, by reason of his disqualification, does not arise. The Collector is not empowered to decide, after the election is over, whether a candidate was or was not qualified to stand for election. This question can, therefore, be raised and decided in an election petition filed under s. 22.

In our opinion, therefore, the petitioner can challenge the validity of the nomination of opponents Nos. 3 and 4 in the election petition filed by him. It will be open to him to contend that these opponents were disqualified from standing for election under sub-s. (1) of s. 15.

Mr. Jahagirdar has placed strong reliance on the decision of this Court in *Narayan Maruti v. District Judge, Kolaba*¹. In that case it was held that s. 15 of the Bombay District Municipal Act deals with the disqualification which attaches to a councillor on his being elected and that no jurisdiction is conferred upon the District Judge to decide whether any disqualification attaches to the councillor under s. 15 of the Act. The provisions of s. 15 were different at that time when this case was decided from what they are today. At that time the section contained two other sub-ss. (1A) and (1B). Sub-section (1A) was in the following terms:

"If any person is elected or nominated as a councillor in contravention of the pro-

visions of sub-section (1) his seat shall, subject to the provisions of sub-section (1B), be deemed to be vacant."

The material part of sub-s. (1B) was as follows:

"In every case, the authority competent to decide whether a vacancy has occurred under sub-section (1A) shall be the Collector... Until the Collector decides that the vacancy has arisen, the seat of the person elected or nominated shall not, under sub-section (1A), be deemed to have become vacant."

These provisions, therefore, specifically empowered the Collector to decide whether a person had been elected or nominated as a councillor, in contravention of the provisions of sub-s. (1). It was, therefore, held in *Narayan Maruti's* case that the only authority, which could decide whether a person was disqualified from standing for election, was the Collector. Since this decision was given, the law has been changed. Sub-sections (1A) and (1B) have been omitted from s. 15. Under sub-s. (3), as it now stands, the Collector is only empowered to decide whether a vacancy has arisen under sub-s. (2), that is, whether a councillor has, after his election and during the term of his office, incurred any disqualification.

Narayan Maruti's case has been distinguished in *V. A. Ransing v. Shankar Vitthal*.² In that case, the question was whether in an election petition filed under s. 6 of the Bombay Primary Education Act, sub-ss. (1) and (2) of which contained provisions similar to those contained in sub-ss. (1) and (2) of s. 22 of the District Municipal Act, the District Judge had jurisdiction to decide the case of a person being elected without the necessary qualification or without being eligible to be elected, and it was held that he possessed this jurisdiction. The view taken in this case was, therefore, the same as we are taking in the present case.

We accordingly hold that the answers given by the learned Assistant Judge to issue I(a) and the first part of issue II, were erroneous. Both these issues should be answered in the affirmative.

The second point, which Mr. Sukthankar has urged, is that the electoral roll, on the basis of which the election was held, is invalid, because it shows some persons as voters who are under 21 years of age or who do not reside in Ward III, in which the election was held. Sub-section (1) of s. 12 of the Act provides:

"The electoral roll of the Bombay Legislative Assembly for the time being in force, on such day as the State Government may by general or special order notify in this behalf, for such part of the Constituency of the Assembly as is included in a ward of a municipal district shall, for the purpose of this Act, be deemed to be the list of voters for such ward."

Under this provision, therefore, the relevant portion of the electoral roll of the Bombay Legislative Assembly is deemed to be a list of the voters of the particular ward. Sub-section (1) of s. 13 states:

"Every person whose name is in the list of voters referred to in section 12 shall, unless disqualified under this Act or under any other law for the time being in force, be qualified to vote, and every person whose name is not in such list shall not be qualified to vote, at the election of a member for the ward to which such list pertains."

Every person, whose name is shown in the relevant portion of the electoral roll of the Bombay Legislative Assembly, is, therefore, entitled to vote at the election of a member for the ward to which such list pertains, unless he is disqualified under the Act or under any other law for the time being in force to vote. The only other provisions in the Act, which disqualify a person from voting, are those contained in ss. 21 and 21A, which are in the following terms:

"21. No person shall vote at any municipal election under this Act, if he—

(a) is of unsound mind and stands so declared by a competent court, or

(b) has voluntarily acquired the citizenship of foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State.

21A. (1) No person shall vote at a general election in more than one ward and if a person votes in more than one ward, his vote in all such wards shall be void.

(2) No person shall at any election vote in the same ward more than once, notwithstanding that his name may have been entered in the list of voters for that ward more than once, and if he does so vote, all his votes in that ward shall be void."

If, therefore, a person, whose name is shown in the list of voters referred to in s. 12, is not subject to the disqualification mentioned in s. 21, he is qualified to vote, subject, of course, to the provisions contained in s. 21A that he cannot vote in more than one ward and that he cannot vote more than once. The Act contains no provision that a person shall not be entitled to vote, if he is under 21 years of age or if he does not reside in the ward in which the election is to be held. Consequently, it is not open to the petitioner to object to the electoral roll on the ground that it contained the names of some voters, who are under 21 years of age or who do not reside in ward III. The proper time for the petitioner to raise these objections was when the electoral roll of the Legislative Assembly was being prepared. But he cannot raise them in the election petition filed by him.

Mr. Sukthankar has relied on the decision of the Supreme Court in *Chief Commissioner, Ajmer v. Radhey Shyam Dani*.³ Sub-section (2) of s. 30 of the Ajmer-Merwara Municipalities Regulation, 1925, as amended provided that

"Every person who would be entitled under the Representation of the People Act, 1950 (XLIII of 1950) to be registered in the electoral roll for a Parliamentary Constituency if that Constituency had been co-extensive with the Municipality, and whose name is registered in the electoral roll for the Parliamentary Constituency comprising the Municipality shall be entitled to be enrolled as an elector of the Municipality,"

and s. 43 enabled the Chief Commissioner to make rules consistent with the Regulation for the preparation and revision of electoral rolls and the adjudication of claims to be enrolled and objections to enrolment. In exercise of this power the appellant framed rules, which, *inter alia*, provided that the electoral roll for the particular municipality shall be the same as the final printed roll for the Parliamentary Constituency representing the area covered by the Municipality. He notified an electoral programme and also authenticated and published an electoral roll on August 8, 1955. The respondent, whose father's name was recited wrongly in the electoral roll, applied for the rectification of the mistake in the Parliamentary Electoral Roll, on August 10, 1955, but it was rejected on the ground that the roll of the municipal elections had been finally published on August 8, 1955, and, therefore, no correction could be made. The respondent challenged the validity of the notification and the electoral roll. It was held that under s. 30(2) of the Ajmer-Merwara Municipalities Regulation, 1925, the electoral roll for the Parliamentary Constituency was only treated as the basis for the electoral roll of the municipality and that the rules in so far as they made no provision for the revision of the electoral roll, for the adjudication of claims to be included therein or for entertaining objections to such inclusion, were defective and, therefore, the electoral roll of the Ajmer Municipality which was authenticated and published by the appellant on August 8, 1955, was not in conformity with the provisions of s. 30(2) and the relevant provisions of the Regulation and could not form the basis of any valid elections to be held to the Ajmer Municipal Committee. It will be noticed that in that case s. 43 empowered the Commissioner to make rules consistent with the Regulation for the preparation and revision of electoral rolls and the adjudication of claims to be enrolled and objections to enrolment. This case is, therefore, clearly distinguishable. Section 12 of the Bombay District Municipal Act provides that the electoral roll of the Bombay Legislative Assembly for the time being in force, for such part of the Constituency of the Assembly as is included in a ward of a municipal district shall, for the purpose of this Act, be deemed to be the list of voters for such ward. The Act, therefore, makes the relevant part of the electoral roll of the Bombay

Legislative Assembly, the electoral roll of the wards of the municipal district. It does not contain any provisions, such as were contained in s. 43 of the Ajmer-Merwara Municipalities Regulation, 1925, for making rules for the preparation and revision of electoral rolls. Consequently, the petitioner is not entitled to object to this electoral roll, on the ground that it was not revised before the elections to the municipality were held.

The answers given by the learned Assistant Judge to issues IV, V and VI were, therefore, correct.

The learned Assistant Judge should now proceed with the petition in the light of what we have stated in this judgment. There will be no order as to costs of this petition.

Order accordingly.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Nalk.

**DHANANJAYA KESHAO BHENDE v. BOMBAY REVENUE TRIBUNAL
AT NAGPUR.***

Barar Regulation of Agricultural Leases Act (XXIV of 1951), Secs. 9(6), 9(1), 9(3), 8(1)(g)† and Rule 9 framed under Act—Landholder taking over land from tenant for personal cultivation—Landholder selling land before lapse of two years from date of re-entry—Whether condition laid down in s. 9(6) fulfilled—Expression “two years” in r. 9 whether means two cultivating seasons—Failure of landlord to cultivate land for even short period during prescribed period whether would entail forfeiture—Whether under s. 9(6) tenant can claim as compensation income of land or value of crops for two years.

The period of two years fixed in r. 9 of the Rules made under the Barar Regulation of Agricultural Leases Act, 1951, is the minimum period during which the landholder is expected to cultivate the land personally after taking over the land from the tenant on the ground of personal cultivation. The rule does not in terms prohibit the transfer or sale of the land before the lapse of two years from the date of re-entry, but the fact that lands have been sold is conclusive that after the sale the landlord would be incapable of cultivating the land personally for himself un-

*Decided, March 26, 1959. Special Civil Application No. 338 of 1958.

†The relevant sections run thus:

9. (1) Notwithstanding anything contained in section 8 the landholder may terminate the lease of a protected lessee by giving him notice in writing delivered not less than three months before the commencement of the next agricultural year stating therein the reasons for such termination and the description of the area in respect of which it is proposed to terminate the lease, if the landholder requires the land for cultivating the land personally...

(3) If, upon receipt of a notice under sub-section (1), the protected lessee considers—

(a) that the notice is not bona fide, or
(b) that he should be permitted to give up some other land of the same landholder in lieu of the land mentioned in the notice; he may apply to the Revenue Officer within thirty days from the date of receipt of the notice either for a declaration that the notice shall have no effect or for permission to give up some other land of the same landholder in lieu of the land mentioned in the notice as

the case may be...

(6) If on re-entering upon any land after termination of the lease of a protected lessee in accordance with this section, a landholder fails at any time during such period as may be prescribed to utilise the land for the purpose for which the lease was terminated, the dispossessed lessee may apply to the Revenue Officer to put him in possession of the land from the commencement of the agricultural year next following; and the Revenue Officer shall, after hearing the landholder and making such enquiry as he deems fit, put the lessee in possession of the land if he is satisfied of the failure and also award him such sum by way of compensation as the Revenue Officer may consider sufficient.

8. (1) Notwithstanding any agreement, usage, decree or order of a court of law, the lease of any land held by a protected lessee shall not be terminated except under orders of a Revenue Officer made on any of the following grounds, namely:—...

(g) he has been served with a notice by the landholder as provided in section 9.

less there is a stipulation in the sale deed that the landlord was to relinquish the possession at some later date mentioned in the deed itself. Therefore, *prima facie*, the fact of sale before the lapse of two years from the date of re-entry would show that the landholder was putting himself beyond the possibility of fulfilling the requirement of personal cultivation for the prescribed period under s. 9(6) of the Berar Regulation of Agricultural Leases Act, 1951.

In r. 9 the expression "two years" cannot be construed to mean two cultivating seasons. The two years are to be computed from the specific and definite date of the re-entry by the landholder.

The words, in s. 9(6) of the Act, "a landholder fails at any time during such period as may be prescribed" indicate that the landholder is expected to cultivate the land during the entire period so prescribed; failure of the landholder to cultivate the land even for a short period will entail the consequence of forfeiture.

When an order under s. 9(6) of the Act is passed in favour of the tenant for restoration of the possession the right of the tenant to claim compensation flows from the order and begins from the next agricultural year. Therefore, the word "compensation" must be construed in a restricted sense, namely, that the tenant would be entitled to compensation for the damage caused by injury to the field but there would be no legal basis for the claim either for the income of the land or for the value of the crops for two years.

THE facts appear in the judgment.

Dr. D. W. Kathalay, for the petitioners.

D. B. Padhye, for respondent No. 2.

NAIK J. This is an application under art. 227 of the Constitution of India for setting aside the order passed by the Revenue Tribunal directing the restoration of possession of survey No. 26 to the tenant.

The material facts can be briefly stated as follows:—

Survey No. 26, measuring 23 acres and 37 gunthas, and situated at mouza Pimpri, originally belonged to one Keshao Shamrao Bhende. This land was given on lease to Baliram Panduji Jadhao as a tenant. Keshao served a notice on November 23, 1952, terminating the tenancy of Baliram on the ground that he required the land for his personal cultivation. Baliram did not make any application under s. 9(3) of the Berar Regulation of Agricultural Leases Act, challenging that the notice was not *bona fide* or even making a prayer under cl. (b) of sub-s. (3) that some other land may be given to him in lieu of the land mentioned in the notice. It appears that Baliram handed over possession of the land to Keshao by the middle of April 1953. It further appears that prior to the surrender of possession Keshao had made an application to the Sub-Divisional Officer on February 13, 1953, under s. 8(1)(g) of the said Act for an order for the termination of Baliram's tenancy. The Sub-Divisional Officer passed an order on June 16, 1954, terminating the tenancy to the extent of 22 acres and 26 gunthas out of the total area of 23 acres and 37 gunthas. Keshao cultivated the land personally for the years 1953-54 and 1954-55. On January 16, 1955, he passed two sale deeds, one in favour of Bhaurao (petitioner No. 2) in regard to 8 acres, and another in favour of petitioners Nos. 3 to 7 in regard to 13 acres and 7 gunthas. Thereafter on May 3, 1956, Baliram made an application under s. 9(6) of the Act requesting for the restoration of the land to him on the ground that the landholder failed to cultivate the land personally for two years as required under the rules framed under the said Act.

The Sub-Divisional Officer came to the conclusion that the landholder had not cultivated the land for the requisite period of two years and, therefore, was liable to be vacated from the land. Consequently he passed an order restoring the possession to the tenant Baliram. Keshao, the landholder, then went up in appeal to the Deputy Commissioner. The Additional Deputy Commissioner held that the landholder had cultivated the land for two years i.e. for the years 1953-54

and 1954-55 before he entered into the transaction of sale. Consequently he passed an order dismissing the original application made by Baliram. Baliram then went to the Revenue Tribunal. The Revenue Tribunal took the view that in view of the provisions of s. 8(1)(g) there could not be a valid termination of the tenancy and, therefore, although the landholder might have secured possession prior to the valid termination of the lease and although he may have cultivated the land for that year, still that would not be a cultivation after the termination of the lease and, therefore, that cultivation would not be available to the landholder. Consequently, it held that there was a contravention of the provisions of s. 9(6) of the Act read with r. No. 9. He, therefore, directed that the land should be restored to the possession of the tenant.

At this stage it will be convenient to mention that in the original application the tenant had not only asked for the restoration of the possession of the land but had also claimed compensation for the loss sustained by him by reason of the fact that he could not cultivate the land for two years. He claimed a sum of Rs. 2,000 on the above account. He also claimed another sum of Rs. 400 for bringing the land under proper cultivation by removing the weeds etc.

So far as the prayer for compensation is concerned, the Revenue Tribunal sent the case back to the Sub-Divisional Officer for settling the amount of compensation. The order of the Revenue Tribunal was passed on March 13, 1958. Keshao, the original landholder died on May 29, 1958. Dhananjaya, the son of the deceased Keshao, filed the present application on August 25, 1958. He stated that he was not aware of the decision of the Revenue Tribunal and that he came to know about the same in June 1958. He has, therefore, prayed for the condonation of the delay in filing the said application.

Mr. Kathalay, the learned counsel for the petitioners, contended that the Revenue Tribunal was wrong in holding that for a valid termination of the lease it is necessary to have the order of the Sub-Divisional Officer. He argued that this question had been concluded by the decision of the Bombay High Court, Nagpur Bench, in *Tarabai v. B'bay Rev. Tribunal*.¹ He also pointed out that the finding of the Additional Deputy Commissioner which was upheld by the Revenue Tribunal was to the effect that as a matter of fact the landholder started cultivating the land with effect from April 1953. That being the case, he argued that the landholder must be deemed to have cultivated the land for two years 1953-54 and 1954-55. He further contended that although the land was sold in the middle of January 1955 no agricultural operations remained to be done and that, therefore, the period of two years must be deemed to have been completed before the date of sales.

It is clear that the view taken by the Revenue Tribunal viz. that even for the termination of the lease under s. 9(1) it is necessary that there should be an order of the Revenue Officer under s. 8(1)(g) is wrong. This question was considered by this High Court and it was held that the right of the landholder to terminate the lease under s. 9(1) was in no way fettered by the provisions of s. 8(1)(g). Emphasis was laid on the opening words of s. 9 to the effect "Notwithstanding anything contained in section 8". In view of the above decision we must hold that the tenancy was rightly determined as soon as the landholder gave a notice under s. 9(1), particularly so because the tenant did not make any application under sub-s. (3) of s. 9.

We are also bound by the finding of fact recorded in the Revenue proceedings, namely, that the landholder secured the possession of the land sometime in April 1953. Reliance was placed on the crop statements for the years 1953-54 and 1954-55 which shows that Keshao raised crops for both the years 1953-54 and 1954-55. The Additional Deputy Commissioner based his finding that Keshao cultivated the land for both the years mainly on the entries made in the crop statements referred to above. The Additional Deputy Commis-

sioner seems to have assumed that Keshao reaped the harvest for the year 1954-55. It must, however, be pointed out that no evidence was led to show that as a matter of fact the crops were really harvested by Keshao. The crop statement does not give any indication as to whether Keshao actually harvested the crops. At best it shows that he raised the crops for that year. Admittedly he sold the land in the middle of January 1955, and Mr. Kathalay argued that crops like *juar*, *bajra* etc. are harvested before the middle of January. It is significant that copies of the sale-deeds have not been produced. We do not know what provisions were made in the sale-deed and whether possession was delivered to the vendee with or without standing crops. Even assuming that the crops were harvested by Keshao for the year 1954-55 before he entered into the sale transaction, still the question to be considered is whether that fulfils the conditions laid down in sub-s. (6) of s. 9 of the Act. The relevant part of sub-s. (6) runs thus:—

"If on re-entering upon any land after termination of the lease of a protected lessee in accordance with this section, a landholder fails at any time during such period as may be prescribed to utilise the land for the purpose for which the lease was terminated, the dispossessed lessee may apply to the Revenue Officer to put him in possession of the land from the commencement of the agricultural year next following;..."

The purpose for which the lease is terminated is mentioned in sub-s. (1) and it is that the landlord required the land for cultivating the same personally. The period has been prescribed in r. 9 as follows:—

"The period for the purpose of sub-section (6) of section 9 shall be two years from the date of re-entry by the landholder."

Mr. Kathalay contended that the expression "two years" should be construed to mean two cultivating seasons. We are not prepared to accept this argument in view of the following considerations.

The first point to be noted is that the date of the commencement of the period of two years has been clearly stated in the rule itself and that is the date of the re-entry by the landholder. Two years are to be computed from this specific and definite date. The re-entry may take place at any time of the season. It may be at the beginning of the season, it may be at the middle, or even it may be at the end of the season. If the rule of two seasons is applied, then in some cases the period of two years would be shortened to less than two years, whereas in others it may be lengthened for more than two years. If the period of commencement is indefinite, then the date of termination also must be equally indefinite. Secondly, if Mr. Kathalay's argument were accepted, then there would be different periods for different kinds of lands, depending on the nature of the crops raised and the period required for the harvesting of the crops. In respect of some lands the crops will be harvested in December, whereas, particularly in respect of lands in which the second crops are grown the period of harvesting would be as late as February or March of the next year. It is impossible to believe that different periods would be contemplated by the Legislature for the same purpose. Thirdly, the words in sub-s. (6) "a landholder fails at any time during such period as may be prescribed" indicate that the landholder is expected to cultivate the land during the entire period so prescribed. The words "at any time during such period" are significant and suggest that the failure of the landholder to cultivate the land even for a short period will entail the consequence of forfeiture. Fourthly, the period of two years that has been fixed in r. 9 is the minimum period during which the landholder is expected to cultivate the land personally after taking over the land from the tenant on the pretext of personal cultivation. In other words, that period seems to have been prescribed to test the *bona fides* of the landholder. It is true that the rule does not in terms prohibit the transfer or sale of the land before the lapse of two years from the date of re-entry, but the fact that lands have been sold is conclusive that at any rate after the sale the landholder would be incapable of cultivating the land personally for himself unless there is a stipulation in the sale-deed that the land-

lord was to relinquish the possession at some later date mentioned in the deed itself. *Prima facie*, therefore, the fact of sale shows that the landholder would be putting himself beyond the possibility of fulfilling the requirement of personal cultivation. In that view of the case it is clear that the conditions laid down in sub-s. (6) of s. 9 have not been fulfilled by the landholder. We must, therefore, hold that he has not utilized the land for the purpose for which he obtained possession thereof, i.e. personal cultivation, for the prescribed period.

Mr. Kathalay suggested that the case should be sent back to the Sub-Divisional Officer for an enquiry as to when the crops were harvested in the year 1954-55 and as to what has been the practice or custom prevailing in that locality regarding the harvesting of the type of crops mentioned in the crop statement. In the view that we have taken any enquiry into the above question would be wholly unnecessary and futile.

Mr. Kathalay pointed out that according to the Revenue Tribunal the period of two years was not completed because the landholder could not be deemed to be in lawful cultivation for the year 1953-54 and his cultivation would be lawful only from June 1954 when there was an order for the termination of the lease. He complained that this Court would be upholding the decision of the Tribunal on the ground that the period of 1954-55 was not completed which is an entirely new and different ground. There is no substance in that grievance. It is open to us to uphold the final conclusion of the Tribunal altogether on new and different grounds which emerge from the record, and we do not require any fresh material.

The last question to be considered is what should be the basis on which the compensation is to be awarded to the tenant after he is restored to possession under sub-s. (6). Under that sub-section the dispossessed tenant is entitled to claim compensation, but the sub-section does not specify as to what kind of compensation the tenant is entitled to and for what purpose. Apparently the tenant had claimed compensation for the value of the crops which he would have raised had he continued to be in possession for the years in question. In other words, according to the tenant he would be entitled to be restituted, that is to say, not only he is entitled to be put in possession of the land but also to be compensated for the loss of the profits that he has sustained due to his remaining out of possession. It is however clear from the wording of sub-s (6) that the tenant would be entitled to be restored to possession after the date of the order passed in that behalf and from the commencement of the next agricultural year. That means that the right of the tenant to claim compensation flows from the order passed in that respect and begins from the next agricultural year. The claim for restitution is founded on the basis that a lawful claimant who is entitled to immediate possession has been kept out of the same. That position does not obtain when an order under sub-s. (6) has been passed in favour of the tenant for restoration of the possession. Therefore, the word "compensation" will have to be construed in a restricted sense, namely, that the tenant would be entitled to compensation for the damage caused by injury to the field. That means that the tenant's claim for compensation for taking out the weeds would be justifiable and can be allowed to the extent of its proof. There will, however, be no legal basis for the claim either for the income of the land or for the value of the crops for two years.

The result is that the application substantially fails. Subject to what we have said regarding compensation the rule is discharged. No order as to costs.

Order accordingly.

CRIMINAL APPELLATE.

Bfore Mr. Justice Gokhale and Mr. Justice V. S. Desai.

RATANCHAND RADHAKISONDAS v. THE STATE.*

Criminal Procedure Code (Act V of 1898); Sec. 154—Indian Penal Code (Act XLV of 1860), Sec. 30—Bombay Sales Tax Act (Bom. III of 1953), Secs. 9 proviso (1), 12—Bombay Sales Tax (Registration, Licensing and Authorisation) Rules, 1954, Rule 13(2)—First information report in cognizable case reduced to writing but not signed by person giving it—Whether such information inadmissible in evidence—"K" Form of Bombay Sales Tax Office whether "valuable security" within s. 30, Indian Penal Code—Whether fact that purchasing dealer giving "K" Form not a licensed dealer makes Form not a "valuable security."

Under s. 154 of the Criminal Procedure Code, 1898, the condition as to a first information report being reduced to writing and that it shall be signed by the person giving it, is a mere matter of procedure and failure to observe the procedure as to signature will not make the information given, if it is reduced to writing, inadmissible.

*Emperor v. Chittar Singh*¹ and *Emperor v. Nazir Ahmed*,² referred to.

The "K" Form of the Bombay Sales Tax Office which contains a declaration that the goods purchased are intended for resale, creates the legal right in the purchasing dealer to get exemption from payment of general sales tax as provided under cl. (1) of the proviso to s. 9 of the Bombay Sales Tax Act, 1953, and is a valuable security within the definition of that term under s. 30 of the Indian Penal Code, 1860. The mere fact that the purchasing dealer has no licence under s. 12 of the Act will not make the "K" Form furnished by him not a valuable security under s. 30 of the Code.

*Superintendent and Remembrancer of Legal Affairs, Bengal v. Daultaram Mudi*³ and *Durgadas Tulstram v. State*,⁴ referred to.

THE facts appear in the judgment.

M. J. Mirchandani, with *R. Jethanalani* and *B. K. Hirani*, for the appellant-accused.

V. T. Gambhirwala, Assistant Government Pleader, for the State.

GOKHALE J. Criminal Appeal No. 1491 of 1958 is an appeal by one Ratanchand Radhakisondas against his convictions under s. 471 read with s. 467 and under s. 420 of the Indian Penal Code. The charge against the accused was that on November 12, 1956, at Bombay he fraudulently or dishonestly used as genuine a certain document purporting to be a valuable security, viz., "K" Form of Bombay Sales Tax Office, which he knew or had reason to believe at the time he used it to be a forged document and thereby committed an offence punishable under s. 471 read with s. 467 of the Indian Penal Code. The second charge against him was that at the same time and place and in the course of the same transaction, he cheated one Ratilal Wadilal, partner of Shantilal and Company, by dishonestly inducing him to deliver poplin cloth valued at Rs. 884-1-0 to the accused without payment of General Sales Tax and which cloth was the property of the said Ratilal Wadilal and thus committed an offence punishable under s. 420 of the Indian Penal Code. The allegations against the appellant were that on November 12, 1956, he approached Ratilal Wadilal, a partner in the firm of Shantilal & Co., with a representation that he represented a firm named Manmal Kundanmal either as a proprietor or as a representative, stating that he was authorized to make purchases of goods on behalf of Manmal Kundanmal free of general sales tax, as he was a licensed

*Decided, March 30/31, 1959. Criminal Appeal No. 1491 of 1958 (with Criminal Appeal No. 124 of 1958), against the order of convictions and sentences passed by R. D. Nadkarni, Additional Sessions Judge, Greater

Bombay, in Case No. 2, III Sessions 1958.

1 (1925) I.L.R. 47 All. 280.

2 (1945) 47 Bom. L.R. 245, P.C.

3 (1932) I.L.R. 59 Cal. 1233.

4 (1954) 56 Bom. L.R. 188.

dealer, held a registration certificate and was purchasing the goods in question for the purpose of resale to other persons. Under cl. (1) of the proviso to s. 9 of the Bombay Sales Tax Act, 1953, no general sales tax is to be levied on the sales of goods to a dealer who holds a licence and furnishes to the selling dealer a certificate in "K" Form. On the representation made by the appellant goods worth Rs. 884-1-0 were sold to him without levy of the general sales tax. According to the prosecution, the accused had knowledge that the "K" form which he was furnishing was a forged "K" form that constituted a valuable security, inasmuch as he would be able to purchase the goods that he was purchasing without payment of general sales tax. The representation made by the accused to Shantilal & Co. was, according to the prosecution, a false and fraudulent representation, on the basis of which they parted with goods worth Rs. 884-1-0 on November 12, 1956. It appears that there was another firm in the Mulji Jetha Market called B. Jayantilal & Co. and certain investigations were being made by the Sales Tax Officer, in the course of which the Officer came across a similar "K" form in the name of Manmal Kundanmal and in the course of a cross check the Sales Tax authorities realised that the firm of Manmal Kundanmal had altogether a different business and did not deal in cloth. That was why further inquiries came to be made with B. Jayantilal and on November 29, 1956, Kshatriya, Sales Tax Inspector, located the present appellant sitting at some place. A complaint was filed on December 4, 1956, and a raid was organized in the course of which, according to the prosecution, the appellant was found in possession of a bag containing several forms of a similar type which indicated that the appellant was intending to use them and also that he was responsible for furnishing this form given to Shantilal & Co. on November 12, 1956. On these allegations, the accused was charged as already stated above.

The defence of the appellant was that he had no dealings of any kind with Ratilal Wadilal of Shantilal & Co. According to him, he was a petty commission agent or Dalal working in the Mulji Jetha Market and it was his case that he was making purchases of small quantities of cloth at the instance of customers but that he was not a licenced dealer. As he used to move about in the Mulji Jetha Market, he was taking tea on December 4, when the raid was made, and the place where he was sitting was really a tea-shop. According to him, Jayantilal Punamchand Parekh of the firm of B. Jayantilal & Co. happened to come there for tea, took his seat beside the accused, kept his bag there and told him that he was going to answer a call of nature and left the spot. Within 5 or 7 minutes, the raiding party came and foisted Jayantilal's bag on him. He denied that he had any connection with the transaction on which the prosecution relied or with the bag which he stated was foisted upon him at the instance of Jayantilal.

The accused was tried by the learned Additional Sessions Judge, in the Court of Sessions for Greater Bombay with the aid of a jury which returned a unanimous verdict of guilty on both the charges levelled against the accused. Accepting that verdict, the learned Judge convicted the appellant under s. 471 read with s. 467 of the Indian Penal Code and sentenced him to rigorous imprisonment for two years and a fine of Rs. 300 in default rigorous imprisonment for three months. He also convicted the appellant under s. 420 of the Indian Penal Code and sentenced him to rigorous imprisonment for 18 months on that charge. He directed that the sentences on these charges should run concurrently. That is why the accused has filed the present appeal.

In this appeal, Mr. Mirchandani, learned advocate appearing on behalf of the appellant, has not been able to point out any substantial misdirection or non-direction in the learned Judge's charge to the jury. The only misdirection of which Mr. Mirchandani made a serious grievance was about the use of the first information report. According to Mr. Mirchandani, the first information report in this case consists of the complaint made by Athale, Sales Tax Officer, Enforcement Branch, Sales Tax Department, at the Princess Street Police Station

on December 4, 1956. It is admitted by Athale that his signature was not taken upon this complaint. According to Mr. Mirchandani, the signature not having been taken on the first information report as required under s. 154 of the Criminal Procedure Code, that first information report was inadmissible in evidence and since the learned trial Judge has referred to it in his charge to the jury, he has asked the jury to consider and rely on a document which is inadmissible and has thus misdirected the jury. We do not think there is any substance in this argument. Under s. 154 of the Criminal Procedure Code, every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, has to be reduced to writing by him or under his direction and has to be read over to the informant and every such information, whether given in writing or reduced to writing has to be signed by the person giving it and the substance thereof has to be entered in a book to be kept by the officer in such form as the State Government may prescribe in this behalf. Now, the admissibility of a first information report depends not on the fact that it is signed by the person making it, but on the fact that a first information report given in writing or taken down by a police officer would be a part of the official record as the substance of such information is to be entered in a book kept by the station officer in the form prescribed and that may attract the operation of the provisions of s. 35 of the Indian Evidence Act. See *Emperor v. Chittar Singh*.¹ The condition as to its being reduced to writing and that it shall be signed by the person giving it seems to us to be a mere matter of procedure, and failure to observe the procedure as to signature would not make the information given, if it is reduced to writing, inadmissible. It is well settled, however, that a statement of an informant contained in the first information report is not substantive evidence. The information is only admissible to corroborate or contradict the testimony of the informant when he gives his evidence in Court. The object of the first information report is to obtain early information of any alleged criminal activity, to record the circumstances before there is time for such circumstances to be forgotten or embellished, and the report can be put in evidence when the informant is examined, if it is desired to do so. See *Emperor v. Nazir Ahmed*.² In the present case, Athale, the Sales Tax Officer, has deposed that he lodged the present complaint on December 4, 1956, at the Princess Street Police Station, that it was reduced to writing and that the same was read over to him though his signature was not taken upon it. He also stated that the statement which was read over to him in Court was the one made by him and was correctly recorded. In our view, therefore, the argument of Mr. Mirchandani that the first information in the present case should not have been read out to the jury because it was not signed by Athale and hence becomes inadmissible is untenable.

Then Mr. Mirchandani has contended that the learned trial Judge has misdirected the jury as regards the contents of the first information report and his grievance is that the first information report does not contain any reference to any bag to be found with the accused. Now, it has to be remembered that the complaint was lodged by Athale, the Sales Tax Officer, before the raid was effected and what was indicated in that information was that a certain person would be sitting at a particular place with certain things in his possession. Thereafter the raid came to be made by the police and in that raid certain things were found in the possession of the accused. In his charge to the jury, at one place, the learned Judge has undoubtedly stated that the raid was arranged in pursuance of the first information report which was lodged and, as alleged in the first information, the accused happened to be found there with a bag in his possession. Mr. Mirchandani's grievance is that since no bag has been actually referred to in the first information report, there has been a misdirection which has introduced an infirmity in the charge. This argument cannot be accepted. The learned Judge referred to the evidence of Athale and Kshatriya and read out the first information to the jury stating that it could not be

1 (1925) I.L.R. 47 All. 280.

2 (1945) 47 Bom. L.R. 245, P.C.

treated as substantive evidence and thereafter he pointed out as to how in pursuance of the information a raid took place and the accused came to be found in possession of certain things. According to the first information report, the accused was sitting on the first floor, Sanchagalli, Mulji Jetha Market and was issuing 'K' forms. After the raid was carried out, according to the prosecution evidence, in fact the accused was found in possession of a bag which contained amongst other papers similar type of 'K' forms. Merely because the learned Judge at one place, instead of referring to the contents of the bag as disclosed in the evidence, stated that as anticipated and as alleged in the first information report the accused was found with a bag in his possession, we do not think that there has been any misdirection as to seriously prejudice the minds of the jury.

Mr. Mirchandani then contended that Ratilal's evidence was full of contradictions and discrepancies, but the learned Judge, according to him, has gone into too many details which were calculated to confuse the minds of the jury, instead of drawing their pointed attention to the contradictions and discrepancies in the prosecution evidence on which the defence relied. We are not impressed by this argument either. The learned Judge has referred to the evidence of all the three prosecution witnesses at some length. He has also referred to the discrepancies between the evidence of Athale on the one hand and the evidence of Kshatriya, Sales Tax Officer, and Shaikh, Sub-Inspector of Police, on the other. He has also referred to the discrepancies between the evidence of Kshatriya and Shaikh on the one hand and the evidence of the panch witness on the other. The latter discrepancies related to the question whether at the time of the raid the bag was in the hand of the accused or the accused was running away with the bag. The other contradictions and discrepancies in the evidence have also been referred to in the learned Judge's charge to the jury. We do not, therefore, think that there is either any misdirection or non-direction in the charge to the jury delivered by the learned Judge when he dealt with this part of the prosecution evidence on the record.

Then Mr. Mirchandani contends that Jayantilal who gave information to the Sales Tax Officer has been proved to be a shady person and the defence has placed on the record a document which was admitted by the learned trial Judge, which shows that Jayantilal was convicted on a charge of being in possession of counterfeit coins. But Jayantilal was not examined on behalf of the prosecution and Mr. Mirchandani says that the learned Judge's charge has failed to lay the correct emphasis on the failure of the prosecution to examine Jayantilal. This argument also is without any substance. It appears from the evidence that the Sales Tax Officer obtained information against the present appellant while he was making investigation in connection with the dealings of Jayantilal & Co. The prosecution has not examined Jayantilal, but Athale, the Sales Tax Officer, has deposed that Jayantilal had closed his business, that there was a case of evasion of sales-tax against B. Jayantilal for the period commencing from April 1, 1954, and that investigation into it was pending at the time and that he did not know where Jayantilal was at the time he gave evidence. The learned trial Judge referred to this part of Athale's evidence and he also told the jury that it was for them to consider whether Jayantilal was a material witness who could have spoken on material points and whether he had been deliberately kept back by the prosecution, and the learned Judge also told them that if that was their opinion they should draw an adverse inference against the prosecution. In our view, therefore, there is no misdirection or non-direction on this point in the learned Judge's charge to the jury.

As there are no misdirections or non-directions in the charge to the jury, it would not be open to us to examine the correctness of the verdict of the jury by going through the evidence ourselves.

But then Mr. Mirchandani has challenged the conviction of the accused under s. 471 read with s. 467 of the Indian Penal Code on the ground that form 'K' which was alleged to have been used by the appellant would not be a valuable

security within the meaning of s. 30 of the Indian Penal Code. Section 467 of the Indian Penal Code deals amongst other things with the offence of forging a document purporting to be a valuable security and prescribes punishment therefor, and s. 471 prescribes the same punishment for the offence of fraudulently or dishonestly using as genuine any document which a person knows or has reason to believe to be a forged document. Under s. 30 of the Code, the words "valuable security" are defined as denoting a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right. Mr. Mirchandani has pointed out that according to the prosecution, the appellant is alleged to have tendered to Ratilal Wadilal a 'K' form on behalf of Mamal Kundanmal which enabled him to purchase goods worth Rs. 884-1-0 without paying general sales tax. But Mr. Mirchandani contends that what enabled the appellant to make this purchase without payment of general sales tax was not the 'K' form, but that the right to get such an exemption arose by virtue of the Sales Tax Act itself. Section 9 of the Bombay Sales Tax Act, 1953, deals with the levy of general sales tax and it provides that subject to the provisions of s. 7, there shall be levied a general sales tax on the turnover of sales of goods specified in column 1 of Schedule B at the rates, if any, specified against them in column 3 of the said Schedule. Section 7 provides that no tax shall be payable on the sales or purchases of certain goods. Section 9 is subject to the provisions of this section. There are three clauses to the proviso to s. 9, and in the present case, we are concerned with cl. (1) of the proviso to s. 9 which states that no general sales tax shall be levied on the sale of goods to a dealer who holds a licence and furnishes to the selling dealer a certificate in the prescribed form declaring *inter alia* that the goods so sold to him are intended for resale by him. Section 45 of the Act gives the State Government power to make rules for carrying out the purposes of the Act and under r. 13(2) of the Bombay Sales Tax (Registration, Licensing and Authorization) Rules, 1954, it is provided that a certificate for the purpose of cl. (1) of the proviso to s. 9 shall be in form 'K'. Under cl. (1) of the proviso to s. 9, the dealer must hold a licence and must furnish to the selling dealer a certificate in the 'K' form declaring *inter alia* that the goods sold to him are intended for resale by him. It is then alone that he would be entitled to be exempted from levy of the general sales tax. Mr. Mirchandani's argument is that Ratilal's evidence shows that the accused had shown him a licence in the name of Mamal Kundanmal firm and also the registration only once when he had the first transaction with him in 1955 and he relied on the licence shown to him as a genuine one. Thereafter the accused had dealings with his shop on 10 or 12 occasions prior to the transaction in question. But he stated that on subsequent occasions he did not insist on seeing the licence of the accused because he had seen that once and so he merely accepted the 'K' forms. Mr. Mirchandani says that the 'K' form on which the prosecution relies and on basis of which the accused purchased the goods in the present case cannot be considered as a valuable security because the right to be exempted from the payment of general sales tax is conferred by the statute itself and, therefore, the furnishing of the 'K' form duly filled in would not bring the accused within s. 467 of the Indian Penal Code. This argument cannot be accepted. The Sales Tax Act provides for the levy of general sales tax under s. 9. The goods mentioned in s. 7 would be free from levy of the general sales tax. The proviso to s. 9 mentions certain other exemptions and the first clause of the proviso enables a dealer who holds a licence to purchase goods without paying general sales tax, if he furnishes to the selling dealer a certificate in the 'K' form declaring that the goods sold to him are intended for resale by him. What enables the purchasing dealer to get exemption from the levy of general sales tax is the furnishing of a certificate in the 'K' form containing a declaration that the goods sold to him are intended for resale by him. As the 'K' form prescribed itself shows, besides

mentioning the licence under s. 12 of the Bombay Sales Tax Act, there has to be a declaration that the goods purchased are intended for resale. It is apparent, therefore, that the 'K' form containing the due declaration creates the legal right in the purchasing dealer to get exemption from payment of general sales tax as provided under cl. (1) of the proviso to s. 9 of the Sales Tax Act.

In *Superintendent and Remembrancer of Legal Affairs, Bengal v. Daulatram Mudi*³ it was held that the original of the transit pass, without which no forest produce could be removed, was a valuable security within the meaning of s. 30 of the Indian Penal Code because it creates or purports to create a right to transport forest produce, an action which, without the transit pass, would be an offence punishable with fine and imprisonment. In *Durgadas Tulsiram v. State*⁴ it was held by a division bench of this Court that an import licence would be a valuable security because it created a right in the licensee to import goods. In the present case also, though cl. (1) of the proviso to s. 9 of the Sales Tax Act provides for an exemption from the payment of the general sales tax, it is the certificate in the prescribed 'K' form containing a declaration that the goods sold to the dealer are intended for resale by him that confers on him the right to purchase these goods without the levy of general sales tax. It is true that the purchasing dealer must be a licensed dealer before he can furnish the necessary certificate. In the present case, it would appear that the licence produced by the accused on the first occasion was in the name of Manmal Kundanmal who deal in gold and silver and with whom the accused had no connection. The 'K' form furnished by the accused was, therefore, a forged one and that was accepted by Ratilal Wadilal as a genuine certificate required under cl. (1) of the proviso to s. 9. The mere fact, however, that the accused had no licence would not make the 'K' form furnished by him not a valuable security under s. 30 of the Indian Penal Code. In our judgment, therefore, the certificate in form 'K' which is alleged to have been furnished to the firm of Shantilal & Co. by the accused on November 12, 1956, was a valuable security within the definition of that term under s. 30 of the Code. There is, therefore, no illegality in the conviction recorded against the accused under s. 471 read with s. 467 of the Indian Penal Code.

We must, therefore, confirm the convictions of the appellant under s. 471 read with s. 467 as well as under s. 420 of the Indian Penal Code.

As regards the sentences imposed on the accused, Mr. Mirchandani appealed to us to reduce these sentences on the ground that they were excessive. He does not dispute the position that as the convictions of the accused are confirmed, the appellant is guilty of an offence which has enabled him to cheat the State of its revenue. But he points out that there was another case of a similar character against the present appellant and that case is the subject of the other appeal which is also before us, viz., Criminal Appeal No. 124 of 1959. In that case, which was also tried in the Court of Session for Greater Bombay, with the aid of a jury, it appears that the jury returned a verdict of not guilty on the charge under s. 471 read with s. 467 of the Indian Penal Code, as regards the 'K' form. The accused was also charged with fabricating the 'N' form and on that charge also the jury returned a verdict of not guilty under s. 471 read with s. 467 of the Indian Penal Code. However, they unanimously found him guilty under s. 471 read with s. 465 in respect of the 'K' and 'N' forms and also under s. 420 of the Code. It appears that in that case by the use of these two forms the accused was alleged to have cheated one Diwanchand Bishandas, partner of Bishandas Diwanchand, cloth merchants, Bombay, by purchasing artificial cloth of the value of Rs. 2,075-11-3 without payment of general sales tax. Mr. Mirchandani says that in the present case the accused purchased without paying general sales tax, goods worth only Rs. 884-1-0, while the goods purchased by him in the other case are worth about 2½ times the value of the goods in the present case, so that the loss to the State in the amount of tax would be larger, and even then the learned Additional Sessions

³ (1932) I.L.R. 59 Cal 1233.

⁴ (1954) 56 Bom. L.R. 188.

Judge has imposed on him, in that case, a sentence of six month's rigorous imprisonment on each count under s. 471 read with s. 465 and a sentence of one year's rigorous imprisonment on the third charge under s. 420 of the Indian Penal Code, and while doing so, Mr. Mirchandani points out, the learned Judge observed that he could not help feeling that the accused was a willing tool in the hands of some bigger merchants and that was why he was imposing on the accused a rather lenient sentence. The other appeal is also before us for hearing to-day, and there seems to be some force in what Mr. Mirchandani has urged, though in the present case the conviction is under s. 471 read with s. 467 while in the companion appeal it is under s. 471 read with s. 465 of the Indian Penal Code. In our view, the ends of justice would be met if we reduce to some extent the sentences imposed on the accused on both the charges in the present case. We, accordingly, confirm the conviction of the appellant under s. 471 read with s. 467 of the Indian Penal Code, but reduce the substantive sentence imposed on him with regard to this charge to rigorous imprisonment for one year, but maintain the sentence of fine and the sentence in default of payment of fine. His conviction under s. 420 of the Indian Penal Code is also confirmed, but the sentence in connection with this conviction is also reduced to rigorous imprisonment for one year. Both these sentences will run concurrently.

[The rest of the judgment, which deals with Criminal Appeal No. 124 of 1959, is not material to this report.]

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Naik.

SHRIMATI AMBI PUNDALIK v. PUNDALIK SHANKAR.*

Central Provinces and Berar Courts Act (I of 1917), Sec. 20—Hindu Marriage Act, (XXV of 1955), Secs. 19, 3(b), 28—Suits Valuation Act (VII of 1887), Sec. 9 and Rule 311 framed under Act—Additional District Judge deciding proceedings under Hindu Marriage Act—Whether appeal from such decision lies to District Court or High Court.

Under s. 20(c) of the Central Provinces and Berar Courts Act, 1917, an appeal from a decision in a matrimonial proceeding under the Hindu Marriage Act, 1955, given by the District Judge or by an Additional District Judge lies to the High Court *Balakotayya v. Nagayya*,¹ referred to.

THE facts appear in the judgment.

R. N. Desphande, for the applicants.

W. L. Khare, for the opponent.

NAIK J. This is an application in revision from the judgment of the District Judge, Amravati, holding that the appeal preferred before him in matrimonial proceedings under the Hindu Marriage Act was maintainable. The circumstances which have led to this revision application may be briefly stated as follows: The husband started proceedings for restitution of conjugal rights under the Hindu Marriage Act against his wife. That petition having been dismissed by the Third Additional District Judge, the husband went up in appeal to the District Court in Civil Appeal No. 10-A of 1957. A preliminary objection was raised on behalf of the wife contending that the appeal did not

*Decided, March 31, 1949. Civil Revision Application No. 442 of 1958, against the finding of S. N. Handole, District Judge at Amravati, in Civil Appeal No. 10-A of 1957,

from the order passed by N. M. Indurkar, Third Additional District Judge at Amravati, in Civil Suit No. 117-A of 1957.

¹ [1946] Mad. 566.

lie to the District Court, but that the appeal should have been properly filed before the High Court. On this preliminary objection, the District Judge, after examining the relevant provisions, came to the conclusion that the appeal to the District Court was competent. It is from that decision that the present revision application has been directed. The application was heard by Mr. Justice Badkas. He found that appeals are being filed in the High Court from the decisions of the additional Judges in a number of cases and, therefore, the question is of general importance. He has, therefore, referred the matter to a Division Bench for a more authoritative decision.

In order to appreciate the question of the competency of the appeal it is necessary to refer first to the provisions of the Hindu Marriage Act. Section 19 of that Act provides that every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together. The definition of a District Court is contained in cl. (b) of s. 3 of the same Act under which a District Court means the principal civil Court of original jurisdiction, and includes any other civil Court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act. The only other provision to which reference need be made is s. 28 of the Act, which lays down that all decrees and orders made by the Court in any proceeding under this Act may be appealed from under any law for the time being in force. It will thus be seen that the District Court has been constituted as the Court having exclusive jurisdiction under the Act and it will continue to exercise such jurisdiction until the State specifies any other civil Court as having jurisdiction in these matters. So far as this area is concerned, no notification has yet been issued specifying any other civil Court as a District Court for the purpose of the Hindu Marriage Act. It would also appear that the District Court cannot transfer the proceedings to any other civil Court for trial. Of course, this does not affect the power of the District Judge, as the officer presiding over the District Court to refer the proceedings for decision to the Additional District Judge attached to the same Court. The jurisdiction of the Additional District Judge, however, does not stem from the order of reference or distribution of business, but from the fact that the Additional District Judge is part and parcel of the District Court.

In view of the provisions of s. 28 of the Hindu Marriage Act in order to determine the forum to which appeals are to be preferred we have to consider the provisions of other enactments. The relevant enactment in this respect is the Central Provinces and Berar Courts Act, 1917. That act contemplates two classes of Courts; (i) the Court of the Civil Judge and (ii) the District Court. Section 20 of the Act deals with the appellate jurisdiction of the Courts. Clause (a) relates to an appeal from the decree or order of the Court of a Civil Judge and it lays down that first appeal would lie to the District Court. Clause (b) is divided into two parts and it relates to an appeal from the decree or order of an Additional Judge. Part (i) provides that where the value of the suit or original proceeding in such Court does not exceed ten thousand rupees, an appeal shall lie to the District Court and part (ii) provides that an appeal shall lie to the High Court where the value of such suit or original proceeding exceeds ten thousand rupees. That shows that an additional District Court deals with suits or original proceedings the value of which is below Rs. 10,000 as also those where the value exceeds Rs. 10,000. The argument advanced by Mr. Khare was based on the provisions of subcls. (i) and (ii) of cl. (b) of s. 20 of the C. P. and Berar Courts Act. He contended that since the decision appealed from is that of the Additional District Court we have to consider the valuation of the suit or proceeding from which the appeal has been preferred. He then drew our attention to r. 311 framed under s. 9 of the Suits Valuation Act which is in the following terms:

“Suits of the following classes shall, for the purposes of the Court-fees Act, 1870,

the Suits Valuation Act, 1887, and the Central Provinces Courts Act, 1917, be treated as if the subject-matter of such suits were of the value of four hundred rupees:—

(1) suits for the restitution of conjugal rights, for declaration of the validity of marriage, or for a divorce;

(2) suits for the custody or guardianship of a minor; and

(3) suits for declaration that an adoption is valid or invalid."

Mr. Khare, therefore, contended that the valuation of a proceeding for restitution of conjugal rights is an artificial value fixed by this rule, which is Rs. 400. If this argument is correct then it will logically follow in view of the provisions of s. 20(b)(i) and (ii) of the C. P. and Berar Courts Act that the appeal will necessarily lie to the District Court.

We have, however, to take into account some other factors in deciding this question. The first point to be noted is that r. 311 speaks of suits and does not refer to other proceedings of civil nature. This rule has been framed under s. 9 of the Suits Valuation Act and s. 9 also refers only to suits and not to other proceedings. The question, therefore, is whether a petition instituted under the Hindu Marriage Act can be regarded as a suit within the meaning of s. 9 of the Suits Valuation Act or within the meaning of r. 311 of the rules framed thereunder.

It is significant to note that the Legislature has deliberately used the word 'petition', and proceedings under the Hindu Marriage Act are to be initiated by a petition. The word 'suit' is so common that it is impossible to conceive that it would escape the attention of the framers of the law. It is noteworthy that the word 'suit' has been used in respect of matrimonial proceedings under the Indian Divorce Act. That shows that the word 'petition' must have been deliberately employed by the Legislature with the object of distinguishing these proceedings from ordinary suits.

Mr. Khare relying on the decision of the Madras High Court reported in *Balakotayya v. Nagayya*¹ contended that the word suit should be extended to any proceeding in a Court of Justice by which an individual pursues that remedy in a Court of Justice which the law affords him; that the modes of proceeding may be various, but that if a right is litigated between the parties in a Court of Justice the proceeding by which the decision of the Court is sought is a suit. In view of the fact that the Legislature has deliberately used the word 'petition' in the Hindu Marriage Act it is not possible for us to accept the extended meaning of suit as propounded by the Madras High Court in the above ruling. If that is so then the provisions of r. 311 will have to be confined only to suits and cannot be extended to petitions under the Hindu Marriage Act. In that view of the case it is not necessary to take into account the artificial valuation put on a matrimonial proceeding by the provisions of r. 311.

Then the question is whether it is possible or necessary to put any valuation upon the claims made in proceedings under the Hindu Marriage Act. Reliefs claimed in these proceedings are either for restitution of conjugal rights or for divorce or for custody of wife and children and so on. These reliefs are in the very nature of things incapable of valuation in terms of the market value. Further, when a special Court has been created as the Court having exclusive jurisdiction it is hardly necessary to put pecuniary valuation on the relief claimed. Pecuniary valuation becomes necessary to locate the Court where the proceedings are to be instituted. It is also necessary for choosing the Court of lowest grade, because, under s. 15, Civil Procedure Code, where there is concurrent jurisdiction vested in more than one Court, the suit has got to be instituted in the Court of the lowest grade. Such a problem does not arise when a Court of exclusive jurisdiction has been created for certain proceedings under a statute. That being the case, the decrees and orders passed in proceedings under the Hindu Marriage Act cannot fall in any of the categories specified in s. 20 of the C.P. and Berar Courts Act. Therefore,

whether the decision has been given by the District Judge himself or by an Additional District Judge, it will have to be treated as a decision of the District Court, and under cl. (c) of s. 20, an appeal from such a decision would necessarily lie to the High Court.

The Legislature has deliberately provided that the proceedings under the Hindu Marriage Act must be instituted in the District Court. Of course, under s. 3 of the Hindu Marriage Act, it is open to the State Government to specify any other civil Court as a District Court. When that is done, different considerations would arise. For instance, if the Court of a Civil Judge is designated as a District Court for the purpose of the Hindu Marriage Act, then naturally appeals from the decisions of such Courts will lie to the District Court under cl. (a) of s. 20 of the C.P. and Berar Courts Act.

We, therefore, hold that the appeal filed before the District Court is not competent and direct that the same should be returned to the parties for being presented to the proper Court.

Costs of this application will be costs in the cause. The rule is made absolute.

Rule made absolute.

Before Mr. Justice Shah and Mr. Justice Patel.

RAKHAMA SITARAM GHADGE v. LAXMAN, SITARAM GHADGE.*

Transfer of Property Act (IV of 1882), Sec. 14—Specific Relief Act (I of 1877), Sec. 21—Agreement to sell immoveable property in future on demand by party to agreement—Whether such agreement infringes rule against perpetuity.

A bare agreement to sell immoveable property in future on demand by a party to the agreement does not infringe the rule against perpetuity enunciated in s. 14 of the Transfer of Property Act, 1882.

Dinkarrao v. Narayan, Harkisandas v. Bai Dhanu' and Basdeo Rai v. Jhagru Rao,' referred to.

THE facts appear in the judgment.

S. J. Jadhav, for the appellant.

G. R. Madbhavi, R. G. Madbhavi and B. O. Thatte, for respondent No. 1.

SHAH J. The dispute in this appeal relates to two lands—survey Nos. 155/5 and 155/6 of the village of Kandali, Taluka Junnar, district Poona. The lands originally belonged to the plaintiff. By a conveyance, dated January 17, 1951, the plaintiff sold these lands to defendant No. 1 for Rs. 500. Defendant No. 1 then executed an agreement in favour of the plaintiff, who it may be noted is his full brother, whereby he contracted to reconvey the lands to the plaintiff at any time on repayment of Rs. 500. On November 13, 1954, the plaintiff served a notice calling upon defendant No. 1 to reconvey the lands pursuant to the agreement dated January 17, 1951, but defendant No. 1 declined to carry out the requisition. The plaintiff then filed Civil Suit No. 16 of 1955 in the Court of the Civil Judge, Junior Division, Junnar, for a decree for specific performance of the agreement. To that suit, Krishnabai—wife of defendant No. 1—was impleaded as defendant No. 2 on the allegation that she was managing the property on behalf of defendant No. 1. The suit was resisted by defendant No. 1 who contended that the condition relating to “re-conveyance of the property at any time” was fraudulently incorporated in the agreement. Defendant No. 1 submitted that it was agreed between the parties that the condition relating to reconveyance of the property was to be

*Decided, March 31, 1959. Letters Patent Civil Judge, Junior Division, Junnar, in Civil Appeal No. 82 of 1957, against the decision of Suit No. 16 of 1955.
Datar J. in Second Appeal No. 1822 of 1957, - 1 (1922) 24 Bom. L.R. 449.
confirming the decision of V. A. Naik, District 2 (1926) 28 Bom. L.R. 954.
Judge, Poona, in Civil Appeal No. 152 of 1956, 3 (1924) I.L.R. 46 All. 333.
confirming the order passed by C. T. Digloo,

enforced within one year only from the date of the agreement. The learned trial Judge negatived the contentions raised by defendant No. 1 and decreed the plaintiff's claim for specific performance. In appeal to the District Court at Poona, the decree passed by the trial Court was confirmed. A second appeal against that decision was summarily dismissed by Mr. Justice Datar. But Mr. Justice Datar thereafter granted leave to defendant No. 1 to appeal under cl. 15 of the Letters Patent.

Mr. Jadhav, who appears on behalf of defendant No. 1, contends that the agreement to reconvey the property to the plaintiff on demand at any time after January 17, 1951, infringes the rule against perpetuity enunciated in s. 14 of the Transfer of Property Act, and on that account the covenant to reconvey the property is void. In support of his contention, Mr. Jadhav relies upon a judgment of a Division Bench of this Court in *Dinkarrao v. Narayan*.¹ But under the Transfer of Property Act an agreement to sell immoveable property does not, of itself, create any interest in or charge on such property. The rule against perpetuity prohibits the creation of certain remote interests in immoveable property. It is then difficult to appreciate how by an agreement, which does not create an interest in or charge on immoveable property, the rule against perpetuity can be regarded as infringed.

In *Dinkarrao's* case, a plot of land was agreed to be sold under a deed of sale, dated September 18, 1878, and there was a covenant in the sale-deed that if the vendee or his heirs desired to sell the plot, the same was to be resold to the vendor at the price mentioned in the sale-deed. Relying upon this covenant, the heirs of the vendor took out an Originating Summons for determining the rights of the heirs of the vendee. It was held by Mr. Justice Pratt, that the covenant contained in the sale-deed was personal and created no rights *in rem* affecting the title of the vendee, and that no declaration of the rights under a personal contract could be made. Against the decision of Mr. Justice Pratt an appeal was preferred and it was held in appeal that the covenant in question was void and the heirs of the vendee were entitled to a declaration to that effect. The Court expressly held that prior to the Transfer of Property Act, 1882, which was applied to the Bombay Presidency as from January 1, 1893, a contract for sale of immoveable property created an equitable interest in the property and made the purchaser the owner in equity, and the covenant for pre-emption in the sale-deed was void as infringing the rule against perpetuities. Macleod C.J. also claimed to approach the case from another angle. He observed that

"...although contracts for the sale of land which can be specifically enforced immediately or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future do not according to the law in India create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinary personal contracts and stand in a category by themselves." (p. 457)

He further observed that the principles which underlie the rule of perpetuities applied to this class of contracts. Mr. Justice Kanga who delivered a supplementary judgment observed that the

"...law laid down in *London and South Western Railway Co. v. Gomm* applies to a contract for sale of immoveable property in India even where the Transfer of Property Act is in force." (p. 464)

But *Gomm's* case was expressly decided on the ground that under the law applicable to real property in England a contract of sale creates an executory interest or estate and is, therefore, subject to the rule against perpetuities.

The observations made by Macleod C.J. and by Mr. Justice Kanga as to the effect of a contract to sell immoveable property made after the Transfer of Property Act was applied to the area in which the land is situate were evidently *obiter* and were not necessary for the decision of the case.

¹ (1922) 24 Bom. L.R. 449.

² (1882) 20 Ch. D. 562.

In a later judgment of this Court, *Harkisandas v. Bai Dhanu*,³ the view which was expressed in *Dinkarrao's* case was not approved. In dealing with the contention that an agreement to sell immoveable property was void as offending against the rule against perpetuity, Mr. Justice Madgavkar expressed concurrence with the judgment of Mr. Justice Sulaiman in *Basdeo Rai v. Jhagru Bai*.⁴ The Allahabad High Court in *Basdeo Rai's* case had taken the view that agreements for sale of land or of pre-emption of an obligation arising out of a contract and annexed to the ownership of the land were not void as infringing the rule against perpetuity. Macleod C.J. in *Dinkarrao's* case expressed the opinion that even though by a contract of sale no interest in land which is the subject-matter of the agreement is created, because the contract is capable of specific performance against third parties in certain cases, the result is that the law in England and India is substantially the same "with regard to the enforcement of the contract". He observed (p. 460):

"...The only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly it is void and the principle is the same in India as in England."

But the possibility of a contract of sale being enforced against a third person acquiring interest in the subject-matter of the agreement does not attract the rule against perpetuity which is restricted in its application to transfers of immoveable property. Nor is the Court on alleged grounds of public policy entitled to extend a statutory rule to classes of property which are not expressly within its purview. If under the statute law of India an agreement to sell immoveable property does not create an interest in that property, it is difficult to hold that because under an agreement one person agrees to sell to another on demand by the latter immoveable property at some indefinite time in future the agreement is impressed with incidents which it does not possess. It is also difficult to appreciate how a contract to sell property in future when demanded by another person "purports to do by indirect means what the law forbids to be done directly."

We are unable to hold that a bare agreement to sell immoveable property in future on demand by a party to the agreement infringes the rule against perpetuities.

Mr. Jadhav then contended that the agreement in question was void on the ground that there was absence of mutuality, and he sought to rely upon the judgment of their Lordships of the Privy Council in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*.⁵ That was a case in which the guardian of a minor had entered into a contract to purchase immoveable property, and it was held that on the ground of absence of mutuality the contract could not be specifically enforced. We fail to appreciate how this case can have any application to the facts of the present case. In that case it was held that because the contract was not enforceable against the minor it could not be enforced at the instance of the minor. In the present case, defendant No. 1 has solemnly agreed to reconvey the property on payment of Rs. 500 and that was one of the covenants which formed consideration for the sale; and we are unable to see any ground of equity relying on which defendant No. 1 may be entitled to evade his obligation to sell the property. Section 21 of the Specific Relief Act enumerates certain contracts which cannot be specifically enforced, and a contract which may be enforced at a time to be selected by one of the parties thereto and not at the instance of the other is not one of such contracts. We are, therefore, of the view that there is no substance in this alternative contention also.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

³ (1926) 28 Bom. L.R. 954.

⁵ (1911) L.R. 39 I.A. 1, s.c. 14 Bom. L.R. 5.

⁴ (1924) I.L.R. 46 All. 333.

CRIMINAL APPELLATE.

Before the Hon'ble Mr. H. K. Chhainani, Chief Justice, and Mr. Justice S. T. Desai.

RAMDAS KIKABHAI v. STATE.*

Criminal Procedure Code (Act V of 1898), Secs. 207A, 173, 287—Whether Magistrate can examine accused for enabling him to explain circumstances appearing in documents referred to in s. 173—Statement of accused recorded by Magistrate after such examination whether admissible in evidence.

Under s. 207A of the Criminal Procedure Code, 1898, the Magistrate may examine the accused for the purpose of enabling him to explain any circumstances appearing in the documents referred to in s. 173 of the Code. If the Magistrate so examines the accused and records his statement, that statement will be admissible in evidence under s. 287 of the Code.

*State v. Anadi Betankar,*¹ dissented from.

*State v. Dhtrajlal Maneklal,*² referred to.

ONE Ramdas (accused) was a resident of Bajupura in Valod Taluka. He had married the deceased Kavita about five years ago. He was not pulling on well with his wife. He had no issue from her. He, therefore, used to beat her frequently with the result that she began to ask for divorce from him. On the night of December 25, 1957, there was a quarrel between the accused and his wife. He then attempted to commit suicide by pouring kerosene on his clothes and then lighting the same. He received severe burns, on account of which he was detained in the Civil Hospital at Surat for about 6 months. During this period, his wife Kavita used to take food for him to the hospital. The accused was discharged from the hospital a day or two before June 3. He then went back to his village. His mother-in-law, Chhani, used to stay in the hut of one Chhotu Daya, which was at a short distance from the house of the accused. On the evening of June 3, Kavita and Chhani were sitting outside on the Otila of Chhotu's house. The accused went there. He asked Kavita to go to his house for applying medicine and giving him food. She, accordingly, accompanied the accused to his house. Apprehending that the accused might again beat Kavita, Chhani went to the house of the accused some time thereafter, but the accused drove her away. On that night, the accused slept inside his house, while Kavita slept outside in the Pejari of the house. Chhani slept in a cart outside the house of Chhotu Daya. She woke up at about 5 a.m. in the morning. She then heard some noise and went to the house of the accused. She found her daughter lying in the Pejari with severe injuries on her head and mouth. She was unable to speak and she was about to breathe her last. She questioned the accused why he had beaten her daughter. He told her that she had been asking him to give her divorce and that he had given it to her. Chhani then raised cries, on hearing which, one Thakorebhai, who was headmaster of a primary school in a neighbouring village and Chhotubhai and Ranchhod, who lived nearby, went there. They questioned the accused and he told them that Kavita had not been looking after him, that she had not applied medicine to him and that, instead, she had been asking him for a divorce and that, therefore, he had caused injuries on her with a stone. Chhani informed the police patil, Sorabji Framji, who then wrote a report. In this report, he stated that, at about 7 a.m. the accused's mother-in-law Chhani had given him information that the accused had beaten her daughter with a stone on her head and mouth, that her daughter was unable to speak and that she was on the point of death. This report was then sent to the police station at Valod. Kavita died within a short time after she had received the injuries. The police then went to the village and started investigation. On the same day, the ac-

*Decided, April 3, 1959. Criminal Appeal No. 1532 of 1958, against the order of conviction and sentence passed by N. G. Shelat, Sessions Judge, Surat, in Sessions Case No. 60 of 1958.

1 [1958] A.I.R. Orissa 241.

2 (1957) 59 Bom. L.R. 645.

cused took the police and the panchas to a place near the hedge in front of his house and from there took out the stone, which was attached. The body of Kavita was then sent for post-mortem examination. Three injuries were found on her person. She had a contused wound at the bridge of the nose and a lacerated wound on her forehead and ecchymosis on both the lips. Her jaw was fractured and some teeth were missing. Below the injury on her head, there was a fracture of the frontal bone. This injury was the cause of the death. In the opinion of Dr. Vyas, who held the post-mortem examination, this injury was sufficient in the ordinary course of nature to cause death. The accused was then sent up for trial on the charge of committing the murder of Kavita. Before the Committing Magistrate, he admitted that he had caused the injuries to his wife, which resulted in her death. In the Sessions Court, however, he denied that he had given any beating to his wife. He stated that he was sleeping inside his house as he was still not well; that he did not know who had caused the injuries to his wife and that, in the morning, when the police patil and others had gone to his house, he told them that he did not know how she had died. The Sessions Judge, however, believed the evidence of Chhani, Thakorebhai, Chhotubhai and Ranchhod that the accused had confessed soon after the offence that he had committed the offence. He also relied on the statement made by the accused before the Committing Magistrate in which he had admitted his guilt. He, therefore, convicted the accused under s. 302, Indian Penal Code.

THE accused appealed.

I. C. Bhatt, for the appellant.

V. H. Gumaste, Assistant Government Pleader, for the State.

CHAIYANI C.J. [His Lordship after stating the facts and dealing with the evidence in the case, proceeded.] Then, there is the statement of the accused made before the Committing Magistrate. In this statement, he has stated that, on that night, he had asked Kavita to sleep inside his house, that she refused to do so and that she told him that she would not stay with him and that on the following morning she would send for panchas and take a divorce. She then slept outside in the Pejari. He woke up in the morning and as he was angry with her, he took up a stone and gave two or three blows with it to her and killed her. In this statement, therefore, the accused has admitted that he had killed Kavita. Before recording this statement of the accused, the Committing Magistrate had not recorded any evidence. It has, therefore, been urged that this statement made before the Committing Magistrate is not admissible in evidence. It is, therefore, necessary to consider the relevant provisions of s. 207A, which lay down the procedure to be adopted in proceedings instituted on a police report. Sub-section (4) of s. 173 provides that, after the investigation is completed, the accused shall be supplied with a copy of the report of the police officer submitted to a Magistrate under sub-s. (1) and of the first information report recorded under s. 154 and of all other documents or relevant extracts thereof on which the prosecution proposes to rely. Sub-section (3) of s. 207A states that at the commencement of the inquiry, the Magistrate shall satisfy himself that the documents referred to in s. 173 had been furnished to the accused, and if he finds that the accused had not been furnished with such documents or any of them, he shall cause the same to be so furnished. Sub-section (4) states that the Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence, and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also. This sub-section has been construed by this Court in *State v. Dhirajlal Maneklal*,¹ in which it was held that it is not obligatory upon the

prosecution to produce before the Magistrate at the stage of the committal inquiry all or any of the persons who might have witnessed the actual commission of the offence and that the prosecution has an absolute discretion in the matter. It is, therefore, open to the prosecution not to examine any witnesses in the inquiry held by the Magistrate. Then come sub-ss. (6) and (7), which are in the following terms:

"(6) When the evidence referred to in sub-section (4) has been taken and the Magistrate has considered all the documents referred to in section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(7) When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged."

The procedure which the Magistrate has to follow, therefore, is that after satisfying himself that the accused has been supplied with the requisite documents, he has to take the evidence of such eye-witnesses as may be produced by the prosecution and of those other witnesses, whom he considers it necessary to examine in the interests of justice. He may then, if necessary, examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Thereafter he has to give the prosecution and the accused an opportunity of being heard. He has then to consider the evidence, if any, taken by him, the documents referred to in s. 173 and the statement of the accused, if any, recorded by him, in the light of the arguments advanced by the prosecution and the accused and decide whether the accused should or should not be committed for trial.

These provisions draw a distinction between evidence and the documents referred to in s. 173, which also the Magistrate has to consider before deciding whether the accused should be committed for trial. The evidence referred to is the evidence, if any, taken under sub-s. (4). It cannot, therefore, include the documents referred to in s. 173. The learned Assistant Government Pleader has urged that the word "evidence" which follows the words "any circumstances appearing in the" in sub-s. (6) is used in a wider sense so as also to include the documents referred to in s. 173. This argument cannot be accepted, in view of the latter part of the sub-section, which requires the Magistrate to form an opinion on "such evidence and documents". Here again the documents are referred to separately from evidence. It is, therefore, clear that "evidence" does not include the documents, which are mentioned separately in both sub-ss. (6) and (7). Consequently, "evidence" in these provisions means evidence, if any, recorded under sub-s. (4). The section, therefore, contemplates an examination of the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, that is in the evidence, if any, recorded under sub-s. (4). It has, therefore, been urged that the Magistrate has no power to question the accused for the purpose of enabling him to explain any circumstances appearing in the documents referred to in s. 173. This argument ignores the requirement of the section that the Magistrate should give the prosecution and the accused an opportunity of being heard before deciding whether there are or are not sufficient grounds for committing the accused for trial. The hearing is given to the accused in order to enable him to show cause why he should not be committed for trial. The Magistrate is, therefore, under an obligation to give a hearing to the accused, so that the accused may be able to satisfy him that sufficient grounds

do not exist for committing him to the Sessions Court. In cases in which no evidence has been recorded under sub-s. (4), the accused can satisfy the Magistrate by reference only to the documents referred to in s. 173. The Magistrate is, therefore, bound to hear the explanation of the accused in regard to circumstances appearing in the documents referred to in s. 173. Instead of hearing this explanation orally and making notes about it, the Magistrate may question him and record it in writing. There is undoubtedly a lacuna in sub-s. (6), but this does not appear to be intentional, having regard to the provisions which require the Magistrate to give the accused an opportunity of being heard as to why he should not be committed for trial. It is implicit in these provisions that the Magistrate may examine the accused for the purpose of enabling him to explain any circumstances appearing in the documents referred to in s. 173. There is also nothing in the section which debars him from doing so.

Mr. Bhatt has urged that, if the Magistrate questions the accused in regard to the documents referred to in s. 173, matters may be brought on record, which are inadmissible under s. 162 of the Criminal Procedure Code. There is no force in this argument, for the Magistrate can only question the accused with regard to the circumstances disclosed against him in these documents. The questions put by the Magistrate will not be evidence of the facts stated therein. What will be evidence will be the replies given by the accused to the questions put to him. It is, therefore, not likely that any matters, which cannot be brought on record under s. 162, will become admissible in evidence by the Magistrate's questioning the accused in regard to circumstances appearing against him in the documents referred to in s. 173.

Mr. Bhatt has relied on a decision of a single Judge of the Orissa High Court in *State v. Anadi Betankar*.² With respect, we are unable to agree with the view taken in this case.

We are accordingly of the opinion that, while a Magistrate is not bound to question the accused and ask him to explain the circumstances appearing in the documents referred to in s. 173, he may do so, if he so deems it proper or necessary in the interests of justice. If he examines the accused and records his statement, that statement will be admissible in evidence under s. 287 of the Criminal Procedure Code. The statement of the accused recorded by the Committing Magistrate is, therefore, admissible in evidence.

[The rest of the judgment is not material to this report.]

Appeal dismissed.

FULL BENCH—CRIMINAL REVISION.

Before the Hon'ble Mr. H. K. Chaitani, Chief Justice, Mr. Justice S. T. Desai and Mr. Justice Tarkunde.

SADASHIV TATOBA GATADE v. P. V. BHALERAO.*

Prevention of Food Adulteration Rules, 1955, Appendix B, Rule A. 11.05—Butter prepared from dahi or curd whether comes within definition of butter in r. A. 11.05.

Butter prepared from dahi or curd is butter prepared from milk within the meaning of Rule A. 11.05 in Appendix B to the Prevention of Food Adulteration Rules, 1955.

Narstha Bhaskar v. State of Bombay,¹ overruled.

ON May 10, 1957, one Sadashiv (accused) was in charge of a shop which belonged to his uncle Gundappa, and he sold to Bhalerao (complainant), Food

² [1958] A.I.R. Orissa 241.

*Decided, April, 13, 1959. Criminal Revision Application No. 1692 of 1958, against the decision of M. T. Vijaykar, Additional Sessions Judge, Ahmednagar, in Criminal

Appeal No. 70 of 1958, confirming the order of conviction passed by B. J. Abhyankar, Judicial Magistrate, First Class, 1st Court, Ahmednagar, in Criminal Case No. 1590 of 1957.

¹ (1957) 60 Bom. L.R. 434.

Inspector in the Ahmednagar Municipality, a certain quantity of butter and ghee for analysis. It was the case of the prosecution that the butter and ghee sold by the accused to the complainant were adulterated and the accused had committed an offence under s. 16(1)(a) of the Prevention of Food Adulteration Act, 1954. The trying Magistrate acquitted the accused of the charge for sale of adulterated ghee but convicted him of the offence under s. 16(1)(a) of the Act. On appeal the Additional Sessions Judge confirmed the conviction of the accused but reduced the sentence passed on him. The accused applied in revision to the High Court. The application was heard by Shah and Mody JJ. who referred the following question to a larger bench:—

“Whether the expression ‘butter’ within the meaning of rule A. 11.05 in the Rules framed under section 24 of the Prevention of Food Adulteration Act includes butter prepared from curd?”

In the course of his judgment delivered on February 6, 1959, Shah J. observed as follows:—

SHAH J. ...It was finally contended by Mr. Adik that the butter sold by the petitioner was not butter prepared from milk or cream but it was prepared from curd, and that the prosecution having failed to lead evidence that the butter which was sold by the petitioner was prepared from milk or cream, the petitioner was not guilty of the offence of selling adulterated butter: and in support of that argument reliance was placed upon a judgment of this Court reported in *Narsinha Bhaskar v. State of Bombay*,¹ where it was held that butter prepared from curd did not come within the purview of the definition “butter” given in A. 11.05 of Appendix B to the Prevention of Food Adulteration Rules, 1955. In order to appreciate this contention, it is necessary to refer to certain provisions of the Prevention of Food Adulteration Act. Under s. 24 of the Prevention of Food Adulteration Act the State of Bombay has published rules *inter alia* prescribing the forms of licences for the sale and distribution of articles of food or any specified article of food or class of articles of food. Rule A. 11.01 in Appendix B to those rules defines “milk” as meaning

“the normal clean and fresh secretion obtained by complete milking of the udder of a healthy cow, buffalo, goat or sheep during the period following at least 72 hours after calving or until colostrum free whether such secretion has been processed or not.” Butter is defined in A. 11.05 as meaning

“the product prepared exclusively from the milk or cream of cow or buffalo, or both, with or without the addition of salt and annatto...”

Curd is defined in A. 11.06 as “the product obtained from fresh whole milk either of cow or buffalo by souring”. Cream is defined in A. 11.10 as meaning

“that portion of milk rich in milk fat which has risen to the surface of milk on standing and has been removed or which has been separated from milk by centrifugal force.”

It is urged by Mr. Adik, relying on the judgment in *Narsinha Bhaskar's* case, that butter is only that product which is derived exclusively and directly from the milk or cream of cow or buffalo or both and it does not include a product which is prepared from curd. Mr. Adik submits that if the Legislature intended to include in the definition of the word “butter” a product prepared from curd, the rule making authority would have used the expression “from the milk or cream or curd of cow or buffalo...” in A. 11.05. The absence of the words “or curd” in A. 11.05, says Mr. Adik, indicates that the rule making authority intended only to make provision in respect of butter which was prepared directly from milk or cream and not from curd. On the other hand, the learned Government Pleader contends that butter which is prepared by the process of souring milk into curd and churning it is as much butter prepared from milk as butter prepared directly from milk by adding an acid or otherwise. It is, therefore, urged that in the absence of any express provision

made by the rule making authority which excludes from the definition in A. 11.05 butter which is prepared from curd, no artificial meaning as suggested by Mr. Adik should be given. Reliance in that behalf is also put upon the definition of the word "buttermilk" given in A. 11.03, where that expression is defined as meaning "the product obtained after removal of butter from curds by churning or otherwise", and it is submitted that the rule making authority also recognised that product as butter which is prepared by separation of buttermilk from curd after churning or otherwise. It is submitted that if the rule making authority defined butter as meaning only that product which was directly obtained from milk or cream and not from curd, there is still a product which is designated butter under A. 11.03 which is not butter within the meaning of A. 11.05 and for the sale, storage, distribution and adulteration of which no provision is made. The learned Government Pleader says that practically all butter in the villages in India is prepared by churning curd and not directly from milk or cream; and it could not have been the intention of the Legislature to exclude from the purview of the Act this important commodity which is used extensively as food.

The difficulty in the interpretation of A. 11.05 arises by reason of the addition of the words "or cream". Evidently cream is also prepared from milk, and the rule making authority has included in the definition of the word "butter" a preparation which is made from milk or cream, and has not expressly included a preparation which is made from curd. It is suggested by Mr. Adik that this absence is deliberate. There is a judgment of this Court in *Narsinha Bhaskar v. State of Bombay* in which it has been held that the rule making authority by defining the expression "butter" contemplated that product only which was prepared directly from milk or cream and not a preparation made from curd. Authority of that judgment is challenged by the learned Government Pleader. As the question is of considerable importance, we think that this case may be placed before a larger Bench for decision.

THE question was heard by a full bench composed of Chainani C.J. and S. T. Desai and Tarkunde JJ.

R. W. Adik, for the petitioner.

N. H. Gursahani, for respondent No. 1.

Y. V. Chandrachud, Government Pleader, for respondent No. 2.

CHAINANI C.J. The question referred to the Full Bench is "whether the expression "butter" within the meaning of rule A. 11.05 of the Rules framed under section 23 of the Prevention of Food Adulteration Act includes butter prepared from curd." In order to answer this question, it is necessary to consider the relevant provisions of the Act and the Rules. The Act was enacted in 1954 in order to make provision for the prevention of food adulteration. Clause (1) in s. 2 of the Act defines the term "adulterated". This clause contains sub-cl. (a) to (1), which lay down the different circumstances in which an article of food shall be deemed to be adulterated. For instance, under sub-cl. (a) an article of food is to be deemed to be adulterated, if the article sold by the vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice, or is not of the nature, substance or quality which it purports or is represented to be. Under sub-cl. (1), with which we are concerned in this case, an article of food is to be deemed to be adulterated, if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities, which are in excess of the prescribed limits of variability. The word "prescribed" is defined in cl. (xii) as meaning prescribed by rules made under this Act. The rule making power is conferred upon the Central Government by s. 23 of the Act. Clause (b) in sub-s. (1) of this section empowers the Central Government to make rules defining the standards of quality for, and fixing the limits of variability permissible in respect of, any article of food. In exercise of the

powers conferred by s. 23, the Central Government has made the Prevention of Food Adulteration Rules, 1955. Rule 5 of these Rules states that the standards of quality of the various articles of food specified in Appendix B to these rules are as defined in that Appendix. Appendix B does not, therefore, lay down the standards of quality of all articles of food, but only of those articles which are specified in this Appendix. The heading of Appendix B is "Definitions and Standards of Quality." Rule A. 11 in this Appendix contains provisions with regard to milk and milk products. Rule A. 11.01 defines milk as meaning

"the normal clean and fresh secretion obtained by complete milking of the udder of a healthy cow, buffalo, goat or sheep during the period following at least 72 hours after calving or until colostrum free whether such secretion has been processed or not." Rule A. 11.03 defines butter-milk as meaning the product obtained after removal of butter from curds by churning or otherwise. Rule A. 11.05 is in the following terms:

"Butter means the product prepared exclusively from the milk or cream of cow or buffalo, or both, with or without the addition of salt and annatto and shall contain not less than 80 per cent of milk fat and not more than 16 per cent of moisture. No preservative is permissible in butter."

Rule A. 11.06 defines whole milk *dahi* or curd as meaning the product obtained from fresh whole milk either of cow or buffalo by souring, and states that it shall not contain any ingredient not found in milk. Cream is defined in Rule A. 11.10 as meaning that portion of milk rich in milk fat which has risen to the surface of milk on standing and has been removed or which has been separated from milk by centrifugal force.

The question, which we have to decide, is whether butter prepared from *dahi* or curd can be said to be butter prepared from milk within the meaning of Rule A. 11.05.

On behalf of the petitioner-accused it has been urged by Mr. Adik that the rules contain separate provisions with regard to milk products and prescribe different standards for such products, that curd is a milk product and not milk, that Rule A. 11.05 also deals with butter prepared from a milk product, viz. cream, and that the fact that the rule refers separately to cream only also indicates that the rule making authority intended to exclude from the purview of the rule butter prepared from other milk products such as curd. Stress has also been laid on the word "exclusively" and it has been contended that the rule applies only to butter prepared directly from milk and cream, but not to butter made from curd. Reliance has been placed on *Narsinha Bhaskar v. State of Bombay*,¹ in which Miabhoy J. held that butter prepared from out of curd does not come within the purview of the definition of the word "butter" given in Rule A. 11.05.

In appreciating these arguments, it is important to note that the words used in Rule A. 11.05 are "exclusively from milk or cream" and not "directly from milk or cream." The emphasis is, therefore, on the basic material from which butter is prepared and not on the process by which it is made. *Dahi* is prepared from milk by souring it. Butter prepared from *dahi* can, therefore, be said to be butter prepared from milk itself, after it has undergone the process of souring. The two well known and widely prevalent methods of preparing butter are by souring milk and then churning the product so obtained, viz. curd, or by souring cream and churning it. There is, also, a third method, which is used in some dairies, and that is to produce butter directly from milk itself. In all these three cases, the basic material from which butter is made is milk. Only the processes adopted for making it are different. In one case it is produced from milk directly. In the other two cases, cream and curd are first prepared and these are then churned to obtain butter. The preparation of cream or curd is only an intermediate process in the manufacture of butter

from milk. Butter made from *dahi* or curd is therefore, also butter made from milk.

It is also difficult to understand why the process, by which an article is prepared, should make any difference as to whether it falls or does not fall within the scope of the Act and the rules. In almost all places in this country, outside the bigger towns, butter is prepared not directly from milk, but from *dahi* or curd. The object of the Act is to prevent the sale of adulterated butter, and it is impossible to believe that either the Legislature or the rule making authority could have intended to exclude butter prepared from *dahi*, which, as I have stated, forms the bulk of the butter, which is sold in this country, from the purview of the Act and the rules made under it. It is well settled that so far as possible the Court should adopt that interpretation, which will promote and further the object and policy of the legislation and suppress the mischief which the statute was enacted to prevent. In Rule A. 11.03, the substance left, after churning curd and separating butter-milk, is referred to as butter. The provisions of this rule also make it clear that the rule making authority intended that the rules should also apply to butter prepared from *dahi* or curd.

Cream, like curd, is a milk product. Rule A. 11.05 refers to cream but not to curd. It does not contain the words "or curd" after the words "or cream". Mr. Adik has, therefore, contended that the intention clearly was to make provision only for butter prepared from milk or cream and to exclude butter obtained from curd. This argument cannot be accepted for the reasons which I have given above. It seems to us that reference was made to cream in this rule by way of abundant caution and not in order to exclude butter prepared from curd. According to the ordinary meaning of the word "butter", it would include butter prepared from curd. In fact, in common parlance, butter prepared from *dahi* or curd would be regarded as butter prepared from milk. The language used in rule A. 11.05 is not such as to exclude the ordinary meaning of the word "butter".

With respect, therefore, we do not agree with the view taken in *Narsinha Bhaskar v. State of Bombay*. In our opinion, Rule A. 11.05 applies also to butter prepared from *dahi* or curd. The reply to the question referred to the Full Bench will, therefore, be in the affirmative.

Answer accordingly.

CRIMINAL APPELLATE.

Before Mr. Justice Tarkunde.

FRANCIS D'SOUZA v. EDWARD A. L. GAMEIRO.*

Criminal Procedure Code (Act V of 1898), Sec. 522—Indian Penal Code (Act XLV of 1860), Secs. 341, 339—Accused breaking open lock of complainant's room and occupying it—Complainant coming to know of trespass for first time about a month after his locking the room—Complainant when attempting to enter room next day after receiving information of trespass, obstructed from entering by accused—Accused convicted of wrongful restraint under s. 341, I. P. Code and further ordered under s. 522, Cr. Pr. Code to restore possession of premises to complainant—Whether Magistrate competent to pass order under s. 522—Complainant whether dispossessed by show of force employed by accused.

The complainant, who had locked and left his room on January 16, 1958, came to know for the first time on February 22, 1958, that the accused had broken open the lock and occupied the room. Next day, i.e. on February 23, 1958, when the complainant

*Decided, April 24 1959. Criminal Revision Application No. 403 of 1959, against the order of conviction and sentence passed by

J. H. A. Vakil, Presidency Magistrate, 9th Court, Bandra, Bombay, in Case No. 107/8 of 1958.

tried to enter the room the accused personally obstructed the complainant from entering the room. On a complaint being filed by the complainant, the accused was convicted by the Magistrate of the offence of wrongful restraint under s. 341 of the Indian Penal Code and it was further ordered under s. 522 of the Criminal Procedure Code, 1898, that possession of the premises in dispute be restored to the complainant by the accused. On the question whether the Magistrate was in law justified in passing the order under s. 522 of the Criminal Procedure Code, it was contended by the accused that the complainant was dispossessed sometime between January 16, 1958, and February 22, 1958, and not when he tried to enter the room on February 23, 1958, and that, therefore, his dispossession was not brought about by the wrongful restraint at the hands of the accused on February 23, 1958:—

Held, that the dispossession of the complainant took place when he was wrongfully restrained from entering the room in dispute on February 23, 1958, and that, therefore, the Magistrate was competent to pass the order under s. 522 of the Criminal Procedure Code.

Narayan v. Visaji,¹ distinguished.

Mahabir v. Rex,² referred to.

THE premises in dispute consisted of a room and a verandah in a certain building at Bandra. One Ramprasad Dhobi was the tenant of these and several other premises in the same building. Before 1950 a lady named Marie Gonsalves was the sub-tenant of Ramprasad Dhobi in the said premises. The case of the complainant, Edward A. L. Gameiro, was that in 1950 he obtained the possession of the premises as a result of a document passed by Marie Gonsalves. When Marie Gonsalves was in occupation of these premises Francis D'Souza (accused) and his wife and children were staying with her. According to the complainant, when Marie Gonsalves left the place after transferring possession of the premises to him, he allowed the accused and his family to occupy a portion of the verandah as his licensees on payment of compensation for use and occupation at the rate of Rs. 7 per month. The complainant was married in 1955 and sometime thereafter there were disputes between the parties. According to the complainant, he and his wife were harassed by the accused. In January 1958 the complainant's wife was expecting a child within a few months and, therefore, in order to avoid the harassment of the accused when his wife was in that delicate condition, the complainant left the premises on January 16, 1958. He carried some goods with him and locked the room and obtained temporary accommodation from his employer. On February 22, 1958, one Waxirali whom the complainant had asked to keep a watch on the room informed the complainant that the room was entered into and occupied by the accused and his family. The complainant, his wife and his brother visited the place and finding the accused in occupation, lodged a complaint at a police station. Next day, i.e., on February 23, 1958, the complainant went again to the room and tried to enter it but was prevented from doing so by the accused. Accordingly, he filed a complaint against the accused for wrongful restraint under s. 341, Indian Penal Code.

The accused stated in his defence that when Marie Gonsalves left the premises in 1950 he and not the complainant became the sub-tenant of the premises and that he took the complainant merely as his paying guest. He further stated that after the complainant got married, he (the accused) was asking him to leave the place and, therefore, on January 16, 1958, the complainant left the premises with the intention of leaving them permanently. The accused denied that the complainant had visited the premises on February 23, 1958, and that he was prevented from entering the room on that day.

The trying Magistrate came to the conclusion on a consideration of the evidence led before him that the complainant was in exclusive occupation of the room from about 1950 till the date when he left the room on January 16, 1958, after locking it. The Magistrate relied on the rent receipts produced by the

1 (1898) I.L.R. 23 Bom. 494.

2 [1949] A.L.R. All. 228.

complainant, and on the oral evidence including that of one Hanuman Ramprasad, the son of the tenant, to whom the rent of the premises was being paid by the complainant, and held that the accused and his family were occupying only a portion of the verandah outside the room. The accused was able to produce one receipt the contents of which suggested that he paid the rent of the premises in the month of April 1951. The accused also produced a letter written by an advocate of the tenant Ramprasad Dhobi dated June 1, 1954, which contained the statement that the accused was the sub-tenant of Ramprasad. This evidence was not accepted by the Magistrate as sufficient to cast doubt on the evidence led by the complainant to the effect that he was in sole occupation of the room since 1950. On these findings, the Magistrate convicted the accused under s. 341, Indian Penal Code, and sentenced him to pay a fine of Rs. 150. He also passed an order under s. 522, Criminal Procedure Code, that the accused should forthwith hand over to the complainant possession of the room and the portion of the verandah where the complainant had his kitchen. In his judgment the trying Magistrate observed as follows:—

"Shri Mascarenhas for the complainant has applied for an order under s. 522, Criminal Procedure Code, restoring possession of the room and portion of the verandah used by the complainant as a kitchen. Shri Neemuchwalla for the accused opposes the application and submits that no order under s. 522, Cr. P. C., should be made and the complainant should be left to his remedy in the civil Court. In my opinion the complainant has made out a case for an order under s. 522. The complainant has deposed that on February 22, 1958, when he was going to his room after lodging his complaint at the police station and after the accused was called to the police station and warned, two persons threatened him near the gate obviously at the instigation of the accused. On February 23, 1958, the accused stopped him from entering the verandah. The complainant's wife has similarly deposed that on February 22, 1958, the accused refused to allow them to enter. As they reached the gate of the house, two boys assaulted her husband and so they did not enter the compound. On February 23, 1958, also the accused restrained them from entering the room. The accused told them that he would not allow them to enter the room. This implies that if the complainant and his wife used force, the accused would use force. In these circumstances the complainant and his wife went away. In [1949] A.I.R. All. 228 [*Mahabir v. Rex*] Wanchoo J. has stated; 'if the accused or his accomplices having entered upon the land do not quit when the true owner protests against such unauthorised entry and are ready to fight, the offence can be said to have been attended by "show of force". Show of force may consist in the physical presence of the accused, his servants or companions in such a way that the true owner is put to the fear that if he tried to regain possession by force, he will be met by force... We think that dispossession of the complainant had not become complete till the complainant appeared on the scene, protested and had to go away...where shortly after the commission of the offence, the true owner becoming aware of the trespass committed in his absence, goes to the spot to regain possession of his land and is prevented from doing so by the accused showing readiness to fight if attempts were made to regain possession, the case would be covered by s. 522, Criminal P.C., and an order for restoration of possession can be passed by the Court'. I respectfully agree with these observations. It would be obviously improper to drive the complainant to the civil Court after he has established in this Court that he had possession of the room and a portion of the verandah and that he has been wrongfully deprived of the same by the accused. I accept the case of the complainant that he had only temporarily left the premises after putting locks on his room and kitchen. Subsequently the accused is found in occupation of the room and kitchen. It would be legitimate to presume in these circumstances that it is the accused who broke open the locks and went into occupation. Thereafter the accused has by show of force retained possession of the premises which were in the possession of the complainant. He cannot in these circumstances be allowed to retain possession.

I may also refer to the judgment of Allsop J. reported in [1943] A.I.R. All. 7 [*Chhabia v. Ram Charan*]. There his Lordship has stated: 'It is open to argument that it is not necessarily at the time the criminal trespasser goes upon the property that

dispossession takes place. It may perhaps be said that it sometimes takes place at the time when he prevents the rightful possessor from coming upon the property'.

In [1938] A.I.R. Lah. 839 [*Roda v. Autar Singh*], a case which is almost on all fours with the case before me, it has been held that an order under s. 522, Cr. P. C., would be proper in these circumstances although the complainant was not present when the lock was broken open and the accused went into occupation. In this case Skemp J. has not followed an earlier decision of the same Court. In [1939] A.I.R. Lah. 184 [*Ganda Singh v. Warsakha Singh*] the judgment of Skemp J. has not been followed. In the absence of any judgment of our High Court on this point, I prefer to follow the judgment of Skemp J."

The accused applied in revision to the High Court.

The application was heard.

S. A. Neemachwala, with *N. G. Menon*, for the petitioner.

C. B. Dalvi, Hon. Assistant Government Pleader, for the State.

T. V. Mascarenhas, for the complainant.

TARKUNDE J. [His Lordship after stating the facts and holding that the conviction of the accused under s. 341 of the Indian Penal Code was justified, proceeded]. Mr. Neemachwala then urged that the learned Presidency Magistrate erred in law in passing an order under s. 522, Criminal Procedure Code, for the restoration of possession of the premises to the complainant. In order to appreciate the arguments of Mr. Neemachwala the terms of s. 522(1) may be set out:

"Whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation and it appears to the Court that by such force or show of force or criminal intimidation any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, when convicting such person or at any time within one month from the date of the conviction order the person dispossessed to be restored to the possession of the same."

It will be seen that two conditions are required to be fulfilled in order that possession may be restored under s. 522. The first condition is that the accused must have been convicted of an offence attended by criminal force or show of force or by criminal intimidation. The second is that it must appear to the Court that by such force or show of force or criminal intimidation any person has been dispossessed of any immoveable property. In the present case it cannot be doubted that the offence of the petitioner of wrongful restraint was attended by show of force. Mr. Neemachwala contests this, but the very definition of "wrongful restraint" as given in s. 389, Indian Penal Code, shows that the offence consists of obstructing another person so as to prevent that person from proceeding in a certain direction, and the fact that, according to the finding of the learned Presidency Magistrate, the petitioner personally obstructed the complainant from entering the room implies that the offence of the petitioner was attended by show of force.

The question which is not so easy to decide is whether the complainant was dispossessed of his room by the show of force employed by the petitioner. The complainant had locked and left the room on January 16, 1958, and he came to know for the first time on February 22, 1958, that the petitioner had broken open the lock and occupied the room. The offence of wrongful restraint took place the next day, i.e., on February 23, 1958. Mr. Neemachwala urged that the complainant must have been dispossessed some time between January 16, 1958, and February 22, 1958, and not when he tried to enter the room on February 23, 1958, so that his dispossession was not brought about by the wrongful restraint at the hands of the petitioner on February 23, 1958. I do not think that Mr. Neemachwala is right in this contention. A person in juridical possession of any immoveable property cannot be rightly said to be dispossessed as soon as a trespasser occupies that property. When a trespasser enters into the property in the absence of the person in possession,

the latter, when he comes to know of the trespass, has still the right without recourse to a Court of law to try to secure possession back from the trespasser. In other words, a trespasser cannot merely by the act of trespass constitute himself into a person in possession. If, however, the person in juridical possession, after his physical dispossession, allows a sufficiently long time to pass or adopts some course such as instituting a legal action, from which an inference arises that he has mentally relinquished the possession which he had physically lost, then he can properly be held to be dispossessed. In the present case the complainant came to know of the trespass of the petitioner on February 22, 1958, and immediately on the next day he tried to enter the room as he was in law entitled to do. It cannot, therefore, be said that he was dispossessed earlier than on the occasion when the offence of wrongful restraint was committed.

A similar view was taken by a Division Bench of the Allahabad High Court in *Mahabir v. Bez.*¹ In that case Mr. Justice Wanchoo, delivering the judgment of the Court, observed (p. 230):

"...We think that where shortly after the commission of the offence, the true owner becoming aware of the trespass committed in his absence, goes to the spot to regain possession of his land and is prevented from doing so, by the accused showing readiness to fight if attempt were made to regain possession, the case would be covered by s. 522, Criminal P.C., and an order for restoration of possession can be passed by the Court."

For the contrary view, Mr. Neemachwala relied on *Narayan v. Visaji*,² which was a decision of a Division Bench of this Court consisting of Parsons and Ranade JJ. The facts in that case were that the accused entered into possession of an agricultural land and sowed it with rice in July 1897. About a month and a half thereafter, in September 1897, the complainant went to the land but was turned out by force by the accused. On these facts the accused was convicted of criminal trespass under s. 447, Indian Penal Code, but it was held by this Court that the order passed by the trial Magistrate restoring possession to the complainant was not justified by law. It is clear from the facts of that case that the complainant was fully aware since the month of July 1897 of the illegal entry effected on the land by the accused and of the sowing operations thereon. It was his case that the trespass had taken place in the month of July 1897. Under these circumstances the Court held that the offence of the accused was not attended by force and that the complainant was not dispossessed by the use of force. Delivering the principal judgment in that case Ranade J. observed (p. 500):

"...In the present case, the illegal entry on the land, according to the complainant himself, took place in July, 1897, when Ravlo is alleged to have sown it with rice. Complainant went to the place towards the close of September, and Ravlo refused to vacate or pass a *kabulayat*, and pushed out complainant. Complainant did not bring any charge for this assault, but complained of the trespass which took place some months before. Under these circumstances, it is clear that the offence complained of was not attended by criminal force nor did the use of such force cause the dispossession."

It is obvious that the offence which was held to have been committed by the accused in that case was the offence of trespass which took place in July 1897 and it was at that time that the dispossession of the complainant had taken place. No complaint regarding the assault in the month of September 1897 had been filed by the complainant. It is clear, therefore, that this decision does not come in the way of my holding that the dispossession of the complainant in the present case took place when he was wrongfully restrained from entering the room in dispute on February 23, 1958.

The result, is that this revision application fails and is dismissed.

Mr. Neemachwala requests that the petitioner should be allowed some time for restoring the possession of the premises to the complainant. On behalf

¹ [1949] A.I.R. All. 228.

² (1898) I.L.R. 23 Bom. L.R. 494.

of the complainant Mr. Mascarenhas agrees that time may be extended provided the petitioner pays to the landlord, without prejudice to the rights of either party, all the arrears of rent due in respect of the period from February 22, 1958, till the date on which the petitioner is allowed to hand over possession to the complainant. I accordingly order that the petitioner shall hand over possession to the complainant of the room and that part of the verandah in which the complainant had his kitchen on or before August 31, 1959. The petitioner has given an undertaking to the Court that he will, without prejudice to the rights of either party, pay to the tenant Ramprasad Dhobi by June 1, all the arrears of rent in respect of the period between February 22, 1958, and May 31, 1959, and that he will pay regularly the rent of the three subsequent months of June, July and August 1959. If the petitioner fails to pay the rent according to his undertaking, this part of the order by which time is given to him for handing over possession to the complainant will be vacated.

Application dismissed.

ORIGINAL CIVIL.

Before Mr. Justice K. K. Desai.

TARA SINGH UJAGAR SINGH v. THE UNION OF INDIA.*

Constitution of India, Arts. 310, 311—Army Instructions in India—Civilian employed in defence service whether entitled to protection under art. 311(2)—Whether non-observance of rules in Army Instructions give cause of action to such civilian—Army Instructions whether affect art. 310.

A person holding any post connected with defence within the meaning of art. 310(1) of the Constitution of India is not included in the class of persons holding a civil post under the Union referred to in art. 311(1) of the Constitution. A civilian employed in defence service is not entitled to protection under art. 311 and is not entitled to any reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

Chhandra Bhan v. Union of India,' Chandra Bhan Varma v. Union of India,' Subodh Ranjan v. N.A.O. Callakhan' and Dass Mal v. Union of India,' referred to.

The rules contained in Army Instructions in India (No. 212/1949 dated June 25, 1949) do not affect the provisions of art. 310 of the Constitution regarding the tenure of office of persons employed in the service of Government of India or State. The Army Instructions, therefore, are not binding on the Union and the non-observance of the rules contained therein do not give any cause of action to a civilian employed in the defence service.

Attindra Nath v. G. F. Gillet' and T. V. Ravindran v. C. M. Patel,' referred to.

On August 15, 1933, one Tara Singh (plaintiff) was initially employed at Bombay as a temporary clerk in the defence service. In connection with his employment the plaintiff signed a printed form of agreement dated January 5, 1934. This agreement was not signed on behalf of the Government of India and remained escrow. In December 1935 the plaintiff was appointed a temporary Overseer. In March 1940 the plaintiff was appointed Overseer on permanent substantive basis and then he signed a printed form of agreement dated June 21, 1940 (exh. 5). This agreement was executed (on behalf of the Governor General in Council) by Garrison Engineer, Wellington. As appeared from his service book, the plaintiff was discharging his duties at

*Decided, September 22, 1958. O. C. J. Suit No. 1336 of 1952.

1 [1956] A. I. R. Bom. 601.

2 (1958) O. C. J. Appeal No. 52 of 1956, decided by Chagla C. J. and Mody J., on April 11, 1958 (Unrep.).

L.R.—78.

3 [1956] A. I. R. Cal. 532.

4 [1956] A. I. R. Punj. 42.

5 [1955] A. I. R. Cal. 543.

6 (1956) Special Civil Application No. 1081 of 1956, decided by Chagla C. J. and Dixit J., on July 4, 1956 (Unrep.).

Wellington for a considerable time before March 1940. In about July 1941 the plaintiff was appointed temporary Sub-Divisional Officer and was made permanent in that post in August 1941.

After the plaintiff was transferred to and served at different places in June 1951 the plaintiff was stationed at Baroda as a Sub-Divisional Officer attached to a Military Camp situate at Baroda. The plaintiff's salary then was Rs. 480 (Rs. 350 as basic pay and Rs. 130 being dearness and other allowances). On May 6, 1950, the plaintiff got prepared an indent No. G-30801-A dated May 6, 1950, for striking off a quantity of $1\frac{1}{2}$ tons of coal from stocks that were in his charge. The Accounts Office reported that there was no basis for such an indent being prepared and inquiries were instituted. On March 27, 1951, the plaintiff was served with a charge-sheet along with certain documents in support of the charge in respect of the aforesaid $1\frac{1}{2}$ tons of coal. The relevant part of the charge served on the plaintiff ran as follows:—

"Committing an act prejudicial to good order and departmental discipline involving fraudulent issue and misappropriation of Government Stores in that he while employed as Superintendent B/R Gde. 1 at Baroda on 6-5-1950 struck off ledger charge $1\frac{1}{2}$ tons of steam coal on indent No. ..."

By a reply dated March 29, 1951, the plaintiff admitted having made out the indent. He, however, gave explanations as to why he had made "a consolidated indent to regularise the issue for accounting purposes". The plaintiff's explanations were not acceptable to the authorities and by a show cause notice dated September 5, 1951, the Commander, Works Engineers, Bombay, referred to the aforesaid charge against the plaintiff and further stated as follows:—

"The Chief Engineer, Southern Command, Poona, has after duly considering your statements of defence and all relevant documents, proposed to take the following action:

"Mr. Tara Singh should be removed from service without disqualification from further Government employment".

You are hereby required to show cause in writing as to why the proposed action should not be taken..."

By his letter dated September 22, 1951, the plaintiff denied the charge against him and asked for a chance of defending himself. He referred to the Army Instructions No. 212/49 as giving him the right to a complete hearing before proposed punishment. By an order dated October 12, 1951, the plaintiff was removed from service with effect from October 25, 1951, without disqualification from further government employment. An appeal to the Union of India against the order of removal was dismissed. Intimation of such dismissal was given to the plaintiff on June 12, 1952. The plaintiff, therefore, filed this suit after serving statutory notice dated September 2, 1952, *inter alia* for declarations that "the order of dismissal dated October 12, 1951 is illegal and void" and "the plaintiff continues in the service" of the Union and for arrears of salary on that basis. The sole ground on which the plaintiff based his claim was the right which according to him he had under Army Instructions in India No. 212/49 dated June 25, 1949, which *inter alia* provide for giving an opportunity to all employees for hearing and cross-examining the evidence in support of any charge and also for submitting written statement and evidence in defence and for a due and complete hearing. The plaintiff's contention in the plaint was that these rules of procedure in departmental enquiry were not observed in his case and, therefore, his dismissal was wrongful.

By its written statement the Union did not deny that the plaintiff has had no hearing in accordance with the Army Instructions No. 212/49. The Union's case was that the plaintiff did not ask for a personal hearing when the charge-sheet was served on him and that he was not entitled to ask for a hearing after the appropriate authority had decided that the plaintiff was guilty of the offence mentioned in the charge. The two main contentions which the Union raised were that (i) the plaintiff held a "post connected with defence" within

the meaning of art. 310 of the Constitution, and the grievance of the plaintiff was not justiciable and the plaint, therefore, did not disclose any cause of action; and (ii) that the cause of action did not arise wholly in Bombay, and the plaintiff having failed to obtain leave under cl. 12 of Letters Patent, the High Court had no jurisdiction. The Union also contended that the notice under s. 80 of the Code of Civil Procedure was defective.

K. L. Gauba, for the plaintiff.

S. B. Kher, with *Ajit Mehta*, for the defendant.

K. K. DESAI J. [His Lordship after stating the facts and dealing with points not material to this report, proceeded.] As regards the contention of the Union that the plaintiff held "post connected with defence" and that the grievance of the plaintiff is not justiciable, it is necessary to refer to the provisions of arts. 310(1) and 311 of the Constitution which provide as follows:—

"310. (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President..."

"311. (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

It is obvious that art. 310(1) deals with tenure of office of persons holding posts and offices under the Union or a State. It is also patent on the language of that article that the tenure as fixed under the article can only be affected or altered by provisions contained in the Constitution itself. By the language of the article it is made impossible for any other statute made by Parliament or State Legislature to provide for different tenure of office. The limitation as regards the tenure, if any, must be found in the Constitution.

Article 311, which provides for protection of persons employed by the Government, can only be available to specific persons mentioned in that article. The protection provided by art. 311 is protection given to a member of (i) a civil service of the Union or (ii) an all-India service or (iii) a civil service of a State or (iv) a person who holds a civil post under the Union or a State. All these specific persons and/or members of each class mentioned in art. 311 are also mentioned in art. 310. It is, however, significant that art. 310 makes specific reference to (a) "a member of defence service" and (b) "persons who hold posts connected with defence". No reference is made to "a member of defence service" and "persons who hold posts connected with defence" in art. 311. Members belonging to these classes have been specifically taken out of the provisions of art. 311 with intent to deprive them of the protection given to others under art. 311.

Having regard to the aforesaid position Mr. Gauba contended that the plaintiff held "a civil post under the Union" and was, as such, entitled to protection under art. 311 and was entitled to a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. This, of course, is a new contention and is not mentioned in the plaint. It is not included in the statutory notice given under s. 80 of the Code of Civil Procedure. This contention came to be made because on the amendment of the written statement the Union for the first time in August 1958 relied upon art. 310 as complete defence to the plaintiff's suit. I have allowed Mr. Gauba to argue on the footing that this contention was included in the plaint only because the plaintiff has had long service with the Government of India and it was necessary to

see if the defence raised by the Union of India on the footing of art. 310 was correct.

As regards the nature of his employment it is admitted by the plaintiff that he was a civilian employee in defence service. It is also admitted by the plaintiff that his salary and allowances came out of the defence expenditure. The description of rules on which the plaintiff relies indicates that they are made with reference to persons in defence service. These rules are described as "Army Instructions". These are rules relating to civilians paid from defence expenditure. These rules are admittedly not made for any person who is not holding a civilian post paid from defence expenditure. Mr. Gauba contends that since the plaintiff is described as a civilian employee in defence service he is holding a civil post under the Union. This contention appears to me to be ill-founded. A person holding "civil post under the Union" is classified separately from "a person holding any post connected with defence" in art. 310(1) of the Constitution. On comparison of the provisions of art. 310(1) and art. 311 it is clear that the person described as "a member of defence service" or "holding any post connected with defence" has been altogether excluded from art. 311. The tenure of office of such a person under art. 310(1) was "at pleasure" and yet he was not intended to be given any protection as provided under art. 311. That is the irresistible conclusion one reaches by reason of specific exclusion of such a person from art. 311.

It is not the contention of Mr. Gauba that the plaintiff is not holding a post connected with defence. On the contrary the plaintiff proceeds on the footing and it is admitted that the plaintiff holds a post connected with defence. In my opinion "person holding a post connected with defence" cannot be stated to be included in the class of persons "holding civil post under the Union" if the provisions of art. 310(1) are read correctly. I do not agree with the contention of Mr. Gauba that the plaintiff held "a civil post under the Union" within the meaning of these two articles. The only class within which the plaintiff falls is the class which is described in art. 310 as "holds any post connected with defence". I accordingly hold that the plaintiff is not entitled to any protection under art. 311 and is not entitled to any reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

In this connection Mr. Kher has relied upon the decision of this Court in the case of *Chandra Bhan v. Union of India*,¹ where in the first Court (S. T. Desai J.) considered and construed the provisions of art. 310 in regard to "a member of defence service". The relevant observations in that case are as follows (p. 602):—

"Now it is obvious that Art. 310 so far as it relates to a member of the defence service lays down in terms both express and explicit that in the absence of any provision of the Constitution and subject to the exception to which I shall presently refer:

'every person who is a member of a defence service or holds any post connected with defence...holds office during the pleasure of the President.'

The limitation or exception contained in the initial part of the Article has no bearing to any such case...I find that Art. 310 inevitably leads to the conclusion that a member of the defence service is dismissible at will unless he is protected by any of the restrictions and limitations provided for by the Article itself. Restrictions and limitations on the exercise of the 'pleasure of the President' as I have already pointed out are not applicable to the case of the plaintiff and his case would therefore be clearly covered by the rules relating to service 'durante bene placito' and on that view of the matter the claim made by the plaintiff would not be justiciable under Art. 310, if it fell under that Article because he could have no right of action against the Union of India for wrongful dismissal."

As regards the rules of procedure made under the Army Act for giving a complete hearing to an alleged defaulter in his defence it was observed in that deci-

sion as follows (p. 603) :—

"Then again the sections of the Army Act and the Rules and Regulations to which I have referred do not, in my judgment lay down any stipulations as to the tenure of service. Moreover as I shall have occasion to point out later on in my judgment these sections do not in any way affect the rule relating to tenure of service being terminable at will...Therefore, even if I were to accept the contention that Art. 310 permits any statute of Parliament modifying the general rule contained in it so far as it affects the defence personnel the conclusion would still have to be that the tenure of service was during the pleasure of the President."

Referring to the general rule that the tenure of office of serviceman was *durante bene placito* it was observed that (p. 604) :—

"There is another consideration of the matter. It seems to me that the principle underlying the rule should apply with greater force to a member of the defence service than to a civil servant. Article 311 of the Constitution and the provisions of S. 240, Government of India Act, 1935, in which there is no reference at all to a member of the defence service are to a degree illustrative of the principle."

After considering all the provisions applicable to a person in defence service as also to persons holding civilian posts in defence service it was held in that case that the tenure of office of such a person was at pleasure of the President and any grievance in respect thereof was not justiciable.

The judgment of S. T. Desai J. came before the appeal Court in *Chandra Bhan Varma v. Union of India*², and Chagla C.J. also agreed with the ratio of that judgment as correct and held that on a true construction of art. 310 as regards a member of the defence service the tenure of office must be at pleasure of the President and any grievance in that connection was not justiciable.

The provisions of these articles came to be considered in the case of *Subodh Ranjan v. N. A. O. Callaghan*.³ The question there also related to a civilian employed in defence service holding position similar to the plaintiff in this case. It was there also held that a civilian employed in defence service was not entitled to protection under art. 311 and that his tenure of office was at pleasure of the President and the grievance made by him was not justiciable.

The question whether a civilian employed in defence service could be classified as a person holding a civil post under the Union came to be considered by Kapur J. in the case of *Dass Mal v. Union of India*.⁴ The plaintiff in that case was a civil clerk employed in the defence services. He was not governed by the provisions of the Army Act. The contentions raised on his behalf were same as the contentions raised before me by Mr. Gauba. After considering the relevant provisions of the Government of India Act, 1935, as also arts. 309, 310 and 311 of the Constitution, the conclusion that was reached appears in the following words (p. 44) :

"In Article 311(1) a member of a defence service or a person who holds any post connected with defence has been omitted, and in my view this omission has only one meaning that the protection afforded under Article 311(1) is not available to the appellant *Dass Mal*."

The contention raised on behalf of the plaintiff in that suit that he held "a civil post under the Union" and was entitled to protection of art. 311 was negatived.

In connection with the Army Instruction No. 212/1949 Mr. Kher referred me to a decision in the case of *Atindra Nath v. G. F. Gillot*.⁵ What appears in that decision seems to me to be applicable in all respects to the case before me.

The information given to me as regards the "Army Instructions" is nothing more than the production of "Army Instructions" as evidence in this case. Mr. Gauba contends that these rules appearing in the Army Instructions must

2 (1958) O. C. J. Appeal No. 52 of 1956,
decided by Chagla C. J. and Mody J., on
April 11, 1958 (Unrep.).

3 [1956] A. I. R. Cal. 532.

4 [1956] A. I. R. Punj. 42.

5 [1955] A. I. R. Cal. 543.

have been enacted under s. 241 of the Government of India Act. Neither side, however, is in a position to give me correct information as to under what provisions these Army Instructions have been framed. It appears to me that these are the subject matter of a Government Resolution and made for the purpose of guidance of military authorities in connection with civilians employed in defence services. These rules have no binding force in themselves. These rules are only directory rules. They do not appear to have been made under provisions of any particular statute. These rules have in any event no force of affecting the provisions of art. 310 regarding the tenure of office of persons employed in the service of Government of India or State. The tenure of office of persons employed in such service continues to be at pleasure of the President or the Governor or the Rajpramukh as the case may be.

In this connection Mr. Kher has referred me to the judgment of Chagla C.J. in *T. V. Ravindran v. C. M. Patel*.⁶ That was a case of dismissal of an employee from Ordnance Depot at Ambarnath. The contention raised before the Division Bench was that the provisions of the Industrial Disputes Act which were admittedly applicable even to the government employees came in the way of dismissal of the petitioner in that case and that the dismissal was, therefore, not effective. Rejecting these contentions it was held that by reason of the provisions of art. 310 the tenure of office of a government servant employed even in civil service continued to be at the pleasure of the President or the Governor, that even by legislation, (viz. as in that case the Industrial Disputes Act) Parliament had no authority to derogate from the provisions of art. 310 of the Constitution. The petitioner's petition was accordingly dismissed in that case.

Having regard to the decisions referred to by me above, I have come to the conclusion that the plaintiff does not hold a civil post under the Union and is not entitled to protection of art. 311. I have also come to the conclusion that the Army Instructions referred to in the plaint are not binding on the Union and the non-observance of the rules contained in these Army Instructions do not give any cause of action to the plaintiff. The validity of dismissal of the plaintiff is not justiciable and this Court has no jurisdiction to give any relief to the plaintiff.

The third contention raised by Mr. Kher related to the statutory notice given by the plaintiff under s. 80 of the Code of Civil Procedure. This notice admittedly does not refer to the reliefs claimed by the plaintiff in this suit. That notice only indicated that the plaintiff would be claiming damages against the Union and did not indicate that the declarations as mentioned in the plaint would be sought against the Union. The plaint and the notice do not refer to art. 311 of the Constitution.

Mr. Gauba has referred me to the commentary of Sir Dinshaw Mulla on s. 80 and also to the decision in *Secretary of State v. Chimanlal Jamnadas*.⁷ He says that this notice must be construed liberally and is valid. Having regard to my conclusions on the main contentions of the parties as hereinbefore mentioned, I do not propose to decide the issue as to whether the notice under s. 80 in this case is improper.

In the result the suit is dismissed with costs.

Suit dismissed.

Solicitors for the defendants: *Little & Co.*

⁶ (1956) Special Civil Application No. Dixit J., on July 4, 1956. (Unrep.).
1061 of 1956, decided by Chagla C. J. and ⁷ (1941) 44 Bom. L. R. 295.

Before Mr. Justice K. K. Desai.

SHIRINBAI MANCHERSHAW MEHANTY v. THE STATE OF BOMBAY.*

Bombay Land Requisition Act (Bom. XXXIII of 1948), Secs. 6, 9, 4(5)—Word "release" in ss. 6(1) and 9(1) whether means restoration of physical possession—Whether de-requisition order made under s. 9(1) complete before its service on landlord and before physical possession of premises transferred to appropriate person—Whether vacancy under s. 6 can arise by reason of mere order of de-requisition of premises—Order of requisition whether effective without transfer of physical possession of premises to Government.

The word "release" used in ss. 6(1) and 9(1) of the Bombay Land Requisition Act, 1948, does not mean restoration of physical possession. The word is used not as other word for restoration of possession, but as something precedent to transfer and/or restoration of physical possession of the premises.

A de-requisition order made under s. 9(1) of the Act is complete in all its effects and aspects when it is made. It is, therefore, complete before service or communication thereof on the landlord and even if physical possession is not transferred to the appropriate person.

Under s. 6 of the Act a vacancy can arise by reason of release of the premises from requisition under s. 9(1) notwithstanding the fact that the de-requisition order is not communicated to the person concerned and physical possession of the premises in question is not given to such person.

An order of requisition under the Act in all its aspects is completed by merely making an order for the purpose. Even when physical possession is not transferred to the Government and/or taken on behalf of the Government, a requisition order made would exist in all its effects.

THE facts appear in the judgment.

B. L. Dalal, for the petitioners.

S. J. Sorabji, for the respondent.

K. K. DESAI J. This is a petition under art. 226 of the Constitution challenging the validity of a requisition order dated July 4, 1958, passed in pursuance of cl. (a) of sub-s. (4) of s. 6 of the Bombay Land Requisition Act of 1948.

The relevant facts are as follows: The petitioner is the owner of Heera Building at Jehangir Daji Lane, Sleater Road, D. Ward, Bombay 7. Prior to May 31, 1957, one P. N. Mehta was occupying the first floor of that building as a tenant of the petitioner. By a notice to quit P. N. Mehta gave notice to the petitioner that he would vacate the first floor of the premises on the expiry of the month of the tenancy, viz., May 31, 1957. In fact on June 5, 1957, P. N. Mehta vacated the first floor of the premises—hereinafter referred to as the premises. By a letter dated June 5, 1957, the petitioner gave information regarding P. N. Mehta having vacated the premises. On June 14, 1957, the petitioners signed the printed prescribed form relating to intimation of vacancy and furnished the same to the Accommodation Officer. A copy of that form is annexed as Annexure I to affidavit to the reply dated November 1, 1958. This form reached the Accommodation Department on June 18, 1957. By a requisition order dated July 17, 1957, the premises were requisitioned under cl. (a) of sub-s. (4) of s. 6 for housing a person rendered homeless due to house demolition on the ground that the intimation under sub-s. (1) of s. 6 of the Bombay Land Requisition Act had been received from the petitioner on June 18, 1957.

The petitioner made several representations to the Government from time to time that he intended to sell off the Heera Building and that the Government should, therefore, not enforce the requisition order and should not take possession of the premises. The Government accepted the representations made

*Decided, November 26, 1958. O.C.J. Miscellaneous Petition No. 374 of 1958.

by the petitioner and from time to time extended the date within which the petitioner should complete the intended sale of the property. The time was extended ultimately to May 31, 1958. As the petitioner had not completed the sale of the property an enforcement order dated May 30, 1958, was issued and on June 3, 1958, possession was taken by the Government of the premises.

It appears that having regard to the time that was given to the petitioner from July 1957 till May 1958, the premises were not needed for housing a person rendered homeless due to house demolition for which purpose the requisition order dated July 17, 1957, was made. Government thereupon by a de-requisition order dated July 3, 1958, made under s. 9 of the Act de-requisitioned the premises.

On July 4, 1958, the requisition order in question was made for housing a State Government servant. The de-requisition order and this requisition order were served on the petitioner on July 4, 1958. The petitioner has challenged the requisition order dated July 4, 1958, before me on the following grounds:—

(1) The first requisition order dated July 17, 1957, was illegal and void because the intimation (of vacancy) dated July 14, 1957, which was delivered to the Accommodation Department did not comply in all respects with the prescribed form as certain details to be mentioned were incomplete and that the intimation did not amount to an intimation of vacancy, on the footing whereof a requisition order could be made by the Government. The first order being illegal and void, there could not be any release from requisition in respect of such illegal and void requisition.

(2) The requisition under s. 6, on the ground of release of premises from requisition, must comply with the provisions of s. 9 of the Act and under s. 9 release is not complete unless physical possession is restored to the person entitled to the same. The requisition order cannot be made under s. 6 on the ground of release of the premises from requisition without restoration of physical possession to such person. The requisition was in fact made without release and, therefore, is illegal.

(3) No vacancy as required under s. 6 could come into existence by the said de-requisition order before the same was served on the petitioner. Before such service and communication of the de-requisition order on the petitioner a fresh requisition order on the ground of release of the premises from requisition was made. The order was without existence of vacancy.

(4) As both the de-requisition order and the requisition order were served at the same moment on the petitioner, there was no vacancy and jurisdiction under s. 6 to the Government to make a requisition order; that in fact no inquiry had taken place as required under the provisions of sub-cl. (4) of s. 6, and, therefore, the condition precedent to exercise of the jurisdiction had also not been satisfied.

For the examination of these contentions of the petitioner it is necessary to recite the whole of the de-requisition order and the requisition order in question. The de-requisition order dated July 3, 1958, runs as follows:

"In exercise of the powers conferred by sub-section (1) of Section 9 of the Bombay Land Requisition Act, 1948 (Bom. XXXIII of 1948), the Government of Bombay hereby releases from requisition the premises specified below which were requisitioned under Government Order No. R14/101-G/Hira-I-A-1565, dated 17th July 1957..."

The requisition order dated July 4, 1958, runs as follows:—

"Whereas on inquiry it is found that the premises specified below had become vacant on the 3rd day of July 1958 by reason of the de-requisition Order No. VI/101-G/Heera-1, dated 3rd July 1958.

Now therefore, in exercise of the powers conferred by clause (a) of sub-section (4) of section 6 of the Bombay Land Requisition Act 1948 (Bom. XXXIII of 1948) the Government of Bombay is pleased to declare that the said premises had become vacant after 4th December 1947 and to requisition the said premises for a public purpose, namely, for housing a Bombay State Government Servant..."

It is patent that the requisition order in question is made on the basis that the premises had become vacant on July 3, 1958, by reason of the de-requisition order dated July 3, 1958. Jurisdiction to make that requisition order is to be found under s. 6 of the Act. The relevant part of section 6 runs as follows:—

"6. (1) If any premises situate in an area specified by the State Government by notification in the *Official Gazette*, become vacant...by reason of the release of the premises from requisition...the landlord of such premises shall give intimation thereof in the prescribed form to an officer authorised...

(4) Whether or not an intimation under sub-section (1) is given and notwithstanding anything contained in section 5, the State Government may by order in writing—

(a) requisition the premises for the purpose of the State or any other public purpose and...

Provided that where an order is to be made under clause (a) requisitioning the premises in respect of which no intimation is given by the landlord, the State Government shall make such inquiry as it deems fit and make a declaration in the order that the premises were vacant or had become vacant..."

The relevant provisions of s. 9 are as follows:—

"9. (1) The State Government may at any time release from requisition any land requisitioned or continued to be subject to requisition under this Act.

(2) (a) Upon such release the land shall be restored as far as possible in the same condition in which it was on the date on which the State Government was put in possession thereof, and the State Government shall pay compensation for deterioration, if any,...

(3) When any land is to be released from requisition, the State Government may, after making such inquiry, if any, as it deems fit, specify by order in writing the person to whom possession of the land shall be given."

There are further provisions in s. 9 relating to the machinery for crystallising rights and obligations between the person entitled to possession and the Government regarding the premises. These are not relevant for the purpose of this petition.

Mr. Dalal has referred me to the definition of the word "to requisition" in sub-cl. (5) of s. 4, which runs as under:—

"4. (5) 'to requisition' means in relation to any land to take possession of the land or to require the land to be placed at the disposal of the State Government."

In developing the grounds (2), (3) and (4) mentioned above, Mr. Dalal argues that the word 'release' in sub-s. (1) of s. 6 and sub-s. (1) of s. 9 must be given the same meaning. He contends that 'release' is converse of the definition of the words 'to requisition' as quoted above. He says that requisition means taking of physical possession and the word 'release' when used in ss. 6 and 9 means restoration of physical possession. He contends that on a true construction of the provisions of s. 6, vacancy cannot arise by reason of release of the premises from requisition until after the communication of a de-requisition order to the person concerned and restoration of physical possession of the premises in question to such person. For this contention he places emphasis on sub-s. (2) of s. 9 and says that it is patent that on de-requisition physical possession is directed to be restored. It is not possible, he says, to complete the de-requisition without such restoration of possession. Now, if one looks at the definition of the words 'to requisition' as quoted above, the second part thereof does not refer to or contemplate immediate transfer of physical possession. "To require the land to be placed at the disposal of the State Government" is merely to make a requisition for the purpose. Such an "order of requisition" in all its aspects is completed by merely making an order for the purpose. Even when physical possession is not transferred to the Government and/or taken on behalf of the Government, a "requisition order" made would exist in all its effects. The converse is true of the de-requisition order, if true meaning is to be given to the provisions of s. 9(1)

of the Act. The word 'release' is used not as other word for restoration of possession, but as something precedent to transfer and/or restoration of physical possession of the premises. A release from requisition is made in all cases by a "de-requisition order". That order is complete in all its effects and aspects when it is made in the relevant Department of the Government. It is, of course, true that consequent upon such "de-requisition order" the Government will restore physical possession of the premises in question to the appropriate person. It is also necessary that rights and liabilities and obligations in respect of such premises between the Government on the one hand and of the appropriate person on the other hand must be crystallised. The provisions under sub-s. (2) and other subsequent sub-sections of s. 9 relate to the machinery for crystallisation of the rights and liabilities of the parties in respect of the premises including the restoration of the premises. It would not be that in respect of a "de-requisitioned" premises "requisition order" would continue, or be effective in law if physical possession is not restored. Nor would it be conversely true for the Government in a given case to contend that possession having not been restored, there is no "de-requisition" of the property in spite of a "de-requisition order" having been made.

If this is the true meaning of the provisions of s. 9, the same should be applicable to the relevant provisions of s. 6, which provides that a vacancy comes into existence by reason of "release of the premises from requisition". In my view upon a de-requisition order being made there is a release of premises from requisition. This is the meaning of s. 6, and in case of a vacancy arising on "release of the premises from requisition" there is jurisdiction to make an order for requisition on the basis of such vacancy. I, therefore, negative the contention of Mr. Dalal that the word 'release' as mentioned under ss. 6 and 9(1) has reference and/or is connected with restoration of possession. I also negative his contention that no vacancy is created by release from requisition until a de-requisition order is served on the landlord. The de-requisition order is, as I have already held, complete before service or communication thereof on the landlord. I, therefore, negative the contention of Mr. Dalal that there was no vacancy in this case because the de-requisition order and the requisition order in question were served on the petitioner at the same time.

[His Lordship after dealing with points not material to this report, concluded.]

Under the circumstances the petition is dismissed with costs. Rule discharged.

Solicitors for the petitioners: *Smetham Byrns & Lambert.*

Solicitors for the respondent: *Little & Co.*

Rule discharged.

Before Mr. Justice K. T. Desai.

FRANCESCO CORSI v. M/S. GORAKHRAM GOKALCHAND.*

Arbitration (Protocol and Convention) Act (VI of 1937), Secs. 2, 4(1), 5; First Schedule, Cl. 2—Indian Independence (International Arrangements) Order, 1947, Schedule, Cls. 1, 3, 4—Indian Limitation Act (IX of 1908), Art. 178—Arbitration Act (X of 1940), Sec. 14—Agreement to refer disputes arising out of contract to arbitration in London in accordance with rules of specified Association—Award obtained in London—Petition for filing award in Court in India under Act VI of 1937—Maintainability of petition—Whether award a foreign award within s. 2 of Act—Award whether made in pursuance of an agreement for arbitration to which Protocol applies—Act VI of 1937 whether has force in India after January 26, 1950—Applicability of art. 178, Indian Limitation Act, to application for filing award under s. 5 of Act VI of 1937.

Under a contract the respondents agreed to sell to the petitioner Indian groundnut oil on certain terms and conditions set out in the contract including the term that "all other terms and conditions as per London Oil and Tallow Trade Association Contract." One of the terms of the London Oil and Tallow Trade Association Contract was to the effect that "any dispute arising out of this contract shall be settled by arbitration in London in accordance with the Rules endorsed on this contract." On the petitioner contending that the respondents had failed to supply the goods agreed to be sold by them to the petitioner under the contract, the matter was referred to arbitration in London in accordance with the rules endorsed on the standard form of the contract of the London Oil and Tallow Trade Association. The petitioner obtained an award in his favour and filed a petition under the Arbitration (Protocol and Convention) Act, 1937, in the High Court, praying that the award may be ordered to be filed in Court and a decree may be passed according to it. The respondents resisted the application contending that the arbitral procedure including the constitution of the Arbitral Tribunal was not governed in the instant case by the will of the parties within the meaning of clause 2 in the First Schedule to the Act, but the parties had bound themselves by the provisions contained in the London Oil and Tallow Trade Association contract as regards the arbitral procedure and the constitution of the Arbitral Tribunal and their will in that connection had been expressed and that, therefore, the Protocol set forth in the First Schedule to the Act did not apply and the award was not a foreign award within the meaning of s. 2 of the Act:—

Held, that clause 2 in the First Schedule to the Act does not preclude the will of the parties in connection with the arbitral procedure and the constitution of the Arbitral Tribunal being expressed in the instrument whereby the parties agree to refer disputes that may arise in connection with the contract to arbitration, and

that, therefore, the agreement for arbitration in the instant case was one to which the Protocol applied and the award was a foreign award within the meaning of s. 2 of the Act.

Clause 2 in the First Schedule to the Arbitration (Protocol and Convention) Act, 1937, requires that the constitution of the Arbitral Tribunal should be governed by the will of the parties and that will can be expressed in the agreement of reference. By the expression of that will the Protocol is not excluded.

*W. Wood & Sons v. Bengal Corpn.*¹ and *Bajrang E. S. Co. v. Commrs. for Port of Cal.*² dissented from.

The Arbitration (Protocol and Convention) Act, 1937, has not ceased to have force in India after January 26, 1950.

Article 178 of the Indian Limitation Act, 1908, does not apply to an application for filing an award under s. 5 of the Arbitration (Protocol and Convention) Act, 1937.

Civil Revision Petitions Nos. 46 of 1954 and 2369 of 1953 decided on March 13, 1956, by Basheer Ahmed Syeed J. at the Madras High Court, dissented from.

*Decided, December 11, 1958. O. C. J.
Suit No. 429 of 1955.

1 [1956] A. I. R. Cal. 238.

2 [1957] A. I. R. Cal. 240.

THE facts are stated in the judgment.

D. P. Madan, with *P. P. Khambata* and *J. M. Thakore*, for the petitioner.

M. P. Laud, with *J. S. Khambata*, for the respondents.

K. T. DESAI J. The petitioner is a national of Italy. He carries on business under the name and style of Messrs. Francesco Corsi. The respondents are a firm, the partners whereof are citizens of India. The respondents carry on business *inter alia* of import and export at Choksi Chambers, Sheikh Memon Street, Bombay. By three contracts in writing the respondents agreed to sell to the petitioner 300 tons of Indian crude groundnut oil in the aggregate, 100 tons being agreed to be sold under each of the aforesaid contracts on the terms and conditions set out in those contracts. One of the terms of each of the said contracts is as follows:—

"All other terms and conditions as per London L.O.T.T.A. contract (that is, "London Oil and Tallow Trade Association Contract.")"

One of the terms of the said London Oil & Tallow Trade Association contract is as follows:—

"(15) Any dispute arising out of this contract shall be settled by arbitration in London in accordance with the Rules endorsed on this contract..."

The petitioner contended that the respondents had failed to supply the goods agreed to be sold by them to the petitioner under each of the aforesaid contracts and committed a breach of the said contracts. The matter was referred to arbitration in London in accordance with the rules endorsed on the standard form of the contract of the London Oil & Tallow Trade Association. The petitioner obtained an award in his favour on February 23, 1953, for £ 3,711-15-3. The petitioner has filed the present petition praying that the said award may be ordered to be filed in this Court and that judgment may be pronounced and a decree may be passed according to the said award. The respondents have resisted that application and have raised numerous contentions. As the respondents contended that there were several issues which were liable to be tried as preliminary issues, the matter was placed on board for raising issues and for determining which of those issues should be tried as preliminary issues and for trying such preliminary issues. After the issues were raised in this case, the parties agreed that four issues should be tried as preliminary issues. Those issues are as follows:—

(1) Whether the Arbitration (Protocol and Convention) Act of 1937 under which the petitioner has filed the application has any force in India after January 26, 1950.

(2) If the answer to issue No. 1 is in the negative, whether this Honourable Court has jurisdiction to entertain the application.

(3) Whether the said award is a foreign award within the meaning of the said Arbitration (Protocol and Convention) Act, and

(4) Whether the application is barred by the law of limitation.

It was strenuously contended on behalf of the respondents that the Convention on the Execution of Foreign Arbitral Awards had not been duly signed on behalf of India so as to bind the Government of India after India attained independence. The matter was adjourned from time to time in order to enable the respondents to get whatever evidence they desired in the matter. They are, however, not in a position to show that the Convention had not been duly signed or that the Convention is not binding on the present Government of India.

India is a State signatory to the Protocol on Arbitration Clauses and to the Convention on the Execution of Foreign Arbitral Awards. In order to give effect to the said Protocol and of enabling the said Convention to become operative in India, the Indian Legislature passed the Arbitration (Protocol and Convention) Act VI of 1937. In the preamble to the Act, it has been recited

as follows:—

"Whereas India was a State signatory to the Protocol on Arbitration Clauses set forth in the First Schedule, and the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule, subject in each case to a reservation of the right to limit its obligations in respect thereof to contracts which are considered as commercial under the law in force in the Provinces of India."

Reliance was placed by Mr. Laud, the learned counsel for the respondents, on foot-note (q) which appears in Halsbury's Laws of England, Vol. II, 3rd edn., at p. 52, which runs as follows:—

"Arbitration (Foreign Awards) No. 1 Order, 1938, S.R. & O. 1938 No. 137. Although it is considered that India and Pakistan are now effective participants in the Convention, it may be that a further Order is required in view of the fact that the Arbitration (Foreign Awards) No. 1 Order, 1938, S.R. & O. 1938 No. 137, merely declared that India was a territory to which the Convention applied and did not declare India to be a party to the Convention."

Beyond citing the footnote the learned counsel for the respondents was not in a position to carry the matter any further. He has not referred me to any document for the purpose of showing that India is not bound by the Convention. The Indian Independence (International Arrangements) Order, 1947, came into force on August 14, 1947. By s. 2 of that Order it is provided that the agreement set out in the Schedule to that Order shall, as from the appointed day, have the effect of an agreement duly made between the Dominion of India and the Dominion of Pakistan. In the Schedule it has been stated by cl. 1 that the international rights and obligations to which India was entitled and subject immediately before August 15, 1947, would devolve in accordance with the provisions of that agreement. Clause 3 of the Schedule provides as follows:—

"3. (1) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion..."

Clause 4 of the Schedule provides as follows:—

"Subject to Articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions."

India being a State signatory to the Protocol on Arbitration Clauses set forth in the First Schedule to the Arbitration (Protocol and Convention) Act, 1937, and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule to that Act, the obligations undertaken thereunder continue to bind India after India was constituted a Dominion and they continue to bind India thereafter. The Arbitration (Protocol and Convention) Act, 1937, has been duly passed by the Indian Legislature and I am bound to give effect to its provisions. It has not been shown how the said Act has ceased to be in force after January 26, 1950. Issue No. 1 is answered in the affirmative.

In view of the answer given on issue No. 1, issue No. 2 does not arise for consideration.

It is next contended on behalf of the respondents that the award that has been obtained by the petitioner is not a foreign award within the meaning of the Arbitration (Protocol and Convention) Act, 1937. Section 2 of that Act, which defines a foreign award, runs as follows:—

"In this Act 'foreign award' means an award on differences relating to matters considered as commercial under the law in force in the Provinces made after the 28th day of July, 1924,—

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have

been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and .

"(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Act an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made."

The only ground urged by the learned counsel on behalf of the respondents for saying that the award was not a foreign award within the meaning of the Act was that it was not made in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applied. It was argued that the parties had contracted themselves out of the Protocol set forth in the First Schedule to the Act. In this connection, strong reliance was placed upon cl. 2 appearing in the First Schedule. That clause runs as under:—

"The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."

It is not disputed that the arbitral procedure, including the constitution of the Arbitral Tribunal, is governed under the terms of the contract by the law of the country in whose territory the arbitration was to take place viz. England. What is urged is that the arbitral procedure including the constitution of the Arbitral Tribunal is not governed in the present case by the will of the parties within the meaning of the said cl. 2. It is urged that as the parties in the present case have bound themselves by the provisions contained in the London Oil & Tallow Trade Association's contracts as regards the arbitral procedure and the constitution of the Arbitral Tribunal, their will in that connection has been expressed and does not thereafter remain to be expressed and where such will has been expressed, the protocol cannot apply. In this connection, cl. 14 of the London Oil and Tallow Trade Association's contract was referred to. That clause provides as under:—

"For the purpose of all proceedings whether at law or by arbitration this contract shall be deemed to be in all respects an English contract, and all disputes and questions thereunder shall be decided in accordance with the law of England. The arbitrators appointed in England and/or the English Courts as the case may be, shall have exclusive jurisdiction over all such disputes and questions. Any party domiciled resident or trading in Scotland shall be held to have prorogated jurisdiction against himself to the English Courts and any party domiciled resident or trading elsewhere than in England or Scotland shall be deemed to have submitted to the jurisdiction of the English Courts. Provided nevertheless that for the purpose only of enforcing or carrying into effect any order, award or judgment of the arbitrators or the English Courts outside the jurisdiction of the English Courts either party may resort to any Court or Authority within whose jurisdiction the other party or any property of his may be found. All proceedings, notices of proceedings and other notices in connection with or to give effect to the arbitration shall be served upon any party not domiciled in England by leaving the same addressed to such party at the office in London of the London Oil and Tallow Trades Association and in the case of a party domiciled, resident or trading elsewhere than in England, Scotland or Ireland by leaving copies or duplicates thereof with the Consul or Agent in London of the country in which such party's last known address is situate..."

Clause 15 of the said contract provides for settlement by arbitration in London of any dispute arising out of the contract in accordance with the rules endorsed on the contract. The rules contain detailed provisions as regards the constitution of the Arbitral Tribunal and the arbitral procedure. The parties in this case have bound themselves by the aforesaid provisions and their will in connection with the arbitral procedure and the constitution of the Arbitral

Tribunal has been duly expressed. The argument of counsel for the respondents is that in order that the protocol may apply the will of the parties in that connection must not have been crystallised and expressed in the contract whereunder the parties agree to submit their disputes to arbitration. I do not see any reason or any warrant for this submission. There is nothing in cl. 2 which precludes that will being expressed in the instrument whereby the parties agree to refer disputes that may arise in connection with the contract to arbitration. I fail to see how the parties could be said to have contracted themselves out of the Protocol by reason of cl. 14 or 15 of the London Oil and Tallow Trade Association's contract.

Mr. Land relies upon two judgments of the Calcutta High Court in this connection delivered by one Judge of that Court. The first is the case of *W. Wood & Sons v. Bengal Corpn.*¹ In that case an application was made under s. 3 of the Arbitration (Protocol and Convention) Act, 1937, for the stay of a suit on the ground that the parties had agreed to refer the subject-matter of the suit to arbitration. In that case the party applying for stay had itself brought an action in the Queen's Bench Division in England in connection with the very contract giving rise to the claim in the suit and had obtained a judgment against the plaintiff in that suit and could not be said to be ready and willing to go to arbitration. The learned Judge there observed that the party applying for stay had by bringing the action in the Queen's Bench Division in respect of the matter agreed to be referred showed that it was not at the time when the proceedings were commenced in the Calcutta High Court ready and willing to do all things necessary to the proper conduct of the arbitration and that the application on that ground was liable to be dismissed. Thereafter the learned Judge, however, further proceeded to observe as follows (p. 240):

"My second reason is that it is open to parties, subject respectively to the jurisdiction of different Contracting States who are signatories to the Protocol and Convention, to elect to come either under Arbitration under the National Statutes or under Arbitration under the Protocol. If by their Arbitration Agreement such parties choose Arbitration under National Statutes, such as the course which is chosen by the parties here, the agreement being that the parties should be governed by the English Arbitration Act mentioned in Cl. 9 of the Agreement, there is then no further scope left for invoking the Protocol Arbitration any more.

To hold otherwise will be tantamount to saying the nonsense that parties choose two different competitive Arbitration Tribunals to decide disputes under the same contract. This conclusion becomes clear on the construction of the words 'a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule applies' used in S. 3 of that Act. A reference to the First Schedule of that Act will at once show the meaning of those words. Clause 2 of the First Schedule says:

"The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place'.

Now plainly the Arbitral Tribunal there contemplated has to be governed by the 'will' of the parties. It is obvious on the facts of this case that there is no agreed will of the parties on such Arbitral Tribunal. It was contended by Counsel on behalf of the applicant that the will of the parties was the contract between the parties or, in other words, Arbitration under the English Arbitration Act.

Clearly that argument is erroneous for two reasons: firstly because if that is the Arbitral Tribunal, then it is not a Tribunal under the Protocol and, secondly because the words 'will of the parties' in Cl. 2 of the First Schedule cannot represent the contract between the parties because wherever the contract between the parties is intended, the First Schedule uses the word 'contract' not 'will'."

I have quoted the observations of the learned Judge *in extenso* because the learned counsel who has urged this point before me has adopted those words

as part of his argument and he has frankly stated before me that beyond what is stated in the observations of the learned Judge he is not in a position to advance any argument or in any way to implement further those observations. With respect to the learned Judge, I am unable to agree with the observations made by him and the reasons given therefor. One of the reasons on which the learned Judge has based his decision is that if a view contrary to that expressed by the learned Judge is taken, there would be constituted two different competitive Arbitration Tribunals to decide the disputes under the same contract. With respect to the learned Judge, I fail to see how two different competitive arbitration tribunals would be constituted. Clause 2 of the First Schedule on which reliance has been placed refers to an Arbitral Tribunal constituted by the will of the parties. If the parties express their will and say that the Tribunal shall be constituted as provided under the English Arbitration Act, there is no room for appointing another Tribunal. The learned Judge perhaps seems to be labouring under the impression that under the Protocol a separate tribunal is constituted and that if there is an agreement for arbitration to which the Protocol applies, the parties are bound to have the matters in dispute adjudicated before that Tribunal. There is no such Tribunal constituted under the Protocol. The Protocol itself by cl. 2 provides that the constitution of the Arbitral Tribunal shall be governed by the will of the parties. According to the will of the parties as expressed in the contract in that case which provided for the constitution of the Arbitral Tribunal according to the English Arbitration Act, there would only be one Tribunal. With respect to the learned Judge, I do not agree with his view that if the parties elect to have the Arbitral Tribunal constituted in accordance with the "National Statutes", the application of the Protocol is excluded. Clause 2 requires that the constitution of the Arbitral Tribunal should be governed by the will of the parties and that will can be expressed in the agreement of reference. By the expression of that will the Protocol is not excluded.

The second decision of the same Judge relied upon by learned counsel on behalf of the respondents is the one reported in *Bajrang E. S. Co. v. Commrs. for Port of Cal.*² In that case, a suit was filed against four different defendants of whom one alone was a party to the arbitration agreement and he applied for stay of the suit. The Court held that the entire suit could not be stayed as it would mean staying the suit against the other defendants who were not parties to the arbitration agreement. The learned Judge refused to stay the suit saying that at best the applicant could ask for a stay of the suit against himself and no others. He further observed that that was a course which had its peculiar difficulties mainly because that meant trial of a suit piecemeal and that such a procedure was most undesirable and unfair unless there were cogent reasons to the contrary and that no such reasons existed in that case. This point by itself was sufficient for the purpose of disposing of the matter. The learned Judge thereafter following his earlier judgment further held that in his opinion the Protocol arbitration did not apply to the case as it was stipulated by the parties to the arbitration agreement that disputes were to be decided in England and that no legal proceedings should be taken to enforce any claim except in England, so that it could at best stipulate for English Arbitration in England or trial of the dispute in English Courts of law in England. It is not necessary for me to state once again the reasons which impel me not to accept the conclusion reached by the learned Judge about the non-applicability of the Protocol.

In my view, the agreement for arbitration in the case before me is one to which the Protocol set forth in the First Schedule to the Arbitration (Protocol and Convention) Act, 1937, applies and that the award is a foreign award within the meaning of the said Arbitration (Protocol and Convention) Act. Issue No. 3 is accordingly answered in the affirmative.

As regards the fourth issue, the learned counsel for the respondents urged that the application was barred by the law of limitation. The award was made on February 23, 1958. The petition has been filed on October 13, 1955. It is urged that art. 178 in the First Schedule to the Indian Limitation Act, 1908, governs the filing of the petition and that the period of limitation being 90 days, the petition is barred by the law of limitation. Article 178 runs as follows:—

"Under the Arbitration Act, 1940, for the filing in Court of an award, period of limitation ninety days from the date of service of the notice of the making of the award."

It is not disputed that the petition has been filed more than 90 days from the date of service of the notice of the making of the award. By the petition the petitioner has prayed that the award may be filed in this Court and that judgment may be pronounced and a decree may be passed according to the said award. Now, the application has been made under the provisions contained in the Arbitration (Protocol and Convention) Act, 1937. It is not an application made under the Arbitration Act, 1940, and the short answer to the argument advanced on behalf of the respondents is that it is not an application under the Arbitration Act, 1940, for the filing in Court of an award and that art. 178 cannot possibly apply. Section 14 of the Indian Arbitration Act provides as follows:—

"14. (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award."

A duty is cast upon the arbitrators or umpire to cause an award or a signed copy of it to be filed in Court under the circumstances mentioned in that section. When the arbitrators or umpire send the award to the Court for the purpose of being filed in Court, it is the duty of the Court to file the award and give notice to the parties of the filing of the award. The filing contemplated under s. 14 is a ministerial act. Article 178 of the Indian Limitation Act does not apply to such filing. There is no time limit for the arbitrators or umpire to file the award in Court. The application contemplated by art. 178 is an application to direct or compel the arbitrators or umpire to carry out their obligation under s. 14, sub-s. (2), of the Indian Arbitration Act. The period of 90 days is provided only for such an application. So far as the Bombay High Court is concerned, it has been so held by Chagla J., as he then was, in the case of *Jayantilal Jamnadas v. Chhaganlal*.³

Counsel for the respondents relied on s. 4(1) of the Arbitration (Protocol and Convention) Act, 1937, which provides that a foreign award shall, subject to the provisions of the Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. He urged that as a foreign award is enforceable in India as if it were an award made on a matter referred to arbitration in India, art. 178 would apply to an application for filing a foreign award in Court. Merely because a foreign award is enforceable in India as if it were an award made on a matter referred to arbitration in India, it does not make that award an award under the Indian Arbitration Act, 1940. It has been held by a Division Bench of this Court consisting of Chagla C.J. and Bhagwati J. in the case of *Madhav Prasad Nigam v. Chandavarkar*⁴ at p. 749, that it is an elementary principle of construction that the scope of the Limitation

³ (1944) 47 Bom. L. R. 317.
L.R.—78.

⁴ (1948) 50 Bom. L.R. 747.

Act cannot be extended by implication, and a party's right to come to Court cannot be taken away unless the Limitation Act expressly provides that his right is so barred. Section 4(1) of the Arbitration (Protocol and Convention) Act, 1937, does not say that a foreign award shall be deemed to be an award made under the Arbitration Act, 1940. It is only enforceable in India subject to the provisions of that Act as if it was an award made on a matter referred to arbitration in India. Before a foreign award is filed under the provisions contained in the Arbitration (Protocol and Convention) Act, 1937, there are various requirements of law which have to be satisfied. Section 6 of the Arbitration (Protocol and Convention) Act, 1937, provides that it is only where the Court is satisfied that the foreign award is enforceable under that Act that the Court should order that award to be filed. Section 7 of the Arbitration (Protocol and Convention) Act, 1937, requires that in order that a foreign award may be enforceable under the Act, it must have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed, it must have been made by the tribunal provided for in the agreement or constituted in the manner agreed upon by the parties, it must have been made in conformity with the law governing the arbitration procedure, it must have become final in the country in which it was made and it must have been in respect of a matter which may lawfully be referred to arbitration under the law of India and the enforcement thereof must not be contrary to the public policy or the law in India. Sub-section (2) of s. 7 provides for various circumstances under which a foreign award is not made enforceable under the Act. The provisions of law in connection with the filing of an award under the Arbitration (Protocol and Convention) Act, 1937, are entirely different from the provisions contained under the Arbitration Act, 1940, for the filing of the award. The nature of the inquiry before the Court under the two Acts is entirely different and an application for the filing of an award under the provisions of the Arbitration (Protocol and Convention) Act, 1937, cannot be equated with an application for directions to file an award under the Arbitration Act, 1940.

Mr. Laud has relied upon an unreported judgment of a single Judge of the Madras High Court in support of his argument in this connection, and if I may say so, that judgment constitutes his sheet-anchor. It is the judgment of Mr. Justice Basheer Ahmed Sayeed in Civil Revision Petitions Nos. 46 of 1954 and 2369 of 1953, delivered on March 13, 1956. In that case an application was made for the filing of a foreign award. That application was filed more than 90 days from the date of the service of notice of the making of the award. Mr. Justice Basheer Ahmed Sayeed, who decided the matter, held that art. 178 applied and considered the application to be barred by the law of limitation. In the course of his judgment the learned Judge observes as follows:—

"By analogy, the provisions contained in sec. 4 of the Arbitration (Protocol and Convention) Act VI of 1937 that a foreign award shall, subject to the provisions of the said Act, be enforceable in the provinces as if it were an award made on a matter referred to arbitration in the provinces, would mean that the foreign award, when it is sought to be enforced, shall conform to all the procedure provided for in the Indian Arbitration Act and laws of the country, before it could become a decree of a Civil Court. When the foreign award filed thus attracts to itself all the provisions of the Indian Arbitration Act and other laws of the State (Provinces) ipso facto the law of limitation in force in this country also becomes applicable to the foreign award. The foreign award is placed exactly on the same footing as an Indian award so far as its enforcement is concerned...in view of the express terms of sec. 4 of the Arbitration (Protocol and Convention) Act, Act VI of 1937, it cannot stand to reason that the period of limitation available for the enforcement of such foreign awards should be different from the period of limitation that is applicable to awards made under the Indian Arbitration Act."

With respect to the learned Judge, I am unable to agree with the conclusion reached by the learned Judge. A foreign award is not placed exactly on the

same footing as an Indian award so far as its enforcement is concerned. Section 4 of the Arbitration (Protocol and Convention) Act, 1937, makes the enforceability subject to the provisions of that Act. Section 7 of that Act lays down numerous conditions which have to be satisfied before a foreign award is considered enforceable. The period of limitation required to be considered is for an application for the filing in Court of an award. As I have already indicated, the provisions in connection with the filing of the award under the Indian Arbitration Act are totally different from those contained in the Arbitration (Protocol and Convention) Act, 1937, and an application for filing an award under s. 5 of the Arbitration (Protocol and Convention) Act cannot be treated as an application for filing an award under the Arbitration Act, 1940. In my view, art. 178 does not apply to the application before me. The other articles referred to were arts. 181 and 120. Article 181 has been held to cover only applications made under the provisions of the Civil Procedure Code and no other in numerous cases which had been decided prior to the legislative changes made in arts. 158 and 178 by s. 49(2) of the Arbitration Act, 1940. It is not necessary for me to consider in the present case the effect of the new arts. 158 and 179 on the interpretation of art. 181 or the applicability of art. 120. The only article relied on for the purpose of showing that the application is barred by the law of limitation is art. 178. That article does not apply to the facts of the case. It is not contended before me that if the provisions of art. 178 do not apply the petition is in any way barred by the law of limitation. I answer issue No. 4 in the negative.

Respondents to pay to the petitioner the taxed costs of issues 1, 2, 3 and 4. The question whether the costs should be taxed on the long cause scale or not is reserved until the final disposal of the whole matter.

Solicitors for the petitioner: *Pereira Faalbhoy & Co.*

Solicitors for the respondents: *Mulla & Mulla & Craigie Blunt & Caroe.*

FULL BENCH.

[NAGPUR BENCH]

Before the Hon'ble Mr. H. K. Channani, Chief Justice, Mr. Justice Tamba and Mr. Justice Badkas.

SHIEKH RAHIMAN CHAND v. RAJE NILKANTHARAO RAJESHWARRAO.*

Berar Land Revenue Code, 1928, Secs. 73(1), 73-A—Whether proviso to s. 73(1) applies in cases where commencement of tenancy known—Meaning of expression "commencement of tenancy"—Proviso, interpretation of, in relation to provision of which it is a proviso—Statement of Objects and Reasons when can be referred to in relation to enactment.

The proviso to s. 73(1) of the Berar Land Revenue Code, 1928, does not apply in cases in which the commencement of tenancy is known. Therefore, a tenant cannot, under this proviso, claim the status of a tenant of antiquity if the date of commencement of his tenancy is known.

The words 'commencement of tenancy' refer to the original or the first tenancy under which the tenant or his predecessor-in-title entered into possession of the

*Decided, February 10, 1959. Second Appeal No. 6 of 1953, against the decision of S. J. Surana, Additional District Judge, Basim, in Civil Appeal No. 85A of 1951, reversing the decree passed by J. N. Khare, Second Civil Judge, Second Class, Basim, in Civil Suit No. 74A of 1950.

land as a tenant and since the time of which tenancy he and his predecessors-in-title have been in continuous and uninterrupted possession of the land.

*Martand v. Ganpat*¹ and *Mohammad v. Kundalik*,² overruled.

V. H. Shastri v. R. B. V. P. Puranik,³ approved.

Shankarrao Dagadujirao v. Shambhu Nathu Patil,⁴ *Vijbhukhandas v. Ishvardas*⁵ and *Mohammad Alimulla Khan v. Maruti*,⁶ referred to.

The duty of the Court is to effect a harmonious construction between a proviso and the provision to which it is a proviso and so far as possible the proviso must be so interpreted and its meaning so restricted as to bring it within the ambit and purview of the main provision itself.

M/s. Ram Narain Sons Ltd. v. Asst. Commissioner of Sales Tax,⁷ *Abdul Jabar Butt v. State of Jammu and Kashmir*,⁸ *Shankarlal v. Pandharinath*⁹ and *Keshavlal Premchand v. Comr. I. T.*,¹⁰ referred to.

The Statement of Objects and Reasons which led to the enactment of a statute is not admissible as an aid to the construction of the statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy.

*The State of West Bengal v. Subodh Gopal Bose*¹¹ and *M. K. Ranganathan v. Government of Madras*,¹² referred to.

ONE Rajeshwarrao, father of Raje Nilkantharao (defendant No. 1) and husband of defendant No. 2, who had filed C.S. No. 190-A of 1953 in the Court of the Second Civil Judge, Second Class, Washim, against Shiekh Rahiman (plaintiff), was a superior holder. His allegation against the plaintiff was that he was an annual tenant of the fields in suit and that his lease was terminated by notice on December 27, 1941. The plaintiff pleaded that he was a tenant of antiquity of the fields. The suit was decreed in favour of the defendants, and the trial Judge held that the plaintiff was only an annual tenant. In execution of this decree, the defendants obtained possession of the fields from the plaintiff on May 7, 1944, and since then continued in possession till they executed a lease-deed on December 19, 1947, in favour of defendants Nos. 3 and 4 and the fields came into possession of defendants Nos. 3 and 4 as lessees of defendants Nos. 1 and 2.

The plaintiff filed Civil Suit No. 74-A of 1950 against defendant No. 1 and others for possession of the same fields. The plaintiff urged that his predecessors-in-title had been in possession of the fields for over a period of 75 years and it could not be said when the tenancy of his predecessors-in-title started. The defendants contended that the plaintiff and his predecessors-in-title came in possession of the fields in suit on October 15, 1919, under a registered Kabuliast and before that they were not in possession.

The trial Court found that the plaintiff was a tenant of antiquity and it decreed the plaintiff's suit. On appeal the Additional District Judge reversed the finding of the trial Court and allowed the appeal. The plaintiff appealed to the High Court Bench at Nagpur. The appeal came on for hearing before J. C. Shah and Kotval JJ. who referred the appeal to a full bench. The following order of reference was made by their Lordships on July 24, 1957:—

This second appeal raises a question as to the conditions requisite for raising a presumption of permanent tenancy in favour of a tenant whose tenancy is of long duration. There appears to be a conflict of decisions in the Nagpur High Court on the question as to the true interpretation of s. 73 of the

1 [1956] Nag. 357.

2 [1957] N. L. J. 377.

3 (1948) Letters Patent Appeal No. 6 of 1945, decided by Bose and Mangabmurti JJ. on December 31, 1948 (Unrep.).

4 (1940) 43 Bom. L. R. 1.

5 (1923) 25 Bom. L. R. 431, s.c. [1923] A. L. R. Bom. 397.

6 [1948] Nag. 78.

7 [1955] II S. C. R. 483.

8 [1957] S. C. R. 51, 59.

9 (1951) 53 Bom. L. R. 319, s.c. [1951] A. L. R. Bom. 385.

10 (1950) 58 Bom. L. R. 945, s.c. [1957]

A. L. R. Bom. 20.

11 [1954] S. C. R. 587.

12 [1955] II S. C. R. 374.

Barar Land Revenue Code. In *Martand v. Ganpat*,¹ Chief Justice Hidayatullah and Mr. Justice V. R. Sen observed (p. 359) :—

“...if twenty years' user is proved, the landlord can get rid of the presumption arising under the proviso in two ways only, that is to say, (i) by proving that the tenant is an annual tenant, or (ii) that the period of twenty years is covered by one or more valid written leases. There may be no need to go to the main section unless the landlord established one or the other of the two circumstances under which the presumption is displaced. Once the presumption is lost to the tenant, the matter is again at large for decision under the main section.”

Whereas it appears that in an earlier judgment, *V. H. Shastry v. R. B. V. P. Puranik*,² it was observed by the division bench consisting of Mr. Justice Bose and Mr. Justice Mangalmurti in para. No. 36 of the judgment:

“...if there is 20 years continuous possession by the person in possession, he must now succeed in all cases where the first provision in Section 73 is prima facie fulfilled, unless the Landlord proves an exact commencement for the tenancy, or unless he proves that the defendant is an annual tenant.”

The learned advocates on behalf of the parties agree that there is a conflict between the two Division Bench judgments. We think, in the circumstances, that the papers be placed before the Chief Justice for constituting a full bench to hear and decide this second appeal.

The appeal was heard by a full bench composed of Chainani C.J. and Tambe and Badkas JJ.

Second Appeal No. 6 of 1953.

G. R. Mudholkar, for the appellant.

R. N. Deshpande, for the respondent.

Interveners.

Second Appeal No. 769 of 1952 and S. A. No. 462 of 1952.

S. N. Kherdekar, for the appellant in S.A. 769/52.

N. A. Athalay, for the appellant in S.A. 462/52.

N. L. Abhyankar and *V. M. Kulkarni*, for the respondents in both appeals.

Letters Patent Appeal No. 98 of 1956.

M. R. Bobde, for the appellant.

CHAINANI C.J. The order of reference to the Full Bench does not formulate the question, which we have to decide. In consultation with the learned counsel on both sides, the question has been formulated as follows:

“Whether the proviso to sub-section (1) of section 73 of the Barar Land Revenue Code applies in cases in which the commencement of tenancy is known.”

In order to appreciate the arguments, which have been advanced before us, it is necessary to refer to the relevant provisions of the Code. Sub-section (1) of s. 73, as it originally stood, was as follows:

“Where, by reason of the antiquity of a tenancy in an alienated village or holding, no satisfactory evidence of its commencement and of its period is forthcoming and there is no usage of the locality as to such period, the period shall, as against the landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and those who derive title under him.

Such tenant is called a tenant of antiquity and his rights shall be heritable and transferable in accordance with his personal law.”

There was an explanation to this sub-section, which provided that antiquity did not mean absolute antiquity but meant antiquity in reference to the difficulty of securing evidence. This sub-section was in similar terms to s. 83 of

1 [1956] Nag. 357.

2 (1948) Letters Patent Appeal No. 6 of

1945, decided by Bose and Mangalmurti JJ., on December 31, 1948 (Unrep.)

the Bombay Land Revenue Code, which is as follows:

"And where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him."

This section came up for consideration before the Privy Council in *Shankarrao Dagadujirao v. Shambhu Nathu Patil*.¹ The Privy Council held that the particular presumption mentioned in this s. 83 could not be made save upon two conditions: first, that there is no satisfactory evidence of the date of the commencement of the tenancy, and secondly, that this lack is due to the antiquity of the tenancy. It was observed that by a tenancy's antiquity the section does not intend any reference to remote ages in the past or to time immemorial, but that it is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted. In order to be entitled to the status of a tenant of antiquity under sub-s. (1) of s. 73 of the Berar Land Revenue Code, a tenant had therefore to prove, firstly, that no satisfactory evidence of the commencement of the tenancy and of its period was forthcoming; and, secondly, that this was due to the antiquity of the tenancy; in other words, he had to show that the origin of the tenancy was lost in antiquity or that it came into existence before the period of living memory. This naturally imposed a heavy burden upon the tenants for proving that they were tenants of antiquity. It was also held by the Courts that if during the period, for which a tenant had been in possession of a land, he had executed leases or kabuliyaats, such leases or kabuliyaats created new tenancies and that consequently, in such cases, the presumption about the antiquity of a tenancy could not arise. See, for instance, *Vijbhukhandas v. Ishvardas*² and *Mohammad v. Maruti*.³ In the last case, it was held that the execution of a kabuliyaat by a tenant imports a surrender of the old tenancy and commencement of a fresh one from that date, and that the commencement of the tenure being known, the requisite conditions in s. 73 of the Berar Land Revenue Code were not fulfilled in order to entitle the tenant to claim a tenancy of antiquity.

In 1948, the Legislature amended s. 73 of the Code. A proviso was inserted in sub-s. (1) of s. 73 and this was in the following terms:

"Provided that where a tenant not being an ante-alienation tenant proves that he has personally or through his predecessors-in-title held land continuously for a period in excess of twenty years shall be deemed to be a tenant of antiquity unless the landlord proves that such tenant is an annual tenant or a tenant holding the land under one or more valid written leases covering the entire period of twenty years."

This amendment was given retrospective effect by a new s. 73-A inserted in the Code, which also made a provision for tenants ejected after January 1, 1935, to file suits in order to recover possession of lands from which they had been evicted. Sub-section (3) of s. 73-A provided that the Court should decide such suits as if s. 73, as amended by the Act of 1948, was in force on January 1, 1935. The proviso added to sub-s. (1) of s. 73, therefore, creates a new rule of evidence, under which if a tenant shows that he has been in continuous possession of a land in excess of twenty years, he is to be deemed to be a tenant of antiquity. It may also be said to have conferred the status of tenants of antiquity on those classes of tenants, who have been in continuous possession of their lands for more than twenty years. If a tenant proves continuous possession of his land for a little over twenty years, a presumption arises in his favour that he is a tenant of antiquity. The burden then shifts to the land-

¹ (1940) 43 Bom. L. R. 1, p.c.

A. I. R. Bom. 397.

² (1923) 25 Bom. L. R. 431, s.c. [1923]

³ [1948] Nag. 73.

lord to show either that the tenant was an annual tenant or that he was a tenant who held the land under one or more valid written leases covering the entire period of twenty years. If the landlord is unable to discharge this burden, the tenant is to be deemed to be a tenant of antiquity.

The question, which we have to determine, is whether this proviso applies in cases, in which the origin of a tenancy can be ascertained or is known. On behalf of the tenants it has been urged that the proviso enacts a substantive provision, that this provision has been made in order to counter or destroy the effect of sub-s. (1) of s. 73 as it stood before its amendment, that it brings into existence a new concept as to for what period a tenancy must exist before it can be said to be a tenancy of antiquity, that this proviso is, therefore, independent of the main part of sub-s. (1) of s. 73, and that if the conditions mentioned in the proviso are satisfied, the tenant must be deemed to be a tenant of antiquity, irrespective of whether the commencement of the tenancy is or is not known. On the other hand, it has been urged by the learned counsel, who have appeared on behalf of the landlords, that the main part of sub-s. (1) of s. 73 must be read along with the proviso and that a tenant cannot claim the status of a tenant of antiquity, if the origin of the tenancy is known.

To decide which of these contentions should be accepted, it is necessary to bear in mind that in 1948 when the Legislature amended s. 73, the original provision contained in sub-s. (1) was not repealed, that it was allowed to stand as it was before, and that a new provision was inserted in the form of a proviso. This provision also was not enacted in the form of a separate sub-section or section. The fact that the original provision of sub-s. (1) was not repealed or modified negatives the argument, which has been advanced that the Legislature enacted the new provision to destroy the effect of this part of the section.

In *M/s. Ram Narain Sons Ltd. v. Asst. Commissioner of Sales Tax*⁴ the Supreme Court has observed (p. 493):—

“...It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other.”

In *Abdul Jabar Butt v. State of Jammu and Kashmir*⁵ it has been observed that it is a fundamental rule of construction that a proviso must be considered with relation to the principal matter, to which it stands as a proviso and that the proviso has to be construed harmoniously with the provisions, to which it is a proviso.

Mr. Kherdekar on behalf of the tenants has referred us to *Shankarlal v. Pandharinath*⁶ in which it was held that if the proviso in clear and explicit terms enacts a substantive provision, it cannot necessarily be controlled by the language of the main enactment. But in the same case it was observed that the normal function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. Mr. Kherdekar has also referred us to the observations in *Keshavlal Premchand v. Comr. I.T.*⁷ that a Legislature may enact a substantive provision in the garb or guise of a proviso and that if the Court is satisfied that the language used in the so-called proviso is incapable of making it applicable to the section, then the Court, if the proviso has a clear meaning, must look upon the proviso as a substantive provision enacted by the Legislature and give effect to it as such. But, in the same case, it was observed that ordinarily the proviso cannot deal with any other field than the field which the section itself deals with and that the duty of the Court also must be to give to the proviso as far as possible a meaning so restricted as to

4 [1955] II S. O. R. 493.

5 [1957] S. O. R. 51, 59.

6 (1951) 53 Bom. L. R. 319, s. c. [1951]

A. I. R. Bom. 385.

7 (1956) 58 Bom. L. R. 945, s. c. [1957]

A. I. R. Bom. 20.

bring it within the ambit and purview of the section itself. Therefore, if a proviso is capable of a wider connotation and is also capable of a narrower connotation, if the narrower connotation brings it within the purview of the section, then the Court must prefer the narrower connotation rather than the wider connotation.

It is clear from these authorities that the duty of the Court is to effect a harmonious construction between a proviso and the provision to which it is a proviso and that as far as possible the proviso must be so interpreted and its meaning so restricted as to bring it within the ambit and purview of the main provision itself. In this case, it is possible to read the main provision in sub-s. (1) of s. 73 and the proviso together. That, this is what the Legislature intended, is also suggested by the fact that in the proviso the Legislature has not used the words, such as, "notwithstanding anything contained above, or in sub-section (1)". The effect of reading the main provision of sub-s. (1) of s. 73 and the proviso together will be that the proviso will only apply in cases in which the commencement of a tenancy cannot be ascertained. This interpretation is also in accordance with the basic concept of the expression "tenancy of antiquity". The ordinary conception of such a tenancy is that the tenancy is so ancient that its origin cannot be determined.

We have been referred to the Statement of Objects and Reasons which led to the enactment of the Amending Act of 1948. The Statement of Objects and Reasons is not admissible as an aid to the construction of a statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time, which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy. See *The State of West Bengal v. Subodh Gopal Bose*⁸ and *M. K. Ranganathan v. Government of Madras*.⁹ This Statement of Objects and Reasons is in the following terms:

"In alienated villages in Berar ante-alienation tenants and tenants of antiquity have protected status. According to the present law, a tenant has to prove facts existing before 1875, or thereabout, for being declared an ante-alienation tenant. Generally the tenants are illiterate and they are rarely in possession of documentary evidence to show what rent their ancestors or predecessors-in-title paid as far back as 1875. Moreover in Berar oral sales were quite common before 1908, in which year the Transfer of Property Act came into force, and oral sales at this distance of time are often difficult of proof. A tenant is often unable to prove a continuous line of succession from 1875 and thus is not able to take advantage of the protected status.

2. The position of tenants of antiquity as defined in section 73 is equally unsatisfactory. The law does not define what is antiquity and individual Judges have taken different views...

3. This Bill is designed to facilitate the conferral of protected status on the tenants."

This Statement of Objects and Reasons shows that the principal reasons for amending the Act were that the law did not define what was antiquity and that a tenant found it difficult to prove continuous possession of land for a very long period. It, therefore, appears that in order to reduce the heavy burden, which lay on the tenants to prove continuous possession of land for a period beyond living memory, the Legislature decided to amend the section so as to confer a certain status on tenants, who had been in continuous possession of lands for twenty years. The Legislature, however, also decided to retain original sub-s. (1) of s. 73. The object, therefore, appears to have been to confer the status of tenants of antiquity on those tenants, who were in continuous possession of lands for twenty years or more, in cases in which the origin of tenancy was not known. After the Act was amended, it is not necessary for the tenant to prove that he was in continuous possession of the land or that the tenancy was in existence since long before living memory. As soon as he proves that he has been in continuous possession of the land for twenty

⁸ [1954] S. C. R. 587.

⁹ [1955] II S. C. R. 374.

years or more, he is presumed to be a tenant of antiquity. The burden of proof, which the tenant had to discharge under the old law, has, therefore, been considerably reduced. The Legislature has also imposed restrictions, so as to make it difficult for landlord to eject such tenants, who have been in continuous possession of the lands for twenty years or more, by requiring them to prove either that the tenants were only annual tenants or that they held the lands under one or more written leases covering the entire period of twenty years. A landlord can no longer obtain possession of a land merely on proof of execution by the tenant of one or more kabuliyats or leases during the long period of his tenancy. He has to prove execution of valid written leases covering the entire period of twenty years.

It has been urged on behalf of the tenants that the presumption arising under the proviso can be destroyed only in two ways mentioned in the proviso and that in the view we are taking, we are not giving full effect to the provisions contained in the proviso. We do not think that there is much force in the argument, because what we are doing is to give effect and meaning both to the main provisions contained in sub-s. (1) of s. 73 and also to the proviso to this sub-section. The Legislature having decided in its wisdom to retain the original sub-s. (1) of s. 73, it cannot be ignored. It must be given its full meaning and the proviso must be read along with it and not independently. The whole section, as amended in 1948, must be read together in order to ascertain what the real aim and purpose of the Legislature was, and if this is done, it appears to us that the aim and purpose of the Legislature was to confer the status of tenants of antiquity on those tenants, who were in continuous possession of their lands for a period exceeding twenty years, in cases in which the origin or the commencement of the tenancy could not be ascertained.

We have been referred to certain cases, in which a contrary view has been taken. In *Martand v. Ganpat*¹⁰ it was held that the presumption arising under the proviso to sub-s. (1) of s. 73 of the Berar Land Revenue Code can be got rid of in two ways only, viz. (i) by proving that the tenant is an annual tenant, or (ii) that the period of twenty years is covered by one or more valid written leases and that it is only when the presumption arising under the proviso is lost, that resort can be had to the main section. This decision has been followed in *Mohammad v. Kundalik*¹¹ and in some other unreported cases. The judgment in *Martand's* case shows that the learned Judges had found it difficult to interpret the section and the proviso harmoniously. With respect, it seems to us that it is possible to harmonise the main section and the proviso and to read them in a manner, which would give full effect and meaning to both. We may also mention that a view similar to that which we are taking was also taken by another Division Bench of the Nagpur High Court in *V. H. Shastri v. B. B. V. P. Purank*,¹² in which it was observed that

"If there is 20 years' continuous possession by the person in possession, he must now succeed in all cases where the first provision in section 73 is *prima facie* fulfilled, unless the landlord proves the exact commencement of the tenancy or unless he proves that the defendant is an annual tenant."

We are, therefore, of the opinion that the question, which we have formulated above for decision by us, must be answered in the negative and that a tenant cannot claim the status of a tenant of antiquity, if the date of commencement of tenancy is known. In this connection it is necessary to consider what the expression 'commencement of tenancy' means. Except in the case of one or more isolated leases executed by a tenant during a very long period of his possession, the former view was that if a tenant during the period of his tenancy executed a lease, the date of commencement of the tenancy was the date on which

10 [1956] Nag. 357.

11 [1957] N.L.J. 377.

12 (1948) Letters Patent Appeal No. 6 of

1948, decided by Bose and Mangalmurti JJ., on December 31, 1948 (Unrep.).

the lease came into force. This view can no longer be regarded as correct, for, under the proviso unless a landlord proves valid written leases covering a period of twenty years, he cannot displace the presumption arising under the proviso that the tenant is a tenant of antiquity. The words 'commencement of tenancy' must, therefore, be held to refer to the original or the first tenancy, under which the tenant or his predecessor-in-title entered into possession of the land as a tenant and since the time of which tenancy he and his predecessors-in-title have been in continuous and uninterrupted possession of the land.

Appeal No. 6 of 1953 will now be placed before a Division Bench for further orders.

Answer accordingly.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Nalk.

RAMDAYAL AYODHYAPRASAD GUPTA v. K. R. PATIL.*

Representation of the People Act (XLIII of 1950), Sec. 27(1)(2), Sch. IV—Representation of the People Act (XLIII of 1951), Secs. 100(1)(d)(iii) & (iv), 62—Constitution of India, Art. 171(3)(a), Seventh Sch., List II Entry 5—Legislative Councils Act (37 of 1957), Secs. 5(1)(2)(5), 12(c)(ii)—General Clauses Act (I of 1897), Sec. 3(31)—C.P. and Berar Municipalities Act, 1922, Secs. 240, 241, 242—Madhya Pradesh Local Authorities (Electoral Offences) Act (XI of 1952), Sec. 2(2)—C. P. and Berar Local Fund Audit Act (IX of 1933), Sec. 3—C.P. and Berar Local Government Act (XXXVIII of 1948)—Expression 'municipality' in Fourth Schedule of Act XLIII of 1950 whether includes municipal corporation—Whether notified area committee a municipality within that expression in Fourth Schedule—Members selected from urban circles of Janapada Sabhas relating to Bombay State whether have right to get their names entered in electoral roll of local authorities' constituency—Electoral Registration Officer erroneously entering names of members of notified area committees in electoral roll of local authorities constituency—Whether such error attracts provisions of s. 100(1)(d)(iii) & (iv) of Act XLIII of 1951.

A municipal corporation is included within the expression "municipality" appearing in the Fourth Schedule of the Representation of the People Act, 1950.

The expression 'municipality' used in the Constitution of India as well as in the Fourth Schedule of the Representation of the People Act, 1950, includes all bodies entrusted with the administration of municipal affairs of a city or a town.

A notified area committee is not included in the expression "municipality" used in the Fourth Schedule of the Representation of the People Act, 1950.

Section 27 of the Representation of the People Act, 1950, confers on all the members of the local authorities specified in the Fourth Schedule of the Act, a right to get their names entered in the electoral roll of the local authorities' constituency. Therefore, under the 7th Item [i.e. "Janapada Sabhas (Rural Circle)"] in the Fourth Schedule to the Act relating to the State of Bombay, such a right is conferred not only on members selected from rural circles of the Janapada Sabhas but also on members selected from urban circle of the Janapada Sabhas.

The Electoral Registration Officer erroneously entered the names of the members of certain notified area committees in the Vidarbha electoral roll of the Vidarbha Local Authorities Constituency for electing members to the Bombay Legislative Council. On the question whether this error on the part of the Officer attracted the

*Decided, February 20, 1959. Election Appeal No. 158 of 1958.

provisions of s. 100(1)(d)(iii) & (iv) of the Representation of the People Act, 1951:—

Held, that there was no improper reception of any vote within the meaning of the first part of cl. (iii) of s. 100(1)(d) of the Act even assuming that all the members of the notified area committees had voted at the election,

that under s. 62 of the Act the votes cast by these members were not void and, therefore, these could not be deemed to be void votes within the meaning of the second part of cl. (iii) of s. 100(1)(d) of the Act, and

that the non-compliance contemplated in cl. (iv) of s. 100(1)(d) of the Act is the non-compliance of the provisions of the Constitution of India or of the provisions of the Act or of the rules or orders made under the Act, and, therefore, non-compliance with the provisions of s. 27(2)(a) read with the Fourth Schedule of the Representation of the People Act, 1950, does not fall within the scope and ambit of cl. (iv) of s. 100(1)(d).

THE facts appear in the judgment.

V. S. Gokhale, P. N. Bhave and B. L. Gupta, for the appellant.

G. J. Ghate, for respondents Nos. 2 and 5 only.

S. V. Padhye, for respondent No. 2.

B. R. Mandekar, for respondent No. 3.

No appearance for respondents Nos. 1, 4 and 6 to 8.

TAMBE J. This is an appeal under s. 116-A of the Representation of the People Act, 1951 (hereinafter referred to as Act of 1951) by one Ramdayal Ayodhyaprasad Gupta, a defeated candidate at the election held on January 24, 1958, for electing five members to the Legislative Council of the State of Bombay from the Vidarbha Local Authorities' Constituency. The questions raised in this appeal relate to the scope and ambit of expressions "Municipality" and "Janapada Sabha (Rural Circle)" appearing in the Fourth Schedule of the Representation of the People Act, 1950 (hereinafter referred to as Act of 1950).

Article 171 of the Constitution relates to the composition of the Legislative Council. It provides that the Legislative Council of a State shall consist of members elected from certain electorates referred to in sub-cl. (a) to (d) of cl. (3) of this article and of certain nominated members as provided in sub-cl. (e) of the said cl. (3). We are here concerned with the electorate mentioned in sub-cl. (a) of cl. (3) of art. 171 which is an electorate consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify. Clause (2) of this article provides that until Parliament by law otherwise provides, the composition of the Legislative Council of a State shall be as provided in cl. (3). The Act of 1950 was enacted by the Parliament to provide for the allocation of seats in, and the delimitation of constituencies for the purposes of elections to, the House of the People and the Legislatures of States, the qualifications of voters at such elections, the preparation of electoral rolls, the manner of filling seats in the Council of States to be filled by representatives of Union territories, and matters connected therewith. Part II-A of Act of 1950 relates to the appointment of the officers for carrying out duties enjoined on them under the Act. Section 13-A provides for appointment of a Chief Electoral Officer for a State, and s. 13-B empowers the State Government to appoint Electoral Registration Officer for each Assembly Constituency as well as Council Constituency, and he is entrusted with the work of preparation and revision of the electoral rolls. Section 27 (Part IV) deals with preparation of electoral rolls for Council Constituencies. Sub-section (1) of s. 27, *inter alia*, provides that the constituencies referred to in sub-cl. (a) of cl. (3) of art. 171 would be termed as "Local Authorities' Constituency." Clause (a) of sub-s. (2) of s. 27 provides that for the purpose of elections to the Legislative Council of a State in any local authorities' constituency the electorate shall consist of members of such local authorities exercising jurisdiction in any place or area within the limits

of that constituency as are specified in relation to that State in the Fourth Schedule. Clause (b) thereof provides that every member of each such local authority within a local authorities' constituency shall be entitled to be registered in the electoral roll for that constituency. The local authorities specified in the Fourth Schedule in relation to the State of Bombay are—

- (1) Municipalities.
- (2) District Local Boards.
- (3) Cantonment Boards.

It is common knowledge that as a result of reorganisation of States brought into effect by the States Reorganisation Act of 1956, eight districts of former Madhya Pradesh, namely Buldana, Akola, Amravati, Yeotmal, Wardha, Nagpur, Bhandara and Chanda, known as Vidarbha area, were integrated with the new State of Bombay formed under cl. (c) of sub-s. (1) of s. 8 of the States Reorganisation Act. The former State of Bombay had a Legislative Council but the former State of Madhya Pradesh had no Legislative Council. The result thereof was that the aforesaid eight districts had no representation in the Bombay Legislative Council, and provisions had to be made to secure representation from this area. Similar situation also arose in respect of certain other newly formed States. Section 34 of the States Reorganisation Act provided for the reconstitution of the Legislative Council for the new State of Bombay. The Parliament enacted the Legislative Councils Act, 1957 (No. 37 of 1957) to provide for the creation of a Legislative Council for the State of Andhra Pradesh and the increasing of the strength of the Legislative Councils of the States having such Councils and for matters connected therewith. Sub-section (1) of s. 5 of this Act provided that the total number of seats in the Legislative Council of Bombay shall be increased to 108 and of these seats the numbers to be filled by persons elected by the electorates referred to in sub-cl. (a) of cl. (3) of art. 171 shall be 36. Sub-section (2) of s. 5 further provided that as from the commencement of this Act the Delimitation of Council Constituencies (Bombay) Order, 1951, shall, until other provision is made by law, have effect subject to the modifications directed by the Second Schedule and in the said Order as so modified, any reference to the State of Bombay shall be construed as a reference to that State as formed by s. 8 of the States Reorganisation Act, 1956. This sub-section read with Second Schedule resulted in the creation of a Local Authorities' Constituency for Vidhardha consisting of the aforesaid 8 districts and the number of representatives that were to be elected by this constituency was 5. Sub-section (5) of s. 5 further provided that as soon as may after such commencement, elections shall be held to fill such of the seats allotted to the several Council constituencies by the Delimitation of Council Constituencies (Bombay) Order, 1951, as modified by this Act and such of the seats to be filled by persons referred to in cl. (b) of sub-s. (1) as are then vacant, as if these seats had then become vacant. Clause (c) of s. 12 of this Act also amended the Fourth Schedule of the Act of 1950 and the changes effected by this Act, so far as it related to the State of Bombay, are contained in sub-cl. (ii) of cl. (c) of s. 12 of the Act, and it provided for addition of certain other authorities to the Schedule already referred to. The combined effect of the Act of 1950 as amended by this Act is that the Fourth Schedule of the Act of 1950 so far as it relates to the State of Bombay reads as follows:—

"Local authorities for purposes of elections to Legislative Councils

* * *

Bombay.

- (1) Municipalities.
- (2) District Local Boards.
- (3) Cantonment Boards.
- (4) District Boards.
- (5) District Panchayats.

(6) Town Committees.

(7) Janapada Sabhas (Rural Circle)."

To implement the direction given by sub-s. (5) of s. 5 of the Legislative Councils Act, the Deputy Commissioner of Nagpur came to be appointed as Electoral Registration Officer under s. 13-B of the Act of 1950 for Vidarbha Local Authorities' constituency. The Chief Electoral Officer, Bombay, issued directions to various Electoral Registration Officers, including the Deputy Commissioner, Nagpur, vide his letter dated November 4, 1957, the material part whereof reads as follows:

"So far as the local authorities' constituencies are concerned, Government has proposed you for appointment as the Electoral Registration Officer for the constituency mentioned in column 1 of the attached statement. You are, therefore, requested to prepare the electoral rolls of the local authorities' constituency for which you are being appointed as Electoral Registration Officer. According to the provisions of sub-section (2) of section 27 of the Representation of the People Act, 1950, every member of the constituent local authority within a local authorities' constituency will be entitled to be registered in the electoral roll of that constituency without any reference either to the qualifying date or qualifying period. The electoral roll for the local authorities' constituency will consist of a list of such members. In view of this, the question of publishing these rolls either preliminarily or finally does not arise."

In pursuance of these directions, the Deputy Commissioner, Nagpur, in his capacity as Electoral Registration Officer of the Vidarbha Local Authorities' Constituency prepared the electoral roll, but it does not appear to have been formally published, presumably on account of the directions contained in the aforesaid letter of the Chief Electoral Officer, Bombay. In the Bombay Government Gazette of December 26, 1957, two notifications under the signature of Under Secretary to the Election Commission and purported to be of date December 17, 1957, were published. By one notification, Vidarbha Local Authorities' Constituency was called upon to elect 5 members. The second notification published the various dates appointed by the Election Commission in connection with the election. December 27, 1957, was the last date fixed for making nominations, December 30, 1957, for the scrutiny of the nomination papers, January 2, 1958, as the last date for withdrawal of candidatures, January 24, 1958, for taking a poll, if necessary, and February 8, 1958, was the date for completing the election.

For the election from the Vidarbha Local Authorities' Constituency, appellants and respondents Nos. 1 to 8 filed their nomination papers. On the date of the scrutiny of the nomination papers, an objection was raised to the validity of the nomination paper of respondent No. 2 Ishwar Deshmukh on the ground that his nomination form was subscribed by persons who were not qualified for being voters they being members of the Nagpur Corporation. The objection was overruled. Poll was taken on January 24, 1958, the method of voting being by single transferable vote. After counting, respondents Nos. 1 to 5 were declared duly elected on February 8, 1958. Feeling aggrieved, the appellant made this election petition to the Election Commissioner under s. 81 of the Act of 1951 on various grounds. We are, however, for purposes of this appeal, not concerned with all the grounds raised. The contentions raised by the appellant in the petition and which are material for purposes of this appeal in brief were:

Appellant contended that in preparation of the electoral roll of the Vidarbha Local Authorities' Constituency, the Electoral Registration Officer was in error in including the names of 55 councillors of the Nagpur Corporation, 10 members of the Fatur Notified Area Committee, 13 members of the Tiroda Notified Area Committee, 84 members of the Janapada Sabhas who were elected from the urban circles, 50 members of the Janapada Sabhas who were elected directly as Presidents, Vice Presidents and Chairmen of the Standing Committees of Janapada Sabhas. In short, the contentions raised

on behalf of the appellant were that the aforesaid members were not the members of any of the authorities specified in the Fourth Schedule of the Act of 1950, and were, therefore, not qualified to vote and their names were wrongly included in the electoral roll by the Electoral Registration Officer. The electoral roll was not published. The appellant or any other person had no opportunity to object to the wrong inclusion of these names in the electoral roll. No finality, therefore, could be attached to this electoral roll. This error has resulted in 212 unqualified persons casting their votes at the election. The total number voted at the poll was only 2,027. The voting was by single transferable vote. In these circumstances, it was contended on behalf of the appellant that a presumption could be raised that the result of the election had been materially affected. The aforesaid contentions of the appellant failed before the Election Tribunal appointed by the Election Commission. The appellant has, therefore, preferred this appeal.

The first question that arises is whether the names of the Councillors of the Nagpur Corporation, the members of the Notified Area Committees of Fatur and Tiroda and the members of Janapada Sabhas elected by the urban circles, and Presidents, Vice Presidents and Chairman of the Standing Committees were properly included in the electoral roll.

As regards the Councillors of the Nagpur Corporation, it is the contention of Mr. Gokhale, learned counsel for the appellant, that these councillors were not qualified to get their names included in the electoral roll of this constituency. On a true construction of art. 171(3)(a) and s. 27 of the Act of 1950 read with the Fourth Schedule, persons who are qualified to vote are only members of such of the authorities as are specified in the Fourth Schedule. Municipal Corporation of Nagpur or any other City is not an authority specified in the Fourth Schedule. The authorities specified are only municipalities. A "Municipal Corporation" cannot be included in the expression "Municipality". Inclusion of the names of councillors of Corporation of City of Nagpur in the electoral roll was, therefore, bad. On the other hand, the contention on behalf of the respondent is that a municipal corporation is included within the expression "Municipality" appearing in the Fourth Schedule. In support of his contention Mr. Gokhale, learned counsel for the appellant, has further argued that the expression "municipality" must be understood and has to be understood only with reference to the local Acts in force in various States and in no other sense. In support of the argument he has also referred us to the fifth entry in the Second List of the Seventh Schedule of the Constitution, cl. (31) of s. 3 of the Central General Clauses Act, 1897 (No. I of 1897), cl. (2) of s. 2 of the Madhya Pradesh Local Authorities (Electoral Offences) Act, 1952 (No. XI of 1952) and the Notification issued under s. 3 of the C.P. and Berar Local Fund Audit Act, 1933 (Act IX of 1933). We find it difficult to accept this contention of Mr. Gokhale. The expression "municipality" occurs both in art. 171 of the Constitution as well as in the Fourth Schedule of Act of 1950. This expression has not been defined either in the Constitution or in the Act of 1950. In the absence of any definition or any other indication in the Act, it is difficult to assume that the Constituent Assembly or the Parliament was using the expression "municipality" in any narrower sense than what it actually means. The primary meaning of the word "municipality" as given in the Oxford Dictionary is "a town, city or district possessed of privileges of Local Self Government", and it is in this sense, in our opinion, that the expression has been used both in the Act of the Parliament and in the Constitution. It would not be reasonable to assume that the intention of the Legislature was to confer a right to vote only on the members of a body for the municipal administration of a town and deprive the councillors or members of the corporation, which is nothing but a body for the municipal administration of a city, of this right. There appears to be no good reason to infer any such intention. The provisions of the Central enactments referred to by

Mr. Gokhale, also, in our view, are not of any assistance to him. Item 5 of List 2 of the Seventh Schedule of the Constitution reads as follows:

"Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

True, the expression used is 'municipal corporation' but it is to be noted that in this entry the expression 'municipality' or 'municipal committee' is not used. It cannot be assumed that the intention of the Constitution-makers was to empower the State Government to enact in respect of municipal corporation i.e. a body to conduct municipal affairs of a city only and not in respect of the municipal committee or municipality i.e. a body to conduct the municipal affairs of a town. It appears that the expressions 'municipality' and 'municipal corporation' have been interchangeably used in the Constitution, such expression meaning a body for conducting the municipal administration of cities or towns. Similar is the position also when we refer to cl. (31) of s. 3 of the General Clauses Act. It reads:

"'local authority' shall mean a municipal committee, district board, of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

It is pertinent to note that the expression used is 'municipal committee' and there is no reference to municipal corporation. For reasons already stated above, it is difficult to assume that the intention of the Legislature in enacting the General Clauses Act was to exclude a municipal corporation from the definition of local authority. The other two references to the Provincial Acts undoubtedly make mention both of corporation as well as municipality. It is true that in cl. (2) of s. 2 of the Madhya Pradesh Local Authorities (Electoral Offences) Act, 1952, and in the list of local bodies published under s. 3 of the C.P. and Berar Local Fund Audit Act, 1933, both the expressions 'City of Nagpur Corporation' and 'municipal committee' are used, but it cannot be lost sight of that both these enactments have a specific objective. The former was enacted to provide for electoral offences of or in connection with the election of certain bodies, and the Legislature, therefore, was enumerating these bodies *ex abundanti cautela*. Similar is the case with the list published under the C.P. and Berar Local Fund Audit Act. It is to be noted that the accounts of every local authority is not subjected to audit under the Act unless the State Government, by notification, declares that the accounts of a particular body would be subject to audit under the Act. That being the position, the State Government had to enumerate in the notification all these bodies whose accounts it desired to be subjected to audit under the Act. Reference to the two aforesaid enactments, therefore, in our view, is hardly of any assistance to the appellant in his contention that the municipal corporation is not included in the expression 'municipality'.

In the result, therefore, in our opinion the expression 'municipality' used in the Constitution as well as in the Fourth Schedule of the Act of 1950 is used in the most widest sense and includes all bodies entrusted with the administration of municipal affairs of a city or a town. The Electoral Registration Officer, therefore, was not in error in including the names of the councillors of the City of Nagpur Corporation in the electoral roll for the Vidarbha Local Authorities' Constituency.

Turning next to the contention of Mr. Gokhale relating to the members of the Notified Area Committees of Tiroda and Fatur, in our opinion, the contention is well founded, as, in our opinion, it is not possible to hold that a notified area committee is a body which carries on the municipal administration of a city or a town. We will first refer to the provisions contained in the C.P. and Berar Municipalities Act, 1922. Sub-section (1) of s. 240 provides that the Provincial Government may, by notification, declare that, with respect to some or all of the matters upon which a municipal fund may be expended

under s. 63, improved arrangements are required within a specified local area, which, nevertheless, it is not expedient to constitute as a municipality. Sub-section (2) provides that such area would be called a "Notified Area". Under sub-s. (3) of s. 240, the area which the Provincial Government is authorised to declare as a notified area is one having a population less than 10,000. Sub-clause (d) of cl. (1) of s. 241 provides for the constitution of a committee to conduct the administration of the notified area. It was not possible for us to refer to the provisions of the enactments in force in all other States except the two Acts, namely the Bihar and Orissa Municipal Act of 1922 and the Bombay District Municipal Act of 1922. The provisions of these two enactments to certain extent are the same. We, therefore, consider that the body, that is the notified area committee, thus being a body not discharging the functions of municipal administration of a city or a town, does not fall within the meaning of the term 'municipality'. Mr. Ghate, learned counsel for respondents Nos. 2 and 5, referred us to the provisions of s. 242 of the C.P. and Berar Municipalities Act, and on the strength of these provisions he contends that the Act itself recognises a notified area committee as a municipal committee, and therefore, the expression 'municipal committee' includes a notified area committee. He further contends that s. 240 onwards fall within Chapter XXXI—"Small Towns", and it is his contention that a notified area committee also is a body that conducts the municipal affairs of a town. In our opinion, there is little force in the contention raised by Mr. Ghate. We have already shown that on the language of sub-s. (1) of s. 240 a notified area committee is constituted by the Government when the Government is of opinion that it is not expedient to constitute a municipality. Section 242 also does not provide that a notified area committee when constituted would have the rights and privileges of the municipal committee but the expression used is that for certain purposes mentioned in that section a notified area committee shall be deemed to be a municipal committee. Now the use of the word "deemed" affords answer to the contention of Mr. Ghate. In *Income-Tax Commissioner, Bombay Presidency v. Bombay Trust Corporation*¹ their Lordships of the Privy Council observed (p. 55):

"Now when a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were."

Thus, on the language of s. 242 itself it is clear that a notified area committee is, in fact, not a municipality but for certain purposes as provided in the section it would be treated as a municipality. This fiction, in our opinion, cannot be carried further so as to include a notified area committee in the expression 'municipality' used in the Fourth Schedule of the Act of 1950.

Apart from this, there is another difficulty in the way of Mr. Ghate. If we turn to the Fourth Schedule, it would be seen that therein a "notified area committee" is specified as one of the authorities whose members are entitled to be enrolled in the electoral roll of the local authorities' constituency so far as they relate to the State of Bihar, State of Madhya Pradesh, State of Punjab and State of Uttar Pradesh but is not included so far as it relates to the State of Bombay, State of Madras, State of Mysore and State of West Bengal. Now, when the Legislature has specifically included a notified area committee in this Schedule so far as it relates to some of the States and has omitted it from other States, it is clear that the omission is intentional. It is also pertinent to note that in those States where a notified area committee is included in this Schedule, the expression 'municipality' is also separately used. This also indicates that the Legislature has treated a notified area committee as a local authority separate and distinct from a municipality. It would also be seen that so far as Vidarbha is concerned, the Act in force in the Vidarbha area, namely the C.P. and Berar Municipalities Act, which provides for the

¹ (1929) L.R. 57 I.A. 49, s.c. 33 Bom. L.R. 361.

formation of a "Notified Area Committee", is also in force in the areas which formed part of the former State of Madhya Pradesh and which now form part of the new State of Madhya Pradesh. In the list of local authorities relating to the formation of Madhya Pradesh Council, a notified area committee is specifically mentioned but relating to the Bombay State a notified area committee is not included. This omission also indicates that the Legislature did not intend to confer on the members of a notified area committee in the Vidarbha area a right to be enrolled in the electoral roll of the local authorities' constituency for electing members to the Legislative Council. In our opinion, therefore, the Electoral Registration Officer was in error in entering the names of 13 members of the Tiroda Notified Area Committee and 10 members of the Fatur Notified Area Committee in the electoral roll of the Vidarbha local authorities' constituency. Mr. Ghate has also advanced an argument that it is not open to the appellant to challenge the inclusion of the names of the aforesaid 23 members inasmuch as he has failed to call the Chief Electoral Officer to the witness box to explain as to why he had asked the names of the 23 members to be included in the electoral roll. In our opinion, the argument has very little substance. Whatever view the officer may be holding for including the names of the members of the notified area committee in the electoral roll is wholly irrelevant in construing a statute.

Turning to the inclusion of the names of the Janapada Sabhas elected from urban circles and inclusion of the names of the Presidents, Vice Presidents and Chairmen of the Standing Committees of the Janapada Sabhas, it is the contention of Mr. Gokhale that their names had been wrongly included. He referred us to the 7th item in the Fourth Schedule relating to the State of Bombay which reads:

"Janapada Sabhas (Rural Circle),"

and laying emphasis on the words "Rural Circle", he very vehemently contends that the intention of the Legislature is to confer a right only on the members elected from the rural circles and on no other member. He has also taken us through certain provisions of the C.P. and Berar Local Government Act, 1948 (XXXVIII of 1948) under which Janapada Sabhas are constituted. To summarise these provisions, s. 3 empowers the State Government to divide the State into administrative areas to be known as Janapada. It also empowers the State Government to sub-divide a Janapada area into two categories of circles (1) an urban circle and (2) a rural circle. The urban circle consists of the existing municipal and notified areas comprised in a janapada, and the rural circle consists of the areas in a janapada other than municipal, notified and cantonment areas. Sub-section (1) of s. 4 of the Act provides that for each Janapada a Sabha would be constituted. Sub-section (1) of s. 6 provides that such Sabha would consist of the councillors elected by the electoral divisions in the rural circle and such number of councillors, not exceeding one-sixth of the total number of councillors of the Sabha, as may be prescribed. Sub-section (5) of s. 3 empowers the State Government to sub-divide the rural circle into electoral divisions. On the other hand, the urban circle in the janapada area constitutes only one electoral division. Sub-section (1) of s. 13 provides that after a Sabha has been constituted, it shall at its first meeting elect from its own body, or from other persons residing in the janapada area and qualified to be a councillor, a chairman and a deputy chairman of the Sabha, and sub-s. (2) of s. 13 provides that the chairman and the deputy chairman so elected shall be deemed to be councillors under the Act. Sub-section (1) of s. 23 provides that every Sabha shall appoint certain standing committees mentioned therein, and sub-s. (3) of s. 23 provides that every standing committee shall have a chairman elected either from the councillors or from other persons residing in the Janapada area and qualified to be a councillor, and a chairman when so elected would be deemed to be a councillor of the Janapada Sabha. The aforesaid provisions undoubtedly

indicate that the Janapada is divided into two circles, rural circle and urban circle. The urban circle consists of the existing municipal and notified areas comprised in the Janapada. It is also clear that a chairman or a deputy chairman of the Janapada Sabha or a chairman of the standing committee need not necessarily be a person resident in the rural circle, and it is on the strength of these provisions and mention of the words 'rural circle' in the entry in Fourth Schedule that the contention of Mr. Gokhale is founded. We find it difficult to accept this contention of Mr. Gokhale. In the first instance, if the contention is accepted, it would mean that the right to vote or in other words right to get the name entered in the electoral roll of the local authorities' constituency is conferred not on all the members of the Janapada Sabha but only on some of them, namely those elected to the Janapada Sabha from the rural circles. Had the Legislature so intended, it would have used the expression "members elected to the Janapada Sabha from rural circles". The expression used in the aforesaid 7th item is not that. To accept Mr. Gokhale's contention it would be necessary to read certain words in that item. A Court would refrain from adopting this course unless it is so compelled. We also find another difficulty in the way of Mr. Gokhale. In our opinion, the rule of construction requires us to read this entry in conjunction with the main provision contained in the section under which the schedule is framed, and it would not be proper to read that entry completely divorced from the provisions of the said section. The relevant provision is cl. (a) of sub-s. (2) of s. 27 of the Act of 1950. It reads:

"For the purpose of elections to the Legislative Council of a State in any local authorities' constituency—

(a) the electorate shall consist of members of such local authorities exercising jurisdiction in any place or area within the limits of that constituency as are specified in relation to that State in the Fourth Schedule;"

On the language of this clause, it is clear that in framing the Schedule, the intention of the Legislature was only to specify a local authority and was not to confer the right only on certain members of that local authority. Had that been the intention, in our view, cl. (a) of sub-s. (2) of s. 27 would have read—

"For the purpose of elections to the Legislative Council of a State in any local authorities' constituency—

(a) the electorate shall consist of such members of such local authorities exercising jurisdiction in any place or area within the limits of that constituency as are specified in relation to that State in the Fourth Schedule."

To accept Mr. Gokhale's contention would mean to add the word 'such' in sub-cl. (a) before the word 'members'. As already stated, a Court in interpreting a statute would refrain from adding anything to the statute unless the context clearly so indicates. Further, the Legislature has not left the matter in any doubt. After enacting sub-cl. (a) and the Schedule, it has further enacted sub-cl. (b) to sub-s. (2) of s. 27 of the Act and it reads:

"every member of each such local authority within a local authorities' constituency shall be entitled to be registered in the electoral roll for that constituency;"

Assuming that there is any ambiguity in the language of the aforesaid 7th item of the Fourth Schedule, no doubt is left in our mind on account of the provisions of cl. (b) of sub-s. (2) of s. 27 that the intention of the Legislature was to confer on all the members of the local authorities specified in the Fourth Schedule a right to get their names entered in the electoral roll of the local authorities' constituency. Mr. Gokhale in support of his contention also argued that the C.P. and Berar Local Government Act, 1948, is in force in the areas of the present Madhya Pradesh which formerly formed part of the old Madhya Pradesh. The expression used in the second item of the Fourth Schedule relating to the Madhya Pradesh is 'Janapada Sabha'. The expression used in the 7th item of the Bombay list is 'Janapada Sabhas (Rural Circle)'. Mr. Gokhale contends that the use of these different expressions in the afore-

said two items clearly indicates that the intention of the Legislature was to confer a right to vote on all members so far as Madhya Pradesh was concerned, but so far as the State of Bombay is concerned the intention was to confer the right only on members elected from rural circles. If these two entries are read only by themselves this argument no doubt is plausible, but in view of the clear indication of the intention of the Legislature contained in cls. (a) and (b) of sub-s. (2) of s. 27 of the Act of 1950, cannot be accepted. In our judgment, therefore, the Electoral Registration Officer was not in error in including the names of all the members of the Janapada Sabhas in the electoral roll of the local authorities' constituency for Vidarbha.

The result is that the appellant has been able to establish his contention only in respect of 23 members of the Notified Area Committees of Tiroda and Patur.

The question that next arises is whether on account of this error on the part of the Electoral Registration Officer, the appellant is entitled to claim the relief claimed by him, namely setting aside the election. On our findings, it is not necessary to consider the contention of Mr. Gokhale, relating to the validity of the nomination paper of respondent No. 2. It is not in dispute that it was subscribed by councillors of the Nagpur Corporation whose names had been included in the electoral roll of the constituency. As already stated, inclusion of the names of the councillors was valid. That being the position, acceptance of the nomination paper of respondent No. 2 is not open to challenge. Mr. Gokhale next contends that the aforesaid error on the part of the Electoral Registration Officer in including the names of 23 members of the Notified Area Committees would attract the provisions of sub-cl. (iii) and (iv) of cl. (d) of sub-s. (1) of s. 100 of the Act of 1951. Sub-clause (iii) reads:

"(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—...

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void..."

This sub-clause contemplates two contingencies—(1) improper reception, refusal or rejection of any vote, and (2) reception of any vote which is void. The question of reception, refusal or rejection of a vote arises only at two stages, the first when the voter goes to the polling station to vote, and the second when the votes cast are counted. This clause obviously relates to something that happens at those two stages. The contention of Mr. Gokhale is not that either the Polling Officer or the Returning Officer was in error on account of his failure to comply with the duties which were cast on him, but his contention, as already stated, is that the Electoral Registration Officer was in error in including the names. Now, once the name is included in the electoral roll, the provisions of s. 62 come into play. Sub-section (1) of s. 62 provides that no person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency. Mr. Gokhale has not been able to show to us that the Act makes any express provision which would have entitled the appellant to raise an objection either before the Polling Officer or before the Returning Officer that the votes cast by the members of the Notified Area Committees should not be accepted even though their names had been entered in the roll. In our opinion, therefore, we do not think that there has been any improper reception of any vote within the meaning of the first part of the aforesaid sub-cl. (iii) even assuming that all the 23 members of the Notified Area Committees had voted at the election. It is next to be considered whether the votes cast by these 23 persons could be termed as votes which were void. In view of the language of sub-s. (1) of s. 62 of the Act of 1951, it is not possible for us to hold that these votes were void votes. On the language of the said sub-section, an error in including the name would not by itself render a vote as a void vote. The position becomes clear when we turn to sub-ss. (2), (3) (4) and (5) of s. 62, and when we turn to these sub-sections it is clear that even when the name of a person has been entered in an

electoral roll; he is debarred from voting or the vote cast by him is rendered void on account of certain circumstances mentioned in sub-ss. (2) to (5). Such votes alone, in our opinion, could be deemed to be void votes within the meaning of sub-cl. (iii) of cl. (d) of sub-s. (1) of s. 100.

It is next to be seen whether the aforesaid error would fall within sub-cl. (iv) of cl. (d) of sub-s. (1) of s. 100. It reads:

"That the result of the election, in so far as it concerns the returned candidates, has been materially affected by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the Tribunal shall declare the election of the returned candidate to be void."

It has been held by the Supreme Court that the expression 'non-compliance' is wide enough to include any infraction of the Constitution or the Act or the rules or orders. In *Durga Shankar Mehta v. Thakur Raghuraj Singh*² their Lordships observed (p. 279):

"There is no material difference between 'non-compliance' and 'non-observance' or 'breach' and this item in clause (c) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause."

As already observed, the appellant has no doubt established that in the inclusion of the 23 names of the members of the Notified Area Committees in the electoral roll. This no doubt is an infraction of cl. (a) of sub-s. (2) of s. 27 read with the Fourth Schedule of the Act of 1950. It is to be seen whether the said infraction would fall within the aforesaid sub-cl. (iv). It is the contention of Mr. Mandlekar, learned counsel for respondent No. 3, that the non-compliance contemplated in sub-cl. (iv) is the non-compliance of the provisions of the Constitution, or of the provisions of the Act of 1951 or of the rules or orders made under the Act of 1951. Non-compliance of the provisions of the Act of 1950 does not fall within the scope and ambit of sub-cl. (iv). This contention, in our opinion, has substance. The relevant provisions of s. 100 contained cl. (c) of sub-s. (2) of s. 100, prior to their amendment, were:

"(2) Subject to the provisions of sub-section (3), if the Tribunal is of opinion—...

(c) that the result of the election has been materially affected...by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any other Act or rules relating to the election, or by any mistake in the use of any prescribed form, the Tribunal shall declare the election of the returned candidate to be void."

The present provisions contained in the aforesaid sub-cl. (iv) and the provisions, as they were prior to the amendment of s. 100, when read together, it is clear that the former provision was wider in terms and the election was open to challenge on account of non-compliance of the provisions of all the Acts relating to election. The Legislature has amended this section and in the new provision has deleted the part so far as it related to the challenge to other enactments and has confined a right only to the infraction of the provisions of the Constitution, the Act of 1951 and the rules and orders framed under that Act. That being the position, it would be reasonable to assume that the intention of the Legislature was to debar a challenge to an election on account of the non-compliance with the provisions of the Act of 1950 which *inter alia* provides for preparation of electoral rolls. It is, however, the contention of Mr. Gokhale that in this case the electoral roll was not even published; his client had no opportunity to challenge the inclusion of the names of the aforesaid 23 members in the electoral roll; no finality to the electoral roll, therefore, could be attached. He further contends that that being the position, the election itself was void. He also referred us to the following decisions reported in *Kanglu v. Chief Executive Officer, Janapada Sabha, Durg*³, *Vithaldas v.*

² [1955] I S.C.R. 267.

³ [1954] Nag. 875, r.s.

*Sadanand*⁴ and *Vinayak v. Gopal*⁵ in support of his contention that no finality could be attached to the electoral roll when there had been no opportunity to get the electoral roll corrected. There is a good deal of force in this contention. In *Chief Commr. Ajmer v. Radhey Shyam*⁶, their Lordships of the Supreme Court observed (p. 308):

"It is of the essence of these elections that proper electoral rolls should be maintained and in order that a proper electoral roll should be maintained it is necessary that after the preparation of the electoral roll opportunity should be given to the parties concerned to scrutinize whether the persons enrolled as electors possessed the requisite qualifications. Opportunity should also be given for the revision of the electoral roll and for the adjudication of claims to be enrolled therein and entertaining objections to such enrolment. Unless this is done, the entire obligation cast upon the authorities holding the elections is not discharged and the elections held on such imperfect electoral rolls would acquire no validity and would be liable to be challenged at the instance of the parties concerned."

It must be conceded that this salutary rule laid down by their Lordships of the Supreme Court has not been observed. The Chief Electoral Officer had issued instructions to the Electoral Registration Officer only on November 4, 1957, for preparation of the electoral roll. It was also observed therein that the question of publishing the electoral roll either preliminarily or finally does not arise. The constituency was called upon to elect members by a notification appearing in the gazette of December 26, 1957. There is no material on record to show that in between these dates the electoral roll was, in fact, published or that any publicity was given to the publication of the electoral roll. By another notification, which appeared in the gazette of December 26, 1957, the date of nomination as fixed was December 27, 1957. The interval was only of a day. In these circumstances, it does appear that the appellant had no opportunity to get the electoral roll corrected. On behalf of the respondents, we were referred to the provisions of cls. (c) and (d) of sub-s. (1) of s. 27 of the Act of 1950 and the provisions of ss. 15, 16, 18, 22 and 23 as they stood prior to the amendment in the year 1958, and it has been argued on their behalf that it was not obligatory on the part of the Electoral Registration Officer to publish the electoral roll and it is also contended that it was not open to anybody under the provisions, as they then stood, to complain of erroneous inclusion of the name of any person in the electoral roll. The contention is well-founded. It appears there had remained a lacuna in the Act which had resulted in a denial of a very valuable right of objecting to the inclusion of a name in the electoral rolls on the ground of lack of requisite qualifications. This lacuna has, however, now been removed by amendment of s. 22 by Act No. 58 of 1958. We are here concerned whether this lack of opportunity to challenge the wrongful inclusion of the names of the 23 aforesaid members can afford a ground for setting aside the election and whether it would be within our competence to grant that relief in exercising appellate power under the Act of 1951. As already shown, on the construction put by us on sub-cl. (w) of cl. (d) of sub-s. (1) of s. 100, it cannot afford a ground to the appellant to get the election set aside. It, therefore, would not be within our competence in exercise of our appellate jurisdiction to set aside the election on this ground. The other decisions to which reference was made are also, in our opinion, not of any assistance to the appellant as they relate to the construction of the provisions of different statutes, and each case, therefore, turns on the provisions of the statute to which it relates. We have not been shown a case relating to the Act of 1951, as it now stands, where it is held that the lack of opportunity to get the election roll corrected would afford a ground for setting aside the election. On the other hand, the provisions of sub-s. (1) of s. 62 indicate that the Legislature intended to attach finality to the electoral roll subject to certain conditions mentioned in sub-ss. (2) to (5) of the Act.

⁴ [1957] A.I.R. Nag. 63.

⁵ (1938) 40 Bom. L.R. 525.

⁶ [1957] A.I.R. S.C. 304.

Even assuming for a moment that the non-compliance with any of the provisions of the Act of 1950 would fall within the ambit and scope of the said sub-cl. (iv), there is another hurdle in the way of the appellant. It is to be noticed that it is not sufficient to establish that there had been non-compliance with any of the provisions. It has further to be established that the result of the election, in so far as it concerns the returned candidates, has been materially affected on account of that non-compliance. The burden to establish it lies on the appellant, and howsoever it may be difficult to discharge that burden, it is incumbent on him to discharge it. In *Vashist Narain v. Dev Chandra*,⁷ it has been observed by their Lordships (p. 515):

"This section indicates that an election is not to be declared invalid if it appears to the Tribunal that non-compliance with statutory rules or any mistake in the use of such forms did not affect the result of the election. This throws the onus on the person who seeks to uphold the election. The language of Section 100(1)(c), however, clearly places a burden upon the objector to substantiate the objection that the result of the election has been materially affected."

After considering the case law on the question, their Lordships further observed (p. 516):

"...That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate."

It is to be seen whether the appellant has discharged this burden. The burden undoubtedly could have been discharged if a presumption that the result of the election has been materially affected could have been raised on the facts and circumstances. If the appellant had been able to establish his case in full and had been able to show that the names of as many as 212 members had been wrongly entered in the electoral roll, then it would have been possible to presume that the result of the election had been materially affected, but the position that is obtained on our findings is that the names of only 23 members had been wrongly entered in the electoral roll. It is not in dispute that the valid votes cast were 2001. In these circumstances, in the absence of any further evidence, it is not possible for us to hold that the result of the election has been materially affected.

Mr. Gokhale, however, contends that it was not necessary for the appellant to lead any evidence; he had made an application to the Tribunal to get the documents pertaining to the election brought before it; these documents were brought in the Court and amongst these documents is a marked voters' list, i.e. a voters' list on which remarks were made as and when it was found necessary. Referring us to r. 19 read with r. 27(3) of the rules framed under the Act, Mr. Gokhale argues that by referring to these documents, it is possible for the Court to ascertain as to whether the result of the election has been materially affected or not and the case should be remanded to the Court for that purpose. We find it difficult to accept this contention. No witness has deposed that even one out of these 23 voters has voted at the election. In our opinion, in these circumstances, it is not now open to the appellant to ask for a rambling enquiry involving scrutiny of documents requiring a special skill and take a chance on its result. We do not, therefore, consider it necessary to remand the case for this purpose. Appellant having failed to establish that the inclusion of the names of 23 members in the voters' list has materially affected the result of the election, the appeal must fail.

In the result, therefore, the appeal fails and is dismissed. The appellant shall pay 2/3 costs of the respondents throughout.

Appeal dismissed.

Before Mr. Justice Gokhale and Mr. Justice V. S. Desai.

ABDUL KAYUM MAHOMED HOOSEIN PITALVALA v. EBRAHIM
ABBASBHAI HARIANIVALLA.*

Presidency Small Cause Courts Act (XV of 1882), Secs. 41, 46, 47—Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Sec. 28—Defendant sub-letting premises to plaintiff before coming into force of Bombay Rent Act—Defendant in 1954 filing ejectment application against plaintiff under s. 41 of Act XV of 1882 and obtaining order in his favour—Suit by plaintiff against defendant filed in Bombay City Civil Court under s. 47 of Act XV of 1882 for declaration that defendant's ejectment application act of trespass—Plaintiff in plaint claiming protection under Bom. Act LVII of 1947—Jurisdiction of Bombay City Civil Court to entertain suit—Whether suit within ambit of s. 28 of Bom. Act LVII of 1947.

The defendant sub-let certain premises to the plaintiff in April 1945 on a monthly rent, and the plaintiff continued to be in exclusive possession and occupation of the premises and paid the rent to the defendant. In 1954 the defendant filed an ejectment application against the plaintiff in the Court of Small Causes, Bombay, under s. 41 of the Presidency Small Cause Courts Act, 1882, to recover possession of the premises on the basis that they were given to the plaintiff under leave and licence and that the licence was revoked. The plaintiff contended that he was the lawful sub-tenant of the defendant. The Court, however, passed an order in favour of the defendant. The plaintiff then filed a suit in the Bombay City Civil Court under s. 47 of the Presidency Small Cause Courts Act for a declaration that the defendant's ejectment application was an act of trespass and that the defendant was not entitled to recover possession of the premises. In his plaint the plaintiff after describing himself as a lawful sub-tenant of the defendant stated that he was entitled to the protection of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The defendant later *ad id* contended that the plaintiff was not his sub-tenant but was in occupation of the premises as his licensee and that the suit as framed by the plaintiff could not be entertained by the Bombay City Civil Court—

Held, that as the order of possession obtained by the defendant was under the summary procedure provided under Chapter VII of the Presidency Small Cause Courts Act, the plaintiff was entitled to challenge that order by filing a suit as contemplated by ss. 46 and 47 of the Act,

that merely because of the statement in the plaint that the plaintiff was entitled to the protection under the Bombay Rent Act, the suit did not fall within the ambit of s. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, and

that, therefore, the Bombay City Civil Court had jurisdiction to entertain the suit.

Govindram Salamatrai v. Dharampal,¹ *Madhavprasad Kalkprasad v. Indrabai*,² *Harwarup Khannamal v. Nandram*,³ *Babulal Bhuramal v. Nandram Shitram*⁴ and *Jaswantilal v. "Western Comp., India"*⁵ referred to.

THE facts are stated in the judgment.

D. S. Parikh, for the appellant.

S. J. Sorabji, instructed by *Jehangir and Seervai*, for the respondent.

GOKHALE J. This is an appeal by the original defendant against a decree passed in respondent's favour by the Bombay City Civil Court in Suit No. 1106 of 1956. The suit came to be filed in the following circumstances:

The premises in the suit consist of a room on the first floor of Bandukwalla Bungalow situated at first Hasnabad Lane, Santa Cruz. The present appellant was the tenant of the suit room as well as a room on the ground floor of the same building. According to the plaintiff in April 1945 the room in suit was sublet to him by the defendant on a monthly rent of Rs. 15 and a further

*Decided, February 24/25, 1959. First Appeal No. 577 of 1957, against the decision of M. G. Chitale, Judge, City Civil Court at Bombay, in Civil Suit No. 1106 of 1956.

¹ (1964) 53 Bom. L. R. 386.

² (1952) 55 Bom. L. R. 21.

³ (1955) 58 Bom. L. R. 288.

⁴ (1958) 60 Bom. L. R. 954, S. O.

⁵ (1959) 61 Bom. L. R. 1037.

amount of Rs. 3 was payable for electric charges, and it is the plaintiff's case that he was in exclusive possession and occupation of the said room and used to pay to the defendant the amount of Rs. 18 per month inclusive of rent and electric charges upto October 1950, but the defendant did not pass any receipts in his favour in respect of this payment of rent. In October 1950 the defendant threatened to evict the plaintiff and to throw out his belongings from the room and the plaintiff had to address a letter to the defendant through his advocate on November 20, 1950, recording as to how he got possession of the room, and he also sent a sum of Rs. 18 by postal money order in respect of rent and electric charges for October 1950. The defendant was also called upon to send all rent receipts which had not been issued in favour of the plaintiff, but the defendant gave a reply on November 25, 1950, through his advocate, denying that the plaintiff was a tenant but alleged that he was permitted to stay in the room under leave and licence of the defendant. The defendant also denied that he had received any rent from the plaintiff. According to the plaintiff in October 1950 he came to know that the defendant was paying rent of Rs. 15 only per month in respect of both the rooms, namely, the room in suit as well as the room on the ground floor and, therefore, the plaintiff approached him through one Kadarbhai for reduction of rent but the defendant insisted on his paying Rs. 18 per month as the plaintiff had been doing upto that time. In 1954 the defendant filed an application being ejectment Application No. 2102 of 1954 in the Court of Small Causes under s. 41 of the Presidency Small Cause Courts Act against the plaintiff for recovery of possession of the suit room on the basis that it was given to the plaintiff under leave and licence and that the licence had been revoked. This allegation was denied by the plaintiff who contended that he was the lawful sub-tenant of the defendant. However, the Small Causes Court passed an order on February 17, 1956, in favour of the defendant under which the plaintiff was required to vacate the premises by June 30, 1956. It is the case of the plaintiff that he was at all times the lawful sub-tenant of the defendant in respect of the suit room and was in exclusive possession and occupation thereof and was entitled to protection under the Bombay Rent Act. The plaintiff, being aggrieved by the order of ejectment obtained by the defendant in the Small Causes Court under s. 41 of the Presidency Small Cause Courts Act, filed the present suit for a declaration that the said ejectment application was an act of trespass and that the defendant was not entitled to recover possession of the premises from the plaintiff. Without prejudice to these contentions, the plaintiff also stated that there being no notice of revocation of the leave and licence alleged by the defendant and the same not having been proved before the Small Causes Court, the defendant was not entitled to obtain the order of ejectment. On this basis the plaintiff filed the present suit under s. 47 of the Presidency Small Cause Courts Act which will hereafter be referred to as 'the Act' in this judgment. The suit was filed on April 26, 1956, and the plaintiff prayed *inter alia* for a declaration that the ejectment application No. 2102 of 1954 filed by the defendant against the plaintiff and the aforesaid order dated February 17, 1956, amounted to acts of trespass and the defendant was not entitled to recover possession of the premises in suit. He also claimed a sum of Rs. 100 by way of damages or compensation in respect of the said trespass.

This suit was resisted by the defendant on several grounds. He denied that the plaintiff was the sub-tenant of the room on the first floor of Bandukwalla Bungalow. According to him the suit premises were occupied by his son and daughter-in-law prior to 1945. The defendant's son is married to the daughter of one Kadarbhai Valliji, who was at one time employed with one Abdul Hussein Arsiwalla. The plaintiff is the son of the sister of Arsiwalla according to the defendant. In April 1945 the plaintiff approached Kadarbhai and stated that the sister of the plaintiff was coming down to Bombay and he had no accommodation in Bombay and requested Kadarbhai to arrange for some

accommodation and Kadarbhai requested his son-in-law and the defendant to provide accommodation for a temporary period, and it was under these circumstances that the defendant permitted the plaintiff and his sister to reside in the room as his licencees. The defendant stated that at no time he recovered or received any amount from the plaintiff either as rent or compensation. He denied that the room was sub-let to the plaintiff; that he had agreed to receive Rs. 15 as rent and a further sum of Rs. 3 in respect of electric charges. The defendant also denied that the plaintiff was in possession of the suit premises as a sub-tenant or that the plaintiff paid to him rent at the rate of Rs. 15 per month or at any other rate or electric charges at the rate of Rs. 3 per month, from April 1945 to October 1950. The defendant further denied that the plaintiff was in exclusive possession of the suit premises but stated that when the plaintiff was allowed to occupy the room, several articles and things belonging to the defendant were left lying in the room and continued to be there even after the plaintiff began to occupy the room as a licensee. According to the defendant he never threatened the plaintiff that he would evict him or throw out his belongings in or about October 1950 as alleged by the plaintiff, but he stated that he had requested the plaintiff to remove himself and his belongings from the suit premises at about that time, as the plaintiff had been allowed to occupy the room for a temporary period but instead of complying with that request the plaintiff addressed the defendant an advocate's letter dated November 20, 1950, wherein he made a vain attempt to claim sub-tenancy in respect of the said premises. According to the defendant the total rent of the suit room as well as another room on the ground floor of which he was the tenant was Rs. 17 per month. He denied the plaintiff's allegation that at any time Kadarbhai had approached him to reduce the rent payable by the plaintiff. The defendant also denied that the plaintiff was his sub-tenant or that he was at any time in exclusive possession of the suit premises or that he was entitled to the protection of the Bombay Rent Act. He further stated that he was entitled to the possession of the room as he had revoked the licence of the defendant and denied that his act in filing the ejectment application was an act of trespass as alleged by the plaintiff. The defendant also contended that the suit as framed by the plaintiff could not be entertained by the Bombay City Civil Court.

On these pleadings several issues were framed and the trial Court held that the Bombay City Civil Court had jurisdiction to entertain the suit and the plaintiff was a sub-tenant of the defendant. The learned trial Judge also came to the conclusion that the plaintiff was at all material times in exclusive possession and occupation of the suit premises, and that he had paid to the defendant rent at the rate of Rs. 15 per month and Rs. 8 per month in respect of electric charges upto the month of October 1950. In accordance with these findings, he held that the defendant committed an act of trespass by filing the ejectment application No. 2102 of 1954 in the Court of the Small Causes at Bombay and the plaintiff was accordingly entitled to Re. 1 as nominal damages. The trial Court did not find it necessary to decide the question whether the plaintiff was entitled to the protection of the Bombay Rent Act and also took the view that it was not necessary to grant the injunction claimed by the plaintiff. A decree was passed in favour of the plaintiff in accordance with these findings. That is why the original defendant has come in appeal against that decree.

Mr. D. S. Parikh, the learned advocate appearing on behalf of the defendant-appellant, in the first instance contended that the learned trial Judge's view that the Bombay City Civil Court had jurisdiction to entertain the suit was erroneous. According to Mr. Parikh the plaintiff claimed to be a sub-tenant and he also claimed protection under the Bombay Rent Act. Though the defendant disputed the claim of the plaintiff to be his sub-tenant, Mr. Parikh contends that that would not change the essential nature of the suit, which, according to him, would fall within the provisions of s. 28 of the

Bombay Rent Act. Mr. Parikh further contends that alternatively the plaintiff has also based his suit on the allegation that the leave or licence granted to him was not proved to have been validly revoked and that, says Mr. Parikh, is a claim which cannot be entertained in a suit filed in the City Civil Court because in granting the ejectment order the Bombay Small Causes Court had held that the plaintiff was not a sub-tenant but was a licensee of the defendant and that the licence had been revoked. That in short is the argument of Mr. Parikh on the question of jurisdiction.

Now, in order to examine this argument it is necessary to understand the real nature of the plaintiff's suit. According to the plaintiff in April 1945 the defendant sub-let the suit room to the plaintiff on certain terms and plaintiff occupied the premises as defendant's sub-tenant. Plaintiff, therefore, claimed to be a sub-tenant of the defendant long before the Bombay Rent Act came into force. It is obvious, therefore, that the plaintiff is claiming a title to sub-tenancy under the defendant not by virtue of the provisions of the Bombay Rent Act, but by virtue of an agreement between him and the defendant who was himself a tenant and which agreement, as it was entered into prior to the Bombay Rent Act, would not be rendered invalid by the provisions of that Act. This claim of the plaintiff is denied by the defendant according to whom the plaintiff was merely a licensee. Now the question whether the plaintiff became a sub-tenant in April 1945 or whether he was allowed to occupy the suit room as a licensee is not a question which arises out of the provisions of the Bombay Rent Act. Secondly, it is clear from the facts of this case that the plaintiff filed this suit under the provisions of ss. 46 and 47 of 'the Act'. It is necessary for the purpose of the arguments addressed to us in this appeal to examine the relevant provisions of Chapter VII of 'the Act'. Under s. 41 of 'the Act' when any person has had possession of any immoveable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rackrent does not exceed three thousand rupees, as the tenant, or by permission of another person, or of some person through whom such other person claims, and such tenancy or permission has been determined or been withdrawn, and such tenant or occupier or any person holding under or by assignment from him refuses to deliver such property in compliance with a request made to him in this behalf, an application may be made to the Small Causes Court for a summons against the occupant, calling upon him to show cause why he should not be compelled to deliver the property. Under s. 43 if the occupant does not appear at the time appointed and show cause to the contrary, the applicant shall be entitled to an order for possession of the property from the occupant if the Small Causes Court is satisfied that he was entitled to apply under s. 41. The explanation to this section says that if the occupant proves that the tenancy was created or permission granted by virtue of a title which determined previous to the date of the application, he shall be deemed to have shown cause within the meaning of this section. Section 45 provides that when the applicant, at the time of applying for any such order as aforesaid, was entitled to the possession of such property, neither he nor any person acting in his behalf shall be deemed, on account of any error, defect or irregularity in the mode of proceeding to obtain possession thereunder, to be a trespasser; but any person aggrieved may bring a suit for the recovery of compensation for any damage which he has sustained by reason of such error, defect or irregularity. Then comes s. 46 which provides that nothing contained in the foregoing provisions shall be deemed to protect any applicant obtaining possession of any property under Chapter VII from a suit by any person deeming himself aggrieved thereby, when such applicant was not at the time of applying for such order as aforesaid entitled to the possession of such property, and para. 2 of s. 46 provides that when the applicant was not at the time of applying for any such order as aforesaid, entitled to the possession of such property, the application for such order, though no possession is taken thereunder, shall be deemed to be an act

of trespass committed by the applicant against the occupant. The first paragraph of s. 47 deals with the power of the Small Causes Court to stay proceedings under s. 41 on the occupant giving sureties, to bring a suit against the applicant. The second paragraph of s. 47 states that if the occupant obtains a decree in any such suit against the applicant, such decree shall supersede the order (if any) made under s. 43. Under s. 49 recovery of the possession of any immoveable property under Chapter VII shall be no bar to the institution of a suit in the Bombay City Civil Court for trying the title thereto.

It would be clear from these provisions that when an application for possession is filed under s. 41 the applicant is entitled to an order for possession under the summary procedure contemplated by these provisions. But the party aggrieved can still challenge the order by filing certain kinds of suits. Under s. 45 if there is any error, defect or irregularity in the mode of proceedings to obtain possession, that itself will not constitute a trespass though any person aggrieved by the order may bring a suit for recovery of compensation for damage sustained by him on account of any error, defect or irregularity. Under ss. 46 and 47 the party aggrieved may also file a suit for a declaration that the applicant was not at the time of applying for an order under ss. 41 and 43 entitled to the possession of such property, and the application for such an order constituted an act of trespass. If the applicant obtains a decree in such a suit, such decree is to supersede the order made under s. 43. Section 49, however, contemplates a suit instituted for trying the title which is claimed by the occupant and which suit is not barred even if recovery of possession of property is obtained by the occupant. The present suit filed by the plaintiff is obviously a suit under ss. 46 and 47 of 'the Act'. It is true no doubt that in para. 7 of the plaint the plaintiff, after describing himself as a lawful sub-tenant of the defendant, has stated that he was entitled to the protection under the Bombay Rent Act, but that, by itself, in our opinion, would not convert the suit into a suit contemplated under s. 28 of the Bombay Rent Act. Looking to the prayers of the plaintiff in the plaint, there can be no doubt that in substance the plaintiff has filed the suit under ss. 46 and 47 of 'the Act' for a declaration that when the defendant filed the ejectment application against him he was not entitled to do so and the order passed in his favour amounted to a trespass.

In support of his argument that the Bombay City Civil Court could have no jurisdiction to entertain the present suit, Mr. Parikh relied upon certain decisions of this Court. In *Govindram Salamatrai v. Dharampal*¹ it was held by this Court that s. 28 of the Bombay Rent Act did not deprive the High Court of its jurisdiction in all suits for possession wherever the defendant took up the contention that he was a tenant. It was held that the High Court was deprived of the jurisdiction in such suits where the landlord filed a suit against his tenant and the tenant sought the protection of the Rent Act and the High Court's jurisdiction was also deprived in those cases where, although the landlord might have filed a suit against a person alleging that he was a licensee or a trespasser, it might ultimately turn out that the defendant was not a licensee or a trespasser, but a tenant and he was entitled to the protection of the Act. It was further observed that whether a person was entitled to the protection of the Rent Act, whether a person was entitled to the benefit of any of the provisions of that Act, all these were questions which only the Small Causes Court could decide and determine, but whether a person was a tenant or a licensee or a trespasser were not questions which s. 28 had left to the determination of the special Court set up under the Act.

Now, it is the contention of Mr. Parikh in the first instance that in this case also in the plaint it is stated that the plaintiff is entitled to the protection of the Rent Act. As we have already stated, that by itself would not change the

nature of the suit which is essentially one filed under ss. 46 and 47 of 'the Act.' It is also contended that the authority of the decision in *Govindram Salamatrai v. Dharampal* has been affected to some extent by a recent decision of the Supreme Court in *Babulal Bhuramal v. Nandram Shivram*.² Now, this argument has been considered recently in *Jaswantilal v. "Western Comp., India"*³ and we have taken the view that the authority of *Govindram Salamatrai v. Dharampal* has not been affected by the Supreme Court decision, but before we deal with Mr. Parikh's argument on the basis of the Supreme Court decision, it is necessary to refer to other cases to which also a reference was made before us.

In *Madhavprasad Kalkaprasad v. Indirabai*,⁴ the question arose whether in a suit filed by the plaintiff in the High Court for a declaration of his title that he was a sub-tenant of the defendant and possession was asked for by him merely as an ancillary relief, in view of s. 28 of the Bombay Rent Act, the High Court had jurisdiction to try the suit, and it was held by this Court that s. 28 of the Act only permitted the special Courts to try a question of title incidentally, but when the question of title arises substantially in the suit, the ordinary Courts are competent to try and dispose of the suits on title and, that, therefore, even though incidentally the plaintiff prayed for possession, that fact did not oust the jurisdiction of the High Court to try the suit for title. This case obviously does not support the contention of the defendant.

Then reference was made to the case of *Harswarup Khannamal v. Nandram*.⁵ It may be observed that the Supreme Court decision in *Babulal Bhuramal v. Dharampal* was given in the appeal against the decision of this Court in *Harswarup Khannamal v. Nandram*. Now, in this latter case, this Court affirmed its earlier view that in trying suits under s. 28 of the Rent Act, it might become necessary to a special Court incidentally to determine questions of title, but that such determination was not binding upon the party against whom the decision was given, and notwithstanding such decision a party could assert his title in a competent Court. But where the decision of the special Court was direct, where the decision was on the very question which had been left to the special Court to decide, such a question could not be re-agitated under s. 29A of the Bombay Rent Act. It was further observed that, the title contemplated by s. 29A was a title in a party *de hors* that Act and a title not arising out of any of the provisions of the Rent Act. If, on the other hand, the title which was sought to be established arose by reason of the provisions of the Rent Act, then it was a question arising out of that Act and that question could only be determined by the special Court set up under that Act.

Now in the decision of the Supreme Court in *Babulal Bhuramal v. Nandram* the view taken by this Court regarding s. 29A has been affirmed and it has been held that by enacting s. 29A the Legislature clearly intended that no finality should be attached to the decision of a Court trying a suit under s. 28 on a question of title *de hors* the Act. But Mr. Parikh contends that the observations of the Supreme Court regarding the ambit and scope of s. 28 of the Bombay Rent Act would go to show that a suit as the present one would be entertainable by the Bombay Small Causes Court only and not by the Bombay City Civil Court. We are not persuaded to uphold this argument. That case arose out of a suit filed in the City Civil Court by three plaintiffs, plaintiff No. 1 being the tenant of the premises under defendant No. 1, plaintiffs Nos. 2 and 3 being persons to whom the said premises were sub-let by plaintiff No. 1. The landlord defendant No. 1 had given a notice to quit to plaintiff No. 1 in 1947 and thereafter the landlord filed a suit in the Court of Small Causes, Bombay, in 1948 whereby he sought to evict plaintiff No. 1. To that suit plaintiffs Nos. 2 and 3 were also made parties on the allegation that they were trespassers and had no right to be on the premises. The Small Causes Court

² (1958) 60 Bom. L. R. 954, S.C.

³ (1959) 61 Bom. L. R. 1087.

⁴ (1952) 55 Bom. L. R. 21.

⁵ (1955) 58 Bom. L. R. 288.

held that plaintiffs Nos. 2 and 3 were not lawful sub-tenants and the subletting by plaintiff No. 1 to them being contrary to law, the latter had deprived himself of the protection of the Rent Act. A decree for the eviction of all the plaintiffs was accordingly passed by the Small Causes Court. An appeal against this decree was unsuccessful as also a revision application to the High Court. Thereafter all the three plaintiffs filed a suit in the Bombay City Civil Court praying for a declaration that plaintiff No. 1 was a tenant of the defendant and was entitled to the protection of the Rent Act and plaintiffs Nos. 2 and 3 were lawful sub-tenants and were entitled to possession, use and occupation of the premises as sub-tenants thereof. The City Civil Court dismissed the suit on the ground that there was no lawful subletting by plaintiff No. 1 of the premises to plaintiffs Nos. 2 and 3 though on the question of jurisdiction it held that it had jurisdiction to entertain the suit. The appeal to the Bombay High Court was also dismissed and the decision is reported in *Harswarup Khannamal v. Nandram*. The High Court disagreed with the view of the City Civil Court that it had jurisdiction to entertain the suit and, therefore, confirmed the dismissal of the plaintiff's suit though on a different ground, but did not record any decision on the merits of the appellants' case as being unnecessary. Now, this view of the High Court was confirmed by the Supreme Court and it was observed that the suit filed in the City Civil Court raised in substance a claim that the plaintiffs were tenants of the premises within the meaning of the Rent Act and such a claim was one which arose out of that Act and was, therefore, within the ambit of s. 28. In dealing with the argument that the suit in the City Civil Court was not one between landlord and a tenant because the defendant to the suit did not admit that the plaintiffs were tenants of the premises in question, their Lordships of the Supreme Court observed as follows (p. 958) :—

"...Section 28 applies to a suit where admittedly the relationship of landlord and tenant within the meaning of the Act subsists between the parties. The plaintiff in the City Civil Court admits that the defendants were landlords of the premises at various stages and the plaintiffs were their tenants. The suit, therefore, was essentially a suit between a landlord and a tenant. The suit did not cease to be a suit between a landlord and a tenant merely because the defendants denied the claim of the plaintiffs. Whether the plaintiffs were the tenants would be a claim or question arising out of the Act or any of its provisions which had to be dealt with by the Court trying the suit. On a proper interpretation of the provisions of s. 28 the suit contemplated in that section is not only a suit between a landlord and a tenant in which that relationship is admitted but also a suit in which it is claimed that the relationship of a landlord and a tenant within the meaning of the Act subsists between the parties. The Courts which have jurisdiction to entertain and try such a suit are the Courts specified in s. 28 and no other."

It is the submission of Mr. Parikh that these observations would apply with equal force to the present suit. In our opinion this contention is not well-founded. The question whether the defendant is or is not entitled to an order for possession under the summary procedure under Chapter VII of 'the Act', cannot attract the exclusive jurisdiction of the Courts specified in s. 28 of the Rent Act. It is the case of the plaintiff that he became a lawful sub-tenant of the defendant in April 1945 before the Rent Act came into force and that he was not a licensee. It is on this basis that the plaintiff claims that the defendant was not entitled to recover possession under s. 41 of 'the Act' alleging that plaintiff was a mere licensee whose licence has been revoked. He, therefore, filed the present suit which is essentially one under ss. 46 and 47 of 'the Act' for a declaration that defendant's application for an order for possession under Chapter VII was an act of trespass and for damages. The fact that the plaintiff has stated in addition that he was entitled to protection under the Rent Act would not, as already stated, change the nature of the suit as framed. We are also not impressed by the argument of Mr. Parikh that since

the plaintiff has claimed alternatively that the alleged licence given to him was not duly determined defendant was not entitled to obtain the order of ejectment against him, that would come in the way of the Bombay City Civil Court entertaining the present suit as the Small Causes Court had decided that point against him. The order of possession obtained by the defendant is under the summary procedure provided under Chapter VII of 'the Act' and the plaintiff is entitled, in our judgment, to challenge that order by filing a suit as contemplated by ss. 46 and 47 of 'the Act'. Such a suit will not fall within the ambit of s. 28 of the Rent Act. In our view, therefore, the learned trial Judge's finding that the Bombay City Civil Court had jurisdiction to entertain the suit is correct and must be upheld.

[The rest of the judgment is not material to this report].

Appeal dismissed.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Badkas.

PUKHRAJ CHAMPALAL JAIN v. D. R. KOHLI.*

Sea Customs Act (VIII of 1878), Secs. 178A, 167 Item 8, 181, 182, 183—Foreign Exchange Regulation Act (VII of 1947), Secs. 8(1), 23, 23A—Constitution of India, Arts. 19(1) (f)(g), 31—Section 178A of Sea Customs Act in so far as gold concerned whether violative of art. 19(1)(f) & (g) of Constitution—Restriction imposed by s. 178A in shape of rule of evidence whether reasonable within art. 19(5)—Whether s. 23A of Foreign Exchange Regulation Act incorporates provisions of Sea Customs Act into former Act—Mere finding that smuggled goods in person's possession whether sufficient to impose penalty under Item 8 of s. 167 of Sea Customs Act—Burden of proof under s. 178A, how discharged—When can Court refer to speech made in Parliament by sponsor of Bill.

Section 178A of the Sea Customs Act, 1878, does not infringe the constitutional guarantee afforded by art. 19(1)(f) and (g) of the Constitution of India so far as gold is concerned.

*Amichand Vallamji v. M. G. Abrol*¹ and *Nathlla Sampathy Chetty v. The Collector of Customs*,² dissented from.

State of Madras v. V. G. Row,³ *Thakur Raghubtr Singh v. Court of Wards, Ajmer*⁴ and *Ebrahim Vazir Mavut v. The State of Bombay*,⁵ distinguished.

Babulal Amthalal Mehta v. The Collector of Customs, Calcutta,⁶ *Tot v. United States*,⁷ *Gopalan v. State Bank of Madras*⁸ and *State of West Bengal v. Subodh Gopal*,⁹ referred to.

The effect of s. 23A of the Foreign Exchange Regulation Act, 1947, is not to incorporate the provisions of the Sea Customs Act, 1878, into the Foreign Exchange Regulation Act, 1947, but the effect is of incorporating the restrictions imposed by sub-ss. (1) and (2) of s. 8, sub-s. (1) of s. 12 and cl. (a) of sub-s. (1) of s. 13 in the Sea Customs Act, 1878, with certain modifications in s. 183 of the Sea Customs Act, 1878.

Nathlla Sampathy Chetty v. The Collector of Customs,² differed from.

Secretary of State for India v. Hindusthan Co-operative Insurance Society,¹⁰ referred to.

*Decided, March 20, 1959. Special Civil Application No. 322 of 1958.

1 (1958) Miscellaneous Application No. 21 of 1957, decided by K. T. Desai J., on May 15, 1958.

2 (1958) Writ Petitions Nos. 384 of 1957 and 660 of 1958, decided by Rajgopalan and Balakrishna JJ., on September 9, 1958.

3 [1952] S.C.R. 597.

4 [1953] S.C.R. 1049.

5 [1954] S.C.R. 933, s.c. 56 Bom. L.R. 768.

6 [1957] S.O.R. 1110.

7 (1948) 319 U.S. 463, 87 Law. ed. 1519.

8 [1950] A.I.R.S.O. 27.

9 [1954] A.I.R.S.O. 92, s.c. [1954] S.O.R. 587.

10 (1958) Writ Petitions Nos. 384 of 1957 and 660 of 1958, decided by Rajgopalan and Balakrishna JJ., on September 9, 1958.

11 (1931) L.R. 58 I.A. 259, s.c. 33 Bom. L.R. 1006.

Under Item 8 of s. 167 of the Sea Customs Act, 1878, the liability to pay penalty arises only when it is proved that the person proceeded against is concerned in the importation in India or exportation from India of goods contrary to the provisions of the law. The mere finding that the goods found in a person's possession were smuggled goods is not sufficient to impose a penalty.

The burden cast on a person under s. 178A of the Sea Customs Act, 1878, from whose possession gold is seized would be discharged by him either by proving that the gold seized from him was on the Indian soil prior to September 4, 1939, or that it was brought on the Indian soil subsequent to that date on the authority of a licence granted in that behalf by the Reserve Bank of India and duty thereon was paid, if any was payable.

Speech made in Parliament by the sponsor of a Bill may be referred to by the Court for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce it and the extent and urgency of the evil which he sought to remedy.

State of West Bengal v. Subodh Gopal Bose and *M. K. Ranganathan v. Govt. of Madras*, referred to.

THE facts appear in the judgment.

S. J. Sorabji, M. O. Chinoy, S. R. Vakil, G. L. Sanghi and A. S. Bobde, for the petitioner.

N. L. Abhyankar, Special Government Pleader, for the respondent.

TAMBE J. One of the questions raised in this application relates to the constitutionality of s. 178A of the Sea Customs Act (Act VIII of 1878) and, therefore, a notice was issued to the Attorney General. The contention is that it violates the constitutional guarantee to acquire, hold and dispose of property, and to practise any profession, or to carry on any occupation, trade or business enshrined in sub-cl. (f) and (g) of cl. (1) of art. 19 of the Constitution of India.

Petitioner Pukhraj Jain, a national and citizen of India, owns a gold and silver shop at Rajnandgaon and carries on business of a goldsmith under the name and style of "Champalal Pukhraj". The petitioner claims that his business is of buying and selling gold and that he was doing business both at Rajnandgaon and Tatanagar.

On October 25, 1956, while he was travelling in a train he was intercepted at Raigarh railway station at about 4.30 p.m. by the Customs Inspector (P & I) and he was found in possession of five bars of gold bullion weighing 290.6 tolas valued approximately at Rs. 29,835. The Inspector under a reasonable belief that the gold was smuggled, seized it from the petitioner. He also recorded statements of the petitioner on October 25, 26 and 30. On completion of necessary investigation, the Collector of Central Excise, M.P. and Vidarbha Area, Nagpur, respondent No. 1 hereto, served the petitioner with a show cause notice on May 20, 1957, which reads as follows:

"To

Shri Pookhraj Jain,
s/o Champalal Jain,
Sadar Bazar, Rajnandgaon.

Whereas Shri Pookhraj Jain s/o Champalal Jain of Rajnandgaon while travelling by train on 25-10-56 from Calcutta on interception by the Inspector (P & I) Raipur at the Raigarh Railway Station at 16.30 hrs, on 25-10-56 was found to be in possession of 5 pieces of gold bullion weighing tolas 290.6 (valued at Rs. 29,835/- approximately) which the said officer seized while acting on a reasonable belief, strengthened by the suspicious circumstances of his journey without a railway ticket, that it was smuggled into the State of West Bengal of the Indian Union in contravention of the Government of India's Notification No. 12(11)F.I/48 of 25-8-48 (as amended) issued under the

Foreign Exchange Regulation Act, 1947, read with section 19 of the Sea Customs Act, VIII of 1878, and section 23A of the first mentioned Act.

And whereas it appears that the above action of the said Shri Pookhraj Jain *prima facie* amounts to the contravention of Government of India's Notification No. 12(11) F.I/48, dated 25-8-1948 (as amended) issued under the Foreign Exchange Regulation Act, 1947, read with section 23A of the said Act, and section 19 of the Sea Customs Act, 1878, and punishable under item (8) of section 167 of the Sea Customs Act, 1878.

Now, therefore, the said Shri Pookhraj Jain is hereby required to show cause to the undersigned why a penalty should not be imposed on him and why the said quantity of gold weighing tolas 290.6 in respect of which the offence appears to have been committed should not be confiscated under item 8 of the Schedule to section 167 of the Sea Customs Act, 1878.

2. Shri Pookhraj is further directed to produce at the time of showing cause all the evidence upon which he intends to rely in support of his defence, as per section 178A of the Sea Customs Act, 1878.

3. Shri Pookhraj should also indicate in his written explanation whether he wishes to be heard in person before the case is adjudicated.

4. If no cause is shown against the action proposed to be taken within ten days of the receipt of this notice or if he does not appear before the adjudicating officer when the case is posted for hearing, the case will be decided on the basis of evidence on record, assuming that Shri Pookhraj Jain has no defence to offer."

In reply to the notice the petitioner showed cause. His defence in short was that out of 290.6 tolas of gold found in his possession, 162 tolas of gold was purchased by him from various persons and remaining 128 tolas of gold formed part of 150 tolas of gold which he had received as his share at the time of the partition of the joint family property. He wanted to sell that gold. He, therefore, got it melted and converted into five bars. He had taken gold from Rajnandgaon to Tatanagar for selling it. He however was not successful in selling the gold at Tatanagar and while he was returning from Tatanagar he was intercepted. In support of his contention the petitioner also examined certain witnesses before the Collector of Central Excise, respondent No. 1 hereto. His defence was not accepted by the Collector. The conclusions reached by the Collector in his words are:

"In view of the foregoing discussions and examination of the case in all its aspects, I am fully convinced in that the party has failed to discharge his burden under section 178A of the Sea Customs Act, 1878, to prove that the seized gold is not the smuggled one. Even though there are no foreign marks on the seized gold, the irresistible conclusion from the evidence led before me and the serious contradictions and material factual discrepancies in the defence story is that the gold in question is obviously contraband as per information received by the Department."

The Collector, therefore, by his order dated July 26, 1958, ordered confiscation of 290.6 tolas of gold and also imposed a penalty of Rs. 25,000 on the petitioner under s. 167(8) of the Sea Customs Act, 1878, read with s. 19 *ibid* and s. 23A of the Foreign Exchange Regulation Act, 1947. Against this order of the Collector the petitioner has preferred this application under arts. 226 and 227 of the Constitution of India and therein he prays for the issue of a writ of *certiorari* or a writ in the nature of *certiorari* or other appropriate writ and for quashing and setting aside the said order. The petitioner further prays for issue of a writ of prohibition or a writ in the nature of prohibition or other appropriate writ, direction or order under art. 226 of the Constitution of India against respondent No. 1 prohibiting him, his officers, subordinates, servants and agents from taking any steps in enforcement and/or execution of the said order dated July 24/26, 1958.

At this stage it would be convenient to refer to some of the provisions of the relevant Acts.

Section 19, which appears in Chapter IV of the Sea Customs Act, provides that the Central Government may from time to time, by notification in the Official Gazette, prohibit or restrict the bringing or taking by sea or by land

goods of any specified description into or out of India across any customs frontier as defined by the Central Government.

Item 8 of section 167 of the Sea Customs Act runs as follows:

"167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:—

Offences	Section of this Act to which offence has reference.	Penalties.
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction, or	18 & 19	Such goods shall be liable to confiscation; any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees."

Section 178 of the Act provides that anything liable to confiscation under this Act may be seized in any place, either upon land or water, by any officer of Customs or other person duly employed for the prevention of smuggling.

Section 183 provides that whenever confiscation is authorized by this Act, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit.

Section 8(1) of the Foreign Exchange Regulation Act, 1947, provides that the Central Government may, by notification in the Official Gazette, order that, subject to such exemption, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed, bring or send into India any gold or silver, etc. In exercise of the powers conferred by sub-s. (1) of s. 8, notification No. 12(11) FI/48, dated August 25, 1948, was issued. The notification runs as follows:

"(1) Restrictions on Import of Gold & Silver.

In exercise of the powers conferred by sub-section (1) of section 8 of the Foreign Exchange Regulation Act, 1947 (VII of 1947), and in supersession of the notification of the Government of India in the late Finance Department No. 12(11) FI/47, dated the 25th March 1947, the Central Government is pleased to direct that except with the general or special permission of the Reserve Bank, no person shall bring or send into India from any place outside India—

(a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not; or

(b) any silver bullion, any silver sheets or plates which have undergone no process of manufacture subsequent to rolling, or any silver coin not current in the country of issue."

Section 23 of the Foreign Exchange Regulation Act, 1947, provides for penalties and procedure in respect of contravention of the provisions of this Act or of any rule, direction or order made thereunder.

Section 23A provides that

"without prejudice to the provisions of section 23 or to any other provision contained in this Act, the restrictions imposed by sub-sections (1) and (2) of section 8, ... shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878 (VIII of 1878), and all the provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted."

The combined effect of the aforesaid provisions of the Acts and the notification in short is that under notification dated August 25, 1948, restrictions are imposed on the import of gold in India and it can only be imported under general or special permission of the Reserve Bank. By virtue of s. 23A of the Foreign Exchange Regulation Act, the aforesaid notification has the force of a notific-

tion issued under s. 19 of the Sea Customs Act. Thus gold imported in contravention of the aforesaid notification is liable to be seized under s. 178 of the Act and renders the person in possession of such gold liable for being proceeded against by the authorities under the Sea Customs Act under Item 8 of s. 167 of the Act. The Customs authorities, however, are not under an obligation to give him an option to pay a fine in lieu of confiscation of the gold. It is within the discretion of the authority concerned to give him that option or not. The order of confiscation made under s. 167 of the Sea Customs Act after completing the inquiry has the effect of vesting the seized property in the Government (s. 184 of the Act).

The provisions of s. 178A of the Sea Customs Act come into play at the stage of inquiry. Relevant provisions of the section read as follows:

"178A. (1) *Burden of proof:* Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

(2) This section shall apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf."

We are here concerned with gold. Mr. Sorabji, learned counsel for the petitioner, contends that the provisions of this section violate the rights guaranteed under art. 19(1)(f) and (g) of the Constitution of India. Under the aforesaid cls. (f) and (g) a citizen of India is guaranteed the right to acquire, hold and dispose of property and to practise any profession, or to carry on any occupation, trade or business. Gold is a commodity which is capable of acquisition. Trading in gold is also not prohibited. The aforesaid section makes it well-nigh impossible for a citizen to exercise these rights on account of the heavy burden that is cast on him by sub-s. (1) of s. 178A to prove that the gold in his possession is not smuggled gold. The burden cast is impossible to be discharged. By looking at gold it is not possible to tell whether it was imported in India or not and yet a citizen is called upon to prove the date of its being first brought in India. It affects a person's right to acquire, hold and dispose of gold and also to carry on trade and business in gold. A person would be afraid of purchasing gold in market. This also affects trade and business. The burden imposed is excessive and arbitrary. It is also contended by Mr. Sorabji that there is no connection between reasonable belief of the customs officer seizing gold and the burden which a citizen is called upon to discharge, viz. that the gold is not smuggled gold. Reliance is placed on the decisions of Mr. Justice K. T. Desai in *Amichand Vallamji v. M. G. Abrol*¹ and a Division Bench of the Madras High Court in *Nathlla Sampathy Chetty v. The Collector of Customs*.² These decisions, no doubt, support the contentions raised.

Mr. Abhyankar, Special Government Pleader, for respondent No. 1, on the other hand, contends that art. 19 of the Constitution has no application at all. Result of failure to discharge the burden on the part of a citizen is deprivation of gold under Item 8 of s. 167 of the Sea Customs Act. Apposite article that is attracted to this case is art. 31 of the Constitution. Section 178A is placed on the statute book for the purpose of imposing or levying penalty and the Legislature was, therefore, competent to make that legislation under art. 31(5)(b)(i). In the alternative, Mr. Abhyankar contends that even if the provisions of art. 19(1)(f) and (g) are attracted, the case falls under the provisions of cl. (5) of art. 19. The restrictions imposed are in the interests of the general public and are reasonable. There are also adequate safeguards provided in the Sea Customs Act itself against an arbitrary action of a Customs authority.

In our opinion, there is not much force in the contention of Mr. Abhyankar

¹ (1958) O.C.J. Miscellaneous Application No. 21 of 1957, decided by K. T. Desai J., on May 15, 1958 (Unrep.).

² (1958) Writ Petitions Nos. 384 of 1957 and 660 of 1958, decided by Rajgopalan and Balakrishna JJ., on September 9, 1958.

that the apposite article applicable would be art. 31 to the facts and circumstances of the case.

Article 31 relates to the deprivation of private property of a person. On the language of s. 178A of the Sea Customs Act, it has no relation to the question of deprivation of property. It is not enacted for the purpose of taking the property of a person but is only a rule of evidence enacted for the purpose of ascertaining whether gold seized from the possession of a person is smuggled gold or not. No doubt the combined effect of ss. 178A and 167⁽⁸⁾ is deprivation of property but then the deprivation is on a footing that the person in possession had no legal right to hold that property it having been smuggled. It is well-settled that art. 31 deals with the field of eminent domain. In *Dwarkanadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co. Ltd.*,³ their Lordships of the Supreme Court observed (p. 694):

"...In considering Article 31 it is significant to note that it deals with private property of persons residing in the Union of India, while article 19 only deals with citizens defined in article 5 of the Constitution. It is thus obvious that the scope of these two articles cannot be the same as they cover different fields. It cannot be seriously argued that so far as citizens are concerned, freedoms regarding enjoyment of property have been granted in two articles of the Constitution, while the protection to property qua all other persons has been dealt with in article 31 alone. If both articles covered the same ground, it was unnecessary to have two articles on the same subject. The true approach to this question is that these two articles really deal with two different subjects and one has no direct relation with the other, namely, article 31 deals with the field of eminent domain and the whole boundary of that field is demarcated by this article. In other words, the State's power to take the property of a person is comprehensively delimited by this article. The article has been split up in six clauses. Moreover, by the amendment of the Constitution certain kinds of laws have been exempted from the operation of the article or from the whole of Part III of the Constitution by the addition of articles 31A and 31B. Article 31(1) declares the first requisite for the exercise of the power of eminent domain. It guarantees that a person cannot be deprived of property by an executive fiat and that it is only by the exercise of its legislative powers that the State can deprive a person of his property. In other words, all that article 31(1) says is that private property can only be taken pursuant to law and not otherwise."

This contention of Mr. Abhyankar, therefore, fails.

It is next to be seen whether the provisions of s. 178A are violative of art. 19(1)(f) and (g) of the Constitution. Clauses (f) and (g) of art. 19 guarantee to a citizen the right to acquire, hold and dispose of property and to practise any profession, or to carry on any occupation, trade or business. There is no prohibition in any law for acquisition or holding or disposing of gold. There is also no law prohibiting a person from trading or doing business in gold. Gold is an article which could be possessed and over which the aforesaid rights could be exercised. It has to be seen whether the provisions of s. 178A in any manner restrict the exercise of these rights. In a given circumstance, i.e. when gold is seized by a Customs authority under a reasonable belief that it is smuggled, the section requires a citizen to prove that gold in his possession is not smuggled, and indeed it is difficult to discharge that burden. As observed by Mr. Justice K. T. Desai in *Amichand Vallamji v. M. G. Abrol*,

"It (gold) is an article which is capable of being split and there can be a fusion of diverse quantities of gold. It is easily changeable in form, size and shape. The gold available in the market hardly bears any identification mark. It is available in the form of lagdis, ravas, patlas and bars. It is available in the shape of coins. It was at one time a medium of currency."

A person purchasing gold has no means for ascertaining the year in which it was imported in India. It is common knowledge that there is very little indigenous gold in India and a large percentage of gold found in India is imported gold.

An innocent purchaser may bona fide acquire gold in the market and yet he will be required to prove that that gold is not smuggled gold. In *Babulal Amthalal Mehta v. The Collector of Customs, Calcutta*⁴ their Lordships observed (p. 1119):

"...No doubt the content and import of the section are very wide. It applies not only to the actual smuggler from whose possession the goods are seized but also to those who came into possession of the goods after having purchased the same after the same has passed through many hands or agencies. For example, if the Customs authorities have a reasonable belief that certain goods in the possession of an innocent party are smuggled goods and the same is seized under the provisions of this Act, then the person from whose possession the goods were seized, however innocent he may be, has to prove that the goods are not smuggled articles. This is no doubt a very heavy and onerous duty cast on an innocent possessor who, for ought one knows, may have bona fide paid adequate consideration for the purchase of the articles without knowing that the same has been smuggled. The only pre-requisite for the application of the section is the subjectivity of the Customs-officer in having a reasonable belief that the goods are smuggled."

This heavy and onerous duty imposed by the section on a citizen of India would undoubtedly act as a restriction on free exercise of the right of acquiring, holding and disposing of gold or of carrying on trade or business in gold guaranteed by art. 19(1)(f) and (g) of the Constitution. It has, however, to be remembered that the right conferred by art. 19(1)(f) and (g) is not an absolute right. The Legislature has been authorised to curtail that right, and impose restrictions on its exercise to a certain extent as provided in cl. (5) of art. 19 of the Constitution, and when we turn to cl. (5) of art. 19 it is clear that the power conferred on the Legislature to impose restrictions on the exercise of the right under art. 19(1)(f) and (g) are circumscribed by three limitations, the first limitation is that the restrictions imposed must be by enacting a law, the second limitation is that the law must be in the interests of the general public and the third limitation is that those restrictions must be reasonable. It is not in dispute that the restrictions imposed are by law. It is also not in dispute and indeed it cannot be disputed, that the restrictions imposed are in the interests of the general public. The question to be considered is whether the restrictions imposed are reasonable.

Now, the restriction imposed is in the shape of rule of evidence casting a burden of proof on the person from whose possession the gold is seized to prove that the gold was not smuggled. The expression 'smuggling' is not defined. The meaning given to that word in the words of their Lordships of the Supreme Court in *Babulal's* case is as follows (p. 1116):

"...Though the word 'smuggling' is not defined in the Act, it must be understood as having the ordinary dictionary meaning namely carrying of goods clandestinely into a country."

It would be convenient at this stage to consider various steps taken by the Government of India to restrict importation of gold. Upto September 4, 1939, there was no restriction on the import of gold in India. On that day a notification No. 53, dated September 4, 1939, was issued by the Finance Department (Central Revenues) of the Central Government. This notification was issued in exercise of the powers conferred on the Central Government by s. 19 of the Sea Customs Act. It prohibited bringing or taking by sea or land into British India from any place other than Burma or out of British India to any place other than Burma, gold coin, gold bullion or gold ingots, whether refined or not, except on the authority of a licence granted in that behalf by the Reserve Bank of India. On March 25, 1947, the Foreign Exchange Regulation Act came into force, and on the same day, in exercise of the powers conferred on the Central Government under s. 8(1), the Central Government issued a notification prohibiting import of any gold coin, gold bullion, gold sheets or gold

ingots, whether refined or not except with the permission of the Reserve Bank of India. This notification superseded the aforesaid notification dated September 4, 1939, issued under s. 19 of the Sea Customs Act. The notification dated March 25, 1947, was also superseded by another notification issued on August 25, 1948. The contents of this notification are similar in effect to that issued on March 25, 1947. This notification of August 25, 1948, was in force at the material time. No duty was levied on the import of gold till April 1, 1946, but thereafter a duty has been imposed. The burden that falls on a person from whose possession gold is seized is that he must prove that the gold seized from him was not smuggled gold and not as contended for by Mr. Sorabji that he has to trace its history from the date on which it was for the first time brought on the Indian soil. In our opinion, the burden cast on him would be discharged by him either by proving that the gold seized from him was on the Indian soil prior to September 4, 1939, or that it was brought on the Indian soil subsequent to that date on the authority of a licence granted in that behalf by the Reserve Bank of India and duty thereon was paid if any was payable. It has to be considered whether this burden can be termed as reasonable. The approach to the question has to be in the light of the following observations of their Lordships of the Supreme Court in *State of Madras v. V. C. Row*⁵ (p. 607):

"...It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

It has also to be assumed that the elected representatives of the people have in authorising imposition of the restrictions considered them to be reasonable. It is, therefore, first to be considered what conditions were prevailing when s. 178A of the Sea Customs Act was brought on the statute book and the evil it sought to be remedied. In other words, what was the underlying object or purpose of the Legislature in enacting s. 178A.

As already stated, import of gold was restricted in India since September 4, 1939. Section 178A, however, was brought on the statute book for the first time in the year 1955 by virtue of s. 14 of the Sea Customs (Amendment) Act, 1955 (21 of 1955). To understand the conditions that prevailed in 1955 and the evil which was sought to be remedied by the Legislature by enacting this section, reference to the Objects and Reasons of the Act and the Explanatory Note in the Bill would afford a useful guide and it is open to the Court to refer to them for this limited purpose.

In *State of West Bengal v. Subodh Gopal*⁶, Das J., as he then was, observed (p. 104):

"It is well settled by this Court that the statement of objects and reasons is not admissible as an aid to the construction of the statute... & I am not, therefore, referring to it for the purpose of construing any part of the Act or of ascertaining the meaning of any word used in the Act but I am referring to it only for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same & the extent & urgency of the evil which he sought to remedy. Those are all matters which, as already stated, must enter into the judicial verdict as to the reasonableness of the restrictions which Art. 19(5) permits to be imposed on the exercise of the right guaranteed by Article 19(1)(f)."

These observations were affirmed by the Supreme Court in *M. K. Ranganathan v. Govt. of Madras*.⁷ In our opinion, these observations would apply with equal force to use of the speech made in Parliament by the sponsor of the Bill, for the limited purpose.

⁵ [1952] S.O.R. 597.

⁶ [1954] A.I.R.S.C. 92, s.c. [1954] S.O.R.

587.

⁷ [1955] A.I.R.S.C. 604.

The Bill introduced in Parliament is Bill No. 48 of 1954. By this Bill it was proposed to amend the Sea Customs Act. Clause 14 thereof provided that the following clause be inserted in the Act as s. 178A after s. 178:

"Where any goods are seized under this Act on the ground that they are smuggled goods, the burden of proving that the goods are not smuggled goods shall be on the person from whose possession the goods are seized."

One of the objects for introducing this Bill was to take some additional power for controlling smuggling. Note to clause 14 reads:

"At present when action is taken against persons who are in possession of smuggled goods, it is not always easy for customs authorities to prove that the goods are smuggled goods. This clause places the burden of proof in such cases on persons from whose possession suspected smuggled goods are seized. Such a provision is necessary in order to safeguard the revenues of the State."

This Bill was introduced in Parliament by the Minister of Revenue and Defence Expenditure (Shri A. C. Guha) on March 12, 1955. The following observations in his speech at the time of making a motion for taking the Bill into consideration are material:

"The second point is to take some additional power for controlling smuggling. It may not be quite unknown to this House that smuggling has increased rather enormously. Previously there was not much economic incentive for smuggling, but due to so many restrictions and controls, and licences and prohibitions due to the development of indigenous industries and also due to our having long land borders after the partition of India, smuggling has become more rampant and has also become a paying proposition. Certain articles are prohibited for import and even for export, and if a smuggler can get them into or send them out of India, he can reap rich profits. This economic incentive for smuggling was lacking so long; now it has become necessary for the Government to take stringent measures and to take additional powers to stop smuggling."

In considering the genesis of s. 178A their Lordships of the Supreme Court observed as follows in *Babulal Amthlal Mehta v. The Collector of Customs, Calcutta* (p. 1118):

"The genesis of s. 178-A may now be considered. The Central Government had appointed a commission known as the Taxation Enquiry Commission which by its report recommended the adoption of the principles underlying section 178-A in order to minimize smuggling. In Vol. II of their report, Chapter VII deals with administrative problems in regard to customs and excise duties. At pp. 320 and 321 the Committee recommends the amendment of the Sea Customs Act, firstly to make smuggling a criminal offence and secondly empowering Customs officers to search premises etc. and the third recommendation is the one with which we are concerned. It is in the following terms:

"To transfer the onus of proof in respect of offences relating to smuggling to the person in whose possession any dutiable restricted or prohibited goods are found."

It is to implement this recommendation that s. 178A has been enacted."

It would be seen that this clause of the Bill as originally framed has not been accepted by the Parliament and material changes have been effected by Parliament in enacting s. 178A. The burden is imposed on a person only when gold is seized from his possession in the reasonable belief that it is smuggled gold and not when it is seized on the ground that it is smuggled as originally proposed. In the second instance, the amendment proposed was of general application to all smuggled goods. By enacting cl. (2) Parliament limited it only to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf. Looking to the articles mentioned in cl. (2) the common feature that appears to be is that it relates to articles which can easily be smuggled. Thus considering all this material, in our opinion, the conditions prevailing in 1955 were that smuggling of articles including gold, had increased in dangerous proportions and was affecting the economy of the country. There was an incentive for the

residents of India and others to smuggle articles including gold. On account of inherent characteristics of the articles there was difficulty in the way of the Customs authorities to prove that the seized gold was smuggled gold. This resulted in the smuggled gold getting distributed in the country and in adversely affecting the economy of the country. The primary object with which s. 178A was brought on the statute book was, in our opinion, to prevent certain smuggled articles getting absorbed in the country.

Keeping these aforesaid conditions and circumstances prevailing at the time s. 178A of the Sea Customs Act was brought on the statute book and the underlying object or the purpose of the Legislature in enacting this section in view, it has to be considered whether the restrictions imposed have a rational relation to the object sought to be achieved by the Act; or in other words, the restrictions imposed are in any manner disproportionate, arbitrary and excessive. Mr. Sorabji contends that the presumption raised is not founded on the proof of any fact as such but is founded only on the subjectivity of the Customs officer in having a reasonable belief that the goods are smuggled. There is no provision in the statute which entitles a person from whose possession gold is seized to know the reasons or grounds of his reasonable belief nor the subjectivity of the Customs officer made a justiciable issue. Powers conferred on the Customs officer are, therefore, arbitrary and there is no rational relation between the subjectivity of the Customs officer and the presumption raised. Reliance is placed by Mr. Sorabji on certain observations made in *State of Madras v. V. G. Row* and decisions in *Thakur Baghu-bir Singh v. Court of Wards, Ajmer*⁸, *Ebrahim Vasir Mavat v. The State of Bombay*⁹ and *Tot v. United States*.¹⁰

It must be conceded that there is no provision in the Sea Customs Act which entitles a person from whose possession gold is seized to know the facts on which the reasonable belief of the Customs officer that the gold is smuggled is founded. Section 181 no doubt provides that when anything is seized, or any person is arrested under this Act, the officer or other person making such seizure or arrest shall, on demand of the person in charge of the things so seized, or of the person so arrested, give him a statement in writing of the reason for such seizure or arrest. But when we turn to s. 178A it becomes clear that entertaining a reasonable belief that the gold is smuggled is a sufficient reason for the seizure of the gold, and if the Customs officer says so in the writing which he gives to the person concerned, it would amount to sufficient compliance with the provisions of s. 181 of the Sea Customs Act. It is also true that the grounds on which the reasonable belief is entertained by the Customs officer cannot be inquired into a Court of law.

It is, on the other hand, contended by Mr. Abhyankar that the information which a Customs officer receives regarding the smuggled gold has to be kept confidential, and if this information is disclosed either to the person from whose possession gold is seized or at the time of judicial inquiry, people will not come forward to give information to the Department and the very object of the Act would be defeated. There is considerable force in the argument of Mr. Abhyankar. In our opinion, there is good reason for not disclosing information giving rise to the reasonable belief of a Customs officer. This, however, does not mean that the facts on which the Customs officer seizing gold founds his reasonable belief are not subjected to any scrutiny at all. If we turn to the provisions of s. 182 of the Sea Customs Act, it becomes clear that the officer who holds an inquiry thereunder is usually not the same officer who has seized the gold. As already stated, s. 178A comes into play only at the stage of inquiry and it is for that officer to consider whether he should raise a presumption or not. It necessarily follows that it is open to that officer to consider whether on the material placed before him he could hold that the

8 [1953] S.C.R. 1049, 1054.

9 [1954] S.C.R. 933, 937.

10 (1943) 319 U.S. 463, 87 Law. ed. 1519.

seizure made by the Customs officer was made in the reasonable belief that the gold was smuggled.

Mr. Abhyankar has placed on record instructions issued to the Customs officer by the Collector of Central Excise Collectorate, Nagpur, being Standing Order 4 of 1953. The procedure which has to be followed by the Customs officer according to this Standing Order in short is that the Customs officer making a seizure as a result of an information lodged with him, has to place on record substance of the information received. He has to disclose the names of the informers to his superior officers confidentially. Preliminary reports of searches and seizures are to be submitted to the immediate superior officer promptly. Seizure report which has to be made has to contain particulars of the date, time, place of seizure of the person from whom and the goods which are seized, of the rules for the violation of which the seizure has been effected and of the reasons why the seizing officer made the seizure. This report and its enclosures form the basis of the proceedings before the adjudication officer. Seizure report complete with essential documents is to be submitted within 7 days of the seizure. The officer receiving the seizure report has to scrutinise the papers and see whether a *prima facie* case has been made out and whether the case is within his competence to adjudicate and it is only when he is satisfied on both these points that he issues a formal show cause notice. If he is not satisfied and if he feels that a wrong seizure has been made and there was actually no *prima facie* case against the person from whom the goods are seized, the goods seized are ordered to be released. These instructions in the Standing Order further make it clear that the officer holding an inquiry has to apply his mind to the facts and circumstances which led to the seizure and has to satisfy himself that they in fact give rise to a reasonable belief that the gold seized was smuggled.

The next stage after the show cause notice is the inquiry by the adjudication officer. Here the person from whom gold is seized has an opportunity of showing that the gold was not smuggled gold. As already stated, no doubt, the onus is a heavy onus. After considering all this material on record the decision is arrived at by the adjudication officer. Now, if the adjudication officer orders confiscation of gold or imposition of any penalty the person from whose possession the gold is seized has a right to prefer an appeal against that order to the appropriate appellate authority under s. 188 of the Sea Customs Act. At this stage, again, the whole case including the facts giving rise to the reasonable belief of the Customs officer seizing gold comes under the scrutiny of the appellate authority. Apart from this, revisional powers are also conferred on the Chief Customs authority and the Chief Customs officer under s. 190A, and on the Central Government under s. 191, of the Act. There is no reason to assume that the various Customs authorities on whom the aforesaid powers are conferred will not exercise them honestly and fairly. The validity of a statute must be judged rather on the assumption that those who are called upon to exercise these wide powers will exercise them honestly and *bona fide*: *Bapurao Dhondiba v. State of Bombay*.¹¹ On this assumption and in view of the aforesaid safeguards contained in the Sea Customs Act itself, it is difficult to assume that a citizen of India would be called upon to bear the burden of rebutting the presumption on a mere arbitrary whim of a Customs officer. It must also be kept in view that the presumption raised is not that the person from whom the gold is seized under such reasonable belief is a smuggler or is in any manner concerned in smuggling of that gold, or that he is in possession of it knowing that it is smuggled. The presumption only is that that gold is smuggled. As already stated, the object of the Act is to prevent smuggling. The presumption raised is only limited to that extent and not for the purpose of holding the person from whose possession gold is seized criminally liable. Failure to rebut the presumption would only result

in confiscation of gold and thereby prevent smuggled gold from getting absorbed in the country.

The presumption raised, in our opinion, has therefore, a rational relation to the object sought to be achieved by the Act.

Mr. Sorabji further contends that the restrictions imposed are manifestly excessive and are not necessary for the achievement of the object of the Act. They would affect a person who had *bona fide* acquired gold prior to the date this Act came into force. It is true that to discharge the burden raised under s. 178A it is not sufficient for the person from whose possession gold is seized to prove that he had acquired this gold *bona fide* prior to the date the Act came into force. He has further to establish that the gold is not smuggled gold. But to so limit the presumption would not achieve the object which the Legislature had in view, viz. confiscation of smuggled gold. We have already shown that the chances of gold being confiscated from innocent *bona fide* purchasers are very much minimised on account of the safeguards in the Act to which we have already referred. It is true that some instances may occur where *bona fide* purchasers may suffer on account of failure on their part to discharge the heavy onus cast on them. But hardship in few individual cases should not weigh in considering the constitutionality of an enactment.

The decisions to which reference was made by Mr. Sorabji also are not of much assistance to him and are distinguishable on facts.

The passage in *State of Madras v. V. G. Row* on which reliance was placed by Mr. Sorabji reads as follows (p. 608) :

"...The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights." These observations are no authority for holding that the formula of subjective satisfaction cannot be viewed as a reasonable restriction in any case. Each case would depend on its own facts. On the facts of this case it was held that there was no adequate provision in the Act for the scrutiny of the subjective satisfaction on the basis of which the action was taken nor was there a real opportunity to the person to show cause against the action proposed to be taken against him. Such is not the case here. Confiscation of gold does not follow as a result of the mere subjective satisfaction of officer seizing it. It is open to scrutiny at the hands of his superior officer. A citizen has an opportunity of being heard at the stage of inquiry.

In *Thakur Raghbir Singh v. Court of Wards, Ajmer* a citizen was deprived of his right to enjoy his property on the mere subjective determination of the Court of Wards that he was a person who habitually infringed the rights of his tenants without any opportunity to show that he had not been doing so.

In *Ebrahim Vazir Mavai v. The State of Bombay* also subjective determination of the Central Government that the citizen has committed a particular offence resulted in his expulsion from the country without an opportunity to show that he had not committed that offence.

The American decision reported in *Frank Tot v. United States of America*, referred to by Mr. Sorabji, proceeds on the application of the American doctrine of due process clause of the American Federal Constitution. As observed by their Lordships of the Supreme Court in *Babulal's case* and in *Gopalan v. State of Madras*¹² and *State of West Bengal v. Subodh Gopal*, the decisions of the American Courts relating to the application of the doctrine of due process clause are of little assistance in construing the provisions of the Constitution of India.

To summarize; At the time s. 178A was brought on the statute book im-

portation of gold had become highly lucrative, it could easily be smuggled and was being smuggled in the country in large quantity for some years prior to the enactment of this section, this was largely affecting the economy of the country, detection was getting difficult, even on detection of certain cases proving that the gold seized was smuggled gold was difficult presumably because information received in confidence could not be put in evidence which in its turn resulted in getting the smuggled gold absorbed in the country. This mischief had to be remedied and, therefore, s. 178A, amongst others, was brought on the statute book principally to prevent smuggling or, in other words, to prevent getting smuggled goods absorbed in the country. Restrictions imposed come into play only when the seizure of gold is under the reasonable belief of a Customs officer that it is smuggled gold. In view of the safeguards provided in the Act, the power conferred on the Customs officer to seize gold is not likely to be exercised in an arbitrary or capricious manner and afford sufficient safeguard to a citizen of India against any arbitrary action being taken against him. In these circumstances the restrictions imposed under s. 178A of the Sea Customs Act have a rational relation to the object of the Act and, therefore, are reasonable restrictions in the interests of the general public within the meaning of cl. (5) of art. 19 of the Constitution.

For the reasons stated above and with utmost respect to the learned Judges, deciding *Amichand Vallamji v. M. G. Abrol* and *Nathla Sampathy Chetty v. The Collector of Customs*, in our judgment, we hold that the provisions of s. 178A of the Sea Customs Act do not infringe the constitutional guarantee afforded by art. 19(1)(f) and (g) of the Constitution so far as gold is concerned.

It is true that their Lordships of the Supreme Court in *Babulal's* case were considering the constitutionality of s. 178A in relation to art. 14 of the Constitution. But their following observations lend support to the conclusions to which we have reached (p. 1121):

"A cursory perusal of s. 178-A will at once disclose the well defined classification of goods based on an intelligible differentia. It applies only to certain goods described in sub-s. (2) which are or can be easily smuggled. The section applies only to those goods of the specified kind which have been seized under the Act and in the reasonable belief that they are smuggled goods. It is only those goods which answer the threefold description that come under the operation of the section. The object of the Act is to prevent smuggling. The differentia on the basis of which the goods have been classified and the presumption raised by the section obviously have a rational relation to the object sought to be achieved by the Act. The presumption only attaches to goods of the description mentioned in the section and it directly furthers the object of the Act, namely, the prevention of smuggling."

Now, when the presumption raised by the section has a rational relation to the object sought to be achieved by the Act and it directly furthers the object of the Act, namely, the prevention of smuggling, it is difficult to hold that the restriction imposed in the shape of this presumption is unreasonable.

Mr. Sorabji then contends that even if s. 178A of the Sea Customs Act is not *ultra vires* of the Constitution, it has no application in deciding questions relating to contravention of the notification issued under s. 8(1) of the Foreign Exchange Regulation Act. He argues that by virtue of s. 23A of the Foreign Exchange Regulation Act the provisions of the Sea Customs Act were incorporated in the Foreign Exchange Regulation Act in the year 1952. Section 178A of the Sea Customs Act was brought on the statute book in the year 1955 but was not incorporated in the Foreign Exchange Regulation Act and, therefore, in deciding the question of contravention of the notification issued under s. 8(1) of the Foreign Exchange Regulation Act, the Collector was not entitled to call in aid the provisions of s. 178A, he ought to have decided the case only in accordance with the provisions of the Sea Customs Act as they stood when s. 23A of the Foreign Exchange Regulation Act was enacted. Reliance is placed on the following observations of the Judicial

Committee of the Privy Council in *Secretary of State for India v. Hindusthan Co-operative Insurance Society*¹³ (p. 267) :

"It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function effectively without the addition."

Reliance is also placed on the decision of a Division Bench of the Madras High Court (*Nathila Sampathy Chetty v. The Collector of Customs*). In our opinion, the aforesaid observations of their Lordships of the Privy Council have no application to the facts of the present case inasmuch as in our view the effect of s. 23A of the Foreign Exchange Regulation Act is not to incorporate the provisions of the Sea Customs Act into the Foreign Exchange Regulation Act but the effect is of incorporating the restrictions imposed by the sub-s. (1) and (2) of s. 8, sub-s. (1) of s. 12 and cl. (a) of sub-s. (1) of s. 13 in the Sea Customs Act with certain modifications in s. 183 of the Sea Customs Act. With respect, it is, therefore, not possible for us to accept the view of the Division Bench of the Madras High Court in the aforesaid case. This contention of Mr. Sorabji, therefore, fails.

It is next contended by Mr. Sorabji that the inquiry held by respondent No. 1 in this case under s. 167(8) of the Sea Customs Act was a quasi judicial inquiry. Respondent No. 1 was, therefore, bound to follow the principles of natural justice in the conduct of that inquiry. He has failed to follow those principles inasmuch as he had examined three witnesses Anwar, Marotrao and his brother Rambhau behind the back of the petitioner and had considered their evidence in deciding the case against the petitioner. This contention also in our opinion has no force. The inquiry held under s. 167(8) is a quasi judicial inquiry: *Sewpujanrai I. Ltd. v. Collector of Customs*¹⁴ and respondent No. 1 was bound to follow the principles of natural justice in holding the inquiry. These principles are in the words of their Lordships of the Supreme Court in *Union of India v. T. R. Varma*¹⁵ (p. 507):

"...Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed."

In the first place, the arguments raised before us were not specifically stated in the petition filed before us. The plea is contained in para. 7 of the petition and it is in vague terms. A copy of the letter dated October 21, 1957, referred to therein is not placed on the record. Mr. Abhyankar stated before us that in the letter dated October 21, 1957, the request made by the petitioner was that these witnesses should be submitted for cross-examination. The Department produced Anwar on February 6, 1958. The petitioner as well as his counsel were present at that time. Anwar was examined in the presence of the petitioner's counsel. His counsel however did not cross-examine him. When this statement was made by Mr. Abhyankar, Mr. Sorabji accepted the statement of Mr. Abhyankar. Mr. Abhyankar further stated that the question of producing Rambhau and Marotrao for cross-examination did not arise because on February 6, 1958, the petitioner went back on his previous statement and stated that he had not melted gold through Rambhau and Marotrao. The statement of Marotrao and Rambhau was also to the same effect. That being the position, it was not necessary to produce Rambhau and Marotrao at

¹³ [1931] L. R. 58 I.A. 259, s.c. 33 Bom. L.R. 1006.

¹⁴ [1958] A.I.R.S.C. 845, 849.

¹⁵ [1958] S.C.R. 499. •

the time of the inquiry, the inquiry officer having accepted the statement of the petitioner that the gold was not melted by him through Rambhau and Marotrao. In view of these facts, in our opinion, this contention of Mr. Sorabji must fail.

Last contention of Mr. Sorabji is that, at any rate, on the facts found by respondent No. 1, no penalty could be imposed on the petitioner and, therefore, the order of respondent No. 1 to the extent it imposes personal penalty of Rs. 25,000 on the petitioner is bad in law. At any rate, respondent No. 1 was acting beyond his jurisdiction in imposing penalty in excess of Rs. 1,000. In our opinion, the contention is well-founded. We have already reproduced the relevant provision of Item (8) of s. 167 of the Sea Customs Act and it would be seen that the liability to pay penalty arises only when it is proved that the person proceeded against is concerned in the importation in India or exportation from India of goods contrary to the provisions of the law. The mere finding that the goods found in a person's possession were smuggled goods is not sufficient to impose a penalty. In the instant case, respondent No. 1 has not found that the petitioner was in any manner so concerned in the importation of gold. The finding recorded is only that the gold found in the petitioner's possession is smuggled gold. Respondent No. 1, therefore, in our opinion, has erred in law in imposing the penalty of Rs. 25,000 on the petitioner. This error of law is apparent on the face of the record and, therefore, the order of respondent No. 1 to this extent is liable to be quashed.

Mr. Abhyankar, however, contends that though respondent No. 1 has not recorded a finding that the petitioner was concerned in the importation of this smuggled gold found in his possession, this is the necessary inference on the facts found by him. It is not possible for us to accept this contention. It is not for this Court to record any finding on a question of fact. The question was entirely within the jurisdiction of respondent No. 1. Respondent No. 1 having failed to record the necessary finding of fact his order is liable to be set aside to the extent stated above. On this finding of ours it is not necessary to consider the question as to the quantum of fine which could be imposed under Item (8) of s. 167 of the Sea Customs Act. We would, however, record our finding in view of the arguments advanced before us by Mr. Abhyankar. He contends that there is no limitation in the matter of imposing a penalty on the Customs authority under Item (8) of s. 167. In support of his contention he placed reliance on the decisions in *Mohandas v. Sattanathan*¹⁶ and *Palriwala Bros. Ltd. v. Collector of Customs*.¹⁷ The question, however, is no more open to debate and is concluded by the decision of their Lordships of the Supreme Court in *F. N. Roy v. Collector of Customs, Calcutta*¹⁸ where they observed:

"...The section (167, Item 8 of the Sea Customs Act) makes it clear that the maximum penalty that might be imposed under it is Rs. 1000. The discretion that the section gives must be exercised within the limit so fixed. This is not an uncontrolled or unreasonable discretion."

In view of these observations, it will have to be taken that the aforesaid two decisions stand overruled by necessary implication.

In the result, the petition partly succeeds. The order of respondent No. 1 so far as it relates to the imposition of penalty of Rs. 25,000 is quashed. Rest of the order including the order of confiscation of gold shall stand. In view of partial success of the parties, costs of this petition shall be borne as incurred.

Order accordingly.

¹⁶ (1954) 56 Bom. L.R. 1156, 1163.

¹⁸ [1957] S.C.R. 1151, 1158.

¹⁷ [1958] A.I.R. Cal. 232.

ORIGINAL CIVIL.

*Before Mr. Justice K. K. Desai.*JAYASHREE SHANTARAM VANKUDRE v. RAJKAMAL
KALAMANDIR PRIVATE LTD.*

Companies Act (I of 1956), Sec. 155—Application made under s. 155 involving questions of forgery and fabrication of deed of transfer of shares—Whether such questions can be tried under summary procedure of application under s. 155.

The summary procedure of trial by petition under s. 155 of the Companies Act, 1956, should not be allowed to be resorted to by the Court where discovery and inspection are necessary and complicated questions such as of forgery and fabrication of documents arise for decision in the petition.

Matheran Steam Tramway Co. v. Lang' and *Shrimati Savitadevi Jhunjhunwala v. Harinagar Sugar Mills Ltd.*,¹ referred to.

THE facts appear in the judgment.

M. R. Mody, for the petitioner.

P. P. Khambatta, for respondent No. 1.

J. C. Dias, for respondent No. 2.

K. K. DESAI J. On December 31, 1947, the petitioner and one Shantaram then being wife and husband floated respondent No. 1 company as a private limited company. The petitioner was registered as a shareholder in respect of 251 ordinary shares (of respondent No. 1 company) being the subject-matter of this petition. The petitioner and the said Shantaram both continued to act as and were directors of respondent No. 1 company on July 1, 1955.

From the deed of transfer dated June 28, 1955, a copy whereof is annexed as exh. 2 to the affidavit in reply made on behalf of respondent No. 1 company, it appears that the petitioner had signed the deed of transfer in respect of these 251 ordinary shares of the company. In the register of shares of respondent No. 1 company as on July 1, 1955, these shares were transferred and registered in the name of respondent No. 2. From the minutes of the meeting of the directors held on July 1, 1955, it appears that the petitioner and the said Shantaram were both present at the said meeting and the application for transfer of the shares from the name of the petitioner to respondent No. 2 was resolved to be accepted and the shares were resolved to be transferred to the name of respondent No. 2.

I understand from counsel that there have been disputes and differences between the petitioner and the said Shantaram since July 1, 1955. This petition appears to be one of the litigations arising in consequence of such disputes. In para. 7 of the petition the petitioner has referred to a suit which she has filed against respondent No. 1 company and the said Shantaram. In the written-statement in that suit the minutes of the meeting of the directors held on July 1, 1955, were referred to and annexed. It is the petitioner's case that she was never present at such meeting and that no such meeting of directors was held on July 1, 1955. The petitioner's contention is that the minutes are fabricated for the purpose of depriving the petitioner of the shares in question and of her position as a director of respondent No. 1 company. The petitioner denies having at any time executed a deed of transfer of the kind which is annexed as exh. 2 to the affidavit in reply made on behalf of respondent No. 1 company. The petitioner, however, does not deny the signature on the deed of transfer. The petitioner's case is that the contents of the deed of transfer which bears her signature are forged and fabricated. In the affidavit in reply made on behalf of respondent No. 1 company all these allegations are denied.

*Decided, January 19, 1959. O.C.J. I. O. No. 96 of 1958.

1 (1927) 33 Bom. L. R. 184.

2 (1955) O. C. J. I. O. No. 67 of 1954, decided by Coyajee J., on March 23, 1955 (Unrep.).

Mr. Khambatta on behalf of respondent No. 1 company has contended that the procedure prescribed under s. 155 of the Indian Companies Act is a summary remedy and should not be allowed to be resorted to in matters involving complicated questions such as have arisen in this petition. He contends that questions of forgery and fabrication of documents are not proper to be tried under the summary procedure of an application under s. 155 of the Companies Act. He has in that connection referred me to various text-books. In Vol. VI of Halsbury's Laws of England the summary of the purport of the English decisions in this connection appears in art. 448. The relevant observations in that article are as follows (p. 218) :—

"The application may be made by the person aggrieved,...It may be by motion or summons or by action commenced by writ. If the Court thinks that the case, by reason of its complexity or on the ground that there are matters requiring investigation or otherwise, could more satisfactorily be dealt with by an action, the court will decline to make an order on a motion, without prejudice to the right of the applicant to institute an action for rectification. An action may, without any direction by the Court, be instituted for rectification of the register, a course which should be followed where there is much complexity, or where other relief is required."

Mr. Khambatta and Mr. Mody both have referred me to the case of *Matheran Steam Tramway Co. v. Lang*.¹ In that case the trial Court in its discretion heard on merits and decided a petition made under s. 38 (which is the same as the present s. 155) of the Companies Act. In the Appeal Court before the Division Bench one of the contentions raised was that a complicated matter requiring trial by evidence should not have been allowed to be heard by petition and a suit should have been directed to be filed. That contention was dealt with as follows (p. 196) :—

"It was next said that this was not a matter which could be determined under s. 38 of the Indian Companies Act and that the petitioners should be left to a separate suit, more especially as Mr. Dinshaw had threatened a suit to enforce his lien. But s. 38 is widely worded. At the most it is a matter of discretion for the Court whether in any particular case it will hear the petition or leave the parties to a separate suit. An express issue was raised on this point, and the learned Judge exercised his discretion by deciding to hear this petition. Under those circumstances, we do not think we ought to overrule him, and force the parties to begin *de novo*. Mr. Dinshaw's explanation as to why he did not bring a separate suit was because it would in effect be carried on at his own expense. There is the additional circumstance that a petition under s. 38 should be a speedier and cheaper process than an ordinary suit."

The effect of the above observations appears to me to be that the Appeal Court was not willing to interfere with the discretion that was used by the trial Court in refusing to refer the petitioner in that matter to an action. The Appeal Court also pointed out that the terms of s. 38 of the Companies Act were wide and the remedy was speedier and cheaper. The matter is, therefore, entirely in the discretion of the trial Court.

Mr. Khambatta has referred me to the case of *Shrimati Savitadevi Jhunjhunwala v. Harinagar Sugar Mills Ltd.*² In that case after considering the position as arising under the decision in *Matheran Steam Tramway Co. v. Lang* on the facts of that case Coyajee J. refused to allow the petitioner to proceed by the summary procedure prescribed under s. 38 of the Companies Act, and referred him to an action.

In all matters arising under the Companies Act the rules of this Court provide that the application must be by petition. It is not, however, that complicated questions of facts must be tried on a petition where remedy for action is available to a party. It appears to me that the observations made in English decisions in this connection are relevant and that where discovery and inspection are necessary and complicated questions such as of forgery and fabricated documents arise for decision the summary procedure of trial by peti-

¹ (1927) 33 Bom. L. R. 184.

decided by Coyajee J., on March 23, 1955

² (1955) O. C. J. L. C. No. 67 of 1954, (Unrep.).

tion under s. 155 should not be allowed to be proceeded. This is not a matter where remedy of action is not available. On the contrary it is admitted by both sides that the procedure of filing a suit for rectification is not unknown and is generally resorted to where rights of third parties are concerned. In the matter of petition before me it appears to me that the real disputes are between the petitioner and her erstwhile husband Shantaram and complicated questions of fabrication and forgery must arise. In my view this is not a petition which I should allow to proceed to a hearing. The petitioner may if she so chooses file a suit for the relief which is claimed in the petition.

The order which I therefore make is: the petition must stand dismissed with liberty to the petitioner if so advised to file a regular suit. Costs of this petition if the suit is filed by the petitioner within four months from to-day will be costs in the suit. In default of any suit being filed the costs of this petition will be paid by the petitioner. Counsel certified.

Petition dismissed.

Solicitors for the petitioner: *Bhaishanker Kanga & Girdharlal.*

Solicitors for the respondents: *Daphitary Ferreira & Divan: Sukthankar & Gupta.*

APPELLATE CIVIL.

Before Mr. Justice S. T. Desai and Mr. Justice Miahboy.

THE STATE OF BOMBAY v. DAVALBHAI NARANBHAI PATEL.*

Bombay Town Planning Act (I of 1915)†, Secs. 14, 30, 51, 51-A‡—Land Acquisition Act (I of 1894), Sec. 6—Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Secs. 63, 66—Land included in sanctioned draft Town Planning Scheme awaiting final scheme—Whether such land can be acquired by Government under s. 6 of Land Acquisition Act—Word “land” in s. 51 of Bom. Act I of 1915 whether covers land within town planning area—Interpretation of statute.

A land included in a sanctioned draft Town Planning Scheme under the Bombay Town Planning Act, 1915, can be acquired by Government under s. 6 of the Land Acquisition Act, 1894.

The word “land” used in s. 51 of the Bombay Town Planning Act, 1915, covers land situated within a town planning area or outside it.

If a statute is clear and unambiguous, then, subsequent legislation cannot affect its interpretation. It is the duty of the Court to interpret a statute and not for the Legislature to do so and this has to be done with reference to the language used in the statute itself. An amendment is not necessarily made to remove a lacuna. It may be introduced *ex majore cautela*.

The meaning of s. 66 of the Bombay Municipal Boroughs Act, 1925, read with s. 63 of the Act, is that, though a municipality may acquire land outside its limits, it must utilise that property for the purpose of the Act within the limits of the municipal borough only i.e., for the benefit of the citizens residing within the municipal borough.

ONE Davalbhai (plaintiff) was the owner of a plot of land which bore Survey No. 199/4 and which was assigned final plot No. 881 in the Ahmedabad

*Decided, February 24, 1959. First Appeal No. 607 of 1954, against the decision of R. N. Kulkarni, Second Joint Civil Judge (Senior Division) at Ahmedabad, in Civil Suit No. 2431 of 1948.

†This Act is repealed by s. 90 of the Bombay Town Planning Act, 1954 (Bom. XXVII of 1955).

‡The relevant portion of the section runs thus:

“51-A. (1) If at any time the Provincial Government is of opinion that any land included in a town planning scheme is needed for a

public purpose other than that for which it is included in the scheme, it may make a declaration to that effect in the *Official Gazette* in the manner provided in section 6 of the Land Acquisition Act, 1894. The declaration so published shall, notwithstanding anything contained in the said Act, be deemed to be a declaration duly made under the said section....

(4) On the land vesting in the Crown under section 16 or 17 of the Land Acquisition Act, 1894, as the case may be, the scheme shall be deemed to have been suitably varied by reason of acquisition of the land.”

Town Planning Scheme No. 3. On the relevant date, this plot of land was outside the municipal limits of Ahmedabad. The State Government published a notification dated June 2, 1938, under s. 4, read with s. 17(4) of the Land Acquisition Act, for acquisition of this and some more surrounding plots. The notification declared that these lands were needed for public purposes, viz., for construction of an archaeological museum, a school and a playground. The notification also directed that, under sub-s. (4) of s. 17 of the Land Acquisition Act, the provisions of s. 5A of the Act shall not apply to the acquisition. It was followed by another notification, dated June 9, 1938, by which the Government declared that they were satisfied that the lands were needed for public purposes, and further declared under sub-s. (1) of s. 17 of the Act, that, as the said lands were urgently required, the Collector shall take possession, on the expiration of 15 days from the publication of the notice under sub-s. (1) of s. 9 of the Act, of all the waste and arable lands specified in the notification. The notification further stated that the Special Land Acquisition Officer, Ahmedabad, was empowered to perform all the functions of the Collector under the Act. On March 10, 1939, the Special Land Acquisition Officer took possession of Survey No. 199/4. After possession of the land was taken, it was handed over by the State Government to the Ahmedabad Municipality as the land was acquired for the purposes of the Municipality. Till November 18, 1948, when the present suit was filed, the Municipality had not made use of this and the other acquired lands for the purposes for which they were acquired, and they were being used for agricultural purposes and at the time when the notifications were issued, the lands under acquisition were included in a Town Planning Scheme, the draft of which was sanctioned by the Government on or about March 20, 1936. The plaintiff got compensation for the land of Rs. 6,495-10-9 in 1942. Thereafter the plaintiff filed a suit praying for a declaration that the acquisition of the land and all acts towards acquisition, beginning with the abovementioned two notifications, the act of taking possession of the land from the plaintiff and all acts of misfeasance, malfeasance and nonfeasance in not using the land for a public purpose and using the same for a non-public purpose of cultivation, be declared to be illegal, *ultra vires*, unwarranted and fraudulent and the State of Bombay and the Ahmedabad Municipality (defendants) may be ordered to hand over possession of the land to the plaintiff. The main allegations on which the plaintiff based his suit were: that the acquiring authority had no power to acquire the land in question, because the land was included in the draft town planning scheme, that the acquisition of the land was *mala fide*, that the urgency clause had also been applied *mala fide*, that the land being situated outside the municipal borough could not be acquired by the Municipality, and that the purpose for which the land had been acquired had been frustrated and that, therefore, the acquisition of the land was bad and that the plaintiff was still the owner of the same. The defendants denied all the allegations of the plaintiff and pleaded that the suit of the plaintiff was barred by the law of limitation. The trial Judge found that the acquisition of the suit land was illegal and that the suit was not barred by the law of limitation. He, therefore, held that the plaintiff was entitled to recover possession of the acquired land.

The State of Bombay appealed to the High Court.

B. R. Sompura, Assistant Government Pleader, for the appellant.
S. V. Gupta, with *V. S. Patel* and *A. H. Mehta*, for respondent No. 1.
B. G. Thakore, for respondent No. 2.

MIABHOY J. [His Lordship after stating the facts, proceeded]. The main point, which arises for consideration in the appeal is whether acquisition of the suit land was bad on the ground that it was included in the Draft Town Planning Scheme. The submission of Mr. Gupta, learned counsel for the plaintiff, was that once a land was included in a draft scheme, the power of ac-

quiring it under s. 6 of the Land Acquisition Act was lost to the State Government. His second submission was that though, under s. 6 of the Land Acquisition Act, the Government had power to acquire land needed for a public purpose, before such land could be acquired, the land must be capable of being so acquired. He argued that, if on account of the existence of another law, a land was rendered incapable of acquisition, then, the power of the acquiring authority to acquire the land was lost. He contended that the Town Planning Act of 1915 contained a number of provisions which showed that once land became the subject-matter of a town planning scheme, then, it could not be acquired under the Land Acquisition Act. It is, therefore, necessary, first, to examine the sections of the Town Planning Act on which Mr. Gupte relied for contending that the Act debarred the acquiring authority from exercising the power conferred on it by s. 6 of the Land Acquisition Act and which provisions, according to him, remove the suit land from the category of lands capable of being acquired. Section 3 of the Town Planning Act provides that a town planning scheme may make provision for certain matters, which are mentioned in that section. Then s. 8 of the Act provides that a town planning scheme may be made in accordance with the provisions of the Act in respect of any land, which is in course of development or which is likely to be used for building purposes. Sub-section (1) of s. 9 provides that the local authority may, by resolution, declare its intention to make a scheme in respect of the whole or any part of such land and of any land which is in the vicinity of such land. Sub-section (2) of s. 9 provides that, within twenty-one days from the date of such declaration, the local authority shall despatch a copy of the resolution to the Government for publication in the official gazette and, then, shall apply to the State Government for sanction for the making of such scheme. Then, sub-s. (6) of s. 9 provides that, after the receipt of such application and after making such inquiry as it may think fit, the State Government may by notification in the official gazette, either give sanction to make such scheme with or without modifications and subject to such conditions as it may think fit to impose or refuse to give sanction. Section 10 provides that, within 12 months from the date of the notification, sanctioning the town planning scheme, the local authority shall, in consultation with the owners, prepare and publish, in the prescribed manner, a draft scheme for the area in respect of which sanction has been given. Section 11 mentions what the contents of the draft scheme shall be. Then s. 15 imposes certain restrictions on the owners of lands situated within the town planning area. It provides that, after the declaration of intention to make a scheme, no person shall, within the area included in the scheme, erect or proceed with any building or work unless such person has applied for and obtained the necessary permission which shall be contained in a commencement certificate granted by the local authority in the form prescribed. Section 14 empowers Government to grant or withhold sanction for the draft scheme. Section 29 of the Act provides that, after a draft scheme has been sanctioned, the State Government shall appoint an arbitrator. Then s. 30 provides that, in accordance with the prescribed procedure, the arbitrator shall perform certain duties, which are mentioned in sub-ss. (1) to (10). Mr. Gupte especially drew our attention to the two provisos to sub-s. (10) of s. 30. The first proviso empowers the arbitrator to make variations from the draft scheme, but, enacts that any variation, estimated by the arbitrator to involve an increase of ten per cent. in the costs of the scheme, as described in s. 16, shall require the sanction of the Provincial Government. The second proviso, among other things, provides for an appeal to the Provincial Government from a decision of the arbitrator varying the scheme substantially. Then s. 31 provides that, except in certain matters, arising from some clauses of s. 30 and, subject to the provisos contained in cl. (10) of s. 30, every decision of the arbitrator shall be final and conclusive and binding on all persons. Then there are provisions for the appointment of a Tribunal. Then s. 40 provides that, after the Tribunal has decided all matters, which it is entitled to decide, the

Government may, by notification in the official gazette, sanction the final scheme or refuse to give such sanction, provided that, in sanctioning the scheme, the State Government may make such modifications as may, in its opinion, be necessary for the purpose of correcting an error, irregularity or informality. Mr. Gupte's contention is that, if all these provisions are read as a whole, then, the legislative intent is quite clear that once a draft scheme is sanctioned by the Government, the only authority which has got the power of making any variation in the scheme is the arbitrator alone and nobody else.

Mr. Gupte's contention was that though the Act confers on the Government power to modify or vary a scheme, before it is sanctioned under s. 14(2), no such power is conferred on it after such sanction is given and that the power to vary or modify a scheme thereafter vests only in the arbitrator, the power of the Government being restricted only to sanction a variation made by the arbitrator involving increase in cost of ten per cent. or of hearing an appeal from a decision of the arbitrator to vary a scheme substantially. It is not necessary for us to examine the Act with a view to ascertain as to what powers the Government possess after a final scheme is sanctioned, because, the facts of the present case do not demand an examination of the Act from this point of view. In this case, we are only concerned with determining as to what is the effect of a sanctioned draft scheme which is awaiting preparation of a final scheme. After a draft scheme has been sanctioned, the Act provides by s. 29 that an arbitrator shall be appointed. The duties of the arbitrator are mentioned in sub-s. (1) of s. 30 of the Act. It is true, that, so far as the matters provided for in this sub-section are concerned, duty is cast upon the arbitrator only and the Government has neither any power nor is any duty cast on it in connection with the draft scheme, at this stage, except those which are mentioned in the provisos to sub-s. (1) of s. 30. The first proviso, as already mentioned, provides that, in case there is a variation which involves an increase in costs of ten per cent., then, the sanction of the Provincial Government is necessary. The second proviso provides for an appeal to the Provincial Government. Section 31 provides that, except in these two matters, the decision of the arbitrator, except in regard to matters mentioned in cls. (3A), (3B), (3C), (4), (5), (6) and (9) of s. 30, shall be final and conclusive. Therefore, Mr. Gupte is right in his submission that, after a draft scheme is sanctioned, the matter is mostly in the hands of the arbitrator and it is that Officer whose duty it is to consider and sanction a variation of the scheme and the Government has no power of variation, their powers being confined to sanctioning variation made by an arbitrator or hearing an appeal therefrom. But this conclusion does not touch the point which requires to be decided in the appeal. The question that requires to be considered is whether these provisions of the Act either curtail the powers of the acquiring authority to acquire land under s. 6 of the Land Acquisition Act and/or they affect the land situated in a scheme area in such a way that it ceases to be the subject-matter of acquisition. Mr. Gupte began his argument by submitting that s. 6 of the Land Acquisition Act contains within it a limitation as to the kind of land which can be acquired by the Government. We are not in agreement with this submission of Mr. Gupte. In our opinion, s. 6 of the Land Acquisition Act covers all lands and does not exclude any land. Of course, it is open to the Legislature to provide that certain types of land shall not be acquired. If any such provision is made, then, it would be binding, subject to such objections which could be raised under the law of the land. However, an examination of the provisions of the Bombay Town Planning Act clearly reveals that they do not deal with the question of transfer of lands before a final scheme is sanctioned. It is only after a final scheme is prepared that, under s. 41 of the Town Planning Act, all rights in original plots which have been reconstituted stand determined and the reconstituted plots become subject to the rights settled by the arbitrator. But, before a final scheme is sanctioned, there is nothing in the provisions of the Act which deal with the subject of transfer of

lands. The main object of the Land Acquisition Act is to transfer ownership of land from private persons to Government or local authority or company free from all encumbrances. We are unable to find anything in the Town Planning Act nor is our attention been drawn to any provision therein, which would justify the submission that the power of the Government to acquire land was taken away the moment a draft scheme was sanctioned.

Mr. Gupte's further contention is that, when a draft scheme is sanctioned, then, the land, situated in the scheme area, becomes subject to certain restrictions and he submits that the acquisition of such land will interfere with such restrictions. We cannot agree with this submission also. Under s. 15 of the Town Planning Act, the restrictions are not absolute, but qualified. Under that section, it is true that all persons are prohibited from erecting or proceeding with any building or working or doing some other things on the lands situated within a Town Planning Area. But the section also makes it clear that such erection or other things can be made by obtaining a commencement certificate from the local authority in the prescribed form.

The main argument of Mr. Gupte which requires examination is that acquisition of land for a public purpose would vary a draft scheme and such a variation cannot be effected by the Government by the use of the machinery of acquisition. Under s. 30(1), a duty has been cast upon the arbitrator to demarcate areas allotted to, or reserved for, public or municipal purposes. If he so demarcates, then, his decision will become final, conclusive and binding under s. 31. But, in our opinion, this does not mean that, during the pendency of the draft scheme and before the final scheme is sanctioned, the Government is totally prevented from acquiring any land for a purpose other than that for which it may have been assigned in the draft scheme. All that these provisions mean is that the Government would have to approach the arbitrator and obtain his sanction for using the land for the intended purpose. But that does not take away the lands situated in a town planning scheme from the category of lands which are liable to be acquired under s. 6 of the Land Acquisition Act. In the present case, the correspondence shows that the local authority had consulted the arbitrator in the matter of the acquisition of this land and the arbitrator had given his approval. But, we do not propose to rest our decision on this approval. We do not propose to do so because the approval appears to have been obtained in private correspondence and not under the machinery devised by the Act. We propose to rest our judgment on the broad ground that the Act does not remove the lands situated in a town planning area from being acquired under the Land Acquisition Act. If the Legislature had intended such far reaching effect, it would have made a specific and clear provision on that subject and would not have left the same to be inferred indirectly from an examination of the provisions of the Act. It is true that an Act may be by implication amended, but, in order that such a result may be achieved, the implication must be inevitable and must necessarily flow from the language of the Act. For these reasons, we are not in agreement with the submission of Mr. Gupte that the provisions, to which he had drawn our attention, deprive the Government of its powers to acquire land situated in a town planning area or that such land had become incapable of being acquired under the machinery of the Land Acquisition Act.

Mr. Gupte has also relied on ss. 51 and 51A of the Town Planning Act. Now on the date when the suit land was acquired, s. 51A was not in existence. That section was introduced, for the first time, by the Bombay Amendment Act LV of 1948. Therefore, the question about the power of the Government to acquire the suit land or the land being taken out of the category of lands, which can be acquired, has got to be decided mainly with reference to the provisions contained in s. 51 of the Act. So far as this section is concerned, the argument, which appears to have been advanced in and accepted by the lower Court, was that this section implied that the Government had no power to acquire land situated in a town planning area. Mr. Gupte did not support this argument

and finding. He conceded that the true meaning and scope of s. 51 was to provide for acquisition of land for the purpose of a town planning scheme. But the contention of Mr. Gupte was that this section did not cover land situated within the limits of a town planning area. His contention was that it covered only lands situated outside such limits. He submitted that the expression "land needed for the purpose of a town planning scheme" meant land situated outside the town planning area and not within it. He contended that this section was intended to cover those lands which were required for the town planning scheme but which lands were situated outside the area of the scheme. He contended that if the section were interpreted to cover land situated in a town planning area, then, it would mean that the Legislature was guilty of tautology as such lands could always be covered under the Act by the arbitrator allotting it for a public purpose. We do not agree with this submission. In our opinion, the contention of Mr. Gupte is against the plain language of the section itself. The word "land" used in s. 51 is intended to cover all lands and cannot be restricted to lands situated outside a town planning area. The view which we take about this section is that it was really intended to expand the definition of the expression "for public purpose" as used in ss. 4 and 6 of the Land Acquisition Act. The Legislature appears to have thought that a contention might be raised that acquisition of land for the purpose of a town planning scheme does not fall within the purview of the expression "for public purpose" used in ss. 4 and 6 of the Land Acquisition Act. To negative such a contention, a specific legal fiction is created in s. 51 that land needed for the purpose of a town planning scheme must be deemed to be land needed for a public purpose.

The learned Assistant Government Pleader canvassed for a wider proposition. He contended that if this section was read as a whole and, especially, in the light of the marginal note, then, it showed that the machinery of the Land Acquisition Act could be used for acquiring land, which was situated within a town planning area. It was this contention which was seriously opposed by Mr. Gupte. In our opinion, the learned Assistant Government Pleader is right. Having regard to our conclusion that the word "land" as used in s. 51 covers also land which is situated within a town planning area, it follows as a corollary that the Government has got power of using the machinery of the Land Acquisition Act for the purpose of acquiring such land. This conclusion is to some extent supported by the marginal note which shows the trend of the section and states that land needed for purpose of town planning scheme may be compulsorily acquired. Therefore, in our opinion, instead of s. 51 supporting the argument advanced by Mr. Gupte, it supports the argument of the Government that the Act does not deprive the appropriate authority of the powers to make use of the machinery of the Land Acquisition Act.

Mr. Gupte has strongly relied upon the fact that the Legislature had thought fit to introduce s. 51A. He submitted that the enactment of s. 51A supported his earlier proposition that, once a draft scheme was sanctioned by the Government, then, the Government had no power to vary the draft scheme. He submitted that the introduction of the new section implied that the Government had no power to vary a draft scheme. However, if a statute is clear and unambiguous, then, subsequent legislation cannot affect its interpretation. It is the duty of the Court to interpret a statute and not for the Legislature to do so and this has got to be done with reference to the language used in the statute itself. An amendment is not necessarily made to remove a lacuna. It may be introduced *ex majore cautela*. In this connection, we may refer to the observations in Maxwell on Interpretation of Statutes, 10th edn., at p. 316.

"Provisions sometimes found in statutes, enacting imperfectly or for particular cases only that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim *expressio unius, exclusio alterius*. But that maxim is inapplicable in such cases. The only inference which a

Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts), is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution. If the law be different from what the Legislature supposed it to be, the implication arising from the statute, it has been said, cannot operate as a negation of its existence..."

The task which we have to perform in this case is to examine the language of the Town Planning Act, 1915, as it existed before s. 51A was introduced, and if an examination of the relevant provisions show that the Legislature unequivocally and unambiguously intended that the machinery of the Land Acquisition Act could be used for acquiring a land which is situated within a town planning area, then, the introduction of s. 51A does not make any difference. If the new section was introduced by the Legislature under the belief that till then the acquiring authority had no power to use the machinery of the Land Acquisition Act for the purpose of acquiring a land situated within a town planning scheme, then, we cannot share that belief. If it did so without sharing such a belief, then, the Legislature must be taken to have introduced the new section *ex majore cautela*.

Examining the provisions of s. 51A, it appears that the section applies to a land which is needed for a purpose other than a purpose for which provision is made in the scheme. Therefore, the scope of s. 51A appears to be different from the scope of s. 51 so far as the purpose of acquisition is concerned. In s. 51, the purpose is the purpose of a town planning scheme and in s. 51A the purpose is *de hors* that scheme. This provision appears to have been introduced mainly for the purpose mentioned in sub-s. (4) of s. 51A. That sub-section provides that, when any land is vested in the Crown under s. 16 or 17 of the Land Acquisition Act, the scheme shall be deemed to have been suitably varied by reason of acquisition of the land. Therefore, the main intention of the Legislature was to provide for an automatic variation of the town planning scheme on the acquisition taking place. But, that again, in our opinion, does not mean that the Government was debarred from acquiring land situated in a scheme area. Even before the introduction of the new section, though the Act did not permit Government to vary a scheme, the Government could use land for a purpose for which no provision was made in the scheme by approaching the arbitrator under s. 30(1) of the Town Planning Act and thus getting the scheme varied. In our opinion, though it is only the arbitrator who can vary a draft scheme, this does not either take away the power of the Government nor does it in any way impress land in the scheme area with any disability in matter of acquisition. Therefore, in our opinion, neither any of the provisions contained in the Town Planning Act nor s. 51 of the Act can justify any of the two propositions urged by Mr. Gupte. In our opinion, the suit land was capable of being acquired by the Government under the Land Acquisition Act and the first objection of the plaintiff must be overruled.

[His Lordship after considering the question whether the acquisition was *ultra vires* and illegal on the ground that the declaration and the act of acquisition were *mala fides*, proceeded.]

The next contention, which requires to be examined, is whether the municipality was competent to acquire lands outside its own limits. The contention of Mr. Gupte is that the municipality had no such power. A clear answer to this contention is s. 63 of the Bombay Municipal Boroughs Act, 1925. We may mention that though respondent No. 2 is now a Municipal Corporation and is now governed by the Municipal Corporation Act of 1948, it was, on the relevant date, a municipal borough and was governed by the provisions of the Municipal Boroughs Act, 1925. Section 63 of the said Act provides that a municipality may acquire and hold property both movable and immovable whether within or without the limits of the municipal borough. Therefore, this section provides in explicit terms that the municipality may not only acquire and hold property within its limits, but also acquire and hold property

outside its own limits. The submission of counsel is based on the provisions of s. 66 of the said Act. That section states that the municipal fund and all property vested in a municipality shall be applied for purposes of the Act within the limits of the municipal borough. The contention, therefore, is that, as this section permits the municipality to use its fund only within the limits of the municipal borough and inasmuch as the acquisition of land outside its limits would mean utilization of municipal fund and property outside its limits, it had no power to acquire the land in question. In our opinion, s. 66 has nothing to do with the subject of the acquisition of property. It deals with a different subject altogether—the subject of utilization of municipal funds. In our opinion, if this section were to be construed, as contended for by Mr. Gupte, then, s. 63 of the Municipal Boroughs Act, would be rendered nugatory. These two sections should be construed in such a manner that both of them are made effective. The true meaning of s. 66, read with s. 63 of the Act, is that, though municipality may acquire land outside its limits, it must utilise that property for the purpose of the Act within the limits of the municipal borough only i.e., for the benefit of the citizens residing within the municipal borough. Therefore, we do not agree with the submission of Mr. Gupte that the municipality had no authority to acquire land outside its own limits.

[The rest of the judgment is not material to this report.]

Appeal allowed.

Before Mr. Justice Datar and Mr. Justice Tarkunde.

JIVANLAL MANILAL PARIKH v. CHHITALAL CHUNILAL SHAH.*

Civil Procedure Code (Act V of 1908), Sec. 95; O. XXXVIII—Attachment before judgment on insufficient grounds—Whether such attachment itself an "injury" entitling defendant to compensation under s. 95.

The word "injury" in s. 95 of the Civil Procedure Code, 1908, includes injury to reputation and mental pain, and when attachment is got effected on insufficient grounds, such attachment itself without more will be regarded as having caused the defendant such "injury" as to entitle him to general damages under the section.

*Palanisami v. Kallappa*¹ and *Srinivasaraghavan v. Sundararajan*², followed.

Chandulal Straugi v. Purna Chandra Paul,³ *Joharmull & Co. v. Iswardas*⁴ and *Madhva Mohan Doss v. Gokul Doss*,⁵ referred to.

THE facts appear in the judgment.

N. V. Karlekar, for the appellant.

N. B. Osa and *S. B. Vakil*, for the respondent.

DATAR J. This is an appeal against an order made by the Civil Judge, Senior Division, of Baroda, on an application filed by one of the defendants in the original suit under s. 95 of the Civil Procedure Code for awarding of compensation against the plaintiff on the ground that the plaintiff had got effected an attachment before judgment of his property without sufficient reasons. The learned trial Judge held that the defendant applicant had succeeded in showing that the attachment before judgment had been effected without sufficient reasons. He, accordingly, awarded an amount of Rs. 500 to the defendant applicant from the plaintiff.

The application for attachment before judgment was made by the plaintiff on the same day on which he instituted his suit for an amount of Rs. 21,719-14-9 due on the foot of accounts. The learned trial Judge, before whom the appli-

*Decided, March 9, 1959. First Appeal No. 216 of 1957, against the order passed by P. S. Malvankar, Civil Judge, Senior Division, Baroda, in Special Civil Suit No. 62 of 1956.

¹ [1940] A.I.R. Mad. 77.

² [1955] A.I.R. Mad. 552.

³ (1935) 39 O.W.N. 915.

⁴ [1932] A.I.R. Cal. 895.

⁵ (1866) 10 M.I.A. 563, 575.

cation came for preliminary orders, granted an *ex parte* order for attachment before judgment. This *ex parte* order was, however, vacated after the defendant put in his objections in that application. Thereafter, on February 4, 1957, the defendant filed the application under s. 95 out of which the present appeal arises complaining that there was no reasonable and probable cause for the plaintiff to get the properties of the defendant, which consisted of certain lands and houses, attached before judgment, and therefore he had suffered loss of reputation. The learned trial Judge held that under the circumstances of the present case, the defendant would be entitled to an amount of Rs. 500 for the loss of reputation and mental injury which he suffered on account of the attachment before judgment.

The plaintiff filed an affidavit stating that there were reasonable and probable causes which entitled him to get the order of attachment before judgment. He also filed an affidavit of one Bansilal Ambulal, who was his neighbour. Bansilal in his affidavit stated that when he had met the defendant in the Bazar of Dabhoi, the defendant told him that as the plaintiff was not allowing him to pay the amount by instalments and was not prepared to forego the interest, he would dispose of his properties and see how the plaintiff would recover any part of his claim. Sometime thereafter Bansilal went to the plaintiff and gave the information which had been given to him by the defendant. It was then that the plaintiff instituted his suit and made the application for attachment before judgment under the provisions of O. XXXVIII.

Now, in an application filed under s. 95, the applicant has to prove that the attachment was applied for on insufficient grounds. The decided cases have taken the view that the words "insufficient grounds" are equivalent to "without reasonable and probable cause", and, therefore, it is for the plaintiff who applied for attachment before judgment to prove that the attachment was applied for and got effected on reasonable and probable grounds. The learned Judge was not inclined to believe the evidence of Bansilal Ambulal, who had filed his affidavit in the case. He observed that Bansilal was a stranger to the defendant, and it was not probable that the defendant could ever have stated to Bansilal that in the event of no settlement being arrived at by the plaintiff with him he would dispose of his property and make it impossible for the plaintiff to recover his claim. In another place of his judgment, the learned Judge was inclined to hold that Bansilal was no better than a hireling. It appears that this Bansilal had also made an affidavit even at the time of the final hearing of the application. At that stage the learned Judge was inclined to hold that Bansilal had no relations whatever with the defendant and to reject his evidence. Under these circumstances, we do not find any fault with the learned Judge if he stated in the present application that he was not prepared to believe the affidavit of Bansilal. The learned Judge also took into consideration that the defendant owned as many as 235 acres of lands besides some houses at the village Tejgadh, and finally he came to the conclusion that there was no reasonable or probable cause for the plaintiff to make an application for attachment before judgment. On the whole, we are satisfied that his conclusion is right and no valid reasons are shown as to why we should differ, in appeal, from his appreciation of evidence.

This brings us to the next question whether when the defendant has proved that the attachment was applied for and got effected on insufficient grounds, he would be entitled to compensation on that account. Section 95(1), so far as material, is as follows:—

"Where, in any suit in which an attachment has been effected, it appears to the Court that such attachment was applied for on insufficient grounds, the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him:

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction."

Sub-section (2) of the section states:

"An order determining any such application shall bar any suit for compensation in respect of...attachment..."

Now, Mr. Karlekar contends that the defendant has not proved that any expense or injury was caused to him by the attachment before judgment and, therefore, he would not be entitled to any compensation under the aforesaid section. The defendant contended that by the attachment he had suffered a heavy blow to his reputation and had also suffered mental pain. Mr. Karlekar says that there is no evidence of any loss of reputation or of any mental pain caused to the defendant by the attachment. Further, he contends that the words "expense or injury" used in the section do not refer only to the loss of reputation or mental pain. They refer to some damage caused to the defendant by the attachment of his property. It is contended that the word "expense" unquestionably indicates that the defendant, in order to be entitled to compensation, must show that he sustained some pecuniary loss or damage by the wrongful attachment, and that the words "expense" and "injury" being analogous words having been used in the same context, the word "injury" must also receive the same import.

In support of his contentions, Mr. Karlekar relied upon two cases of the Calcutta High Court. In *Chandulal Siraogi v. Purna Chandra Paul*,¹ it was held that damage to prestige or a feeling of humiliation is not an injury within the meaning of s. 95 of the Code of Civil Procedure for which compensation may be awarded under that section for attachment before judgment of the defendant applicant's property on insufficient grounds. The learned Judge who decided that case observed (p. 916):

"...The claim must be in respect of some damage caused to him as the proximate result of the attachment, arrest or injunction which had been applied for on insufficient grounds."

This was the view which had been taken by a Division Bench of the Calcutta High Court in the case of *Joharmull & Co. v. Iswardas*,² and the learned Judge felt that he was bound to follow it in preference to the decision of the High Court of Madras. He observed (p. 917):

"...No doubt, the Madras High Court has given a very elastic interpretation to the word 'injury' as used in the section, but there being a decision of this Court expressly dealing with this point, I have to follow that decision."

The learned Judge also made a distinction between a claim for damages for malicious attachment in a suit properly framed and an application under s. 95 where the matter had to be summarily investigated. But it may be noted that under sub-s. (2) of s. 95 an order determining an application under s. 95 shall bar any suit for compensation for such attachment.

In the earlier decision to which he referred, a Division Bench of the Calcutta High Court held that

"In a motion for an inquiry as to the damages caused to the defendant by reason of the operation of an injunction restraining him from alienating or disposing of his immovable and moveable property except in the usual course of business he must show that he was prevented from doing something which he could otherwise have been free to do. It will not do to say that this kind of injunction is a reflection on his character and upon his business stability and that the moment this injunction was pronounced and as a consequence of it nobody entered into any dealings with him, that his friends on the contrary began to break their contracts and failed to do their duty. He must show that he suffered loss by his inability to do one or more of the things which the injunction restrained him from doing and until some sensible case of that sort is put forward, it is unnecessary to direct an inquiry."

In this case, it appears that in an earlier judgment it was arranged that the defendant should be at liberty to apply by motion for an inquiry as to the

damages caused to him by reason of the operation of injunction obtained by plaintiff, and it was also directed that he should state his case for damages and his claim and that the matter should be heard on the original side. When the defendant made his claim, it seems that he did not make any claim that could be entertained as arising out of or caused by the injunction. It was, however, stated by the defendant that the kind of injunction served upon him amounted to a reflection upon his character and upon his business stability, and that the moment this injunction was pronounced and as a consequence of it nobody entered into any dealings with him, that his friends on the contrary began to break their contracts and failed to do their duty. The learned Judges, however, took the view that the claim that the defendant had made could not be regarded as the proximate result of the order of injunction served upon him. They observed (p. 696):

"...In order to get an inquiry as to damages, he would have to show that he had suffered loss by his inability to do one or more of the things which the injunction restrained him from doing and, until some sensible case of that sort is put forward, it is unnecessary... to direct an inquiry on materials of the character before us."

With great respect to their Lordships, it seems to us their Lordships were considering the case as it emerged from the order which had been passed at an earlier stage, and that order was that the defendant should be at liberty to apply by motion for an inquiry as to the damages caused to him by reason of the operation of this injunction, and so far as the facts mentioned in the case go it does not seem to us that it was a case under s. 95 of the Code of Civil Procedure and that the defendant had made out a case of "injury" as having been caused to him by the order of injunction. It is not clear whether their Lordships' attention had been drawn to the words "expense or injury" occurring in s. 95.

On the other hand, there are two decisions of the High Court of Madras which directly deal with the question arising in an application under s. 95. One is reported in *Palanisami v. Kaliappa*,³ where the learned Judge took the view that there was nothing in the language of s. 95 to justify the inference that special damage need be proved in application under s. 95 for damages for wrongful attachment. The words "expense or injury" in s. 95 indicate that either the particular damage upon which a monetary value can obviously be placed or the more general damage which the Court endeavours with difficulty to assess in terms of money, is contemplated by the section. This view was followed in a subsequent decision of the same Court reported in *Srinivasa-
raghavan v. Sundararajan*,⁴ where it was held that it was enough if general damage is proved such as mental pain, general loss of reputation, etc. Damage to prestige and humiliation suffered do amount to injury. We prefer to follow the Madras decisions and hold that the word "injury" in s. 95 includes also injury to reputation and mental pain, and when attachment is got effected on insufficient grounds, such attachment itself without more must be regarded as having caused the defendant at least such "injury" as to entitle him to general damages. In *Mudhun Mohun Doss v. Gokul Doss*,⁵ their Lordships of the Privy Council held that in a case arising out of a suit filed by a third party for damages for wrongful attachment of his property wrongful attachment was actionable *per se* and that the plaintiff was entitled to ordinary damages although he did not prove any special damages.

In the present case, we have held, agreeing with the finding of the lower Court, that plaintiff got the attachment before judgment effected wholly on insufficient grounds. If so, it was a wrongful attachment for which defendant would be entitled to compensation as by way of general damages. The unauthorised attachment interfering as it did with the common law rights of the defendant was itself an injury, actionable *per se*.

3 [1940] A.I.R. Mad. 77.

5 (1866) 10 M.I.A. 563, 575.

4 [1955] A.I.R. Mad. 552.

Mr. Karlekar contends that "injury" as used in s. 95 must mean injury to the person or goods, and particularly so when the word "injury" follows the word "expense" in the same context. Now, injury, as is well-known in the law of Torts, not only means injury to the body but also injury to the reputation or mind. We cannot also accept the contention of Mr. Karlekar that the two words "expense" and "injury" being analogous words should be interpreted as having the same meaning. According to Maxwell

"where analogous words are used each may be presumed to be susceptible of a separate and distinct meaning; for the Legislature is not supposed to use words without a meaning." (Interpretation of Statutes, Edn. 8, p. 276).

Mr. Karlekar contends that there is no evidence to show as to what was the loss caused to the reputation, or what was the nature of the mental pain suffered by the defendant. In our view, we do not think that there is any need for further proof as to the nature of the injury which the defendant says he suffered on account of the wrongful attachment before judgment of his property. We have held that the illegal attachment itself constituted an injury within the meaning of s. 95.

The learned Judge has held that although there was also an attempt to effect attachment before judgment of all the lands, for some reason or the other such attachment was not effected in regard to the lands. But there was an attachment in regard to the houses, and if the houses were improperly attached, then we are of the view that the defendant had sustained an injury, so as to entitle him to general damages.

The learned Judge has awarded Rs. 500, though he has not given any reasons as to why he was inclined to hold that in the present case an amount of Rs. 500 as compensation would meet the ends of justice. If any reasons had been given, then in all probability we would have been reluctant to interfere with the quantum of compensation as awarded by the learned Judge. But in this case, it seems to us that the learned Judge overlooked the fact that the lands, though attempted to be attached before judgment, were not in fact attached, and there is also the evidence that the house property was not worth Rs. 39,000 and odd as stated in the Panchakyas which appears to have been made at the time when the attachment was effected, but was about Rs. 7,900. Under these circumstances, we are inclined to hold that the amount as awarded was a little excessive, and we, therefore, reduce it to Rs. 200.

With this modification, the appeal is dismissed. There will be no order as to costs.

The cross objections also fail and are dismissed. There will be no order as to costs in the cross objections also.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Shelat.

THE SPECIAL LAND ACQUISITION OFFICER, BOMBAY CITY AND
BOMBAY SUBURBAN DISTRICT v. J. H. KATRAK.*

Land Acquisition Act (I of 1894), Secs. 23, 24—Salsette Estates (Land Revenue Exemption Abolition Act (Bom. XLVII of 1951)—Facts occurring after date of notification under s. 4 and relevant for determination of value of land at date of notification—Whether evidence as to such facts relevant—Amount of compensation payable to Khot for loss of privilege of levying non-agricultural assessment on date of notification issued before coming into force of Bombay Act XLVII of 1951, how to be determined.

Section 23 or section 24 of the Land Acquisition Act, 1894, does not preclude the Court from considering facts, which, though occurring after the date when the right to compensation accrues, help the Court in estimating the value of the property at the relevant date. It would, therefore, be improper to discard facts which have actually occurred, even though after the date of notification, which throw light on the question of the value of the land in question at the relevant date and which assist the Court to a correct ascertainment of such value.

Bradberry In re: National Provincial Bank, Ltd. v. Bradberry; Fry, In re: Tasker v. Calliford,¹ applied.

Manmatha Nath Mitter v. The Secretary of State for India in Council,² referred to.

A Notification under s. 4 of the Land Acquisition Act, 1894, in respect of certain lands held by a Khot was issued on January 19, 1950, and the question was as to what amount of compensation was payable to the Khot for the loss of the privilege of levying non-agricultural assessment on the lands accruing on the date of the notification:—

Held, that in view of the Salsette Estates (Land Revenue Exemption Abolition) Act, 1951, (if the Act is held valid and applicable to the claimant Khot), compensation payable to him would be for the period between January 19, 1950, and March 1, 1952, when the Act came into force.

While arriving at the value of the right of compensation for the loss of the privilege of levying assessment accruing on the date of the notification, the Court is entitled to and must look into facts which have actually occurred in preference to mere hypothetical considerations.

Bullfa and Merthyr Dare Steam Collieries v. Pontypridd Water Works Company,³ applied.

These References arose out of acquisition of certain lands situate in the village Parjapur for the dairy farm at Aare. The notifications under s. 4 of the Land Acquisition Act were issued on January 19, 1950, in respect of all these lands. Possession of the lands was taken by the Milk Commissioner on April 5, 1950.

The total area of land, which was the subject-matter of Reference No. 7 of 1955, was 153 acres 13 gunthas out of which 19 acres 38½ gunthas were Kharif lands, 126 acres 30½ gunthas were Varkas land and 6 acres 24 gunthas were covered by a tank and a Nallah. The Kharif lands were not contiguous but small pieces of them were scattered in several survey numbers. Out of 126 acres 30½ gunthas of Varkas land, 41 acres 18 gunthas in Survey No. 18 and 6 acres in S. No. 17 were hilly lands forming part of the hill in the western part of the village Maroshi which continues in Parjapur.

Parjapur was a Khoti village and the Khots were the claimants in Reference No. 7 of 1955 who were the trustees under the will of the late Ardesahir Hormusjee Wadia. The lands fell into two classifications; 'Malaki' lands of which the claimants were the proprietors and 'Suti' lands which belonged to

*Decided, March 30, 1959. O.O.J. Land Acquisition Reference No. 7 of 1955 (with Land Acquisition References Nos. 8, 9, 13, 14 and 2 of 1955).

1 [1943] 1 Ch. 35.

2 (1897) LL.R. 25 Cal. 194, P.C.

3 [1903] A.C. 426.

tenants who were subject to a certain land revenue assessment by the Khot.

Before the Special Land Acquisition Officer the acquired lands were, for the purpose of compensation, classified as Varkas, Kharif, quarrying lands and lands with building potentiality.

The Khot was levying until acquisition agricultural assessment on the lands held by the Sutidars and the aggregate amount of such assessment was Rs. 140-13-0. The Khot was likewise entitled to levy agricultural assessment on the 'Malaki' lands which was Rs. 391-15-3. No non-agricultural assessment on any of these lands was levied and none was fixed by the Collector.

Before the Acquisition Officer a claim for Rs. 9,86,087 including the statutory solatium was made. In that claim Varkas land was valued at Rs. 1,787-8-0 per acre and Kharif land was valued at Rs. 2,875 per acre. The land for which building potentiality was claimed was valued at Rs. 1-8-0 per sq. yd. and the value of the loss of the right to levy assessment was placed at Rs. 19,112. It was also urged before the Acquisition Officer that there were in all 4,194 trees on the acquired land for which a sum of Rs. 76,203 should be paid.

The Acquisition Officer awarded Rs. 1,300 per acre for Kharif land in respect of 12 acres 17 gunthas, Rs. 700 per acre for Varkas land for 91 acres 1 guntha, Rs. 1,250 for a bore well and a token value of Rs. 100 each for the road, Nallah and tank. He awarded a sum of Rs. 13,249 as compensation for the loss of right to levy agricultural assessment by capitalising Rs. 622-7-0 being the total assessment per year at 20 years' purchase but he rejected the claim made in respect of the loss of non-agricultural assessment. As regards the rest of the lands he awarded Rs. 23,087 for 15 acres 19 gunthas (74,899 sq. yds.) at Rs. 0-6-0 per sq. yd., Rs. 4,356 for 36 gunthas (4,356 sq. yds.) at Rs. 1-0-0 per sq. yd. and Rs. 21,520 for 26 acres 36 gunthas at Rs. 800 per acre. The last three items were valued by him at rates higher than those allowed by him for the rest of the lands presumably on the footing that those lands had some building potentiality. In all, the award including the amount of solatium and interest was for Rs. 1,98,276.

The claimants, being dissatisfied with the award as regards the amount of compensation, applied for reference to the High Court. The matter was accordingly referred to the Court under s. 18 of the Act for determination of the amount of compensation.

The reference was heard.

M. P. Land, for the claimants.

H. M. Seervai, Advocate General, with *J. M. Thakore*, for the Special Land Acquisition Officer.

SHRIJAT J. [His Lordship after dealing with the facts of the case and points not material to this report, proceeded.] As regards development, admittedly upto January, 1950, there was no development in Parjapur itself except for a solitary one-room structure with a verandah in S. N. 34/2-A. As one comes down south towards Marol gaathan, the Acme Bobbin & Shuttles Co., Ltd. had, by January, 1950, constructed a factory in Instance No. 3. Except for that, there were no structures on Marol-Maroshi Road until one came to S. No. 168/6 where there were three structures. Marol gaathan had, of course, about 400 houses. Going eastwards there was some development in S. Nos. 44 and 45 of Paspoli and in S. No. 31 of Tungwa where M/s. Larsen & Toubro and Khandelwal & Co. had their factories. Near Saki Naka also there were some 3 or 4 structures. But the distance between these places and Marol-Maroshi Road is as much as five furlongs and, therefore, any development in that direction cannot be considered as a development in the vicinity of the acquired land. There is next the evidence that from the south of Marol gaathan upto Andheri-Kurla Road, a distance of about 1,200 feet, there were only 10 residential structures but not any industrial structure and all these 10 structures abutted on the main road. The position, therefore, was that there were considerable undeveloped areas, first, between Andheri-Kurla Road and Marol gao-

than, and secondly between Marol gaathan and the land in Instance No. 3. Even to the south of Marol gaathan development was in a ribbon fashion. Thus, except for three structures in S. No. 168/6, the factory in the land in Instance No. 3, a bungalow on the top of a hillock in S. No. 10 and a one-room structure in S. No. 34/2-A there were no other structures in this entire locality. But Mr. Vaidya's anticipations were that all these areas, right from the north of Marol gaathan to S. No. 19/3, the northernmost part of the acquired land, would be filled up upto a depth of 900 feet on both sides of the road within a period of 25 years. These anticipations are not, in my view, justified by the evidence of the very scanty development that had taken place by January 19, 1950.

The learned Advocate General in view of Mr. Vaidya's statement that this entire area would be fully developed within 25 years asked him what development, if any, had in fact taken place since the date of the notification until to-day. Mr. Land objected to that question on the ground that any evidence as to the period after the date of notification was inadmissible. For this objection reliance was placed on ss. 23 and 24 of the Act. Now, s. 23 provides that in determining compensation the Court shall consider the market-value of the acquired property at the date of the publication of the notification. Whereas that section lays down the several things to be taken into consideration, s. 24 provides what are the things that the Court cannot consider. Thus cl. (4) of s. 24 provides that the Court shall not take into consideration any damage likely to be caused to the land acquired after the date of the declaration under s. 6 or in consequence of the use to which it would be put. Clause (5) of s. 24 provides likewise that the Court shall not take into consideration any increase in the value of the land acquired likely to accrue from the use to which it would be put when acquired. As stated by their Lordships of the Privy Council in *Manmatha Nath Mitter v. The Secretary of State for India in Council*,¹ the time of awarding compensation must be construed as meaning the time of compensation, the time at which the right to compensation attaches. In other words the valuation does not depend upon the result of acquisition. To that extent, evidence as to facts which arose after the acquisition is no doubt irrelevant. But the point to consider is, does s. 23 or s. 24 mean that the Court must shut its eyes on all facts which have occurred after the date of notification under s. 4. Suppose the Court is asked to determine compensation on the basis of building potentiality on the footing that the acquired land is likely to develop upto a certain distance within a certain period into either residential or industrial area and the Court is shown that between the date of the notification and the hearing of the Reference when the Court estimates the compensation payable on that footing no development has in fact taken place, does it mean that the Court must brush aside actuality and proceed to determine compensation on hypothetical considerations? The effect of ss. 23 and 24 is that compensation must be fixed looking to the condition of the property and the probable use to which a purchaser would most advantageously put it at the date of the notification. The date of notification fixes the time at which the value of the property, as it then is, is to be determined. Reliance was placed on *Bradberry, In re., National Provincial Bank, Ltd. v. Bradberry. Fry, In re. Tasker v. Calliford*² to show that facts, though occurring after the date at which valuation is to be determined, can be looked at for the purpose of arriving at a correct estimate. There the testatrix, one Ellen Bradberry, by her will dated August 19, 1931, gave legacies to certain legatees and life annuities beginning from the date of her death to three other persons. The annuities were payable out of a fund sufficient by its income to answer them. She, however, directed that if the income could not answer the annuities at the date when they became payable, no annuitant should have a claim against any other part of her estate. She gave her residue to four residuary legatees. The testatrix died on July 27, 1939. Her estate was not

1 (1897) 11 L.R. 25 Cal. 194, P.C.

2 [1943] 1 Ch. 35.

enough to pay the legacies and also to provide income to pay these annuities, but it was enough to pay the legacies and the capitalized values of the annuities. On July 13, 1940, Clara Jones, one of the three annuitants, died. The estate then became able to provide the fund to meet the remaining annuities. Before her death, however, the residuary legatees had consented to the annuitants' accepting the capitalized values of their annuities, but on learning of the death of Clara Jones they withdrew their consent. In May 1941, William Edwards, another annuitant, died. The executors and trustees, the National Provincial Bank, Ltd. were prepared to pay to the executors of Clara Jones and William Edwards the values of their annuities capitalized at the date of the testatrix's death. The residuary legatees contended that the executors of Clara Jones and William Edwards were entitled to receive only sums equal to the amount of the annuities payable for the periods between the death of the testatrix and the respective deaths of the two annuitants. In that event the Bank would have been able to pay those sums and the legacies and would also have been able to set aside a fund sufficient by its income to pay the third surviving annuitant her annuity in full. The residuary legatees contended that the surviving annuitant should be paid her annuity and not its capitalized value. On behalf of the executors of the two deceased annuitants it was claimed that their right to the value of annuities capitalized as at the date of the death of the testatrix cannot be said to have ended because the two annuitants died before it was paid. The two deceased annuitants had accepted the values so capitalized and that it should be paid to their executors. Negating this contention, Uthwatt J. said that it was the duty of the Court to take into consideration every relevant fact that is known at the date when the decision is to be made and work out the rights of the parties accordingly. The death of an annuitant before the Court's decision enabled the Court to measure what was in fact given to him.

"Why should the Court," he observed, "neglect known facts and put itself in the position of a prophet who, when he knows all the facts, projects himself to an earlier date and predicts as the span of life of a person known to be dead the length of life of the hypothetical person who lives his actuarial life?"

At p. 45 of the report the learned Judge sums as follows:

"A principle is to be drawn from these authorities, namely, that where facts are available they are to be preferred to prophecies."

Thus the principle laid down in this decision is that where the question at issue is the method of working out rights, regard can be had in estimating the value of those rights to events which have happened since those rights accrued.

Now, it is true that compensation payable to a claimant under the Land Acquisition Act is to be determined from the market value of the property at the date of the notification and not its value after that date. But while estimating that value at that date if a certain hypothetical basis is adopted, does s. 23 or s. 24 debar a Court from testing that basis by facts which are no longer speculative or in the region of estimates but are well-known and actual at the time when the Court is determining that value? There is a distinction between the value of the property at the date of notification and no other date and its determination by the Court at the time of hearing a Reference. There is nothing in either s. 23 or s. 24 of the Act which precludes the Court from considering facts, which, though occurring after the date when the right to compensation accrued, help the Court in estimating the value of the property at the relevant date. If, for instance, a claim for compensation is made on the footing that the acquired land had a certain potentiality, such as quarrying potentiality, and the Court is called upon to estimate the value of such land, does it mean that the Court should disregard facts available to it at the date when it determines such value and which show that the property had no such potentiality and yet estimate the value on theoretical and hypothetical considerations? I think not. It would, in my view, be improper to

discard facts which have actually occurred, even though after the date of notification, which throw light on the question of the value of the land in question at the relevant date and which assist the Court to a correct ascertainment of such value. Though the case *Bradberry In re* was not one dealing with land acquisition, the principle there laid down applies with equal force to the case before me. I held, therefore, that the evidence as to facts occurring even after the date of notification if relevant for the determination of the value at the date of the notification would be relevant. Mr. Vaidya thereupon stated that since January 1950 only two new structures had been put up in S. No. 10 in the entire area from Instance No. 3 down to the north of Marol gaathan and that too within a depth of 300 feet from the road and that no structures at all have been built in the area beyond the depth of 300 feet from that road. These facts clearly show that the period of 25 years during which Mr. Vaidya thought that the entire area from the north of Marol gaathan to S. No. 19/3 upto a depth of 900 feet on both sides of the road would be filled up was a too optimistic estimate.

[His Lordship, after dealing with points not material to this report, continued.]

That takes me to the question of the loss of the right of assessment of the Khot, both agricultural and non-agricultural. Mr. Land has accepted the Acquisition Officer's award as to the agricultural assessment which has been capitalized at 20 years' purchase and, therefore, no question remains to be determined on that item of compensation. But there is considerable controversy as regards the question of compensation for the loss of the right to levy non-agricultural assessment. At one stage the learned Advocate General sought to support the attitude of Government that the Khot had no right to levy non-agricultural assessment. But when it was pointed out to him that that question was already a matter of some judicial pronouncements, he gave up that stand at once. Shortly stated, the question before me is, what would a purchaser have paid in January, 1950 for the right of the Khot to levy non-agricultural assessment in respect of lands to which I have given building potentiality? As I have stated, Mr. Vaidya has based his calculations on the footing that within a period of 25 years the entire area from the north of Marol gaathan upto the northernmost part of the acquired area would be fully developed. On that basis he has taken a mean period of $12\frac{1}{2}$ years and worked out compensation due to the claimants after providing for certain charges of collection and for roads. It was, however, argued that in calculating compensation Mr. Vaidya had not taken into consideration certain facts which would govern the value that a purchaser of this right of the Khot would offer in January, 1950. The first is that though the Khot has a right to levy non-agricultural assessment as and when user of the land is converted from agricultural to non-agricultural purpose, Government has the power to direct the Collector not to change the assessment. Rule 92 of the Rules framed under the Land Revenue Code provides:

"When land assessed for purposes of agriculture only is subsequently used for any purpose unconnected with agriculture, the assessment upon the land so used shall, unless otherwise directed by the State Government, be altered under sub-section (2) of section 48 by the Collector in accordance with rules 81 to 87 inclusive."

The learned Advocate General contended from this rule that this was one of the factors which rendered the right to levy assessment insecure, for Government at any time can direct the Collector not to change the assessment. Therefore, even though a piece of land might be put to non-agricultural use, Government, by directing that no non-agricultural assessment should be levied, could defeat the right of the Khot. In *The Special Land Acquisition Officer v. The Trustees of the Will of the late A. H. Wadia*³, a Division Bench of this Court, however, disregarded such a contention and held that such risk was

³ (1956) O.C.J. Appeal No. 60 of 1953, decided by Chagla C. J. and Desai J., on April 4, 1956 (Unrep.).

fanciful for it must be assumed that Government would act honestly and reasonably. The next contention was that Government had always denied the right of the Khot to levy non-agricultural assessment and that, therefore, there was considerable doubt as to the Khot's right to compel Government to levy non-agricultural assessment. That question has also been finally decided by the Supreme Court in *Fatma Haji Ali Mohammad v. State of Bombay*.⁴ No doubt this decision was delivered on February 5, 1951, after the date of the notification but, as observed by the Appeal Court in *The Special Land Acquisition Officer v. The Trustees of the Will of the late A. H. Wadia*, although this decision came in February, 1951 the law always was what was finally decided by the Supreme Court and, therefore, although in 1950 the question was a matter of dispute, Government was bound in law to levy non-agricultural assessment even though the benefit of it would go to the Khot. But apart from these questions of law although under r. 92 Government could ask the Collector not to levy such assessment if some part of the assessment was shared by the Khot with Government, there would be no reason for Government to exercise its right to direct the Collector not to levy non-agricultural assessment. There was, therefore, no such risk or insecurity as to the right of the Khot to levy the non-agricultural assessment on these grounds.

But a point, which was not either before Mr. Justice Tendolkar in Land Acquisition Reference No. 10 of 1947 or before the Appeal Court in *The Special Land Acquisition Officer v. The Trustees of the Will of the late A. H. Wadia* which arose from the decision in that Reference has now been raised. That is that by January, 1950, a certain agrarian policy adopted by the Government of Bombay had been made manifest by certain legislative enactments. These enactments made clear that the intention of both the Government and the Legislature was to do away with the middleman, such as a Khot, standing between the State and the farmer. Thus on April 3, 1950, the Bombay Legislature passed the Bombay Khoti Abolition Act being Act VI of 1950. This Act abolished the Khoti tenure in Ratnagiri and Kolaba districts. Though the Act was passed in April 1950, the Bill was published in the Bombay Government Gazette as early as July 30, 1949. Mr. Land, however, argued that since the Bill proposed to do away with the Khoti tenure only in Ratnagiri and Kolaba districts, a purchaser might well think that the Legislature did not intend to touch the Khoti tenures in Bombay and the areas surrounding the City. That argument, however, is not very impressive. It is well-known that when such reforms are undertaken the Legislature often starts such reforms piecemeal, taking certain districts or areas where they are first set in motion. A prudent purchaser is bound to know that the Legislature had chalked out a certain line of policy, and that once it started abolition of Khoti rights in one area, that policy might well be extended to other areas. But apart from such theoretical aspect, the Legislature had disclosed its mind in the Bill which ultimately became Act VI of 1950 that it regarded the Khoti tenure as an anachronism and should, therefore, be abolished. Besides this Act, the Legislature had already passed four other enactments viz. the Bombay Bhagdari and Narwadari Tenures Abolition Act being Act XXXII of 1949, the Bombay Maleki Tenure Abolition Act of 1949 being Act LXI of 1949, the Bombay Taluqdari Tenure Abolition Act of 1949 being Act No. LXII of 1949 and the Panch Mahals Meh-wassi Tenure Abolition Act, 1949, being Act No. LXIII of 1949, which abundantly made clear the agrarian policy sought to be followed by it. It seems to me, therefore, that a purchaser in January 1950 was bound to feel that there was an element of risk and insecurity so far as this right to levy non-agricultural assessment was concerned. Mr. Justice Tendolkar no doubt in the Reference which I have already referred to capitalized the value of this right at 8 per cent. which was also confirmed by the Appeal Court. But, as I have said before, this aspect, which has now been presented, was not before him or the Appeal Court, probably because the acquisition before Mr. Justice

⁴ (1951) 53 Bom. L.R. 951, S.C.

Tendolkar took place long before these Acts were passed. But looking to the tenor of these Acts it is clear that the Legislature had decided to do away with the several tenures which stood between the State and the peasant.

On January 14, 1952, the Bombay Legislature passed the Salsette Estates (Land Revenue Exemption Abolition) Act, 1951, being Act XLVII of 1951 which abolished amongst other things the Khoti tenure in Salsette District. The Act came into force on March 1, 1952. The Bill was published on August 14, 1951. This Act obviously was passed in furtherance of the Government's agrarian policy already disclosed in the Acts previously enacted. The learned Advocate General argued that the right of the Khot to levy assessment in any event came to an end as from March 1, 1952, and therefore, the only compensation that can be awarded to the claimants in respect of the loss of this right would be for the period between January 19, 1950, and March 1, 1952, that is to say, for 2 years and 1½ months only. Mr. Land has, on the other hand, contended strenuously that the Court is not entitled to take into consideration this Act which came into force after January 19, 1950, the date on which compensation has to be determined. I am told that the present claimants and certain other parties have filed several suits in this Court which are still pending in which two contentions have been raised, first, as to the validity of this Act, and secondly that even if the Act were to be held valid it would not apply to them. Normally I would have postponed this part of the Reference till these suits are finally disposed of but the questions involved in these suits are so important that it might take considerable time before they are finally set at rest. I was, therefore, requested by both the parties that in order to avoid multiplicity of proceedings I should decide this question on two alternative footings, first, what would be the compensation if the Act is held to be valid, and secondly what would be the compensation if the Act is held to be invalid or even if the Act is held valid that it did not apply to the present Khot.

Now, if the Act is held to be valid, it is obvious that the Khot would have the right to levy assessment only upto March 1, 1952. On the other hand, if the Act were to be held invalid or inapplicable to the present Khot, the Khot would have the right to levy assessment until another Act to the same effect was passed or an Act validating the Act was passed. But as to whether another such Act would be passed or not must remain a matter of considerable speculation. On the footing that the Act is valid and that it applies to the present Khot, the question is, can I take into account the fact that on January 14, 1952, this Act was passed although it was enacted after the relevant date? Mr. Land would have me not to consider this Act at all. In other words, his contention is that although the Legislature has in fact done away with this right from March 1, 1952, I am bound to award compensation to the claimants as if the abolition of the right of the claimants to levy assessment has not taken place. *Prima facie* such a contention does not appear to be either right or proper. As I have said earlier, Mr. Land loses sight of the distinction between (1) the right of compensation for the loss of the privilege of levying assessment accruing on the date of the notification and (2) the determination of the amount of that compensation. In the first case, the right to compensation accrues to the claimants as on the date of the notification. In the second case, the Court estimates that compensation when a Reference in regard to it is heard and disposed of. While arriving at that estimate, viz. the value of that right at the date of the notification, the Court, in my view, is entitled to and must look into facts which have actually occurred in preference to mere hypothetical considerations. Such a question arose in *Boulfa and Mertyhr Dare Steam Collieries v. Pontypridd Waterworks Company*.⁵ Owners of coal mines under and near certain waterworks gave the undertakers notice under s. 22 of the Waterworks Clauses Act, 1847, that they intended to work the coal. The undertakers replied by a counter-notice requiring the mine owners not to

work and stating their willingness to make compensation. In an arbitration under that Act and the Land Clauses Acts to assess the compensation the mine owners gave evidence to prove that coal rose in value after the date of the counter-notice. It was held that there was no purchase of the coal or transfer of the property in the coal; that the inquiry was not what was the value of the coal at the date of the counter-notice, but what would the coal owners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it; and that the evidence was admissible. In this connection it is pertinent to cite certain observations made by the Earl of Halsbury L.C. after stating the questions of debate before him. He observed (p. 428):

"...If it were a purchase, the rights and liabilities and profits, if there were any, would pass to the purchaser, and its value, with all its possibilities, would pass at the time notice to treat was given; but, if the question is that which I think it was, then the person who had to make the calculation of what was the compensation ought to have arrived at the sum which experience has now shewn to be the correct amount.

It is true that he probably would not have been able to arrive at that sum accurately, but he ought to have contemplated upon such material as he had what would be the true sum. He ought to have considered the possible rise or fall of prices; but, as I have said, he probably would have made a mistake. We now know what would have been the true sum, and the proposition baldly stated appears to be that, because you could not arrive at the true sum when the notice was given, you should shut your eyes to the true sum now you do know it, because you could not have guessed it then.

It is, of course, only an accident that the true sum can now be ascertained with precision; but what does that matter? It seems to me that the whole fallacy of the contention that you may not look to the facts that have occurred rests upon the false analogy of a sale."

Although this was not an acquisition case, the principle enunciated there for estimating compensation has application. The distinction there made between the case of a sale and the case of estimating compensation is also relevant. I respectfully agree with that principle and hold that in view of the Act having been passed, if the Act is held valid and applicable to the claimants, compensation payable to the claimants would be for the period between January 19, 1950, and March 1, 1952, that is to say, for 2 years and 14 months. To hold otherwise would mean that the Court would be awarding compensation for the period after the Legislature has abolished the very right which alone entitles the aggrieved party to receive compensation. That cannot be for obvious reasons either sound or proper. If the Act, on the other hand, is held to be invalid or even if valid but not applicable to the present claimants then the fact that such an Act was passed becomes irrelevant and the question whether the Legislature would pass either another such Act or a validating Act being purely speculative, the value of the loss of right to levy non-agricultural assessment should be capitalized at 8 per cent. as was done by Mr. Justice Tendolkar in Reference No. 10 of 1947 and confirmed in *The Special Land Acquisition Officer v. The Trustees of the Will of the late A. H. Wadia*.

[The rest of the judgment is not material to this report.]

Solicitors for the claimants: *Crawford Bayley & Co.*

Solicitors for the Land Acquisition Officer: *Little & Co.*

APPELLATE CIVIL.

Before Mr. Justice Tamba and Mr. Justice Datar.

WAMAN GANESH JOSHI v. GANU GUNA KHAPRE.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 31-A(d), 3—Transfer of Property Act (IV of 1882), Sec. 109—Civil Procedure Code (Act V of 1908), Sec. 65; O. XXI, r. 96—Landlord judgment-debtor's name standing in record of rights as occupant of lands since before January 1, 1952, till appointed day—Opponent in occupation as tenant of lands—Petitioner purchasing lands at court sale and his rights as landlord coming into existence after appointed day—Petitioner giving notice to opponent under s. 31(2) and applying for possession—Whether petitioner can terminate tenancy of opponent—Applicability of s. 31-A(d).

The term "landlord" occurring in s. 31-A(d) of the Bombay Tenancy and Agricultural Lands Act, 1948, includes any person from whom or through whom a landlord derives his right as such landlord, and for the proper compliance with the conditions mentioned in cl. (d) of s. 31-A of the Act, it is sufficient if either the name of the claimant or that of his predecessor-in-title stands in the record of rights or any public record or similar revenue record on the 1st day of January, 1952, and thereafter during the period between the said date and the appointed day.

*Khattulla Hasmya v. Yesu,*¹ applied.

THE facts appear in the judgment.

S. S. Bangnekar, with A. V. Dalvi, for the petitioner.

S. J. Paradkar, for opponent No. 1.

DATAR J. Survey No. 60 and Hissa No. 1 of survey No. 31 situate at Mouje Rai, originally belonged to one person, whose name does not appear in the record, but, who, in some execution proceedings, was the judgment-debtor. It appears that the judgment-debtor had leased the two survey numbers to opponent No. 1. In execution of a decree obtained against the judgment-debtor the two survey numbers were put up for sale and were purchased by the present petitioner in court auction on November 28, 1955. As the opponent-tenant was on the lands at the time of court auction, symbolical possession was delivered to the auction purchaser on June 15, 1956, under the provisions of O. XXI, r. 96, Civil Procedure Code.

On December 13, 1956, the petitioner gave a notice to opponent No. 1 for terminating his tenancy under the provisions of sub-s. (2) of s. 31 of the Bombay Tenancy and Agricultural Lands Act, on the ground that he required the lands for his own personal cultivation. On March 26, 1957, the petitioner applied for possession of the lands from opponent No. 1 under the provisions of s. 29 read with s. 31(1) of the Act. The Tenancy Awal Karkun, before whom the application came up for hearing on the preliminary issues, held that the said lands were not owned by the petitioner on the date mentioned in cl. (d) of s. 31A of the Act. The Tenancy Awal Karkun, when he referred to the date mentioned in cl. (d) referred to the 1st day of January 1952. Accordingly, he rejected the application on December 16, 1957. The petitioner thereafter preferred tenancy appeal No. 4 of 1958 in the Court of the District Deputy Collector, Ratnagiri. The District Deputy Collector agreed with the view of the Tenancy Awal Karkun and dismissed the appeal on February 24, 1958. Thereafter, the petitioner approached the Bombay Revenue Tribunal under s. 76 of the Act, in revision, against the order passed in appeal by the District Deputy Collector. The Tribunal agreed with the view taken by both the Tenancy Awal Karkun and the District Deputy Collector and summarily dismissed the revision application on June 16, 1958. It is against the summary

*Decided, April 7, 1959. Special Civil Application No. 3278 of 1958.

¹ (1956) 59 Bom. L.R. 201.

dismissal of the revision application that the petitioner has come to this Court under the provisions of art. 227 of the Constitution.

Mr. Rangnekar, who appears for the petitioner, has contended that under the provisions of cl. (d) of s. 31A, it is not necessary that the name of the petitioner himself should stand in the record of rights on the 1st day of January 1952, and thereafter during the period between the said date and the appointed day. It is enough if the petitioner is able to show that his predecessor-in-title, who, in this case, was the judgment-debtor as mentioned above, had got his name entered in the record of rights on the 1st day of January 1952 and thereafter during the period between the said date and the appointed day. The appointed day, it may be noted, is June 15, 1955. It is not disputed that since before the 1st day of January 1952 till the appointed day, June 15, 1955, the name of the judgment-debtor stood in the record of rights as the *kabjedar* or the occupant of the said lands. It is also not disputed that during this period and till the auction purchase, the judgment-debtor was the landlord of the present opponent No. 1. Now, s. 31A of the Act provides that the right of a landlord to terminate a tenancy for cultivating the land personally under s. 31 shall be subject to certain conditions of which we are concerned in the present case only with the one mentioned in cl. (d) thereof which states:

"The land leased stands in the record of rights or in any public record or similar revenue record on the 1st day of January, 1952, and thereafter during the period between the said date and the appointed day in the name of the landlord himself, or of any of his ancestors, or if the landlord is a member of a joint family, in the name of a member of such family."

The argument of the learned counsel on behalf of the petitioner is that by reason of s. 3 of the Act, the provisions of Chapter V of the Transfer of Property Act, are made applicable to the tenancies and leases of lands to which the Tenancy Act applies in so far as those provisions are not inconsistent with the provisions of the Tenancy Act, and in view of s. 109 of the Transfer of Property Act, the petitioner himself became the landlord having possessed all the rights of the former landlord (the judgment-debtor) since the date of his auction purchase.

It is true that the petitioner purchased the lands in question in court auction. But at the court sale what passed to the auction purchaser was the right, title and interest of the original judgment-debtor. It is obvious that in the present case, the right, title and interest of the original judgment-debtor was that of a landlord in regard to the said lands and as against the rights of the protected tenant, viz., opponent No. 1. The provisions of s. 65 and of O. XXI, r. 96, Civil Procedure Code refer to the interest of the judgment-debtor as vested in and transferred to the auction purchaser from the time when the property is sold. It is, therefore, clear that the rights of the original judgment-debtor were transferred to the petitioner and the petitioner stepped into the shoes of the original landlord as against opponent No. 1. Now, if the petitioner's position was that of a landlord, then he would be regarded as such landlord from the time when the lands were sold in court auction.

Mr. Rangnekar says that if the petitioner was thus the landlord from November 28, 1955, and was entitled to apply for possession of the lands under s. 31 of the Act, the condition mentioned in cl. (d) of s. 31A would be fulfilled and he would have the right to terminate the tenancy merely on his showing that the lands stood in the record of rights on the 1st day of January 1952 and thereafter during the period between the said date and the appointed day in the name of his predecessor-in-title who alone was (and the petitioner was not) the landlord on the said date and during the said period. According to him it will not be necessary (and indeed in conceivable cases may not be possible, as in the present case when the petitioner's rights have validly come into existence after the appointed day) to show that the petitioner's own name stood in the record of rights on the date and during the period mentioned in cl. (d) of s. 31A. In support of his contention he has relied upon a decision of this Court

in *Khalilulla Hasmiya v. Yesu*.¹ Mr. Justice Gajendragadkar (as he then was), who delivered the judgment of the Bench in that case, was considering the corresponding clause in s. 34 as it stood before the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1955, and Bombay Act XV of 1957. It was cl. (1) of sub-s. (2A) of s. 34 of the Bombay Tenancy and Agricultural Lands Act, 1948. Sub-section (2A) and cl. (1) read as follows:

"If the landlord *bona fide* requires the land..., then his right to terminate the tenancy shall be subject to the following conditions, namely,

(1) The land held by the protected tenant on lease stands in the record of rights in the name of the landlord on the 1st day of January, 1952 as the superior holder."

It was held that s. 34(2A)(1) of the said Act merely requires the claimant for possession of the land under s. 34 of the Act to show that the person who was the lessor of the tenant on January 1, 1952, had taken care to have his name entered in the record of rights as superior holder. This section does not necessarily require that it is the claimant whose name must appear in the record of rights on January 1, 1952, as superior holder. All that this section requires is that whosoever was the lessor or the landlord on January 1, 1952, must have his name entered as a superior holder in respect of his land. Where, therefore, a claimant whose name does not stand in the record of rights on January 1, 1952, as superior holder, seeks to evict the tenant, he must show that he claims through the lessor whose name stood in the record of rights on January 1, 1952. It is true that cl. (1) of sub-s. (2A) of s. 34 has now been amended and we have to deal with the amended cl. (d) of s. 31A of the present Act. But even in the amended clause, the words of the original cl. (1) of sub-s. (2A) of s. 34 are substantially retained and, with respect, we are of the view that the decision in the aforesaid case still holds good in so far as cl. (d) of s. 31A of the present Act deals with the condition that the name of the landlord must stand in the record of rights on the date and during the period specified in the clause. It is true that in the aforesaid case the learned Judges were considering the claim of persons who had inherited the (landlord's) interest from their father whose name had stood in the record of rights on the 1st day of January 1952 as superior holder. But the reasoning upon which their decision is founded applies, in our view, with equal force even to the case where the claimant, as in the present case, claims through the original landlord not by succession but by a transfer. The cases of an heir and of a member in a joint family are now expressly provided for by the introduction of the words "of any of his ancestors, or if the landlord is a member of a joint family, in the name of a member of such family" in cl. (d) of s. 31A of the Act. In the case above-mentioned it was observed that January 1, 1952, was chosen arbitrarily as the appointed day and the provision in question seemed to require that it must clearly appear that either the claimant or his predecessor appeared in the record of rights as the superior holder, and this observation of the learned Judges applies as much to the case of a transferee from the original landlord whose name stood in the record of rights at the relevant time as it did to the case of succession which was before them. It seems to us that in view of the provisions of s. 109 of the Transfer of Property Act under which the transferee in the position of the present petitioner having possessed all the rights of the original landlord himself became the landlord, the Legislature thought it unnecessary to make an express provision in the amended cl. (d) in the case of the transferee, as in the cases of an heir and a joint family member.

Besides, we do not see why any distinction in principle should be made between the case of an heir and that of a transferee. In one case the property of the original landlord is taken by succession and in the other, by transfer. But the interest in either case is the same—that of the original landlord. If in the case of a claimant who has succeeded to the property of his ancestor after the appointed day, the condition mentioned in cl. (d) of s. 31A of the Act would be regarded as having been complied with by the claimant merely

¹ (1956) 59 Bom. L.R. 201.

showing that the name of his ancestor stood in the record of rights on the date and during the period specified in the clause, we do not see why the same result should not follow in the case of a transferee similarly situated. We have looked to the relevant provisions of the Tenancy Act and we do not see any provision whereunder transfers have been absolutely prohibited. In fact, with the permission of proper revenue authorities transfers are allowed even under the provisions of the present Act. If, therefore, transfers are allowed and if an assignee or a transferee has come to possess all the rights of the original landlord after the 1st day of January 1952 or indeed after the relevant period mentioned in cl. (d) of s. 31A, we do not think why such assignee or transferee should not stand on the same footing as an heir who has succeeded to his ancestor or as a member in a joint family.

It may also be noted that cl. (d) of s. 31A clearly shows that it is the name only of that person who was the landlord on the date and during the period specified in that clause that should appear in the record of rights. If such landlord is himself the claimant, all that he has to show is an entry in his name in the record of rights only on the date and during the period specified in the clause. If, however, the claimant is his successor-in-title or his transferee all that he has still to show is only an entry in the name of his predecessor-in-title on the relevant date and during the relevant period. Indeed, the Act cannot expect such a claimant to do the impossible and call upon him to show an entry in his own name for a period during which he was not, but his predecessor-in-title was, the landlord.

We are, therefore, of the view that the term "landlord" occurring in cl. (d) of s. 31A of the Act includes any person from whom or through whom a landlord derives his right as such landlord and that for proper compliance with the conditions mentioned in cl. (d) of s. 31A, it is sufficient if either the name of the claimant or that of his predecessor-in-title stands in the record of rights or any public record or similar revenue record on the 1st day of January 1952 and thereafter during the period between the said date and the appointed day.

In the present case, it is admitted that the name of the petitioner's predecessor-in-title stood in the record of rights on the date and during the period specified in the clause. It must, therefore, be held that the condition mentioned in the clause has been complied with by the petitioner.

Accordingly, we set aside the orders of the Bombay Revenue Tribunal and the lower revenue authorities and remand the case to the Tenancy Awal Karkun for disposal of the application in accordance with law. Costs of this petition will abide the result before the Tenancy Awal Karkun.

Orders set aside: case remanded.

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Patel.

LOKU BASAPPA PUJARI v. THE STATE.*

Evidence—Notes of post-mortem examination recorded by medical officer—Whether such notes admissible in evidence—Practice (Criminal)—Whether notes of post-mortem examination where evidence relating to such examination relevant should be taken on record—Indian Evidence Act (I of 1872), Sec. 159.

Notes of post-mortem examination prepared by a medical officer are admissible in evidence where the same are duly proved by the testimony of the medical officer who has performed the examination and has recorded the same. As a matter of practice such notes of post-mortem examination, where the evidence relating to the post-mortem examination is relevant, should be taken on the record.

The notes of the post-mortem examination are not intended to be mechanically admitted on the record of the case. In every case when the medical officer is examined before the Court to establish the cause of death disclosed by a post-mortem examination, he must be called upon to give evidence about the matters which have a bearing on the questions to be decided by the Court and he must also be called upon to depose whether the record made by him in the notes of the post-mortem examination are true and if the medical officer deposes to the truth of the record made by him, the record itself may be treated as evidence.

Roghuni Singh v. The Empress; Queen-Empress v. Jadub Das and Rangappa Goundan, in re,* referred to.

LOKU and Shantappa (appellants) were tried before the Additional Sessions Judge of the City Court of Session for Greater Bombay sitting with a special jury, for the offence of murder of one Narayan punishable under s. 302 read with s. 34 of the Indian Penal Code and in the alternative for the offence punishable under s. 302 read with s. 109 of the Indian Penal Code. The jury brought in a unanimous verdict of guilty against both the appellants. The Additional Sessions Judge accepted the verdict of the jury and sentenced each of the appellants to suffer imprisonment for life. Against the conviction and sentence the present appeal was preferred by the appellants.

R. A. Jahagirdar, (appointed) for the appellants.

V. T. Gambhirwala, Assistant Government Pleader, for the State.

SHAH J. [His Lordship after finding that the evidence in the case did not justify the conviction of the appellants and holding that they were entitled to be acquitted, proceeded:] Before parting with the case we think it necessary to deal with certain questions of practice. We find that the notes of the post-mortem examination of the dead body of Narayan have not been taken on the record, though the medical officer who performed the post-mortem examination was examined as a witness. We have noticed in appeals from orders passed by the Sessions Court for Greater Bombay that in very rare cases the notes of the post-mortem examination on the dead body of the victim are tendered and admitted in evidence, whereas in appeals from the Sessions Divisions in the mofussil, the notes of post-mortem examination, whenever post-mortem has been held on a dead body, are invariably tendered and admitted in evidence. That these notes constitute valuable material for checking up the correctness of the medical and other evidence is undisputed. It is somewhat surprising that on an important matter of practice there should be absence of uniformity prevailing in the Courts of Session subordinate to this Court. The learned Assistant Government Pleader, who appears before us, has fairly conceded that the notes of post-mortem examination constitute a

*Decided, April 14, 1959. Criminal Appeal No. 1421 of 1958, against the order of conviction and sentence passed by B. O. Vakil, Additional Sessions Judge, Greater Bombay, in Case No. 12, III Sessions 1958.
 1 (1882) I.L.R. 9 Cal. 455.
 2 (1899) I.L.R. 27 Cal. 295.
 3 (1935) I.L.R. 59 Mad. 349.

valuable piece of evidence, which assists the Court in understanding the medical and other evidence led before the Court, but he submitted that presumably because some Courts in India have expressed the view that the notes of post-mortem examination are inadmissible in evidence that the practice prevails in the City Sessions Court to exclude them from evidence. We have invited the learned advocates to argue the question before us, and after carefully considering the rival arguments, we are of the view that notes of post-mortem examination cannot be regarded as inadmissible in evidence.

Examining the question apart from authority, we are of the view that the contention that notes of post-mortem examination are inadmissible in evidence cannot be sustained. If the medical officer who has performed the post-mortem examination on a dead body deposes before the Court orally about the matters which are observed by him in the course of the post-mortem examination, and entered by him in the notes, there can be no doubt that such evidence will be admissible. It is not contended by the Assistant Government Pleader that the medical officer who has made the post-mortem examination is prohibited from giving evidence about the observations made by him of the condition of the dead body, the external and internal injuries and the condition of the various organs as explanatory of the opinion formed by him. If oral evidence given by the medical officer who has examined the dead body and who has noticed its condition is admissible in law, we fail to appreciate how a written record of the observations made by the medical officer may be regarded as inadmissible in evidence. The notes of post-mortem examination are but a contemporaneous record made by the medical officer who performed the post-mortem examination on a dead body for forming his opinion as to the cause of death. If instead of orally deposing before the Court about the individual observations made by him, the medical officer states that the notes maintained correctly set out his observations and the notes are then tendered in evidence, no fault can be found with the admission of those notes on the record. We may hasten to observe that the notes of the post-mortem examination are of course not intended to be mechanically admitted on the record of the case. In every case when the medical officer is examined before the Court to establish the cause of death disclosed by a post-mortem examination, he must be called upon to give evidence about the matters which have a bearing on the questions to be decided by the Court and he must also be called upon to depose whether the record made by him in the notes of the post-mortem examination are true and if the medical officer deposes to the truth of the record made by him, the record itself may be treated as evidence. Admission of the notes in evidence is but a convenient method of maintaining the record of the observations made and the opinion formed by the medical officer, when he orally deposes in a comprehensive form to the correctness of all the statements recorded therein.

We may consider the authorities to which our attention was invited by the learned Assistant Government Pleader in support of the contention that the notes of post-mortem examination prepared by a medical officer from observations made by him are inadmissible. In *Roghuni Singh v. The Empress*,¹ it was observed that evidence of a medical man who has seen, and has made a post-mortem examination of the corpse of the person touching whose death the inquiry is made, is admissible, firstly, to prove the nature of the injuries which he observed; and, secondly, as evidence of the opinion of an expert as to the cause of death. That observation is not inconsistent with the view that the notes of post-mortem examination are admissible in evidence. But there is at page 461 of the Report the following observation, on which reliance is placed:—

“...The Assistant Surgeon might have used this report to refresh his memory when giving evidence; but the report itself was not admissible in evidence.”

In that case the Assistant Surgeon who performed the post-mortem examination was examined before the Committing Magistrate, but not before the Court

of Session. One Dr. Shaw was examined in the Court of Session at the trial as an expert witness by the prosecution, and the opinion given by Dr. Shaw was diametrically opposed to the testimony of the Assistant Surgeon. Notes of the post-mortem examination were not tendered in evidence through the Assistant Surgeon, but Dr. Shaw in giving his evidence based his opinion partly upon the facts recorded in the report made by the Assistant Surgeon and upon facts different from the facts observed by the Assistant Surgeon. Evidently the opinion formed by Dr. Shaw on the basis of some but not all the observations made by the Assistant Surgeon could not make the report a part of the record. The report had to be proved, and not having been proved it could not be indirectly regarded as evidence because Dr. Shaw chose to base his conclusions upon some of the observations recorded therein. This case, in our judgment, is not an authority for the proposition that the notes made by a medical officer, who has performed the post-mortem examination of a dead body and has made notes in that behalf, are not admissible in evidence, even if the medical officer orally deposes to the correctness of the individual observations made and recorded by him, or comprehensively thereto. In *Queen-Empress v. Jadub Das*,² it appears that the medical officer who performed the post-mortem examination was not examined by the Court of Session even though the evidence as given in the Committing Magistrate's Court was not explicit as regards the actual cause of death. At the trial a Civil Surgeon was examined as an expert witness, but that officer was not examined on the points which were disclosed in the evidence of the medical officer who had conducted the post-mortem examination. The Sessions Judge took into consideration the statement of the medical officer on matters entered in the post-mortem report. In that context it was observed (p. 303):

"...Now that report is not admissible as evidence except to contradict the officer who made it. It may, however, be used by that officer when under examination for the purpose of refreshing his memory."

That again, in our judgment, is not an authority in support of the proposition that even when oral evidence is given by a medical officer about the truth of the notes made at the post-mortem examination the record of the notes is inadmissible. Our attention was also invited to *Rangappa Goundan*, In re.³ It was held in that case that the report of a post-mortem examination on a dead body is not evidence, and can only be used by the witness who conducted the post-mortem enquiry as an aid to memory. In that case, however, there is no discussion of the question whether the notes of post-mortem examination may be proved in the manner stated by us, and may then be admitted in evidence. The judgment contains merely an *ipse dixit* that a post-mortem report is not evidence, and can only be used by the witness who conducted the post-mortem enquiry as an aid to memory and in support of the observation reliance was placed upon *Jadub Das's* case.

We may observe that in the Courts of Session functioning in this State outside the Greater Bombay area, it has been the consistent practice to admit the notes of post-mortem examination where the evidence relating to such post-mortem examination is relevant.

The learned Assistant Government Pleader concedes that this practice conduces to a better appraisal of the medical and other evidence in trials for offences of murder and culpable homicide. We have carefully considered the arguments advanced at the Bar and we are not satisfied that the observations recorded in the notes of post-mortem examination which are relevant to the subject-matter of enquiry are inadmissible even if the same are duly proved by the testimony of the medical officer who has performed the examination and has recorded the same.

[The rest of the judgment is not material to this report].

Appeal allowed

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Patel.

NARAYAN YESHWANT NENE v. RAJARAM BALKRISHNA RAUT.*

Representation of the People Act (XLIII of 1951), Secs. 116B, 116A—Appeal against order of Tribunal filed in High Court—High Court permitting withdrawal of appeal and ordering disposal thereof—Whether such order a decision within s. 116B—Order whether open to review.

The expression "decision of the High Court" in s. 116B of the Representation of the People Act, 1951, means the final order of the High Court disposing of the appeal on merits or otherwise. Therefore, an order of the High Court permitting withdrawal of the appeal filed against the Tribunal under s. 116A of the Act and ordering disposal thereof, is a decision within the meaning of s. 116B of the Act, and such an order is final and conclusive and not open to review by the High Court.

Quære: Whether in view of s. 116A(2) of the Act the provisions relating to the withdrawal of a petition or abatement apply to an appeal filed against the order of the Tribunal.

THE facts appear in the judgment.

In C.A. No. 2422 of 1958.

V. K. Joshi, for the petitioner.

S. B. Bhasme, for the respondent.

H. M. Seervai, Advocate General, as *amicus curie*.

In C.A. No. 2423 of 1958.

V. K. Joshi, for the petitioner.

S. B. Bhasme and M. A. Rane, for respondents Nos. 1 and 2.

G. N. Vaidya, for respondent No. 2.

H. M. Seervai, Advocate General, as *amicus curie*.

SHAH J. An election was held in the Parliamentary Constituency for electing a representative from the Kolaba District. One Rajaram Balkrishna Raut was declared elected by the Election Commissioner. Thereafter, one Narayan Yeshwant Nene (whom we shall hereafter refer to as "Nene") applied to set aside the election on the ground that Rajaram Balkrishna Raut had been guilty of corrupt practices which had vitiated the election. That application was dismissed by the Tribunal constituted under the Representation of the People Act, 1951. Against the order passed by that Tribunal, an appeal was preferred to this Court under s. 116A of the Act. That appeal was placed for hearing before Mr. Justice S. T. Desai and Mr. Justice Miabhoy on June 17, 1958. It appears from the judgment recorded that after arguments were heard by the Court on the merits of the dispute, a suggestion was thrown out by the Court that the petition for setting aside the election be abandoned in the larger interest of the public. The learned advocates who appeared on behalf of Nene and Raut after considering the suggestion informed the Court that the appeal need not be proceeded with. Thereafter, Mr. R. B. Kotwal, who appeared on behalf of Nene, stated that his client desired to withdraw the petition and the appeal may be allowed to be withdrawn. Mr. Sule, who appeared on behalf of Raut, stated that his client had no objection to the petition and the appeal being permitted to be withdrawn. The Court then proceeded to pass the final order as follows:

"The result is that the appeal will be allowed to be withdrawn. Learned Counsel for the parties are agreed that there should be no order for costs of the hearing of this appeal and that the order for costs made by the Tribunal should be vacated. Order accordingly."

On August 4, 1958, one Jagannath Bhau Patil, who is the petitioner in this

*Decided. April 23, 1959. Civil Application No. 2423 of 1958 in F.A. No. 2422 of 1958 in F.A. No. 145 of 1958 (with 146 of 1958).

application, has applied for being substituted as an appellant and for prosecuting the appeal. He contended that the proceeding for setting aside an election on the ground of corrupt practices is not merely a proceeding in which the two parties before the Court are concerned, but it is a dispute in which the entire electorate is concerned, and, having regard to the provisions of s. 110 of the Representation of the People Act, 1951, read with s. 116A of the Act, the appeal could not have been permitted to be withdrawn by the Court which heard the appeal. It is urged that the order allowing withdrawal of the appeal was without jurisdiction, when it was not followed by the publication of a notice of withdrawal of the appeal, and, therefore, the applicant be substituted for the original appellant and to prosecute the appeal. When rule was issued the Court requested the Advocate General to appear and assist the Court as *amicus curie*. This application is now before us for hearing and the learned Advocate General has appeared before us.

Section 110 of the Representation of the People Act, 1951, provides by the first sub-section that if there are more petitioners than one, no application to withdraw an election petition shall be made except with the consent of all the petitioners. By sub-s. (2), it is provided that no application for withdrawal shall be granted if in the opinion of the Election Commission or of the Tribunal, as the case may be, such application has been induced by any bargain or consideration which ought not to be allowed. By sub-s. (3), it is provided that if the application is granted, an order as to costs shall be passed, and the notice of withdrawal shall be published in the Official Gazette by the Election Commission or by the Tribunal, as the case may be, and a person who might himself have been a petitioner may, within fourteen days of such publication, apply to be substituted as petitioner in place of the party withdrawing, and upon compliance with the conditions of s. 117 as to security, shall be entitled to be so substituted and to continue the proceeding upon such terms as the Tribunal may think fit. It is evident from s. 110 of the Representation of the People Act that an application for withdrawal which is not *bona fide* may not be allowed by the Tribunal or the Election Commission, and, even if the application is granted, any person who was entitled to present the petition, may upon such terms, as the Tribunal imposes, continue the proceeding. This provision sufficiently indicates that a proceeding for setting aside an election is one in which the entire electorate is interested, and may not be abandoned without due notice to the electorate. That is further made clear by ss. 112 to 115, whereby any person, who might himself have been a petitioner, is permitted to come on the record and to prosecute the petition of a person dying before its disposal. By s. 116, an election proceeding may be continued even after the death of the original respondent against a substituted respondent. There can be no doubt, therefore, that once a proceeding under the Representation of the People Act has reached the Election Commission or the Tribunal, those authorities must hear and dispose it of on its merits.

This Court was requested by the appellant Nene to be permitted to abandon the appeal. It may appear, in view of sub-s. (2) of s. 116A, that the provisions relating to the withdrawal of a petition or abatement, may also apply to an appeal filed against the order of the Tribunal. But, on that question we express no considered opinion. The petitioner, in this case is faced with a two-fold difficulty. There is an order passed by this Court, by which the appeal has been disposed of after permitting withdrawal, and the Legislature has not only not enacted any provision for review of orders passed by the High Court in appeal, but has expressly enacted that the orders are to be final and conclusive. Again, even if there was some irregularity in the passing of the order disposing of the appeal, this Court is incompetent on that account to set aside the order.

In support of the application, it is urged that an order of the Court permitting withdrawal of the appeal and ordering disposal thereof is not a decision within the meaning of s. 116B. It is contended that the decision con-

templated by s. 116B is an adjudication on the merits of the dispute between the parties before the Tribunal, and an order of disposal without adjudication of the merits of the dispute by the High Court in appeal, is not a decision within the meaning of s. 116B. We are unable to accept that contention. The expression 'decision' is not defined in the Act, and there is nothing in the context in which that expression occurs, which justifies the submission that a final order disposing of the appeal though not on the merits is not a decision. Even a casual examination of the argument is likely to present numerous difficulties against its acceptance. If an appeal is permitted to be withdrawn and a notice of the intended withdrawal is published in the Official Gazette, and if, thereafter, no party comes before the Court, on the argument advanced by the learned Advocate General, the appeal may still not be regarded as disposed of by a decision, and may permanently remain on the file of the Court. Similarly, if the appellant dies and no one comes forward to prosecute the appeal, if the argument is accepted, the appeal will remain undisposed there being no decision of the Court. In our view, the expression "decision of the High Court" means the final order of the High Court disposing of the appeal on merits or otherwise. If that be the true effect of s. 116B, in our judgment, the order disposing of the appeal on withdrawal by the original appellant, must be regarded as a decision of the High Court, which is final and conclusive. The Act does not provide for review of judgment of this Court on any ground, and it is well settled that a Court is not invested with a power of review unless such power is expressly conferred. The Legislature has not only not conferred a power of review upon this Court to review decisions in appeal under the Representation of the People Act, but has declared the decision final and conclusive.

On that view of the case, in our judgment, the application filed by Jagannath Bhan Patil must be held not maintainable and must on that ground be rejected. There will be no order as to costs of the application. The same order in Application No. 2423 of 1958.

Applications rejected.

Before Mr. Justice Mudholkar and Mr. Justice Modj.

KUBERDAS HARGOVANDAS MODY v. THE STATE OF BOMBAY.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 84C, 64—Constitution of India, Arts. 31(1) & (2)—Provision in s. 84C as to forfeiture of land on declaration made by Mamlatdar whether constitutional—Whether open to State Government on such forfeiture to recover purchase price from seller or purchaser—Section 84C whether violates art. 31(2)

Section 84C of the Bombay Tenancy and Agricultural Lands Act, 1948, in so far as it refers to the forfeiture of the land to the State Government by reason of the sale being declared invalid is constitutional; but on such forfeiture it is not open to the State Government to recover the purchase price belonging to the purchaser either from him or from the seller as an arrear of land revenue.

Section 84C of the Act is not violative of art. 31(2) of the Constitution of India as it does not deal with acquisition of property for a public purpose.

The facts appear in the judgment.

Spl. C.A. No. 2878 of 1958.

B. B. Kotwal, with S. B. Vakil, for the petitioner.

B. J. Joshi and T. R. Andhyarujina, instructed by Little and Co., for opponents Nos. 1 and 2.

*Decided, March 18, 1959. Special Civil Civil Applications Nos. 2879 to 2881 of 1958. Application No. 2878 of 1958 (with Special

Spl. C.As. Nos. 2879 to 2881 of 1958.

B. B. Kotwal, with *S. B. Vakil*, for the petitioner.

R. J. Joshi, instructed by *Little and Co.*, for opponents Nos. 1 and 2.

MUDHOLKAR J. Two of these petitions are under art. 226 of the Constitution and two under art. 227 of the Constitution.

The petitioner in the first and second petition is the occupant of Survey No. 204 of the village Sahijpurbogha. It is common ground that he sold this field to one Punjiram Prajapati on April 1, 1957, for Rs. 9,176. This sale has been declared invalid by the Mamlatdar under s. 84C(2) of the Bombay Tenancy and Agricultural Lands Act. Pursuant to this declaration the land purported to have been sold by the petitioner to Punjiram Prajapati has been declared by the Mamlatdar to have been forfeited to the Government and the price received by the petitioner is also declared to have been forfeited to the Government. The Mamlatdar's order having been ultimately affirmed by the Prant Officer in appeal and by the Bombay Revenue Tribunal in revision, the petitioner seeks to have all those orders quashed under art. 227 of the Constitution. By way of precaution the petitioner is invoking the jurisdiction of this Court under art. 226 also and that is why he has made two applications. The petitioner in the other petitions is a purchaser of another field of the same village from the occupant thereof and the sale in his favour has been held by the Tenancy Aval Karkun to be invalid as being in contravention of s. 63 of the Act. This order having been affirmed by the Bombay Revenue Tribunal the petitioner wants it to be quashed under art. 227. By way of precaution he has also filed an application under art. 226.

The petitioner's contention is that the provisions of s. 84C of the Act are unconstitutional inasmuch as they contravene art. 31(2) of the Constitution. It is said on behalf of the petitioner that what s. 84C purports to do is to acquire property without payment of compensation and, therefore, this section is *ultra vires* the Constitution. We cannot accept the contention that s. 84C deals with acquisition of property for a public purpose and, therefore, hold that it is not violative of art. 31(2) of the Constitution.

Now, in so far as this section provides that on a declaration made by the Mamlatdar under sub-s. (2) of s. 84C to the effect that the sale effected by the occupant of an agricultural land is invalid and consequently the land shall be deemed to vest in the Government, the law can be sustained under art. 31(1) of the Constitution. Under this provision it is open to a Legislature to make a law whereunder a person may be deprived of his property. Such deprivation, of course, may be in the exercise of the police power or may be for the purpose of taxation or penalty. Here, so far as the sale by the occupant of the land is concerned the provisions of s. 64 lay down a number of restrictions on him. Sub-section (2) of s. 64 says that a sale held in contravention of the provisions of that section would be invalid. It would, therefore, follow that the Legislature has prohibited the owner of a land from alienating it except in compliance with certain provisions of law. Then by s. 84C it has been provided that where an occupant of a land has effected a sale of his land without complying with the provisions of law or in contravention of the provisions of law and the sale is declared invalid by the Mamlatdar, the land shall be forfeited to the Government. Where a sale has been rendered invalid by law, the immediate result would be that the land would revert to the occupant and all that the purchaser is entitled to is the refund of consideration from his vendor, the occupant of the land. No doubt s. 84C, as already stated, provides that after a sale is declared to be invalid by a Mamlatdar, the land, which is the subject-matter of the sale, shall be forfeited to the Government, but that must happen after its reversion to the occupant. Then, the land having reverted to the occupant because the sale had been declared invalid, the forfeiture would operate against the occupant of the land. It is competent to the Legislature

to make a law of this type, and, therefore, s. 84C in so far as it refers to the forfeiture of the land to the Government by reason of the sale being declared invalid is constitutional. The same, however, cannot be said with regard to another provision of s. 84C, which is to the effect that the money or the purchase price received by the occupant of the land shall be forfeited to the Government and will be recoverable as an arrear of land revenue. No sooner the sale is declared invalid the purchaser becomes entitled to the refund of the purchase price on the ground of failure of consideration. The price which is in the hands of the occupant of the land must, thereafter, be said to belong to the purchaser. The Legislature cannot effectively enact a law concerning forfeiture of the purchase price of land which its owner or occupant is incompetent to sell unless it enacts a provision therein prohibiting the purchaser from purchasing such land. It is no doubt true that under art. 31(1) of the Constitution the Legislature can make a law imposing a penalty but the law in order to be complete and effective must also provide for the circumstances under which the penalty will be leviable against an individual. Now, a penalty is a form of punishment. A person will be liable to punishment only if he has contravened a provision of law. Therefore, the law must first enact a prohibition, then specify the person or persons who will be subject to that prohibition and thereafter provide for the penalty and specify the person or persons who will be liable to suffer it. Here, so far as the purchaser is concerned, the law is very much short of this. It does not prohibit him from purchasing any land. Nor indeed does it even render him liable to suffer any penalty for purchasing a land which the occupant is incompetent to sell. So far as the occupant of the land is concerned, it can no doubt be said that he has contravened the provisions of s. 64 if he has effected the sale without complying with the provisions of that section. There is nothing in the provisions of that section which prevents the purchaser from purchasing land from its occupant. It is true that in certain circumstances the sale in the purchaser's favour would be rendered invalid. But that by itself is not sufficient to show that he was prohibited from purchasing any land. In our opinion, the provisions of s. 84C-3(b), which run thus—

"(3). On the declaration made by the Mamlatdar under sub-section (2)—;

"(b) the amount which was received by the transferor as the price of the land shall be deemed to have been forfeited to the State Government and it shall be recoverable as an arrear of land revenue;"

cannot be regarded as a law relating to the deprivation of the property of a purchaser made under art. 31(1) of the Constitution. It is, if we may say so, an incomplete piece of legislation in the sense that though it prescribes a penalty, which would operate against a purchaser, it does not specify the act or the omission which will render him liable to this penalty. Therefore, it is not open to the State Government to recover the purchase price belonging to the purchaser either from him or from the seller.

Mr. Kotwal points out that in the first two petitions the State Government is trying to recover the purchase money in the hands of the seller as an arrear of land revenue. In view of our finding that the purchase money cannot be forfeited to the Government, it cannot be recovered as an arrear of land revenue.

These petitions must, accordingly, succeed partially. For this reason we make the rule absolute in so far as the prayers 10(d) and (e) as set out in Special Civil Application No. 2879 of 1958 are concerned and quash the orders of the Mamlatdar, the Prant Officer and the Bombay Revenue Tribunal as prayed for in Special Civil Application No. 2878 of 1958 to the extent of declaring the forfeiture of the amount and directing its recovery as an arrear of land revenue. There will, however, be no order as to costs.

In the other two applications the purchaser not being an agriculturist, the sale is invalid and, therefore, under s. 84C the Mamlatdar was entitled to declare that the land comprised in that sale stands forfeited to the Government.

As regards the purchase price, we hold, for the reasons already stated, that it belongs to the purchaser and in the absence of appropriate provisions of law it cannot be forfeited to Government. The order of the Mamlatdar in regard to this must, therefore, be quashed as also his order directing the recovery of the money as an arrear of land revenue. The order of the Prant Officer in appeal and of the Bombay Revenue Tribunal in revision must also be quashed. We accordingly make the rule absolute in both the applications to the extent of quashing the orders of the Mamlatdar, the Prant Officer and the Bombay Revenue Tribunal in so far as the forfeiture of the purchase money is concerned, as prayed for in Special Civil Application No. 2880 of 1958 and in terms of prayer 10(d) and (e) as set out in Special Civil Application No. 2881 of 1958. There will, however, be no order as to costs.

Order accordingly.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Nalk.

RASHTRIYA MILL MAZDOOR SANGH, NAGPUR v. STATE INDUSTRIAL COURT, NAGPUR.*

Central Provinces and Berar Industrial Disputes Settlement Act (XXIII of 1947), Secs. 14†, 7-A—C.P. and Berar General Clauses Act (I of 1914), Sec. 14—Person appointed to function as Registrar under s. 14—Whether such person can only be appointed by name.

There is no requirement under the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, or the rules framed thereunder for publishing the name of the person appointed to function as Registrar of recognised unions. Therefore, under s. 14 of the Act the appointment of the Registrar can be made by virtue of office also.

*U.C. Bank v. Their Workmen*¹ and *State of Bihar v. D. N. Ganguly*², referred to.

THE facts appear in the judgment.

S. W. Dhabe, for the petitioner.

N. L. Abhyankar, Special Government Pleader, for opponents Nos. 2, to 6.

V. P. Sathe, for opponent No. 7.

MUDHOLKAR J. In this application we have to consider mainly two questions. The first is the date on which s. 7-A which was inserted by Act XXI of 1955 (The Madhya Pradesh Industrial Disputes Settlement (Amendment) Act, 1955), which amended the Industrial Disputes Settlement Act of 1947, came into force. The second question is whether the Deputy Labour Commissioner, who was appointed as a Registrar under s. 14 of the Act, was entitled to entertain the application of opponent No. 7.

The circumstances which have given rise to this petition are briefly these:—The Rashtriya Mill Mazdoor Sangh, Nagpur, who is the petitioner before us, was recognised as a registered union under s. 3 of the Industrial Disputes Settlement Act, 1947, sometime during the year 1951-52. Taking advantage of the provisions of s. 7-A, opponent No. 7 made an application to the Assistant Registrar of Recognised Unions, Nagpur, on April 25, 1958, for its recognition in place of the petitioner Union. This application was opposed by the petitioner. It was contended on behalf of the petitioner that s. 7-A came into

*Decided, March 24, 1959. Special Civil Application No. 28 of 1959.

†The section is as under:—

"S. 14. Appointment of Registrar and Assistant Registrar.—(1) The Provincial Government shall by notification appoint the Labour Commissioner or any other person to be the Registrar of Recognised Union under this Act.

(2) The Provincial Government may by notification appoint a person to be an Assistant Registrar of Recognised Union for any local area and may, by general or special order, confer on such person all or any of the powers of the Registrar."

1 [1951] A.L.R. S.C. 230.

2 [1958] A.I.R.S.C. 1018.

force on March 11, 1958, by virtue of a notification made by the Government of India, under sub-s. (3) of s. 1 of the Act of 1947, that this section had only a prospective operation and not a retrospective one, and that, therefore, it was not open to the Union to make an application under s. 7-A for its recognition, till after the lapse of one year from this date. It is not easy to follow the argument of Mr. Dhabe. It appears to be that a Union which seeks recognition by an application made by it earlier than one year after the date on which s. 7-A was notified to come into force cannot do so as the notification could not give retrospective operation to that section. In support of his contention Mr. Dhabe relied upon the Explanation to sub-s. (4) of s. 7-A, which is in the following terms:—

“Explanation.—In determining the membership for purposes of sub-section (2) any person who—

(i) has not been continuously on the roll of members of the union for a period of at least twelve months immediately before the date of application; and

(ii) is in arrears of subscription payable to the union for a period exceeding three months;

shall not be counted as a member of the Union.”

According to him the comparative membership of the unions is to be determined with reference to a date which is one year prior to the coming into force of s. 7-A, and that thereby the existing right of a union to continue to be a recognized union would be infringed if the application of another union were to be granted before the expiry of one year from the date of the notification. Now, all that this section contemplates is that the relative strength of the unions is to be considered only by taking into account those members who have been on the roll of the union continuously for a period of 12 months prior to the application and have not been in arrears in the matter of payment of subscription for a period exceeding three months. That is to say, the explanation requires the existence of a certain fact and the non-existence of another fact. It does not in any way tend to give retrospective operation to any of the provisions of the statute. A newly recognized union will be entitled to function as a recognized union and act on behalf of the workers engaged in an industry only from a date subsequent to its recognition. Till a new union is recognized, an existing union, and here the petitioner, will continue to function as recognized union and exercise all its rights as such union. It is, therefore, difficult to appreciate how the mere ascertainment of the existence of a certain fact during the course of one year prior to the application for recognition will amount to giving retrospective operation to a provision of the statute.

Then Mr. Dhabe argued that by virtue of the Explanation to sub-s. (4) of s. 7-A no action under s. 7-A can be taken unless the period of two years has elapsed from the commencement of the Madhya Pradesh Industrial Disputes Settlement (Amendment) Act of 1955. If the amending Act did not come into force till the notification of March 6, 1958, the present application, according to Mr. Dhabe, is clearly premature as it was made only a few days after the notification bringing s. 7-A into force was issued. What is to be borne in mind is that the Explanation refers to the commencement of the amending Act of 1955 and not to the making of any notification. Mr. Dhabe, however, contends that the amending Act of 1955 which introduced s. 7-A was not specifically brought into force by issue of any notification under sub-s. (3) of s. 1 of the Act of 1947. The scheme of this Act is that while it extends to the whole of the Central Province and Berar (which include the present territories of Vidarbha) sub-s. (3) requires the issue of a notification bringing the sections, other than s. 1, into force in such areas or of industries and on such date as may be specified in the notification.

Now, according to Mr. Dhabe the words “commencement of the Act of 1955” used in the Explanation must be deemed to refer only to the provisions of s. 7-A and as no notification extending the provisions of that section or

bringing them into force anywhere was issued till March 11, 1958, the amending Act cannot be deemed to have come into force at all. He relied upon the decision of this Court in *The Textile Mills Association v. The Rashtriya Mill Mazdoor Sangh*¹, in which it was held that the provisions introduced into the Industrial Disputes Settlement Act of 1947 by the amending Act of 1955 did not come into force at once and that it was necessary for the State Government to issue a notification under sub-s. (3) of s. 1 to bring those provisions into force. In that case the Division Bench of this Court held that the provisions of the amending Act became a part and parcel of the parent Act after the Act passed into law, and that consequently none of them could come into force until a notification was made by the State Government under sub-s. (3) of s. 1. In taking this view the Division Bench did not, if we respectfully point out, take into consideration two facts. One is that the amending Act of 1955 does not specify the date on which it has to come into force, and the other is that the provisions enacting the amending Act could not become part of the parent Act till the amending Act came into force.

Now, s. 3, sub-s. (1)(b), of the Central Provinces and Berar General Clauses Act provides:—

“3. (1) Where any Madhya Pradesh Act is not expressed to come into force on a particular day, then,...

(b) in the case of a Madhya Pradesh Act made after the commencement of the Constitution, it shall come into operation on the day on which the assent thereto of the Governor or the President, as the case may require, is first published in the Official Gazette.”

In the instant case the amending Act of 1955 was submitted to the President for his assent. That assent was received on November 19, 1955, and was published in the Madhya Pradesh Gazette on November 25, 1955. Since the amending Act makes no provision regarding the date of its commencement, it must be held under sub-s. (1)(b) of s. 3 of the C.P. and Berar General Clauses Act that the amending Act came into force on November 25, 1955. Now, since it came into force on that date, there was no need whatsoever to issue a notification under sub-s. (3) of s. 1. The restraints imposed by this latter provision were intended to apply to the provisions of the main Act which was enacted in the year 1947. It was open to the Legislature to extend those restrictions even to the provisions of the amending Act. It has however not chosen to do so. Therefore, the absence of a notification under sub-s. (3) of s. 1 is of no consequence.

No doubt, where an Act is amended by another Act, the provisions of the amending Act become part of the parent Act, but it does not mean that the provisions of the amending Act never come into force except by following the procedure laid down in the parent Act for bringing them into force. The provisions of the amending Act could not become part of the parent Act without bringing into operation the amending Act. Once the amending Act came into operation, s. 7-A which was introduced into or superimposed on the original Act also came into operation. Thus, the coming into force of s. 7-A of the Act and its becoming part and parcel of the parent Act was a simultaneous process. Since s. 7-A has come into force, the issue of the notification under sub-s. (3) of s. 1 bringing it into force would be redundant. It is for these reasons that we cannot accept the view taken in the earlier case.

It may be mentioned that consequent on the decision in that case the Legislature has passed a validating Act. That Act is the Bombay Act No. LIX of 1958. Section 2 of that Act runs thus:—

“2. Amendments to Central Provinces and Berar Act No. XXIII of 1947 made by Madhya Pradesh Act No. XXI of 1955 to come into force on the date Madhya Pradesh Act XXI of 1955 commenced.—Notwithstanding anything contained in sub-section (3)

¹ (1958) Special Civil Application No. 340 on January 24, 1958 (Unrep.) of 1957, decided by Chaimani and Badkas JJ.,
L.R.—81.

of section 1 of the Principal Act, or in any judgment, decree or order of a Court, the amendments incorporated in the Principal Act by the Amending Act (whether by way of amendment to, insertion in, or substitution of, the provisions of the Principal Act), which have not been brought into force by notification issued under sub-section (3) of section 1 of the Principal Act, shall be deemed to have come into force in the Vidarbha area of the State of Bombay on and with effect from the 25th day of November, 1955 in relation to the industries to which the Principal Act applied on that date."

Now, one of the results of these provisions is to render ineffective the decision of this Court in *The Textile Mills Association v. The Rashtriya Mill Maadoor Sangh*. That being the position, we do not think it necessary to refer this case to a larger Bench.

The other argument of Mr. Dhabe is regarding the jurisdiction of the Deputy Labour Commissioner to entertain the application. According to him, the Registrar of Unions has to be appointed by name, and that since here the appointment is made only by office, the appointment is bad and consequently the Deputy Labour Commissioner, who is purporting to act as Registrar, has no jurisdiction to entertain the application. In our opinion, there is no substance whatsoever in this contention. Sub-section (1) of s. 14 provides that the State Government shall, by notification, appoint the Labour Commissioner or *any other person* to be the Registrar of Recognised Unions under the Act. Now, Mr. Dhabe contends that apart from the Labour Commissioner, no other person can be appointed as a Registrar except by name. Mr. Dhabe, however, ignores the provisions of s. 14 of the C.P. and Berar General Clauses Act which runs thus:—

"Where, by any Madhya Pradesh Act, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment may be made either by name or by virtue of office."

Clearly, a power to appoint by office is granted by the section. Mr. Dhabe however says that the provisions of this section are not applicable to any matter arising under the Industrial Disputes Settlement Act, and in this connection he relied on two decisions of the Supreme Court. The first of these is *U. C. Bank v. Their Workmen*². That, however, is not a case where it was held that the provisions of the General Clauses Act cannot be applied to a matter arising under the Industrial Disputes Act. What was held was that the persons appointed under s. 5(1) of the Industrial Disputes Act on the Board of Conciliation must be specified in the notification in order to invoke the jurisdiction to carry on the conciliation proceedings. The view of their Lordships was based on the fact that r. 5 of the rules framed under the Act required that the names of the persons constituting a Board, Court or Tribunal appointed under the Act should be notified in the Official Gazette. In the case before their Lordships there was a clear breach of the requirements of the rule and, therefore, they held that the Board, the appointment of whose members was not properly notified, had no jurisdiction to function under s. 5 of the Act. There is no requirement under the Industrial Disputes Settlement Act of 1947 or the rules framed thereunder for publishing the name of the person appointed to function as Registrar of Recognized Unions.

In the other case before their Lordships, *State of Bihar v. D. N. Ganguly*³, they have held that the rule of construction enunciated by s. 21 of the General Clauses Act in so far as it refers to the power of rescinding or cancelling the original order cannot be invoked in respect of the provisions of s. 10(1) of the Industrial Disputes Act. Now, under s. 10 of the Industrial Disputes Act where the appropriate Government is of opinion that an industrial dispute exists or is apprehended, it has a power to refer, among other things, the dispute to a Board for settlement. The dispute so referred by the Government of Bihar was eventually withdrawn by the Government and the question which came up before their Lordships was whether the Government which had referred the dispute to the Board had power to withdraw it. One of the argu-

ments advanced before their Lordships was that under s. 21 of the General Clauses Act the Government had the power to withdraw the dispute. This argument was negatived by Gajendragadkar J. who delivered the judgment of the Court. He observed (p. 1021):—

"It is well settled that this section embodies a rule of construction and the question whether or not it applies to the provisions of a particular statute would depend on the subject-matter, context, and the effect, of the relevant provisions of the said statute. In other words it would be necessary to examine carefully the scheme of the Act, its object and all its relevant and material provisions before deciding whether by the application of the rule of construction enunciated by sec. 21, the appellant's contention is justified that the power to cancel the reference made under sec. 10(1) can be said to vest in the appropriate government by necessary implication."

What is, therefore, to be considered in the present case is whether upon the considerations of all the relevant provisions of the Industrial Disputes Settlement Act it could be said that the provisions of s. 14 of the General Clauses Act are excluded. No doubt, the learned Judges also observed later on in the judgment that on general principles it is difficult to accept the argument that the appropriate Government should have an implied power to cancel its own order made under s. 10 of the Act because such an order must have been made by it on the representation made by the employer or his workmen and after the matter was fully considered by the Government. It would, therefore, be seen that the case before the Supreme Court was very much different from the present one and further the provisions of the General Clauses Act, which were held to be inapplicable to a matter arising under the Industrial Disputes Act, are also of a different character from those of s. 14 of the C.P. and Berar General Clauses Act which we have to consider. The Supreme Court has not laid down any general proposition to the effect that the provisions of the General Clauses Act have to be kept out of consideration in their entirety while interpreting industrial laws. Indeed, it would be extremely dangerous to say that the provisions of the General Clauses Act ought not to be applied to industrial legislation. One of the objects which the General Clauses Act serves is to fill in gaps or lacunae that may be found in different laws made by the Legislature. The provisions are, therefore, of a salutary character and we would not be prepared to hold that those provisions do not apply to industrial legislation at all. The argument therefore based on the mere fact that the appointment of the Registrar for the Vidarbha region was made not by name but by office has no substance.

Then Mr. Dhabe contended that the provisions of s. 14 are very ambiguous, and though they create the post of an Assistant Registrar and enables that person to exercise all the powers of the Registrar, they do not provide for the transfer of cases to him by the Registrar. It may be that the provisions are not very clear, but how that fact is of any assistance to Mr. Dhabe in this case is not easy to see. Apart from that, it may be pointed out that it was by virtue of the agreement between the parties that the dispute may be taken up for consideration by the Registrar that it was so taken up by him.

For all these reasons we are of opinion that the Registrar is competent to entertain the application of respondent No. 7 for being recognized as a Union under s. 7-A of the Act. The Registrar was right in holding accordingly. The petition is dismissed. We are told that the matter is pending before the Registrar for over a year. In matters like this it is desirable to arrive at a decision as early as possible. We, therefore, direct the Registrar to deal with this matter expeditiously. But of course it is the duty of the parties also to see to it that unnecessary adjournments are not taken by them. Though we dismiss the petition and discharge the rule, we make no order as to costs.

Petition dismissed.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Naik.

NARAYAN LAXMAN KOLTEWAR v. STATE OF BOMBAY.*

Central Provinces and Berar Municipalities Act (II of 1922), Secs. 15, 22(2), 45—Transfer of Property Act (IV of 1882), Sec. 108—Members of municipality taking leases of rooms belonging to municipality—Whether such members incur disqualification under s. 15(1)—Members whether so disqualified if not in possession of leased rooms.

Under s. 15(1) of the Central Provinces and Berar Municipalities Act, 1922, a member of a municipality incurs a disqualification by taking a lease of property from the municipality. Whether such a person is in possession of the property or not will not take the case out of s. 15(1) of the Act.

THE facts appear in the judgment.

P. N. Karekar, for the petitioners.

N. L. Abhyankar, Special Government Pleader, for the respondents.

MUDHOLKAR J. The petitioners were elected members of the Warora Municipality in the year 1955. After they were elected to the municipality they are alleged to have taken leases of certain rooms belonging to the municipality. It is because of this that the Commissioner exercising his powers under s. 22(2) of the C.P. and Berar Municipalities Act has declared that they have incurred a disqualification set out in s. 15 of the Act and have consequently ceased to be members of the municipality.

It is contended on behalf of the petitioners that by merely taking leases of the rooms belonging to the municipality a member does not incur a disqualification under s. 15. The relevant part of that section runs thus:

"No person shall be eligible for election, or nomination as a member of a committee, if such person—

(1) has directly or indirectly any share or interest in any contract with, by or on behalf of the committee, while owning such share or interest.

Provided that in cases (e), (f)... and (j) the disqualification may be removed by an order of the State Government in this behalf, and in case (1) the disqualification may be removed by an order of the Deputy Commissioner in this behalf."

According to Mr. Karekar what is objectionable is to have a share or interest in a contract and not in a transfer which has been effected by a municipality. He says that a lease is after all a transfer of property, and since that is so, it cannot be regarded as a contract. In our opinion, this is not quite correct. No doubt a lease is a transfer of property, but there are various clauses in the lease and various covenants which are imported into it by s. 108 of the Transfer of Property Act which give rise to contractual rights and obligations. Therefore, though a lease is a transfer it cannot be said to have ceased to be a contract altogether. No doubt some of the clauses of the Contract Act will not apply as they would to a contract which is wholly executable. But that is a different matter. There is no doubt that where there is a subsisting lease there are outstanding obligations, those obligations being of a continuing nature, and it must follow that a lease of property from a municipality is a disqualification under s. 15(1) of the Act from being a member thereof.

Then it is said that this disqualification has been removed because the permission of the Collector was obtained by the petitioners under s. 45 of the Act. That section runs thus:

"(1) If any member, officer or servant of a committee is, without the written permission of the Deputy Commissioner, directly or indirectly interested in any contract made with such committee, he shall be deemed to have committed an offence under section 168 of the Indian Penal Code.

*Decided, March 26, 1959. Special Civil Application No. 340 of 1958.

(2) A member, officer or servant of a committee shall not, by reason only of being a shareholder in or a member of, any incorporated or registered company, be deemed to be interested in any contract entered into between the company and the committee, but he shall not take part in any proceedings of the committee relating to any such contract."

It will be clear that this provision has nothing to do with incurring a disqualification or with the removal of a disqualification which has already been incurred under s. 15(1) of the Act. The only object of the section is to release a member who has entered into a contract with a municipality from the liability of being proceeded against under s. 168 of the Indian Penal Code, which is entirely a different matter.

Then it is said that two out of the four petitioners are not in possession of the leasehold premises and, therefore, they cannot be said to have incurred a disqualification. Now, what s. 15 speaks of is the existence of a share or interest in a contract and not the fact of being in possession of any property by virtue of a transaction entered into with a municipality. Here, as already stated, the outstanding obligations are under the leases and, therefore, whether any of the petitioners is in possession or not would not take the case out of cl. (1) of s. 15 of the Act.

Then it was contended that the petitioners were not given an opportunity by the Commissioner before they were removed. Now the Commissioner's order on the face of it says that the petitioners were called upon to show cause why action should not be taken against them under s. 22(2) of the C.P. and Berar Municipalities Act and that they pleaded that their action was covered by the permission granted to them by the Collector, Chanda. In the face of what the Commissioner has stated in the order we do not think that it is open to Mr. Karekar to advance the argument that the petitioners were not given an opportunity to be heard by the Commissioner. Indeed, there is no clear averment to this effect in the petition. Mr. Karekar, however, says that the only notices which the petitioners got were those issued by the Deputy Collector, Chanda, and that no notices were actually sent by the Commissioner. As already stated, in the absence of any clear averment on this point in the petition, we cannot take notice of it.

The petition is without substance and is dismissed with costs. We discharge the rule.

Petition dismissed.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Naik.

VISHWANATH RUPCHAND PATIL v. THE BOMBAY REVENUE
TRIBUNAL, NAGPUR.*

Berar Regulation of Agricultural Leases Act (XXIV of 1951), Secs. 14, 2(1), 11(1)—Word "lease-money" in s. 14 whether refers to cash only—Applicability of s. 14 where lease-money payable in kind—Commutation under s. 11(1) whether applies with respect to liability completely discharged before commutation made.

The word "lease-money" in s. 14 of the Berar Regulation of Agricultural Leases Act, 1951, refers to cash only and, therefore, s. 14 of the Act applies only where the lease-money is payable in cash and not where it is payable in kind.

The commutation made by the Revenue Officer under s. 11(1) of the Act is regarding the prospective liability of the lessee or of the liability of a lessee which is yet to be discharged.

THE facts appear in the judgment.

*Decided, April 1, 1959. Special Civil Application No. 359 of 1958.

C. P. Kalele, for the petitioner.

J. N. Chandurkar, for respondent No. 4.

MUDHOLKAR J. This petition raises some interesting questions arising under the Berar Regulation of Agricultural Leases Act, 1951.

The petitioner before us is a tenant of field survey No. 7 of mouza Rati, tahsil Khamgaon, district Buldana, and respondent No. 4 is the landlord thereof. Sometime in December 1956 this respondent gave a notice to the petitioner under s. 9(1) of the Act, terminating the tenancy on the ground that the respondent required the land for cultivating it personally. It may be mentioned that under the lease the petitioner was liable to pay to the respondent half share in the crops and was also liable to pay the land revenue of Rs. 51 assessed on the field. Early in January the petitioner delivered some grain to the respondent which according to the petitioner represented respondent No. 4's half share in the grain. According to the petitioner he subsequently delivered half share in the kadba, kutar etc., but according to the respondent he did not receive anything beyond his half share in the grain harvested from the field.

After the petitioner received a notice terminating the tenancy, he made an application to the Sub-Divisional Officer, Khamgaon, under sub-s. (3) of s. 9 for a declaration that the notice given by the respondent shall have no effect. He also made two applications before the Sub-Divisional Officer, one under s. 11 of the Act for commutation of the lease money into cash and the other under s. 14 for the recovery of the excess lease money, which according to him he had paid to the respondent during the years 1953-54 to 1956-57. The applications were opposed by the respondent. Those under s. 9(3) and s. 14 were dismissed but that under s. 11 was granted and the lease money was commuted to Rs. 255 which represented five times the land revenue payable on the land.

The petitioner preferred an appeal before the Revenue Tribunal which it dismissed. He has, therefore, come up to this Court.

Now, in dismissing the appeal the Revenue Tribunal has come to the conclusion that s. 14 of the Act does not apply to a case where the lease money is payable otherwise than in cash. Mr. Kalele who appears for the petitioner challenges the correctness of this view. He points out that the word "lease-money" has been defined in s. 2(1) of the Act to mean anything that is payable to a landholder in money or kind by a lessee for the right to use the land, and that, therefore, that is the meaning which should be accorded to the word as used in s. 14 of the Act. Section 14 runs thus:—

"If any landholder receives by way of lease-money any amount in excess of the lease-money payable under this Act he shall on the application of such protected lessee, be liable by an order of a Revenue Officer, to refund the excess amount recovered and to pay, as penalty, a sum not exceeding two hundred rupees, or, if double the amount of the total lease-money recovered exceeds two hundred rupees, not exceeding double such amount and such Revenue Officer may direct that the whole or part of such sum shall be paid as compensation to the protected lessee."

It has to be borne in mind that this section provides for the refund of excess lease-money paid to the landholder. It uses the expression "any amount in excess of the lease money" which, in our opinion, is indicative of a payment in cash rather than in kind. The word "amount" is used more commonly in connection with cash or specie, and in the particular context it does not appear to have been used in any other sense than cash. Then the section provides for the refund of the amount. The meanings of the word "refund" are given in the Shorter Oxford Dictionary as follows:—

- "1. *trans.* To pour back, pour in or out again. Now rare or Obs.
- b. To give back, restore. Also *absol.* late ME.
2. To make return or restitution of (a sum received or taken); to hand back, repay, restore 1553.

3. To reimburse, repay (a person) 1736.

4. *absol.* To make repayment 1635."

It would appear that the third and the fourth meanings are the current ones. This will be clear from the abbreviation "*absol.*" which stands for "absolutely" used in the fourth meaning. No doubt a similar abbreviation is used in the meaning l.b., but that is further limited by the words "late ME" i.e. late Middle English. In other words, that was the meaning which was in absolute use during that period but not so now.

For these reasons we agree with the Revenue Tribunal and hold that s. 14 applied only where the lease money is payable in cash and not where it is payable in kind.

It is true that the definition contained in s. 2(i) is wide enough to include lease-money payable in kind, but that meaning i.e. the wide meaning, is not to be accorded to the word if there is something repugnant in the context. Here by the fact that the words "amount" and "refund", which, in our opinion, refer to cash only, are used in s. 14, a repugnancy would be created if a wider meaning was given to the word "lease-money".

Then Mr. Kalele points out that the lease-money in terms of half share has actually been commuted into cash by the Sub-Divisional Officer by his order dated April 6, 1957, and that, therefore, the petitioner is entitled to the benefit of the provisions of s. 14. Now, the commutation made under s. 11(1) is necessarily regarding the prospective liability of the lessee, or at any rate, of the liability of a lessee which is yet to be discharged. In the instant case the liability has been completely discharged with respect to the years 1953-54, 1954-55 and 1955-56. As regards the year 1956-57, it is the petitioner's own case that that liability has been discharged in full though according to the respondent that liability is partially discharged. Now the petitioner himself accepts the position that the liability has been discharged. Thus the mere fact of commutation would not entitle him to the benefit of the provisions of s. 14. The reason for this is that the commutation made by the Revenue Officer will only apply with respect to the undischarged liability of the lessee. Mr. Kalele, however, said that he (the petitioner) had actually made the application for commutation of the rent before the end of the agricultural year 1956-57, and, therefore, he should be allowed to get the benefit of the commutation with respect to that year even though the commutation was made after the end of the year. As we have already said, the very idea of commutation was to convert one kind of liability into another, and, therefore, that conversion can be effective with respect to the undischarged liability only and not with respect to the liability which was completely discharged. The petitioner, having made an application under s. 11 to the Sub-Divisional Officer for commutation of rent, was not bound to give to the respondent his share of the crops for the year 1956-57 till the decision of the Sub-Divisional Officer. If he had not delivered the respondent's half share before the commutation was made, he would certainly have got the benefit of that order with respect to that year.

For these reasons we are of opinion that the Revenue Tribunal was right in rejecting the petitioner's appeal. Accordingly we dismiss this petition and discharge the rule. Costs of this petition will be borne by the petitioner.

Petition dismissed.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Naik.

RAMCHANDRA VISHWANATH MUTHAL

v.

MUNICIPAL COMMITTEE, KATOL.*

Central Provinces and Berar Municipalities Act (II of 1922), Secs. 25(1), 10(1), 27, 24-B†—Central Provinces and Berar General Clauses Act (I of 1914), Sec. 15††—Applicability of cl. (iii) of proviso to s. 25(1)—President's power to employ municipal servants—Limitations on such power.

Clause (iii) of the proviso to s. 25(1) of the Central Provinces and Berar Municipalities Act, 1922, will not apply to a post in which there is a time scale and the maximum salary in that scale exceeds Rs. 40.

Under the Central Provinces and Berar Municipalities Act, 1922, the power to employ servants is reserved with the municipal committee not only by the general provisions of s. 10(1) of the Act, but expressly by the provisions of s. 25(1) of the Act. This power cannot be exercised by the President of the municipality unless it is delegated to him by a bye law made under s. 25(1) or under s. 27 or unless it is exercised in a case covered by cl. (iii) of the proviso to s. 25(1).

THE facts appear in the judgment.

P. S. Badhiye, for the petitioner.

N. S. Nandedkar, for the respondents.

MUDHOLKAR J. The petitioner is an assistant teacher serving in the municipal Primary School of the Municipal Committee, Katol. According to him, he was appointed to the school about 24 or 25 years ago. On March 18, 1958, the head master of the school, Mr. Pawar, made a report to the Secretary of the Municipal Committee, Katol, to the effect that the petitioner, who used to hold the classes from 7 a.m. to 11 a.m. in the morning, had refused to attend office work from 2.30 p.m. onwards. He also stated that when he inspected the class of the petitioner on March 13, 1958, he did not find his work satisfactory. The general complaint against the petitioner was that the petitioner was not observing the discipline of the school and this had an adverse effect on other teachers also. Thereupon the following notice dated March 22, 1958, was served on the petitioner which runs thus:—

"You are hereby informed that you are not attending the office work in the noon

*Decided, April 3, 1959. Special Civil Application No. 870 of 1958.

† The relevant sections are as under:—

S. 24. B(1) The president of the committee shall perform all the duties and exercise all the powers specifically imposed or conferred on the president by or under this Act, and subject, wherever it is hereinafter expressly so provided, to the sanction of the committee, and subject to all other restrictions, limitations and conditions imposed by or under this Act, exercise the executive power for the purpose of carrying out the provisions of this Act, and be responsible for the fulfilment of the purpose of this Act.

S. 25. (1) A committee may employ such officers and servants as may be necessary and proper for the efficient discharge of its duties, and may make byelaws providing for the delegation of powers, duties and functions to such officers and servants and regulating their procedure, appointment, pay, leave, leave allowances and other conditions of service: Provided that....

(iii) any appointment to a municipal post carrying a salary of not more than forty rupees a month shall be made by the president in accordance with rules made by the Provincial Government, and he shall report every such appointment to the committee when it meets next after such appointment.

S. 27. A committee may make byelaws providing for the delegation of powers, duties and functions to a president, vice president, or individual member and regulating their procedure.

S. 10. (1) There shall be established for each municipality a committee having authority over the municipality.

†† The section is as under:—

S. 15. Where, by any (Madhya Pradesh) Act, a power to make any appointment is conferred then unless a different intention appears, the authority having power to make the appointment shall also have power to suspend or dismiss any person appointed by it in exercise of that power.

in spite of the orders of the Head Master in this respect. So also you are not doing the morning school work satisfactorily and with discipline. Thus you are misbehaving and you are not executing the orders of your superiors properly. A report about all this has been received from the Head Master.

You are therefore informed to submit your explanation to this office, within three days of the receipt of this order by you."

In answer to the notice the petitioner submitted an explanation. It may be mentioned that due to paucity of accommodation the teaching work of the school is carried out in two shifts, the morning shift from 7.30 a.m. to 11 a.m. and the afternoon shift from 11 to 4.30 p.m. The petitioner was admittedly working in the morning shift. The head master of the school had issued a directive to the petitioner and the other teachers working in the morning shift to report themselves at the school at 2.30 p.m. every day for doing office work. It is not denied that the petitioner did go to the school in the afternoon, but it is said that he was not always punctual, and that the head master thereupon took him to task and enjoined on him the necessity of attending the school punctually at 2.30 p.m. The petitioner continued to be remiss, and, therefore, the aforesaid notice was issued against him.

An enquiry into the petitioner's conduct was held by S. S. Misra, the Secretary of the Municipal Committee, and eventually an order was passed against him by the President, Mr. K. K. Chandak, on May 23, 1958. That order reads thus:—

"From the enquiry report of the Secretary Shri S. S. Misra it is found that Shri R. V. Muthal disobeyed the order of the Head Master. This sort of behaviour on the part of the Assistant teacher is highly objectionable.

I therefore order suspension without pay of Shri R. V. Muthal for a period of 15 (fifteen) days with effect from 25-5-1958 as a penalty. During this period no pay or allowance will be paid to him."

It is clear from this order that the only charge which is held to have been established against the petitioner is that he disobeyed the order of the head master. We would like to point out in the first instance that it was not shown to us that the head master could issue a directive to the teachers to do work other than their legitimate work i.e. the work of teaching. As a teacher the petitioner was bound only to do that work and no other work. Of course, if the contract of employment provides that a teacher in the municipal primary school and doing the work of teaching would also be called upon to do office work, then that is another matter. Mr. Nandedkar, who appears for the Municipal Committee, had not been able to show to us anything from which it could be deduced that the petitioner had undertaken to do work other than the teaching work of the municipal school. It would follow from this that the petitioner could not be punished for his failure to attend the school punctually at 2.30 p.m. for doing office work which was not part of his normal duty.

Apart from that, Mr. Nandedkar was not able to point out to us any provision under the Municipalities Act, or the rules made under the Act, or the byelaws framed by the Katol Municipal Committee, conferring upon the President the power to inflict a punishment upon a teacher. Section 24-B of the Act deals with the "powers and duties of the president". It provides that the president shall perform all the duties and exercise all the powers specifically imposed or conferred on him by or under the Act and that he shall, subject to all other restrictions, limitations and conditions imposed by or under the Act, exercise the executive powers for the purpose of carrying out the provisions of the Act. Sub-section (1) of s. 25 of the Act provides that the committee may employ such officers and servants as may be necessary and proper for the efficient discharge of its duties. This provision empowers the committee to make byelaws providing for the delegation of powers, duties and functions to such officers and servants and regulating their procedure, appointment, pay, leave, leave allowance and other conditions of service. It is pos-

sible for the Municipal Committee, therefore, to frame a byelaw under sub-s. (1) of s. 25 to confer upon the President the power to take disciplinary action against a municipal servant. Similarly, under s. 27 of the Act the committee has power to frame byelaws providing for the delegation of powers, duties and functions to a President, Vice-President etc. Where there has been such a delegation, under s. 25(1), the President would be entitled to exercise such a power. The scheme of the Act thus is that the President shall exercise only those powers which are conferred on him by the Act, or those which are conferred on him by the rules or those which are delegated to him by the committee under s. 25(1) or s. 27.

Now, cl. (iii) of the proviso to sub-s. (1) of s. 25 confers on the President the power to make appointment to a municipal post carrying a salary of not more than Rs. 40 a month. Thus, the power is conferred by the Act itself and the President can exercise it. Mr. Nandedkar said that the petitioner drew a salary of Rs. 25 only when he was appointed 24 years ago, and therefore, he belongs to the class of persons who could be appointed by the President under cl. (iii) of the proviso. If that is so, Mr. Nandedkar's argument proceeds, then under s. 15 of the General Clauses Act the President will also be deemed to have the power to suspend or dismiss the person so appointed in the exercise of the powers conferred by cl. (iii) of the proviso to sub-s. (1) of s. 25. We would like to point out that in the first place this proviso was added in the C.P. and Berar Municipalities Act, 1922, in the year 1947, while the petitioner entered the municipal service long before this year. Therefore, it is not open to Mr. Nandedkar to contend on the basis of this proviso that the petitioner belonged to a class of persons whose appointment could be made by the President. Secondly, we would like to point out that the petitioner's present salary is Rs. 60 and that he is appointed in a post which carries a time scale of which the maximum exceeds Rs. 40. Clause (iii) of the proviso, in our opinion, would not apply to a post in which there is a time scale and the maximum salary in that time scale exceeds Rs. 40.

Then Mr. Nandedkar contended that the President is entitled under s. 24-B(1) to exercise the executive power for the purpose of carrying out the provisions of the Act and that this power includes the power to take disciplinary action against a municipal servant. In our opinion, this contention is not correct. The executive power which the President is entitled to exercise is subject to the limitations and conditions imposed by or under the Act. Section 10(1) of the Act vests the municipal government in the committee itself. Section 25(1) recognises the power of the committee to employ such officers and servants as may be necessary and proper for the efficient discharge of its duties. It will thus be seen that the power to employ servants is reserved with the committee not only by the general provisions of s. 10(1), but expressly by the provisions of s. 25(1). Since the power is reserved with the committee, it cannot be exercised by the President unless it is delegated to him by a byelaw made under sub-s. (1) of s. 25 or under s. 27. No byelaws appear to have been made by the Katol Municipality under either of these provisions. No doubt a power is conferred by cl. (iii) of sub-s. (1) of s. 25, but it is confined, as already stated, to appointment to posts of which the salary does not exceed Rs. 40 per month. The power being thus expressly limited to posts which fall in the aforementioned category cannot be construed to be of a wider amplitude by resort to the general terms of s. 24-B.

Mr. Badhiye, who appears for the petitioner, pointed out that in the byelaw framed by the Katol Municipal Committee in the year 1950 the power has been conferred on the President to suspend an employee but that this power is made subject to the sanction by the Municipal Committee. Mr. Nandedkar, however, pointed out that the power of suspension to which the byelaw refers is with respect to suspension pending enquiry against a municipal servant and not a suspension by way of punishment. Mr. Nandedkar's contention is correct, but the result is that there is no provision whatsoever in the byelaw

which empowers the President to suspend a municipal servant by way of punishment. Such being the position, it is clear that the President's order is without jurisdiction. Mr. Nandedkar says that the Municipal Committee has subsequent to the making of the petition ratified the order of the President. We cannot, however, take notice of such a ratification.

It is thus clear that the order made by the President cannot be sustained. Accordingly we quash it and direct that the petitioner be paid his salary for the period during which he was suspended by way of punishment. The petition is allowed and the rule is made absolute. Costs of this petition will be borne by the respondents.

Petition allowed.

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Patel.

STATE v. DHANRAJ MILLS LTD.*

Cotton Textiles (Control) Order, 1948, Cls. 3(aa), 21(3)(c)—Essential Supplies (Temporary Powers) Act (XXIV of 1946), Secs. 7, 8, 9—Constitution of India, art. 19—Whether "yarn" in cl. 3(aa) includes yarn manufactured from cotton waste—Obligation to pack yarn under cl. 21(3)(c) whether restricted to type of yarn packed in basic period—Reasonableness of statute how to be adjudged—Whether serious inconvenience or hardship resulting to citizen by restriction imposed on his fundamental rights decisive of unreasonableness of statute.

The expression "yarn" used in cl. 3(aa) of the Cotton Textiles (Control) Order, 1948, includes yarn manufactured from cotton waste.

Under cl. 21(3)(c) of the Cotton Textiles (Control) Order, 1948, the obligation to pack yarn is not restricted to the particular type of yarn which was packed in the basic years 1949 and 1950.

In ascertaining whether the impugned statute is unreasonable, no abstract tests can be laid down. Reasonableness or otherwise of the statute has to be adjudged in the light of the nature of the right infringed, the object of imposing the restriction, the extent and the gravity of the evil to be remedied, the degree of harm or inconvenience to the aggrieved citizen in the context of the benefit intended to be achieved for the benefit of society and similar other considerations. Even serious inconvenience or hardship resulting to a citizen by the imposition of a restriction on the exercise of his fundamental rights cannot be decisive of unreasonableness of a statute. Nor can the restriction be called unreasonable because its degree or extent is delimited by reference to a point of time or some period in the past.

THE facts appear in the judgment.

Y. V. Chandrachud, Government Pleader, for the State.

H. M. Choksi, with *Shellim Samuel*, for respondent-accused No. 3.

Shellim Samuel (appointed), for respondent-accused Nos. 1 and 2.

SHAH J. These are four companion appeals which raise for determination common questions. We propose to deal with Appeal No. 1225 of 1958, and the reasons set out for the decision in this appeal will govern the other three appeals.

Before the Presidency Magistrate, 25th Court, Mazgaon, Bombay, the Dhanraj Mills Ltd., which will hereafter be referred to as the company, and its three officers were charged with contravention of cl. 21(3)(c) of the Cotton Textiles (Control) Order, 1948, read with Government Notification No. SRO-

*Decided, April 23, 1959. Criminal Appeal No. 1225 of 1958 (with Criminal Appeals Nos. 1226 to 1228 of 1958), against the order of

acquittal passed by H. J. Chinoy, Presidency Magistrate; 25th Court, Mazgaon, Bombay, in Case No. 1724/P of 1956.

609, dated April 27, 1951, and thereby committing offences punishable under ss. 7 and 8 of the Essential Supplies (Temporary Powers) Act (XXIV of 1946). During the pendency of the proceedings accused No. 4, Meherji M. Pastakia, who was the manager of the company, died on March 21, 1958, and his name was struck off. The learned Magistrate acquitted the remaining three accused, and against the order of acquittal, this appeal has been preferred.

Dhanraj Mills Limited is a public limited company, which has its textile factory in the town of Bombay. In the year 1949-50, in the factory of the company were installed a spinning and a weaving plant. There were 780 looms and approximately 36,000 spindles—including ring, mule and bump mule—installed in the factory. From the returns submitted by the company, it appears that in the factory there were on January 1, 1950, 35,476 spindles, mule, ring roving, doubling and other types. On January 1, 1950, there were 36,316 spindles, and on January 1, 1951, the total number of spindles also remained at 36,316. Some of the mule spindles were old, and it was represented by the company to the Textile Commissioner in the returns made from time to time that a certain number of mule and bump mule spindles had remained idle in the year 1951. These bump mule and mule spindles were permitted by the Textile Commissioner to be dismantled in the year 1953. The mule and bump mule spindles were primarily used for manufacturing yarn of low count and constituted about 5 per cent. of the total number of spindles installed in the factory. In the year 1949-50, all the yarn manufactured on the mule spindles was packed for disposal, and the yarn manufactured on the other spindles was utilised by the company for its own weaving plant. In the years 1949 and 1950, the company manufactured an aggregate of 653 bales of low count yarn and that yarn was packed and sold. For use in the factory, however, 93 bales of higher count yarn were purchased in the year 1949, and 8 bales of yarn were purchased in 1950. In and after the year 1951, the mule and the bump mule spindles were kept idle and there was no production of low count yarn. The yarn produced by the other spindles in the factory was utilised for weaving cotton fabrics. The higher count yarn produced by the spindles was insufficient for the requirement of the factory for weaving cloth, and from time to time applications were submitted requesting the Textile Commissioner to release yarn for consumption in the mill, but on account of the prevailing shortage, the applications were turned down.

After the Defence of India Act, 1939, lapsed, the Central Legislature enacted the Essential Supplies (Temporary Powers) Act, 1946, to provide for the continuance of powers to control production, supply and distribution of, and trade and commerce in, certain commodities including cotton textiles. By s. 3 of that Act, power to issue orders to control production, supply, distribution etc. of essential commodities was conferred upon the Central Government, and by s. 7, contravention of orders made under s. 3 relating to cotton textiles was made punishable with imprisonment for a term which may extend to three years and also fine. By s. 8, attempts to contravene or abetment of the contravention of the orders made under s. 3 were deemed contravention of those orders. In exercise of the authority conferred by s. 3 of the Essential Supplies (Temporary Powers) Act, 1946, the Central Government issued the Cotton Textiles (Control) Order, 1948, which was brought into force on August 2, 1948. By cl. 3(aa), "yarn" was defined as meaning any type of yarn manufactured either wholly from cotton or partly from cotton and partly from any other material. The expression "manufacturer" was defined to include a producer or a processor, and the expressions "processor" and "producer" were defined as meaning a person engaged in the manufacture of cloth or yarn or both. By cl. 12, which was added by an amendment, it was provided that every producer who has a spinning plant, shall sell, in each quarter, at least one-eighth of the total quantity of yarn sold by him in the years 1949 and 1950 taken together. By cl. 21, provision was made for packing of cloth and yarn. By sub-cl. (3)(c) of cl. 21, it was pro-

vided that no producer having both a spinning and a weaving plant shall pack during any month a quantity of yarn less than 80 per cent. of the average quantity of yarn packed by him per month during the two years 1949 and 1950 taken together. In the years 1949 and 1950, the company packed 693 bales of yarn i.e. an average of 27.2 bales per month. By cl. 21(3)(c), the company was obliged to pack 21 bales of yarn, but it failed to carry out that obligation. The company also failed to carry out its obligation under cl. 12 of the Cotton Textile (Control) Order, 1948, to sell the prescribed quantity of yarn manufactured by it. The company and its officers were then prosecuted in three complaints which were filed in the year 1954, for contravention of cl. 12(1) of the Cotton Textiles (Control) Order, 1948, but they were acquitted of the charge. Thereafter, four complaints were filed against the company and its three officers, for contravention of cl. 21(3)(c) of the Cotton Textiles (Control) Order. By these four complaints the four accused were charged with having committed default in the months of June 1951, and August, October and November, 1952, in packing yarn as required by cl. 21(3)(c). It was the case for the prosecution that the company was a producer having spinning and weaving plants, and was statutorily obliged to pack every month 21 bales of yarn, being 80 per cent. of the average quantity of yarn which was packed per month during the two years 1949 and 1950 taken together, and the company having failed to do so, the company had committed the offence punishable under s. 7 of the Essential Supplies (Temporary Powers) Act, 1946. It was submitted that by reason of the provision of s. 9 of that Act, the directors, managers and the officers of the company were responsible for the default committed by the company.

Before the trial Court, it was contended that the order of acquittal passed in the prosecution for charges for contravention of cl. 12, i.e. failure to sell the yarn, was a bar to the maintainability of the complaints for contravention of cl. 21(3)(c); that yarn manufactured from cotton waste was not "yarn" within the meaning of cl. 3(aa) of the Cotton Textiles (Control) Order; that the Order did not apply to manufacture, packing for sale and distribution of yarn prepared exclusively from cotton waste, and that in any event the company having ceased to manufacture cotton waste yarn in the years 1951-1952, no obligation to pack yarn remained imposed upon the company by cl. 21(3)(c), and by failing to pack yarn manufactured from cotton waste, the company had not committed any offence punishable under ss. 7 and 8 of the Essential Supplies (Temporary Powers) Act, 1946. It was also urged by accused Nos. 2 and 3 that they had appointed accused No. 4 as a manager, and he alone was attending to the day to day business of the company including production of yarn, and accordingly for failure to pack yarn accused No. 4 alone was responsible. The learned Presidency Magistrate held that the order of acquittal passed in cases filed against the company and its officers for contravention of cl. 12 did not bar the complaints against the accused for contravention of cl. 21(3)(c) of the Cotton Textiles (Control) Order. He also observed that the period for which the accused in the earlier cases were prosecuted, were different from the periods for which the accused are sought to be prosecuted in these four cases. But in the view of the learned Magistrate, the expression "yarn" used in cl. 3(aa) did not include "cotton waste yarn", and that, in any event, the company having ceased to manufacture cotton waste yarn since 1951, by failing to pack yarn, the accused did not violate cl. 21(3)(c). The learned Magistrate observed that the obligation imposed by cl. 21(3)(c) of the Cotton Textiles (Control) Order was to pack the same "type of yarn" which was being manufactured in the years 1949 and 1950, and if yarn of that type was no longer manufactured by the company in the succeeding years, there was no obligation upon the company to pack yarn of a different type. The learned Magistrate having acquitted the accused, the State of Bombay has appealed to this Court.

It has not been urged before us that the order of acquittal passed in the cases

for contravention of cl. 12 of the Cotton Textiles (Control) Order constituted a bar to the maintainability of the complaints against the accused. Evidently, in the previous cases the contravention was of a provision imposing a different obligation and in periods different from those to which the complaints in these four cases relate, and there can be no bar of *autrefois acquit* to the maintainability of these complaints. It is urged in support of the appeal, that the learned Magistrate was in error in holding that the expression "yarn" did not include "cotton waste yarn". It is also urged that the obligation to pack yarn imposed by cl. 21(3)(c) is not to pack yarn with the same count as was packed in the basic years 1949-50, but the obligation is to pack cotton yarn irrespective of the count, and if that obligation is not discharged, the producer thereby contravenes cl. 21(3)(c). The expression "yarn" by cl. 3 of the Cotton Textiles (Control) Order, 1948, is defined as meaning any type of yarn manufactured either wholly from cotton or partly from cotton and partly from any other material. The expression "yarn" in the Cotton Textiles (Control) Order, undoubtedly refers to cotton yarn and no other yarn. The argument that yarn may be manufactured from different materials, has in construing the provisions of Cotton Textiles (Control) Order, in our judgment no importance. Cotton waste is that residue of cotton which is, in the process of carding or spinning, discarded because of its short or damaged staple. For preparing yarn of a specified count, cotton has to be of uniform staple. Cotton which is not of the requisite staple is separated in the process of carding. Where the staple of cotton is very short it is unfit for spinning into yarn which can be utilised for fabrics to be used for preparing clothes. Cotton waste or as it is sometimes called waste cotton is but cotton of short or damaged staple, unfit for being spun into yarn which may be used for fabrics for preparing clothes. It is conceded on behalf of the accused that yarn can be spun out of cotton waste; but from that yarn fabrics which may be used for clothes may not be manufactured. In 1949 and 1950, a considerable quantity of waste cotton was utilised by the company for spinning yarn, but the yarn was of very low count and was suitable only for preparing blankets, towels, furnishing fabrics, durries, carpets or ropes.

The trial Magistrate was persuaded to accept the view that the expression yarn used in cl. 21(3)(c) did not include yarn manufactured from cotton waste. But if cotton waste be regarded as cotton of short or damaged staple, we fail to see anything in cl. 3(aa) which supports the view of the learned Magistrate, that yarn prepared from cotton waste is not yarn within the meaning of the Control Order. Yarn is, by the definition, that type of yarn which is manufactured either wholly from cotton or partly from cotton and partly from any other material, and if cotton waste be cotton, yarn spun from cotton waste is, in our judgment, yarn within the meaning of the Cotton Textiles (Control) Order. By cl. 21(3)(c), an obligation is imposed upon the producer having a spinning and a weaving plant, to pack during any month a quantity of yarn not less than 80 per cent. of the average quantity of yarn packed by him during the two years 1949 and 1950 taken together. That the company had packed, in the years 1949-50, 653 bales of yarn manufactured from cotton waste is not disputed, and by cl. 21(3)(c), the company was obliged to pack 21 bales of yarn per month. There is nothing in cl. 21(3)(c) which supports the view that the expression "yarn" used in that clause has a meaning different from the meaning which is ascribed thereto by the definition clause. It was urged by Mr. Choksi, who appears on behalf of the accused, that the Legislature itself has deliberately made a distinction between cotton and cotton waste. Our attention was invited to cl. 20C, which imposes a restriction against the producer having a spinning plant, undertaking to carry out the spinning of yarn out of cotton and cotton waste not owned by him. But the reference to cotton waste and cotton in cl. 20C(b) does not support the argument that yarn spun from cotton waste is not yarn within the meaning of the definition clause; nor does the circumstance that the marking regulations

are expressly made inapplicable to yarn manufactured from cotton waste support that argument. By cl. 21(3)(d), an obligation is imposed upon the producer having a spinning plant to pack a certain quantity of yarn. In sub-cl. (vi) of cl. 21, a table is set out which refers to groups and counts of yarn. Under group I are set out 1 to 6 counts both inclusive, and it is followed by the expressions (waste) and (single). Similarly, Group II is also of 1 to 6 counts both inclusive and the range and description is set out as (waste) (folded). This table of classification of various counts indicates that the producer having a spinning plant is to carry out the obligation imposed by cl. 21(3)(d) both in respect of yarn manufactured from cotton as well as cotton waste. By the explanation to cl. (x), in item (v) it is prescribed that for the purpose of sub-cl. (d), the following varieties of cloth, namely, cotton waste blankets, durrries, towels and furnishing fabrics shall be excluded in determining any quantity of cloth referred to in para. (d). It is true that by the use of the expression "cotton waste blankets" is intended to limit the exclusion of blankets which are manufactured from cotton waste, but that is not enough to suggest that within the contemplation of the order cotton waste is a commodity which is different from cotton.

The learned Presidency Magistrate was of the view that waste yarn is produced from waste which again is produced from cotton in the process of carding and spinning, and as Vishnu Hule, Head Clerk of the company, has stated that "waste yarn" which was produced during the basic period was produced from 100 per cent. waste and no cotton was mixed in it, and Shiveshwerker, Assistant Textile Controller, was unable to say whether the waste yarn packed by the company during the period was 100 per cent. waste, the yarn produced from cotton waste was a commodity different from the yarn produced from cotton. In our opinion, the yarn produced "from 100 per cent. waste cotton" is still yarn produced from cotton. This type of yarn is undoubtedly of a very low count, unfit for use for weaving fabrics which may be used for wearing, but that is not a material distinction which justifies the view that within the definition in cl. 3(aa) yarn manufactured out of waste cotton is not included. There was it is true at the relevant time no control on sale or purchase of cotton waste though there was control on the price of waste yarn, but on that account also we are unable to hold that the provision which imposes an obligation to pack a prescribed quantity of yarn does not apply to a manufacturer who in the basic period was manufacturing yarn from cotton waste as well as ordinary cotton; nor are we able to agree with the view of the learned Magistrate that the obligation imposed by cl. 21(3)(c) is to pack the same type of yarn which was manufactured in the basic period. The definition of the expression "yarn" does undoubtedly refer to the "type of yarn"; but that is evidently enacted to make all yarn which has a cotton component subject, unless otherwise expressly provided, to the restrictive provisions of the Order. There is however nothing in cl. 21(3)(c), which suggests that the obligation to pack yarn is restricted to the particular type of yarn which was being packed in the basic period. The learned Magistrate followed a rather unusual process of reasoning in substituting for the expression "yarn" as used in cl. 21(3)(c), the expression "type of yarn" and then inferred that the Legislature intended that the same type of yarn should be packed by the producer as was packed by him in the basic period. He reinforced his conclusion by observing that, as cl. 21(3)(c) imposed an obligation, and failure to comply with the same was penalised, the Courts must be astute to hold that the producer, who did not manufacture yarn of the same type as was manufactured in the basic period, could not be penalised. In our view, the entire process of reasoning of the learned Magistrate proceeds upon assumptions which are not warranted. There is nothing in cl. 21(3)(c) which supports the view that the obligation is to pack the same type of yarn which was manufactured in the basic period; nor is there any warrant for the observation that the liability to pack is in respect of the same type of yarn which was being

manufactured in the basic period. The obligation imposed by cl. 21(3)(c) is absolute in terms, and we do not see any reason to restrict the same in the manner suggested by the learned Magistrate. We are, therefore, unable to agree with the learned Magistrate that there was no infringement of the provision of cl. 21(3)(c) by the company.

But, Mr. Choksi contends that cl. 21(3)(c) of the Cotton Textiles (Control) Order, 1948, is *ultra vires* the Legislature because it imposes an unreasonable restriction upon the right to hold and dispose of property, and upon the right to carry on trade or business. By cl. (f) of art. 19 of the Constitution, all citizens have the right to acquire, hold and dispose of property; and by cl. (g) they have, amongst other rights, the right to carry on any trade or business. But the fundamental rights guaranteed by art. 19(f) and (g) are made subject to any law imposing reasonable restrictions. During the Second World War, and thereafter, there was undoubtedly a severe shortage of cotton yarn and to secure an equitable distribution of this commodity in short supply, orders were issued under the Defence of India Rules, imposing control upon the manufacture, distribution and sale of yarn. After the Defence of India Act lapsed, by the Essential Supplies (Temporary Powers) Act, 1946, power was conferred by the Legislature upon the Central Government to issue orders in respect of certain essential commodities. The Legislature has by s. 3 of the Essential Supplies (Temporary Powers) Act, 1946, conferred authority on the Central Government to issue orders, and in pursuance of the authority, the Central Government has promulgated the Cotton Textiles (Control) Order. Mr. Choksi contends that the order in so far as it imposes an obligation to pack a prescribed quantity of yarn for sale is unreasonable. Counsel submits that by art. 19 of the Constitution, every citizen has a right to use his property for his own benefit and yarn being the property of the company, it could not be required to pack for disposal a certain quantity of yarn manufactured by it, when the production of yarn was insufficient for its own requirements in its Weaving Department. But the argument assumes that a law, which imposes a restriction upon the fundamental rights guaranteed by cl. (f) and (g) of art. 19, is unreasonable if the restriction results in inconvenience to a citizen. If in the larger interest of the society, it is found necessary for making an equitable distribution of an essential commodity, to require a citizen that he shall part with the same or a part thereof, the provision imposing the obligation is not *per se* unreasonable. In ascertaining whether the impugned statute is unreasonable, no abstract tests can be laid down. Reasonableness or otherwise of the statute has to be adjudged in the light of the nature of the right infringed, the object of imposing the restriction, the extent and the gravity of the evil to be remedied, the degree of harm or inconvenience to the aggrieved citizen in the context of the benefit intended to be achieved for the society and similar other considerations. Even serious inconvenience resulting to a citizen by the imposition of a restriction on the exercise of his fundamental rights cannot be decisive of unreasonableness of a statute. If in the larger interest of the public the individual rights of a citizen must be made subservient thereto, the consequences which Mr. Choksi says are likely to result if the company being required to pack for sale a part of their production which is necessary to keep the factory running, will not justify us in holding that the provision is unreasonable. The Constitution has not conferred upon the citizens an absolute fundamental right to hold and dispose of his property. The right is subject to the law imposing reasonable restrictions. The Constitution has sought to create a balance between the rights of the citizens individually and the rights of the citizens generally; and as, in our view, the restrictions imposed by cl. 21(3)(c) are enacted in the interest of the public in an emergency arising out of the conditions prevailing as an aftermath of the world war for the equitable distribution of an essential commodity, by itself the restriction cannot be regarded as unreasonable. The statute does not

prescribe the imposition of restrictions based on *ad hoc* decisions of an executive authority in exercise of discretion vested in him by law to permit or not to permit user by a citizen of his property. Where such a provision is made, as for instance in licencing provisions, different considerations may arise. The Legislature having enacted a general provision applicable to all producers, provided they have a spinning and weaving plant, requiring them to pack a certain quantity of yarn, which was related to the quantity packed in the basic period, we do not think that the ground of individual hardship can be pressed into service in considering the question of reasonableness of the provision. Mr. Choksi also urged that the assumption made in enacting cl. 21(3)(c) that the number of spindles installed by the producer in the basic period and the periods subsequent thereto and the requirements for consumption by the producer continue to remain unaltered was unwarranted. He says that it is possible that a section of the spinning plant may go out of commission and the producer may not have the same extent of the plant as in the basic period, and it would entail great hardship upon the producer to be called upon to pack a quantity of yarn based upon the quantity packed in the basic period when it is not even sufficient for his own requirement. But, this, in our judgment, is the argument of inconvenience in another guise. A restriction imposed by a statute is not unreasonable because it entails some hardship or inconvenience to the citizen in the exercise of his fundamental rights. Nor can it be called unreasonable because the degree or extent of restriction is delimited by reference to a point of time or some period in the past. Mr. Choksi contended that where the entire spinning plant is destroyed or dismantled and no yarn is manufactured by the producer in the period after the basic period, though the producer had a substantial production in the basic period, the producer would, if literal effect be given to the obligation under cl. 21(3)(c), be called upon to pack something which he does not produce. But the answer to that contention is that the producer, by reason of the destruction of his spinning plant, ceases to be a producer governed by that provision, and there is in that eventuality no obligation imposed upon him to pack any yarn. It is true that cases may be imagined where a considerable part of the spinning plant is out of order since the basic period, and the total production may even be less than 80 per cent. of the average quantity of yarn produced during the basic period. But by contemplating such exceptional cases we will not be justified in regarding the provision of cl. 21(3)(c) as unreasonable and *ultra vires*.

Mr. Choksi stated that after the mule spindles became idle, the reeling department and the bundling department were also stopped, and in the year 1951-52, the mills had not even machinery for reeling and bundling of yarn in the process of packing. But if the company closed the reeling and the bundling departments, and it experienced difficulty in packing yarn, we are unable to hold that on that account the statutory obligation requiring the company to pack the prescribed quantity of yarn disappeared.

Mr. Choksi also urged that in any event accused Nos. 2 and 3 had not personally infringed the obligation imposed by cl. 21(3)(c) of the Cotton Textiles (Control) Order, and they were not guilty of the offence under s. 7 of the Essential Supplies (Temporary Powers) Act, 1946. Counsel invited our attention to a circular Ex. Z/15 issued from the office of the Textile Controller. The producers were by that circular advised to nominate by a special resolution officers who will be responsible for and look after the affairs of the mills, and accordingly answerable for the contravention of the provisions of the Textile Control Order that may be committed in future. They were also informed that the adoption of this suggestion may enable Government to take action against the particular officer or officers nominated by the Board of Directors, and in the absence of such an arrangement, it may become incumbent on the Government to prosecute every director, manager, secretary and other officers or agents thereof of the mills and any plea that may be put forward that the Board of Directors were not directly responsible

for the day to-day running of the mills may not be accepted as the provision of the law was very clear and held every one connected with the mills responsible for the contravention in the absence of specific delegation of authority to an officer or officers. It is submitted, relying upon this circular, that accused No. 4 was, by a resolution of the company, appointed a manager, and all authority for the manufacture and packing of yarn was conferred upon him. But this circular which is issued on June 16, 1949, was cancelled by another circular, Ex. Z-16, issued on August 31, 1949. It was recited in that circular that it was never the intention of the Government that the entire responsibility for the proper observance of the Textile Control Order should be fixed on a minor functionary of the mills and that the directors, managers and other responsible officers should be completely relieved of their obligation to exercise due care in that behalf. Whatever may be the view of the Textile Controller, the liability upon the directors, managers, secretary and the staff attending to the business of the company is imposed by s. 9 of the Essential Supplies (Temporary Powers) Act, 1946, and the interpretation which may have appeared to the Textile Control Office is entirely irrelevant. By that section it is expressly provided that if the person contravening an order under s. 3 is a company or other body corporate, every director, manager, secretary or other officer or agent thereof shall, unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention, be deemed to be guilty of such contravention. In the present case, it is true that accused Nos. 2 and 3 had pleaded in the Court below that accused No. 4 alone was attending to the day to day production of the yarn. But our attention has not been invited even to a defence raised by accused Nos. 2 and 3 that the contravention took place without their knowledge or that they had exercised all due diligence to prevent such contravention; nor is there any evidence on the record which supports the contention that the contravention took place without their knowledge or that they had exercised all due diligence to prevent the contravention. A general resolution appointing accused No. 4 to attend to the day to day administration and the working of the mills and the production of yarn, does not justify the inference that the contravention took place without the knowledge of the accused or that they exercised diligence to prevent the contravention. The burden under s. 9 of the Essential Supplies (Temporary Powers) Act lies heavily upon accused Nos. 2 and 3 to prove that the contravention took place without their knowledge, or that they exercised diligence to prevent the contravention and no evidence has been led to discharge that burden. In that view of the case, accused Nos. 2 and 3 must also be held guilty of contravention of cl. 21(3)(c) of the Cotton Textiles (Control) Order by the mills.

Mr. Shellim Samuel, who appears on behalf of the company, has contended that the Essential Supplies (Temporary Powers) Act, 1946, ceased to be in operation from January 26, 1955, and the Act being a temporary Act, no prosecution could after that date be commenced against the accused for infringement of the provision of orders framed in exercise of the authority under that Act. It is true that when a temporary Act lapses, the infringement of the provision of that temporary Act or orders passed thereunder will not in the absence of any express provision to the contrary made, on prosecution started after the Act has lapsed, be liable to be punished. But the Legislature has under s. 1(3) of the Essential Supplies (Temporary Powers) Act, 1946, which was amended by Act LXV of 1952, expressly provided that the Act shall cease to have effect on January 26, 1955, except as respects things done or omitted to be done before that date, and s. 6 of the General Clauses Act, 1897, shall apply upon the expiry of this Act as if it had then been repealed by a Central Act. Evidently, the Legislature has contemplated that in respect of things done or omitted to be done, s. 6 of the General Clauses Act, 1897, shall apply, and it is not disputed that if s. 6 applies, the prosecution of the accused could be commenced and continued notwithstanding the repeal of the Essential Sup-

plies (Temporary Powers) Act, 1946. The learned Government Pleader invited our attention to the Essential Commodities Act, 1955, which repealed the Essential Commodities Ordinance, 1955 (I of 1955) and other laws in force immediately before the commencement of the Act, in so far as such laws controlled or authorised the control of the production, supply and distribution of, and trade and commerce in, any essential commodity, and also to the provision of sub-s. (2) of s. 16 thereof which continued in force any appointments made, licence or permit granted or direction issued under any such order and in force immediately before the commencement of the Act. It is unnecessary for us to consider whether, by reason of the Essential Commodities Act, 1955, the penal provision of the Essential Supplies (Temporary Powers) Act, 1946, may be deemed to remain in operation, because, in our view, the Essential Supplies (Temporary Powers) Act itself contained a provision which kept alive the penal provision even after the Act lapsed on January 26, 1955.

On the view taken by us, the order of acquittal passed by the trial Magistrate must be set aside. We, therefore, convict accused No. 1 for the offence under s. 7 of the Essential Supplies (Temporary Powers) Act, 1946, read with cl. 21(3)(c) of the Cotton Textiles (Control) Order, 1948, read with Government Notification No. SRO-609, dated April 27, 1951. We convict accused Nos. 2 and 3 for the same offence read with s. 9 of the Essential Supplies (Temporary Powers) Act, for contravention of the same provision. We sentence each of the accused to pay a fine of Rs. 1,000. Fine to be paid within a fortnight. Accused Nos. 2 and 3, in default of payment of fine, to suffer rigorous imprisonment for three months each.

In the companion appeals, for the reasons stated in the judgment in the principal appeal, the same orders are passed.

Order set aside.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Naik.

JOHN SERVAGE PHILIP v. THE CITY OF NAGPUR CORPORATION.*

City of Nagpur Corporation Act (II of 1950), Secs. 57, 58, 58-A, 84, 20A—C. P. and Berar Local Fund Audit Act—Corporation passing resolution to send at its expense delegates at Health Conference in England—Whether resolution beyond powers of Corporation and, therefore, ultra vires—Right of Corporation to incur expenditure—Court's power to issue writ of mandamus or other appropriate writ or order.

The City of Nagpur Corporation passed a resolution at a meeting of the Corporation accepting an invitation received from the Secretary of the Royal Society for the Promotion of Health, London, requesting it to send delegates at the Health Conference of representatives of Commonwealth countries to be held in England. In pursuance of an order of the Government of India allotting foreign exchange for meeting the expenses out of India for two delegates it was decided to send two delegates to the Conference at the expense of the Corporation. On the question whether the City of Nagpur Corporation Act, 1948, conferred a power upon the Corporation to expend money on the object involved in the resolution passed by the Corporation:—

Held, that the resolution of the Corporation which permitted the incurring of expenditure for sending delegates to the Conference was beyond the powers of the Corporation and was, therefore, *ultra vires*.

Quære: Whether the Corporation was competent to pass a resolution at all selecting delegates for attending the Conference at their own costs.

Section 58(s) of the City of Nagpur Corporation Act contemplates that there must

*Decided, April 23, 1959. Special Civil Application No. 100 of 1959.

be a reasonable and legitimate connection between what is sought to be done and the promotion of public health, safety and convenience of the public.

Under s. 58(c) of the Act the further educational facilities are those intended for the people in general living within the limits of the Corporation. This section, therefore, cannot be interpreted as permitting expenditure by the Corporation for providing special educational facilities to its Councillors.

Mere sanctioning of an expenditure which is of a special nature by the Corporation is not enough. Either the amount proposed to be spent should be included in the budget [s. 84] or should be expressly sanctioned by the Standing Committee [s. 84, proviso (a)]. If it is not included in the budget or if it is not expressly sanctioned by the Standing Committee, the expenditure would be unauthorised.

Every Municipal Corporation is entitled to spend money only when the power to do so is expressly conferred upon it by the Act bringing the corporation into existence, or is necessarily implied from any power expressly granted by the Act or is essential to the object for which the corporation is created.

There must be a substantial compliance with the Constitutional or statutory provision as to the right of the municipal corporation to incur expenditure. Such power is to be exercised by the authority named in the Act and by no one else.

The statutory provision prohibiting the incurring of expenditure out of the municipal fund without prior appropriation cannot be transgressed.

Where money is sought to be expended outside the Corporation limit, a very strong case must be made by the Corporation to show that the incurring of this expenditure was essential to the due performance of its duties by the Corporation and that it was bound to result in benefit to the people living within the municipal limits of the Corporation.

The Queen v. Mayor & Town Council, Liverpool,¹ *Att. Gen. v. Manchester Corporation*,² *Tynemouth Corporation v. Attorney General*³ and *James v. Seattle*,⁴ referred to.

Courts may not inquire into the unreasonableness or reasonableness of a municipal act or ordinance but reasonableness of municipal action is subject to review and inquiry by the Courts.

Under the C. P. and Berar Local Fund Audit Act it is only the Examiner of Local Fund Accounts who can take the initiative and report that an expenditure has been wrongly incurred or a payment has been wrongly made by members of the Municipal Corporation voting on a resolution for incurring such expenditure or making such payment. Under the Act no citizen is entitled to move the Government to take action against the members of the Corporation who had voted for the resolution, to refund the amount.

The requirement of a demand by a person who seeks the issue of a writ of *mandamus* is necessary where that person seeks to compel a public authority or a public body to perform its duties under the statute.

If the Court comes to the conclusion that the petitioner is entitled to have his grievance removed, then it has the power to issue an appropriate writ or order though it may not strictly be a writ of *mandamus*.

Rashid Ahmed v. Municipal Board, Katrana,⁵ referred to.

The facts appear in the judgment.

S. G. Kukde, for the petitioner.

M. N. Phadke and *V. M. Golwalkar*, for respondent No. 1.

N. L. Abhyankar, Special Government Pleader, for respondent No. 2.

MUDHOLKAR J. The City of Nagpur Corporation passed a resolution at a meeting held on March 18, 1959, accepting an invitation received from the Secretary of the Royal Society for the Promotion of Health, London, requesting it to send delegates at the Health Conference to be held at Harrogate,

¹ 41 L. J. Com. Law 175.

² 75 L. J. Ch. 330.

³ [1899] A. C. 293.

⁴ American States Report 79, 957.

⁵ [1950] A.I.R. S.O. 163.

Yorkshire, from April 27 till May 1, 1959. The Corporation decided to send the following four persons as delegates to that Conference:—

- (1) Shri Madan Gopal Agarwal, Councillor,
- (2) Shri O. V. Deshmukh, Councillor,
- (3) Dr. D. W. Duragkar, Councillor,
- (4) Shri D. J. Madan, Municipal Commissioner.

Apparently the Corporation was not quite sure whether it could send delegates to that Conference at its expense. It, therefore, addressed a letter to the State Government, requesting it to grant sanction for the expenditure which will have to be incurred for sending the aforesaid delegates to the Conference. On April 4, 1959, the Government sent a reply to the Corporation in which, amongst other things, it was stated that there does not appear to be any provision in the Act or the rules under which the sanction of the Government was necessary and that it presumed that only a formal approval of the Government was sought for by the Corporation. The Government then stated that it had no objection to one delegate being sent to attend the Health Congress and that it approved of an expenditure of Rs. 4,000 in respect of it from the municipal fund. Thereafter the Corporation again moved the Government for reconsidering the matter and it would appear that eventually the Government agreed to the original proposal of the Corporation to send four delegates. Accordingly the Government recommended to the Government of India to release sufficient foreign exchange for meeting the expenses of the delegates out of India. The Government of India, however, sanctioned only 200 pounds and said that this was to enable the Corporation to send two delegates. Now, in the original resolution which was passed by the Corporation the names of the four delegates were set out in the order in which they were to go in case it was decided that all the delegates should not go. In pursuance of the order of the Government of India allotting foreign exchange for meeting the expenses out of India for two delegates, only the first two delegates viz. Shri Agarwal and Shri Deshmukh were to be sent to the Congress.

The petitioner, who claims to be a citizen of Nagpur, came to know of this on April 19, 1959, from newspaper reports and on the next day, i.e. on the 20th, he preferred an application to this Court under art. 226 of the Constitution for the issue of an appropriate writ, order, or direction, restraining the Corporation from carrying out the resolution of March 18, 1959. After the petition was admitted by us we issued a temporary injunction restraining the Corporation from giving effect to the resolution pending decision of the petition before us. We also directed that the petition shall be heard on the 22nd.

The Corporation has filed its return and has raised several contentions. We will only refer to those contentions which were pressed in the argument before us by Mr. M. N. Phadke, who appears for the Corporation.

The first contention which Mr. Phadke raised was that the petition has been delayed, that money has actually been placed at the disposal of two delegates who are supposed to go, and probably the passages have also been booked for the two delegates. We realize that there is not much time left for the delegates to leave. Mr. Phadke says that they would have to leave Bombay today by air to enable them to attend the Congress. Even so, we do not think that this is a case where the petitioner has been guilty of any laches or inaction. It is no doubt true that soon after the resolution in regard to this matter was passed by the Corporation, the news was flashed in the local newspapers, but it was also known that the Corporation had sought the sanction of the Government. It was also known to the people that foreign exchange was to be made available by the Reserve Bank and for that purpose the Government of India's orders were necessary. It seems that the petitioner did not expect that the proposed move of the Corporation would be accepted by the Government of

Bombay or the Union Government. In these circumstances we do not think that the delay is inexcusable. We, therefore, overrule Mr. Phadke's first contention.

The second contention of Mr. Phadke, which is also in the nature of a preliminary objection, is that another remedy is open to the petitioner. That remedy is said to be to move the Government to take action against the members of the Corporation who voted for the resolution to refund the amount under the C.P. and Berar Local Fund Audit Act. Now, under this Act the Examiner of Local Fund Accounts is empowered to report to the Commissioner that an expenditure has been wrongly incurred or a payment has been wrongly made. When such a report has been made the Commissioner has power to require those members of the Corporation or a local authority who voted for incurring such expenditure or making such payment to refund that amount to the Corporation or the local body. There does not appear to be any provision in the Act under which a citizen is entitled to move the Government. Under the Act the initiative can be taken only by the Examiner of Local Fund Accounts and no one else. In these circumstances it cannot be said that another remedy was open to the petitioner.

The arguments were closed yesterday, but today Mr. Phadke has made another point. It is this: The petitioner, according to him, is in fact seeking a writ of *mandamus*, and since there has been no prior demand by the petitioner from the Corporation, it is not open to him to ask for the issue of such a writ. Now, the requirement of a demand by a person who seeks the issue of a writ of *mandamus* is necessary where that person seeks to compel a public authority or a public body to perform its duties under the statute. In the instant case what the petitioner is seeking is not a demand for the performance of a duty but the issue of an appropriate writ, order or direction restraining a public body from doing an act which, according to him, is in contravention of the statute which has brought it into existence. Therefore, strictly speaking, what the petitioner is seeking is not a writ of *mandamus*. Now, in *Rashid Ahmed v. Municipal Board, Kairana*¹ a person was prohibited by an order of the Municipal Committee from carrying on a trade within the municipal limits. He made a petition to the Supreme Court under art. 32 of the Constitution for enforcing his fundamental right to carry on his business, which according to him was completely stopped by the municipal body. One of the contentions raised before the Supreme Court by the Advocate General of Uttar Pradesh was that the petitioner had an adequate remedy by way of appeal and that, therefore, the Supreme Court should not grant any writ in the nature of prohibition, *mandamus* or *certiorari*. Dealing with the argument their Lordships observed (p. 165):—

"...There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs but the powers given to this Court under Art. 32 are much wider and are not confined to issuing prerogative writs only."

Then their Lordships proceeded to observe (p. 165):—

"We are satisfied that in this case the petitioner's fundamental rights have been infringed and he is entitled to have his grievance redressed. The proper order in such circumstances would be to direct the respondent Board not to prohibit the petitioner from carrying on the trade of whole-sale dealer and commission agent of vegetables and fruits within the limits of the Municipal Board of Kairana..."

It would thus be clear that if the Court comes to the conclusion that the petitioner is entitled to have his grievance removed, then it has the power to issue an appropriate writ or order though it may not strictly be a writ of *mandamus*. Apart from that, we would like to point out that on the same day on which the petitioner presented the petition, another petitioner, Govind Mahadeo Khode, also presented a similar petition in which he asked for an

identical relief. On April 16, 1959, this person served a notice on the Corporation calling upon it to cancel its previous resolution and to desist from sending the delegates named in the resolution of March 18, 1959, to attend the Harrogate Congress. This petition was not admitted by us for the simple reason that whatever the petitioner wanted to be enquired into there could be enquired into in the present petition. Therefore, even if we uphold Mr. Phadke's contention, the most that can happen is that we would dismiss the petition but then we would be entitled to take into consideration the other petition and if we think that the contentions are right we can issue not only a writ of *mandamus*, if we can issue such a writ in that petition, but also any other writ, order or direction. For these reasons we overrule Mr. Phadke's third preliminary objection.

Coming to the most important question which is involved in this petition, we would like to state that it is settled law that every municipal corporation is entitled to spend money only when the power to do so is expressly conferred upon it by the Act bringing the Corporation into existence, or is necessarily implied from any power expressly granted by the Act or is essential to the object for which the Corporation is created. What we have, therefore, to see is whether the City of Nagpur Corporation Act confers a power upon the Corporation to expend money on an object such as the one which is involved in the resolution of March 18, 1959.

Chapter V of the City of Nagpur Corporation Act deals with "powers, duties and functions of the Municipal Authorities". These duties are divided into two categories, obligatory and discretionary. Section 57 sets out the obligatory duties, s. 58 sets out the discretionary duties. In addition to this classification, s. 58-A empowers the State Government to entrust either conditional or unconditional functions in relation to any matter specified in the Schedule or in relation to any other matter to which the executive authority of the State extends or in respect of the powers of the State Government or the Central Government. These are thus the only duties which the Act lays upon the Corporation. Of course, as already stated, for the performance of these duties the Corporation will also be bound to perform certain duties which were essential to secure the performance of the duties expressly cast upon it. The Corporation would likewise have the power to do all that is necessary to ensure the due performance of its duties. There is another principle which is also well settled and which must be borne in mind while dealing with the contentions raised before us. That principle is that there must be a substantial compliance with the Constitutional or statutory provision as to the right of the municipal corporation to incur expenditure. Such power is to be exercised by the authority named in the Act and by no one else. The third principle which is to be borne in mind is that the statutory provision prohibiting the incurring of expenditure out of the municipal fund without prior appropriation cannot be transgressed. Here we have got s. 84 of the Act which provides that no payment of any sum shall be made out of the municipal fund unless the expenditure of the same is covered by a current budget grant and a sufficient balance of such budget grant is still available. There is, no doubt, a proviso to this section which excepts certain expenditure from the prohibition enacted in the section. But then it has to be established that the expenditure falls within the exception.

It is not disputed that no duty is cast upon the Municipal Corporation either under s. 57 or under s. 58, or under s. 58-A, requiring it to send delegates to any conference. Mr. Phadke's contention, however, is that it is implicit in the powers of the Corporation to do all such things as are necessary for ensuring a satisfactory exercise of its duties under the Act and that sending delegates to conferences such as the one in question must be deemed to be in the exercise of that power. He says that the Corporators upon whom is laid the duty of providing various amenities to the people by making improvements

of different kinds in the government of the city would require the necessary knowledge and information for securing this end. He says that the two corporators going as delegates will learn a good deal about various matters concerning public health and on their return they will enlighten the other corporators about the modern trends of thoughts and activities in the sphere of public health and would be able to suggest what improvements should be made and what new amenities should be supplied to the people of Nagpur. The Corporation will thus be in a much better position to judge as to what should be done in the City of Nagpur. We would, however, like to state that there must be some legitimate and reasonable connection between what is sought to be done and what is required or permitted by the statute to be done by the Corporation in order to justify the act.

Dealing with this aspect of the matter the law has been summarised thus in 64 Corpus Juris Secundum at Note 1835 (p. 334):—

"There is no universal test for distinguishing between a purpose which is public or municipal and, therefore, a proper object of municipal expenditure and one which is private and, therefore, an improper object to which to devote public money. Each case must be decided in the light of the existing conditions, with respect to the objects sought to be accomplished, the degree and manner in which that object affects the public welfare, and the nature and character of the thing to be done;..."

A question somewhat similar to the one which is before us has also been before the State Courts in the United States of America. That question was whether a municipality may lawfully provide for payment of expenditure of delegates attending conferences of municipal institutions. On this question there has been a divergence of judicial opinion in the Courts of that country. Some Courts have held that disbursement of money for such purpose is outside the powers of the Corporation because the connection between that purpose and the duties cast upon the Corporation is too remote. On the other hand, it has been held by some other Courts that disbursement of money for such purpose is within the competence of the corporation. In one of these cases it has been held that the expenditure incurred reasonably by municipal authorities to learn the manner in which complex municipal problems concerning government and other capacities of the municipality are solved is for public purpose. Here the delegates are not going to attend a conference of other municipal authorities, but to attend a public Health Congress of representatives of Commonwealth countries. The invitation, which has been extended to the Corporation, says that this Congress is presided over by a certain Peer and that delegates representing all aspects of public health are expected to meet there to discuss subjects of common interest. It also states that next year (i.e. 1959) a Radiation section dealing with radiation levels and nuclear power stations will be included for the first time, thus providing for a platform for the discussion of a rapidly developing subject of particular public health importance. The invitation says that there will be a Health Exhibition associated with these functions which will enable the delegates to see at first hand the latest equipment and products of many leading manufacturers as well as displays by Government Departments and trade and research organisations.

It will thus be seen from this invitation that the subjects which will be dealt with and discussed at the Congress are highly technical. It is questionable whether there is any ground at all for a Corporation situate in the heart of India to be concerned about radiation. Apart from that, the invitation makes it clear that the subjects to be discussed there will be of "public interest" to members of the medical profession, engineers, architects, health officers, public health nurses etc. Therefore, it is clear that local bodies in India can but play only an insignificant part at this function. The knowledge to be gained or information to be obtained at the Congress must be of a kind which is capable, or reasonably capable, of being useful to the local authority which sends its delegate. It cannot be said that there is any reasonable con-

nection between the object which this Congress has in view and the duties which the Corporation has to perform in the city of Nagpur. No doubt, it appears from the invitation that delegates will be able to visit water supply undertakings, district heating schemes, sewage disposal works, housing schemes, homes for the aged, hospitals, health service centres, industrial rehabilitation units, etc. That however is only incidental to the main thing. Indeed, if it were to be granted that a Corporation will be able to do its duties better by sending delegates all over the world to see how similar problems are tackled elsewhere, the cost of it would be disproportionate to the benefit that is expected to be derived from such a tour. We may also point out that even the capacity of the Corporation to make use of the knowledge gained by its delegates to the aforesaid conference is extremely limited, and, therefore, that knowledge is not reasonably likely to result in any benefit to the Corporation. In the light of these circumstances no other conclusion but one can be reached and that is that there is no reasonable connection or no legitimate connection between sending delegates to a conference of this kind and the discharge of the duties cast upon the Corporation by the Act.

Mr. Phadke, however, contended that this is really a matter of opinion, and that as regards what is reasonable or what is not reasonable the Court cannot substitute its own judgment for that of the Corporation. For, certain duties are cast upon the Corporation by the Act, and it is for the Corporation to decide as to how to discharge their duties. It has been pointed out in Note 199 of 62, *Corpus Juris Secundum*, that discretionary action on the part of a municipality is subject to judicial review where the action is manifestly arbitrary or the discretion is clearly abused whether such action is within or without the limits of its discretionary power. No doubt, as a general rule Courts may not inquire into the unreasonableness or reasonableness of a municipal act or ordinance but it is accepted as a general rule that reasonableness of municipal action is subject to review and inquiry by the Courts. In Note 204 of the aforesaid volume it has been pointed out that in passing on the reasonableness of municipal ordinance and regulations, the Courts may consider the object to be accomplished, the means for its accomplishment and all the surrounding facts and circumstances. In determining the question the Courts are not bound by the form, but must look at the substance of things. Similarly, it has been pointed out in Note 205 that the Courts may review the acts of a municipality as to whether the act is within the power of the municipality and as to whether the power was legally exercised. The law is the same in England as would be apparent from the decisions in *The Queen v. Mayor & Town Council, Liverpool*,² *Att. Gen. v. Manchester Corporation*³ and *Tynemouth Corporation v. Attorney General*.⁴ In all these cases the Courts have reviewed the action of the Corporation and held that the expenditure incurred or sought to be incurred by the Corporation has no reasonable connection with the duties cast upon it by its charter or by the statute constituting it. Mr. Kukday, who appears for the petitioner, has brought to our notice an American case, *James v. Seattle*,⁵ which is very similar to the present case. In that case it was held that the expenditure incurred by the members of the City Corporation and connected with the municipal matter was not necessary expenditure incurred in the performance of the official duties and the citizen is not liable, therefore, to such expenditure. It was contended before the Court that the subjects of water works, street lighting, terminal facilities and other municipal matters come within the control of the city council and that members of the council are bound to use their best endeavours in behalf of the taxpayers, by giving them the best results in the most economical manner, and that it is the duty of councilmen to inform themselves concerning all matters which come before them, that they may act intelligently for the benefit

² 41 L. J. Com. Law 175.

³ 75 L. J. Ch. 330.

⁴ [1899] A. C. 293.

⁵ American States Report 79, 957.

of the city. Dealing with this argument the learned Judge observed:—

"It is true the members of the city council owe the public duty to the city to exercise their best faculties in its interest. The compensation of a member for his official duties as councillor may be determined and fixed, and cannot be changed during his incumbency of office. If the members of the council, upon their tour of inspection, were in the discharge of their official duties, the restriction upon additional compensation applies.

Judge Cooley in his work on Taxation, page 209, observes:

"In the construction of any grant of the power to tax made by the state to one of its municipalities, the rule which is accepted by all the authorities is, that it should be with strictness. The reasonable presumption is held to be that the state has granted in clear and unmistakable terms all it has intended to grant at all; and whatsoever authority the municipal officers assume to exercise, they must be able to show the warrant for in the words of the grant."

And we think the rule thus announced is the established one, and in consonance with all sound authority. The members of the city council are trustees. The body holds a trust for the inhabitants of the city. The terms of the trust are fixed by legislation, and no expenditure of money belonging to the city can be made without express authority, or implied authority by reason of a necessary granted power. Where this authority did not exist, the council is without power to authorize the payment of the claim against the city; and, upon sound principle, it cannot be conceded that the council had the power to authorize the payment of the claim of appellant."

Prima facie, therefore, where money is sought to be expended outside the Corporation limit, as is the case here, a very strong case must be made by the Corporation to show that the incurring of this expenditure was essential to the due performance of its duties by the Corporation and that it was bound to result in benefit to the people living within the municipal limits of the Corporation.

These reasons, therefore, compel us to hold that the proposed expenditure is not in connection with the performance of any of the duties laid upon the Corporation. We are aware of the provisions of s. 58, cl. (s), which provides that the Corporation has a discretion to provide for any matter other than the matter specifically set out in the section which is likely to promote public health, safety and convenience of the public. But this provision also contemplates that there must be a reasonable and legitimate connection between what is sought to be done and the promotion of public health, safety and convenience of the public. Taking part in the deliberation of a conference of technical men and experts in a foreign country may perhaps enable those who attend to increase their knowledge of how the problems are tackled in different countries, which are far more advanced than India. But the gaining of this knowledge cannot be said to be reasonably capable of promoting public health, safety and convenience of the public in Nagpur. Numerous conferences are being held in this country and elsewhere where delegates meet, sit and discuss and disperse, but it is well known that usually nothing comes out of this. It would be far better to spend that money or even a smaller amount on matters of which direct benefit can be received by the public than on sending delegates to attend conferences the benefit of which to the public is at best problematical. Of course, Mr. Phadke would say that this is again a matter of opinion. It seems to us, however, that this is not a matter in which there could be more than one opinion. The connection as we have said already, must be direct, reasonable and legitimate, and not a probable and a possible one, between the object sought to be achieved and the thing in general.

We are also aware of the provisions of cl. (c) of s. 58 to which Mr. Phadke indirectly referred. Under that provision the Corporation has discretion to provide for further educational facilities other than the establishment and maintenance of private schools. He suggested that educating the corporators would fall within this category. In our opinion, that is not what the Legislature intended to provide for. We have to bear in mind that so far as main-

tenance of primary schools is concerned, that is an obligation cast upon the Corporation, by cl. (s) of s. 57(1) of the Act. Now, primary schools had to be established by the Corporation for the benefit of the people living within the limits of the Corporation. The Legislature thought that the Corporation would be able to discharge this duty within the limits of its financial capacity and, therefore, it has made the performance of this duty obligatory. But as regards the other educational objects it has left to the discretion of the Corporation to provide facilities or not. It would, therefore, be clear that the facilities contemplated by this clause were those intended for the people in general living within the limits of the Corporation. It was not the intention of the Legislature to give discretion to the Corporation to provide for special educational facilities to its Councillors. If such a contention were to be accepted, then if any corporator wanted to join a college or school, the Corporation would be required to defray all the expenses. We cannot, therefore, interpret this clause as permitting expenditure by the Corporation over the education of its Councillors. We cannot, therefore, accept Mr. Phadke's explanation that the proposed expenditure would fall directly within this clause.

Then we have to see whether there is any provision in the budget regarding this matter. We will concede that the Corporation has had no notice of this ground which is a point which we ourselves raised at the outset. Mr. Phadke, however, has been good enough to place before us the budget of the Corporation for the year 1959-60. We asked him to point out whether there has been any provision in the budget for the special expenditure of this kind. Mr. Phadke points out to item No. 53 which is described as "नागपूर महानगर पालिकेच्या माननीय सदस्यांना मत्ता" (allowance payable to the members of the City of Nagpur Corporation) and an amount of Rs. 34,770 has been allotted to this item. Mr. Phadke says that since the budget was passed subsequent to the resolution of March 18, 1959, the amount of expenses of the delegation must be deemed to have been included in this item. On the other hand, Mr. Kukday said that this item relates to an entirely different matter. He referred to the provisions of s. 20A of the Act which provides that the Corporation may with the previous sanction of the State Government pay each councillor such honoraria, fees or other allowances as may be prescribed by the Corporation under that section. He asserts that the Corporation has made a byelaw under which each member of the Corporation is entitled to get apart from the honoraria of Rs. 75 an allowance of Rs. 10 for every meeting of the Corporation which he attends. Mr. Phadke says that no such byelaw has been made. It may be that a byelaw is proposed to be made and, therefore, a provisional allotment for the expenditure has been made. However, we cannot say for certain, on the material before us, that this item relates to the payment of any allowances as suggested by Mr. Kukday. But, apart from that, it is necessary for us to be satisfied about the allotment or appropriation of money towards such expenses by the Corporation. The expenditure involved in this case is of a special nature and the Corporation should have been able to show affirmatively that it has been sanctioned either under s. 84 by its inclusion in the budget or under the proviso (a) to s. 84 by the Standing Committee. We asked Mr. Phadke whether there was any resolution of the Committee expressly sanctioning the expenditure, but he says that there is no such resolution. Mr. Kukday then pointed out that even the Corporation has not passed a formal resolution authorising the incurring of the expenditure involved in sending the delegates to the Congress. It will be necessary to set out the minutes of the meeting held on March 18, 1959, for the purpose of deciding this objection. The minutes are in Marathi and have been translated by both the petitioner and the Corporation. We would prefer to rely on the translation made by the Corporation. The Minutes as translated are as follows:—

"The General Meeting consider a letter dated 10-11-58 No. M/21-C-L of the Secretary of the Royal Society of the Health requesting the Nagpur Corporation to send

delegates for the conference which is going to be held from 27-4-1959 to 1-5-1959 at Harrogate, Yorkshire.

Shri Mishra suggested the following names in Serial No.

1. Shri Madan Gopal Agarwal.
2. " O. V. Deshmukh.
3. " D. W. Duragkar.
4. " D. J. Madan.

Shri Rajaram Singh Bhonsale, seconded the suggestion.

Shri Mishra then explained his suggestion. 'I suggested four names but if the Government sanction is necessary the names should be sent to the Government in S. No. in which I have suggested for the sanction of the Government if the Government gives permission to one delegate then Serial No. 1 should be sent first and if the Government gives permission to two then first two should be sent if three delegates be permitted to be sent then the first three and if all the four delegates be permitted to be sent then all the delegates be sent'...

After the above discussion the Mayor put the suggestion of Shri Mishra to vote. The Mayor declared that the suggestion of Shri Mishra was passed by a majority of votes of 30 voting for and 12 against the suggestion.

In this manner the Corporation decided that according to the serial order, Sarvasbhi Madan Gopal Agarwal, O. V. Deshmukh, Dr. Duragkar and Shri D. J. Madan, I.A.S., Municipal Commissioner, be sent as delegates from the City of Nagpur Corporation. If the proposal requires government sanction it be obtained early.

If the Government gives sanction to send four delegates then the four delegates be sent. If Government gives sanction to send delegates less than four then according to the serial order, 1, 2 or three, in this order, the sending of the delegates and meeting their travel expenses and the payment of the necessary fees to the conference etc. was passed by a majority of votes."

Now Mr. Kukday points out that the only resolution which was specifically put to vote was regarding the sending of four persons as delegates to the Congress and nothing else. This was the resolution which was proposed by one Shri Mishra and seconded by one Shri Bhonsale and was passed by a majority of 30 voting for and 12 against. There is no reference in the aforesaid resolution to the expenditure of money. Mr. Kukday concedes that the minutes do show that the Corporation has sanctioned by majority the expenses of the delegates, but he says that no such resolution was moved by anyone, seconded by anyone or put to vote. The minutes do not on their face show that such a resolution was moved, at any rate, put to vote, but the minutes do show that a resolution of this kind was passed at the meeting. In our opinion, the object of the meeting was to sanction the expenditure for the delegation and we think that it can be said that the Corporation has sanctioned it. However, mere sanction of the expenditure by the Corporation is not enough. Either the amount proposed to be spent should be included in the budget or should be expressly sanctioned by the Standing Committee. If it is not included in the budget or if it is not expressly sanctioned by the Standing Committee, it will have to be said that the expenditure is unauthorized.

Mr. Kukday urged very vehemently that the Corporation has acted *mala fide* in passing the resolution and in particular in selecting the four delegates. In our opinion, the circumstances which have been established in this case do not warrant the inference that the action of the Corporation was *mala fide*. It is no doubt true that the delegates who have been selected have no special qualifications, but it was within the competence of the Corporation to decide what persons should go. We, therefore, overrule the contention of Mr. Kukday as to the *mala fide* nature of the purpose.

No other contention now remains to be examined. Upon the view which we have taken, the resolution of the Corporation dated March 18, 1959, which permits the incurring of expenditure for sending delegates to the Congress is beyond the powers of the Corporation and is, therefore, *ultra vires*. We need not express any opinion in this case as to whether the Corporation was compe-

tent to pass a resolution at all selecting delegates for attending the congress at their own costs because no arguments were specifically advanced before us with regard to this point. We accordingly make the rule absolute in terms of the prayer in the petition. In the particular circumstances we think that costs of the petition should be borne as incurred.

Rule made absolute.

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Patel.

STATE v. CHINUBHAI HARIDAS SHETH.*

Indian Penal Code (Act XLV of 1860), Sec. 304A—Rash and negligent act of accused causing death—Whether such act or illegal omission could be a remote cause of death under section 304A.

Under s. 304A of the Indian Penal Code, 1860, the rash or negligent act of the accused which causes the death of the victim must be the immediate or proximate cause of death and not any act or illegal omission which can be said to be a remote cause of death.

*Emperor v. Omkar,*¹ referred to.

THE facts appear in the judgment.

V. H. Gumaste, Assistant Government Pleader, for the State.

Rajni Patel, with *Vithalbhai B. Patel*, for accused No. 1.

M. N. Thakkar, for accused No. 2.

B. G. Thakore and *K. M. Desai*, for accused No. 4.

Y. S. Murudkar, (appointed) for accused No. 3.

SHAH J. This is an appeal against an order passed by the Judicial Magistrate, First Class, Broach, acquitting the accused who were tried before him in Criminal Case No. 3148 of 1955 for offences under s. 304A and under s. 304A read with s. 109 of the Indian Penal Code.

In the town of Broach there is a factory known as the Gopal Mills which manufactures cotton textiles. Accused No. 1 is the occupier of that mill, accused No. 2 is the manager of that mill, accused No. 3 was in charge as manager on July 4, 1955—the date of the offence—and accused No. 4 is an engineer of the mill. In the factory a purification plant is installed. On July 4, 1955, a valve pit in the purification plant stopped functioning, and one Fakirji who was attending to the plant asked one Melia Dadla, a labourer, to enter the pit for opening the valve. Melia Dadla who entered the pit with a crow-bar was overpowered by poisonous fumes and became unconscious. Fakirji, finding that Melia Dadla had become unconscious, himself entered the pit and he was also overpowered by the poisonous fumes. Three other persons also entered the pit and they also lost consciousness. The Municipal Fire Brigade at Broach was then contacted, and one Mr. Tanna, Superintendent of the Fire Brigade, arrived on the scene. Mr. Tanna entered the pit where the five workmen were lying unconscious on the floor of the pit. He brought out two of them, but in the process he himself was overpowered by the fumes and became unconscious. The other three labourers were also brought out, and all the five labourers and Mr. Tanna were rushed to the Civil Hospital. All the five labourers died, but Mr. Tanna survived. Thereafter a charge-sheet was lodged against Chinubhai Haridas

*Decided, April 27, 1959. Criminal Appeal No. 438 of 1957, against the order of acquittal passed by M. A. Baqui, Joint Civil Judge, Junior Division and Judicial Magistrate

First Class, Broach, in Criminal Case No. 3148 of 1955.

1 (1902) 4 Bom. L.R. 679.

Sheth, the occupier of the Factory, who will hereafter be referred to as accused No. 1 for offences under sub-ss. (3) and (4) of s. 36 of the Factories Act, 1948. Accused No. 1 was tried in Criminal Case No. 2890 of 1955 by the Judicial Magistrate, First Class, Broach, for those offences. The learned Magistrate acquitted accused No. 1 of those offences. Against the order of acquittal the State of Bombay preferred Criminal Appeal No. 365 of 1957. That appeal was heard by Mr. Justice Vyas and Mr. Justice Palnitkar on August 1, 1957,[†] and the learned Judges set aside the order of acquittal passed by the trial Court and remanded the proceeding for investigation of a complaint under s. 101 of the Factories Act by accused No. 1 against S. D. Vashistha and Haribhai Tripathi—respectively the manager and engineer of the mill. We are informed at the Bar that special leave to appeal against the order of remand has been granted by their Lordships of the Supreme Court and the appeal is pending for decision.

In the meanwhile, a complaint under s. 304A of the Indian Penal Code was filed against the four accused charging them with having neglected to take all practicable measures to remove the fumes of dangerous gases from the pit of the purification plant in the mill premises and with having also neglected to provide the workers with suitable breathing apparatus and belts, and with failing to take the necessary precautions and thereby causing the death of Melia Dadla, Fakirji Dhanjishaw, Manilal Bechar, Chhotubhai Nathubhai and Maganlal Gordhandas. In the alternative, accused Nos. 3 and 4 were charged with having neglected to take all practicable measures to remove the fumes of the dangerous gases from the pit of the purification plant in the mill premises and with having neglected to provide the workers with suitable breathing apparatus and belts and with failing to take the necessary precautions and by doing these negligent acts causing the death of the aforesaid five persons and thereby committing an offence punishable under s. 304A of the Indian Penal Code; and accused Nos. 1 and 2 were charged with abetting accused Nos. 3 and 4 in the commission of the offence under s. 304A of the Indian Penal Code.

The learned trial Magistrate on the evidence held that it was not established that the four accused or any of them had neglected to take measures to remove the fumes of dangerous gases in the pit of the purification plant or had neglected to provide the workers with suitable breathing apparatus and belts. He held that merely because accused No. 1 did not maintain the breathing and reviving apparatus and belts and ropes he was not on that account exposed to the penalty prescribed for breach of the provisions contained in s. 36(4) of the Factories Act. In his view, the obligation to provide suitable breathing apparatus and reviving apparatus was not absolute but arose only when permission was granted by the management to any worker to enter the pit or when a person actually entered the pit after permission and not till then, and it was not obligatory upon the occupier of the mill or the management to maintain the apparatus near the valve pit at all times. On that view he declared that the accused were not liable to provide the apparatus near the pit before any permission to enter the pit was granted, and for the consequences which arose out of the failure to maintain the apparatus near the pit the accused could not be held liable.

The view taken by the learned trial Magistrate that there is no absolute obligation on the part of an occupier or manager of a factory to maintain the breathing and reviving apparatus near the pit has not been accepted by this Court in *State v. Chinubhai Haridas*.¹ It was held in that case that s. 36(4) of the Factories Act, 1948, imposes an obligation upon the manager or occupier of a factory to keep ready at all times, beside a confined space, suitable breathing apparatus, reviving apparatus, belts and ropes for instant use whether any person had entered the said space or not, whether the entry had been made

[†]See 59 Bom. L.R. 1155 (*State v. Chinubhai Haridas*) 1 (1957) 59 Bom. L.R. 1155.

with permission or not and whether any need for the use of these appliances arose in fact or not. The view taken by the learned trial Magistrate as to the nature of the obligation imposed upon the management of the factory cannot, therefore, on the view taken by this Court, be sustained.

But we are unable on the facts proved to hold the accused guilty of the offence under s. 304A of the Indian Penal Code. It is undisputed that none of the four accused was present at the scene when the workmen entered the pit. Melia Dadla was the first workman to enter the pit, and he was so directed by Fakirji. Fakirji then entered the pit and three other workmen followed him. It is not the case for the prosecution that any of the four accused had directed these five workmen to enter the valve pit, nor does there appear to be any reliable evidence on the record to show that it was even to the knowledge of any of the four accused that these workmen had entered the pit. Section 304A of the Indian Penal Code provides the penalty for causing death by negligence. Under that section whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished as provided therein. The evidence in this case does not justify the view that the accused had caused the death of the five persons who died on account of the poisonous fumes which had accumulated in the valve pit. In our view, the rash or negligent act which causes the death of the victim must be the immediate or proximate cause of death and not any act or omission which can be said to be a remote cause of death. The expression "act" does undoubtedly include unless the context otherwise warrants an illegal omission (vide s. 32 of the Indian Penal Code). But not only must the act or illegal omission result in death, but the death must have been the direct result of the act or illegal omission of the accused. It was held by this Court in *Emperor v. Omkar*² (p. 682):

"...to impose criminal liability on the accused [under section 304-A, Indian Penal Code] it is necessary that the death should have been the direct result of a rash and negligent act of the accused and that act must have been the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*."

In the present case, the death of the five workmen of the factory was not the *causa causans* of any act or illegal omission on the part of the four accused or any of them.

In our view, therefore, the order of acquittal passed by the trial Magistrate, must be upheld. We may, however, observe that in this case we are not concerned to deal with the question whether the four accused or any of them are guilty of an offence under s. 92 read with s. 36, sub-ss. (3) and (4), of the Factories Act, 1948. That question is pending for determination before their Lordships of the Supreme Court, and we are not called upon to decide that question, nor is any observation made herein intended to deal with the liability alleged to have been incurred by any of the accused for infringement of the provision of s. 36 of the Factories Act.

The order of acquittal passed by the trial Magistrate is confirmed and the appeal dismissed.

Appeal dismissed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Naik.

RAMKRISHNA RAMNATH BIDI MANUFACTURERS v. THE STATE INDUSTRIAL COURT, NAGPUR.*

Central Provinces and Berar Industrial Disputes Settlement Act (XXIII of 1947), Sec. 2(10)—Relaiwala whose name is entered in attendance register of bidi factory and who works in factory under supervision and control of management—Whether such relaiwala, whose work in factory consists of rebundling and wrapping bidis, an employee within s. 2(10).

A relaiwala, whose name is entered in the attendance register of a bidi manufacturing factory and who works in the factory under the supervision and control of the management, can be regarded as an "employee" within the meaning of that word as used in s. 2(10) of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947.

Dharangadhara Chemical Works Ltd. v. State of Saurashtra,¹ Chintaman Rao v. State of M.P.,² and Westall Richardson, Ltd. v. Rouleau,³ referred to.

THE facts appear in the judgment.

M. N. Phadke, with *V. M. Golwalkar*, for the petitioner.

N. L. Abhyankar, Special Government Pleader, for respondent No. 2.

S. P. Oke, for respondent No. 3.

NAIK J. This is a petition under arts. 226 and 227 of the Constitution of India for a writ of *certiorari* to quash the orders passed by the Additional District Magistrate and the State Industrial Court on April 29, 1958, and October 8, 1958, respectively.

The circumstances leading to this petition briefly stated are as follows: Respondent No. 3 Shamrao Kawdoo made an application to the Additional District Magistrate who was empowered to act as Labour Commissioner, complaining that he was wrongfully dismissed from service by the petitioner. According to him, he was dismissed from service with effect from July 19, 1956. The application was made under s. 16 of the C.P. and Berar Industrial Disputes Settlement Act. The petitioner contended that respondent No. 3 was not an employee in the factory, that he was working under one Shamrao Mahadeo and that there was no privity of contract between the petitioner and respondent No. 3. He further stated that he was prepared to re-employ respondent No. 3 provided the latter renounced his claim for backwages and also if he was agreeable to work under Shamrao Mahadeo. The Labour Commissioner came to the conclusion that respondent No. 3 was an employee of the petitioner and consequently directed him to reinstate respondent No. 3 and also to pay him backwages. The petitioner went up in revision to the State Industrial Court. The State Industrial Court upheld the decision of the Labour Commissioner. That is why the petitioner has now come to this Court under arts. 226 and 227 of the Constitution for quashing the orders of the two industrial Courts.

In the petition it was contended that the appointment of the Additional District Magistrate under s. 16(2) of the C.P. and Berar Industrial Disputes Settlement Act as Labour Commissioner was not valid inasmuch as the name of the person was not mentioned in this order. Mr. Phadke for the petitioner however did not press this objection before us. It was also contended in the petition that, as a matter of fact, respondent No. 3 was not dismissed from

*Decided, April 30, 1959. Special Civil 2 [1958] A.I.R.S.C. 388.

Application No. 405 of 1958.

3 [1954] 2 All E.R. 448.

¹ [1957] S.O.R. 152.

service, that he himself deliberately remained absent from July 19, 1956, to July 31, 1956, and that is why his name was removed from the attendance register. The Labour Commissioner, however, recorded a finding that respondent No. 3 was discharged from service and this finding was upheld by the State Industrial Court. Mr. Phadke conceded that it will not be open to him to challenge this finding before this Court in its jurisdiction under art. 226 of the Constitution. Mr. Phadke, therefore, confined his attention to two points as follows. The Labour Commissioner has not recorded any finding as to whether respondent No. 3 was actually in the employment of the petitioner. This was a question of fact, and it was the duty of the Labour Commissioner as a fact finding Court to record a clear finding on that question. Secondly, he complained that the Labour Commissioner and the State Industrial Court have misunderstood the meaning and scope of the definition of "employee" as contained in s. 2(10) of the Act.

It is not in dispute that the name of respondent No. 3 was entered in the attendance register of the factory. It was the specific case for the petitioner that his name was taken off the register because of his continuous absence from duty for more than two weeks. Presumably, the attendance register was maintained under the provisions of the Factories Act. No explanation has been offered on behalf of the petitioner as to why respondent No. 3's name was entered in the register. It is contended for the petitioner that respondent No. 3 was working under one Shamrao Mahadeo who was a *Belaiswala* and that there was no privity of contract between respondent No. 3 and the petitioner. It was further suggested that respondent No. 3 was receiving his wages through Shamrao Mahadeo. If that be the correct position, then it is difficult to understand why the petitioner should think of enrolling the name of respondent No. 3 in the attendance register.

In this background let us turn to consider the arguments addressed by Mr. Phadke on behalf of the petitioner. He complained that the Labour Commissioner has attached a sort of presumptive value to the entry in the attendance register and not considered other evidence led in the case with a view to find out whether, as a matter of fact, respondent No. 3 was in service of the petitioner or not. It is mainly on this ground that Mr. Phadke suggested that, as a matter of fact, there was no finding on the essential question of fact recorded by the Labour Commissioner. There is no substance in this line of reasoning. It is true that the Labour Commissioner has attached considerable importance to the entry of respondent No. 3's name in the attendance register. As suggested above, the register must have been maintained under the provisions of the Factories Act. Section 62 of the Act makes it obligatory on the part of the manager of a factory to maintain a register of adult workers to be available to the Inspector for inspection. It also contains particulars which are required to be entered in regard to each of the workers. It is impossible to believe that the petitioner would enter the name of a person who was not really an employee or a worker, in this register. Mr. Phadke suggested that the name of respondent No. 3 may have been entered in the register with a view to avoid criminal liability that fastens on the factory manager for non-compliance with the provisions of s. 62. In the first place, such an explanation was not offered by the manager who was examined for the petitioner. Secondly, the explanation is neither logical nor satisfactory. The Labour Commissioner, in our opinion, was justified in raising a presumption in favour of respondent No. 3 to the effect that the latter was employed and, therefore, his name came to be entered in the attendance register.

The first two issues framed by the Labour Commissioner were as follows:—

- (i) Whether the applicant is an employee of the non-applicant's bidi works.
- (ii) Whether the applicant was working under Shamrao Mahadeo.

The Labour Commissioner recorded a finding in the affirmative on the first issue mainly on the basis of the entry in the attendance register. There is nothing in the evidence led for the petitioner which goes to vitiate this finding.

As regards the second issue, the Labour Commissioner has said that in view of the finding on the first issue it was not necessary to record any finding on the second issue. It is because of the sentence to the above effect that Mr. Phadke complained that the Labour Commissioner has failed to record a finding on the second issue. There is no substance in this grievance.

The Labour Commissioner has proceeded to examine the second issue in some details and has arrived at his own finding, although at the initial stage he said that no finding was necessary. It is true that he has not written a well-reasoned judgment in support of his finding. It would, however, be highly improper on our part to send back the case to the Labour Commissioner either for re-writing the judgment or for dotting the 'i's and crossing the 't's. The petitioner has not led satisfactory evidence to show that respondent No. 3 was really working under Shamrao Mahadeo. Shamrao Mahadeo was cited as a witness but was not examined for the petitioner. We cannot, therefore, accept the solitary statement of Venkatrao, the manager of the petitioner's factory, to the effect that respondent No. 3 was really working under Shamrao Mahadeo, particularly because no satisfactory explanation has been offered as to why the name of respondent No. 3 came to be entered in the attendance register. It is also significant that the petitioner had given an offer to respondent No. 3 for taking him back in service although that offer was made on certain stipulations and conditions. The very fact that such an offer was made suggests that respondent No. 3 was in the service of the petitioner.

That takes us to the question of law, viz. whether respondent No. 3 can be regarded as an 'employee' within the meaning of that word as used in the C.P. & Berar Industrial Disputes Settlement Act. Section 2(10) defines 'employee' to mean any person employed by an employer to do any skilled or unskilled manual or clerical work for contract or hire or reward in any industry. There are thus three ingredients in this definition: (i) there is an employer; (ii) he employs a person in the industry to do certain kind of work and (iii) the person has to work for contract or hire or reward. Mr. Phadke argued that the nature of work entrusted to the *Relaiwalas* is such that it does not involve any relationship of master and servant, that the work is in the nature of an independent contract and that the payments are made on piece-rate basis. He, therefore, argued that even assuming that respondent No. 3 was working in his own right still he would not be covered by the definition of 'employee' contained in s. 2(10) of the Act. In this connection he relied upon two decisions of the Supreme Court viz. *Dharangadhara Chemical Works Ltd. v. State of Saurashtra*¹ and *Chintaman Rao v. State of M.P.*² In the first case their Lordships were dealing with the definition of 'workman' in the Industrial Disputes Act, 1947. The question in that case was whether a class of professional labourers known as *agarias* who carried on the work in certain seasons of manufacturing salt in certain pieces of land and who are paid on the basis of volume of salt manufactured by them were workmen. Their Lordships held that such persons must be considered as workmen within the meaning of s. 2(s) of the Industrial Disputes Act. Mr. Justice Bhagwati, who delivered the judgment of the Court, emphasised that the real test to find out whether a particular person is a workman or not, is to see whether the relationship was that of master and servant. His Lordship also pointed out that the main distinction between a workman and an independent contractor would largely turn on consideration of the question as to whether the work was controlled by the manufacturer. In the other case (*Chintaman Rao v. State of M.P.*) their Lordships were considering the definition of 'worker' as contained in s. 2(1) of the Factories Act. It was held by their Lordships in that case that a contractor is a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons without submitting himself to their control in respect to the details of the work. They further pointed out that the identifying mark of a workman is that he should be under the control and supervision

1. [1957] S.O.R. 152.

2. [1958] A.I.R. S.C. 388.

of the employer in respect of the details of the work. The facts of that case were as follows. The contractor was to receive tobacco from the management and he was to supply them rolled in bidis for a certain fixed price. He was not under the control of the factory management and he could manufacture bidis wherever he pleased. The management could not regulate the manner of discharge of his work. His liability was discharged by his supplying bidis and delivering them in the factory. The terms of the contract between the management and the contractor did not enjoin on the latter to work in the factory. On these facts it was held that the contractor was not employed by the management as worker but was only independent contractor who performed his part of the contract by making bidis and delivering them at the factory. Mr. Justice K. Subba Rao, who delivered the judgment of the Court, referred to the earlier decision of the Supreme Court and relied on the observations cited above. In the course of his judgment Mr. Justice Subba Rao has referred to another part of work which is carried on in a bidi factory. That process was described by him in the following terms: After the bidis are brought by Sattedars to the factory they are to be rebundled and wrapped after attaching labels. This process is generally carried out in the factory by the coolies or workmen employed by the management and these coolies work directly under the control and supervision of the factory management. It appears to us that respondent No. 3 was engaged in a process similar to the one which fell within the second part described by Mr. Justice Subba Rao in his judgment.

Mr. Phadke also referred to a decision in *Westall Richardson, Ltd. v. Roulson*³. In that case the definition of the word 'worker' as contained in s. 23(1) of the Wages Councils Act, 1945, came up for construction. Vaisey J. in the course of his judgment pointed out that the word 'employee' has always a relation to the word 'employer'. On the facts before him he came to the conclusion that the person who was claiming the benefit of all holidays and holiday pay under the Wages Councils Act, could not be regarded as a worker within the meaning of that expression because the work which he was doing was an independent type of work over which the employer had no kind of control and that the element of independence and freedom was far greater than the element of servitude. We are unable to understand as to how this decision assists Mr. Phadke in his argument. On the facts as disclosed in the record of this case, as stated above, the process of work in which respondent No. 3 was engaged was the process carried out in the factory and further was carried out under the supervision and control of the management. On this point we would simply refer to the admission of Venkatrao who stated

"There is a supervision and control over the Relai workers. Even though the Relai workers do work on a contract basis yet they have to do work according to our supervision and under our control."

Respondent No. 3 stated that he used to receive payment either through Shamrao Mahadeo or himself. The admission of the manager coupled with the circumstances that the name of respondent No. 3 was entered in the attendance register clearly establishes that there was relationship of master and servant between the petitioner and respondent No. 3.

The result is that the petition fails and is dismissed with costs. Rule discharged.

Petition dismissed.

Before Mr. Justice Shah and Mr. Justice Patel.

YAMUNABAI HARIHAR PANDIT v. RAM MAHARAJ SHREEDHAR MAHARAJ PANDIT.*

Hindu Succession Act (XXX of 1956), Secs. 4, 14, 5—Widow of last male holder of Inam property recognised as Navawali of property by former Kolhapur State—Defendant adopted by widow in 1949 without obtaining sanction to adoption from Kolhapur authorities—Plaintiff, another widow of deceased holder, inheriting property—Defendant granted ex post facto sanction to his adoption in 1958—Whether defendant could divest plaintiff's title to property acquired under s. 14—What is possession contemplated by s. 14.

The last male holder of certain Inam property died leaving him surviving his two widows, A and the plaintiff, but no lineal descendants. A was recognised as the Navawali of the property by the former Kolhapur State. On March 14, 1949, defendant No. 1 was adopted by A as a son to her deceased husband. A died on March 18, 1949, and the plaintiff became entitled by inheritance to the property as the sanction of the Kolhapur State authorities to the adoption of defendant No. 1 was not obtained. On June 6, 1958, defendant No. 1 was informed by the Government of Bombay that orders granting sanction *ex post facto* to his adoption by A on March 14, 1949, were issued. Defendant No. 1 relying on this sanction claimed the property as the adopted son. The plaintiff contended that on A's death the property had devolved upon her by inheritance and as she had acquired rights of full ownership in the property on the coming into force of the Hindu Succession Act, 1956, on December 21, 1956, defendant No. 1 could not divest her of her title which was by law made absolute and indefeasible:—

Held, that the estate possessed by the plaintiff, which had become absolute by virtue of s. 14 of the Hindu Succession Act, was not liable to be divested on the grant of the sanction *ex post facto* to the adoption of defendant No. 1.

Balgonda Appanna v. Bhimgonda,¹ referred to.

A sanction *ex post facto* to an adoption may have the effect of divesting property vested in another person by inheritance from the sole surviving coparcener, or a limited owner, but that rule in so far as it is inconsistent with s. 14 of the Hindu Succession Act, 1956, is superseded by cl. (b) of s. 4 of the Act.

Full ownership contemplated by s. 14 of the Hindu Succession Act, 1956, is not subject to any incident of divestation by adoption.

The possession contemplated by s. 14 of the Hindu Succession Act, 1956, is legal possession and property in the wrongful occupation of a trespasser either directly or through his tenants is nonetheless possessed by a Hindu female within the meaning of s. 14 of the Act.

THE facts appear in the judgment.

F.A. No. 386 of 1955.

H. R. Gokhale and S. G. Patwardhan, for the appellant.

M. V. Paranjape, for the respondent.

F.A. No. 480 of 1955.

M. V. Paranjape, for the appellant.

H. R. Gokhale and S. G. Patwardhan, for the respondent.

SHAH J. By interlocutory judgment dated February 11, 1958, further hearing in these two appeals was adjourned to enable defendant No. 1 to apply to the State of Bombay for and obtain sanction *ex post facto* to his adoption. Defendant No. 1 then submitted an application to the State of Bombay for sanctioning his adoption *ex post facto*. Defendant No. 1 was informed by the Under Secretary to the Government of Bombay, Political and Services Department,

*Decided, March 24, 1959. Cross First Appeals Nos. 386 and 480 of 1955 (with Civil Application No. 1748 of 1958), against the decision of

P. K. Kute, Joint Civil Judge, Senior Division, Kolhapur, in Special Civil Suit No. 6 of 1952. 1 (1958) 61 Bom. L.R. 184.

by letter dated June 6, 1958, that orders granting sanction *ex post facto* to his adoption by Shri Annapurnabai, widow of late Bala Maharaj, on March 14, 1949, have been issued, and that defendant No. 1 may "approach the Collector of Kolhapur in that behalf". Defendant No. 1, then, applied for a certified copy of the order, but none was supplied to him. We are informed by Mr. Gokhale, who appears on behalf of the plaintiff, that his client—the plaintiff—also applied for a certified copy of the order, but a copy of the order has not been furnished to her. But on the intimation which has been received by defendant No. 1, we hold that an order sanctioning *ex post facto* the adoption of defendant No. 1 made on March 14, 1949, by Annapurnabai, widow of Bala Maharaj, was issued by the State of Bombay.

Mr. Gokhale contends that under the Vat Hukums issued by the Kolhapur State, no sanction *ex post facto* could be granted in respect of an adoption which took place after the year 1930. But in our judgment, it is now too late to entertain that contention having regard to the decisions of this Court. In a recent judgment, *Balgonda Appanna v. Bhimgonda*¹, it was observed by Mr. Justice Gokhale sitting with my learned brother (p. 185):

"...Under Political Agent Judi Niyam of Faal 1281, published in Volume 2 of the Kolhapur Vat Hukums, at p. 817, there was a provision under which the Kolhapur Darbar could accord sanction to adoptions which affected Inam properties. It appears from this Vat Hukum that the Kolhapur Government had power to accord *ex post facto* sanction to adoptions which were made without getting such a sanction."

In several decisions of this Court e.g. First Appeal No. 424 of 1952, Letters Patent Appeal No. 60 of 1955 and First Appeal No. 115 of 1958,[†] the privilege of the Kolhapur Government to accord sanction *ex post facto* to adoptions made initially without sanction, so as to invest title in respect of Inam properties, has been affirmed.

Mr. Gokhale submitted that even if the sanction was accorded by the State of Bombay upon which devolved the authority of the Kolhapur State, such a sanction will not divest the absolute title vested in the plaintiff by the Hindu Succession Act, 1956. To appreciate this contention, we may review the undisputed facts. Bala Maharaj, the last male holder of the property, died on January 6, 1937, leaving him surviving his two widows Annapurnabai and Yamunabai and no lineal descendants, and the revenue authorities of the Kolhapur State recognized Annapurnabai as the "Navawali" of the Inam properties. On March 14, 1949, defendant No. 1 was adopted by Annapurnabai as a son to her deceased husband. On March 18, 1949, Annapurnabai died, and to the estate of Annapurnabai, which included Inami lands, her co-widow Yamunabai became entitled by inheritance, because the sanction of the Kolhapur State authorities to the adoption of defendant No. 1 by Annapurnabai was not obtained. Proceedings were commenced before the revenue authorities for recognizing the claim of defendant No. 1 as the adopted son of Bala Maharaj, but the plaintiff resisted the claim, and the Collector of Kolhapur passed an order that the name of neither of the parties may be entered in the Revenue Record and that *status quo* be maintained till the decision of a civil suit adjudicating upon the claims of the parties. The plaintiff then filed on January 17, 1952, a suit in the Court of the Civil Judge (Senior Division), Kolhapur, for a declaration that she was the owner of the properties described in Schedules A, B, C and D annexed to the plaint and for an injunction restraining defendant No. 1 from collecting the rents and profits from his tenants, and also for a declaration that defendant No. 1 was not in fact adopted as a son to her husband by Annapurnabai. The suit was partially decreed by the trial Court. The trial Court held that defendant No. 1 was proved to be the duly adopted son of Bala Maharaj and that view was upheld by this Court by the interlocutory judgment dated February 11, 1958. It is after the decision of this Court that the Government of Bombay have sanctioned the

¹ (1958) 61 Bom. L.R. 184.

[†] *Abasaheb Vinayakrao Inamdar v. Shrid-*

harao Sakharamrao Bhirdikar, decided on November 20, 1957, by Shah and Gokhale JJ.

adoption *ex post facto* of defendant No. 1 made by Annapurnabai on March 14, 1949.

Defendant No. 1 as adopted son claims the Inami Lands of Bala Maharaj relying on the sanction to his adoption accorded by the State of Bombay, and in support of his claim he relies upon the decision of this Court in *Balgonda Appanna v. Bhimgonda*. In that case, the contention that since the Hindu Adoptions and Maintenance Act, 1956, was brought into force on December 21, 1956, a sanction *ex post facto* granted to the plaintiff's adoption by an order of the Government of Bombay dated June 26, 1957, was invalid and could not divest the estate which was vested in the defendant was negatived. It was held that as the adoption of the plaintiff took place long before the Act, s. 30 excluded the operation of the Act in its application to the adoption of the plaintiff.

The plaintiff contends that on the death of Annapurnabai, her estate which consisted of Inami lands has devolved upon her by inheritance, and since then the Hindu Succession Act having been brought into force on December 21, 1956, she has acquired rights of full ownership in the property, and relying upon an adoption made prior to December 21, 1956, defendant No. 1 cannot divest her of her title which is by law made absolute and indefeasible. Evidently in *Balgonda Appanna v. Bhimgonda* relied upon by defendant No. 1, the Court was not called upon to consider whether an estate, possessed by a Hindu widow which became absolute by virtue of s. 14 of the Hindu Succession Act, was liable to be divested on the grant of a sanction *ex post facto* to an adoption in the family to which the widow belonged.

There is no doubt that Inam property in the former Kolhapur State was inheritable as impartible property. That was so decided by a Full Bench of this Court, *Ramappa Vanappa v. Lazman*.² It was held in that case:—

"Under the *vat-hukums* issued in Kolhapur State (now merged in the State of Bombay), Sanadi inam land, which is impartible, does not revert to the State on the death of the holder but passes by rule of primogeniture to his heir."

In the present case, the nearest heir to Annapurnabai's estate which consisted of Inami lands, was the plaintiff Yamunabai, and upon her devolved the right by inheritance to that property. The plaintiff when she inherited that property became a limited owner according to the rules enacted by the Digest of Hindu Law of the Kolhapur State, but by the combined operation of ss. 4 and 14 of the Hindu Succession Act of 1956, she acquired full ownership even in the Inam property. Sub-section (1) of s. 14 of the Hindu Succession Act provides that:—

"Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner."

And by s. 4(i) it is provided that:—

"Save as expressly provided in this Act

(a) Any text, rule or interpretation of Hindu Law, or any custom or usage to the contrary, or any other law applicable to the Hindus shall be deemed to be superseded by the provisions of this Act.

(b) Any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act."

Notwithstanding the interpretation of the text of the Hindu Shastras whereby the estate inherited by a Hindu widow is regarded as a limited estate, by the operation of s. 14, a Hindu female possessed of any property becomes invested with an absolute title, and the texts which made the estate a limited estate are by s. 4 expressly superseded. A sanction *ex post facto* to an adoption may in certain cases have the effect of divesting property vested in another person by inheritance from the sole surviving coparcener, or a limited owner, but that rule in so far as it is inconsistent with s. 14 is superseded by cl. (b) of s. 4.

Mr. Paranjpe, who appears on behalf of defendant No. 1, contends that full ownership of property is not inconsistent with liability to divestation by adoption, and he invites our attention to certain cases decided by the High Courts in India and also by the Privy Council which have taken the view that an adoption made by a Hindu widow in a joint family may divest the estate which has, by operation of the rules of inheritance, vested in another person even if the holder who acquired the estate on the death of the last absolute owner may himself be holding an absolute estate. Mr. Paranjpe submits that if an absolute estate, which is acquired under the relevant rules of inheritance or succession applicable to Hindus, is liable to be divested, then this Court may not be justified in investing the estate which is conferred upon a Hindu widow as the estate of a full owner by s. 14 of the Hindu Succession Act, an incident inconsistent with the normal rules of Hindu law. In the hands of Bala Maharaj, the estate was undoubtedly subject to the incident that by the birth of a legitimate son to him, or by adoption by him or by a widow of a deceased coparcener who died in union, his estate was liable to be restricted, and the plaintiff inherited that estate subject to the same restrictions. That incident, contends Mr. Paranjpe, was inherent in the estate of the plaintiff, and there is nothing in the Hindu Succession Act which abrogates that incident. The estate held by a Hindu, who is a sole surviving coparcener in a joint Hindu family is, it is true, liable to be restricted by the introduction of a coparcener by birth or adoption, and such new coparcener acquires an interest in the entire estate equal to the interest in the estate held by the existing coparcener. But that incident of the estate, does not in our judgment, justify the imposition of a limitation restricting the connotation of the expression "full owner" used in s. 14 of the Hindu Succession Act. Full ownership contemplated by s. 14 of the Succession Act is not made by the Legislature subject to any incident of divestation by adoption. If liability to divestation be implied, it will cut across the estate and the estate will not be regarded as of a full owner within the meaning of s. 14 of the Act. We are, therefore, unable to hold that the estate of the plaintiff was liable to be divested by the recognition *ex post facto* of the adoption of defendant No. 1 by the State.

Mr. Paranjpe concedes that the rights of defendant No. 1 as an adopted son could arise for the first time on the grant of sanction by the State and not before, and that concession is properly made having regard to the judgment of this Court in First Appeal No. 424 of 1952. Evidently before the date on which the sanction *ex post facto* was given by the State to the adoption of defendant No. 1, the plaintiff Yamunabai had acquired full ownership in the property, which she had inherited on the death of her co-widow Annapurnabai as a limited owner, but that right is sought to be defeated by defendant No. 1 who acquired by the sanction *ex post facto* the rights of an adopted son in the property of Bala Maharaj. In resolving the conflict between these two rights, cl. (b) of s. 4 of the Hindu Succession Act is, in our judgment, decisive. By that clause any other law in force immediately before the commencement of the Hindu Succession Act ceases to apply to Hindus in so far as it is inconsistent with any provision contained in the Act. The claim of defendant No. 1 to the Inam properties of his father, which had devolved upon his adoptive mother Annapurnabai and thereafter by succession upon the plaintiff Yamunabai, must, in our judgment, be subject to the title which by statute became absolute.

But Mr. Paranjpe submitted that to Inam properties, the Hindu Succession Act has no application, and in support of his contention, Mr. Paranjpe invites our attention to Vat Hukum No. 44 of 1913 issued by the Government of Kolhapur. By that Vat Hukum it was declared that all lands held in Inam were impartible and were to devolve only upon the eldest son and that private partition of Inam lands will not be recognised by the State Government. By this Vat Hukum all lands held in Inam, whatever may be the nature of the Inam, were regarded as impartible and devolved upon the eldest son. By an

earlier Vat Hukum No. 12 of July 13, 1878, it was declared by cl. 7 that in the absence of male descendants, the government may, so long as the widow of a male member of the family is alive, allow the estate to continue in her possession after taking service. Pursuant to this Vat Hukum Annapurnabai was recognised as the Inamdar by the Kolhapur State, on the death of Bala Maharaj leaving no male lineal descendant; and the plaintiff was also entitled to recognition as Inamdar on Annapurnabai's death.

Indisputably by s. 5 of the Hindu Succession Act, any estate which descends to a single heir by the terms of any enactment passed before the commencement of this Act, is excluded from its operation. By the Vat Hukums of the former Kolhapur State, Inam property devolves upon a single heir; and the Vat Hukums issued by that State whatever informality may appear in the promulgation thereof, are enactments within the meaning of s. 5 of the Hindu Succession Act. But we do not think it necessary to enter upon a detailed examination of Mr. Paranjpe's argument because the property in dispute which was originally held in inam by the operation of Bombay Act XXII of 1955, acquired the character of Rayatawa property before the date on which the Hindu Succession Act was enacted and had accordingly ceased to be an estate which devolved upon a single heir.

Mr. Paranjpe then contended that on the day on which defendant No. 1 was adopted, there was in operation no law under which sanction of the authorities of the Kolhapur State was required to confer title upon him to the Inam properties. On March 1, 1949, the State of Kolhapur was merged with the Province of Bombay as it then was, and all the laws in operation in the Kolhapur State were repealed. This, it appears, was a drastic provision made in a hurry and the rule making authority under the Extra Provincial Jurisdiction Act intervened and amended the Application of Kolhapur Laws and Order on March 23, 1949, whereby the operation of several statutes and the Vat Hukums was restored retrospectively as from March 1, 1949. This Court has held in *Narhar Sakharam Pradhan v. The Collector of Kolhapur*³ that the effect of the amendment made on March 23, 1949, was not merely to revive the Kolhapur enactments with retrospective effect, but by legal fiction to keep them alive in the interregnum. Chagla C.J. in considering the effect of the amendment dated March 23, 1949, in that case observed:—

"...In other words, in the eye of the law the Order of the 1st March 1949 always was as amended by the order of the 23rd March 1949. In other words, on the 1st March 1949 there was no repeal of the Kolhapur enactments except those to which we have referred as falling within the amended para. 5. Therefore this is not a case of repeal and a revival. It is a case where the Legislature by a legal fiction retrospectively amends an earlier enactment and provides that the earlier enactment shall always be deemed to have been enacted as amended subsequently."

That observation, in our judgment, is sufficient to repel the argument advanced by Mr. Paranjpe that on the date on which defendant No. 1 was adopted by Annapurnabai, he acquired title to the Inam property of Bala Maharaj. There is no dispute that before defendant No. 1 was adopted, sanction of the Kolhapur State was not obtained. Even after the adoption and before the suit was filed, no application requesting sanction to the adoption of defendant No. 1 was made. In view of the amendment which by legal fiction kept alive the Vat Hukums since March 1, 1949, we are unable to agree with Mr. Paranjpe that on the date on which the adoption was made, there was no authority competent to sanction the adoption of defendant No. 1, and consequently the condition requiring the adoption of defendant No. 1 was invalid.

Mr. Paranjpe also contended that under the Bombay Merged Territories Miscellaneous Inams Abolition Act XXII of 1955, defendant No. 1 became on June 8, 1955, because of the extinction of the inam, entitled to the lands in

³ (1954) Special Civil Application No. 2463 of 1954, decided on December 14, 1954, by Chagla C. J. and Dixit J (Unrep.).

dispute. Under Bombay Act XXII of 1955 by s. 4 it was provided that:—

"Notwithstanding anything contained in any usage, settlement, grant, agreement, Sanad, order, rule, notification, or Vat-Hukum or any decree or order of a court, or any law for the time being applicable to any alienation in the merged territories with effect from and on the appointed date (i) all alienations shall be deemed to have been abolished; and (ii) expressly by or under this Act all rights legally subsisting on the said date in respect of such alienations and all other incidents of such alienations shall be deemed to have been extinguished."

Evidently, the Inam i.e. the alienation in favour of the family of the plaintiff was abolished on the application of Act XXII of 1955, and the property became subject to the provisions thereof, such as payment of the assessment and other incidental obligations of Rayatawa property. But because the property which was, till the date on which the Act was applied, Inam property became Rayatawa property by the extinction of the Inam, defendant No. 1 was not invested with title to the property which he, till the date on which the Act was applied, did not possess. The right of defendant No. 1 to the Inam property could only be recognised if his adoption was sanctioned by the competent authority, but at the date of his adoption, defendant No. 1 did not acquire title to the Inam property, because his adoption was not sanctioned by the State authorities and he could not acquire title to the estate which was substituted in place of the Inam property by alteration of the tenure. The title of defendant No. 1 to that estate must if at all depend upon the sanction of the State and not upon the alteration of the tenure. In our judgment, by the operation of the Bombay Merged Territories Miscellaneous Alienation Abolition Act, 1955, the plaintiff became the owner of the property held by her. It is a question of some nicety whether since the abolition of the Inams, it was possible for the State Government to accord sanction *ex post facto* to the adoption of defendant No. 1. In terms the Act provides that on the date on which the Act comes into operation in respect of the alienation and all other incidents of such alienations of rights legally subsisting shall be deemed to have been extinguished; and if the right of a person to be recognized *ex post facto* as an adopted son in respect of the property is regarded as one of the rights contemplated by s. 4 of the Act, *prima facie* such a right may be deemed to be extinguished. But on this part of the case we have not heard full arguments and we do not propose to express any considered opinion thereon.

Mr. Paranjpe also contended that at the date when the Act No. XXX of 1956 was brought into operation, the plaintiff did not possess the lands in dispute and she could not have acquired title as full owner thereof by virtue of s. 14 of the Act. The property in dispute in this case had devolved upon the plaintiff and defendant No. 1 had acquired by his adoption no title thereto. In that premise we fail to appreciate how defendant No. 1 can resist the claim of the plaintiff for a declaration of her title and the injunction claimed by her. We may also observe that the possession contemplated by s. 14 is legal possession, and property in the wrongful occupation of a trespasser either directly or through his tenants is none the less possessed by a Hindu female within the meaning of s. 14.

Finally, Mr. Paranjpe contended that the suit as filed by the plaintiff for declaratory relief and for injunction was not maintainable. It is true that in this case the plaintiff has claimed a declaration of her title to the Inam properties and has claimed a declaration that defendant No. 1 be restrained by an injunction from collecting the rents and profits thereof. Such a suit, contends Mr. Paranjpe, is one purely for a declaratory relief and the Court is debarred from granting that relief on a claim made by the plaintiff in circumstances existing in the present case. But in *Parasram v. Bhimbhai*⁴ it was held by a Division Bench of this Court that:—

"Where defendants are in constructive possession through tenants, and plaintiff desires to have constructive possession only, the utmost that the plaintiff can ask for,

or obtain, against the defendants is a declaration of rights, binding the defendants, coupled with an injunction preventing them from interfering with such rights."

It was further held that:—

"...the plaintiff is not bound to ask for actual physical possession from the tenants, and that there is no rule of law to compel a man to seek for all the relief that he is entitled to or might obtain if he desired it."

In our view, the suit was properly framed. On the view taken by us, the decree passed by the trial Court will be confirmed and both the appeals will be dismissed with costs.

Appeals dismissed.

Before Mr. Justice Tambe and Mr. Justice Datar.

THE JAYASINGPORE OIL MILLS CO. (PRIVATE) LTD.

v.

THE COLLECTOR OF KOLHAPUR.*

Kolhapur State (Application of Laws) Order, 1949, Cls. 3, 5, Sch. Part I—Land Revenue Rules, 1921; rr. 87(a), 81(2) and (3)—Whether Vat Hukum No. 14 of former Kolhapur State good law after March 1, 1949, in areas which formed part of that State—Revision of assessment whether absolutely banned by r. 87(a) before expiry of period mentioned therein—Whether obligatory on Collector under r. 81(2) & (3) to give reasons where land assessed by him at maximum rate.

By virtue of the Kolhapur State (Application of Laws) Order, 1949, Vat Hukum No. 14 of July 4, 1891, issued by the Maharaja of Kolhapur is not a law in force in the areas forming part of the former Kolhapur State after March 1, 1949.

Under r. 87(a) of the Land Revenue Rules, 1921, there is no absolute ban on revising the assessment once made before the expiry of the period of thirty years. All that the rule provides is that assessment shall ordinarily be not revised.

Sub-rules (2) and (3) of r. 81 of the Land Revenue Rules, 1921, require the Collector to give reasons only if he assessed the land revenue higher than the maximum rate fixed. So long as the assessment is upto the limit of the highest rate fixed, it is not obligatory on the Collector to give his reasons thereof.

THE facts appear in the judgment.

M. V. Paranjape, for the petitioners.

C. C. Vaidya, Assistant Government Pleader, for respondents Nos. 1 and 2.

TAMBE J. The dispute relates to the validity of the assessment of land revenue of Rs. 504-2-0 annually on 10 acres of the land in question, situate within the municipal limits of Jayasingpore, District Kolhapur. These ten acres form part of survey No. 439, admeasuring about 37 acres and 19 gunthas. In or about the year 1942, 15 acres out of this area was, by the order of the then Kolhapur State, included in the Town Planning scheme and on this 15 acres of land, Rs. 6-12-0 was assessed as non-agricultural assessment. Out of these 15 acres sometime in the year 1945, the then Kolhapur State granted ten acres of land to the petitioner for the purposes of its business of oil mill. The land revenue was proportionately apportioned and these ten acres were assessed to Rs. 4-7-5. It is not in dispute that the petitioner from 1945 had been paying this amount as land revenue. It is a matter of history that on March 1, 1949, the Kolhapur State merged with the State of Bombay and the area constituting the former Kolhapur State came under the jurisdiction of the Commissioner, Southern Division. On or about August 13, 1950, the Commissioner, Southern Division, issued a notification under sub-r. (1) of r. 81 of the Bombay Land Revenue Rules, whereunder Jayasingpore was classified as a first class village for the purpose of assessment of land revenue and for non-agricultural assess-

*Decided, April 3, 1959. Special Civil Application No. 8193 of 1953.

ment, the maximum fixed was two pies per square yard. On or about July 17, 1951, the Collector then made an order whereunder he assessed the land revenue on the said ten acres of land of the petitioner at Rs. 504-2-0 annually, and further directed that the land revenue at this rate be recovered from the petitioner from the year 1945. Against this order, the petitioner took an appeal to the Bombay Revenue Tribunal. The appeal succeeded and the Revenue Tribunal held that the assessment was made without giving an opportunity to the petitioner to be heard. It further held that the order directing recovery of land revenue retrospectively from the year 1945 was bad. With these directions it remanded the case to the Collector for a fresh decision. After notice to the petitioner and giving him an opportunity to place his case before him, the Collector decided the matter afresh and by his order of May 11, 1957, re-affirmed the assessment made by him in his previous order. He, however, modified the order as regards the recovery of land revenue and directed that the same be recovered only from August 1, 1953. The petitioner again took an appeal against this order to the Revenue Tribunal, respondent No. 3 hereto, and the Tribunal dismissed it by its order dated June 26, 1958. Against this order the petitioner has approached this Court.

Mr. Paranjape, learned counsel for the petitioner, in the first instance contends that the petitioner has been paying the house tax and, therefore, this land is exempted from payment of land revenue, under the Vat Hukum No. 14 of July 4, 1891, issued by the Maharaja of Kolhapur. The decision of this contention raised turns on the construction of the said Vat Hukum read together with certain provisions of the Notification issued on March 1, 1949, by the State of Bombay,† in pursuance of the powers conferred on it by the Extra-Provincial Jurisdiction Act of 1947. It would at this stage be convenient to refer to these provisions. It is not in dispute that the Vat Hukum (No. 14 of July 4, 1891, Mulki Vat Hukum, Vol. II, p. 671) was issued by the Maharaja of Kolhapur. That being the position, it was a prevailing law at the time of the merger. On the language of the said Vat Hukum, it is clear that where the house tax was paid in respect of a particular land situated within the area of the municipality, recovery of land revenue in addition to the house tax was prohibited. If this Vat Hukum be still a good law governing the rights of the parties residing at Jayasingpore, then certainly the petitioner would be entitled to claim that he has been exempted from payment of land revenue, if he proves that he has been paying the house tax in respect of this land. The petitioner, however, has not placed any material before the authorities below as regards the extent of land relating to which the petitioner had been paying the house tax. Apart from it, in our opinion, this Vat Hukum is no more a law in force, on account of certain provisions of law to which we will presently advert. Section 4 of the Extra-Provincial Jurisdiction Act, 1947, provides that the Central Government may by notification in the official gazette, make such orders as may seem to it expedient for the effective exercise of any extra-provincial jurisdiction of the Central Government. It is not in dispute that this power vested in the Central Government has been delegated to the State of Bombay. In exercise of that power, the Government of Bombay issued a notification on March 1, 1949. That notification was amended by another notification issued on March 23, 1949, giving retrospective effect to the amendments effected. We are here concerned with cls. 3 and 5 of the said Notification. Paragraph (1) of cl. 5 provides that save as expressly provided in this Order,†† all enactments in force in the Kolhapur State or part thereof and corresponding to the enactments in force in the Province of Bombay and extended to the Kolhapur State under para. 3 and all notifications, schemes, rules, by-laws, vat-hukums and all orders by whatever name or description called under such enactment or having the force of law immediately before the appointed day

†See Notification No. 4384/46-F-III. The Bombay Government Gazette Extraordinary, Part IV-A, p. 175.

††The Kolhapur State (Application of Laws) Order, 1949.

shall stand repealed (appointed day being March 1, 1949). The effect of this provision, in our opinion, is that where any law in force in the State of Bombay is made applicable to the area formerly constituting the State of Kolhapur, then the corresponding provisions of law in force in the Kolhapur State covering the same subject stood repealed as and from March 1, 1949. Turning to the provisions of cl. (3) (1) of the said Notification, we find that all enactments specified in Parts I and II of the schedule and all notifications, orders, schemes, rules and by-laws issued, made or prescribed under such enactments and in force in the Province of Bombay immediately before the coming into force of this Order shall extend to and be in force in the Kolhapur State subject to any amendments to which the said enactments are for the time being generally subject in the Province of Bombay. It is then clear that if we find that any law, which was in force in the State of Bombay on March 1, 1949, was brought in force in the Kolhapur State under this Notification from the said date corresponding to the aforesaid Vat Hukums, the necessary consequence of these provisions would be that the Vat Hukum would stand repealed as and from March 1, 1949. It is the contention of Mr. Paranjape that there was no corresponding provision of law in force in the State of Bombay and, therefore, the Vat Hukum has not been repealed and is still a good law in force in the areas forming part of the former Kolhapur State. It is not possible for us to accept this contention of Mr. Paranjape. Referring again to the provisions of Vat Hukum, it is clear that it deals with the subject of exemption of liability of payment of land revenue on certain lands, which are made liable to pay the house tax. The subject, in short, is exemption from the liability of payment of land revenue. Now, when we turn to the first part of the Schedule of the Notification, we find that the Bombay Land Revenue Code, 1879, was made applicable to the areas forming part of the former Kolhapur State. It cannot be disputed, and, indeed, it is not disputed that certain provisions of the Land Revenue Code deal with assessment of the land to land revenue as well as exempting the land from payment of land revenue. That being the position, there cannot be any doubt that law corresponding to the provisions contained in the Vat Hukum No. 14 and which was in force in the Bombay State has been made applicable to the areas of the former Kolhapur State under the said notification. The Vat Hukum (No. 14) cannot, therefore, be held to be a good law in force in the Kolhapur State.

It is next contended by Mr. Paranjape that even assuming that the Vat Hukum is not the law in force in the Kolhapur State after March 1, 1949, it was in force when the aforesaid notification was brought into effect and, therefore, under the proviso to the first para. of cl. (5), all rights acquired under the law in force on the eve of March 1, 1949, are saved. The said proviso reads as follows:

"Provided that the repeal by this Order of any such enactments, notifications, schemes, rules, bye-laws, or vat Hukums or orders shall not affect the validity, invalidity, effect, or consequence of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation liability, claim or demand, or any indemnity already granted or the proof of any past act or thing."

It is the contention of Mr. Paranjape that the petitioner was entitled from exemption from assessment of ten acres of land to the land revenue under the Vat Hukum. This right he had acquired prior to the coming into force of the said notification. Under the aforesaid proviso, this right is saved to him. No doubt, if the petitioner had acquired that right the said provisions save it to him. The question is, whether it has been shown to us that the petitioner had acquired any such right under the said Vat Hukum. As already stated, the right conferred by the Vat Hukum is that, when the house tax is paid in respect of any land, that land is exempted from payment of land revenue. The notification was brought into force on March 1, 1949. It is not in dispute that

at the time these ten acres of land was granted to the petitioner, it was an open land and the petitioner was paying Rs. 4-7-5 as land revenue in respect of that land. It has not been shown by the petitioner that on the eve of March 1, 1949, there has been any construction on that land or that the petitioner had been paying any house tax in respect of that land. In other words, no foundation, in fact, has been laid by the petitioner to hold that any right had been acquired by the petitioner under the Vat Hukum No. 14, on which reliance is placed by Mr. Paranjape. The contention of Mr. Paranjape must, therefore, fail.

It is next contended by Mr. Paranjape that the Collector was in error in acquired another right and that right was to pay the land revenue at Rs. 4-7-5 for a period of thirty years and before the expiry of that period that assessment cannot be enhanced. Reliance is placed by Mr. Paranjape in this respect on r. 87 of the rules framed under the Bombay Revenue Code. Clause (a) of r. 87 of the Bombay Revenue Rules provides that the period for which the non-agricultural assessment is to be fixed shall ordinarily be 30 years except in the Bombay Suburban District where on account of its special conditions the period shall ordinarily be 50 years. It is the contention of Mr. Paranjape that the provisions of the Land Revenue Code had been adopted by the Kolhapur State and the law in force in the Kolhapur State was in identical terms, only substituting State of Kolhapur for State of Bombay. Even assuming it to be so, again there is no foundation, in fact, laid by the petitioner. It has not been shown when the land in question had been first assessed on non-agricultural basis. It has also not been shown that the assessment made by the Collector by his order of May 11, 1957, was prior to the expiry of 30 years. It is, therefore, not possible for us to decide the contention of Mr. Paranjape as raised by him. Apart from it, suffice it to say that on the language of this rule, there is no absolute ban on revising the assessment once made before the expiry of the period of 30 years. All that it provides is that assessment shall ordinarily be not revised. In our opinion, there is no absolute right as such acquired by the petitioner under this rule. This contention of Mr. Paranjape, therefore, must fail.

It is next contended by Mr. Paranjape that even assuming that it was open to the Collector to assess the lands to payment of land revenue, the Collector was in error in assessing the entire land for non-agricultural purpose. The entire land was not put to non-agricultural use. Indeed, this is a question of fact and the fact found by the fact finding authority is that the entire land was being used for non-agricultural purpose. This contention, therefore, in our opinion, has very little substance.

It is next contended by Mr. Paranjape that the Collector was in error in directing that the land revenue be recovered from August 1, 1953. This contention again has very little merit. It is to be noted that the assessment was made as early as on July 17, 1951. Proceedings naturally had been started prior to that date. The second order has been made only on remand after reconsideration of facts as directed by the Tribunal. In these circumstances, there is no assessment of land revenue retrospectively. It is contended by Mr. Paranjape that the Collector had levied the land revenue at the maximum rate without assigning any reasons. The Collector was bound to assign reasons showing that the case was made out for assessing the said land revenue on the particular land. Reliance is placed in this respect on sub-r. (2) of r. 81 of the Rules. This contention also, in our opinion, has no force. If sub-rr. (2) and (3) of r. 81 are read together, it would be seen that they require the Collector to give reasons only if he assessed the land revenue higher than the maximum rate fixed. So long as the assessment is upto the limit of the highest rate fixed, it is not obligatory on the Collector to give his reasons thereof. Apart from it, even assuming that there is any lacuna in the order of the Collector, inasmuch as he has not given reasons for assessing the land to the land revenue at the maximum rate, in our opinion, no injustice has been caused to

the petitioner on that account. The Revenue Tribunal had given him an opportunity to say his say as to why the land revenue should not be levied at the maximum rate and the petitioner has not been able to make out any case before the Tribunal in this respect. That being the position, in our opinion, no interference at the hands of this Court on this ground is called for. In the result, for the reasons stated above, the petition must fail. The rule is, therefore, discharged with costs.

Rule discharged.

Before Mr. Justice Tambe and Mr. Justice Datar.

DESAIBHAI KASHIBHAI DESAI v. S. M. DUDANI.*

Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Secs. 58(a) & (b), 46—Nadiad Borough Municipality Rules, rr. 43, 2(5)—Whether word "officer" in r. 43 includes president of municipality—Procedure for electing president where no statutory provision thereto made or in absence of precedent of local body.

The word "officer" occurring in r. 43 of the Rules framed by the Nadiad Borough Municipality under s. 58(a) and (b) read with s. 46 of the Bombay Municipal Boroughs Act, 1925, must be understood in a wider sense, and not in the narrower sense as defined in r. 2(5) of the Rules. Therefore, the president would be included in the word "officer" as used in r. 43 and the procedure prescribed in that rule for the purpose of voting would apply for electing a president.

In the absence of any statutory provision or precedent of a Local Government body, the person presiding over that body should adopt some well recognised procedure relating to the business which the meeting is convened to transact. For electing a president any one of the three well-established rules of procedure could be adopted, viz. (1) the procedure for election of mayor of the Bombay Municipal Corporation as set out in r. 10 of the Bombay Municipal Corporation Rules and Regulations, (2) the procedure relating to the election of the Speaker set out in r. 6, cl. 5 of the Bombay Legislative Assembly Rules and (3) the procedure relating to the election of the Speaker of the House set out in r. 6, cl. 4, of the Rules of Procedure and Conduct of Business in the House of the People. It is a basic principle of the above rules of procedure that a person declared elected as the president of a body has the vote of the majority of its members in his favour.

THE facts appear in the judgment.

R. B. Kotwal, with *B. K. Amin*, for the petitioner.

Y. V. Chandrachud, Government Pleader, for opponents Nos. 1 and 2.

J. C. Bhat, with *A. D. Desai*, for opponents Nos. 3 and 4.

TAMBE J. By this petition under arts. 226 and 227 of the Constitution of India, one Desai Bhai Kashibhai Desai, an elected councillor of the Nadiad Borough Municipality, challenges the election of Chimanbhai Kashibhai Patel, opponent No. 3 hereto, to the office of the President of the Municipality held on March 23, 1959.

The facts giving rise to this petition in brief are, Chimanbhai was a duly elected President during the year 1958-59. His term of office expired on March 9, 1959. Section 19A read together with s. 23(2) of the Bombay Municipal Boroughs Act, 1925, (hereinafter called the Act) cast a duty on the Collector to call a meeting for the election of the President. The Collector, Kaira District, (opponent No. 1), accordingly called a meeting of the councillors of the Municipality for March 23, 1959, for electing a President of the Nadiad Borough Municipality, and he further directed the District Deputy Collector, opponent No. 2 hereto, to preside over the meeting. From among the 34 councillors 32 councillors attended the meeting. The meeting first unanimously

*Decided, April 14, 1959. Special Civil Application No. 542 of 1959.

passed a resolution that a new President should be elected for a period of one year. Thereafter, for the office of the President three nominations were made. Chimanbhai Kashibhai Patel's name was proposed by Babubhai Bhikhabhai Desai and seconded by Haribhai Govindbhai Patel. Manmohandas Bhagwandas Desai was proposed by Balubhai Harishanker Bhatt and seconded by Desaibhai Kashibhai Desai. Balubhai Harishanker Bhatt's name was proposed by Kanubhai Kashibhai Patel and seconded by Mangubhai. It appears that opponent No. 2 decided to take the poll in two rounds. He first asked the house to elect one out of the two nominees, Manmohandas Bhagwandas Desai and Balubhai Harishanker Bhatt. At this stage, Balubhai declared in the meeting that he wanted to withdraw from the election. His proposer Kanubhai, however, did not agree to the withdrawal of Balubhai. The presiding officer, therefore, did not allow Balubhai to withdraw from the contest. Poll was thereafter taken, and each of the candidates, namely, Manmohandas and Balubhai, secured 16 votes each. Lots were drawn, with the result that Balubhai was declared elected. According to the procedure initially laid down by the presiding officer, there should have been a voting as between the remaining two candidates, namely, Chimanbhai and Balubhai, the successful candidate in the first round. But before poll for the second round was taken, the proposer of Balubhai, namely, Kanubhai, with the consent of the seconder, informed the presiding officer that he withdrew the name of Balubhai from the contest. It appears that there was opposition by some of the members to the proposed withdrawal of the name of Balubhai. The presiding officer, however, ruled that the proposer having withdrawn the name of Balubhai, only one proposal remained before the House, namely, the proposal of the name of Chimanbhai for the election of presidentship, and in this view of the matter he declared that Chimanbhai Kashibhai Patel was duly elected President of the Nadiad Municipal Committee. This election is challenged before us. The petitioner has claimed the following reliefs:—

"(a) That the Hon'ble Court be pleased to issue a Writ of quo warranto or a writ, order or direction of like nature against the 3rd respondent herein and call for the record and proceedings of the said election and quash the same and set aside the said election;

(b) That the Hon'ble Court be pleased to issue a writ of prohibition or a writ, order or direction of like nature and restrain the 3rd respondent herein from acting as the President until such time that he may be validly elected if at all as a President in another valid election;

(c) That the Hon'ble Court be pleased to command or direct by a writ of Mandamus or a writ, order or direction of like nature, the 1st respondent to hold with the utmost expedition possible another election for electing the President of the 4th respondent in accordance with law and procedure and in accordance with the provisions of Rule 43 of the Rules of the Nadiad Borough Municipality."

Mr. Kotwal, who appears for the petitioner, contends that the procedure adopted by the District Deputy Collector in holding the election of the President is contrary to law; he ought to have conducted the election in accordance with the provisions contained in r. 43 of the Rules framed by the Municipality under s. 58(a) and (b) read with s. 46 of the Act. In the second instance, Mr. Kotwal contends that even assuming that the provisions of r. 43 were not applicable, the District Deputy Collector should have held the election according to the parliamentary procedure. At any rate, according to Mr. Kotwal, the District Deputy Collector was in error in not allowing Balubhai to withdraw from the election before poll was taken for the first time. It is his further contention that after having refused to allow Balubhai to withdraw his candidature, the District Deputy Collector ought not to have permitted Kanubhai, the proposer of Balubhai, to withdraw the proposal at the commencement of the second round. Lastly, it is contended by Mr. Kotwal that in any event it was the bounden duty of the District Deputy Collector to have put to the vote of the House as to whether they approved the election of Chimanbhai as the President of the Municipality. On the other hand, it is contended by the learn-

ed Government Pleader, who appears for the District Deputy Collector, and Mr. Desai, the learned counsel for Chimanbhai, that the provisions of r. 43 have no application to the election of a President. It was open to the Prant Officer to adopt any procedure he thought best suited. In the instant case, the Prant Officer adopted the aforesaid procedure with the consent of the members of the Municipality and, therefore, it is not open to any of the members of the Municipality to challenge the procedure now in this Court by a petition under art. 226 or 227 of the Constitution of India.

The first question to be considered is, whether r. 43 would govern the case. It reads as follows:—

"43. Voting for appointment of Committees or officers—Voting for appointment of committees and for officers by ballot shall be conducted as follows:—

(1) Printed or typewritten slips of papers bearing the names of the candidates shall be circulated among the Councillors present at the meeting fixed for the selection and the voting shall be by putting a cross against the name of the candidate for whom they want to vote without signing the slips. The first ballot shall be kept open for 15 minutes from the commencement thereof, the votes for all the candidates shall be counted by the presiding authority with the assistance of the Chief Officer or the Secretary.

(2) On the announcement of the result of the first ballot, the name of the nominee who obtains the lowest number of votes shall be struck off and a fresh ballot shall be taken from the rest of the original nominees. The nominee with the lowest number of votes shall then be struck off, and this process shall be repeated until there remain only as many nominees as places, when the nominees thus remaining shall be declared duly elected."

According to the learned Government Pleader and Mr. Desai, the procedure prescribed in r. 43 has application only when the question of appointment of committees and of officers arises. According to them, the word "officers" has to be understood and given the meaning as is given to it in the interpretation clause, r. 2(5) of the rules, which defines that "officer" means any Municipal employee, whose salary, or in the case of time scale of pay, the maximum salary, exceeds Rs. 50 per mensem. On the other hand, it is the contention of Mr. Kotwal that the word "officer" has to be understood in its wider sense. It includes not only the servants of the Municipality, but also other persons occupying the various posts and offices in the Municipality. We find it difficult to accept the contention raised on behalf of opponents Nos. 2 and 3 and give the word "officer" a very restricted meaning as is contended for by them. It is true that in the definition in r. 2(5) such a restricted meaning is given to the word "officer". But then it has to be kept in mind that that meaning cannot be given when there is something repugnant in the subject or the context. It would be seen that even in the rules themselves the word "officer" is used in a sense other than the servant of the Municipality. If we turn to r. 2(3) (i) we find that the President is a Controlling officer of the auditors. It cannot be disputed that the President is not a servant of the Municipality drawing any pay from the Municipal funds. If we refer to the Shorter Oxford English Dictionary, we find that there are various shades of meaning of the word "officer". In one sense, it means "one who holds a public, civil or ecclesiastical office; a servant or minister of the king; a functionary authoritatively appointed or elected to exercise some public, municipal or corporate function." In another sense, it means "a person holding the office of president, treasurer, secretary etc. of a society or institution;" or, in other words "an office-bearer". Turning to the provisions of the Act, we find that s. 18 provides that a person is elected to the office of the president. Section 19 provides for the term of office of President. Section 20 provides for the resignation from the office of the President. Section 21 provides for the removal of a person from the office of the President. Section 23-A provides for handing over of the charge by the person holding the office of the President. It is, therefore, clear that the President holds office, or, in other words, is an office-bearer of a municipality. The President, therefore, can be termed as an officer within the wider

meaning of the word "officer" as defined in the Oxford Dictionary. Turning now to the provisions of r. 43 itself, we find a certain procedure prescribed for the purpose of voting, and a person successful therein is termed as a duly elected person, and persons contesting are termed as nominees. These expressions used in the rule indicate that the procedure prescribed in the rule relates to holding an election. It is not in dispute that a person appointed in the post of the President has to be elected by the members of the municipality. It is also worth noting that this rule provides for the appointment of committees, and turning to the provisions of the statute, namely, ss. 37 and 38, it is clear that the various committees are to be elected by the members of the municipality. On the other hand, it cannot be said that the servants of the municipality are appointed by holding an election. It also cannot be said that persons, who apply for service, are the nominees of any of the members of the municipality. For reasons stated above, in our opinion, the word "officer" occurring in r. 43 of the rules has to be understood in a wider sense, and not in the narrower sense as defined in r. 2(5). To hold otherwise, we would have to assume that no provision exists either in the Act or in the rules regarding the procedure to be followed for electing a president. We find it difficult to make such an assumption.

Even assuming for a moment that r. 43 has no application to the election of the President, then the course open to the District Deputy Collector was to adopt such a procedure as would enable him to perform his duties and adequately ensure to the councillors of the Nadiad Municipality the exercise of their statutory right of electing their President. Section 19-A read with s. 23(2) of the Act casts a duty on the Collector to call a meeting of the municipality for the purpose of electing a President and preside over that meeting, or appoint some other person to preside over it. Thus, whoever be the person that presides over the meeting has a duty to perform, namely, to hold an election. The right to elect consists in free and honest expression of the will by the electoral council. It, therefore, follows that the duty that fell on the District Deputy Collector was to adopt such a procedure as would ensure to the members of the Nadiad Municipality a free and honest expression of their will.

In the absence of any specific provision, the procedure which a person presiding over the meeting should adopt, in the words of the learned author in his book "The Conduct of and Procedure at Public, Company and Local Government Meetings (Crew)" at p. 32, is,

"where there are no standing orders or where standing orders are inadequate, then either the practice of the House of Commons or the usual practice of the previous meetings may be followed. In a simple case, however, the difficulty may be overcome by the chairman exercising his common sense and bearing in mind that it is his duty to ascertain the views of the meeting."

In our opinion, the aforesaid observations contain a salutary rule and can in its substance be followed with advantage. The substance of the rule appears to be that in the absence of any statutory provision or a precedent of the body, the person presiding over that body should adopt some well-recognised procedure relating to the business which the meeting is convened to transact.

Now, in the instant case, the District Deputy Collector could have well adopted any one of the following three well-established rules of procedure. In the first instance, there is the procedure for election of Mayor of the Bombay Municipal Corporation. The relevant rules are at p. 25 of the Bombay Municipal Corporation Rules and Regulations. The important rule is r. 10. It reads as follows:—

"If there are more than two candidates, the candidate who gets the least number of votes shall be eliminated and votes taken again for the remaining candidates. This process shall be continued until there are two candidates left and then the one who gets more votes shall be declared elected."

It is pertinent to note that the provisions of this rule are in substance similar to those of cl. (2) of r. 48 of the Rules of the Nadiad Borough Municipality. Next, we have the Rules made by the Bombay Legislative Department for regulating the procedure and conduct of the business of the Assembly. Rule 6 of the Bombay Legislative Assembly Rules relates to the election of the Speaker. Clause (5) of the said rule contains the material provisions. It reads:

"Where more than two candidates have been nominated and at the first ballot no candidate obtains more votes than the aggregate votes obtained by the other candidates, the candidate who has obtained the smallest number of votes shall be excluded from the election and balloting shall proceed; the candidate obtaining the smallest number of votes at each ballot being excluded from the election, until one candidate obtains more votes than the remaining candidate or than the aggregate votes of the remaining candidates, as the case may be. The candidate who obtains more votes than those obtained by the remaining candidate or than the aggregate votes obtained by the remaining candidates, as the case may be, shall be declared to have been elected as the Speaker." It is again pertinent to note that the provisions of this clause are in substance similar to r. 43 of the Nadiad Municipality Rules.

Next, we may refer to the relevant provisions of Rules of Procedure and Conduct of Business in the House of the People. Clause (4) of r. 6 thereof reads:

"The motions which have been moved and duly seconded shall be put one by one in the order in which they have been moved and decided if necessary by division. If any motion is carried, the person presiding shall, without putting later motions, declare that the member proposed in the motion which has been carried, has been chosen as the Speaker of the House."

These provisions, to a certain extent, differ from the other provisions referred to above. It would, however, be seen that there is a common characteristic in all these provisions and that is that, a person declared elected as the President of a body has the vote of the majority of its members in his favour. In the procedure adopted by the District Deputy Collector this basic principle has been lost sight of.

It is, however, contended by Mr. Desai that it was open to the President to adopt the procedure agreed to by the members of the House. He relies in that connection on the following observations occurring at p. 32 of "Law of Meetings" by James Muirhead, 2nd edn. :—

"The ultimate power and right of decision on any question rests with the body itself when duly assembled to be exercised by the vote of the majority. The board, in the absence of special provision by statute or standing order, is entitled to take its business in such order as it may think proper, and is not bound by any agenda paper that may have been previously prepared."

Now, in our opinion, the aforesaid observations have no relevance to the procedure to be adopted in the matter of election. On the other hand, it appears that the question that was being considered related to the right of the body to decide the order in which it would consider the items in the agenda before it. We feel doubtful about the advisability of leaving it to the members of the body to devise a procedure for holding an election, inasmuch as the possibility of the right of the minority suffering at the hands of the party in power cannot be excluded.

Even assuming for a moment that in the instant case it was open to the members of the municipality themselves to devise a procedure for the conduct of the election of the president, there is nothing in the minutes of the meeting of March 23, 1959, to show that the members of the municipality themselves had devised any such procedure. We, however, find in the affidavit of the District Deputy Collector an averment to the effect that the members of the municipality had decided to adopt a certain procedure. The relevant portion thereof reads as follows :—

"It was found that there were three proposals, viz. proposing (1) Shri Chimanbhai Kashibhai Patel (2) Shri Manmohandas Bhagwandas Desai and (3) Shri Balubhai Hari-

shanker Bhatt. After scrutiny it was found that all the three proposals were duly proposed and seconded. It was, therefore, then put before the house that, as there were three proposals two proposals at a time in each round should be taken like this proposal No. 3 and proposal No. 2 should be taken for contest in the first round, and whosoever wins in the first round shall contest with the proposal No. 1."

Assuming that this was the procedure to which the councillors had agreed, on the facts of the case it is clear that that procedure was not adhered to, but was very materially departed from in not holding an election in the second round. It is not the case of the District Deputy Collector nor of opponent No. 3 that it had been agreed to by the members of the Municipal Committee to allow the proposer of Balubhai to withdraw the candidature of Balubhai and declare Chimanbhai as duly elected President. The District Deputy Collector has done so. On his own admission then, it is clear that what he had done was contrary to the procedure alleged to have been agreed to by the House itself. In his return, justification is also sought on the ground that what he did was in accordance with the provisions of r. 21. It reads as follows:—

"21. *Withdrawal of motion*—Any motion which has been proposed and seconded may be withdrawn by the proposer with the consent of the councillor who seconded the motion."

Even assuming for a moment that this rule has any relevance to the facts of this case, it is clear that the District Deputy Collector had lost sight of the provisions of r. 25, which provides that after a motion has been made and seconded, it shall not be withdrawn or altered in substance except with the permission of the presiding authority. Reading the return of the District Deputy Collector, there does not appear to be any averment which goes to show that he himself had applied his mind and considered the advisability of allowing Kanubhai to withdraw the candidature of Balubhai. On the other hand, it appears that he thought that under r. 21 he was bound to allow Kanubhai to withdraw the proposal when the seconder had agreed to such a course. That clearly is an error of law. Thus, looking at the case from any angle, it is clear that the procedure adopted by the District Deputy Collector in holding this election is contrary to the provisions of law; at any rate, contrary to the well-recognised practice usually followed in holding an election. What has happened is that opponent No. 3 Chimanbhai has been declared elected without a single vote being cast in his favour by any councillor. It is not in dispute that there was opposition to the course adopted by the District Deputy Collector in allowing Kanubhai to withdraw the candidature of Balubhai. About seventeen people lodged their protest in writing before the District Deputy Collector just after the declaration of the result. It indicates that the person declared elected has not the approval of the House behind him. The procedure adopted by the District Deputy Collector has resulted in negating the exercise of the right of electing a President conferred by the statute on the councillors of the Municipal Committee, Nadiad. It is, therefore, not possible to uphold the election of opponent No. 3.

In the result, we set aside the election of opponent No. 3 to the office of the elected President of Nadiad Municipality held on March 23, 1959. An injunction, therefore, will be issued against him restraining him from discharging any of the functions, exercising any rights and performing any duties of the office of the President of the Nadiad Borough Municipality as a duly elected President in the election held on March 23, 1959. We, however, wish to make it clear that it will be open to him to exercise such rights as are available to him under the Act as an out-going President till fresh election is held. We further direct the Collector of Kaira, opponent No. 1 hereto, to take steps, as expeditiously as possible, to hold an election for the office of the President of Nadiad Municipality in accordance with law.

Costs of this petition shall be borne by opponent No. 3.

Order accordingly.

INCOME-TAX REFERENCE.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

POPATLAL BHIKAMCHAND v. THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY.*

Indian Income-tax Act (XI of 1922), Sec. 16(3)(a)(iv)—Assessee making gift of his shares in company to his minor son—Company issuing bonus shares and assessee's minor son allotted bonus shares on his original holding—Dividend income from bonus shares whether taxable in hands of assessee—Whether income from accretions to assets transferred by assessee to his minor children taxable in his hands.

Income arising from accretions to the assets transferred by the assessee to his minor children cannot be taxed in the hands of the assessee under s. 16(3)(a)(iv) of the Indian Income-tax Act, 1922.

The assessee, who was the holder of certain shares in a company, gifted these shares to his minor son. The company, thereafter, issued bonus shares by increasing its capital and the assessee's minor son was allotted certain bonus shares in respect of his original holding of shares. On the question whether the dividend income from the bonus shares held by the assessee's minor son was taxable in the hands of the assessee under s. 16(3) of the Indian Income-tax Act, 1922:—

Held, that the source of the dividend income from the bonus shares was not the assets transferred but the accretion thereto and that income could not be regarded as arising even indirectly from the assets transferred by the assessee, and,

that, therefore, the dividend income from the bonus shares held by the assessee's minor son was not taxable in the hands of the assessee under s. 16(3) of the Act.

THE facts appear in the judgment.

R. J. Kolah, with *N. A. Palkhiwala*, for the assessee.

G. N. Joshi, with *R. J. Joshi*, for the respondent.

SHAH J. The assessee was the holder of 350 shares of the Shree Ram Mills, Ltd. On December 28, 1946, the assessee gifted these shares to his minor son Virendra. Under s. 16(3)(a)(iv) of the Income-tax Act, the dividend income from these shares was liable to be included in computing the total income of the assessee for the purpose of assessment. On August 9, 1947, the directors of the Shree Ram Mills, Ltd., resolved to recommend the issue of bonus shares by increasing the capital of the company and a certain number of bonus shares were issued in the name of the assessee's minor son Virendra. There was a further increase in the capital of the company on December 30, 1947, and certain additional bonus shares were issued in his name. Virendra, the minor son of the assessee, was thus allotted 744 bonus shares for his original holding of 350 shares. The Income-tax Officer held that the 350 shares originally transferred by the assessee and the 744 bonus shares were "assets transferred" by the assessee, and computed his total income under s. 16(3) of the Income-tax Act by including the dividend income from all these shares. The Appellate Assistant Commissioner of Income-tax and the Income-tax Appellate Tribunal confirmed the order of the Income-tax Officer. At the request of the assessee the Tribunal has referred for decision the question whether "the dividend income from the 744 bonus shares held by the assessee's minor son is taxable in the hands of the assessee under section 16(3) of the Income-tax Act."

Section 16(3) of the Income-tax Act, in so far as it is material, provides:

"In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly...

*Decided, June 15, 1959. Income-tax Reference No. 38 of 1958.

(iv) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration;..."

The assessee concedes that the dividend income from the 350 shares transferred by him to his minor son is liable to be included in computing his total income. He contends, however, that the dividend received from the 744 bonus shares is not liable to be so included. In our judgment, the contention of the assessee must be accepted. The assets transferred by the assessee were the original 350 shares. The bonus shares were in the hands of the assessee's minor son undoubtedly an accretion to the assets transferred, but they could not be regarded as assets transferred by the assessee. Mr. Joshi, who appears on behalf of the Department, contends that the dividend income from the bonus shares in the hands of the minor child is income which arose indirectly from assets transferred by the assessee and is liable to be included in computing the total income of the assessee for the purpose of assessment. But, in our judgment, the source of the dividend income from the bonus shares is not the assets transferred but the accretion thereto; and that income cannot be regarded as arising even indirectly from the assets transferred by the assessee. The Legislature has not by enacting s. 16(3)(a)(iv) sought to tax in the hands of assessee income arising from accretions to the assets transferred by him to his minor children.

We, therefore, answer the question referred to us in the negative. The Commissioner of Income-tax to pay the costs of the reference.

Solicitors for the assessee: *Mulla & Mulla & Craigie Blunt & Caroe.*

Solicitor for the respondent: *P. G. Gokhale.*

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

THE MADHYA PRADESH INDUSTRIES, LIMITED, NAGPUR

v.

THE COMMISSIONER OF INCOME TAX, NAGPUR.*

Indian Income-tax Act (XI of 1922), Sec. 10(2)(xy)—Lessees granted by Government, under leases, right to enter upon lands and win manganese ore—Lessees transferring such right to assessee for consideration—Whether consideration paid by assessee a capital or revenue expenditure.

By certain leases the Government granted to a mining syndicate the beds, veins and seams of manganese ore lying in or under the lands described in the leases with certain rights and subject to certain restrictions. All these rights of the mining syndicate under the leases were transferred to the assessee company under an agreement. On the question whether the consideration paid by the assessee for purchasing the rights of the mining syndicate under the mining leases was capital expenditure and as such not an allowable deduction, it was contended by the assessee that the manganese ore lying underground though unascertained—but nonetheless ascertainable—was sold to the mining syndicate and by transfer of the rights the assessee had in substance acquired a stock of manganese ore for the purposes of its business and, therefore, the expenditure incurred by the assessee for acquiring the stock-in-trade of a business was revenue expenditure:—

Held, that the consideration paid for acquiring the means to obtain the stock-in-trade could not be regarded as consideration paid for acquiring the stock-in-trade itself, and

that, therefore, the consideration paid by the assessee for purchasing the benefits and the rights under the leases to win the manganese ore from the lands described in the leases must be regarded as capital expenditure.

Kamakshya Narain Singh v. Commr. of Inc.-tax,¹ Hood Barrs v. Inland Revenue Commissioners² and Stow Bardolph Gravel Co. Ltd. v. Poole,³ referred to.

Mohanlal Hargovind v. Commr. of Inc.-tax⁴, distinguished.

*Decided, June 15, 1959. Income-tax Reference No. 36 of 1958.

¹ (1943) 11 I.T.R. 513, P.C.

² (1958) 34 I.T.R. 238.

³ (1955) 27 I.T.R. 146.

⁴ (1949) 17 I.T.R. 473, P.C.

THE facts appear in the judgment.

N. A. Palkhivala, for the applicants-assessees.

G. N. Joshi, with *R. J. Joshi*, for the respondent.

SHAH J. The Income-tax Appellate Tribunal has referred the following three questions to this Court:

(i) Whether the sum of Rs. 15,27,000 paid by the assessee-company for the leasehold interest in several manganese mines was capital expenditure and as such not an allowable deduction?

(ii) Whether even a proportionate amount of the total sum paid for the leasehold manganese mines, i.e., Rs. 98,280 per annum was not deductible in determining the profits of the business?

(iii) Whether the legal and other expenses incurred for the leases of the manganese mines were not admissible deductions under s. 10(2)(xv) of the Income-tax Act?

The facts which give rise to the reference may be briefly stated. The assessee-company was originally a private limited company having its registered office at Nagpur. It was converted into a public limited company on March 17, 1952. R. B. Bansilal Abirchand Mining Syndicate, hereinafter referred to as the Mining Syndicate, were lessees from the Government of Central Provinces and Berar of mining rights under certain leases executed before and after the year 1949. Under the mining leases the Mining Syndicate were entitled to enter upon the lands described in the leases and to search for and win manganese ore and to raise and carry away and dispose of the same. The rights of the Mining Syndicate under the leases were sold by the Court Receiver appointed in a suit for dissolution of partnership and rendition of accounts of that Syndicate and were purchased on December 13, 1951, by the assessee-company for a lump sum of Rs. 17,00,000. Out of the sum of Rs. 17,00,000, Rs. 15,27,000 were allocated for the price of the rights in the mines, Rs. 21,320 for buildings and other immoveable properties, Rs. 14,900 for machinery, furniture and other moveable properties and Rs. 1,36,780 for stock of raw and ready manganese ore. The Income-tax Officer held that the amount of Rs. 15,27,000 paid by the assessee-company for the interest it purchased from the Mining Syndicate in the manganese mines was capital expenditure. In appeal to the Appellate Assistant Commissioner, the order passed by the Income-tax Officer was confirmed. That order was further confirmed by the Income-tax Appellate Tribunal. The assessee-company then applied to the Tribunal for a reference to this Court under s. 66(1) of the Income-tax Act, and a reference was accordingly made and the three questions, hereinbefore set out, have been referred for decision.

This reference raises the rather familiar question as to what may, having regard to the facts and circumstances, be regarded as capital expenditure as distinguished from revenue expenditure. In the leases obtained by the Mining Syndicate before the year 1949 it was recited that in consideration of the rents and royalties, covenants and agreements the lessor, i.e., the Government of the Central Provinces and Berar, granted and demised unto the lessees the mines, beds, veins and seams of manganese ore situate, lying and being in or under the lands referred to in Part I of the Schedule together with the liberties, powers and privileges to be exercised or enjoyed in connection therewith set out in Part II of the Schedule subject to the restrictions and conditions as to the exercise and enjoyment of such liberties, powers and privileges set out in Part III of the Schedule except and reserving out of the demise unto the lessor the liberties, powers and privileges set out in Part IV of the Schedule. The lease included a schedule consisting of nine parts. In Part II were set out the liberties, powers and privileges to be exercised or enjoyed by the lessees subject to the restrictions and conditions in Part III. Under this part the lessees were entitled to work mines, to sink pits, to erect or construct machinery, to make roads, to get building and road materials, to use water, to use the land adjacent to the land granted on lease for stacking,

to prepare manganese ore and to take timber from reserved forests. These liberties were made subject to the restrictions set out in Part III. Certain liberties were also set out in Part IV which were exercisable by the lessor. We are not concerned in this reference with the restrictions and liberties set out in Parts III and IV of the Schedule. In the leases executed after the year 1949 it was recited that in consideration of the rents and royalties, covenants and agreements by and in the presents and the schedule thereunder the State Government granted and demised to the lessees all the mines, beds, veins and seams situate, lying and being in or under the lands referred to in Part I of the Schedule together with the liberties, powers and privileges to be exercised or enjoyed in connection therewith set out in Part II of the Schedule subject to the restrictions and conditions as to the exercise and enjoyment of such liberties, powers and privileges set out in Part III of the Schedule except and reserving out of the demise unto the State Government the liberties, powers and privileges set out in Part IV of the Schedule. These leases also included a schedule the first four parts of which set out respectively the area of the lease, the liberties, powers and privileges to be exercised and enjoyed by the lessees, the restrictions and conditions as to such exercise or enjoyment and the liberties, powers and privileges reserved to the State Government.

Though different phraseology has been used in these two sets of leases, it is evident that in substance by the leases the Government of the Central Provinces and Berar granted to the Mining Syndicate the beds, veins and seams of manganese ore lying in or under the lands described in the schedule with certain rights and subject to certain restrictions. All those rights of the Mining Syndicate under the leases were transferred to the assessee-company under the agreement, dated December 13, 1951. The principal question which falls to be determined is whether the consideration paid by the assessee for purchasing the rights of the lessees under the mining leases was capital expenditure.

Mr. Palkhivala for the assessee company contends that by the leases no right or interest in land was created but manganese ore lying underground though unascertained—but nonetheless ascertainable—was sold to the Mining Syndicate; and by the transfer of all those rights the assessee company in substance acquired a stock of manganese ore for the purpose of its business. Evidently expenditure incurred for acquiring the stock-in-trade of a business is revenue expenditure. But we are unable to agree with the contention raised by Mr. Palkhivala that by the leases the Government of the Central Provinces and Berar sold any definite or identifiable quantity of manganese ore to the Mining Syndicate: in our opinion, they only authorised the Mining Syndicate to win manganese ore from the area defined by the leases and subject to the restrictions and conditions set out therein. The right conferred by the leases was not a proprietary right to any stock of manganese ore readily identifiable, but merely a right during the period specified in the leases to get at the ore, and to remove and dispose of the same. By exercising the right and obtaining ore, the lessees may obtain a stock-in-trade; but the consideration paid for acquiring the means to obtain the stock-in-trade may not be regarded as consideration paid for acquiring the stock-in-trade itself. Therefore, the consideration paid by the assessee-company for purchasing the benefits and the rights under the leases to win manganese ore from the lands described in the leases must, in our judgment, be regarded as capital expenditure.

In our judgment, this question has been conclusively decided by their Lordships of the Privy Council in *Kamakshya Narain Singh v. Commr. of Inc.-tax*¹ where the material facts were closely similar to the facts of the present case. In that case, the assessee had received large payments by way of royalty under various mining leases. By the leases the lessees were granted and demised for a period of 999 years the underground coal mining rights specified in the schedule to the leases and all the estate, right, title and interest of the lessor into and upon the same and every part thereof with full liberty and power to the

lessees to search for, work, make merchantable and carry away the coal there found and with power to dig and sink pits, to erect engines, machinery, buildings, workshops, cottages and to make such railways, tramways and roads as were required. In consideration of these rights the lessees agreed to pay a sum by way of salami or premium and an annual sum as royalty computed at a certain rate per ton on the amount of coal raised and coke manufactured, subject to a minimum annual sum. It was contended before the taxing authorities by the lessees that the sums received as salami and royalty did not constitute income but was a capital receipt representing the price of the minerals removed, and their Lordships of the Privy Council held that the salami was paid for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lease, and that right being a capital asset, the money paid to purchase it was a payment on capital account. In the present case, the transferee from the lessees is contending that the payment made by it for acquiring the rights of the lessees was revenue expenditure and treated as allowable deduction in assessing its taxable income. In *Kamakshya Narain Singh's* case, in dealing with the argument that the salami received by the lessees for transferring their rights was received on capital account, their Lordships observed (p. 519):

"...It is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account."

In the present case, the assessee-company has purchased all the rights which the transferors had obtained from the Government of the Central Provinces and Berar. There was no stock-in-trade in the hands of the transferors and for purchasing merely the rights or benefits granted under the leases and not the stock-in-trade the assessee-company must, in our judgment, be regarded as having incurred a capital expenditure. By the leases merely a source from which the raw materials required for the business of the assessee-company were to be obtained was indicated, with rights to tap the source, and it was not a sale of the raw materials *in situ*.

A similar view was taken by their Lordships of the House of Lords in *Hood Barrs v. Inland Revenue Commissioners*.² In that case, a timber merchant, soon after commencing business, entered into two agreements with a company undertaking to pay certain sums of money in respect of a large number of trees growing on the company's land. The merchant acquired the right to "mark, fell and carry away all the said trees and complete all the operations authorized at such times as he...shall consider convenient", no time limit being fixed. The trees had not been selected or identified. The House of Lords held (Lord Oaksey dissenting) that in computing the timber merchant's income-tax liability the sums payable to the company should be treated as capital expenditure and not as the price for stock-in-trade and accordingly could not be debited in calculating his trading profits.

In *Stow Bardolph Gravel Co. Ltd. v. Poole*³ a company of sand and gravel merchants, in consideration of a payment of £2,000, acquired the benefit of a contract to take a deposit of sand and gravel. They later exercised an option contained in the contract under which they acquired for £2,250 a right to take a further deposit. It was held that the amounts paid were not expended on the purchase of stock-in-trade and were not, therefore, admissible as deductions in the computation of the company's profits under the relevant Income-tax provisions—the reason for that conclusion being that by the contract and option the company did not acquire any proprietary right in the deposits *in situ* but merely had the right to work them and to take away what was won, and the company had not, on the facts, purchased stock-in-trade readily identifiable as such from the moment of purchase but merely a means of getting gravel and sand which when excavated and taken into possession may be part of their

stock-in-trade. The same reasoning will, in our judgment, apply to the facts of the present case for holding that the rights purchased by the assessee-company are not rights to stock-in-trade readily identifiable as such from the moment of purchase but merely the rights to the means of getting manganese ore which if excavated and taken into possession may form part of its stock-in-trade.

But Mr. Palkhivala relies upon a judgment of their Lordships of the Privy Council in *Mohanlal Hargovind v. Commr. of Inc.-tax*⁴ in which it was held that the consideration paid for purchasing a right to *tendu* leaves required for manufacturing *bidis* was revenue expenditure and not capital expenditure. In that case, the Privy Council held that the contracts made by the assesseees were wholly and exclusively for the purpose of supplying themselves with one of the raw materials for their business, that under the contracts no interest in land or in the trees or plants was conveyed to the assesseees, that under the contracts it was the *tendu* leaves and nothing but the *tendu* leaves that were acquired, that the right to pick the leaves or to go on to the land for the purpose was merely ancillary to the real purpose of the contracts, that under such a contract, even if not expressed, by the clearest implication of law there was a transfer of a growing crop and that, therefore, the expenditure incurred in acquiring the raw material was in a business sense on revenue account and not on capital account. In our view, this case is clearly distinguishable from the facts of the present case and the cases to which we have already referred. By the contracts which the assesseees had made in *Mohanlal Hargovind's* case no interest in land was conveyed to the assesseees and the assesseees merely acquired a right to the *tendu* leaves, i.e., a right to the growing crops, and having regard to the nature of the business and the purpose for which the commodity was acquired, their Lordships of the Privy Council regarded the expenditure as expenditure incurred for obtaining raw materials for the business of the assesseees. In the present case, the expenditure having been incurred by the assessee-company for acquiring a right to the manganese ore, which was not identifiable *in situ*, the expenditure must be regarded as capital expenditure.

We, accordingly, answer the three questions referred for decision as under:

(i) The sum of Rs. 15,27,000 paid by the assessee-company for the leasehold interest in the manganese mines was capital expenditure and not revenue expenditure and as such it was not an allowable deduction.

(ii) Even a proportionate amount of the total sum paid for the leasehold manganese mines, i.e., Rs. 98,280 per annum, was not deductible in determining the profits of the business.

(iii) The legal and other expenses incurred for the leases of the manganese mines were not admissible deductions under s. 10(2)(xv) of the Income-tax Act.

The assessee-company to pay the costs of the Commissioner of Income-tax.

Solicitors for the assessee: *Malvi Ranchhoddas & Co.*

Solicitor for the Commissioner: *P. G. Gokhale.*

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

THE COMMISSIONER OF INCOME-TAX (CENTRAL) BOMBAY v.
THE SARASPUR MILLS LTD., AHMEDABAD.*

Indian Income-tax Act (XI of 1922), Secs. 10(2)(vi-b), 10(5)—Word “plant” in s. 10(2)(vi-b) whether includes motor cars and bicycles.

The word “plant” in s. 10(2)(vi-b) of the Indian Income-tax Act, 1922, includes vehicles such as motor cars and bicycles.

THE facts appear in the judgment.

G. N. Joshi, for the Income-tax Department.

N. A. Pakhivala, with D. H. Dvarkadas, for the assessee.

SHAH J. The assessee is a limited company carrying on the business of manufacturing cloth. In the year of account 1954-55 the assessee purchased certain motor cars and bicycles for use in their business and claimed in the year of assessment 1955-56 development rebate under s. 10(2)(vi-b) of the Income-tax Act. The income-tax authorities allowed the assessee the normal depreciation on the motor cars and the bicycles under s. 10(2)(vi). The Tribunal also allowed to the assessee development rebate in respect of the motor cars and bicycles, holding that the motor cars and bicycles were “plant” within the meaning of s. 10(2)(vi-b) of the Income-tax Act and that the same had been “installed” after March 31, 1954, and had been wholly used for the purpose of the business carried on by the assessee.

In this reference, Mr. Joshi for the Department contends that even though within the definition of the expression “plant” in s. 10(5) of the Income-tax Act vehicles may be included, for the purpose of sub-s. (2)(vi-b) of s. 10 of the Act vehicles are not included in that expression. Mr. Joshi contends that the Legislature has advisedly used the expressions “installed” and “installation” in sub-s. (2)(vi-b) of s. 10 and that those expressions postulate that the “plant” must be fixed in position when it is being worked or used, and if a plant is from its nature or otherwise incapable of being fixed in position when it is worked, it cannot be regarded as included within the expression “plant” as used in cl. (vi-b) of sub-s. (2) of s. 10. We are unable to accept that contention. The Legislature has given a special definition of the expression “plant” in sub-s. (5) of s. 10 of the Act, and by that definition vehicles, books, scientific apparatus and surgical equipment purchased for the purposes of the business, profession or vocation are expressly included within the definition; and in the absence of very strong indications to the contrary in sub-s. (2)(vi) of s. 10 we will not be justified in holding that notwithstanding the definition which is specially devised for sub-s. (2), the expression “plant” will not include vehicles, books, scientific apparatus and surgical equipment some of which by their very nature are incapable of being fixed in position at the time when they are worked or used. The assumption made by Mr. Joshi that the expression “installed” must necessarily mean “fixed in position” at the time when the plant is worked or used does not, in our judgment, seem to be warranted. The expression “installed” is also used in the sense of “inducted or introduced”, and if that be the sense in which that expression is used, there is nothing inconsistent in the context in which that word is used which will justify us in holding that the word “plant” in s. 10, sub-s. (2), cl. (vi-b), of the Income-tax Act was not intended to include vehicles.

We, therefore, proceed to answer the question† referred to us for decision in the affirmative. The Commissioner to pay the costs of the assessee.

Solicitor for the Commissioner: P. G. Gokhale.

Solicitors for the assessee: Kanga & Co.

*Decided, June 16, 1959. Income-tax Reference No. 39 of 1958.

†“Whether on the facts and circumstances of the case the assessee company is entitled to

the development rebate in respect of motor cars and cycles purchased and used by it in the year of account under Section 10 (2) (vi-b) of the Income-tax Act?”

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

HASMUKHLAL M. PARIKH v. THE COMMISSIONER OF INCOME-TAX,
BOMBAY NORTH, AHMEDABAD.*

Indian Income-tax Act (XI of 1922)—Assessee receiving earnest money in 1946 for sale of his land—Conveyance executed by assessee in 1950 in favour of purchaser—Profit made by assessee whether liable to be apportioned as income for assessment years 1946-47 and 1951-52—Applicability of s. 4 of Act.

The assessee purchased leasehold interest in certain land and the right to purchase it from a person who had obtained these from the owner of the land. The assessee then purchased a half share in the reversion from the owner and on May 5, 1946, he entered into an agreement with a housing society for sale of his right in the land and obtained Rs. 60,000 as earnest money. The assessee then purchased from the owner his right of reversion in the remaining half share. In 1950 the assessee executed a conveyance in favour of the society conveying the land to the society for Rs. 1,23,677 odd. The assessee made a profit of Rs. 96,796 in this transaction. On the question whether the amount of Rs. 96,796 was liable to be apportioned as income for the assessment years 1946-47 and 1951-52, it was contended by the assessee that tax appropriate to the amount of Rs. 60,000 received by the assessee as part of the price in the year 1946 was payable in the assessment year 1946-47 and the tax on the balance was payable by the assessee in the year of assessment 1951-52, and that even if the amount of Rs. 60,000 was earnest money, when the sale deed was executed, and the assessee received the full price of Rs. 1,23,677 odd, in the amount of Rs. 60,000 which was appropriated towards the price at the date of the sale-deed must be regarded as embedded the characteristic of income received in the year 1946 and that amount was liable to be taxed in the year in which it was initially received and not in the year in which the sale-deed was executed and the amount was appropriated towards the price:—

Held, that on the facts of the case the amount of Rs. 60,000 was earnest money and not part payment of the price,

that the principle of s. 4 of the Indian Income-tax Act, 1922, did not apply to the present case where the amount of Rs. 60,000 was left in deposit with the assessee for due performance of a contract which amount was subsequently appropriated towards the price on the execution of the sale-deed, and

that the amount of Rs. 96,796, which was the profit made by the assessee in the transaction, was taxable in the year of assessment 1951-52 and was not liable to be apportioned as income for the assessment years 1946-47 and 1951-52.

*Turner Morrison & Co. Ltd. v. Commissioner of Income-tax, West Bengal,*¹ referred to.

THE facts appear in the judgment.

N. A. Palkhivala, with *F. N. Kaka*, for the assessee.

G. N. Joshi, with *R. J. Joshi*, for the respondent.

SHAH J. The assessee derived income from house property and a share in a partnership and from interest and dividends. On October 8, 1938, the assessee purchased the leasehold interest in Survey No. 45 of village Paladi from one Bhudarbhai who had obtained a lease from the original owner of the land on September 26, 1938. Under the lease Bhudarbhai had a right to purchase the land, and that right was also assigned to the assessee. On September 14, 1945, the assessee purchased a half share in the reversion from the original owner, and on May 5, 1946, he entered into an agreement with a housing society for sale of his rights in the land and obtained Rs. 60,000 as earnest money. Under another conveyance, dated September 24, 1947, the assessee purchased from the original owner of the land his right of reversion in the remaining half share. On October 1, 1947, the society execut-

*Decided, June 16, 1959. Income-tax Re- 1 (1959) 23 L.T.R. 152.
ference No. 41 of 1958.

ed in favour of the assessee a lease in respect of the entire land, and in 1950 the assessee executed a conveyance in favour of the society in pursuance of the covenant under the deed of lease conveying the land S. No. 45 to the society for Rs. 1,23,677-2-0. In the year of assessment 1951-52 the Income-tax Officer did not include in computing the total income of the assessee the profit of Rs. 96,796 made by the assessee in this transaction. But the Commissioner of Income-tax took action under s. 38B of the Income-tax Act and brought the amount to tax. The matter was then taken to the Income-tax Appellate Tribunal, and the Tribunal was of the view that in acquiring the right of Bhudarbhai the assessee was indulging in a trading venture and that the profit made by the assessee accrued in the year 1950. The Tribunal negatived the contention that the amount of Rs. 60,000 received by the assessee on May 5, 1946, was part of the sale price under the agreement dated May 5, 1946. In this reference under s. 66(2) of the Income-tax Act, the question which falls to be determined is whether on the facts and in the circumstances of the case the amount of Rs. 96,000 odd, which is the profit made by the assessee, is taxable in the assessment year 1951-52 or is liable to be apportioned as income for the assessment years 1946-47 and 1951-52.

Mr. Palkhiyala for the assessee contends that as the assessee received a part of the price on May 5, 1946, and the balance of the price in the year 1950, even if the assessee was liable to pay tax on the profit accruing under the transaction on the footing that it was a trading venture, the profit therein had to be apportioned between the assessment years 1946-47 and 1951-52 for assessing tax liability. Counsel submits that tax appropriate to the amount of Rs. 60,000 received by the assessee in the year 1946 was payable in the assessment year 1946-47 and the tax on the balance was payable by the assessee in the year of assessment 1951-52. That the venture of the assessee was a trading venture has been found by the Tribunal and that question is not open to be canvassed and has not been canvassed before us. It is evident that the assessee had purchased the leasehold rights in the land, which were purchased by Bhudarbhai, only ten days after the latter had obtained the same. Thereafter the assessee purchased the rights of the owner in two instalments, and in the venture he has undoubtedly made a profit. In the agreement, dated May 5, 1946, it was recited that the assessee had agreed to sell to the housing society absolutely the land held by him for Rs. 1,23,677-2-0 and that if the housing society desired to take on lease the rights of the assessee in all the land with a covenant to purchase, the assessee undertook to give the society a lease for three years with a covenant to purchase on the society paying him Rs. 60,000 at the time of executing the lease deed "out of the sale price" of Rs. 1,23,677-2-0. It was then recited that the assessee will, at the time of executing the sale-deed, account and give a set off of Rs. 60,000 "paid as earnest money out of the sale price" and if the housing society failed to get the sale deed executed of the rights of the assessee during the period of the lease on payment of the remaining consideration, then the amount paid by the society as "earnest money" will stand forfeited. It is undisputed that the amount of Rs. 60,000 was paid by the housing society to the assessee; and this amount is expressly designated at two places in the agreement as "earnest money". In the opening sentence of para. 4 of the agreement the amount is, it is true, referred to as "out of the sale price of Rs. 1,23,677-2-0"; but the assessee has in this agreement expressly designated the amount of Rs. 60,000 as "earnest money", and has also reserved a right to forfeit the amount in the event of failure on the part of the society to complete the contract. This agreement, as is evident from the recital contained therein, was drawn up by an advocate. If in a document drawn up by a lawyer the expression "earnest money" was used in referring to the amount of Rs. 60,000 received by the assessee, we would require much stronger evidence than is to be found in this case to justify us in holding that the expression "earnest money" in the agreement was not intended to have the meaning which it normally has, and it was used in the sense of "part payment of the price": and the circumstance that

this amount of Rs. 60,000 was liable to be forfeited in the event of the housing society failing to carry out its part of the contract makes the conclusion inevitable that the amount was intended to be earnest money and not part payment of the price. The Tribunal has taken the view that the amount of Rs. 60,000 paid in 1946 by the housing society to the assessee was earnest money, and we agree with that view.

Mr. Palkhivala has contended that even if the amount of Rs. 60,000 was earnest money, when the sale-deed was executed, and the assessee received the full price of Rs. 1,23,677-2-0, in the amount of Rs. 60,000 which was appropriated towards the price at the date of the sale-deed must be regarded as embedded the characteristic of income received in the year 1946 and that amount was liable to be taxed in the year in which it was initially received and not in the year in which the sale-deed was executed and the amount was appropriated towards the price. In support of that contention our attention was invited to a judgment of their Lordships of the Supreme Court in *Turner Morrison & Co. Ltd. v. Commissioner of Income-tax, West Bengal*.¹ That was a case in which a non-resident association had effected sale of salt in India through brokers. The sale proceeds of the salt were collected by the assessee and credited to the account kept in their own name with a bank, and after deducting the expenses including their commission the balance was remitted to the association in Egypt. The income-tax authorities treated the assessee as the agents of the non-resident association under s. 43 of the Indian Income-tax Act and assessed them to income-tax under s. 4(1)(a) or, in the alternative, under s. 4(1)(c). It was held by their Lordships of the Supreme Court that the income, profits and gains derived from the sale of salt in British India were assessable to income-tax under s. 4(1)(a) as income, profits and gains received by the company in British India on behalf of the association. In dealing with the question as to when the income may be deemed to be received, their Lordships observed (p. 160) :

"There can, therefore, be no question that when the gross sale proceeds were received by the Agents in India they necessarily received whatever income, profits and gains were lying dormant or hidden or otherwise embedded in them. Of course, if on the taking of accounts it be found that there was no profit during the year then the question of receipt of income, profits and gains would not arise but if there were income, profits and gains, then the proportionate part thereof attributable to the sale proceeds received by the Agents in India were income, profits and gains received by them at the moment the gross sale proceeds were received by them in India and that being the position the provisions of section 4(1)(a) were immediately attracted and the income, profits and gains so received became chargeable to tax under section 3 of the Act."

But in the case before us, the assessee did not in the year 1946 receive any part of the gross profit; and we are unable to appreciate how the principle in *Turner Morrison & Co's* case will apply to the facts of this case. When sale proceeds, gross or net, are received by the assessee, evidently s. 4 is immediately attracted, and the income, profits and gains embedded therein become chargeable to tax: but in our judgment that principle will not apply to an amount left in deposit with the assessee for due performance of a contract which amount is subsequently appropriated towards the price on the execution of a sale-deed.

On the view taken by us, the answer to the question† referred is that the amount of Rs. 96,000 odd, which is the profit made by the assessee in the transaction, is taxable in the year of assessment 1951-52 and is not liable to be apportioned as income for the assessment years 1946-47 and 1951-52. The assessee to pay the costs of the Commissioner of Income-tax.

Solicitors for the assessee: *Manilal Kher Ambalal & Co.*

Solicitors for the Commissioner: *P. G. Gokhale.*

1 (1953) 23 I.T.R. 152.

† "Whether in any event on the facts and in the circumstances of the case, the amount referred to in the Petition, namely Rs. 96,796/-

(Rupees ninety six thousand seven hundred and ninety-six) should have been apportioned as income for the assessment year 1947-48 and the assessment year 1951-52?"

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY
v.

PHIROZSHAW PALLONJI MISTRY.*

Indian Income-tax Act (XI of 1922), Secs. 23A, 16(3)—Assessee's wife holding shares in company purchased by assessee—Order under s. 23A passed in assessment of company—Income deemed to have been distributed as dividend under s. 23A in hands of wife of assessee whether assessable in hands of assessee under s. 16(3).

The assessee's wives held shares in a private limited company which were purchased with funds provided by the assessee. For the assessment years 1949-50 and 1950-51 an order under s. 23A of the Indian Income-tax Act, 1922, was passed in making the assessment of the company, and the income deemed to have been distributed as dividend under s. 23A of the Act in the hands of the wives of the assessee was sought to be included in the income of the assessee under s. 16(3) of the Act. On the question whether such dividend income was so assessable in the hands of the assessee:—

Held, that where by a mere fiction the income is deemed to have been received but which has not in fact been received, s. 16(3) of the Act can have no application, and

that, therefore, the dividend income in the present case which was deemed to have been distributed to the assessee's wives under s. 23A was not assessable in the hands of the assessee under s. 16(3) of the Act.

Quære: Whether in the event of actual distribution of the undistributed profits by the company as dividend hereafter, the income received by the wives will be liable to be included in computing the total assessable income of the assessee.

THE facts appear in the judgment.

G. N. Joshi, with R. J. Joshi, for the applicant.

R. J. Kolah, with Dilip Dwarkadas, for the respondents.

SHAH J. The assessment years in this reference are 1949-50 and 1950-51. Phirozshaw Pallonji Mistry and Shapurji Pallonji Mistry are the two assessee. Their respective wives held shares in a private limited company styled Shapurji Pallonji & Co. Ltd. An order under s. 23A of the Income-tax Act was passed by the Income-tax Officer in making the assessment of Shapurji Pallonji & Co. Ltd., and the income deemed to have been distributed as dividend under s. 23A in the hands of the respective wives of the two assessee was sought to be included in the income of the two assessee relying upon s. 16(3) of the Income-tax Act on the ground that the shares in the company held by the respective wives were purchased with the funds provided by the two assessee. It was contended by the assessee that where an order under s. 23A is passed the dividend income is only deemed to have been distributed amongst the shareholders and such income cannot be included in the income of the assessee under s. 16(3). The Income-tax Appellate Tribunal accepted that contention of the assessee purporting to follow the judgment of this Court in *Cambatta v. Commissioner of Income-tax, Bombay*.¹ At the instance of the Commissioner of Income-tax, the following question has been referred by the Tribunal:

"Whether on the facts and circumstances of the case the dividend income deemed to have been distributed to the assessee's wives under section 23A is assessable in the hands of the assessee under section 16(3) of the Income-tax Act?"

Under s. 23A of the Income-tax Act, before it was amended by the Finance Act, 1955, in certain eventualities it was open to the Income-tax Officer to make an order that the undistributed portion of the assessable income of a company, as computed for income-tax purposes and reduced by the amount of income-

*Decided, July 1, 1959. Income-tax Re- 1 (1946) 49 Bom. L.R. 61.
ference No. 65 of 1958.

tax and super-tax payable by the company in respect thereof, shall be deemed to have been distributed as dividends amongst the shareholders. On the footing that the undistributed profits are deemed to have been distributed, the income will be taxable in the hands of the shareholders. But this liability is the consequence of a fictional distribution of income which in reality has not reached the hands of the shareholders. Section 16(3) provides for another fiction. In so far as it is material, that section provides:

"In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife...as arises directly or indirectly...

(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart..."

There is no dispute that in this case certain assets were transferred by the two assesses to their respective wives and the shares were purchased out of those assets. But s. 16(3) permits inclusion of the income of a wife in the income of her husband for purposes of assessment only if such income *arises* directly or indirectly from assets transferred to the wife by the husband otherwise than for adequate consideration. Where by a mere fiction the income is deemed to have been received but which has not in fact been received, in our judgment, s. 16(3) can have no application. There is no warrant for the submission that the expression "as arises directly or indirectly" in cl. (a) of sub-s. (3) of s. 16 is to be equated with the expression "deemed to have been distributed" in s. 23A(1).

Mr. Joshi for the Department invited our attention to sub-s. (4) of s. 23A as it stood before that section was amended by the Finance Act, 1955. By that sub-section it was provided:

"Where tax has been paid in respect of any undistributed profits and gains of a company under this section, and such profits and gains are subsequently distributed in any year, the proportionate share therein of any member of the company shall be excluded in computing his total income of that year."

Mr. Joshi says that in the year in which the undistributed profits are deemed by virtue of the order under s. 23A to be distributed they will not, on the view we are taking, be included in the income of the husband, and even when the profits are distributed as dividends, by the operation of sub-s. (4) they will not be liable to be included in the husband's income. But the Legislature has provided for inclusion in the taxable income of the husband the income of the wife arising from assets transferred by him without consideration. Whether in the event of actual distribution of the undistributed profits by the company as dividend hereafter, the income received by the wife will be liable to be included in computing the total assessable income of the husband is a question which does not, in our judgment, fall to be decided at this stage, and we express no opinion on that question.

On the view taken by us, the answer to the question will be in the negative. The Commissioner of Income-tax to pay the costs of the assesses.

Solicitor for the applicant: *P. G. Gokhale.*

Solicitors for the respondents: *Kanga & Co.*

ORIGINAL CIVIL.

Before Mr. Justice K. K. Desai.

TULSIBAI MANGUMAL v. THE STATE OF BOMBAY.*

Bombay Land Requisition Act (Bom. XXXIII of 1948), Secs. 5, 4—Part of flat in building in which landlord or tenant has not actually resided for continuous period of six months preceding date of requisition order—Whether such part of flat can be requisitioned under s. 5(1).

Under s. 5(1) of the Bombay Land Requisition Act, 1948, no limitation is placed as to the parts of land or parts of buildings which may be requisitioned by the Government under the section. Therefore, under this section, the Government can requisition a part of a flat in a building in which the landlord or the tenant has not actually resided for a continuous period of six months immediately preceding the date of the order of requisition.

Kulrumbai v. State of Bombay,¹ agreed with.

ON May 22, 1958, two petitions for writs of *mandamus* and for directions forbearing the respondent from enforcing an order of requisition dated March 27, 1958, made in respect of property, viz. 3 rooms and a kitchen situate at Tulsi Mahal, Raghavji Road, Bombay, were filed in the High Court. The first petition was by an alleged tenant and was placed for hearing and final disposal immediately before the present petition. At the hearing of that petition it was found that the alleged tenant was not a tenant at all and could have no interest in the property, and his petition was allowed to be withdrawn. This petition was by the owners of the building wherein the requisitioned property are situate.

The relevant facts were as follows: One Alimahomed Kassum was a tenant of the petitioners in respect of flat No. 4 on the 1st floor of Tulsi Mahal which, apart from three rooms and kitchen which were requisitioned, consisted of one more room and a passage and two bath rooms and a water closet. The tenant Alimahomed Kassum died several years ago. On and after the death of Alimahomed Kassum, his son Hussein as heir of Alimahomed was accepted as tenant by the petitioners. Hussein left India for Pakistan some time in the end of 1955. Before he left India Hussein was residing in the flat with all the members of his family. After Hussein left for Pakistan his son Nazim Hussein continued to reside in the flat. Nazim Hussein sub-let the rooms under requisition first to one Sanjiv B. Desai and thereafter to one C. M. Mathai, who was mentioned in the requisition order.

Between February, 1956 and January, 1957, the petitioners as owners addressed correspondence to the Controller of Accommodation informing of a possible vacancy of the flat. They requested the Controller to allow the flat to be used by the petitioners in the event of a vacancy.

On January 21, 1958, the petitioners by their advocate served a notice to quit on Shri Alimahomed who was according to the petitioners a dead man. By a reply dated February 2, 1958, Nazim Hussein, the grandson of Alimahomed, denied through his advocate having sub-let any portion of the flat and denied his liability to vacate the flat. The petitioners through their advocate served another notice to quit dated February 18, 1958. This notice also was addressed to deceased Alimahomed Kassum. According to the petitioners the tenancy of the flat became terminated at the end of February, 1958.

After due enquiries were made as provided under, and in compliance with, the provisions of the Bombay Land Requisition Act, the requisition order dated March 27, 1958, was made. The portion which was requisitioned was described in the order as follows:

"Three rooms and kitchen in occupation of Shri C. M. Mathai (as shown in the

**Decided, September 30, 1958. O.C.J. Miscellaneous Petition No. 273 of 1958.*

¹ (1957) O.C.J. Miscellaneous Petition No.

415 of 1956, decided by K. T. Desai J., on February 20, 1957 (Unrep.).

accompanying sketch) of flat No. 4, on the 1st floor of the building known as Tulsi Mahal,..."

The sketch annexed to the requisition order specifically referred to the three rooms and kitchen. It also showed the passage and the two bath-rooms and water closet and the room which was left in the possession of Nazim Hussein.

R. L. Dalal, for the petitioners.

S. Baptista, for the respondent.

K. K. DESAI J. [His Lordship after stating the facts as above, proceeded.] The sole contention on which the petitioners based their case regarding the invalidity of the requisition order appears in para. 8A of the petition. The petitioners have not pressed before me other grounds as appearing in the petition. Paragraph 8(a) runs as follows:

"The portion of Flat No. 4 sought to be requisitioned is not 'land' within the meaning of Section 4(1) and Section 5 of the Bombay Land Requisition Act, 1948. Section 5 of the said Act does not empower the Government of Bombay to requisition only a part of flat which is neither let nor intended to be let."

In connection with this contention of the petitioners the relevant provisions of the Bombay Land Requisition Act are as follows:

Section 4(1): "land" includes...buildings...

Section 4(2): "landlord" means any person who is, for the time being, receiving, or entitled to receive, rent in respect of any premises...and further includes in respect of his sub-tenant a tenant who has sublet any premises;...

Section 4(3): "premises" means any building or part of a building let or intended to be let separately...

Section 5(1): "If in the opinion of the State Government it is necessary or expedient so to do, the State Government may by order in writing requisition any land for purpose of the State or any other public purpose:

Provided that no building or part thereof wherein the owner, the landlord or the tenant, as the case may be, has actually resided for a continuous period of six months immediately preceding the date of the order shall be requisitioned under this section."

Section 5(2): "Where any building or part thereof is to be requisitioned under sub-section (1), the State Government shall make such enquiry as it deems fit and make a declaration in the order of requisition that the owner, the landlord or the tenant, as the case may be, has not actually resided therein for a continuous period of six months immediately preceding the date of the order and such declaration shall be conclusive evidence that the owner, landlord or tenant has not so resided."

On a reading of these relevant provisions, it is obvious that the jurisdiction to make requisition order is to be found in the first part of s. 5(1) of the Act. The jurisdiction conferred under this section is patently of the widest character. Land which includes buildings can be subject-matter of a requisition order without any limitation. There is in the substantive part of this section conferring jurisdiction on the Government no limitation placed as to the parts of land or parts of buildings which may be requisitioned. Limitation, if any, is to be found in the proviso to sub-cl. (1) of s. 5 and the conditions precedent mentioned in sub-cl. (2) of s. 5. It is worthy of note that the only conditions precedent are that there is to be an inquiry and that there is to be a declaration. The declaration is in respect of those very facts which are mentioned in the proviso, viz., the facts relating to actual non-residence in the requisitioned premises of the owner, landlord or tenant as the case may be. The declaration to be made is to be accepted as conclusive evidence of the facts declared. The facts declared must relate to the actual non-residence of the tenant, owner or landlord in the requisitioned premises. In the circumstances what is left to be justiciable by Court is not the fact of non-residence in the premises of any of the aforesaid three parties. In the event of the Court finding that there had been no inquiry or no inquiry in fact as required under the provisions of sub-cl. (2) or the declaration not being as required under

cl. (2) of s. 5, the Court might consider the contentions raised in that behalf. But if these conditions precedent are satisfied, the jurisdiction of the executive authority to make requisition order would be clearly established, and could not be questioned.

Mr. Dalal, however, contends that if proper emphasis is laid on the word "wherein" in the proviso to sub-cl. (1) of s. 5 and the word "therein" in sub-cl. (2) of s. 5, it would be found that in the case of premises let out to a tenant for exercising jurisdiction to make a requisition order, the declaration that the tenant has not actually resided must be in respect of the whole of the premises. He contends that the provisions in s. 5 of the Act do not contemplate such a declaration in respect of a part of a building. Mr. Dalal goes further and says that as regards the owner or the landlord these orders indicate the whole of the building or the total area of the "land" in question, and the declaration that the owner or the landlord has not actually resided must be with regard to the whole of the building and/or the total area of the "land". Mr. Dalal develops his argument by pointing out the difficulties which would arise in the case of an owner of a bungalow consisting of large number of rooms. Such an owner may not be using all the rooms in his bungalow for considerable length of time and may be for his usual residential purposes using a few of the rooms in such a bungalow. He says that it cannot be that in such a case the rooms which are not in every day use but are used only some times could be subject-matter of a requisition order.

I am of the opinion that the contention of Mr. Dalal is untenable. The definition of the word "land" read with the first part of s. 5(1) which confers jurisdiction on the Government to make requisition order is extremely wide and without any limitations. The language of the proviso as also sub-cl. (2) of s. 5 in my view only prescribes conditions precedent to be satisfied before exercising jurisdiction. The condition precedent is "actually not resided" which in my view is used as synonymous with "factually not used". The owner or a tenant may be using a building or a part of a building or a part of a tenement and may not be at all using the building or a part of a building or a part of a tenement. If such non-user actually (i.e. in fact) exists for a continuous period of six months, I do not see how limitations mentioned in the proviso could affect the jurisdiction of the Government. In my view the language of the section is clear and leaves no doubt that the jurisdiction is conferred with intent that it may be exercised for all purposes except in connection with the premises which may be actually used for a continuous period of six months preceding the date of the order. If the premises are in fact being used the jurisdiction to make the requisition order cannot be exercised.

In this connection it is permissible to consider the object of the Act as also the scheme of the whole Act. The object of the Act is obviously for providing for accommodation in difficult times for public purpose. The Legislature does not think fit that any land or building or a part of a building which is in fact not used should not be available for providing accommodation for public purpose. The definition of the word "premises" in cl. (3) of s. 4 of the Act is different from the definition of the word "land" in cl. (1) of s. 4. In the definition of "premises" the words used are "let or intended to be let separately" whilst in connection with the jurisdiction for making requisition orders in respect of buildings under s. 5 the definition of word "land" does not contain such words. Section 6 of the Act provides for requisitioning of the premises originally in occupation of tenants and/or premises which fall vacant. Clause (4) of s. 6 uses the words "notwithstanding anything contained in section 5" which means that vacant premises could be requisitioned in the case of a vacancy irrespective of provisions of s. 5 of the Act. Section 5 is still wider and the only limitation in exercising jurisdiction conferred under the section is to be found in the words "has not actually resided therein". It is interesting also to note that the fact regarding actual non-residence is left to the subjective satisfaction of the executive authority and is not left to be de-

cided by a judicial inquiry or by a Court of law. This question of fact which is left to be decided by executive authority indicates that the widest power was intended to be conferred on executive authority in respect of requisition orders to be made under s. 5.

Mr. Baptista has drawn my attention to the decision of K. T. Desai J. in *Kulsumbai v. State of Bombay*¹. In that petition also the requisition order was in respect of a part of a tenement and it was contended that a portion of a tenement sought to be requisitioned was not "land" within the meaning of s. 4(1) and s. 5 of the Act, and that the Government had no power under the Act to requisition only a part of a flat which was neither let nor intended to be let. The contention was negatived and it was held as follows:—

"The proviso itself indicates that a part of the building in which the landlord or the tenant has not actually resided for a continuous period of six months immediately preceding the date of the order can be requisitioned under the provisions of that section. In my view the Government has a right in law to requisition a portion of a building provided the other conditions laid down in that section have been satisfied."

I am in respectful agreement with the decision in that case.

Under all the aforesaid circumstances, I negative the contention of the petitioners as raised in para. 8(a) of the petition.

[His Lordship after dealing with matters not material to this report, concluded.]

In the result the rule is discharged and the petition is dismissed with costs.

Petition dismissed.

Solicitors for the petitioners: *Nandlal & Co.*

Solicitors for the respondent: *Little & Co.*

Before Mr. Justice K. K. Desai.

THE ENGINEERING STAFF UNION v. THE STATE OF BOMBAY.*

Industrial Disputes Act (XIV of 1947), Sec. 10—Reference of dispute by Government under s. 10(1)(d)—Dispute contained in demand made by employees whether must be wholly referred to Court or tribunal—Whether Government can make reference in respect of modified demand or dispute.

Under s. 10 of the Industrial Disputes Act, 1947, the question of the subject-matter of reference is left to the subjective decision and opinion of the Government. There is no obligation on the Government under this section while making a reference to a Court of inquiry or a tribunal to make a reference of the whole of the dispute and/or of the whole demand made.

Brundaban Chandra v. State of Orissa,¹ referred to.

The facts appear in the judgment.

N. V. Phadke, for the petitioners.

R. J. Joshi, for the respondents.

K. K. DESAI J. This is a petition under art. 226 of the Constitution whereby the petitioners have prayed for a writ of *mandamus* ordering modification of an order of reference dated January 29, 1958, made under s. 10(1)(d) of the Industrial Disputes Act, so as to substitute the words "1st January 1954" and "1st February 1956" at appropriate positions in place of the words "1st February 1957" contained in that order of reference. The relief claimed as in prayer (b) is not pressed before me.

1 (1937) O. C. J. Miscellaneous Petition No. 415 of 1936, decided by K. T. Desai J. on February 20, 1937 (Unrep.).

*Decided, November 26, 1958. O.C.J. Miscellaneous Petition No. 181 of 1958.

1 [1933] A.I.R. Orissa 121.

The short relevant facts as appearing in the petition are that in the 1st week of February 1957, petitioners No. 1 (who are a registered Union) as representing the employees of respondent No. 2 put forward a demand for increase of dearness allowance with retrospective effect as from January 1, 1954. As there was no settlement between the parties, the matter was taken before the Conciliation Officer in conciliation proceedings. The Conciliation Officer made a report under s. 12(4) of the Industrial Disputes Act and petitioner No. 1 thereafter requested the Government to make a reference of the dispute for adjudication by "Industrial Tribunal".

The Government made the reference order in question before me dated January 29, 1958, under the provisions of s. 10 of the Act. The Government by its letter dated January 29, 1958, informed petitioner No. 1 *inter alia* as follows:

"That Government does not propose to refer it (dispute) to a Tribunal for adjudication under sub-section (5) of the said section 12 as the same has been referred to the Tribunal under Government Order, ... dated 29th January, 1958.

I am to add that as the dispute was raised on 4th February 1957, the retrospective effect has been changed to 1st February 1957."

The whole of the contention in the petition and the arguments before me related to the change in the date regarding the retrospective operation of the demand in connection with dearness allowance. The petitioners' case is that their demand was for increase retrospectively from January 1, 1954, and the reference has been made for such increase only as from February 1, 1957, and the reference is by reason of that alteration in dates for the reasons mentioned in the petition liable to be modified by Court. Having regard to that contention it is first necessary to quote in detail the industrial dispute in question or the demand made by the petitioners and also the dispute mentioned in the order of reference in question and thereafter to summarise the contentions mentioned in the petition.

The demand put forward and/or industrial dispute was as follows:—

"DEARNESS ALLOWANCE: The existing dearness allowance payable to the monthly rated employees of the company at its Wadala establishment should be revised and increased retrospectively from 1st January 1954 as under:

Pay slab.	D. A. at cost of living indices 311 to 320.	Variation in % per 10 points movement in index number.
1 to 100	80 % of basic pay or revised textile scale for 31 days whichever is higher.	8 %
101 to 200	40 %	4 %
201 to 300	20 %	2 %
Over 300	20 %	2 %

(b) Increase in dearness allowance, if and when granted to the monthly rated staff of the Company at its Wadala establishment should also be granted to Shri P. S. Pandit, retrospectively from 1st January, 1956."

The relevant part of the order of reference as appearing in the Bombay Government Gazette, dated February 13, 1958, Part I-L, p. 938 runs as under:

"Whereas the Government of Bombay is of opinion that an industrial dispute connected with the matter specified in the Schedule appended hereto exists between the Indian Hume Pipe Co. Ltd. Bombay, and workmen (monthly rated staff) employed under it at its Wadala factory;

Now, therefore, in exercise of the powers conferred by clause (d) sub-section (1) of section 10 of the Industrial Disputes Act, 1947 (XIV of 1947), the Government of Bombay is pleased to refer the said dispute for adjudication to the Tribunal consisting of Shri Meher constituted under Government Notification, Labour and Social Welfare Department, No. 1DA.1157(b) dated the 12th March 1957.

SCHEDULE

Dearness Allowance: The existing dearness allowance payable to the monthly rated employees of the company at its Wadala establishment should be revised and increased retrospectively from 1st February 1957 as under:—

Pay slab.	Dearness allowance at cost of living indices 311 to 320.	Variation in per cent per 10 points movement in index number.
1 to 100	80 per cent of basic pay or revised textile scale for 81 days which ever is higher.	8 per cent
101 to 200	40 per cent -do-	4 -do-
201 to 300	20 -do-	2 -do-
Over 300	20 -do-	2 -do-

(b) Increase in dearness allowance, if and when granted to the monthly rated staff of the company at its Wadala establishment should also be granted to Shri P. S. Pandit, retrospectively from 1st February 1957."

It is contended in the petition that (i) the demand as made in respect of retrospective effect has not been referred to adjudication, (ii) the reason given by the Government for not making a reference under s. 12(5) of the Act is non-existent and it is simply not true, (iii) simply by having recourse to the provisions of s. 10(1)(d) of the Industrial Disputes Act the Government cannot alter the character of the dispute in any manner, (iv) having regard to the provisions and the scheme of the Act once a dispute had been subject-matter of conciliation proceedings it was not proper for the Government to make a reference under s. 10(1)(d) of the Act, (v) if the Government was satisfied that there was a case for the same, reference must be made under s. 12(5) of the Act, (vi) a reference under s. 10(1)(d) of the Act was only a colourable device for the purpose of avoiding to make a reference of the dispute as raised by the petitioners, and (vii) that the modification of the demand relating to dearness allowance made by the Government amounted to an adjudication of the dispute with regard to its aspect of retrospective effect and it was not competent or open to the Government to pronounce its judgment on the propriety or justifiability of the workmen's demand, that being the function of an Industrial Tribunal only.

Those are the contentions raised in the petition. I have recited those contentions to clarify that the same are based on the provisions of s. 12 of the Act and that not one of them had been pressed before me by Mr. Phadke, presumably because by reason of the recent decisions of this Court it is impossible to sustain the same. He has, however, relying upon the provisions of s. 10(1)(d) of the Act, made certain contentions, and I have allowed him to do that inasmuch as it was desirable that there should be no grievance that the whole of the case of the petitioners was not allowed to be argued before me.

Mr. Phadke contends that in the matter of a reference of dispute by the Government under s. 10(1)(d) of the Act the dispute as contained in the demand made on behalf of the employees must be wholly referred to the Tribunal. He says that Government cannot modify the demand made and make a reference in respect of the modified demand or dispute. He says that the Government has no right to impose its own opinion on the Tribunal as the Government has done in the present case. If the Government wants to act under s. 10(1)(d) of the Act, the Government is bound to make a reference in respect of the whole of the demand and/or dispute raised between the employer and the employee. He has in developing those contentions laid emphasis on the fact that it was patent on the record before the Conciliation Officer and in the report of the Conciliation Officer and otherwise also that the demand of the petitioners was for revision of dearness allowance retrospectively from January 1, 1954. He says that no rational person could have formulated an opinion

that that demand was for increase retrospectively from February 1, 1957, only. The opinion which the Government should have formed and must have formed regarding the dispute raised could be that the increase was demanded retrospectively from January 1, 1954. The opinion now formed by the Government was entirely unreasonable and irrational, and that the Court is entitled to examine that opinion and make a finding that it was arbitrary and capricious and that the dispute forming the subject-matter of reference should have been for increase retrospectively from January 1, 1954. He further contends that having regard to the arbitrary and capricious opinion as formed by the Government as patent on the order of reference I should come to the conclusion that Government has not applied its mind at all or has for its own reasons misconceived its jurisdiction under s. 10(1)(d) and has for collateral purposes attempted to impose its own opinion in respect of a matter which under the scheme of the Act must be decided by a Tribunal and was within the exclusive jurisdiction of a Tribunal. These contentions I will examine with reference to the provisions of s. 10 of the Act, relevant parts whereof run as under:

"10. (1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing—

- (a) refer the dispute to a Board...; or
- (b) refer any matter appearing to be connected with or relevant to the dispute to a Court of inquiry; or
- (c) refer the dispute or any matter appearing to be connected with, or relevant to the dispute,...to a Tribunal for adjudication; or
- (d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second or Third Schedule, to a Tribunal for adjudication."

There are provisos to this section which are for the purpose of this case unnecessary to quote.

Now, it is clear on the language of the section that the decision and the opinion for a reference is to be formed by the Government. That decision and opinion is administrative and is entirely left to the subjective decision and opinion of the Government. The Court cannot impose its opinion on the Government. It is also clear having regard to the use of the following words in sub-ss. (b), (c) and (d) that the Government is not bound to refer the whole of the dispute or the dispute in all its aspects as raised to a Tribunal or a Court. The words to which reference may be made are "matter appearing to be connected with or relevant to the dispute", "the dispute or any matter appearing to be connected with, or relevant to the dispute", and "the dispute or any matter appearing to be connected with or relevant to the dispute". Admittedly the order in question is made under the provisions of s. 10(1)(d) of the Act. The aforesaid words give and/or confer jurisdiction and power on the Government to make a reference in respect of any matter connected with or any relevant part of a dispute and/or the whole of the dispute. If it was intended that the Government was bound whilst making a reference under s. 10 to refer the whole of the dispute and/or the whole of the demand to a Court or a Tribunal the aforesaid words would not have been used in the section and would have been inappropriate altogether. These words are in my view indicative of the clear intention of the Legislature to leave the question of the subject-matter of reference under s. 10 to the subjective decision and opinion of the Government. There is no obligation on the Government under the provisions of this section while making a reference to a Court of inquiry or a Tribunal to make a reference of the whole of the dispute and/or of the whole demand made. On the contrary the matter is left at large.

That being the true construction of this section the whole of the argument raised on behalf of the petitioners appears to be entirely misconceived and not sustainable. The Government was whilst deciding the reference in this case making a reference in respect of the dispute raised but with reference to a smaller and shorter period as regards the retrospective effect in respect of

the demand made for increased dearness allowance. The Government was in its discretion entitled to restrict the reference in the aforesaid manner. There was no obligation on the Government to make a reference of the whole of the demand made by the petitioners as is contended by Mr. Phadke. I negative the contention of Mr. Phadke that the Government had not applied its mind and had misconceived its jurisdiction while making a reference only for a smaller period.

Mr. Phadke has cited before me art. 119 from Vol. XI of Halsbury's Laws of England (3rd edn.) relating to the jurisdiction of the Court to examine administrative decisions of executive authority. Mr. Phadke has also cited in the same connection the decision in the case of *Brundaban Chandra v. State of Orissa*¹. The propositions made in these authorities are unquestionably well established. The question of my going into details and examining the administrative decision of the Government in this case has in my view not arisen at all. I have, therefore, not dealt with these authorities in detail in this case.

Having regard to my aforesaid findings the petition must fail. The petition is dismissed with costs. Rule discharged.

Petition dismissed.

Solicitors for the petitioners: *Vakil Dadabhoy and Bharucha.*

Solicitors for the respondents: *Little & Co.*

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Kotval.

SMT. VATSALABAI RAMCHANDRA PATIL v. TOGYA MEGHA.*

Berar Regulation of Agricultural Leases Act (XXIV of 1951), Sec. 9B(a)†—Berar Land Revenue Code, 1896, Secs. 88, 91, 220—Berar Waste Land Rules, 1865—Applicability of s. 9B(a) of Act XXIV of 1951—Bare declaration of liability to pay land-revenue, whether equivalent to announcing it at settlement.

In order to obtain the benefit of the provisions of s. 9B(a) of the Berar Regulation of Agricultural Leases Act, 1951, it is necessary to prove that land-revenue could be legally fixed and was in fact fixed. The burden to do so rests on the tenant and that burden cannot be discharged by saying merely that by virtue of some law the landlord has now become liable to pay to the Government a sum of money by way of land-revenue. A bare declaration of liability to pay land-revenue is not equivalent to fixing of land revenue and announcing it at a settlement.

THE facts appear in the judgment.

N. L. Abhyankar, for the petitioners.

MUDHOLKAR J. This judgment will also govern Special Civil Applications Nos. 95 to 107 of 1958.

The petitioners in all these petitions claim to be the owners of certain lands which are in possession of the tenants who are respondents in these petitions. These lands are situate in the village Umri which was leased out to the predecessors-in-title of the petitioners under the Berar Waste Land Rules,

¹ [1953] A.I.R. Orissa 121, at 126.

*Decided, April 27, 1959. Special Civil Application No. 108 of 1958 (with Special Civil Applications Nos. 95 to 107 of 1958).

†Section 9B runs as under:—

"Notwithstanding any agreement, usage, decree, order of a court or any law, the maximum lease money payable by protected lessee for the lease of any land shall not exceed—

(a) five times the land revenue on the land in respect of which announcement of the settlement has been made at any time within the 30 years immediately preceding the commencement of the Berar Regulation of Agricultural Leases (Amendment) Act, 1953, or is made at any time after such commencement and

(b) ten times the fair assessment, in other cases."

1865. The petitioners have alleged in their petitions that they were proprietors of Umri till the abolition of their proprietary rights by virtue of the provisions of the M. P. Abolition of Proprietary Rights Act, 1950. This fact is not denied by the respondents tenants.

A lessee under the Waste Land Rules was deemed to be an 'alienee' of the Government and the village to be 'alienated' to him by the Government. Under r. 1 of these Rules such an alienee is liable to pay annual rent to the Government at a rate to be fixed by the Deputy Commissioner. Under r. 5, a lessee is entitled, either on taking the lease or during its currency or after its expiry, to select either proprietary title constituting the village his property in permanent hereditary and transferable right or to select the Patelship of the village without proprietary right on the land. The petitioners' contention is that their predecessors-in-title chose the proprietary right to the aforesaid village and that consequently their liability to the Government was only to pay rent. It is not the case of the tenants that the petitioners enjoyed only the Patelship of the village and not the proprietary right prior to the date of vesting specified in s. 3 of the Abolition of Proprietary Rights Act. In some of the cases the petitioners had made applications for eviction of the tenants under s. 8(1), cl. (a) (i) of the Berar Regulation of Agricultural Leases Act, 1951; in other cases, the tenants had made applications under s. 9B of the aforesaid Act for fixation of lease-money. In all these cases the question which arose was whether the maximum lease-money to which the petitioners were entitled was five times the land-revenue or ten times the fair assessment. Section 9B of the Act provides that the maximum lease-money payable by a protected lessee of any land shall not exceed five times the land-revenue on the land in respect of which announcement of the settlement has been made at any time within the thirty years immediately preceding the commencement of the aforesaid Act, or is made at any time after such commencement, and in other cases ten times the fair assessment. It is, therefore, necessary to consider whether the tenants' cases fall under the first or the second category.

It is contended on behalf of the tenants that the land-revenue on the lands in their possession as protected tenants had been announced at the settlement made in the year 1928 and that, therefore, the maximum amount of lease-money which they can be called upon to pay will be five times the amount of land-revenue fixed at the settlement. Mr. Abhyankar, who appears for the petitioners, contends that no such settlement was announced in the year 1928 or at any subsequent time and he further contends that in respect of lands in Izara villages there can be no question of announcing a settlement of land-revenue in respect of lands held by the lessees from the Izardars.

In order to appreciate the argument it is necessary to refer to certain provisions of the Berar Land Revenue Code of 1896, which was in force when the alleged announcement of settlement was made.

Chapter V of that Code deals with the question of Land and Land-revenue. Section 49 is one of the sections in that Chapter which provides that all lands shall be liable to the payment of land-revenue to the Government unless any land is specially exempted under the provisions of any special contract with the Government or of any law, rule or order for the time being in force. Under the lease granted by the Government to the petitioners' predecessors-in-title under the Waste Land Rules, 1865, the only liability which is cast upon the lessee, that is the Izardar, is that of payment of rent to the Government and not the payment of land-revenue. It is true, however, that under cl. (23) of s. 4 of the Code, 'land-revenue' includes payment to the Government by way of rent. Section 53 provides that on all lands not wholly exempt from payment of land-revenue, the assessment of the amount to be paid as land-revenue shall be fixed at the discretion of the Deputy Commissioner and the amounts due according to such assessment shall be levied on all such lands.

Chapter VIII of the Code deals with Survey-settlements. Section 83 of that Chapter deals with the power of the Chief Commissioner to introduce the

survey of any land in any part of Berar with a view to the settlement of the land revenue. Section 88 provides as follows:

"88. (1) Subject to the control of the (Chief Commissioner) the Deputy Commissioner or other officer in charge of a survey shall have authority to fix the assessment of land-revenue at his discretion on all lands within the local operation of an order made under section 83, which are not wholly exempt from land-revenue, and the amounts due according to such assessment shall, subject to the provisions of section 90, be levied on all such lands.

(2) In fixing such assessment regard shall be had to the requirements of the proviso to section 53.

(3) But nothing in this section shall be deemed to prevent the officer aforesaid from determining and registering on lands wholly or partially exempt from payment of land-revenue or on lands specially excepted under section 83, from the survey settlement, the proper full assessment which would be payable but for such exemption or exception, or from dividing all such lands to which the survey extends, into survey-numbers."

Section 90 provides that assessments made under s. 88 shall not be leviable without the sanction of the Chief Commissioner and also empowers the Chief Commissioner to declare with the previous sanction of the Governor General in Council, the assessment made by the Deputy Commissioner with any modifications that he may think necessary, fixed for a term of years not exceeding thirty. Then comes s. 91 which is as follows:

"91. (1) When the (Chief Commissioner) or other officer aforesaid shall have sanctioned the levy of the assessments fixed by the officer in charge of the survey, the Deputy Commissioner, or other officer in charge of the survey, or such other officer not below the rank of an Extra-Assistant Commissioner as may be specially appointed for the purpose by the Deputy Commissioner, shall publicly announce or cause to be announced the assessment fixed on each survey-number.

(2) The Deputy Commissioner, or other officer in charge of the survey, or the specially appointed officer, shall, at a reasonable time beforehand, cause public notice to be given, in such manner as he shall deem fit, of the time at or about which the assessments will be announced as aforesaid.

(3) If the holder or other interested in any holding does not appear in person or by agent, he shall be subject, nevertheless, to the same liabilities as if he had attended.

(4) When the assessments have been announced in the manner provided in sub-section (1), the survey-settlement shall be held to have been introduced."

Then there is s. 220 of the Code, sub-ss. (1) and (2) of which run as follows:

"(1) Save as is otherwise provided in section 95 and hereinafter in this section, the provisions of Chapters VIII to X shall not be applied to any alienated village, except for the purpose of fixing the boundaries of any such village, of deciding any disputes relating thereto and of determining and registering the proper full assessment on all lands included therein, as provided in section 38, sub-section (3).

(2) But the provisions of the said chapters shall be applicable to—

(a) all unalienated land situated within the limits of an alienated village;

(b) villages of which a definite share is alienated, but of which the remaining share is unalienated;

(c) alienated villages, in which the holders are entitled to a certain amount of the revenue and the Government to the rest."

The word 'alienated' is also defined in cl. (17) of s. 4 of the Code as follows:

"'alienated' means transferred, so far as the rights of the Government to receive the rent or land-revenue are concerned, wholly or partially, to the ownership of any person;

Explanation.—Lands leased under the Waste Land Rules of 1865, 1876, 1879 or 1880 are 'alienated' within the meaning of this definition."

Now, land-revenue can be deemed to have been announced at the settlement held prior to the coming into force of the Berar Land Revenue Code of 1928, if the provisions of ss. 83, 88, 90 and 91 are applicable and have been complied with. There is no doubt that s. 83 applies to this case and we are prepared to accept the position that it has been complied with. The whole of

s. 88 however does not, in view of the provisions of sub-s. (1) of s. 220, apply but only so much of it as is indicated in the aforesaid sub-section. Now, sub-s. (1) of s. 220 provides that the provisions of Chapter VIII shall not be applied to any alienated village, except for the purpose of determining and registering the proper full assessment on all lands included therein, as provided in s. 88, sub-s. (3). Under s. 88(1) the Deputy Commissioner is empowered to fix the assessment of land-revenue at his discretion on all lands with respect to which revenue survey has been introduced by the Chief Commissioner (or Governor). Sub-section (3) of s. 88 provides that the Deputy Commissioner can determine and register the proper full assessment which would be payable in respect of lands wholly or partially exempt from payment of land-revenue, but for such exemption or exception. Therefore, where land is held by a person in proprietary rights and under the contract between him and the Government he is exempt from payment of land-revenue, all that the Deputy Commissioner can do is to determine and register the full assessment of that land. The Code does not provide for doing anything further with respect to land exempt from payment of land-revenue as it does with respect to land which is not exempt from payment of land-revenue. In the latter case the Chief Commissioner is empowered to levy the assessment under s. 90 and fix a period during which it will continue to be levied. Then sub-s. (1) of s. 91 provides that when the levy of the assessment is sanctioned by the Chief Commissioner, the Deputy Commissioner shall publicly announce or cause to be announced the assessment fixed on each survey-number. Sub-section (4) of that section provides that where the assessment has been announced, the survey-settlement shall be held to have been introduced. It is, therefore, where land-revenue has been assessed and levied and the Survey-settlement introduced by following the procedure laid down in ss. 90 and 91 that it can be said that land-revenue has been announced at the settlement. It will be clear from what we have said above that where land is exempt from payment of land-revenue because of a contract between the holder thereof and the Government, no question arises of announcing the settlement. Therefore, if the predecessor-in-title of the petitioners was the proprietor of the village as contended for by the petitioners, there was no question of fixing land-revenue with respect to any land situate in the village Umri and announcing the assessment or land-revenue of the land.

The Bombay Revenue Tribunal has however held that land-revenue was in fact announced in respect of the lands in the possession of the tenants in the village Umri and that, therefore, the provisions of ss. 90 and 91 have been complied with. The Tribunal has further observed that the provisions of sub-s. (1) of s. 220 are not attracted to this case which, according to it, falls under sub-s. (2) of s. 220. It seems to us that the Revenue Tribunal has ignored the fact that the petitioners' predecessor-in-title was not merely a Patel of the village but was a proprietor thereof. If he was a proprietor of the village then the case would not fall to be governed by sub-s. (2) of s. 220. If the case does not fall under sub-s. (2) of s. 220, then the provisions of ss. 90 and 91 of the Code are wholly inapplicable. We would also like to point out that there is no material on record to show that in respect of each individual survey-number situate in the village Umri, there was any announcement of settlement.

When this matter came up before us last, we had made certain enquiries from the revenue authorities on this point. The Deputy Commissioner, Yeotmal, who dealt with this matter has reported to the effect that the revision of assessment did actually take place in respect of Izara villages in the Darwha taluq (in which taluq village Umri is situate) in the year 1927-28 and that announcement of land-revenue in respect of the fields in the Izara villages was made. The only basis upon which this statement is based is the report of the aforesaid settlement. A copy of that report has also been sent to us. Though it does appear from the last page of the aforesaid report that on June 19, 1928, the Governor in Council issued an order under sub-s. (1) of s. 90 of the Berar

Land Revenue Code, 1896, sanctioning the levy of the assessments fixed by the Settlement Officer in charge of the revenue surveys conducted by him in the taluqs and towns in Berar specified in the first column of the schedule to the aforesaid order, there is nothing to indicate that an announcement was made by the Deputy Commissioner under sub-s. (1) of s. 91 of the Code.

Apart from that, we are of opinion, that the aforesaid order of the Governor in Council is illegal in so far as it purports to apply to the Izara villages in the Darwaha taluq in which proprietary rights had been conferred on the Izardars, the provisions of s. 90(1) of the Code.

The Revenue Tribunal has observed in para. 7 of its order that from the provisions of s. 68(1) of the M.P. Abolition of Proprietary Rights Act, 1950, an inference can be drawn that the assessments fixed on individual survey numbers in the Izara settlements had, subsequent to the enactment of the aforesaid Act, acquired the full character of land-revenue. Section 68(1) runs thus:

"The home-farm land held by a superior holder or the land held by a plot-holder on the first day of October 1949 shall on and from the date of vesting be held by him as an occupant and he shall subject to any orders which may be passed under section 7 of the Central Provinces and Berar Revocation of Land Revenue Exemptions Act, 1948, be liable to the payment of land revenue equal to the fair assessment thereon."

Now, this provision certainly makes an ex-Izardar liable for the payment of land-revenue to the Government with respect to his home-farm land. But what we are concerned with here is not whether the land which is his home-farm is liable to pay land-revenue but whether land-revenue with respect to that land has been announced at a settlement effected prior to the enactment of this provision.

Further, in order to obtain the benefit of the provisions of cl. (a) of s. 9B of the Berar Regulation of Agricultural Leases Act it is necessary to prove that land-revenue could be legally fixed and was in fact fixed. The burden to do so rests on the tenant and that burden cannot be discharged by saying merely that by virtue of some law the landlord has now become liable to pay to the Government a sum of money by way of land-revenue. A bare declaration of liability to pay land-revenue is not equivalent to fixing of land revenue and announcing it at a settlement.

In this view we hold that the Revenue Tribunal was in error in holding that the case of the tenants was governed by cl. (a) of s. 9B and not by cl. (b) of that section.

Upon this view, we allow the petitions, make the rule absolute and remit all these matters to the Sub-Divisional Officer with a direction that he should deal with the applications filed before him by the petitioners and their tenants according to law and with advertence to the above remarks.

We, therefore, make no order as to costs.

Petitions allowed.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar.

CHAMPAKLAL RANGILDAS SHAH v. MESSRS. SWASTIK BHARAT
KALA KENDRA.*

Civil Procedure Code (Act V of 1908), Sec. 60(1)(b)—Protection given by s. 60(1)(b) whether extends to a firm.

The protection given by s. 60(1)(b) of the Civil Procedure Code, 1908, is to individuals and not to a body of individuals, that is, to a firm.

Nihal Singh v. Sri Ram,¹ *Karam Chand Sood v. Official Receiver, Simla*² and *Ramchandra Ayyar v. K. Sessa Ayyangar*,³ referred to.

THE facts appear in the judgment.

Imdad Ali, for the applicant.

N. L. Belekar, for the opponent.

MUDHOLKAR J. This is an application for revision of the order of Mr. H. K. Karmarkar, Judge, Small Cause Court, Nagpur, in civil suit No. 1673 of 1959 releasing from attachment two embroidery machines which were attached by the applicant before judgment under O. XXXVIII, r. 5, of the Code of Civil Procedure.

The relevant facts are as follows: The applicant instituted a suit against the opponents for the recovery of Rs. 1,200 alleged to be due on foot of accounts. The applicant alleges that opponent No. 1 is a partnership firm and opponents Nos. 2 to 5 are members of that firm. On February 28, 1959, the applicant made an application under O. XXXVIII, r. 5, of the Code for attachment before judgment of two embroidery machines which according to him are the property of the firm. The ground on which the application was made was that these machines, though they belonged to the firm, were removed by opponent No. 4 from the premises of the firm to his own house and that the other property of the firm had been concealed by the partners. On March 2, 1959, the Court passed an order to the effect that the two machines be attached before judgment unless any of the opponents furnished security for the claim in suit. Apparently, no security was furnished and, therefore, on March 4, 1959, the machines were attached. On March 6, 1959, Manubhai, opponent No. 4, made an application under s. 60(1)(b) of the Code read with O. XXXVIII, r. 6 thereof for releasing the property from attachment. In that application he also offered to furnish security to the extent of Rs. 1,400. An *ex parte* order was passed on this application by the learned Judge of the Court below to the following effect:—

"Machines to be returned to applicant. Attachment to continue. Security to be taken before machines are returned."

No security was furnished by Manubhai. On March 16, 1959, the matter came up before the Court again. On that date, Manubhai filed his reply to the application of the applicant for attachment before judgment. In that reply he sought releasing of the attachment. He denied that opponents Nos. 2-5 are partners of the firm, opponent No. 1. He also specifically denied that he is a partner of the alleged firm. He also denied that he had in any way concealed, disposed of or removed any goods belonging to the firm. As regards the two embroidery machines he contended that they belonged to him exclusively, and that after the severance of his connection with the business of opponent No. 2, who is a brother of the applicant, he removed them to his own house and that he was entitled to do so under law because they belonged to him alone and not

*Decided, April 29, 1959. Civil Revision Application No. 242 of 1959, against the order passed by H. K. Karmarkar, Judge of the Small Cause Court at Nagpur, in Civil Suit No.

1673 of 1959.

1 [1939] A.I.R. Lah. 388, F.B.

2 [1933] I.L.R. 15 Lah. 26.

3 [1943] A.I.R. Mad. 523.

to the alleged firm. He further contended that he is an artisan, that those machines are tools of an artisan and that, therefore, they are not liable to be attached under s. 60(1)(b) of the Code. No enquiry was held by the learned Judge on any of the points in dispute between the parties but he passed an order on March 24, 1959, releasing the machines from attachment. In his order he has framed the following points for determination:

- (i) Does applicant prove that he has a prima facie case?
- (ii) Does he prove that N.A.s are attempting to remove the property out of the jurisdiction of this Court?
- (iii) Does he prove that the property is being disposed of or removed out of the jurisdiction of this Court with a view to obstruct or delay the execution of the decree that may be passed against them? and
- (iv) Is the attached property liable to attachment?

He decided the first three points in the affirmative but the fourth in the negative.

Mr. Imdad Ali, for the applicant, contends that the learned Judge has not framed all the necessary points for determination because some important matters on which the parties were at issue were not included in them. He also says that it was not open to the learned Judge to decide the application without giving an opportunity to the parties to adduce evidence in support of their respective contentions. I agree with Mr. Imdad Ali. The Court must realise that even interlocutory matters have to be decided after giving an opportunity to the parties to adduce the necessary evidence. It is also necessary for the Court to bear in mind all the contentions of the parties before deciding an interlocutory application. Now, here we find that the parties are at issue on the question as to whether there was at all a partnership and whether one Manubhai was one of the members of the partnership firm. They are also at issue on the point whether the machines belong to the firm or to Manubhai exclusively. These points are relevant because before making an order releasing the property on the ground that they are tools of an artisan the Court has to come to the conclusion that they belong to the person who is asking for their release. A firm is not an artisan, though individual members of a firm may be artisans. The protection given by s. 60(1)(b) is to individuals and not to firms because the whole idea is that persons who carry on their livelihood as artisans or as agriculturists should not be prevented from eking out their existence. The same cannot, however, be said about firms. A firm does not individually work as an artisan or as an agriculturist.

In this connection I may refer to some decisions of the High Courts in India. In *Nihal Singh v. Siri Ram*,¹ the question was as to what was meant by the word 'agriculturist' and in this connection they also considered what is the meaning of the word 'artisan'. Dalip Singh J., who delivered the judgment of the Court, observed (p. 392):

"...Reading clause (b) of the Section it appears to me clear that the juxtaposition of the word 'agriculturist' along with the word 'artisan' implies a person who occupies himself in tilling the soil and whose livelihood depends on this tilling of the soil. It could hardly be said that the term 'artisan' meant merely a person who engaged himself in the practice of some handicraft without reference to the fact that the person maintained himself by the practice of that handicraft. Otherwise, a man who made a hobby of some handicraft might say that for the purposes of this Section his tools were exempt from attachment because he was an artisan. But the meaning of 'artisan' is not in this Section clearly a person who merely engages in some particular handicraft for pleasure or as a hobby or even as an additional source of income, but it means a person who employs himself in a handicraft personally and who depends for his living essentially on the proceeds derived from that handicraft."

If that is the meaning of the word 'agriculturist' then it follows that it is limited to an individual and cannot be extended to a body of individuals, that.

is, to a firm. In *Karam Chand Sood v. Official Receiver, Simla*² the same learned Judge pointed out that the word 'artisan' occurring in s. 60(1)(b) implies a handicraftsman, viz. one who makes certain things as part of his trade or calling. If this view is correct then it would follow that it applies only to an individual and not to a firm. Then we have a decision of the Madras High Court in *Ramachandra Ayyar v. K. Sesha Ayyangar*³ where Horwill J. held that if a person employs a number of artisans to work for him and gives tools for that purpose, he is not himself an artisan but an employer of labour who would not be entitled to the benefit of the section. Such being the law, it is essential to ascertain here whether these two machines belong exclusively to Manubhai as claimed by him or to the partnership firm. Now, Mr. Belekar says that from the accounts, extracts of which have been filed in this case, it would appear that some amounts alleged to have been advanced by the applicant have been debited to Manubhai only and, therefore, the liability which is sought to be enforced in this suit must be regarded as being that of Manubhai only. For one thing, this aspect of the matter has not been considered by the Court below. Apart from that, what is pertinent to note is that Manubhai is not entitled to have the machines released unless he shows that they are his exclusive property. The applicant's assertion in this suit is that Manubhai is one of the partners and he used to hand over or advance money to him in that capacity. Therefore, if the applicant establishes his contention he will be able to hold Manubhai liable as a partner for the amounts so advanced by him. But that again has little bearing on the question whether the property should be released from attachment on the ground claimed by Manubhai.

Since the matter has not been enquired into properly by the Court below, I set aside its order releasing the two machines from attachment and direct the Court to enquire into the matter afresh in the light of the aforesaid observations.

Before parting with the case I would like to mention the offers which were made by Mr. Imdad Ali on behalf of the applicant. He said that if Manubhai is willing to deposit in Court Rs. 1,000 he is prepared not only to return the machines to him but also to undertake not to withdraw the amount but also to pay interest on that amount at six per cent. per annum till the decision of the suit in case the suit is dismissed against Manubhai. He further offered to release one machine if Manubhai instead of depositing Rs. 1,000 deposits Rs. 500 in the Court below and agrees to abide by similar conditions. He made a third offer to the effect that if Manubhai furnished security either for Rs. 500 or Rs. 1,000 he was prepared to release one or two machines as the case may be. It will be open to Manubhai to take advantage of these offers if he likes.

I allow the application, make the rule absolute but direct that the costs in this Court shall be borne as incurred.

Application allowed.

INCOME-TAX REFERENCE

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

MANILAL DAHYABHAI v. THE COMMISSIONER OF INCOME-TAX,
BOMBAY CITY, BOMBAY.*

Indian Income-tax Act (XI of 1922), Sec. 24(2)—Assessee carrying on business in cloth and also business in speculation in gold, silver, cotton etc.—Assessee in its return setting off against profits, in year of account, from cloth business, losses in speculation brought forward from preceding years of account—Assessee maintaining one set of books of account for both businesses—Both businesses carried on at same place with same staff—Capital employed for both businesses same—Receipts of one business utilised for the other business and overhead and other expenses common to both businesses—Whether cloth business and business in speculation constitute “the same business” within s. 24(2).

The assessee carried on business as a wholesale dealer in cloth and it also carried on business in speculation in gold, silver, cotton, etc. For the assessment year 1949-50 the assessee made a return of its total income from business and in arriving at the figure of the total income, it deducted from the gross income a certain amount brought forward as loss suffered in the speculation business in the assessment years 1947-48 and 1948-49. It was claimed by the assessee that the cloth business and the business in speculation constituted the same business within the meaning of s. 24(2) of the Indian Income-tax Act, 1922. It was found that only one set of accounts was maintained i.e. in the set of books maintained for the assessee's cloth business, the dealings in speculation were also entered. There was one cash book and the bank accounts were also the same, both for the dealings in cloth as well as in speculation. Receipts either from the assessee's dealings in cloth or from speculation were deposited in these books and similarly withdrawals for purposes of payment either in regard to dealings in cloth or dealings in speculation were made from these books and accounts. The capital employed for both the businesses was the same and the receipts of one business were utilised for purposes of the other business indiscriminately and *vice versa* and the items of overhead and other expenses were common. Both the businesses were carried on from the assessee's shop and the businesses were carried on with the help of the same staff:—

Held, that on the facts and in the circumstances of the case, the business in speculation and the cloth business conducted by the assessee did not constitute one and the same business, and

that, therefore, the assessee was not entitled to set off against the profits from the cloth business in the year of account the losses in the speculation business brought forward from the preceding years of account.

Though not a conclusive test, an important test which may properly be applied in a case like this, is, whether one of the two businesses conducted by the assessee could be stopped without affecting the texture or framework of the other.

Scales v. George Thompson & Co., Ltd.,¹ Chidambaram Chettiar v. Commr. of Inc.-tax, Madras,² Rekhabchand Sarogi v. Commr. of Inc.-tax,³ Govindram Bros. v. Commr. of Income-tax,⁴ Hirnal Kalyanmal v. Commissioner of Income-tax, Bombay⁵ and K. S. S. Soundrapandia Nadar v. Commr. of Inc.-tax,⁶ referred to.

Normally where the assessee carries on two different lines of business, it is a question of fact whether they constitute two separate and distinct businesses or whether they are in truth branches or departments of one and the same business. The conclusion of the Tribunal, which is founded on no evidence or which is unreasonable or perverse, may not be regarded as binding even if it is apparently on a question of fact. If the question is one of legal inference to be drawn from the facts proved, it may be regarded as a question of law.

*Decided, June 16-17, 1959. Income-tax
Reference No. 42 of 1958.

¹ (1927-28) 13 T.O. 83.

² (1945) 13 I.T.R. 177.

³ (1947) 15 I.T.R. 465.

⁴ (1946) 48 Bom. L.R. 899.

⁵ (1942) 45 Bom. L.R. 115.

⁶ (1960) 18 I.T.R. 163.

Per S. T. Desai J. In determining the question whether two businesses can be called the same business or not, consideration must be directed to the concordant activities, if any, and to the basic singleness, if any, of the two businesses. If the activities are diverse and distinct and there is no basic oneness in the nature of the two businesses, then it cannot be said that they are the same business for the purpose of s. 24(2) of the Income-tax Act.

The facts appear in the judgment.

R. J. Kolah, for the applicant.

G. N. Joshi, with *R. J. Joshi*, for the respondent.

SHAH J. The assessee is a Hindu undivided family. It carries on business as a wholesale dealer in cloth in two names: (i) Manilal Dayabhai, Vithalwadi, Bombay, and (ii) Dayabhai Sobharam, Champa Galli, Bombay. The business with the up-country merchants is carried on in the name of Manilal Dayabhai, and the local business is carried on in the name of Dayabhai Sobharam. The assessee also carries on business in speculation in gold, silver, cotton, etc. Two separate sets of books of account are maintained by the assessee in respect of the businesses carried on in the two names. We are in this reference concerned with the business which is carried on by the assessee in the name of Dayabhai Sobharam. For the assessment year 1949-50 the assessee returned a total income of Rs. 1,38,946 from the business done in the name of Dayabhai Sobharam. In arriving at that figure the assessee deducted from the gross income an amount of Rs. 1,04,042 as loss suffered in the speculation business in shares, cotton, gold, silver and other commodities. In the assessment years 1947-48 and 1948-49 the assessee had suffered losses in speculation in gold, silver, cotton and shares as also in seeds, hessian and linseed. The assessee claimed that against the profit made by it in the cloth business in the year of assessment 1949-50 should be set off the losses suffered in the speculation business which were brought forward from the preceding year. It was claimed by the assessee that the cloth business and the business in speculation in gold, silver, cotton, shares, hessian and linseed constituted the same business. The income-tax authorities negatived the contention raised by the assessee. The assessment proceedings were brought before the Income-tax Appellate Tribunal, and Mr. Aggarwal the Judicial Member and Mr. Malhotra the Accountant Member, constituting the Tribunal, disagreed in their conclusion on the question raised before them. Mr. Aggarwal was of the view that the speculation business and the cloth business constituted the same business within the meaning of s. 24(2) of the Income-tax Act. He observed:

"Taking all the facts and circumstances into consideration I am firmly of the opinion that the speculation business carried on by the assessee is 'the same business' within the meaning of section 24(2) of the Indian Income-tax Act and the loss carried forward must be adjusted against the assessee's profit under the head 'profits and gains of business, profession or vocation.'"

In Mr. Malhotra's view, the speculation business carried on by the assessee had no concern with the normal cloth business conducted by it. In view of the difference of opinion between the two members, the matter was referred to the President of the Tribunal who agreed with the conclusion of Mr. Malhotra. He held that the assessee had failed to prove that the speculation business carried on by it was the same business as the business in cloth, and observed that, if a finding was necessary, the cloth business and the speculation business were "not one and the same business in spite of the trivial connection pointed out by the assessee". We may point out that whereas the two members of the Tribunal expressed their respective opinions on the question whether the cloth business and the business in speculation carried on by the assessee could be regarded as one and the same business, the President decided the appeal primarily on the view that the burden lay upon the assessee to establish

that the speculation business was the same business as the cloth business carried on by it and that burden was not discharged by the assessee, and observed that if it was necessary for him to express an opinion he would agree with the view taken by Mr. Malhotra.

In this reference Mr. Kolah for the assessee has strenuously contended that all the usual indicia which are regarded as determinative of "same business" within the meaning of s. 24(2) of the Income-tax Act are found present in this case by all the three members of the Tribunal, and that Mr. Malhotra and the President were in error in coming to the conclusion that on those indicia the cloth business and the business in speculation carried on by the assessee did not constitute one and the same business.

Normally where the assessee carries on two different lines of business, it is a question of fact whether they constitute two separate and distinct businesses or whether they are in truth branches or departments of one and the same business. It is true that the conclusion of the Tribunal, which is founded on no evidence or which is unreasonable or perverse, may not be regarded as binding even if it is apparently on a question of fact. Again, if the question is one of legal inference to be drawn from facts proved, it may be regarded as a question of law.

The test for ascertaining whether two lines of business conducted by the same assessee constitute the same business or distinct businesses was happily expressed by Mr. Justice Rowlatt in *Scales v. George Thompson & Co., Ltd.*¹ The learned Judge observed (p. 89):

"...the real question is, was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing those two businesses;..."

In considering a similar question in *Scales'* case, Mr. Justice Rowlatt observed that he could not conceive of two businesses that could be more easily separated than the two which were conducted by the assessee in that case. He pointed out that both the businesses had something to do with ships and that was all that could be said about them. He then observed (p. 89):

"...One does not depend upon the other; they are not interlaced; they do not dovetail into each other, except that the people who are in them know about ships; but the actual conduct of the business shows no dovetailing of the one into the other at all. They might stop the underwriting; it does not affect the ships. They might stop the ships and it does not affect the underwriting. They might carry on underwriting in a country where there were no ships, except that it would not be commercially convenient; but the two things have nothing whatever to do with one another."

The learned Judge also pointed out that the method of book-keeping did not seem to him to throw any light upon the matter at all.

Mr. Aggarwal in the reasons in support of his order observed that the cloth business and the speculation business conducted by the assessee constituted the same business and that was clear from the following six factors:

(i) That only one set of accounts was maintained; i.e., in the set of books maintained for the assessee's cloth business the dealings in speculation were also entered. There was one Cash Book and the bank accounts were also the same both for the dealings in cloth as well as in speculation. Receipts either from the assessee's dealings in cloth or from speculation were deposited in these books and similarly withdrawals for purposes of payment either in regard to dealings in cloth or dealings in speculation were made from these books and accounts:

(ii) That the speculation business as well as the dealings in cloth were carried on from the assessee's shop in Champa Galli in the name of Shah Dayabhai Sobharam:

(iii) That the business was carried on with the help of the same staff:

(iv) That the capital employed for both the businesses was the same:

(v) That the receipts in respect of one business were utilised for purposes of the other business indiscriminately and *vice versa*: and

(v) That the items of overheads and other expenses were common.

In the view of Mr. Aggarwal, all these factors led to the inevitable inference that the two lines of business conducted by the assessee constituted the same business. In this view, it could not be said that merely because the nature of the speculation business was different from that of dealing in cloth that the two lines of business constituted separate businesses. Mr. Malhotra was of the view that the principal business of the assessee was the cloth business and that the speculation business was carried on by the assessee by debiting the funds to the cloth business, and merely because withdrawals were made from the cloth business for the purpose of the business in speculation it could not be said that there was identity between the two lines of business carried on by the assessee. He analysed the reasons given for drawing the inference from the six factors set out by Mr. Aggarwal and came to the conclusion that between the two lines of business conducted by the assessee there was no inter-connection, interlacing, inter-dependence or dovetailing or unity embracing the two lines. With this view, as we have already observed, the President appeared to agree. *Prima facie* it may appear that when the two members of the Tribunal agreed that there was no inter-connection, interlacing, inter-dependence or dovetailing of the two lines of business nor any unity in the conduct thereof, the finding recorded by the Tribunal is binding upon this Court: but we do not propose to rest our judgment merely on this view.

It is true that one set of books of account was maintained in respect of the two lines of business conducted in the name of Dayabhai Sobharam, and in that set of books of account entries were indiscriminately posted in respect of the cloth and the speculation transactions. Again, it appears that withdrawals of funds were made from the banking accounts and were allocated to the two lines of business. But the maintenance of one set of books of account will not necessarily lead to the inference that the two lines of business in respect of which entries are made in the books of account are the same business. It may be possible for an assessee to conduct two independent businesses having no connection with each other and post entries in respect thereof in one set of books of account. The posting of entries in the same set of books of account does not justify the inference that the two lines of business constitute the same business, nor does the circumstance that the source from which the monies were obtained for conducting the two lines of business was common lead to the inference that the two lines of business must be regarded as one and the same business.

By s. 24(2) of the Income-tax Act, as it stood before its amendment by the Finance Act, 1955, it was in so far as it is material provided:

"Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, in any business, profession or vocation, and the loss cannot be wholly set off under sub-section (1), so much of the loss as is not so set off... shall be carried forward to the following year and set off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year..."

It is evident that under this section the losses incurred by the assessee in his business in any year may, if unabsorbed, be carried forward to the following year and be set off against the profits and gains of the assessee from the "same business" for that year, but not of any distinct business. It is true that the circumstance that accounts were maintained in the same set of books in respect of two different lines of business may have to be considered in the context of the other circumstances, but, in our judgment, that is not decisive. The speculation business and the cloth business were, it is true, primarily conducted from the assessee's shop at Champa Galli in the name of Shah Dayabhai Sobharam, but, here again, that circumstance does not establish any inter-connection between the two businesses conducted from the same shop. It also

appears that in carrying on the speculation business some assistance of the staff employed in the cloth business may have been obtained; but in the view of the President of the Tribunal this assistance must have been "trivial". In our view, even if some assistance was obtained from the staff maintained for the cloth business, that is not a circumstance which establishes an inter-connection or inter-dependence between the two lines of business. The source of the capital which was employed for the two lines of business was undoubtedly the same; and the receipts in respect of the business in cloth and the speculation business went into that source and from that source monies were withdrawn indiscriminately, and even the overhead charges and the other expenses in the two lines of business were regarded by the members of the Tribunal as common. It is true that these circumstances may, in a proper case, together with other circumstances, justify an inference that the two lines of business constituted one and the same business. But we are unable to hold that because these circumstances are found present it must follow that the two lines of business conducted by the assessee were parts of the same business. The Court must in each case ascertain whether, in view of the existence of these circumstances, unity between the two lines of business is established: and we fail to find from the circumstances referred to in the present case any such unity. Though not a conclusive test, an important test, viz., whether one of the two businesses conducted by the assessee could be stopped without affecting the texture or framework of the other, may properly be applied in this case. It was possible for the assessee to close the cloth business and to conduct exclusively the speculation business and the texture or framework of the speculation business would not have been affected thereby: and by the closure of the speculation business the texture or framework of the cloth business could not have been affected. Again, the nature of the two lines of business conducted by the assessee are not the same. The only similarity—if it can be called similarity—between the two lines of business is that one of the items of the speculation business was cotton whereas the other business conducted by the assessee was of cloth. The cloth business was, it appears, a business of purchase and sale of ready commodity, and the other business which the assessee was conducting was of forward dealings in gold, silver, linseed, hessian, shares and seeds. The nature of the two lines of business was entirely independent of each other, and there was no unity between the two lines of business conducted by the assessee. The financing of the two lines of business from the same source, conducting of the business from the same shop and attendance to the business by the same owner or with the aid of the same staff do not by themselves establish the necessary unity which would constitute the same business.

Mr. Kolah for the assessee cited a large number of decisions in support of his contention that the circumstances which are found in this case were present in the cases cited by him and that in those cases it was held that the two lines of business conducted by the assessee in those cases were the same business. It would be fruitless, however, to enter upon a detailed analysis and comparison of the facts on which the various cases cited before us at the Bar were decided. The decisions in those cases evidently proceeded upon inferences drawn from facts found proved by the Income-tax Tribunals. It may be sufficient to observe that in none of the cases cited any particular circumstance or set of circumstances was held decisive of the question whether two or more lines of business conducted by an assessee constituted the same business within the meaning of s. 24(2) of the Income-tax Act. We may make a brief reference to the cases cited at the Bar which have, it is evident, been decided on a collective appreciation of the facts and circumstances of the cases and not on the application of any general principle.

The first case, which was referred to by Mr. Kolah, was *Okidambaram Chettiar v. Commr. of Inc.-tax, Madras*². In that case, a money-lending business

carried on by the assessee at Karaikudi in British India and another similar business carried on by him in the Federated Malay States at Penang were regarded as the same business because the business operations abroad were conducted in the same manner as they were conducted in India. It was found that even though a separate set of books of account were maintained for the business conducted abroad, copies of the day-book were periodically despatched to the headquarters, there was frequent correspondence between the agents abroad and the assessee who asked for particulars and explanations and issued instructions regarding the conduct of the business, and there was a flow of remittance both ways according to the needs of the business and the final trading result was brought into the accounts at the headquarters at the end of the year. This, according to the Court, presented a picture of a trading organization inter-connected as head office and branch office with financial inter-dependence and unity of control. If, on the facts found proved in that case, the Court came to the conclusion that there was a trading organization which was inter-connected and there was a financial inter-dependence and unity of control between the businesses conducted by the assessee at home and abroad, evidently the business, on the test which we have set out earlier, must be regarded as the same business.

In *Rekhabchand Sarogi v. Commr. of Inc.-tax*³, Mr. Justice Manohar Lall, who delivered the principal judgment of the Court, observed that the capital employed in the business of the assessee was the same, that the accounts of the business were mixed up, that the items of expenditure were interwoven, that the overhead expenses were common, that the registered firm was carrying on business as merchants and that, therefore, he was free to conclude that the registered firm by engaging in speculation in different commodities such as hardware, cement, rice, wheat, yarn, salt, grain and hessian was not entering into different businesses. Here again, the conclusion of the Court is founded upon the existence of interweaving in many respects between the different lines of business conducted by a firm of merchants.

In *Govindram Bros. v. Comr. of Income-tax*,⁴ the assessee-company was carrying on since its incorporation speculation in various commodities in several markets, and the business was conducted in the same premises, by the same staff, and with the aid of the same accounts, and when the assessee-company sought to set off the loss under s. 24(2) of the Income-tax Act, it was held by this Court that speculation in cotton was the same business as speculation in silver and that the assessee-company was entitled to set off the loss in speculation in silver carried forward from the assessment year 1940-41 against the profits from speculation in cotton in the assessment year 1941-42 under s. 24(2). Delivering the supplementary judgment of the Court, Mr. Justice Chagla, as he then was, observed that speculation by itself was not a nexus that connected the silver business with the cotton business conducted by the assessee and that what would make those businesses into one business was not the factor of speculation or the fact that the assessee did not take delivery of those commodities and did forward business, but some other inter-connection or a nexus which had to be found independently of the speculative character of those businesses. It appears that the learned Judge, though with some reluctance, agreed on the facts with the view taken by Sir Leonard Stone, Chief Justice, that the business in speculation in cotton and speculation in silver conducted by the assessee was the same business. This case is evidently no authority for the proposition that certain facts found proved must inevitably lead to the inference that two sets of business conducted by an assessee are or are not the same business.

In *Hiralal Kalyanmal v. Commissioner of Income-tax, Bombay*⁵, the assessee was conducting the business of a selling agent of a textile mill and also the business of banking and speculation in cotton and cotton *jatha* busi-

³ (1947) 15 I.T.R. 465.

⁵ (1942) 45 Bom. L.R. 115.

⁴ (1946) 48 Bom. L.R. 899.

ness. For these businesses the assessee maintained separate books of account. It was held by the income-tax authorities that the two businesses conducted by the assessee were separate and disallowed certain expenses incurred by the assessee in collecting the outstandings of the cotton *jatha* business in computing the profits of the other business: and it was held by the Court that the question whether the two businesses conducted by the assessee were separate businesses or were in reality two branches of the same business was a question of fact and that there was no evidence in that case on which the income-tax authorities could come to the conclusion recorded by them. We may observe that this case did not arise under s. 24(2) of the Income-tax Act, nor did the Court come to the conclusion that any particular facts or circumstances proved in the case must necessitate the inference of existence of the same business or of separate businesses.

In *K. S. S. Soundrapandia Nadar v. Commr. of Inc.-tax*⁶, the assessee was conducting business in grain and rice at Tuticorin in British India and was purchasing certain goods at Rangoon through his agents. He also entered into forward contracts in respect of those goods through his agents at Rangoon. The agents sent to the assessee from time to time statements of account in respect of these transactions in a separate folio in the same account books at Tuticorin. The financing of all the transactions was from Tuticorin and the control of all the transactions was under a single management. The Court on these facts held that the transactions in forward contracts carried on by the assessee in the Rangoon grain market were a part of the general business of the assessee as a dealer in rice and grain and that the assessee was, therefore, entitled to set off the loss against the profits under s. 24(2) of the Income-tax Act. We may point out that Mr. Justice Viswanatha Sastri, who delivered the supplementary judgment of the Court, on a review of the evidence came to the conclusion that the business was conducted by the same person, through the same agency, with the same funds, both with reference to the dealings in futures and forward contracts as well as ready goods, that the speculations in futures were entered into with a view to increase the profits of the business and also perhaps to impress the commercial public in Rangoon and command credit facilities and that the speculations were merely ancillary to the ready goods business and they converged to the same point, namely, the earning of profits as a result of the rice and grains business. It was evident from the finding of the Court that the speculation business was ancillary to the principal business in rice and grains and, therefore, the two lines were regarded as the same business. This case also does not seem to lay down any principle of general application.

The two members of the Tribunal have, in the present case, negatived the existence of inter-connection, interlacing or inter-dependence between the two businesses conducted by the assessee. They have also negatived the existence of a unity of control and that finding is based on evidence. As we have already pointed out, the closure of one of the two businesses would not have affected the texture or framework of the other business. Having regard to these facts, we do not think that any case is made out which would justify us in holding that the majority view taken by the Tribunal was erroneous. On the view taken by us, the answers to the questions† referred will be:

6 (1950) 18 I.T.R. 163.

† (1) "Whether on the facts and in the circumstances of the case the business carried on in speculation and in cloth constitute one and the same business?"

(2) Whether there was any evidence to justify the Tribunal's finding that speculation business and the cloth business were separate businesses and/or whether the Tribunal misdirected itself in law in coming to that conclusion?

(3) Whether on the facts and in the circumstances of the case the assessee was entitled to set off against the profits from the cloth business in the year of account the losses of Rs. 3,57,403 (Rupees three lacs fifty seven thousand four hundred and three) and Rs. 68,719 (Rupees Sixty six thousand seven hundred and nineteen) in the speculation business brought forward from the preceding years of account?"

(1) That the business in speculation and the cloth business conducted by the assessee did not constitute one and the same business:

(2) that there was evidence to justify the Tribunal's finding that the speculation business and the business in cloth were two separate businesses, and the Tribunal has not misdirected itself in law in coming to that conclusion: and

(3) On the facts and in the circumstances of the case, the assessee was not entitled to set off against the profits from the cloth business in the year of account the losses of Rs. 8,57,403 and Rs. 66,719 in the speculation business brought forward from the preceding years of account.

The assessee to pay the costs of the reference to the Commissioner of Income-tax.

S. T. DESAI J. This reference raises the rather vexed question of the connotation and meaning of the expression "the same business" in s. 24(2) of the Income-tax Act in the context of set-off of losses in computing the aggregate income of an assessee. No specific criterion, no infallible rule—inclusive or exclusive, no test of universal application is to be expected in respect of a question which is largely one of fact. It has been said that we have to look at the nexus in determining whether two sets of business operations conducted by a person can or cannot be said to be the same business. Emphasis has sometimes been laid on the place where the business is carried on, or the mode or method of carrying on the business, or the source from which the capital employed in the business has flown and other similar facts which indubitably have relevance in their own setting, and at times are of considerable importance. But, as I have already stated, it is impossible to expect any general test which can be applied in all circumstances and to all facts. Therefore, what we have to do in this case is to find out whether looking at the facts already found by the Tribunal it can broadly be said that the business of the assessee was or was not the same business as found by the Tribunal. I may repeat that the question is largely one of fact, though, of course, a Reference to Court is permissible, and indeed allowed, when it appears to the Court that the finding of the Tribunal was without any evidence to support it or that no proper legal inference had been drawn from proved facts or if the Court is satisfied that the Tribunal had misdirected itself in law. The facts leading up to this Reference and the somewhat chequered history of the case have been succinctly set out by my brother and it is not necessary for me to reiterate the same: nor is it necessary for me to set out in this judgment the six factors which found favour with the Judicial Member of the Tribunal and led him to the conclusion that in this case the business conducted by the assessee was "the same business" within the meaning of s. 24(2) of the Income-tax Act. I shall very briefly refer to those six factors, which Mr. Kolah, learned counsel for the assessee, has very strongly relied upon and indeed urged as decisive of the case. The argument has been that these six factors were not properly appreciated by the majority of the members of the Tribunal as was done by the Judicial Member when the matter first came up before the Tribunal.

The first factor relied on by Mr. Kolah is that the assessee maintained only one set of books of account. A person may indulge in numerous distinct, separate and wholly unconnected businesses and may choose to keep his accounts in one set of books, even if he follows the mercantile system of accounts. There is no obligation on him to maintain separate sets of books of account in respect of his separate business activities or operations. This factor no doubt may be of cogency and even of particular importance in a given case. But that does not mean that it has to be looked upon as of such importance that it can lead the Court to the conclusion which it is asked to reach.

The second factor very strongly and strenuously pressed for our acceptance by Mr. Kolah is that the assessee carried on his speculation business as well as

his business in cloth at the same place, viz., at his shop in Champa Galli. A cloth merchant may from his office or shop give instructions for purchase or sale of commodities or shares or securities on a very large scale: but that does not mean that he is carrying on that business from that very shop. At the time of giving instructions he merely happens to be there. In a case of this nature, viz., where speculation is carried on in several commodities, the place from which instructions are given, or the place where instructions are received, or the place where the statements of accounts and *ankadas* are received, or even the place where the merchant keeps the record of his speculation transactions is not of any particular importance. In a loose sense, it may be said to be the place where he carries on his business, but that certainly is not a factor to which any importance can be attached.

Then there is the factor of the same staff being employed in respect of the speculation business and the business in cloth carried on by the assessee. It is not possible to attach any particular importance to this factor also in view of the nature of the two businesses. Very little work, if any, had to be done by the staff employed for the cloth business which, it is said, also helped in the speculation business.

Then there is the factor of the capital employed for both the businesses being the same. There can be cases in which the employment of capital in the businesses may have some bearing on the determination of the question. But in the present case I do not see how the assessee can rely on the factor that it was the same capital which was employed in both the businesses. In the speculative business, which consisted of forward transactions, he received profits and paid-off losses in respect of that business with his own monies, and it was with his own monies that he carried on the cloth business. Therefore, the source of the capital employed in the two businesses cannot have any particular importance in the present case.

Then there are the last two elements relied on by Mr. Kolah. They relate to receipt of monies and over-head expenses. The factor of receipt of money has little bearing on the question before us; and the payment of overhead charges also has hardly any bearing on the point when we are dealing with a speculation business of the nature carried on by the assessee.

It has been argued by the learned counsel for the assessee that these six are all tests which have been applied by Courts in numerous cases in determining the question of the nature involved in this case and should be considered not separately but together. I agree that these are all relevant factors to be taken into consideration, though I do not regard them as tests: it is their cumulative effect that should weigh in the ultimate determination of the question. Of course, it would not be a correct approach to put them in a series of separate compartments and see whether each of them by itself cannot pass the test of inter-connection and unity of business. This test of inter-connection and unity of business was emphasised by Rowlatt, J. in *Scales v. George Thompson & Co. Ltd.*,¹ and his observations in that case have now become *locus classicus* (p. 89):

“...I think the real question is, was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing those two businesses;...”

In that case, a similar question arose in respect of business activities of a limited company which engaged in ship-owning and underwriting, and the view was taken that the operations of ship-owning and underwriting did not constitute one business but were two separate businesses. The celebrated dictum of Rowlatt J. has been referred to practically in every case decided by Courts in India under s. 24, and affords guidance to the Court in determining the question. The emphasis, as I read this passage, is on the element of unity embracing the two businesses. The inter-connection, the interlacing or the inter-dependence must be real—one of substance—and such as would go to establish the unity of the business. An examination of the short judgment of the

learned Judge in that case and the facts of that case go to show that it was the nature of the two business activities which weighed with the Court in deciding the question. In the same judgment, the learned Judge also observed (p. 89):

"...I cannot conceive two businesses that could be more easily separated than those two. They both have something to do with ships; that is all that can be said about them. One does not depend upon the other; they are not interlaced; they do not dovetail into each other, except that the people who are in them know about ships; but the actual conduct of the business shows no dovetailing of the one into the other at all. They might stop the ships and it does not affect the underwriting."

Having regard to the facts and circumstances of this case, I would prefer to lay stress on the nature of the two businesses. In determining the question whether two businesses can be called the same business or not, consideration must be directed to the concordant activities, if any, and to the basic singleness, if any, of the two businesses. If the activities are diverse and distinct and there is no basic oneness in the nature of the two businesses, then it cannot be said that they are the same business for the purpose of s. 24(2) of the Income-tax Act.

Our attention was drawn by the learned counsel for the assessee to a number of decisions which have already been examined by my brother. I do not see anything in those cases which lends support to the argument pressed for our acceptance by Mr. Kolah. I shall make only one observation on those cases. From an examination of those cases it does emerge that the nature of the two businesses must in some way be shown to be connected: and in the case before us it is extremely difficult to see how the nature of the cloth business was connected with the nature of the business in speculation carried on by the assessee.

Here are two businesses conducted by the assessee with his own capital, and I shall assume that they were conducted from the same place, viz., his cloth shop in Champa Galli, which is one of the centres of cloth trade in Bombay. He is maintaining one set of books of account. In substance and reality, that is all there is to it. The other so-called factors are hardly of any importance. On the other hand, it is clear that in no sense one business depended on the other, unless the financial capacity of the assessee was to be taken into consideration. That certainly is not a relevant factor. There is no element of unity save the object of making profit. That, again, is not a factor which is relevant to the question before us. There was no interlacing and no blending of the two businesses which were totally diverse and distinct commercial operations. The nature of the two businesses, I may repeat, was wholly different. On these facts, it is extremely difficult to say that the majority of the members of the Tribunal were in error when they held against the assessee. Moreover, in this reference we are not making an enquiry as to whether the Tribunal was right or was in error in the conclusion reached by it. We have only to satisfy ourselves whether there was any evidence on which the Tribunal could have reached the conclusion drawn by it. It is not possible to say that the Tribunal has failed to draw any proper legal inference from the proved facts of this case, nor is it possible to say that it has misdirected itself in law on any point. I agree that the answers to the three questions should be as stated by my learned brother.

Solicitors for the applicant: *Ramanlal & Himatlal.*

Solicitor for the respondent: *P. G. Gokhale.*

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

THE NEW MAHALAXMI SILK MILLS, LTD., BOMBAY

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY.*

Indian Income-tax Act (XI of 1922), Sec. 23A—Proper order under s. 23A when may be passed—Net commercial profits how to be ascertained—Tax to be deducted from commercial profits whether to be computed on commercial profits.

Under s. 23A of the Indian Income-tax Act, 1922, (as it stood before its amendment by the Finance Act, 1955), it is for the Income-tax Officer to ascertain, having regard to the profits, the anticipated amount of tax which would have to be deducted to find out the net commercial profits, in the light of all the circumstances then present to his mind, and thereafter to relate the same to the amount of dividend declared. If, having regard to the net commercial profits so ascertained, it appeared to the Income-tax Officer that it would not be unreasonable to distribute sixty per cent. of such income as dividend amongst the shareholders, an order under s. 23A of the Act may properly be passed.

Commr. of Inc.-tax v. F. L. Smidth & Co., referred to.

THE facts appear in the judgment.

N. A. Palkhivala, for the applicants-assesseees.

G. N. Joshi, for the respondent.

SHAH J. The assessee is a private limited company. For the year of account 1949-50 according to the balance-sheet a net profit of Rs. 3,367 resulted in the business of the assessee. The assessee distributed Rs. 12,800 as dividend to the shareholders. In the assessment proceedings the Income-tax Officer assessed the assessable income of the assessee at Rs. 1,37,693. The Income-tax Officer disallowed to the assessee Rs. 55,459 included for excess provision for bonus for the year under reference, Rs. 33,000 for under-valuation of stock and Rs. 20,433 for excess provision for bonus for 1947-48 and 1948-49. He also disallowed Rs. 45,020 on charity account and Rs. 1,053 on Diwali account and made a slight adjustment in respect of the claim for depreciation. Finding that the assessee had not distributed as dividend sixty per cent. of the assessable income less the amount of income-tax and super-tax payable by the assessee, the Income-tax Officer passed an order under s. 23A of the Income-tax Act. Against that order an appeal was preferred to the Appellate Assistant Commissioner, and the matter was ultimately brought before the Tribunal. The Tribunal observed that in considering whether an order under s. 23A may be passed against the assessee the Income-tax Officer ought to have regard to the commercial profits and not the assessable profits. The Tribunal assessed the commercial profits of the assessee, as at the date on which the amount of dividend was resolved to be distributed, at Rs. 56,800. Computing on that amount a tax liability of Rs. 19,325, the Tribunal held that Rs. 37,475 were the net commercial profits of the assessee for the year under reference and sixty per cent. of that amount being Rs. 22,485 and as the assessee had distributed as dividend only Rs. 12,800, an order under s. 23A of the Income-tax Act was properly passed by the income-tax authorities.

In this reference, Mr. Palkhivala for the assessee has contended firstly that the Tribunal was in error in estimating the tax liability of the assessee, while assessing the net commercial profits, at Rs. 19,325, and, secondly, that the Tribunal was in error in adding the amount of Rs. 20,433 standing to the credit of the bonus provision account to the net profit of Rs. 3,367 in ascertaining the profit available for declaration of dividend.

Section 23A of the Income-tax Act, as it stood before its amendment by the Finance Act, 1955, in so far as it is material, provided by the first sub-section:

*Decided, *June 17, 1959*. Income-tax Re- 1 (1959) 35 I.T.R. 183.
ference No. 44 of 1958.

"Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent. of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof, he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make...an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid..."

The object of the section is to prevent the avoidance of liability to pay super-tax by the shareholders of companies in which the public are not substantially interested. Income-tax paid by the company on its profits is by s. 49B of the Act deemed to be paid on behalf of the shareholders, but the shareholders have to pay super-tax on dividends received by them even if the company has paid super-tax out of its profits. The rates of super-tax applicable to companies are substantially lower than the rates applicable to other assesseees. Lest by the expedient of not distributing the dividends and converting the accumulated profits into capital and distributing the same as bonus shares, the higher rate of super-tax may be avoided, the Legislature enacted this section. The provisions of the section are in terms (subject to an exception to be presently noticed) mandatory, if the condition that the profits and gains distributed as dividends are less than sixty per cent. of the assessable income reduced by the income-tax and super-tax payable by the company is fulfilled. The Income-tax Officer has, however, a discretion not to make an order if he is satisfied, having regard to the losses incurred by the company in the earlier years, or to the smallness of the profits made, that the payment of a larger dividend would be unreasonable.

It is undisputed that the Income-tax Officer assessed the total profits of the assessee at Rs. 1,37,693, and the tax payable in respect thereof was Rs. 49,689. Sixty per cent. of the balance considerably exceeded the total dividend declared by the assessee, and Mr. Palkhivala for the assessee has not contended that the case is one in which the primary condition about the inadequate distribution of profits or income as dividends was not satisfied. But he contends that even if the primary condition is fulfilled, the Income-tax Officer had to consider whether, having regard to the smallness of the profits made, payment of a larger dividend than the one declared would be unreasonable. Mr. Palkhivala says that having regard to the smallness of the profits made by the assessee it would, in the circumstances of the present case, be unreasonable to declare a larger dividend.

It is now well settled that the expression "profit made" in s. 23A, sub-s. (1), means commercial profits and not assessable profits. In *Commr. of Inc.-tax v. F. L. Smidth & Co.*¹, a Division Bench of this Court (to which my learned brother was a party) held that in considering the smallness of the profits made by a company the profits that the Income-tax Officer had to consider were not the total income referred to in s. 23A(1) but the actual profits from a commercial point of view. The Income-tax Appellate Tribunal has (as it was bound to) followed that view and has, in para. 6 of its judgment, proceeded to assess the commercial profit of the assessee at Rs. 56,800. But that was evidently the gross commercial profit of the assessee as at the date on which the general meeting for resolving upon the distribution of dividend was held. Out of this amount the Tribunal purported to deduct Rs. 19,325, being the appropriate tax payable in respect of an income of Rs. 56,800. In our view, in making a deduction of Rs. 19,325 only for tax liability the Tribunal

was in error. The income-tax payable by an assessee does not bear any definite relation to his commercial profits. Even if the assessee has made payments which he is not entitled to deduct in ascertaining the assessable income, the commercial profits are to that extent depleted. It would, therefore, in our judgment, be an error to deduct merely the amount of tax computed on the commercial profits to ascertain the profits made. Before the Tribunal it was contended that out of the commercial profits the total amount of tax payable by the assessee should be deducted. The Tribunal was of the view that the assessee must adopt one of two methods, viz., (i) to deduct from the assessable income the amount of tax paid and thereafter to ask the Income-tax Officer to ascertain whether the profits were so small that an order under s. 23A (1) need not be passed, or (ii) to confine itself to the circumstances existing at the date on which the general meeting was held and to take the commercial profits as the basis and to deduct therefrom the appropriate tax payable on the profits so ascertained. But the question is, in our judgment, not of any option vested in the assessee. The Income-tax Officer has to exercise his powers subject to the limitations prescribed by s. 23A. The first condition of which he must be satisfied is that the profits and gains distributed by the assessee as dividend amongst the shareholders is less than sixty per cent. of the assessable income reduced by the amount of income-tax and super-tax payable in respect thereof. Even if this condition is satisfied, if, having regard to the losses sustained in the previous years or to the smallness of the profits made, it would be unreasonable to distribute a dividend larger than the one declared, the Income-tax Officer will not pass the order that the undistributed portion of the assessable income shall be deemed to be distributed as dividends. It was, therefore, for the Income-tax Officer to ascertain, having regard to the profits, the anticipated amount of tax which would have to be deducted to find out the net commercial profits, in the light of all the circumstances then present to his mind, and then to relate the same to the amount of dividend declared. If, having regard to the net commercial profits so ascertained, it appeared to the Income-tax Officer that it would not be unreasonable to distribute sixty per cent. of such income as dividend amongst the shareholders, an order under s. 23A of the Income-tax Act may properly be made. In the present case, the Tribunal having proceeded to deduct only Rs. 19,325, which was the amount of tax payable on the income of Rs. 56,800, in our view, an error has been committed in confirming the order passed by the Income-tax Officer under s. 23A of the Act.

Mr. Palkhivala contends that even the commercial profits ascertained by the Tribunal were erroneously ascertained. According to him, the commercial profits of the assessee amounted to Rs. 86,367 and no more, and the amount of Rs. 20,433 under the head "bonus excess provision credited to the profit and loss account" was wrongly included in the commercial profits. This argument of Mr. Palkhivala we are unable to accept. The assessee had year after year been setting apart certain amounts towards liability likely to arise for payment of bonus to the labourers employed in its factory. Normally the assessee used to set apart every year an amount approximately equivalent to three months' salary payable to the employees. It appears, however, that in 1947-48 the provision made on this account exceeded the amount actually paid as bonus by Rs. 218-5-6; in the year 1948-49 it exceeded by Rs. 3,972-12-6 and in the year 1949-50 the provision made on this account exceeded the actual liability by Rs. 16,241-12-3. At the commencement of the year 1950-51 the assessee had an accumulated balance of Rs. 20,432-14-3 in the bonus provision account and it set apart an amount of Rs. 1,00,000 towards the contingent liability for payment of bonus to its employees in that year. The employees had claimed an amount equivalent to four months' salary as bonus. The dispute was taken to the Industrial Court and ultimately by order, dated February 28, 1951, an award was made whereby the liability of the assessee to pay bonus to its employees for that year was restricted approxi-

mately to half the amount set apart. But in assessing its commercial profits the assessee sought to deduct the entire amount of Rs. 1,00,000. The Income-tax Appellate Tribunal held, having regard to the claim made by the employees, that the assessee did not act unreasonably in setting apart Rs. 1,00,000 towards the contingent liability for bonus, but it was of the view that the assessee should have taken into consideration the accumulated amount of Rs. 20,432 odd before setting aside an additional amount to meet that contingent liability. The Tribunal, therefore, added the amount of Rs. 20,432-14-3 to the profits for the year under account and computed the commercial profits on that footing. In our view, the Tribunal was right in so doing. If there was an undisbursed residue of Rs. 20,432-14-3 in the bonus provision account, and the assessee was faced with a claim for bonus which was not defined but the extent whereof was estimated at Rs. 1,00,000, the assessee was bound to take into account the amount lying accumulated and to make a provision during the year of account only for the balance. Mr. Palkhivala contends that the amount of Rs. 20,432-14-3 did not represent the accumulated amounts of excess in the bonus provision account out of the sums set apart during the previous years, but it represented amounts which were due and payable as bonus to the employees but which were for certain reasons not received by them. No such argument, however, appears to have been raised before the Tribunal, and we do not think we will be justified in allowing Mr. Palkhivala to raise this new plea for the first time before us.

Mr. Joshi for the Department contends in the first instance that the expression "profit made" occurring in s. 23A(1) of the Income-tax Act means the gross profits realised by the assessee without deducting the amount of tax payable. But evidently s. 23A is enacted with a view to prevent accumulation of large amounts of profits without distribution of adequate dividends: and dividends can only be distributed after deducting the amount of tax payable from the assessable income. It is only after the tax payable by the assessee is deducted from the assessable income that there will be a net profit remaining with the assessee distributable as dividend amongst the shareholders. If the view contended for by Mr. Joshi were to be accepted, the assessee may have to pay dividend out of its reserve. We are, therefore, unable to accept the argument that the expression "profit made" occurring in s. 23A(1) is the gross commercial profit without deducting the amount of tax payable.

Mr. Joshi has then contended that the amount of tax deductible out of the commercial profits must be appropriate to its quantum. That argument also we are unable to accept. As we have already observed, the commercial profits bear no real relation to the assessable profits, and the tax is payable on the assessable profits and not on the commercial profits.

Mr. Joshi has finally contended that in any event the assessee may be entitled to deduct from the gross commercial profits only such amount as tax as he could, having regard to its transactions, have anticipated as likely to be imposed by the income-tax authorities and not the total amount of tax which may ultimately be assessed. That argument, in our judgment, has substance. If, with a view to provide for contingent liabilities, the assessee has appropriated a certain amount, evidently the tax which he must have anticipated as likely to be imposed on him will have to be computed after excluding from its gross profits the amount so set apart. The assessee cannot contend that in assessing the net commercial profits the whole of the amount so set apart for meeting contingent liabilities should be deducted whereas in assessing the tax which he must have reasonably expected as payable by him the total amount of tax assessed by the income-tax authorities should be deducted.

The Tribunal has held that the net commercial profits made by the assessee during the year under account amounted to Rs. 37,475. That, for reasons set out earlier, is erroneous. We are unable, on the materials before us, to

ascertain the amount of tax which may have been reasonably anticipated by the assessee as likely to be assessed having regard to its transactions at the date on which the dividend was declared at the general meeting, viz., July 25, 1950. In that view of the case, we are unable to answer the question which has been framed by the Tribunal. We, therefore, remand the case to the Tribunal with a direction that the Tribunal do submit a supplementary statement of the case setting out the appropriate amount of income-tax deductible out of the amount of Rs. 56,800 and which the assessee may have reasonably anticipated as likely to be assessed after taking into consideration the profit made by it and the contingent liability for payment of bonus to the employees of its factory. The supplementary statement to be submitted before December 31, 1959.

Solicitors for the assessee: *Chimanlal Shah & Co.*

Solicitor for the Commissioner: *P. G. Gokhale.*

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

ONKARMAL MEGHRAJ v. THE COMMISSIONER OF INCOME-TAX,
BOMBAY CITY I, BOMBAY.*

Indian Income-tax (Amendment) Act (I of 1959), Secs. 2, 4—Indian Income-tax Act (XI of 1922), Sec. 34—Notice issued under s. 34 after April 1, 1956, whether can be challenged on ground that notice not issued within period prescribed by un-amended s. 34(1)(a)—Such notice issued before April 1, 1956, whether affected by bar of limitation prescribed under unamended s. 34(1)(a)—Interpretation of statute—Whether Statement of Objects and Reasons can be pressed into service in interpreting words in statute.

Under s. 4 of the Indian Income-tax (Amendment) Act, 1959, a notice issued under s. 34 of the Indian Income-tax Act, 1922, after April 1, 1956, for reopening assessment cannot be called in question on the ground that the notice was not issued within the period prescribed by s. 34(1)(a) of the Indian Income-tax Act before its amendment by the Finance Act, 1956, but all other pleas which circumscribe the jurisdiction of the Income-tax Officer can be entertained. To a notice for assessment or re-assessment under s. 34(1)(a) issued before April 1, 1956, and to an assessment or reassessment pursuant to such notice, by s. 4 of the Indian Income-tax (Amendment) Act, 1959, the plea of a bar of limitation under s. 34 before it was amended by the Finance Act, 1956, cannot be entertained.

In interpreting the words used in a statute, especially when the words used are plain, the Statement of Objects and Reasons cannot be pressed into service. In construing a statute the Court may consider the legislative history, may also consider what was the understanding of the law prior to the amendment and may even ascertain what the defect sought to be remedied by enacting the amending Act was. But the Courts are not entitled to interpret the Act by assuming that the Legislature has effectuated the purpose which it had in mind as set out in the Objects and Reasons and has only effectuated that purpose and no other purpose.

The facts appear in the judgment.

N. A. Palkhivala, with *M. M. Jhaveri*, for the assessee.

G. N. Joshi, with *R. J. Joshi*, for the respondent.

SHAH J. This Reference substantially concerns two distinct assessments. One part of the reference relates to the assessment year 1944-45 in which eleven assesseees are interested and the other part relates to the assessment year 1943-44

*Decided, June 25, 1959. Income-tax Reference No. 54 of 1958.

in which the assessee Onkarmal Meghraj is interested. We are at this stage primarily concerned with the assessment of the following eleven assesseees:

1. Narayandas Pokermal
2. Govindram (s/o No. 1)
3. Bhagwandas -do-
4. Vasudeo -do-
5. Meghraj Pokermal
6. Onkarmal Meghraj (s/o No. 5)
7. Banarasilal -do-
8. Beniprasad -do-
9. Hanumandas Sewakram
10. Kedarnath (s/o No. 9)
11. Durgaprasad -do-.

Sixteen persons entered on May 19, 1930, into an agreement to conduct a business in partnership in the name of Messrs. Narayandas Kedarnath. Amongst these sixteen partners there were three sets of persons who constituted Hindu united families. Narayandas Pokermal and his three sons—Govindram, Bhagwandas and Vasudeo—constituted one Hindu united family; Meghraj Pokermal and his three sons—Onkarmal, Banarasilal and Beniprasad—constituted another Hindu united family and Hanumandas Sewakram and his four sons—Kedarnath, Banarasidas, Durgaprasad and Harkisondas—constituted the third Hindu united family. Beside these thirteen persons there were three strangers who were partners in the firm. For the assessment year 1944-45, the members of the original three Hindu united families made returns for income-tax in their status as individuals returning their respective shares in the income of the firm. The Income-tax Officer following his view in the previous year of assessment ordered that the firm of Narayandas Kedarnath be registered under s. 26A of the Income-tax Act and the total income be assessed in the hands of only six assesseees, viz. the three outsiders and the three Hindu united families of Narayandas Pokermal, Meghraj Pokermal and Hanumandas Sewakram and he closed the assessment of the remaining assesseees by declaring their cases as of "no assessment". Against the order passed by the Income-tax Officer, the three Hindu united families preferred appeals to the Appellate Assistant Commissioner and claimed that the income of the sons of the respective Managers in the three Hindu united families be excluded from the family income as it belonged to those sons exclusively and was not the income of the Hindu united families to which they belonged. In support of their contention, they relied upon an agreement reached with the Income-tax Department for the assessment years 1939-40 to 1941-42 by which it was admitted that a partition had taken place in the three families on July 19, 1940. The Appellate Assistant Commissioner, following the decision of the Tribunal in respect of the profits from the firm for the assessment year 1943-44, directed the Income-tax Officer to quash the assessment of the three Hindu united families and to tax the income assessed in the hands of the Hindu united family in the hands of the separated members of the family entitled to receive the income. The Income-tax Officer purporting to exercise powers under s. 34 then issued notices to all the thirteen members of the original three Hindu united families for re-opening the assessment of the year 1944-45. These notices were issued in April 1954, after obtaining the Commissioner's approval for taking action under s. 34(1) read with s. 34(3) as amended by Act XVIII of 1953. For the purpose of these assessments, the assesseees Narayandas, Meghraj, Hanumandas and Beniprasad, respectively assesseees Nos. 1, 5, 9 and 8 in the table set out hereinbefore made their fresh returns in the status of individuals and the other assesseees made their returns in the status of Hindu united family. It may be observed that all the thirteen assesseees had submitted their original returns as individuals and the Income-tax Officer had assessed them in the status of Hindu united family. Against the order passed by the Income-tax Officer assessing the thirteen assesseees as separated members of the families entitled

to receive their share of income from the firm in separate shares, appeals were preferred to the Appellate Assistant Commissioner and that officer confirmed the order passed by the Income-tax Officer. In appeal to the Tribunal, the order passed by the Income-tax Officer was substantially confirmed. The Tribunal held that the notices issued by the Income-tax Officer in April 1954 were issued under s. 34(1)(a) read with s. 34(3) as amended by s. 18 of the Income-tax (Amendment) Act, 1953, and that the Act having retrospective operation as from April 1, 1952, the notices issued on the assesseees were within the period of eight years prescribed by s. 34(1)(a). They also held that the case of the other seven members who were appellants before them fell within s. 34(1) read with s. 34(3) of the Income-tax Act as amended. Accordingly, the Tribunal confirmed the order passed by the Revenue Authorities.

On applications made by these eleven assesseees, the Tribunal has referred the following question:

"Whether, having regard to the direction given by the Appellate Assistant Commissioner in his order dated March 9, 1954, in the case of the appropriate Hindu undivided families and having regard to the second proviso to section 34(3) as amended by section 18 of the Indian Income-tax (Amendment) Act, 1953, the reassessment made by the Income-tax Officer on January 31, 1955, in the case of any one or more of the assesseees, is governed by any limitation period such as mentioned in the substantive part of section 34(3)?"

In respect of the four assesseees, Narayandas, Meghraj, Beniprasad and Hanu-mandas, the Tribunal has referred the following question:

"Whether in the case of the assessee, the remedy available to the Income-tax Officer has already become time-barred under section 34 before that section was amended in 1953 with retrospective effect from April 1, 1952?"

Section 34(1) by the first sub-section, in so far as it is material, before it was amended by the Finance Act of 1956 provided:

"If—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been underassessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year..."

he may in cases falling under cl. (a) at any time within eight years and in cases falling under cl. (b) at any time within four years of the end of that year, serve on the assessee or assesseees a notice under sub-s. (2) of s. 22 and may proceed to assess or re-assess all such income, profits or gains. By the Finance Act of 1956, the time limit of 8 years was omitted from sub-s. (1) in its application to cl. (a). It is evident that whereas before April 1, 1956, notice of assessment or reassessment could be issued under s. 34(1)(a) within eight years from the last day of the year of assessment to which the notice related, under the amendment made by the Finance Act, 1956, that notice could be issued at any time subject to certain conditions prescribed by the proviso incorporated in s. 34(1)—one of the important conditions being that the income which had escaped assessment was rupees one lakh or more.

Counsel for the assesseees contends that having regard to the circumstances of the case the conditions prescribed for the issue of a notice under s. 34(1)(a) are absent and the notices issued against the assesseees for reassessment are invalid. It is submitted that all the assesseees had made their returns containing full and true disclosure of all the material facts necessary for assessment of the

income in the year 1944-45 and, therefore, notices under s. 34(1)(a) could not be issued for reopening the assessment and that the Tribunal was in error in holding that, because in the year 1954 some of the assesses had submitted fresh returns in their status as individuals, i.e. as separated members of the erstwhile Hindu united families, whereas in the earlier return they had made their returns as individuals, the assesses had omitted or failed to disclose fully and truly all material facts necessary for the assessment. It is not disputed that the assesses have in the fresh returns made by them made claims which were inconsistent with the claims made by them in the earlier returns. In the original returns made by the eleven assesses they had claimed that they were separated members and were partners of the firm in their individual rights. After the order of the Appellate Assistant Commissioner four out of the eleven assesses made their returns in the status of individuals, and the remaining in the status of Hindu united families. Even the four members made their returns claiming that they were sole coparceners in their families. In the view we take in this case we do not propose to express at this stage any opinion on the correctness of the view of the Tribunal in its order dated July 31, 1958, that the facts represented by all the eleven assesses were "diametrically opposed to the real state of affairs".

Counsel for the assesses contends that in any event the right to reopen the assessment was barred by limitation before the date on which fresh assessment was made, and that right cannot be revived by the subsequent amendment of the Act. The period of eight years from the last day of the year of assessment expired on March 31, 1958, and the notice for reopening the assessment was admittedly not issued before that date, and, therefore, the amendment of s. 34 by the Finance Act of 1956 may not authorise the Income-tax Officer to reassess the assesses, because the period during which the order of re-assessment may be made has expired. But Mr. Joshi contends that even if the period prescribed by s. 34(1) for issuing a notice of reassessment under cl. (a) had expired, the reassessment proceedings are validated by the Indian Income-tax (Amendment) Act, 1959 (Act I of 1959) which provides that in certain cases the issue of a notice under s. 34(1)(a) and the assessment or reassessment in consequence thereof shall not be called in question on the ground that the period prescribed in that behalf had expired. By s. 2 of Act I of 1959 sub-s. (4) has been added to s. 34 of the Income-tax Act. That sub-section reads as follows:

"A notice under clause (a) of sub-section (1) may be issued at any time notwithstanding that at the time of the issue of the notice the period of eight years specified in that sub-section before its amendment by clause (a) of section 18 of the Finance Act, 1956, (18 of 1956), had expired in respect of the year to which the notice relates."

Evidently, this provision is prospective in terms and a notice under s. 34(1)(a) may, since the enactment of Act I of 1959, be issued at any time notwithstanding that the period of eight years prescribed by sub-s. (1), cl. (a), before it was amended by Act of 1956 had expired. Presumably this provision was enacted with a view to supersede a judgment of the Calcutta High Court in which it was held that to a notice of assessment or reassessment issued under s. 34(1)(a) as amended by the Finance Act of 1956, when the period of eight years after the last day of the year of assessment to which the notice relates, had expired before the Finance Act of 1956 was enacted the plea of a bar of limitation could effectively be set up. By s. 4 of Act I of 1959 it was provided:

"No notice issued under clause (a) of sub-section (1) of section 34 of the principal Act at any time before the commencement of this Act and no assessment, re-assessment or settlement made or other proceeding taken in consequence of such notice shall be called in question in any Court, tribunal or other authority merely on the ground that at the time the notice was issued or at the time the assessment or re-assessment was made, the time within which such notice should have been issued or the assessment or re-assessment should have been made under that section as in force before its amendment by clause (a) of section 18 of the Finance Act, 1956 (18 of 1956), had expired."

Whereas by s. 2 the Income-tax Officer was authorised to issue notice of assessment or re-assessment even if the period prescribed in that behalf by s. 34(1) before that section was amended by the Finance Act of 1956 had expired, by s. 4 it was *inter alia* enacted that a notice issued under s. 34(1)(a) at any time before the commencement of the Act I of 1959 could not be called in question on the ground that when the notice was issued, the time for issuing the notice before the clause was amended had expired. Counsel for the assesses contends that s. 4 was enacted with a view only to validate notices which had, even though the period of eight years from the last day of the assessment year had expired, been issued under sub-s. (1) of s. 34 as amended by the Finance Act of 1956. It is submitted that the expression "at any time" used in s. 4 means "at any time after the 1st of April 1956" and the words "clause (a) of sub-section (1) of section 34" occurring in the first clause mean "clause (a) of sub-section (1) of section 34 as amended by the Finance Act of 1956". Counsel stated that any other interpretation of the section is likely to give to s. 4 a wider retrospective operation than was intended by the Legislature and in effect to supersede certain other provisions of the Act which are not either expressly or by necessary implication amended by s. 4. Our attention was invited to the statement of objects and reasons for enacting this Act. Counsel says that in the Statement of Objects and Reasons, it was stated:

"It has recently been held by the Calcutta High Court that in the absence of an express provision to that effect, the amended section cannot be applied to assessments which had become more than eight years old by April 1, 1956. The present Bill seeks to place this matter beyond doubt by an amendment to section 34 of the Act."

Mr. Palkhivala says that if that was the object of the Legislature, no wider effect should be given to the expression "at any time" and it will be only legitimate to restrict the connotation of that expression as submitted by him. The cardinal rule of interpretation of a statute is to read the words used by the Legislature in their ordinary natural and grammatical meaning; and it is only when context of the words used or the scheme of the statute justifies that course, the Court may be justified in cutting down the meaning of the words of the statute. In interpreting the words used in a statute, especially when the words are plain, the Statement of Objects and Reasons cannot be pressed into service. In construing a statute the Court may consider the legislative history, may also consider what was the understanding of the law prior to the amendment and may even ascertain what the defect sought to be remedied by enacting the amending Act was. But the Court is not entitled to interpret the Act by assuming that the Legislature has effectuated the purpose which it had in mind as set out in the Statement of Objects and Reasons and has only effectuated that purpose and no other purpose. The meaning of s. 2 of Act I of 1959 which incorporated sub-s. (4) in s. 34 of the Income-tax Act is fairly plain. A notice for assessment or re-assessment under sub-s. (1), cl. (a), of s. 34 after the amendment by Act I of 1959 may be issued at any time—even after the period of eight years prescribed by that sub-section before it was amended by the Finance Act of 1956 has expired. By s. 4 notices issued before Act I of 1959 and assessment, reassessment, settlement and proceeding consequent upon such notices are saved from the bar of limitation prescribed by s. 34 before it was amended by the Finance Act of 1956. The section in terms saves a notice under cl. (a) of sub-s. (1) issued "at any time" before the commencement of the Act, notwithstanding that at the time of issue of the notice the period prescribed by s. 34(1) before it was amended by the Finance Act of 1956 had expired, and there is nothing in s. 4 or in s. 2 of Act I of 1959 nor has our attention been invited to any other provision of the Act which may support the contention that the words "at any time" used in s. 4 are used in a restricted sense as meaning "at any time after the 1st of April 1956"; nor is there any warrant for holding that the reference to cl. (a) of sub-s. (1) of s. 34 in the opening part of

s. 4 was only to the clause as amended by the Finance Act of 1956. Undoubtedly by the scheme of the Act or the context in which a provision occurs a statute in terms retrospective may be given only a limited retrospective operation. But we are unable to hold that there is anything in the amending Act which limits its retrospective operation. On the plain words used by the Legislature, a notice issued at any time under s. 34(1)(a) before the commencement of the Act and assessment or re-assessment made in consequence of such notice shall not be called in question on the ground that the notice was not issued or the assessment or re-assessment was not made within the prescribed period. Before s. 34 was amended by the Finance Act of 1956, assessment or re-assessment under s. 34(1)(a) could be made if a notice was issued within eight years from the last day of the year of assessment to which the notice related and under s. 34(3) an order for assessment could not be made after the expiry of eight years from the end of the year in which the income was first assessable, unless a notice for assessment or reassessment was issued within the time limited by s. 34(1)(a). If such a notice was issued the assessment could be made within one year from the date of service. By the amendment made by the Finance Act of 1956, these periods of limitation prescribed by s. 34 are abrogated, and s. 4 of Act I of 1959 seeks to protect from challenge notices of assessment or reassessment which have been issued and assessments and reassessments made in pursuance of such notices after the periods prescribed by s. 34 before it was amended by the Finance Act of 1956. The notice which is protected must accordingly be a notice which when issued was barred under s. 34 before it was amended. Therefore, there is the clearest indication in the framework of s. 4 which supports the view that the notices of assessment or reassessment to which the bar of limitation prescribed by the unamended s. 34 cannot be set up may be notices issued before April 1, 1956.

But counsel for the assessee contends that this interpretation of s. 4 is likely to render certain important provisions contained in s. 34 ineffective, and our attention is invited to the proviso incorporated in sub-s. (1) to that section by the Finance Act, 1956. Undoubtedly even after the amendment of the substantive provision which deletes the requirement that a notice of assessment or reassessment shall be issued within eight years, the proviso imposes a restriction prohibiting the Income-tax Officer, from issuing a notice where the escaped income is not one lakh of rupees or more, after the expiry of eight years from the year of assessment. The condition relating to the issue of a notice within eight years from the year of assessment to which the notice relates remains in case of certain assessments imbedded in s. 34. Counsel for the assessee submits that if the expression any time used in s. 4 of Act I of 1959 be interpreted without any restriction, a clear inconsistency will result. In order to appreciate this contention, the material parts of the proviso incorporated by the Finance Act of 1956 may be set out:

"Provided that the Income-tax Officer shall not issue a notice under clause (a) of sub-section (1) [of section 34]—

(i) for any year prior to the year ending on 31st day of March, 1941;

(ii) for any year, if eight years have elapsed after the expiry of that year, unless the income, profits or gains chargeable to income-tax which have escaped assessment... are likely to amount to, one lakh of rupees or more in the aggregate, either for that year, or for that year and any other year or years after which or after each of which eight years have elapsed,...

(iii) for any year, unless he has recorded his reasons for doing so, and, in any case falling under clause (ii), unless the Central Board of Revenue, and, in any other case, the Commissioner, is satisfied on such reasons recorded that it is a fit case for the issue of such notice."

By this proviso, the jurisdiction of the Income-tax Officer to issue a notice at any time under the operative part of sub-s. (1), cl. (a), of s. 34 to assess or reassess income, profits or gains is restricted by the three conditions set out in

the proviso. The Legislature by enacting this proviso put a restriction upon the authority of the Income-tax Officer to issue a notice after the expiry of eight years from the last day of the assessment year when the escaped income did not amount to one lakh rupees or more. Evidently by enacting the proviso to s. 34(1) the Legislature has classified the notices for assessment or reassessment into two broad divisions—notice where the escaped income is rupees one lakh or more and other notices. If the escaped income is rupees one lakh or more the notice under the amended provision may be issued at any time, but in other cases the notice may be issued only within eight years from the year of assessment to which the notice relates. But the restrictions imposed by the proviso have no retrospective operation. A notice of assessment or reassessment issued after April 1, 1956, will of necessity be subject to the restrictions contained in the proviso to cl. (1). Such a notice may not by virtue of s. 4 of Act I of 1959 be called in question merely on the plea that it was not issued within the time prescribed by s. 34 before it was amended by the Finance Act of 1956; but the exercise of the jurisdiction of the Income-tax Officer being conditioned by the proviso, the plea of nonfulfilment of the conditions may certainly be set up in defence. The proviso not being retrospective, a notice of assessment or reassessment issued before April 1, 1956, but not within eight years from the assessment year to which it relates, could successfully be challenged on the ground of limitation before Act I of 1959 was enacted. Act I of 1959 expressly protects such a notice against that challenge whatever may be the amount of escaped income. The Legislature has by enacting s. 4 protected notices issued before the enactment of Act I of 1959 merely against the plea of the bar of limitation, and no other bar is sought to be abrogated thereby. Therefore, in giving full retrospective operation to s. 4 we are not faced with any inconsistency with any other provision contained in s. 34.

In that view we hold that since the enactment of Act I of 1959 a notice issued after April 1, 1956, for reopening assessment by virtue of s. 4 will not be permitted to be called in question on the ground that the notice was not issued within the period prescribed by the unamended s. 34(1)(a) but all other pleas which circumscribe the jurisdiction of the Income-tax Officer will certainly be entertainable. To a notice for assessment or reassessment under s. 34(1)(a) issued before April 1, 1956, and to an assessment or reassessment pursuant to such notice, by s. 4, the plea of a bar of limitation under s. 34 before it was amended by the Finance Act, 1956, will not be entertained. There is, therefore, no warrant for the submission that by s. 4 of Act I of 1959 proviso to s. 34(1) is in any manner abrogated.

But this view, which we have expressed, is not sufficient to dispose of this Reference. Evidently, s. 4 of Act I of 1959 prevents a plea of the bar of limitation being set up against a notice under cl. (a) of sub-s. (1) of s. 34 and not to any other notice. In the present case, it is not clear on the record whether the notice issued was under cl. (a) of sub-s. (1) of s. 34 or under cl. (b) of sub-s. (1). Even the copies of the notices served upon the assesses are not before the Court. The reasons recorded by the Income-tax Officer for issuing the notices under the relevant proviso as it stood when the notices were issued are also not before the Court and there is no evidence of the Commissioner's satisfaction on the reasons recorded by the Income-tax Officer. Even the order of the Income-tax Officer and the manner in which the reassessment proceedings were dealt with are not before the Court. The reasons given by the Income-tax Tribunal for coming to the conclusion that the notices fell within the terms of s. 34(1)(a) were made in a different context and we do not think that they can be regarded as conclusive or binding in considering whether the case is governed by the proviso to s. 4 of Act I of 1959. In the circumstances, before this Reference can be decided, we think that we must have a supplementary Statement of facts as to the character of the notices issued by the Income-tax Officer in April 1954 upon the assesses. After the supplementary Statement of facts is received from the Tribunal, we will proceed to reframe

the questions in the light of the provisions of Act I of 1959 and will proceed to answer the same.

Solicitors for the assessee: *Payne & Co.*

Solicitor for the respondent: *P. G. Gokhale.*

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY
v.

THE NATIONAL ELECTRICAL INDUSTRIES LTD.*

Indian Income-tax Act (XI of 1922), Secs. 15C, 24(2), 10(2)(vi) proviso (5)—Assessee, newly established industrial undertaking, making profit in year of account—Income-tax Officer in making assessment for relevant year deducting, out of profit, losses carried forward from previous years—Benefit of s. 15C not given to assessee as total income of assessment year exhausted—Priority between benefit of exemption from payment of tax under s. 15C and set off in respect of loss of previous year under s. 24(2).

In the year of account the assessee, which was a newly established industrial undertaking, made a profit. The Income-tax Officer in assessing the total income of the assessee for the relevant assessment year, deducted out of the net profits the losses carried forward from the previous years and the unabsorbed depreciation of the previous years and when it was found that the total income of the assessment year was exhausted, he did not give to the assessee the benefit of s. 15C of the Indian Income-tax Act, 1922. On the question whether the losses brought forward from the preceding years should be set off against the profits of the year of account before allowing the assessee the benefit of s. 15C of the Act:—

Held, that s. 15C of the Act merely provides a partial exemption from payment of tax by newly established undertakings, and, therefore, in the computation of tax, the amount of losses carried forward is liable to be deducted out of the income of the year of account and it is only after the quantum of tax is ascertained that exemption from payment under s. 15C could be given by the taxing authorities, and

that, therefore, in the instant case the losses brought forward from the preceding years could be set off against the profits of the year of account before allowing the assessee the benefit of s. 15C.

The facts appear in the judgment.

G. N. Joshi, with *R. J. Joshi*, for the petitioner.

R. J. Kolah, with *N. A. Palkhivala*, for the respondent.

SHAH J. The assessment years in this reference are 1952-53 and 1953-54. The assessee company had suffered a loss of Rs. 1,15,220, in the assessment year 1950-51 and this loss was carried forward to the next assessment year. The company was also unable fully to avail of the depreciation allowance in 1950-51 and 1951-52. The assessee was a newly established industrial undertaking and was entitled to exemption from payment of tax to the extent prescribed by s. 15C of the Income-tax Act. In the year of account 1951-52 the assessee made a profit of Rs. 3,65,000 odd, but after making allowance for the unabsorbed depreciation of the previous years and also the losses carried forward from the previous years, there remained no taxable income and accordingly no demand for tax was made for the assessment year of 1952-53. In assessing the total income, the Income-tax Officer did not give the benefit of exemption from payment of tax under s. 15C of the Income-tax Act to the assessee. The Income-tax Officer deducted out of the net profit the loss of the previous years and the unabsorbed depreciation, and when it was found that the total income

of the assessment year 1952-53 was exhausted, the benefit of s. 15C by providing exemption to the extent of six per cent. of the capital employed was not given. It is evident that if the benefit of exemption from payment of tax under s. 15C was given to the assessee initially before the loss carried forward from the previous year and the unabsorbed depreciation of the previous year were allowed out of the profits, full provision could not be made for the latter allowances in the year of assessment. But the assessee would have been permitted to carry forward the loss to the next assessment year and the unabsorbed depreciation could be treated as depreciation for the subsequent year. When, however, the assessee was not given the benefit of exemption under s. 15C in the assessment year, the shortfall could not under the law be carried forward to the next assessment year.

The order passed by the Income-tax Officer was confirmed by the Appellate Assistant Commissioner. In the view of the Income-tax Appellate Tribunal, in assessing the taxable income certain deductions under s. 24(2) were allowable under the law because the assessee had suffered a loss in the previous year but the Income-tax Officer was bound in the first instance to allow to the assessee the benefit of exemption from payment of tax under s. 15C before setting off the loss carried forward from the previous year. The Tribunal accordingly set aside the order of the taxing authorities and directed the Income-tax Officer to give the benefit of exemption from payment of tax to the assessee under s. 15C before setting off the loss brought forward from the preceding year.

The Tribunal has at the instance of the Commissioner referred the following question:

"Whether on the facts and circumstances of the case, the loss brought forward from the preceding year amounting to Rs. 1,15,220 should be set off against the profits of the year of account without allowing the assessee the benefit of section 15C of the Income-tax Act?"

The question debated before us is as to the priority between the benefit of exemption from payment of tax under s. 15C and the set off in respect of loss of previous year under s. 24(2), when the set off does not leave adequate taxable income to make the exemption under s. 15C from payment of tax real. Evidently, under the scheme of the Income-tax Act, assessable income of the assessee has to be computed by aggregating the various heads of taxable income subject to permissible deductions and thereafter by s. 24 the losses suffered either in the year of account or carried forward from the previous year to the permissible extent have to be deducted in assessing the total income, and it is only after the total income is ascertained and tax is computed thereon that the benefit is to be allowed to the assessee exempting him from payment of tax on such profits or gains derived from the industrial undertaking not exceeding six per cent. on the capital employed in the undertaking. In other words, according to the scheme envisaged by the Act, the total income can be ascertained after allowing from the income of the year of account the unabsorbed depreciation of the previous years as well as the permitted set off of losses of the current and previous years and it is only after the total income is computed and the liability to tax ascertained that the benefit of s. 15C can be provided to the assessee. The forms of return of income prescribed under r. 19 framed under the Act, clearly indicate that the income accrued from various sources such as salaries, interest on securities, business, property and other sources has to be aggregated and on the income so aggregated, the tax has to be ascertained and against the tax so ascertained credit has to be given for the amount exempted to the extent of the items permissible under s. 15C as well as under ss. 15A and 15B. Apparently by enacting s. 15C the Legislature has not prescribed for exclusion of a percentage from the head of profits of a new industrial undertaking in the computation of total income but has merely provided a partial exemption from payment of tax by newly established undertakings and, therefore, in the natural sequence of computation of

tax, the amount of losses carried forward is liable to be deducted out of the income of the year of account and it is only after the quantum of tax is ascertained, exemption from payment to the prescribed extent will be given by the taxing authorities.

The contention of the assessee that by s. 15C so much of the profits derived from the newly established undertaking to which the section applies as do not exceed 6 per cent. per annum on the capital employed in the undertaking are to be excluded in the computation of total income and this exclusion is to be made irrespective of any set off which is permissible under s. 24(2), has, in our judgment, no force. It is true that in order to give a fillip to new industrial undertakings and to secure speedy industrialisation, the Legislature has provided for exemption from payment of tax on a percentage of the capital employed in the undertaking, but thereby the true nature of the exemption is not altered. The exemption is in terms from payment of tax and it is not an exclusion of income in the computation of total income. It is true that under proviso (b) to s. 24(2) it is expressly enacted that where depreciation allowance under cl. (vi) of the proviso to cl. (vi) of sub-s. (2) of s. 10 is to be carried forward, effect shall first be given to the provisions of s. 24(2). If the profits or gains in respect of any business, profession or vocation are insufficient in the assessment year to permit full allowance for unabsorbed depreciation of the previous year under s. 10(2)(vi), proviso (b), the set off of losses for previous years permitted under s. 24(2) is to be given in the first instance and the unabsorbed depreciation is to be treated as depreciation in the subsequent years. No similar provision is made giving priority to set off in respect of losses of the previous years over the exemption from payment of tax under s. 15C. But proviso (b) to s. 10(2)(vi) was enacted to cover cases of competing rival claims for deduction from income in computing the taxable income. The exemption from payment of tax under s. 15C and the privilege of carrying forward losses, are however not benefits of the same category and become allowable to the assessee at different stages of assessment. It is difficult then to visualise a competition between these two benefits. The absence of an express provision postponing the exemption from tax under s. 15C to a set off for losses of previous years carried forward does not therefore justify the view that the scheme of computation of total income for purposes of assessment was intended to be reversed.

By sub-s. (3) of s. 15C profits or gains of an industrial undertaking to which that section applies have to be computed in accordance with the provisions of s. 10. Every industrial undertaking may, however, be regarded as a business and the computation of profits and gains has to be made even apart from sub-s. (3) of s. 15C in accordance with the provisions of s. 10, and the necessity of incorporating that provision in s. 15C may not be easily appreciated; but we are on that account unable to hold that it was intended by enacting that provision by implication to relegate the set off of loss to the exemption of tax under s. 15C. There is no such express provision made, and we do not think that any implication of that nature is permissible. Nor does cl. (5) of s. 15C which provides that nothing in the section shall affect the application of s. 23A in relation to profits or gains of an industrial undertaking to which the section applies affect the interpretation of the operative part of s. 15C.

In our view, whereas s. 24(2) deals with a permissible deduction from the totality of assessable income, s. 15C provides only for an exemption from payment of tax; and if in computing the total income liable to tax and the rates at which the tax is payable, set off of losses of the previous years is to be allowed, it would be difficult to hold that the set off will be postponed to the benefit of s. 15C. The Legislature undoubtedly intended to confer certain benefits upon industrial undertakings to which s. 15C applies, but we will not on that account be justified in holding that, when the Legislature has not provided that the benefit of s. 15C is to be allowed as a deduction from income,

deduction substantially of that nature should still be made on the assumption that an absence of an express provision dealing with priority implied that intention.

We reframe the question by substituting the word "before" for the word "without" and answer the question in the affirmative.

Assessee to pay the costs of the Commissioner.

Solicitor for the Commissioner: *P. G. Gokhale.*

Solicitors for the assessee: *Mulla & Mulla & Craigie Blunt & Caroe.*

SALES TAX REFERENCE.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

M/S. NILGIRI CEYLON TEA SUPPLYING CO. v. THE STATE OF BOMBAY.*

Bombay Sales Tax Act (Bom. III of 1953), Sec. 8(a)—Assessee, dealers in tea, purchasing different brands of tea from registered dealers and after mixing these, selling the mixture—Whether assessee entitled to deduct from their turnover value of tea purchased from registered dealers—Tea purchased whether processed or altered after purchase.

The assessee who carried on business as dealers in tea, purchased diverse brands of tea from registered dealers and without the application of any mechanical or chemical process mixed up the brands of tea purchased in bulk by them and sold the tea as tea mixture. The mixing was according to the formulae evolved by the assessee. In the assessment of sales-tax the assessee claimed that the value of the tea purchased by them should be deducted from the turnover under s. 8 of the Bombay Sales-tax Act, 1953. The Sales-tax authorities having regard to the proviso to s. 8(a) of the Act did not allow the deduction. On the question whether the assessee were entitled to deduct from their turnover the value of the tea purchased from the registered dealers:—

Held, that as there was neither processing nor alteration in any manner of the tea purchased by the assessee within the meaning of the proviso to s. 8(a) of the Act, the assessee were entitled to a deduction from their turnover of sales, the value of the tea purchased, under s. 8(a) of the Act.

THE facts appear in the judgment.

N. A. Palkhivala, for the assessee.

D. P. Madon, for the respondent.

SHAH J. Messrs. Nilgiri Ceylon Tea Supplying Co. carry on business as dealers in tea in Bombay. They are registered dealers under the Bombay Sales-tax Act, 1953. M/s. Nilgiri Ceylon Tea Supplying Co., who will be hereafter referred to as "the assessee", purchased diverse brands of tea and without the application of any mechanical or chemical processes mixed the tea purchased in bulk by them and sold it as tea mixture. The mixing, however, is not haphazard but according to the formulae evolved by the assessee. In the assessment of sales-tax the assessee claimed that the value of the tea purchased by them should be deducted from the turnover under s. 8 of the Bombay Sales-tax Act, 1953. The Sales-tax authorities did not accept the contention of the assessee having regard to the proviso to cl. (a) of s. 8 and did not allow deduction for the value of the tea purchased. The Sales-tax Tribunal also affirmed the view of the Sales-tax authorities. The Sales-tax Tribunal has at the instance of the assessee, referred the following questions:

"(1) Whether on the facts and in the circumstances of this case, the petitioners (assessee) are entitled to a deduction from their turnover of sales under clause (a) of section 8 of the Bombay Sales-tax Act, 1953, of the amount of Rs. 1,17,052-8-0, being

Decided, July 9, 1959. Sales-tax Reference No. 5 of 1958.

sales of goods purchased from registered dealers on or after the appointed day? and

(2) Whether the Tribunal was justified in not allowing the applicants (assesseees) to show that a part of the goods sold by them had not been processed or altered, as the goods in question had been sold as orange pekoe, the original teas purchased also having been called by the same name and only teas of the same variety grown on different plantations had been mixed together?"

Section 8 of the Bombay Sales-tax Act, 1953, so far as it is material, provides:

"Subject to the provisions of section 7, there shall be levied a sales-tax on the turnover of sales of goods specified in column 1 of Schedule B at the rate, if any, specified against them in column 2 of the said Schedule, after deducting from such turnover—

(a) sales of goods—

(i) which have been purchased from a registered dealer on or after the appointed day, or

(ii) on the purchase of which the dealer has paid or is liable to pay the purchase tax:

Provided that the goods have not been processed or altered in any manner after such purchase;"

In the present case, there is no dispute that the assesseees have purchased from registered dealers tea leaves in bulk after the appointed day and the sole question which falls to be determined is whether the assesseees are entitled to deduct from their turnover the value of the goods purchased from registered dealers. The assesseees contend that they are entitled to do so. The Sales-tax Department contends that the goods which have been purchased by the assesseees have been processed or altered after the purchase and, therefore, deduction cannot be permitted. We are, therefore, called upon to decide whether on the facts and in the circumstances of the case there has been a processing or alteration in any manner of the different brands or varieties of tea purchased by the assesseees. The expression "process" has not been defined in the Act. According to Webster's Dictionary "process" means

"to subject to some special process or treatment, to subject (especially raw material) to a process of manufacture, development or preparation for the market etc.; to convert into marketable form, as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking."

In the present case, there has been nothing but a manual application of energy to the different quantities of tea purchased by the assesseees in certain proportions so as to evolve a mixture of tea which was sold as tea mixture of the assesseees. In our view, the quantities of tea purchased by the assesseees cannot since the date of the purchase be regarded as processed within the meaning of the proviso to cl. (a) of s. 8 of the Act. There is not even application of mechanical force so as to subject the commodity to a process, manufacture, development or preparation. The commodity has remained in the same condition. It is true that in the preparation of the tea mixture which is marketed, there may be some skill involved. But that, in our judgment, cannot be regarded as processing within the meaning of the proviso.

It is urged on behalf of the Sales-tax Department that in any event there is alteration in the goods, and if there be alteration in the goods since the purchase, the value of the goods paid to the registered dealer cannot be deducted from the turnover. It cannot however be said that in the preparation of the tea mixture there is any alteration in the goods. Undoubtedly by mixing the different varieties of tea purchased by the assessee there resulted a mixture in which the individuality of the components was obscured, but that, in our judgment, is not alteration within the meaning of the Act. The alteration contemplated by the Legislature is some alteration in the nature or character of the goods. In the present case, in our view, there is neither processing nor alteration in any manner of the goods purchased by the assessee.

On that view of the case, question No. 1 will be answered as follows: "The assesseees are entitled to a deduction from their turnover of sales

under clause (a) of Section 8 of the Bombay Sales Tax Act, 1953, of the amount of Rs. 1,17,052-6-0.”

On that view of the case, question No. 2 need not be answered.

Assessees will be entitled to their costs from the State of Bombay.

No order on the Notice of Motion.

Solicitors for the assessees: *Khona & Suryakant.*

Solicitors for the respondent: *Little & Co.*

ORIGINAL CIVIL.

Before Mr. Justice K. T. Desai.

THE INDIA UNITED MILLS LTD. v. THE REGIONAL PROVIDENT FUND COMMISSIONER.*

Employees' Provident Funds Act (XIX of 1952), Secs. 6, 2(b)—Employees' Provident Funds Scheme, Rr. 29, 30, 33—Standing Orders providing for termination of employment of operatives and clerks by payment of thirteen days' wages and one month's pay respectively, in lieu of notice—Employer terminating services of operatives and clerks by payment of thirteen days' wages and one month's pay—Whether such amounts paid “basic wages” or dearness allowance under Act and Scheme—Provident fund contribution whether payable in respect of such amounts.

Amounts paid by the employer under Standing Orders settled under the Bombay Industrial Relations Act, 1946, for securing the due termination of the employment of the employees without notice, are not amounts drawn by the employees as “basic wages” or dearness allowance and the provisions of the Employees' Provident Funds Act, 1952, and the Employees' Provident Funds Scheme are not applicable thereto. No amount is, therefore, payable in connection therewith by way of provident fund contribution under the Act or the Scheme.

The expression “emoluments which are earned by an employee while on duty” in s. 2(b) of the Employees' Provident Funds Act, 1952, represents the amounts actually earned by an employee during the period of his employment while he is actually on duty.

THE facts appear in the judgment.

R. J. Kolah, with *P. Ramaswamy*, for the petitioners.

M. J. Mistree, for respondent No. 1.

R. J. Joshi, for respondents Nos. 2 and 3.

K. T. DESAI J. The petitioner company is a public joint stock company incorporated under the Indian Companies Act, 1913. The petitioner company carries on business of manufacturing and selling textile piecegoods. The petitioner company in the course of its business employs a large number of workers. Between October 30, 1955, and February 15, 1957, the petitioner company terminated the services of 41 employees. Some of the persons whose services were terminated were operatives and some were clerks. The Standing Orders as finally settled by the Industrial Court under s. 36(3) of the Bombay Industrial Relations Act, 1946, applicable to the petitioner company, provide by Order No. 19(a) that the employment of any permanent operative may be terminated by fourteen days' notice or by payment of thirteen days' wages in lieu of notice. The Standing Orders applicable to clerks provide by Order No. 10 that the employment of any permanent employee may be terminated by one month's notice or one month's pay in lieu of notice unless provided otherwise in any specific agreement. The petitioner company had terminated the services of the operatives on payment of thirteen days wages in lieu of notice and of the clerks on payment of one month's pay in lieu of

*Decided, September 4, 1958. O. C. J. Miscellaneous Application No. 285 of 1957.

notice. The Central Provident Fund Commissioner considered that the petitioner company was liable to pay provident fund contribution in respect of the amounts paid as aforesaid on the termination of the services of the aforesaid operatives and clerks. The Regional Provident Fund Commissioner issued notices requiring payment of the amounts representing the petitioner company's share as well as the employees' share of the provident fund contribution from the petitioner company in connection with the amounts paid as aforesaid. The petitioner company denied its liability to pay the same and declined to pay the same. The amounts claimed were sought to be recovered from the petitioner company by the coercive machinery available under s. 8 of the Employees' Provident Funds Act, 1952. The petitioner company has challenged the action of the authorities in requiring payment of the said amounts and in seeking to recover the same.

The petitioner company has filed the petition for the issue of a writ of *certiorari* or other appropriate writ or direction or order under art. 226 of the Constitution against the Regional Provident Fund Commissioner, the State of Bombay and the Collector of Bombay, calling for the records of the case and for quashing and setting aside respondent No. 1's order relating to the demand of these amounts and the second and third respondents' demand for recovery of the said alleged dues. The petitioner company has also prayed for the issue of a writ of *mandamus* or other writ or direction or order under art. 226 or an order under s. 45 of the Specific Relief Act against respondents Nos. 1 and 3 requiring them and their successors in office to withdraw and/or cancel the said orders and the said notices. The petitioner company has also prayed for the issue of a writ of prohibition or any other appropriate writ or direction under art. 226 of the Constitution restraining respondents Nos. 2 and 3 "from enforcing or taking any proceedings in enforcement of the recovery of the amounts" mentioned in the said notices.

It is not disputed that the services of the operatives stood determined on payment of thirteen days wages in lieu of notice and that the contract of employment did not subsist during the period of thirteen days after payment. It is also not disputed that the services of the clerks stood determined on payment of one month's pay in lieu of notice and that the contract of employment did not subsist during the period of one month after such payment. In my view, the words "thirteen days wages" and "one month's pay" appearing in the Standing Orders refer merely to the quantum of payment to be made for the immediate termination of the services of the employees without notice.

It is urged on behalf of the respondents that the Standing Orders constitute the terms of the contract of employment between the employer and the employees, that what is payable by the company for terminating the services of an employee under the Standing Orders constitutes "wages" in the case of an operative and "pay" in the case of a clerk, and that the amounts so paid are amounts in respect whereof provident fund contribution is payable under the provisions of the Employees' Provident Funds Act, 1952.

On the other hand, it is contended on behalf of the petitioners that wages or pay represent the consideration which is payable during the subsistence of the contract of employment, and that any sum which is payable for securing the due termination of the contract of employment is in reality in the nature of compensation. It is urged that the nature or character of such payment is not altered merely because the parties agree in advance about the amount thereof in terms of wages or pay for a particular period. It is further contended that no amount is payable under the Employees' Provident Funds Act, 1952, and the Scheme framed thereunder by way of provident fund contribution in respect of such payment.

In order to decide when contribution is payable under the Employees' Provident Funds Act, 1952, it is necessary to consider the provisions of the Employees' Provident Funds Act, 1952. Section 6 of the Act provides as under:—

"The contribution which shall be paid by the employer to the Fund shall be six and

a quarter per cent of the basic wages and the dearness allowance for the time being payable to each of the employees, and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may if any employee so desires and if the Scheme makes provision therefor, be an amount not exceeding eight and one third per cent of his basic wages and dearness allowance."

The expression "basic wages" has been defined for the purposes of the Act by s. 2(b) as under:—

"Basic wages" means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include—

(i) the cash value of any food concession;

(ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, over time allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;

(iii) any presents made by the employer."

It has been strongly urged on behalf of the respondents that the expression "basic wages" as used in the Act is wide enough to cover the payments which have been made to the employees for securing due termination of their employment. It is urged that the expression "basic wages" means all emoluments which are earned by an employee while on duty, and that the amounts that have been paid to the employees for securing the due termination of their services represent the amounts which had been earned by them while they were on duty. It is urged that because the employees were on duty, they became entitled to receive such payment under the contractual obligation incurred by the company as embodied in the Standing Orders. In my view, this reading of the section is untenable. The expression "emoluments which are earned by an employee while on duty" represents the amounts actually earned by an employee during the period of his employment while he is actually on duty. The payment in question is not a payment earned for duty done. It is not a payment earned while on duty. It is a payment by way of consideration for terminating the contract of employment of a permanent employee without notice. The payments made cannot in any sense be regarded as representing "emoluments earned while on duty" and are not and do not constitute "basic wages" within the meaning of the definition given in the Employees' Provident Funds Act, 1952, and no percentage thereof is payable by way of provident fund contribution.

Under the provisions of the said Act a Scheme has been framed known as the Employees' Provident Funds Scheme. Under r. 29 of that Scheme contributions are payable by the employer at the rate therein mentioned. Sub-rules (1), (2) and (3) of r. 29 provide as under:—

"29. (1) The contributions payable by the employer under the Scheme shall be at the rate of one anna in the rupee of the basic wages and the dearness allowance payable to each employee to whom the Scheme applies.

(2) The contributions payable by the employee under the Scheme shall be equal to the contribution payable by the employer in respect of such employee.

(3) The contributions shall be calculated on the basis of wages and dearness allowance actually drawn during the whole month whether paid daily, weekly, fortnightly or monthly basis."

The expression "wages" in sub-r. (3) in the context in which it is used can only refer to "basic wages".

Rule 30 provides as follows:—

"The employer shall, in the first instance pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him, the contribution payable by the member (in this Scheme referred to as the member's contribution)."

Rule 32 runs as under:—

"The amount of a member's contribution paid by the employer shall, notwithstanding—

ing the provision in this Scheme or any law for the time being in force or any contract to the contrary be recoverable by means of deduction from the wages of the member and not otherwise..."

The provident fund contribution under the Act and the Scheme has to be made on the basis of a percentage of the basic wages and dearness allowance actually drawn. The amounts paid under the Standing Orders for securing the due termination of the employment of the employees without notice cannot be treated as amounts drawn by the employees as "basic wages" or dearness allowance and the provisions of the Act and the Scheme are not applicable thereto. No amount is payable in connection therewith by way of provident fund contribution and the demands made upon the petitioner company are not warranted by law and are not justified.

In the result, the petitioners are entitled to a writ of *mandamus* against the Regional Provident Fund Commissioner and the Collector of Bombay, requiring them and their successors in office to forbear from claiming the amounts referred to in the notices, copies whereof are annexed as exh. B to the petition, and from seeking to recover the same under s. 8 of the Employees' Provident Funds Act, 1952, and I order accordingly. Respondents to pay to the petitioners the costs of the petition. Costs fixed at Rs. 325.

Petitioners' attorneys to be at liberty to withdraw the amount deposited in Court on behalf of the petitioners.

Application granted.

Solicitors for the petitioners: *Payne & Co.*

Solicitors for the respondents: *Little & Co.; N. B. Vakil.*

Before Mr. Justice K. K. Desai.

MANAHEM S. YESHOOVA v. THE UNION OF INDIA.⁴

Sea Customs Act (VIII of 1878), Secs. 182, 188—Civil Procedure Code (Act V of 1908), Sec. 11—Constitution of India, Art. 226—When can civil Court consider validity of decisions or orders made under s. 182 or 188—High Court deciding on merits contentions raised in writ petition under art. 226—Whether same contention can be re-agitated in suit filed in High Court—Whether suit against Collector of Customs in his official name maintainable.

A civil Court would have jurisdiction to consider the validity of decisions and orders made under the provisions of ss. 182 and 188 of the Sea Customs Act, 1878, on the grounds that the provisions of the Act had not been complied with or that the Tribunal had not acted in conformity with the fundamental principles of judicial procedure.

Secretary of State v. Mask & Co.,¹ followed.

The principles of s. 11 of the Civil Procedure Code, 1908, are applicable to a matter which is initially decided in a writ petition under art. 226 of the Constitution of India.

In *re Prahlad Krishna*,² *Collector of Monghyr v. Pratap Singh*,³ *Chenchanna v. P. S. Transports Ltd.*⁴ and *Budge Budge Municipality v. Mongru Mia*,⁵ referred to.

The Collector of Customs not being a legal entity, a suit cannot be filed against or in the name of the Collector of Customs.

⁴Decided, February 26, 1959. O. C. J. Suit No. 237 of 1954.

¹ (1940) 42 Bom. L. R. 767, P.C.

² (1950) 53 Bom. L. R. 61, P.B.

³ [1957] A. I. R. Pat. 102, P.B.

⁴ [1953] A. I. R. Mad. 39.

⁵ [1953] A. I. R. Cal. 433.

The facts appear in the judgment.

A. M. Chincholkar, with *Soloman*, and *Miss B. H. Tejani*, for the plaintiff.
J. M. Thakore, with *B. J. Joshi*, for the defendant.

K. K. DESAI J. This is a suit filed for challenging the validity of certain orders passed under the provisions of the Foreign Exchange Regulation Act and the Sea Customs Act and for recovering back 310 tolas of gold confiscated in accordance with these orders. The plaintiff also seeks to recover in the alternative the value of gold viz., Rs. 30,790 and interest at the rate of 6 per cent. per annum. The plaintiff's case is as follows:—

The plaintiff was proceeding from Aden to Colombo and "S. S. City of Durham" by which the plaintiff was travelling arrived at Bombay on November 30, 1950. On that date the plaintiff for the purpose of visiting the city of Bombay was passing through the Blue Gate of the Alexandra Docks and was questioned by an officer of the Customs. The plaintiff informed the officer that he was carrying gold which was in his cabin. The plaintiff was asked to take the officer to the plaintiff's cabin. The plaintiff produced gold weighing 310 tolas in his cabin and the same was seized. Ultimately by the impugned order dated December 29, 1950, one M. B. Rahman, the then Collector of Customs, found that the condition of the Reserve Bank of India Notification No. 62/48-R.B. of August 25, 1948, had not been fulfilled in the case of the plaintiff and that the gold must be held to have been brought into India in contravention of the provisions of the aforesaid Notification. He also found that the gold was not shown in the ship's manifest as for through transit nor was it kept with the purser or captain of the ship. The Collector of Customs ordered confiscation of the gold under s. 167(8) of the Sea Customs Act and further ordered that the gold should be allowed to be redeemed on payment of Rs. 30,790 subject to production of permit from the Reserve Bank of India.

The aforesaid order dated December 29, 1950, was duly served on the plaintiff. A copy of that order is annexed as exh. B to the plaint. The plaintiff was informed that an appeal against the order lay to the Central Board of Revenue, New Delhi. The plaintiff went in appeal against the order dated December 29, 1950, to the Central Board of Revenue. That appeal was Customs Appeal No. 976 of 1951. By its order dated October 22, 1951, the Central Board of Revenue held that it saw "no reason to interfere with the order passed by the Collector of Customs, Bombay." In the result in my view the order of confiscation with the right of redemption as made by the Collector of Customs stood confirmed and became the order of the Central Board of Revenue.

As against those orders the plaintiff filed a Revision Application under the Sea Customs Act before the Government of India and by an order in Revision made on June 24, 1953, it was held that "The Government of India sees no reason to interfere with the order in appeal passed by the Central Board of Revenue."

The plaintiff, declared on December 4, 1953, and filed on December 18, 1953, in this Court Misc. Petition No. 342 of 1953 under art. 226 of the Constitution challenging all the aforesaid three orders as being invalid on the ground that the plaintiff had not imported and was not importing these 310 tolas of gold into India and that the finding against the plaintiff by the Customs Collector and the Central Board of Revenue and the Government of India that he had contravened the notification of the Reserve Bank of India as already mentioned in the order of the Customs Collector was contrary to law and untenable. The plaintiff also contended that "show cause" notice was not served on him and he had not been given a proper hearing and the orders were vitiated by violation of rules of natural justice. On December 10, 1953, Tendolkar J. dismissed that petition after considering all the contentions raised by the plaintiff in that petition.

By his advocate's letter dated December 14, 1953, the plaintiff served a notice under s. 80 of the Code of Civil Procedure in connection with this suit

on the Union of India and the Collector of Customs and ultimately on February 24, 1954, the plaintiff filed this suit once again to challenge the afore-said orders.

By their written-statement the defendants have raised contentions technical as well as on merits. The defendants contend that the order of the Collector of Customs was not contrary to the provisions of law or against the principles of natural justice or without giving any opportunity to the plaintiff to be heard or without obtaining any explanation from the plaintiff or without taking into consideration the rules of natural justice. Customs authorities had information that the plaintiff who was travelling by "S. S. City of Durham" intended to smuggle gold into India and as a result of watch kept had found the gold under circumstances proving that it was illegally imported into India.

After issues were raised at the request of the counsel for the plaintiff and the defendants issues Nos. 3, 4, 5 and 6 were directed to be tried as preliminary issues. These issues run as follows:—

3. Whether this Hon'ble Court has jurisdiction to entertain and try this suit?

4. Whether the suit is barred by the rule of *res judicata* as stated in para. 7 of the written-statement?

5. Whether the suit against the second defendant (Collector of Customs) in his official name is maintainable?

6. Whether the plaint discloses any cause of action against the defendants or any of them?

In support of his contentions on issues Nos. 3 and 6 Mr. Joshi for the defendants relied upon the provisions of ss. 188 and 182 of the Sea Customs Act and the decision of the Privy Council in *Secretary of State v. Mask & Co.*¹ wherein the true effect of the provisions of these sections has been considered. Section 188 of the Sea Customs Act provides;

"Any person deeming himself aggrieved by any decision or order passed by an officer of Customs under this Act may, within three months from the date of such decision or order, appeal therefrom to the Chief Customs authority..."

"Such authority or officer may thereupon make such further enquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against..."

"Every order passed in appeal under this section shall, subject to the power of revision conferred by section 181, be final."

Mr. Joshi has contended that having regard to the provisions in s. 188 of the Act, the order of the Central Board of Revenue must be held to be final except when it is found to be patently arbitrary or perverse or where it is found that fundamental principles of natural justice have been violated in the proceedings wherein the orders were made. In that connection he has relied upon the observations of the Privy Council that:

"The exclusion of the jurisdiction of the civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

An order passed in appeal under s. 188 of the Sea Customs Act excludes the jurisdiction of the civil Courts to entertain a challenge of the merits of that decision."

Now, therefore, the question which this Court can consider with reference to the validity of the orders passed by the Customs Collector and the Central Board of Revenue must relate to non-compliance with the provisions of the Act and/or non-conformity with or violation of the fundamental principles of judicial procedure. In that connection I have carefully scanned through all the averments in the plaint. In my view there is no allegation made in the plaint that either the Collector of Customs or the Central Board of Revenue had no power to make the order which they made. The plaint

¹ (1940) 42 Bom. L. R. 767, P.C.

contains recitals of certain facts. The plaintiff has mentioned that the gold represented the plaintiff's life savings and that the plaintiff was a passenger from Aden to Colombo and in transit to Colombo was entitled to carry gold with him under the notification of the Reserve Bank of India No. F.E.R.A. 62/48, dated August 25, 1948. The reasons why the orders passed by the Customs Collector or the Central Board of Revenue are contended to be invalid are that a "show cause notice" was not served on the plaintiff and that a hearing was not given to the plaintiff. A civil Court would have jurisdiction to consider the validity of decisions and orders made under the provisions of s. 182 and s. 188 of the Sea Customs Act on the grounds which have been summarised in the Privy Council decision, viz., that the provisions of the Act had not been complied with or that the Tribunal had not acted in conformity with the fundamental principles of judicial procedure. The aforesaid contentions of the plaintiff regarding conduct of the proceedings would require to be examined by Court as the same involve violation of fundamental principles of judicial procedure. I cannot accept the contention of Mr. Joshi that the plaint does not disclose any cause of action of any kind against the defendants, or that in this case the Court has no jurisdiction by reason of the provisions of s. 188 of the Sea Customs Act.

As regards the question of jurisdiction, Mr. Joshi has relied upon the provisions of cl. XII of the Letters Patent. He has pointed out that the Union of India which is defendant No. 1 does not carry on business nor reside in Bombay. He has also pointed out that it is absolutely essential for the plaintiff to challenge the order made in appeal by the Central Board of Revenue and that admittedly that order was made by the Central Board of Revenue at Delhi. The Central Board of Revenue functions also at Delhi. The cause of action of the plaintiff must arise if not wholly in part in any event at Delhi. Mr. Joshi has further pointed out that the order in revision was made by the Government of India at Delhi. The plaintiff has admittedly not obtained any leave under cl. XII of the Letters Patent.

Mr. Joshi says that since a material part of the cause of action arose outside Bombay, this Court could not have jurisdiction without plaintiff having obtained leave under Cl. XII of the Letters Patent in the first instance.

Mr. Solomon has in that connection contended that the confiscated gold must be held to have remained with the Collector of Customs in Bombay. As the order of the Central Board of Revenue was that it saw "no reason to interfere with the order passed by the Collector of Customs, Bombay" and the order in revision was also that "the Government of India saw no reason to interfere with the order in appeal passed by the Central Board of Revenue", it was not necessary for the plaintiff to challenge the order in appeal and the order in revision and that the effective and subsisting order was the order of the Collector of Customs which was made in Bombay. Mr. Solomon, therefore, contends that the whole of the cause of action has arisen in Bombay. Mr. Solomon also contends that defendant No. 2 resides and works his office at Bombay. He says that I accordingly should hold that this Court has jurisdiction to try this suit irrespective of the plaintiff having not obtained leave under Cl. XII of the Letters Patent. His contention is that it was unnecessary for the plaintiff to obtain leave under cl. XII of the Letters Patent.

It is well settled that where a statute provides for an appeal and an appeal is filed, the subsisting and effective order must be held to be the order and/or decision of the appellate Court and not of the first Court or the trial Court. In this connection the language of s. 188 of the Sea Customs Act is very material. It provides that "such authority or officer (which refers to the appellate authority) may thereupon make such further enquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against." It cannot be denied that substantive right of appeal was available to the plaintiff and was exercised by the plaintiff. The plaintiff desired and wanted to challenge the decision of the Collector of Customs; and the ultimate decision which governed the rights of the plaintiff

is the decision of the Central Board of Revenue. In fact as soon as the plaintiff filed his appeal all the contentions of the plaintiff were before the Central Board of Revenue to be decided by the Central Board of Revenue. The wording of the order made by the Central Board of Revenue, viz., that it saw "no reason to interfere with the order passed by the Collector of Customs, Bombay", does not in any manner detract from the position that the order which governs the right of the parties is the order of the Central Board of Revenue and not of the Collector of Customs. It is true that having regard to the language of s. 188, the Central Board of Revenue should have used the words that "it confirms the order of the Collector of Customs". In my view, therefore, the true construction of the order of the Central Board of Revenue is that it confirmed the order of the Collector of Customs, and did not make any variation or change in that order. The order that must be challenged by the plaintiff and would require to be set aside if the plaintiff has to succeed must be the order of the Central Board of Revenue. I, therefore, cannot accept the contention of Mr. Solomon that the whole of the cause of action arose in Bombay. Mr. Solomon admits that the Central Board of Revenue made its order in Delhi. He, however, says that the order was communicated to the plaintiff in Bombay. In my view the communication of the order to the plaintiff in Bombay cannot form part of any cause of action at all. The making of the order must be challenged. A material part of the cause of action arose outside Bombay and as the Union of India does not carry on business or reside in Bombay, I hold that it was necessary for the plaintiff to apply for and obtain leave under cl. XII of the Letters Patent before this Court could have jurisdiction to try and entertain this suit. The plaintiff having failed to obtain such leave I also hold that this Court has no jurisdiction to try this suit.

Mr. Joshi contended that on the principles which are to be found in s. 11 of the Civil Procedure Code having regard to the decision of Tendolkar J. in the matter of Misc. Petition No. 342 of 1953 filed by the plaintiff, I should hold that the plaintiff is not entitled to reagitate the same contentions once again before this Court. Mr. Joshi has drawn my attention to the whole of the judgment of Tendolkar J. It is unnecessary to quote the whole judgment here. It is clear that Tendolkar J. was of the opinion that the petitioner (plaintiff) was guilty of delay in filing that petition by which he had challenged the orders as mentioned in the plaint in this suit. However he did not dismiss the petition on the ground of delay. He stated "However as the petition disclosed no cause on merits, I do not propose to dismiss it on that preliminary point". Tendolkar J. discussed in detail the contention of the petitioner that the orders made by the Collector of Customs dated December 29, 1950, and the Central Board of Revenue dated October 22, 1951, and the Government of India dated June 24, 1953, were contrary to law and against principles of natural justice. In connection with the aforesaid contention of the petitioner (plaintiff) Tendolkar J. examined in detail the provisions of s. 167(8) of the Sea Customs Act as also s. 182 of the Sea Customs Act and s. 8 of the Foreign Exchange Regulation Act. He held that under explanation (i) to s. 8 of the Foreign Exchange Regulation Act it was quite clear that it is not necessary for the purpose of constituting an import that the article should actually be imported. It is sufficient if it is brought into any port and if the intention is to take it out without being removed from the ship. He further held that the final authority to determine whether in a given case there was import was vested in the Customs Collector and that this Court was not entitled to set aside a finding made by the Customs Collector in that connection. Against that decision on merits by Tendolkar J. the petitioner (plaintiff) did not file any appeal.

On the merits of the plaintiff's case and/or the contentions available to the plaintiff that was a decision made by a Court of competent jurisdiction entitled to give required relief.

Moreover, public policy requires that there should be an end of litigation. The question whether the decision is correct or erroneous has no bearing on

the question whether it operates or does not operate as *res judicata*; otherwise, every decision would be impugned as erroneous and there would be no finality. The rule of *res judicata* may thus be put upon two grounds—the one, the hardship to the individual that he should be vexed twice for the same cause, and the other, public policy, that it is in the interest of the State that there should be an end of litigation. Putting it in another form, it may be said that every suit must be sustained by a cause of action, and there is no cause of action to sustain the second suit of the same party, it being merged in the judgment in the first.

Whatever be the nature of the proceeding by way of petition under art. 226 of the Constitution, in my view it would be contrary to well-established principles of procedure that parties to a litigation should be entitled to re-agitate the same questions of facts or law once again in spite of a decision having been given on merits of the case by a Court of competent jurisdiction. It was not open to the plaintiff to bring to me an appeal against the decision of Tendolkar J. If this suit is heard on merits and the contentions of the plaintiff are accepted, I would have to reverse the decision of Tendolkar J. in Misc. 342 of 1953. Such a position cannot be allowed to be maintained. If Tendolkar J. had not gone into the merits of the contentions for the plaintiff there might have been some scope for argument that there is no question of final findings having been made and that in spite of a writ petition having been dismissed the plaintiff was entitled to file this suit. But as I have already indicated the contentions which could be raised on merits were before the Court in Miscellaneous Petition No. 342 of 1953 and have been decided by Tendolkar J.

Mr. Solomon, however, contends that jurisdiction exercised by this Court under art. 226 of the Constitution is not of a civil nature. He says that it is a supervisory jurisdiction. In that connection he has relied upon the decision of the Patna High Court in *Collector of Monghyr v. Pratap Singh*.² In that case on behalf of the opposite parties it was contended that the proceeding in the High Court for grant of a writ under art. 226 of the Constitution is not a civil proceeding within the meaning of art. 133 of the Constitution and that the petitioner had no right of appeal to the Supreme Court under that article. Ramaswami C.J. accepted that contention as correct and held that the petitioners were not entitled to a certificate for going in appeal to the Supreme Court against the decision of the High Court in the matter of petitions under art. 226 of the Constitution. It is unnecessary for me to make any comment on the decision of the Patna High Court in that case. The issue before me is not whether a certificate should be granted for going in appeal to the Supreme Court in the matter of the petition under art. 226 of the Constitution. The issue before me is of general character and is this, viz., whether in the event of one of the Judges of this Court having finally decided on merits the contentions raised in a writ petition under art. 226, this Court would allow the same contentions to be reagitated in a suit. In my view the answer must be that such a position cannot be allowed to exist. Once a Judge of this Court and/or a Court of competent jurisdiction decides on merits the validity or invalidity of an impugned order in a petition filed under art. 226 of the Constitution the only remedy which can be open to the aggrieved party must be the usual remedy of appeal. In the words of Chagla C.J. in the decision of *In re Prahlad Krishna*³ (p. 64):

“...Although the decision of the High Court refusing a writ or an order under art. 226 may become final *quæ* the High Court, it is not as if the Constitution does not provide other remedies to the citizen. He has a right, an independent right, to approach the Supreme Court under art. 32...Apart from that there is a right of appeal given to the citizen from an order of refusal of the High Court to enforce his fundamental rights. He has the right to ask the Supreme Court to grant him special leave to appeal under art. 136. Therefore it is not as if the citizen is without a remedy in

² [1957] A. I. R. Pat. 102, F.B.

³ (1950) 53 Bom. L. R. 61, F.B.

the event of the High Court refusing to review its own judgment, however erroneous that judgment may be."

Mr. Solomon has cited several authorities dealing with the nature of the proceedings by way of a petition under art. 226 of the Constitution. Having regard to the view which I am taking I find it unnecessary to discuss the various authorities cited by Mr. Solomon.

It is relevant to point out that the High Court of Madras in the case of *Chenchamma v. P. S. Transports Ltd.*⁴ has held as follows:—

"If the application for the issue of a writ under Art. 226 is made on the civil side, in dealing with such an application the High Court is governed by the provisions of the Civil Procedure Code, and the High Court has jurisdiction to review its order under Art. 226."

The High Court of Calcutta in the case of *Budge Budge Municipality v. Mongru Mia*⁵, also observed as follows (p. 433):

"...A judgment of a single Judge on an application under Art. 226, whether in a matter arising within the original jurisdiction or in a matter arising outside, is a judgment pursuant to s. 108, Government of India Act, 1915 and therefore is appealable under cl. 15 of the Letters Patent..."

It is unarguable that nothing but judgments given in exercise of the jurisdictions specifically conferred by and mentioned in the Letters Patent is contemplated by Cl. 15. In actual fact, judgments given in exercise of several jurisdictions not expressly mentioned in the Letters Patent have been held to be appealable."

Though no decision has been cited to me as regards the principles of s. 11 of the Code of Civil Procedure being applicable to a matter which is initially decided in a writ petition under art. 226 of the Constitution, having regard to what I have already observed, I am of the view that the same principles ought to be held to be applicable to all such matters. I accordingly hold that the plaintiff's suit is barred by rules of *res judicata*.

Defendant No. 2 in this suit is described as the Collector of Customs. On December 29, 1950, the impugned order was made by one M. E. Rahman who was the then Collector of Customs. At the date when the suit was filed, viz. February 24, 1954, it is admitted by Mr. Solomon that one M. G. Abrol was the Collector of Customs. The Collector of Customs is not a legal entity, but is merely an office occupied by several persons from time to time as appointed by the authorities. On *prima facie* grounds a suit cannot be filed against any one who is not a legal entity. Defendant No. 2 in this case is described as "the Collector of Customs" and does not indicate any legal entity or person against whom this suit is filed. In my view a suit cannot be filed against or in the name of the Collector of Customs and my finding on issue No. 5 is that the suit against defendant No. 2 in official description is not maintainable.

My answers to issues Nos. 3, 4, 5 and 6 are:

Issue No. 3: In the negative.

Issue No. 4: In the affirmative.

Issue No. 5: In the negative.

Issue No. 6: In the affirmative.

The result, therefore, is that this suit is dismissed with costs.

Suit dismissed.

Solicitor for the defendants: *N. B. Vakil.*

⁴ [1953] A. I. R. Mad. 39.

⁵ [1953] A. I. R. Cal. 433.

SUPREME COURT.

Present: Mr. Justice B. P. Sinha, Mr. Justice J. L. Kapur and Mr. Justice M. Hidayatullah.

MAHARANA MILLS (PRIVATE) LTD. v. THE INCOME-TAX
OFFICER, PORBANDAR.*

Indian Income-tax Act (XI of 1922), Secs. 35, 63, 10(5)(b)—Necessity of notice under first proviso to s. 35(1)—Whether want of such notice renders adverse order against assessee invalid where he knows of rectification proceedings and matter discussed with him—Written down value determined under s. 35 whether can be redetermined in following assessment years—Whether Income-tax officer can redetermine figure of original cost—Record referred to in expression "apparent from record" in s. 35 whether means only order of assessment—Whether recalculation of written down value, rectifying mistake apparent from record.

The rule laid down as to notice in the first proviso to s. 35(1) of the Indian Income-tax Act, 1922, is not so rigid that if, as a matter of fact, the assessee knows of the proceedings and the matter has been discussed with him then an adverse order would be invalid merely because no notice under s. 63 of the Act was given.

The limit to which the Income-tax Officer can go back does not stop at the written down value of the previous year but extends up to the figure of the original cost, and the method enjoined by s. 10(5)(b) is not that the Income-tax Officer should merely scale down the written down value of the previous year but that he should take into consideration the actual cost, determining it for himself, if necessary, take also into consideration the allowances granted in the past and then make his own computation as to the written down value for the assessment year with which he is concerned. Therefore, merely because under s. 35 of the Act some written down value and the depreciation amount have been determined they are not a final determination binding for all times to come nor does the determination operate as estoppel or *res judicata* for the following years.

*Karnant Industrial Bank Ltd. v. Commr. Inc.-tax,*¹ referred to.

The record referred to in the expression "apparent from the record" in s. 35 of the Indian Income-tax Act, 1922, does not mean only the order of assessment but it comprises all proceedings on which the assessment order is based and the Income-tax Officer is entitled for the purpose of exercising his jurisdiction under s. 35 to look into the whole evidence and the law applicable to ascertain whether there was an error. If, therefore, he doubts the written down value of the previous year it is open to him to check up the previous calculations in accordance with the law applicable including the rules made thereunder.

A mistake contemplated by s. 35 of the Act is not one which is to be discovered as a result of an argument, but it is open to the Income-tax Officer to examine the record including the evidence, and if he discovers any mistake, he is entitled to rectify the error provided that if the result is enhancement of assessment or reducing the refund then notice has to be given to the assessee and he should be allowed a reasonable opportunity of being heard.

*Commissioner of Income-tax, Bombay v. Khemchand,*² *Sidhramappa v. Commr. I.T.,*³ and *Venkatachalam v. B'bay Dyg. & Mfg. Co.,*⁴ referred to.

THE facts are stated in the judgment.

A. V. Viswanatha Sastri, with S. P. Mehta, J. B. Dadachanji, S. N. Andley and Rameshwar Nath, for the appellants.

M. C. Setalvad, Attorney General for India, with R. Ganapathy Iyer and D. Gupta, for the respondent.

KAPUR J. This is an appeal by special leave against the judgment and order of the High Court of Judicature at Bombay dismissing the appellant's peti-

*Decided, April 14, 1959. Civil Appeal No. 39 of 1959.

¹ (1958) 25 I. T. R. 558.

² (1938) 40 Bom. L. R. 854, P.O.

³ (1951) 54 Bom. L. R. 163.

⁴ (1958) 61 Bom. L. R. 536, 540, S.C.

tion under art. 226. The appellant before us is a private limited company carrying on the business of manufacturing and selling textiles and the respondent is the Income-tax Officer of Porbander.

Previous to the year 1949, in Porbander which became a part of the State of Saurashtra, there was no income-tax. In 1949 the Saurashtra Income-tax Ordinance (hereinafter termed the Ordinance) was promulgated which was applicable to the State of Saurashtra. By that Ordinance income-tax became leviable, and from 1950 onwards when Saurashtra became part of the Union of India the Indian Income-tax Act (hereinafter referred to as the Act) became applicable by reason of the Finance Act of 1950 (Act XXV of 1950). The appellant was taxed for the accounting year 1949 i.e. the assessment year 1950-51. In that year the amount of depreciation allowed under s. 10(2)(vi) of the Act was Rs. 3,43,869. The appellant continued to be assessed to income-tax in the assessment years 1951-52, 1952-53 and 1953-54 and the present appeal relates to the assessment of year 1953-54. According to the assessment order dated June 30, 1955, the amount of depreciation allowed for the assessment year 1953-54 was Rs. 3,48,105. On August 8, 1955, the appellant made an application for rectification under s. 35 of the Act. In this application he pointed out several mistakes in calculations in regard to the depreciation amount. By his order of February 27, 1956, the Income-tax Officer corrected the written down value of the different properties of the appellant and determined the total allowable depreciation to be Rs. 1,94,074. The order of the Income-tax Officer was as follows:—

"To arrive at the Written Down Value of the assets it was necessary to maintain depreciation record. This being not done so far, is done now and working attached.

Depreciation allowance as per rules is worked out at Rs. 1,94,074 as per working sheet attached.

The correct computation of income is as under:—

Income before allowing depreciation as per original assessment order: Rs. 1,00,874
Less charity disallowed wrongly written Rs. 21,839 instead of Rs. 20,124: Rs. 1,785

					Income	..	Rs.	98,909
Less depreciation	..	..	..	..	..	..	Rs.	1,94,074
					(—)	..	Rs.	95,165
Less Dividend income as per original assessment order	..	..	..	..	..	..	Rs.	11,870
					Loss	..	Rs.	83,295

Loss on account of depreciation to be carried forward. Declared N.A."

And thus the unabsorbed depreciation amount which under the assessment order of June 30, 1955, was Rs. 2,81,944 was reduced to Rs. 83,295 and this was set off against the appellant's income of the assessment year 1954-55. On February 29, 1956, the Income-tax Officer passed two provisional assessment orders for the years 1954-55 and 1955-56. In both these orders he calculated the depreciation amounts on the basis of the same written down value as he had determined for the year 1953-54. The reasons for calculating them on the new basis were set out by the Income-tax Officer in his order dated May 18, 1956, and they were:—

"Less Depreciation. The depreciation of the Company has not been properly calculated by arriving at Written Down Value as per the Saurashtra Income Tax Ordinance and also as per Indian Income-tax Act. The assessee Company was being assessed regularly even as per Indian Income-tax Act. So Written Down Value of all assets are arrived at by working out the depreciation as per above Ordinance as well as Income-tax Act. The depreciation is worked out as per separate statement keeping in view the following:—

(1) Definition of 'assessee' as per Indian Income-tax Act.

(2) The exact meaning of W.D.V. as per Income-tax Act.

(iii) The meaning of W.D.V. as per the Saurashtra Income-tax Ordinance 1949 and Rules (page 20, para. 13-5-A).

(iv) I.T.R. Volume 25, 558. Decision of Calcutta High Court as regards C.I.T., West Bengal,—M/s. Karnani Industrial Bank Ltd.

(v) Views expressed by Taxation Enquiry Commissioner, 1953-54, Volume II, page 84, para. 34.

(vi) Taxation Laws (Part 'B' State) (Removal of Difficulties) Order 1950.

The depreciation thus worked out as per separate statement."

On August 8, 1955, the appellant made an application under s. 35 for certain corrections in the calculations and the order thereon was passed on February 27, 1956, but no written notice of the intended rectification of the written down value and the depreciation amount was given by the Income-tax Officer to the appellant under s. 35 read with s. 63 of the Act. On March 9, 1956, the appellant wrote to the Income-tax Officer protesting against the order:—

"You have exercised powers not vested in you under the said Section, and you have gone beyond the purview of the Act by preparing statements and records which are prejudicial to the rights of the Company."

The appellant requested the Income-tax Officer to cancel his previous order and to pass a fresh order correcting only those mistakes which had been pointed out by it. On the same day the appellant sent another letter asking for the cancellation of the provisional assessment order for 1954-55 and requested for a revised assessment order on the basis of the return filed by it. The reply of the Income-tax Officer of the same date was that the order was correct and a similar order was made on the second application in regard to the assessment of 1954-55.

On April 16, 1956, the appellant filed a petition in the High Court of Bombay under arts. 226 and 227 in which it alleged that the Income-tax Officer had

"exceeded the limits of jurisdiction vested in him and exercised illegally jurisdiction not vested in him by law under Section 35 and passed orders, inter alia, and suo motu and without giving any prior notice and altered the entire procedure and basis of calculating depreciation on the written down value of buildings and machinery of the petitioners."

The appellant prayed that the order made under s. 35 of the Act be quashed and an injunction issued restraining the Income-tax Officer from recovering the assessed tax. The High Court dismissed this petition on the ground that it contained mis-statements of fact; that

"The advantage of this jurisdiction is not available to the subject when adequate and efficacious remedy is available to him under the ordinary law;"

that the appellant could, under s. 33A of the Act, have gone in revision to the Commissioner. The High Court also held against the appellant on merits. The appellant has come to this Court by special leave and three questions were raised: (1) that no notice as required under s. 35 was given to the appellant; (2) that there was no record on the basis of which the rectification in the written down value of the property could be made; and (3) that there was no mistake apparent from the record.

The learned Attorney General contended in the first instance that the remedy available under art. 226 is a discretionary one, and if the High Court had exercised its discretion, no appeal was competent; and in support of his contention he relied upon the judgment of this Court in *K. S. Rashid and Son v. The Income-tax Investigation Commission, etc.*,¹ where Mukherjee J., (as he then was), said (p. 747):—

"...For purpose of this case it is enough to state that the remedy provided for in article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere."

1 [1954] S. C. R. 738.

It is not necessary to decide in this case whether the order passed under art. 226 is of a discretionary nature and, therefore, in appeal this Court would not interfere with the exercise of discretion, because, in our opinion, the case can be decided on other grounds of substance.

The first question is that of notice under s. 35 of the Act. The affidavit of the Income-tax Officer shows that the correctness of the figures for determining the depreciation was discussed with the appellant's Secretary. The Income-tax Officer stated that

"The depreciation which was calculated in the assessment order of 1953-54 was as per the statement given by the petitioner. On submission of the said application the petitioner (Shri Ganatra, the Secretary of the Mills) was told that the depreciation will be given after rectifying mistakes. The petitioner had agreed to the same. There being no record of the working out from the first available record in the assessment order for the assessment year 1943-44, the petitioner was also supplied with the copy of the working of the depreciation along with the necessary rules and regulation for calculating the same."

He also stated that the order of rectification was passed "almost at the end of the financial year, after explaining and discussing all the above calculation along with the relevant rules and regulation of the calculated depreciation"; that the order was not passed without giving a reasonable opportunity to the appellant; that the matter was discussed with its representative more than once; that the assessment for the year 1954-55 was made final after calculating the depreciation; that the point of depreciation was not raised by the applicant at any hearing and that even though no written notice was given, the representative of the appellant was given notice of the intended determination of the written down values. He also stated:

"Thus though no written notice is given, applicant is given notice of the intention of calculating depreciation on record basis and is also allowed a reasonable opportunity of being heard inasmuch as he was given the calculation of depreciation on 21-2-1956."

The orders placed on the record show that the Income-tax Officer made calculation for the purpose of determining the depreciation amount, and, after giving deductions allowed by the Act and the Rules made thereunder, arrived at the corrected figure of Rs. 1,94,074 for the assessment year 1953-54.

Apart from the fact that the petition of the appellant does not set out clearly all the facts which should have been set out, there is the affidavit of the respondent that the matter was discussed with the representative of the appellant although no written notice was given. In this connection the learned Attorney General has further submitted (1) that the order determining the depreciation amount allowable was not final; (2) that the effect of the order making the rectification was not of enhancing the assessment or reducing the refund; and (3) that the question of depreciation could be raised at the time of assessment in any subsequent year.

The object of the provision as to notice in the second sub-section of s. 35 is that no order should be passed to the detriment of an assessee without affording him an opportunity, but it cannot be said that the rule is so rigid that if, as a matter of fact, the assessee knows of the proceedings and the matter has been discussed with him then an adverse order would be invalid merely because no notice under s. 63 was given. Of course, this postulates that a reasonable opportunity has been given to show cause. Secondly, this provision is applicable only where the assessment is enhanced or refund is reduced. Neither of those contingencies has arisen in the present case.

The depreciation allowed to the appellant in the year of assessment 1943-44, when the appellant was assessed as a non-resident, was Rs. 1,91,224. In the year 1944-45 there was no assessable income in British India and so also in 1945-46. In the year 1946-47 there was a loss. In the year 1947-48 as in the preceding years the sales were effected at Porbander and there was no collection made in British India. The total tax due was calculated at Rs. 43-11-0. In 1948-49 the

sales were Rs. 38,656 and they were assessed to income-tax on a total income of Rs. 9,326. For the accounting year 1948 i.e. the assessment year 1949-50 when the Ordinance came into force the total depreciation amount allowed was Rs. 3,66,925 which was much more than what was allowable on the written down values determined in accordance with the provisions of the Ordinance which defined written down value:

“Written Down Value means—

(a) In the case of assets acquired in the previous year, the actual cost to the assessee;

(b) In the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Ordinance or allowed under any Act repealed hereby or which would have been allowed to him if the Indian Income-tax Act, 1922, was in force in past.”

On the basis of this Ordinance and the other statutes and Rules mentioned in his affidavit, which have been set out above, the Income-tax Officer made the various calculations and determined the depreciation amounts which have given rise to the controversy before us. These calculations were based on the written down values for the successive assessment years up to the year of assessment 1953-54.

But it was argued by counsel for the appellant that according to s. 10(5)(b) of the Act the written down value in the case of assets acquired before the previous year mean the actual cost to the assessee less all depreciation actually allowed to him under the Act or under any Act repealed thereby and, therefore, the provisions of the Saurashtra Ordinance which came to an end when the Act became applicable cannot form the basis of determining the written down value for the purposes of assessment of the years 1950-51 onwards. In reply it was submitted that the written down values were calculated and depreciation determined for the year 1943-44 and should in subsequent years have been calculated in accordance with the provisions of the Ordinance and they could not become higher for purposes of s. 10(5)(b) of the Act merely because the Ordinance was replaced by the Act. In this connection reference was made to s. 12 of the Finance Act, 1950, which empowered the Central Government to make provision for the removal of difficulties in giving effect to the provisions of any of the Acts, Rules or Orders extended by s. 3 or s. 11 of that Act i.e. Finance Act, 1950. Under that section (s. 12) the Taxation Laws (Part B States) Removal of Difficulties Order, 1950, was promulgated on December 2, 1950, and by cl. 2 of this Order provision was made for computation of aggregate depreciation allowance and written down values. To this Order the following explanation was added on March 9, 1953:

(Notification No. S. R. O. 477) :—

“For the purposes of this paragraph, the expression ‘all depreciation actually allowed under any laws or rules of a Part B State’ means and shall be deemed to have always meant the aggregate allowance for depreciation taken into account in computing the Written Down Value under any laws or rules of a Part B State or carried forward under the said laws or rules.”

But the appellant’s counsel contended that this explanation is *ultra vires* because it was promulgated under s. 60-A of the Act and that section was inapplicable to the Order made under s. 12 of the Finance Act, 1950. He relied on two cases decided by the Hyderabad High Court in *S. V. Nair v. Commr. of Inc.-tax*² and *Commr. of Inc.-tax v. D. B. R. Mills Ltd.*,³ but we are informed that one of those judgments is under appeal to this Court and we, therefore, do not wish to express any opinion upon the correctness or otherwise of this contention raised by the appellant.

It was next argued by the learned Attorney General that the written down values determined under s. 35 are not final and can be redetermined in the following assessment years, and in support he referred to *Karnani Industrial Bank Ltd. v. Commr. Inc.-tax*⁴ where the original cost of the machinery pur-

² (1955) 29 I. T. R. 208.

³ (1954) 29 I. T. R. 210.

⁴ (1953) 25 I. T. R. 558.

chased at Rs. 3,40,000—was accepted in the successive assessment years till it was doubted in the assessment order 1946-47 and was determined at Rs. 2,80,000 and it was contended that the Income-tax Officer had to take the written down value of the previous year as correct. Thus the question there raised was whether the Income-tax Officer was entitled in law to go behind the original cost accepted by his predecessor ever since the assessment year 1939-40. It was held that neither the principle of *res judicata* nor estoppel nor the terms of s. 10(2) (vi) of the Act prevented the Income-tax Officer from determining for himself what the actual cost of the machinery had been and that depreciation had to be calculated for every year and it was open to the Income-tax Officer not merely to perform "a mathematical operation on the basis of the Written Down Value of the previous year, but one of determining the Written Down Value himself".

The limit to which the Income-tax Officer can go back does not stop at the written down value of the previous year but extends up to the figure of the original cost, and the method enjoined by s. 10(5) (b) is not that the Income-tax Officer should merely scale down the written down value of the previous year, but that he should take into consideration the actual cost, determining it for himself, if necessary, take also into consideration the allowances granted in the past and then make his own computation as to the written down value for the assessment year with which he is concerned. Thus it cannot be said that merely because under s. 35 some written down value and the depreciation amount have been determined they are a final determination binding for all times to come nor does the determination operate as estoppel or *res judicata* for the following years. Therefore, it cannot be said that there is no other efficacious and adequate remedy open to the appellant to challenge the depreciation amount determined under s. 35.

Counsel for the appellant contended that the provision under which the Income-tax Officer acted, i.e. s. 35, was not meant for the purpose of making corrections in written down values; and that for the purpose the appropriate and correct provision was s. 34 which specifically refers to excessive depreciation. There are two sections under which an Income-tax Officer can act i.e. ss. 34 and 35 and the question for decision that arises is whether s. 35 was open to him. Section 35 provides:

"(1) The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee."

The question, therefore, is was it a mistake apparent from the record which the Income-tax Officer has rectified. It was submitted that recalculation is not rectifying a mistake which is apparent from the record. The words used in the section are "apparent from the record", and the record does not mean only the order of assessment but it comprises all proceedings on which the assessment order is based and the Income-tax Officer is entitled for the purpose of exercising his jurisdiction under s. 35 to look into the whole evidence and the law applicable to ascertain whether there was an error. If he doubts the written down value of the previous year it is open to him to check up the previous calculations, and if he finds any mistake, it is open to him to make fresh calculations in accordance with the law applicable including the rules made thereunder.

The Privy Council in *Commissioner of Income-tax, Bombay v. Khemchand*⁵ held s. 35 to be applicable where the facts were that the assessee did not produce books of account and an assessment was made by the Income-tax Officer to the best of his judgment. An application for the registration of the firm was, however, allowed and it was registered on January 17, 1927. On the same day assessment was made under s. 23(4). As it was a registered firm no super-tax was

assessed. The Commissioner called for the record under s. 33 and cancelled the registration on January 28, and ordered the Income-tax Officer to take necessary consequential action. The result of that was that the assessee became liable to super-tax. Consequently an order for super-tax was made on May 4, 1929, and three days later notice of demand was issued. The Privy Council held that as the fresh action taken by the Income-tax Officer was hopelessly out of time the demand for super-tax was illegal because after the final assessment the Income-tax Officer could not go on making fresh computations and issuing fresh notices of demand to the end of all time but it was held that the provisions of ss. 34 and 35 prescribed the only circumstances in which fresh assessment could be made and fresh notice of demand could be issued. At page 867 Lord Romer observed:

"...In the present case it is a debatable question whether the circumstances were such as to bring it within the provisions of s. 34. It is not necessary to determine that question inasmuch as, in their Lordships' opinion, the case clearly would have fallen within the provisions of s. 35 had the Income-tax Officer exercised his powers under the section within one year from the date on which the earlier demand was served upon the respondents. For, looking at the record of the assessments made upon them as it stood after the cancellation of the respondent's registration—and the order effecting the cancellation would have formed part of that record—it would be apparent that a mistake had been made in stating that no super-tax was leviable."

Thus the order effecting the cancellation of the registration of the assessee's firm was considered to have formed part of the record of the case.

In *Sidhramappa v. Commr. I.T.*⁶ the facts were that a debt belonging to a joint family fell on partition to the share of the assessee. This debt was held not to be recoverable by a judgment of the Bombay High Court dated September 29, 1941. Holding it to be within the accounting year the Appellate Tribunal allowed this sum to be taken into consideration for the purpose of the accounting year. It subsequently corrected the error. It was held that under s. 35 the Tribunal was entitled to rectify the mistake and was competent to pass a consequential order dismissing the appeal instead of allowing it.

The power under s. 35 is no doubt limited to rectification of mistakes which are apparent from the record. A mistake contemplated by this section is not one which is to be discovered as a result of an argument, but it is open to the Income-tax Officer to examine the record including the evidence, and if he discovers any mistake, he is entitled to rectify the error provided that if the result is enhancement of assessment or reducing the refund then notice has to be given to the assessee and he should be allowed a reasonable opportunity of being heard.

The scope and effect of the expression "mistake apparent from the record" and the extent of the powers of the Income-tax Officer under s. 35 of the Act were discussed by this Court in *Venkatachalam v. B'bay Dyg. & Mfg. Co.*⁷ where the facts were these: A sum of Rs. 50,063 being interest on tax paid in advance was given credit for under s. 18A(5) of the Act. Subsequently there was an amendment of the Act by which the interest became allowable only on the difference between the amount of tax paid and what was actually determined. As a consequence of this the Income-tax Officer purporting to act under s. 35 of the Act rectified the mistake and reduced the amount of interest credited to Rs. 21,157 and issued a demand for the difference. The assessee obtained a writ of prohibition against the Income-tax Officer on the ground that the mistake contemplated under that provision had to be apparent on the face of the order and it was not contemplated to cover a mistake resulting from an amendment of the law even though it was retrospective in its effect. The Revenue appealed to this Court. Thus the question for decision in that case was whether an order proper and valid when made could be said to disclose a mistake apparent from the record merely because it became erroneous as a result of a subsequent amendment of the law which was retrospective in

⁶ (1951) 54 Bom. L. R. 163.

⁷ (1958) 61 Bom. L. R. 536, 540, S.C.

its operation. In delivering the judgment of the Court Gajendragadkar J. said (p. 540) :—

"At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as from April 1, 1952. If that be the true position then the order which he made giving credit to the respondent for Rs. 50,603-15-0 is plainly and obviously inconsistent with a specific and clear provision of the statute and that must inevitably be treated as a mistake of law apparent from the record. If a mistake of fact apparent from the record of the assessment order can be rectified under s. 35, we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified." The decision of the Privy Council in *Commissioner of Income-tax, Bombay v. Khemchand* was referred to.

Counsel for the appellant sought to distinguish both these cases; *Venkatachalam's* case and *Khemchand's* case, on the ground that the record there considered was the assessment record of that year and the Income-tax Officer did not have to go to the records of the previous year. That is a distinction without a difference. If, for instance, the Income-tax Officer had found that in the assessment year 1952-53 there was an apparent arithmetical mistake in the account of the written down value of the properties which resulted in a corresponding mistake in the assessment of the year in controversy could he not take the corrected figure for the purposes of the assessment and could it be said that the mistake was not apparent from the record. *A fortiori* if he discovered that the very basis of the different assessments was erroneous because of an initial mistake in determining the written down value could it be said that this would not be a mistake apparent from the record. And if in order to determine the correct written down value the Income-tax Officer makes correct calculations, can it be said that that is not rectifying a mistake apparent from the record but is *de hors* it.

In our opinion this appeal is without force and we would, therefore, dismiss it with costs.

Appeal dismissed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Naik.

GAJANAN KRISHNARAO CHAWANDKE v. THE COLLECTOR,
BULDANA.*

Central Provinces and Berar Municipalities Act (II of 1922), Secs. 25(6), 172; Rules framed under s. 25(6)—Employee of Municipal Committee appealing against his exclusion from promotion by Committee—Competency of such appeal—Whether refusal by Committee to promote employee can be regarded as punishment.

The rules framed under s. 25(6) of the Central Provinces and Berar Municipalities Act, 1922, are limited to appeals against departmental punishments only. They cannot be regarded as general rules enabling any employee of the Municipal Committee who is aggrieved by any decision of the Municipal Committee to prefer an appeal.

No Government servant has a vested right to promotion; if a person though entitled because of the length of his service or of his qualifications to promotion is not promoted in due course, it cannot be said that he has been punished. Where, therefore, the Municipal Committee refuses to promote its employee in due course, it cannot be regarded as a punishment. The action of the Municipal Committee may be regarded as a punishment only where as a result of it the existing position of its employee is worsened.

*Decided, April 16, 1959. Special Civil Application No. 394 of 1958.

THE facts appear in the judgment.

C. P. Kalele, for the petitioner.

N. L. Abhyankar, for respondents Nos. 3 and 5.

W. B. Pendharkar, for respondents Nos. 6, 8 and 9.

MUDHOLKAR J. The petitioner is a primary school teacher serving with the Municipal Committee, Khamgaon. He joined service on January 18, 1932, and was eventually confirmed. There are six posts in the Select Grade which are open to primary school teachers serving with the Municipal Committee. The question of filling those posts came before the Municipal Committee on April 17, 1953. On that date they called for recommendations from the Education Sub-Committee. That Sub-Committee sent up the names of six teachers. Apparently, the recommendations of the Sub-Committee did not find favour with the General Committee and, therefore, the General Committee referred the matter to the Education Sub-Committee for fresh recommendations. The petitioner's name was originally recommended by the Sub-Committee, but on the second occasion it was not recommended. On March 19, 1953, the Municipal Committee considered the entire question at its general meeting and resolved to appoint the following six persons in the Select Grade:—

- (1) G. D. Shegokar.
- (2) B. N. Rajhansa.
- (3) H. T. Saraf.
- (4) R. M. Amle.
- (5) S. T. Potdar.
- (6) S. B. Panat.

The petitioner was thus not one of those persons who were appointed in the Select Grade by the Municipal Committee. One K. M. Ghatol was also a senior primary school teacher and he preferred an appeal before the Sub-Divisional Officer, Khamgaon, apparently under the rules framed under s. 25(6) of the C.P. and Berar Municipalities Act against his exclusion from promotion to the Select Grade. This appeal was allowed by the Additional Deputy Commissioner, Khamgaon, by the Order dated November 24, 1954. The operative portion of the order of the Additional Deputy Commissioner was:—

"I, therefore, order that the applicant should be given the selection grade. He should be given selected grade either out of the teachers described above or the order of selection of either Amle or Saraf should be cancelled and preference given to the applicant. It is for the M.C. to decide whether to cancel Amle's selection grade or Saraf's but the applicant should be given the selection grade."

The Municipal Committee, purporting to comply with the aforesaid order, reviewed the entire position and passed a resolution on March 14, 1955, cancelling the select grade of four teachers, S. B. Panat, S. T. Potdar, R. M. Amle and H. T. Saraf, and instead appointed the following six teachers to the select grade with effect from March 1, 1955:—

- (1) D. N. Bhangadbhatti.
- (2) N. M. Mandvekar.
- (3) G. D. Shegokar.
- (4) B. N. Rajhansa.
- (5) G. K. Chawandke (Petitioner).
- (6) K. M. Ghatol.

This was by a resolution of the General Meeting of the Municipal Committee held on April 6, 1958.

The four persons whose select grade was taken away preferred an appeal before the Sub-Divisional Officer, Khamgaon, again apparently under the rules framed under s. 25(6). The Sub-Divisional Officer allowed the appeal and observed:—

"I therefore hold that the action of the Municipal Committee in withdrawing the select grade of the 4 appellants and selecting the aforesaid 4 teachers in their place is

illegal and improper. I therefore set aside the decision of the Municipal Committee and further direct the 4 appellants shall continue in the select grade as before and the other 4 teachers namely Shri Bhangadhatti, Shri Mandvekar, Shri Rajhansa and Shri Chavandke shall revert, if promoted to select grade, to their original grade."

After the aforesaid order was passed by the Sub-Divisional Officer, the President of the Municipal Committee made the following endorsement:—

"Effect needs be given to the S.D.O.'s order. Inform all those affected by the order and place before Ex. S.C. for its information."

The petitioner and the other three teachers, who were affected by the order of the Sub-Divisional Officer, moved the Municipal Committee for preferring an appeal against the order of the Sub-Divisional Officer. The Municipal Committee then went up in appeal before the Deputy Commissioner against the order of the Sub-Divisional Officer. That appeal was dismissed by the Deputy Commissioner. In that appeal one of the contentions raised on behalf of the Municipal Committee was that the appeal before the Sub-Divisional Officer was incompetent. This contention was overruled by the Deputy Commissioner and the appeal of the Municipal Committee was dismissed on merits. The Municipal Committee then went up to the Board of Revenue, Madhya Pradesh, in revision and the application for revision was transferred to the Divisional Officer, Vidarbha. The Divisional Officer dismissed the revision application on the ground that the application was incompetent.

After the dismissal of the revision application the Municipal Committee, Khamgaon, served the following notice dated November 29, 1957, on the petitioner:—

"Subject:—Select Grade.

Reference:—Since the appeal (revision) of the Municipal Committee before the Revenue Tribunal has been rejected, therefore your Select Grade has been taken away. Note."

It may be mentioned that the petitioner actually worked in the Select Grade from March 1, 1955, till the end of November 1957 and was given his pay admissible in that grade. After the petitioner was served with the aforesaid order he preferred an appeal before the Sub-Divisional Officer. The Sub-Divisional Officer also dismissed the appeal on the ground that the order sought to be appealed from was against only an administrative order which intended to give effect to the previous judicial order and was thus incompetent. The petitioner then preferred an appeal to the Deputy Commissioner and that appeal was dismissed on that ground as also on the ground that the teachers who were appointed in place of the petitioner and other ousted persons were not joined as parties to the appeal. The petitioner has, therefore, come up to this Court under art. 226 of the Constitution.

It seems to us that there has been a complete misapprehension of the question as to the right of appeal in such cases on the part of Revenue Officers. Section 172 of the Municipalities Act provides that no appeal shall lie against any order made under the Act except where express provision for appeal from such order has been made in the Act or any rule made thereunder. Section 25 of the Act deals with appointment, duties and conditions of service of the municipal servants. Sub-section (6) of that section makes the following provision in regard to the right of appeal:—

"The Provincial Government may prescribe the classes or grades of officers and servants who shall have the right of appeal except in the case of dismissal under sub-section (5) from any decision of the committee inflicting any departmental punishment other than censure."

In regard to this provision rules have been framed by the then Provincial Government which are to be found at pp. 183 to 184 of the Municipal Manual.

It is to be borne in mind that sub-s. (6) of s. 25 confers power on the Provincial Government to make rules for providing for appeals only against those decisions of the Municipal Committee which inflict departmental punishments

otherwise mentioned. Therefore, those rules must be deemed to be limited to appeals against departmental punishments only. They cannot be regarded as general rules enabling any employee of the Municipal Committee who is aggrieved by the decision of the municipal committee to prefer an appeal. It would appear that the Revenue Officers are under the impression that those rules confer a general right of appeal upon a municipal servant against any decision of the municipal committee. If the right of appeal is limited, and it must be according to the rules limited, to those decisions of the municipal committee which inflict departmental punishments on a municipal servant, then it would follow that the appeal preferred by Ghatol against the resolution dated March 19, 1953, appointing Shegokar, Rajhansa, Saraf, Amle, Potdar and Panat to the select grade, was incompetent. Ghatol's contention in the appeal was that he had better claims to be appointed to the select grade than the persons whom the Municipal Committee by its resolution dated March 19, 1953, had appointed. Even though Ghatol may have a just grievance, we do not think that any redress could be given to him in an appeal by the Sub-Divisional Officer. It must be borne in mind that no Government servant has a vested right to promotion; if a person, though entitled because of the length of his service or of his qualifications to promotion, is not promoted in due course, it cannot be said that he has been punished. If the Revenue Officers think that the refusal to promote a person in due course is a punishment, then we would like to remove the misconception. The action of the Municipal Committee may be regarded as a punishment only where as a result of it the existing position of a person is worsened. It cannot be regarded as a punishment where there is a refusal on the part of the Municipal Committee or any other employer to promote its employee or to improve his position.

If, therefore, the resolution of March 19, 1953, could not be interfered with by the Sub-Divisional Officer in appeal, it follows that the subsequent resolution of the Municipal Committee dated April 6, 1955, whereunder the petitioner was appointed, must be regarded as without jurisdiction. Upon this view, we must hold that the petitioner's grievance cannot be redressed because there was no legal basis for his appointment to the select grade. Here we would like to make one point clear and it is this that in so far as the appeal to the Sub-Divisional Officer by the four persons who were appointed by the resolution dated March 19, 1953, but were reverted by the resolution of April 6, 1955, is concerned it was competent because the action of the Municipal Committee amounted to a reversion of those persons without following the procedure laid down in the rules.

We realize that the petitioner having worked in the select grade for almost three years has been hit hard by what has happened subsequently, but since his original appointment itself was illegal, there is nothing which we can do for him except recommend to the Municipal Committee to consider his case favourably when the next occasion arises for selection. Mr. Kalele, who appears for the petitioner, says that the Municipal Committee will ask him to refund the excess salary which he drew during the period he worked in the select grade. Now we realize that it would be very hard for the petitioner to pay back that amount. But we cannot do anything about it. We, therefore, leave it to the good sense of the Municipal Committee to deal with the petitioner in a sympathetic way.

The rule is discharged. We make no order as to costs.

Rule discharged.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Naik.

BHAGWANDAS MOTIRAM MARWARI v. THE BOMBAY REVENUE
TRIBUNAL, NAGPUR.*

Bombay Commissioners of Divisions Act (VIII of 1958), Sec. 8—Constitution of India, art. 226—Bombay Revenue Tribunal whether an "authority" within s. 8—Whether word "authority" in art. 226 of Constitution includes a purely judicial tribunal.

The Bombay Revenue Tribunal does not fall within the term "authority" as used in s. 8 of the Bombay Commissioners of Divisions Act, 1957.

The word "authority" in art. 226 of the Constitution of India does not include a purely judicial tribunal. A quasi-judicial body or tribunal (that is, an administrative or executive body or tribunal entrusted with judicial functions) will fall within the ambit of the word "authority". But where the sole function of a tribunal is to administer justice judicially, it cannot fall within the expression "authority."

THE facts appear in the judgment.

C. P. Kalele, for the petitioner.

N. L. Abhyankar, for opponent No. 4.

MUDHOLKAR J. This is a petition under arts. 226 and 227 of the Constitution for quashing the order of the Bombay Revenue Tribunal at Nagpur, transferring an appeal preferred by the petitioner and pending before it to the Commissioner, Nagpur, for disposal. According to the Tribunal, by virtue of s. 8 of the Bombay Commissioners of Divisions Act (Act VIII of 1958) an appeal of this kind has to be transferred to the Commissioner for disposal. The appeal in question arose out of an order made by the Sub-Divisional Officer upon an application made by respondent No. 4 under s. 19 of the Berar Regulation of Agricultural Leases Act, 1951.

In coming to the conclusion that the appeal has to be transferred to the Commissioner, the Revenue Tribunal has relied upon a decision of the Full Bench of the Tribunal in *Vishweshar Rao v. State of Bombay*¹. Section 8 of the Bombay Commissioners of Divisions Act runs thus:—

"All proceedings including proceedings by way of appeals, revision or review pending under any existing law before the State Government or a Divisional Officer or Director of Local Authorities or any other officer or authority immediately before the commencement of this Act shall, where disposal of the proceedings falls within the purview of the powers and duties of the Commissioner, be transferred to the Commissioner for disposal according to law."

Now, the Revenue Tribunal is not specifically mentioned in this section, but in *Vishweshar Rao's* case it has been held that the word "authority" occurring in this section includes a Revenue Tribunal. It was contended before the Tribunal that the word "authority" should be construed *ejusdem generis*. Negating this argument the Revenue Tribunal pointed out that before applying the rule of *ejusdem generis* it must be shown that the authorities enumerated in the section belong to the same genus. It was further argued before the Tribunal that in s. 8 the expressions "State Government", "Divisional Officer" and "Director of Local Authorities" are used in the descending order and, therefore, the words "any other officer or authority" must be construed to indicate officers or authorities subordinate to those mentioned already. This argument was also repelled by the Tribunal upon the view that there is nothing to show that the status of the Director of Local Authorities was inferior to that of the Divisional Officer.

In our opinion, however, the word "authority" cannot, at any rate in the particular context, be deemed to include a tribunal which is entrusted with

*Decided, April 16, 1959. Special Civil Application No. 400 of 1958.

1. [1958] N. L. J. 505.

the exercise of purely judicial powers. The word "authority" literally means a body exercising executive, administrative or legislative power and is usually used by the Legislature to indicate subordinate agencies i.e. agencies subordinate to the Executive Government, entrusted with the exercise of executive or administrative or quasi-judicial power. It is also used to denote agencies such as independent or semi-independent Corporations to which power has been delegated by Government or upon which power to exercise executive or administrative functions is conferred by the Legislature. The term "authority" cannot be deemed to include a Court or any other judicial tribunal. In our opinion, therefore, that term, as used in s. 8, would not include a tribunal like the Bombay Revenue Tribunal, which is entrusted with the duty of adjudicating upon the rights of persons judicially. Now, if the word "authority" is given the meaning accorded to it by the Full Bench of the Revenue Tribunal, then it would mean that the Revenue Tribunal must transfer every proceeding pending before it, whether it is an appeal or a revision and which falls "within the purview of the power and duties of the Commissioner" to the Commissioner. The result of this would be that a Revenue Tribunal which has been constituted by the Revenue Tribunals Act of 1939, would be bereft of almost all its work and will have hardly anything to do. It could not have been the intention of the Legislature to deprive the tribunal of its work and strike at the very root of its existence.

We have already adverted to the second condition which has to be fulfilled before any appeal or application could be transferred to the Commissioner and that is that the proceedings must fall within the purview of the powers and duties of the Commissioner. This point has been dealt with by the Full Bench of the Tribunal in para. 9 of its judgment. The Tribunal had examined the provisions of the Madhya Pradesh Land Revenue Code and had come to the conclusion that every appeal against the orders of the Additional Deputy Commissioner and Collector which could have been entertained or dealt with by the Commissioner would lie to the Commissioner or, if it had been preferred to the Tribunal, would have to be transferred to the Commissioner. Upon this view, it will follow that the Revenue Tribunal will have no work whatsoever to deal with.

It is true that in art. 226 of the Constitution, which deals with the power of the High Court to issue writs, it is provided that such a writ can issue to any person or "authority" including a Government. It is suggested that the word "authority" so used must include even a Revenue Tribunal or a Board of Revenue. However wide may be the meaning of the word "authority" used in this article, it cannot, in our opinion, include a purely judicial tribunal. A quasi-judicial body or a tribunal (that is, an administrative or an executive body or a tribunal entrusted with judicial functions) would certainly fall within the ambit of the word "authority". But where the sole function of a tribunal is to administer justice judicially, it cannot fall within the expression "authority". The Bombay Revenue Tribunal is not entrusted with any administrative work but is solely entrusted with the duty of deciding matters judicially, whether between an individual and an individual or between the State and an individual. It cannot be deemed to be performing quasi-judicial functions but must be regarded as performing purely judicial functions. We are, therefore, clear that the Revenue Tribunal does not fall within the term "authority" as used in s. 8 of the Act. Upon this view it will follow that the appeal will have to be dealt with by the Revenue Tribunal itself and that its transfer to the Commissioner is erroneous.

We accordingly make the rule absolute, quash the order of the Revenue Tribunal and direct it to withdraw the appeal from the file of the Commissioner and hear it. There will be no order as to costs.

Rule made absolute.

SUPREME COURT.

Present: Mr. Justice Jafer Imam and Mr. Justice J. L. Kapur.

ANDHERI MAROL KURLA BUS SERVICE v. THE STATE OF BOMBAY.

Industrial Disputes Act (XIV of 1947), Secs. 20(2)(b), 12(6)—Whether conciliation proceedings and when report under s. 12(6) made by Conciliation Officer—Conciliation proceedings continuing beyond fourteen days or report under s. 12(6) not made within fourteen days—Whether such proceedings come to an end after fourteen days.

Under s. 20(2)(b) of the Industrial Disputes Act, 1947, the conciliation proceedings do not end when the report under s. 12(6) of the Act is made by the Conciliation Officer but when that report is received by the appropriate Government.

Workers of the Industry Colliery, Dhanbad v. Management of the Industry Colliery, referred to.

If conciliation proceedings are not closed but are carried on beyond a period of fourteen days, or if the Conciliation Officer does not make his report within fourteen days as required by s. 12(6) of the Industrial Disputes Act, 1947, in law the proceedings do not automatically come to an end after fourteen days but only terminate as provided in s. 20(2)(b) of the Act.

Colliery Mazdoor Congress v. New Beerbhoom Coal Co., Ltd., referred to.

THE facts are stated at 57 *Bombay Law Reporter* 529.

Hardayal Hardy, for the appellants.

H. J. Umrigar and *R. H. Dhebar*, for the respondent.

KAPUR J. This is an appeal by special leave against the judgment and order of the High Court of Bombay reversing the judgment of the Chief Presidency Magistrate, Bombay, and thus convicting accused Nos. 1 and 5 under s. 31(1) read with s. 33(1) of the Industrial Disputes Act (Act XIV of 1947) (hereinafter called the Act) and sentencing accused No. 1 to a fine of Rs. 250 and accused No. 5 to a fine of Rs. 50.

The appellants are the Andheri Marol Kurla Bus Service who was accused No. 1 (now appellant No. 1) and its manager H. M. Khan who was accused No. 5 (now appellant No. 2). Some disputes arose between appellant No. 1 and its workmen. On December 13, 1951, the Conciliation Officer wrote to appellant No. 1 and enclosed the demands of the Union which were dated August 9, 1951. On December 31, 1951, appellant No. 1 was asked to appear before the Conciliation Officer on January 9, 1952, and after getting one adjournment appellant No. 1 appeared before the Conciliation Officer on January 17, 1952, and filed its written statement and raised various objections. The next date of hearing was January 31, 1952, and the proceedings went on till June 2, 1952, when appellant No. 1 wrote to the Conciliation Officer saying that no useful purpose would be served by holding any further meetings. On May 9, 1952, the Union had also indicated to the Conciliation Officer that the negotiations had failed. On March 18, 1952, the appellant dismissed Louis Pereira, a bus conductor, and proceedings were taken on a complaint by the Assistant Commissioner of Labour under s. 33 read with s. 31 of the Act against 5 accused persons, the two appellants and the partners of appellant No. 1. The Chief Presidency Magistrate acquitted all the accused including the appellants and held that as the conciliation proceedings had continued for a period of more than 14 days as from January 17, 1952, further proceedings for conciliation were illegal and, therefore, the accused persons could not be convicted under s. 31(1) of the Act. The State took an appeal to the High Court and the judgment of acquittal was reversed and of the accused persons the two appellants were convicted and the others were acquitted. The two appellants have appealed by special leave.

The question for decision is whether the conciliation proceedings could be

*Decided, April 21, 1959. Criminal Appeal - 1 [1953] S. O. R. 428.
No. 46 of 1957. 2 (1952) L. A. C. 210, 222.

said to be pending when Louis Pereira was dismissed. If the answer is in the affirmative then the appellants have been properly convicted, and if not, the conviction must be set aside. Section 31(1) makes the contravention of the provision of s. 33 of the Act an offence punishable with imprisonment for a period which may extend to six months or with fine or with both.

Section 33(1) provides:

"Section 33. (1) During the pendency of any conciliation proceeding before a Conciliation Officer or a Board or of any proceeding before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall:—

(a) in regard to any matter connected with the dispute, alter to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending."

Therefore, the question reduces itself to the meaning of the words "pendency of any conciliation proceedings before a conciliation officer".

The argument raised on behalf of the appellant is that the object of conciliation is to get a settlement made with expedition and, therefore, under s. 12 the Conciliation Officer was bound to make his report within 14 days of the commencement of the conciliation proceedings or within such shorter period fixed by the appropriate Government. From this it was submitted that as 14 days had expired before March 18, 1952, the dismissal could not be said to be one within the words "pendency of conciliation proceedings". The Act provides for commencement and conclusion of conciliation proceedings under s. 20, but the first sub-section of s. 20 deals with what are called utility services and sub-s. (2) of that section provides as to when the conciliation proceedings conclude. That sub-section is as follows:—

"Section 20. (1) ...

(2) A conciliation proceeding shall be deemed to have concluded—

(a) where a settlement is arrived at, when a memorandum of the settlement is signed by the parties to the dispute;

(b) where no settlement is arrived at, when the report of the Conciliation Officer is received by the appropriate Government or when the report of the Board is published under section 17, as the case may be, or

(c) when a reference is made to a Court, Labour Court, Tribunal or National Tribunal under section 10 during the pendency of conciliation proceedings."

The provisions of sub-s. 20(2) apply to all conciliation proceedings whether in regard to utility services or otherwise. All conciliation proceedings under this sub-section shall be deemed to have concluded in the case where no settlement is reached, when the report of the Conciliation Officer is received by the appropriate Government. The conciliation proceedings, therefore, do not end when the report under s. 12(6) is made by the Conciliation Officer but when that report is received by the appropriate Government. It was contended that the conciliation proceedings should be held to terminate when the Conciliation Officer is required under s. 12(6) of the Act to submit his report but the provisions of the Act above quoted do not support this contention as the termination of the conciliation proceedings is deemed to take place when the report is received by the appropriate Government. This is how s. 20(2)(b) was interpreted in *Workers of the Industry Colliery, Dhanbad v. Management of the Industry Colliery*.¹

It was next contended that on this interpretation the conciliation proceedings could be prolonged much beyond what was contemplated by the Act and the termination would depend upon how soon a report is received by the appropriate Government. It is true that s. 12(6) of the Act contemplates the submission of the report by the Conciliation Officer within 14 days but that does not affect the pendency of the conciliation proceedings, and if for some reason

the Conciliation Officer delays the submission of his report his action may be reprehensible, but that will not affect the interpretation to be put on s. 20(2)(b) of the Act. Section 12 lays down the duties of the Conciliation Officer. He is required to bring about settlement between the parties and must begin his investigation without delay, and if no settlement is arrived at, he is to submit his report to the appropriate Government. No doubt s. 12 contemplates that the report should be made and the proceedings closed within a fortnight, and if proceedings are not closed but are carried on, as they were in the present case, or if the Conciliation Officer does not make his report within 14 days he may be guilty of a breach of duty, but in law the proceedings do not automatically come to an end after 14 days but only terminate as provided in s. 20(2)(b) of the Act. (*Colliery Mazdoor Congress v. New Beerbhoom Coal Co., Ltd.*²). As the conciliation proceedings were pending at the time when Louis Pereira was dismissed the appellants were rightly convicted under s. 31(1) read with s. 33 of the Act.

The appeal is, therefore, dismissed.

Appeal dismissed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Mudholkar and Mr. Justice Nalk.

MST. JANKU ZIBAL v. SHAMRAO MALHARRAO PANDHARE.*

Indian Limitation Act (IX of 1908), Arts. 181, 182—Civil Procedure Code (V of 1908), O. XXI, r. 11—Plaintiff's suit for possession decreed on December 20, 1947, on condition that plaintiff deposited certain amount in Court—Appeal by parties to suit dismissed on October 31, 1955—Application for execution of decree without deposit of money made on October 2, 1956—Deposit made by October 9, 1958—Whether application barred by time—Applicability of arts. 181 and 182—Whether application not in accordance with law because not accompanied by deposit.

Plaintiff filed a suit against the defendants for possession of property and the suit was partly decreed on December 20, 1947, whereby possession was granted to the plaintiff on condition that he deposited a certain amount in Court. The parties to the suit appealed and their appeals were dismissed on October 31, 1955. On October 2, 1956, the plaintiff made an application for execution of the decree without depositing any money along with it, but by October 9, 1958, he had deposited the amount in Court. On the questions whether the application for execution was barred by time and whether it was not in accordance with law, the defendants contended that the decree passed by the trial Court was a conditional decree and that to such a decree the appropriate Article of the Indian Limitation Act, 1908, which applied was art. 181 of the Act, and, therefore, the application was barred by time, and that as the plaintiff's application was not accompanied by the deposit, it was not in accordance with law:—

Held, that on general principles, apart from the provisions of item 2 in column 3 of art. 182 of the Indian Limitation Act, where execution is sought of a decree passed in a suit in which an appeal has been preferred and decided, the starting point of limitation would be the date of the appellate decree,

that even though art. 181 of the Act applied to an appellate decree, the deposit of the amount having been made by the plaintiff within three years of that decree and the execution application having also been made during this period, the application was not barred by time:

² (1952) L. A. C. 219, 222.

*Decided, May 1, 1959. Second Appeal No. 29 of 1959, against the order passed by T. L. Junankar, First Additional District Judge

at Nagpur, in Execution Case No. 5-A of 1946, arising out of Civil Suit No. 5-A of 1946, decided by M. L. Shrivastava, First Additional District Judge, Nagpur.

Gopal Sattu v. Dnyanu Maruti,¹ *Bhuralal v. Jivan Singh*,² *Maharaja of Darbhanga v. Homeshwar Singh*³ and *Jowad Hussain v. Gendan Singh*,⁴ referred to; and

that the relief which the plaintiff had sought was clearly one which was awarded by the decree and the executing Court had jurisdiction to grant it, but if ultimately the plaintiff failed to deposit the amount within the time allowed by the Court, then the Court could dismiss his application but it could not do so simply on the ground that the amount was not put in along with the application for execution:

Gopal Parsharam v. Damodar Janardhan,⁵ referred to.

Normally the article which is applicable to an application for execution is art. 182, and it is only in those cases where for some reason that article does not apply that art. 181, which is a residuary article, can be pressed in aid. Where the question is whether the main article or the residuary article applies, what the Court must do is to determine whether any of the starting points in art. 182 is applicable to the particular application for execution. If none of the starting points is applicable then only the Court can resort to art. 181.

There is a distinction between a case where an application is liable to be dismissed on the ground that it is not in accordance with law and one where it is liable to be dismissed on the ground that the decree-holder is not entitled to obtain any relief because of non-compliance with the condition laid down in the decree sought to be executed.

THE facts appear in the judgment.

D. B. Padhye, for the appellants.

N. S. Nandedkar, for the respondent.

MUDHOLKAR J. This appeal arises out of proceedings in execution and has been referred for decision to a Division Bench because it involves an important question of law.

The relevant facts are these. The plaintiff, who is respondent in the appeal, instituted civil suit No. 5-A/46 for possession of certain property and for setting aside certain alienations made by its limited owners. That suit was partly decreed on December 30, 1947. The appellants before us are some of the alienees who were defendants to that suit. They were in possession of some of the property of which possession was granted to the respondent on condition that he deposited Rs. 41,026-12-6. The decree was appealed from both by the appellants as well as the respondent. Their appeals were dismissed on October 31, 1955. It may be mentioned that defendant No. 8 to the suit had also preferred an appeal against the decree of the trial Court in so far as it affected him. That appeal was allowed and the respondent's claim as against him was dismissed. Therefore, the net result of the appeals preferred before this Court by the parties to the suit was that the decree of the trial Court was modified in so far as it related to defendant No. 8, but was upheld with respect to the plaintiff and other defendants thereto.

On October 2, 1956, the respondent made an application for execution of the decree, but he did not deposit any money along with the execution application. He, however, deposited Rs. 32,000 on August 7, 1958, Rs. 3,000 on August 8, 1958, and Rs. 6,026-12-6 on August 16, 1958. Soon after this amount was deposited, defendants Nos. 6 to 8 and the present appellants attached in all a sum of Rs. 2,407.56 nP. out of the amount deposited by the respondent in execution of the decree for costs which they held against the respondent and in their favour. On October 9, 1958, the respondent deposited a sum of Rs. 2,407.56 nP. in Court 'without prejudice' and thus restored the amount deposited by him for payment to the appellants to the original figure of Rs. 41,026-12-6.

1 [1938] I.L.R. Bom. 649, s.c. 40 Bom. L.R. 721.
L.R. 512.

2 [1956] A.I.R. Rajasthan 21.

3 (1920) L.R. 48 L.A. 17, s.c. 23 Bom. Bom. 353.

4 (1926) I.L.R. 6 Pat. 24, p.c.

5 (1942) 45 Bom. L.R. 707, s.c. [1943] A.I.R.

The appellants resisted the application for execution on two grounds; firstly, that that application was barred by time, and, secondly, that it was not in accordance with law. Both these grounds were negatived by the Court below and possession of the property which was with the appellants was ordered to be delivered to the respondent along with the standing crops. In this appeal the appellants have reiterated both the contentions raised by them before the executing Court and have also taken an additional contention to the effect that the Court below was in error in ordering delivery of possession to the respondent along with the standing crops.

In support of the plea of limitation it is urged by Mr. D. B. Padhye for the appellants, that the decree which was passed by the Court below was a conditional decree, that to that decree the appropriate article of the Limitation Act which applied was art. 181, that under that article the respondent was bound to apply for execution on the date on which the decree was passed, or within three years of that date, and that the application having been made nearly 9 years after the passing of the decree by the trial Court was barred by time.

Reliance was placed by Mr. Padhye strongly on the decision of this Court in *Gopal Sattu v. Dnyanu Maruti*¹ and *Bhuralal v. Jiwansingh*². In the first mentioned case the suit was for possession of certain immovable property and was decreed by consent. The decree provided that the plaintiff shall pay to Bayabai a sum of Rs. 350 by January, 1926, that if he failed to do so, the amount was to carry interest at six per cent. per annum and that on payment of that sum the plaintiff was to get possession of the suit property. Thus under the decree the plaintiff's right to get possession of the property was conditional on his paying the sum of Rs. 350 to Bayabai. Pending the suit Bayabai had sold the property to the defendant, but since he was a purchaser *pendente lite* he acquired no independent rights to the property as against the plaintiff. The plaintiff did not pay Rs. 350 to Bayabai or to the defendant nor did he sue out execution. On July 8, 1930, however, he filed a suit against the defendant for possession of the property. The suit was dismissed by the trial Court on the ground that it was barred by the provisions of s. 47 of the Civil Procedure Code. In appeal the District Judge reversed the decision of the trial Court and decreed the suit subject to the plaintiff paying to the defendant a sum of Rs. 350. The decision of the District Judge was based upon the view taken in *Basappa Budappa v. Bhimangowda Shiddangowda*³ that an alienee *pendente lite* is bound by the result of the suit although he is not a party to it, and that a separate suit can lie against such an alienee to recover possession of the property. The defendant, thereupon, came up to this Court in a second appeal. This Court held, following the decision of the Privy Council in *Parmeshari Din v. Ram Charan*⁴, that the transferee of the defendant *pendente lite* is a representative of the defendant, and that being so, the decree must be enforced against him in execution and not by a separate suit. Then it was contended before this Court on behalf of the plaintiff that the suit could under sub-s. (2) of s. 47 be treated as an application in execution. Dealing with this plea Beaumont C.J., who delivered the judgment of the Court, observed (p. 654):—

"...We should be very ready to treat this suit as an application if we have jurisdiction to do so. But the objection is taken that if we treat this suit as an application, the application is barred by limitation. Article 182 of the Indian Limitation Act provides that for the execution of a decree or order of any civil Court the time is to be three years from the date of the decree or order, and then various alternative dates are given in the case of different forms of decrees. None of those alternatives apply to the present case, which is a case of a decree upon a condition. Where you have, as here, a decree for possession on the payment of a sum on a future date, I do not

¹ [1938] Bom. 649, s.c. 40 Bom. L.R. 512. L.R. 102.

² [1958] A.I.R. Rajasthan 21.

³ (1927) I.L.R. 52 Bom. 208, s.c. 30 Bom.

⁴ (1937) 39 Bom. L. R. 1010, p.c.

think that the provisions of Art. 182 can have any application. It seems to me impossible to say that the date of the decree is the starting point of time, because the future date on which the decree is to become executable may be more than three years from the date of the decree. I, therefore, think that Art. 181 is the article applicable to such a case, and it was so held by the Allahabad High Court in *Shyam Lal v. Sohan Lal*.^{4a} Under Art. 181 limitation runs from the time when the right to apply accrues. It is argued here that the right to apply for execution of this decree did not arise until the sum of Rs. 350 with requisite interest was paid or tendered, and inasmuch as the sum has not been paid up to the present time or tendered, it is said that limitation has not yet begun to run. It seems to me that the plaintiff's right to enforce the decree arose probably on the day of the decree, because there was nothing in the decree to prevent him paying the Rs. 350 at once. But at any rate it arose in January, 1926, when the sum was payable, and he had an absolute right to enforce the decree on payment of the amount. The execution of most decrees necessitates the possession of a certain amount of money, and it is impossible to say that a decree is not executable because the plaintiff has not got the money necessary to enable him to execute it. I think we are bound to hold that this decree could have been executed by the plaintiff at the latest in January, 1926, and as the suit was not filed until July, 1930, an application in execution would have been out of time. That being so, we cannot treat this suit as an application."

Upon this view, this Court dismissed the appeal.

Now, Mr. Padhye, while conceding that the decree was a consent decree and that it specified the date on which money was to be paid by the plaintiff to the defendants relied strongly on the observations of the learned Chief Justice that the plaintiff's right to enforce the decree arose on the day of the decree because there was nothing in the decree to prevent him from paying at once the amount stated in the decree. He says that the plaintiff who has obtained a decree of this kind in his favour cannot be permitted to extend the period of limitation by his own inaction in depositing money which he was required to deposit. It is true that these observations of the learned Chief Justice do lend some support to Mr. Padhye's contention, but we must point out that they are, in fact, *obiter* and that the substantial ground upon which the decision of that case rested was that a sum of money which the plaintiff was required to pay became payable at a specified point of time and, therefore, the provisions of art. 182 could not apply to the application for execution. There is, however, one important point of distinction between that case and the present one. The point is that an appeal was preferred from the decree of the trial Court making the deposit of a certain sum of money as a condition for obtaining possession of the suit property. Now, item 2, in col. 3 of art. 182 of the Limitation Act provides that where there has been an appeal from a decree the date from which the period of limitation begins to run would be the date of the final decree or order of the appellate Court. Mr. Padhye, however, points out that whereas six different points of time from which limitation commences to run have been set out in art. 182 only one point of time is set out in art. 181, which is "when the right to apply accrues", and that as the decree was a conditional decree, the application for execution must be governed by that article despite the fact that an appeal had been preferred and not by art. 182. It is in support of this particular part of the argument that Mr. Padhye strongly relies upon the decision of the Rajasthan High Court.

Normally the article which is applicable to an application for execution is art. 182 and it is only in those cases where for some reason that article does not apply that art. 181, which is a residuary article, can be pressed in aid. Where the question is whether the main article or the residuary article applies, what the Court must do is to determine whether any of the starting points in art. 182 is applicable to the particular application for execution. If none of these starting points is applicable then only the Court can resort to art. 181. Now, applying this test we at once find that one of the starting points

is applicable to the present case and, therefore, it is art. 182 that will be attracted and not art. 181.

Mr. Padhye, however, says that for applying this test what we have to look to are the circumstances which existed when the decree was passed and not those which came into being subsequently. Indeed, had the question been of executing the decree of the trial Court then regard would have had to be had only to the circumstances which obtained when that decree was passed and in the light of those circumstances it would have to be held that the application for execution of the decree originally passed would be governed by art. 181 on the basis of the decision of this Court. But after an appeal is filed a change in circumstances does occur. Where such change occurs then the appropriate article to apply would be art. 182. Indeed, even in the Rajasthan case, on which reliance was placed by Mr. Padhye, the learned Judge held that the maximum period which could be allowed to the plaintiff to deposit the amount required to be deposited under the decree before obtaining possession of the property was three years from the date of the appellate decree, even though the learned Judge has held that the appropriate article to apply is art. 181.

It is no doubt true, as held by their Lordships of the Privy Council, *Maharaja of Darbhanga v. Homeshwar Singh*⁵, that for art. 182 of the Limitation Act to apply the decree sought to be enforced must be in such a form as to render it capable in the circumstances of being enforced. Therefore, where a decree provides that the right to obtain possession thereunder is conditional upon the payment of a certain sum of money by the plaintiff to the defendant, the application for execution will not be governed by art. 182 of the Limitation Act. In such circumstances, the residuary article i.e. art. 181 must, therefore, apply.

But it must be borne in mind that their Lordships were not dealing with a case where an appeal had been preferred from the original decree and execution was sought within three years of the appellate decree. Mr. Padhye, however, says that this should make no difference in a case where an appellate Court merely confirms the decree of a trial Court. It must however be borne in mind that where there has been an appeal from a decree, it is the decree of an appellate Court which is the final and ultimate decree of the Court, and it is that decree alone which could be executed. See *Jowad Hussain v. Gendan Singh*⁶. Therefore, whether an appellate Court modifies or sets aside a decree of a trial Court or merely affirms it, the latter decree must be deemed to have merged in the decree of the appellate Court. It cannot be disputed that there can but be only one decree in a suit and, therefore, the only decree of which execution is permissible is the final or the ultimate decree passed in that case. The period of limitation for executing such a decree must necessarily commence after that decree came into being and not from a date anterior thereto. We are accordingly of opinion that on general principles, quite apart from the provisions of item 2 in col. 3 of art. 182, where execution is sought of a decree passed in a suit in which an appeal has been preferred and decided the starting point of limitation would be the date of the appellate decree. It would follow from this that even though art. 181 of the Limitation Act applied to an appellate decree, the deposit of the amount having been made by the respondent within three years of that decree and the execution application having also been made during this period, it will not be barred by time. Of course, if art. 182 applies to this case, then no question of limitation would at all arise. Looking at the matter either way, the respondent's application for execution must be held to be within time.

Mr. Padhye then contended that the respondent's application was not accompanied by the deposit and was consequently not in accordance with law. Now, an application for execution will be deemed to be in accordance with law provided it complies with the requirements of O. XXI, r. 11, Civil Procedure Code. Mr. Padhye frankly conceded that all the requirements of that rule were

⁵ (1920) L.R. 48 I.A. 17, s.c. 23 Bom. L.R. ⁶ (1926) I.L.R. 6 Pat. 24, p.c. 721.

satisfied by the respondent, but he says that it was not open to the Court to grant relief to him because he had not deposited the amount of Rs. 41,000 and odd, which the decree made it obligatory upon him to deposit before being entitled to be in possession of the suit property. It seems to us that there is a distinction between a case where an application is liable to be dismissed on the ground that it is not in accordance with law and one where it is liable to be dismissed on the ground that the decree-holder is not entitled to obtain any relief because of non-compliance with the condition laid down in the decree sought to be executed.

Mr. Padhye referred us to a decision of this Court in *Gopal Parsharam v. Damodar Janardhan*⁷ in which it has been held that "not in accordance with law" cannot be construed so as to mean "not in accordance with law on the face of the application," but must have some reference to the material content, apart from the form and formal content of the application for execution. The question in that case was whether the execution application was within time by reason of the fact that the decree-holder had made some previous applications for execution. It would appear that in those previous applications for execution the decree-holder had asked for a relief which was not within the power of the Court to grant and, therefore, the learned Judges who decided the case held that those execution applications did not help the decree-holder. In coming to this conclusion the learned Judges had relied upon, among other decisions, two decisions of this Court, *Nathubhai Kasandas v. Pranjivan Lalchand*⁸ and *Bando Krishna v. Narsimha*.⁹ In one of those cases the learned Judges held that if a person, other than one entitled to apply, applies for execution, or if the person entitled applies for execution in a mode and for a relief outside the decree, the application is not in accordance with law. The reason given by one of the learned Judges (Chandavarkar J.) was that the decree of which execution is sought is not in reality the decree to which the application professes to relate but some other decree, one not existing, and, therefore, incapable of execution according to law. The learned Judge then pointed out that where on the other hand a decree gives certain reliefs and the application for execution seeks some or all of them, it may happen that after going into the merits of the application and considering all the circumstances and equities of the case, the Court comes to the conclusion that the particular relief or reliefs sought shall not be granted. In such a case the decision of the Court on merits cannot affect the application for the purposes of the question whether it is in accordance with law, provided it meets in substance the requirements of the Code of Civil Procedure or any other law relating to execution. Batchelor J., who was the other Judge constituting the Division Bench, held that if the applying complies with the forms and the procedure prescribed in that behalf that applying was in accordance with law, and not the less so because on the merits of the application, whether for one reason or another the application had to be refused. The learned Judge thought that the words "in accordance with law" were an adverbial qualification of the word "applying". He was of the opinion that it is not even an application but it is the applying which must be in accordance with law. As pointed out in *Gopal Parsharam's* case by Sen J., the distinction is extremely subtle. But with this aspect of the matter we are not concerned.

What has to be borne in mind is that according to both the learned Judges there is a distinction between a case where an execution application is liable to be dismissed on the ground that it is not in accordance with law and one where it is liable to be dismissed on the ground that in the particular circumstances of a case a decree-holder is not entitled to a relief. Two more cases were cited by Mr. Padhye, but they also proceed on the view that the relief which the decree-holder sought was outside the decree or beyond the power of

⁷ (1942) 45 Bom. L.R. 707, [1943] A.I.R. L.R. 13.

Bom. 353. ⁹ (1912) I.L.R. 37 Bom. 42, s.c. 14 Bom.

⁸ (1909) I.L.R. 34 Bom. 189, s.c. 12 Bom. L.R. 861.

the jurisdiction of the Court to grant. That is not the case here. The relief which the respondent sought was clearly one which was awarded by the decree and the executing Court had jurisdiction to grant it. It is true that before being put in possession the respondent was required to deposit a certain sum of money, but that is entirely a different matter. If ultimately the respondent failed to deposit the amount within the time allowed by the Court, then the Court would be entitled to dismiss his application, but it certainly could not do so simply on the ground that the amount was not put in along with the application for execution.

Then Mr. Padhye contended that there was no proper and valid tender of a sum of Rs. 2,407.56 nP which was deposited by the respondent "without prejudice" on September 10, 1958. We do not understand what Mr. Padhye means by saying that depositing an amount without prejudice by a party cannot be regarded as a proper deposit in law. He referred to the provisions of s. 38 of the Contract Act but those provisions have nothing to do with a question of the kind which we have here. What s. 38 provides is that where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the Contract Act. Then it provides that every such offer must fulfil certain conditions of which one is that it must be unconditional. Here, we are concerned with the execution of the decree and not with the performance of a contract. Where a person deposits a certain sum of money because he is required to do so by a Court or because a decree *prima facie* requires him to do so, he cannot be deemed to be making an offer to anyone. He only discharges an obligation resting on him, and if while making a deposit he says that there is no obligation upon him, it cannot be said that he has failed to comply with an order of a Court or the *prima facie* requirements of a decree. What is of the essence is the depositing of the amount. If he actually makes it within the time allowed by law or by the Court, the deposit is a good one, whether it is conditional or otherwise, and cannot be ignored or said to be no deposit at all in law just because it is conditional. We, therefore, overrule Mr. Padhye's contention.

Finally, Mr. Padhye said that the respondent had sought possession of the fields without standing crops, but the lower Court granted him possession along with the standing crops, and that this was clearly illegal. In column 10 of the execution application "nature of help required from the Court," the respondent has not made an express prayer that he should be given possession along with the standing crops. No doubt, what he asked for was possession only and in fact there were crops standing on the land when the application was made. But we are really not concerned with the crops then standing because the order of the Court below was made almost two years after the execution application was filed and the crops which were standing when the execution application was made have long since been removed. The respondent, however, demanded possession of the standing crops specifically in a later application. He made that application on August 18, 1958, i.e. after he deposited the full amount which the decree had ordered him to deposit as a condition precedent to the obtaining of the possession. In that application he prayed for the issue of a warrant of possession with crops standing on the land. In reply to that application the appellants stated that they had spent Rs. 6,138-9-0

"for preparing the soil and cultivating and sowing and doing other agricultural operations in the fields."

In reply to this application the respondent stated that the amount claimed is highly exaggerated and not admitted and further stated as follows:

"But in order to save trouble and time of ascertaining these expenses the decree-holder submits that possession be given of 81-11 acres of land after the crops are taken out by the judgment-debtors. They should not hereafter make any expenses or sow fresh crop so as to disentitle the decree-holder to claim possession for want of crops."

Dealing with this matter the learned Judge has directed in para. 12 of his

order an enquiry into the expenses which the appellants had incurred and directed the respondent to deposit a sum of Rs. 2,000 for payment to the appellants pending enquiry and further directed the issue of a warrant of possession in favour of the respondent. The result of this order was that the respondent was entitled to immediate possession of the land i.e. along with the standing crops. He, however, did not get such possession because of a stay order passed by this Court. It is common ground that the appellants have removed the crop. Mr. Nandedkar, therefore, says that since the respondent did not get any standing crop, the amount of Rs. 2,000 which the respondent was required to deposit should be refunded to him and that he should be awarded immediate possession. In view of the fact that the respondent did not get possession of the land along with the standing crops, there is no doubt whatsoever that he is entitled to get back the amount of Rs. 2,000 which he had deposited in the Court below.

Then Mr. Nandedkar said that if the appellants placed the respondent in immediate possession of the property, he would be willing to give up his claim for the accounts of the crops realized by the appellants during the agricultural year 1958-59. It is, therefore, open to the appellants to avail themselves of this offer by delivering possession of the land to the respondent without delay. However, we cannot make any specific order with regard to this aspect of the matter.

For all these reasons we dismiss the appeal with costs.

Appeal dismissed.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice V. S. Desai.

ANUSUYABAI VITHAL v. J. H. MEHTA.*

Payment of Wages Act (IV of 1936), Sec. 2—Industrial Disputes Act (XIV of 1947), Secs. 25C, 2(kkk)—Lay-off compensation whether wages within Payment of Wages Act—Whether lay-off terminates contract of employment—Section 2(e) whether applies to lay-off compensation.

Compensation payable for lay-off, under the provisions of the Industrial Disputes Act, 1947, is not wages within the meaning of the Payment of Wages Act, 1936.

¹ Ref. under s. 81, Emp. State Ins. Act,¹ agreed with.

Bala Subrahmanya v. B. C. Patil,² Asher v. Seaford Court Estates Ltd.³ and Tolaram Relumal v. The State of Bombay,⁴ referred to.

Lay-off does not terminate or bring to an end the contract of employment.

Section 2(e) of the Payment of Wages Act, 1936, contemplates a payment under some scheme like a Provident Fund scheme framed under some enactment. It does not apply to any sum payable under the provisions of the Act itself.

ANUSUYABAI and others (petitioners in Special Civil Application No. 3665 of 1958) were employees of India United Mills Ltd., No. 4 (respondent No. 2), which was a cotton textile concern situated within Greater Bombay. The petitioners were played off by respondent No. 2 and they filed an application in the Court of the Authority under the Payment of Wages Act, 1936 (respondent No. 1), for play off compensation amounting to Rs. 3,772. Respondent No. 2 raised a preliminary objection contending that the claim being for "compensation for lay-off" did not constitute wages as defined under the Payment of Wages Act and that, therefore, respondent No. 1 had no jurisdiction to entertain the application. Respondent No. 1 accepted respondent No. 2's contention and dismissed the application.

The petitioners applied to the High Court under art. 227 of the Constitution of India to set aside the order passed by respondent No. 1.

* Decided, June, 20 1959. Special Civil Applications Nos. 3665 and 3666 of 1958.

¹ (1955) 58 Bom. L. R. 828.

² (1958) 60 Bom. L. R. 948, S. C.

³ [1950] A. C. 508, 526.

⁴ [1955] 1 S. C. R. 158, s.c. 56 Bom. L. R. 1206.

This application was heard with Special Civil Application No. 3666 of 1958.

D. H. Nargolkar, for the petitioners.

H. R. Gokhale, with *R. R. Jahagirdar*, for respondent No. 2.

CHAIYANI C.J. The question, which arises for determination in these two applications, is whether compensation, payable to workers, who have been laid off, under the provisions of the Industrial Disputes Act, 1947, is "wages" within the meaning of the Payment of Wages Act. The term "lay-off" is defined in cl. (kkk) of s. 2 of the Industrial Disputes Act as meaning the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery or for any other reason to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched. To put it briefly, lay-off, therefore, means the failure, refusal or inability of an employer to give employment to his employee. There is an Explanation to this clause, which states:

"Every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid-off for that day within the meaning of this clause."

Section 25C of the Act provides that whenever a workman, whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid-off, he shall be paid by the employer for all days during which he is so laid-off, except for such weekly holidays as may intervene, compensation which shall be equal to fifty per cent. of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid-off. Section 25D imposes an obligation upon the employer to maintain a muster roll during the period of lay-off and to provide for the making of entries therein by workmen who may present themselves for work at the establishment at the appointed time during normal working hours. Section 25E specifies cases and circumstances in which no compensation shall be payable to a workman, who has been laid-off. For instance, under cl. (i), no compensation is payable, if the workman refuses to accept any alternative employment provided by the employer. These provisions of the Act impose a liability on an employer to make certain payments to his employees, when he fails, refuses or is unable to provide work to them. The payments are referred to as "compensation" and not as "wages". The Legislature has drawn a distinction between wages and compensation. It was open to the Legislature to say that during the period of lay-off, a workman shall be paid wages calculated in the prescribed manner. But the Legislature has deliberately referred to the sum payable to a workman during the period of lay-off as compensation, thereby suggesting that the Legislature did not intend that it should be regarded as wages.

Standing Order No. 17 of the Standing Orders settled by the Industrial Court under s. 36(3) of the Bombay Industrial Relations Act, 1946, and which determines the relations between the petitioners and their employers, i.e. respondent No. 2 is as follows:

"Any operative played off under Order 16 shall not be considered as dismissed from service, but as temporarily unemployed, and shall not be entitled to wages during such unemployment except to the extent mentioned in Order 16. Whenever practicable a reasonable notice shall be given of resumption of normal work and all operatives played off under Order 16, who present themselves for work, when the normal working is resumed, shall have prior right of reinstatement."

This Standing Order uses the term "played off" instead of "laid off". It gives a right to the employer to lay-off his workmen, that is to say, it relieves him from an obligation to provide work to them. It also relieves him from the liability to pay wages during this period. Consequently, during the

period of lay-off, a workman cannot insist on work being provided by his employer. There is also no obligation on him to render service. Consequently, he does not enjoy a right to demand wages. It is, therefore, urged by Mr. Gokhale that as during this period the mutual obligations of the employer and the employee, of the employer to provide work and to pay wages and of the employee to work, cease to exist, and also as the employee cannot claim wages during this period, the contract of employment does not subsist or at least is suspended during this period. Mr. Nargolkar, who appears on behalf of the petitioners, has, on the other hand, urged that the terms of their employment have been modified by statute and that s. 25C of the Industrial Disputes Act makes it a term of their employment that compensation shall be paid to them whenever they are laid-off. He has contended that the obligation to pay such compensation and the right to claim it arise under the terms of employment and that consequently it would be wrong to say that during the period of lay-off, the contract of employment does not subsist or is suspended, or that the relationship of master and servant ceases to exist. We do not think that it is necessary for us to express any definite opinion on this point in these cases. It is, however, clear that lay off does not terminate or bring to an end the contract of employment. The employees continue to be on the muster-roll of the employer and they have to be reinstated as soon as normal working is resumed.

The next question to be considered is whether the compensation granted for lay-off is wages within the meaning of the Payment of Wages Act. The definition of the word "Wages" given in the Act was amended in 1957. The amended definition is as follows:—

"Wages" means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes—

(a) any remuneration payable under any award or settlement between the parties or order of a court;

(b) any remuneration to which the person employed is entitled in respect of over time work or holidays or any leave period;

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);

(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;

(e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force;..."

Then follow six clauses, under which certain kinds of payments are not to be regarded as wages. It is not necessary to refer to them. Leaving out of consideration, for the time being, cls. (a) to (e), which extend the meaning of the term "wages", the term as defined in the main part of the definition means a payment, which must satisfy three conditions. Firstly, it must be remuneration. Secondly, it must be payable if the terms of employment are fulfilled. Thirdly, it must be payable in respect of employment or work done in such employment. The word "remuneration" ordinarily means any consideration, which a person receives for giving his services (see Stroud's Judicial Dictionary). It is, therefore, a payment made for services rendered. When no services are rendered and when in fact there is no obligation to render services and when the amount becomes payable owing to the failure of the employer to provide work, it would be difficult to hold that it is remuneration. That the Legislature did not also intend that such payments should be regarded as remuneration, is clear from the different phraseology used by it in cls. (a) to (e) as compared to that used in cls. (d) and (e) of the defi-

inition. In cls. (a), (b) and (c), the sums payable are described as remuneration. These sums are payable in respect of, or on account of, services which have been or are to be rendered. Clause (d) refers to a sum, which is payable by reason of the termination of employment. Even though such sum may be payable under the contract of employment or under any law, the Legislature has not described it as remuneration. The reason is obvious and that is that the amount is payable not on account of services rendered, but by reason of services having been brought to an end. The definition of the term "wages", therefore, itself suggests that the word remuneration is used in the sense of any payment, which is made for work done or for services rendered. The Supreme Court appears to have taken the same view in *Bala Subrahmanya v. B. C. Patil*¹. At p. 945 Bose J. observes:

"Remuneration is only a more formal version of 'payment' and payment is a recompense for service rendered."

Compensation, which is payable for lay-off, that is, on account of the failure or inability of the employer to provide work, cannot therefore be said to be remuneration. The payment is made not as consideration for work done or services rendered, but as compensation for temporary loss of employment.

Another requirement of a payment to fall within the term "wages" is that it must be "in respect of employment or work done in such employment". The expression "in respect of" means "attributable to", (see *Asher v. Seaford Court Estates Ltd.*²); or, if it is given a wider meaning, "relating to or with reference to" (see *Tolaram Relumal v. The State of Bombay*³). The payment must, therefore, be attributable to employment, that is, engagement in work, or to work done. During the period of lay-off, the employer is not in a position to provide work and the employee cannot insist on work being provided or wages being paid to him. The employee is also not under any duty to work for his master or even to present himself for work. He has to present himself for work, if he desires to claim compensation (see s. 25E of the Industrial Disputes Act). But he has an option in the matter. If he remains absent, he will not be entitled to compensation, but he will not lose the right, which he possesses under the Standing Orders, of reinstatement when the normal working is resumed. The employer cannot insist on his attendance and there is also no obligation upon him to provide work or to pay wages, even if the worker presents himself for work. In order to escape liability for compensation, the employer may provide the worker with alternative employment, but the worker is not bound to accept it. If he does not accept it, he will not be entitled to claim lay-off compensation, but he will not lose his right of reinstatement when the lay-off ends. The compensation for lay-off is, therefore, paid in respect of a period when no work is done and when in fact there is no liability on the employer to provide work and on the employee to do work. It is not paid as additional remuneration for work done previously. It cannot, therefore, be said to be attributable to the employment of a worker or to the work done by him. It is made payable in order to mitigate or reduce the hardship caused by reason of unemployment or temporary loss of employment. Consequently, it cannot be said to be a payment "in respect of employment or work done in such employment."

As, therefore, compensation payable for lay off is not remuneration and is also not payable to a worker in respect of his employment or work done in such employment, it is not "wages" within the meaning of this term given in the main part of the definition. In this view, it is not necessary to consider whether such compensation is payable by reason of the terms of employment being fulfilled.

Mr. Nargolkar has also contended that lay off compensation will fall under cls. (c) and (e) of the definition of wages. Clause (c) brings within the definition any additional remuneration, such as bonus, payable under the terms

1 (1958) 60 Bom. L. R. 943, S.C.

2 [1950] A. C. 508, 526.

3 [1955] 1 S. C. R. 158, 165, s.c. 56 Bom. L. R. 1206, 1209.

of employment. Lay off compensation is, however, not remuneration. It will, therefore, not fall under cl. (e).

Clause (e) refers to any sum payable under any scheme framed under any law. This clause contemplates a payment under some scheme like a Provident Fund scheme framed under some enactment. It is not intended to apply to any sum payable under the provisions of the Act itself. If that had been the intention of the Legislature, the words "any sum to which the person employed is entitled under any law" would have been sufficient to carry out the intention of the Legislature and it would not have been necessary to also add the words "under any scheme framed" before "under any law". In our opinion, therefore, cl. (e) has no application to lay off compensation.

We are accordingly of the opinion that compensation payable for lay off, under the provisions of the Industrial Disputes Act, is not wages within the meaning of the Payment of Wages Act. Similar view was taken in *Ref. under S. 81, Emp. State Ins. Act*.⁴ That was a case under the Employees' State Insurance Act, but the definition of "wages" given in that Act was for all practical purposes the same as the unamended definition of this word in the Payment of Wages Act. The definition of "wages" given in the Payment of Wages Act has since then been amended. But the amendment does not in any way alter the ratio or principle of the decision in *Ref. under S. 81, Emp. State Ins. Act*. With respect, we agree with the view taken in this case that lay off compensation is not wages.

The rules issued in the two applications will, therefore, be discharged. There will be no order as to costs.

Rule discharged.

INCOME-TAX REFERENCE.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

DHARMA VIJAYA AGENCY, BOMBAY v. THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY.*

Indian Income-tax Act (XI of 1922), Sec. 4(3)(i)—Insurance Act (IV of 1938)—Assessee-firm principal agents of insurance company—Business conducted by assessee as principal agents settled on trust exclusively for charitable purposes—Whether income arising from such business exempt from tax under s. 4(3)(i)—Whether principal agency property within s. 4(3)(i)—Applicability of proviso to s. 4(3)(i) as amended by Indian Income-tax (Amendment) Act (25 of 1953).

The assessee, which was a partnership firm, were appointed principal agents of an insurance company and remuneration was paid for conducting the business as principal agents. The appointment was subject to termination by either party giving to the other party one month's notice in writing. Thereafter the business conducted by the assessee as principal agents was settled on trust exclusively for charitable purposes. On the question whether the income arising to the assessee in respect of the assessment years 1951-52 to 1954-55, as chief agent of the insurance company was exempt from tax under s. 4(3)(i) of the Indian Income-tax Act, 1922, it was *inter alia* contended by the Department (1) that the principal agency was nothing but a right of service and it could not be regarded as business and, therefore, not property held upon charitable trust and (2) that in respect of the assessment years 1952-53 to 1954-55, the case fell within the proviso to s. 4(3)(i) of the Act as amended by the Indian Income-tax (Amendment) Act, 1953:—

Held, that the principal agency conducted by the assessee was a business and, therefore, "property" within the meaning of s. 4(3)(i) of the Act, which was capable of being lawfully settled upon trust for charitable purposes:

⁴ (1955) 58 Bom. L. R. 828.

rence No. 59 of 1958.

*Decided, June 29, 1959. Income-tax Refe-

*J. K. Trust v. Commr. of Inc.-tax,*¹ followed;

that the business of the assesses, not being one which was carried on on behalf of a religious or charitable institution, was not governed by the proviso to s. 4(3)(i) of the Act as amended by the Indian Income-tax (Amendment) Act, 1953, and that the income was governed by the operative part of s. 4(3)(i), and

that, therefore, the income arising to the assesses, in respect of the four assessment years, as chief agent of the insurance company, was exempt from tax under s. 4(3)(i) of the Act.

The business referred to in cl. (b) of the proviso to s. 4(3)(i) of the Indian Income-tax Act, 1922, need not be business which is held for religious or charitable purposes, provided it is business carried on on behalf of a religious or charitable institution.

*Gadodia Swadeshi Stores v. Commissioner of Income-tax, Punjab*² and *J. K. Trust v. Commr. of Income-tax*,³ referred to.

N. A. Palkhivala, for the applicant.

G. N. Joshi, with *R. J. Joshi*, for the respondent.

SHAH J. This reference arises from proceedings for assessment of income-tax in respect of assessment years 1951-52, 1952-53, 1953-54 and 1954-55. Four brothers Tulsidas, Ramdas, Ambalal and Chinubhai—whom I will hereafter refer to collectively as “Kilachand brothers”—entered into a partnership agreement for carrying on business—the nature whereof is not clear on the record—in the name and style of Dharma Vijaya Agency. There was no formal deed recording the terms of this partnership. By an agreement, dated September 28, 1950, the firm was appointed as from September 1, 1950, the principal agents of the New Great Insurance Co. of India, Ltd. The appointment was made by a letter setting out certain terms and conditions addressed by the insurance company to the firm, and these terms and conditions were accepted by the firm. By the first condition of the letter the firm was to act as the principal agent on behalf of the insurance company and was at all times to be the holder of a certificate from the Controller of Insurance to act as principal agent. By condition No. 6 the appointment was subject to termination at the will of either party by one party giving to the other one month's notice in writing. By the seventh condition the company invited the attention of the firm to ss. 41 and 102(1) of the Insurance Act, 1938. On February 17, 1951, Kilachand brothers styling themselves as “the founders” executed a deed of trust of the business carried on by them in the name of Dharma Vijaya Agency as principal agents of the New Great Insurance Co. of India Ltd. It was recited by the first paragraph of the deed that the “founders” so long as they shall respectively remain trustees of the deed and all persons thereafter becoming trustees hold and shall hold the business of principal agency and all the benefits and profits to arise from the said business and the realisation and proceeds thereof and all sums of money thereafter received by the trustees and all investments at any time representing the same or any part thereof and all monies arising therefrom upon trust “to pay and apply the same for the relief of the poor, education, medical relief and the advancement of any other subject of general public utility as the trustees shall from time to time think fit:” and by a parenthetical clause the “founders” and the survivors or survivor of them were included in the expression “trustees”. By para. 12 it was provided that “all moneys received by the trustees on account of the said trust, except such sums as may be reasonably required to be kept for current expenses, shall be deposited forthwith on receipt thereof in the trustees’ banking account.” By para. 13 it was provided:

“A banking account for the purposes of the charity shall be opened with one or more scheduled banks. Such banking account shall be operated on by any one trustee unless the trustees otherwise decide. Every sum of money received on account of the

¹ (1957) 82 I.T.R. 535, S.C.

² (1944) 12 I.T.R. 385.

³ (1957) 59 Bom. L. R. 1255.

charity shall be forthwith paid into the credit of that account unless otherwise expressly ordered by the trustees."

There is no dispute that the trust was created for purposes exclusively charitable. On July 21, 1951, a banking account was opened with the Bank of Baroda, Ltd., in the name of "Dharma Vijaya Agency" with a special instruction that the account will be operated upon by any one of the trustees according to clause 13 of the deed of trust, and under the specimen signature of each of the trustees the word "trustee" was appended. On August 21, 1951, another account was opened also with the same bank under the name and style of "Dharma Vijaya Agency Account No. 2". This account was to be operated upon by any one of the Kilachand brothers who were described as "attorneys", and the specimen signature was to be in the form of "per pro: Dharma Vijaya Agency."

The Income-tax Officer brought the income of the Dharma Vijaya Agency to tax on the footing that no valid trust was created by the deed, dated February 17, 1951. In the view of the Income-tax Officer, in order that the business may be vested in trust there must be a valid transfer of the business from Kilachand Brothers to the trust, which "transfer was not permissible as per the agreement" and accordingly there arose no trust and the title of the trustees was "inchoate". He also observed that the account opened on August 21, 1951, with the Bank of Baroda, Ltd., authorising any one of the four "attorneys" to operate was opened by Kilachand brothers as Insurance Agents and not on behalf of a religious or charitable institution. Against the order refusing to grant to the income earned in the business of the Dharma Vijaya Agency exemption under s. 4(3)(i) of the Income-tax Act, Dharma Vijaya Agency preferred an appeal to the Appellate Assistant Commissioner. That officer held that in the first instance no valid trust was created, but because the insurance company had ratified the trust it must be regarded as valid. He further observed that the Controller of Insurance had been duly informed that the business of the Dharma Vijaya Agency was settled upon trust and no objection had been raised by the Controller in that behalf. He finally observed that if certain property was held under trust or a legal obligation wholly for religious or charitable purposes, all that was required for exemption under s. 4(3)(i) was that the income should be applied or accumulated for application to such religious or charitable purposes: and in the case before him that condition was fulfilled. Against the order passed by the Appellate Assistant Commissioner an appeal was preferred to the Income-tax Appellate Tribunal. The Tribunal set aside the order of the Appellate Assistant Commissioner holding that there was no transfer of the principal agency business with the consent of the Board of Directors of the company, that in any event the right, title and interest in a principal agency was not a business, as the appointment was terminable at one month's notice on either side, and that the contract of general insurance being an annual contract, in substance the trust was sought to be made of the earnings of commission for rendering service. The Tribunal relied upon the fact that the cheques which were signed on behalf of Dharma Vijaya Agency were signed by one or more of the Kilachand brothers as "per pro" and the word "trustee" was omitted from the description. The Tribunal also held that before the income of a trust for charitable purposes is exempt from tax, it must satisfy the conditions laid down in s. 4(3)(i), i.e., "the business income can only be exempt from taxation if the business was carried on in the course of the actual carrying out of the primary purpose of the institution": and "in the present case the business not being carried on in the course of carrying out the primary purpose of the trust", the income was not exempt from liability to pay tax. The Tribunal has, at the instance of the assessee the Dharma Vijaya Agency, referred the following question:

"Whether on the facts and circumstances of the case the income arising to the applicant as chief agent of the New Great Insurance Co. of India Ltd. is exempt from tax under the provisions of section 4(3)(i) of the Income-tax Act?"

Implicit in this reference are two component branches of the question:

(i) Whether the business of Principal Agency conducted by the assesses is "property" held upon charitable trust?, and if it is property held upon charitable trust,

(ii) Whether the case falls within the proviso to section 4(3)(i) of the Indian Income-tax Act as amended by Act 25 of 1953?

We may observe that the second branch of the question falls to be determined only in respect of the assessment years 1952-53, 1953-54 and 1954-55.

Kilachand brothers had entered into a partnership to trade in the name of the assesses. After the partnership agreement the assesses were appointed by deed, dated September 28, 1950, principal agents of the New Great Insurance Co. of India, Ltd.: and this business conducted by the assesses as principal agents was settled on trust by the deed, dated February 17, 1951. It is now not disputed that within the meaning of the Income-tax Act the expression "property" is a term of the widest import and, subject to any limitation or qualification which the context might require, signifies every possible interest which a person can acquire, hold and enjoy. By the terms of appointment of the assesses as principal agents for conducting the business of the principal agency, remuneration was to be paid. In *J. K. Trust v. Commr. of Inc.-tax*¹, their Lordships of the Supreme Court observed that "business" will be property unless there is something to the contrary in the enactment. Mr. Joshi, for the Revenue, contends that principal agency is nothing but a "right of service" conferred by an agreement by the insurance company upon a set of persons, and it cannot be regarded as a business. Mr. Joshi also contends that where the primary component of a principal agency agreement is the performance of service, and in consideration of performance of service remuneration is paid, the principal agency under which the service is rendered will not be regarded as a business and, therefore, not property. In *J. K. Trust's* case, to which we have already referred, their Lordships of the Supreme Court held that the managing agency of a company is business.

By the Insurance Act, 1938, a "principal agent" is defined as meaning

"a person, who, not being a salaried employee of an insurer, in consideration of any commission, (i) performs any administrative and organising functions for the insurer and (ii) procures general insurance business whether wholly or in part by employing or causing to be employed insurance agents on behalf of the insurer."

Evidently a principal agent by the definition does not merely render personal service but is concerned with performing certain administrative and organising functions and also with procuring of general insurance business by employing or causing to be employed insurance agents. In our judgment, such an agent by the very definition will be regarded as carrying on the business of a principal agent. He is not merely an employee engaged for rendering services of a personal nature: he is invested with the right as an agent to perform the administrative and organising functions for the insurer and also to procure general insurance business by employing, directly or indirectly, insurance agents. By s. 42A of the Insurance Act principal agents are required to obtain a certificate from the Controller of Insurance or an officer authorized by him entitling them to conduct the business of principal agency, and the certificate remains in operation for a period of twelve months only from the date of issue but is liable to be renewed. It is also true that under Part A of the sixth schedule to the Insurance Act certain terms are deemed to be included in every contract between an insurer carrying on general insurance business and a principal agent. Under cl. 2 of Part A of the sixth schedule the principal agent has to procure or cause to be procured through insurance agents such an amount of general insurance business as will yield a gross premium income of not less than Rs. 20,000 in each calendar year. Under cl. 4, in the event of the principal agent failing to comply with the requirements of cl. 2 in any

two successive calendar years, the contract shall, without prejudice to the provisions of cl. 3, terminate on the 31st day of March immediately following the second calendar year. Under cl. 3 the agency is also liable to be forfeited in the events set out in sub-cl. (i) and (ii) thereof. By cl. 5 certain restrictions are placed upon the principal agent.

But on account of these provisions, which impose certain restrictive conditions upon the principal agents, we are unable to hold that the appointment of a principal agent gives rise to a bare service agreement and that the remuneration paid is not for the conduct of a business but for performance of personal service. The circumstance that the appointment was liable to be terminated at short notice and the agency was not permanent and was liable to be forfeited, in the events set out hereinbefore will not, in our judgment, affect the character of the agency as business. We are also unable, having regard to the definition of principal agent, to agree with the contention for the Revenue that in the case of a principal agent there is no organisation, asset or goodwill which can form the capital of the business. Under s. 2, cl. (25), of the Companies Act, "managing agent" means amongst others any firm or body corporate entitled, subject to the provisions of the Act, to the management of the whole, or substantially the whole, of the affairs of a company by virtue of an agreement with the company or by virtue of its memorandum or articles of association. If a managing agent in conducting the affairs of a company as such managing agent can be regarded as carrying on a business, we are unable to hold that a principal agent appointed under the Insurance Act is not conducting a business.

In *J. K. Trust's* case, their Lordships of the Supreme Court negatived the contention that a managing agency was merely an office which involved performance of services and rendering of certain obligations and was, therefore, not property which could be the subject-matter of a trust. It was observed that even an office of a trustee was property especially when emoluments were attached to it, and that must *a fortiori* be the position in the case of office of managing agency which was "clearly one of profit and even alienable under certain circumstances". They further observed (p. 543):

"...The office requires no doubt the performance of services; but there is no antithesis between service and business, as there are several kinds of business, which involve the performance of services, such as insurance and commission agency. The true test is whether the services are a regular source of income... Nor is it an accurate statement of the true position to describe trust of the managing agency as a trust of an obligation. It is in truth a trust of property, which carries with it certain obligations, and in law, there is no objection to creating a trust over property burdened with obligations, though, if it is onerous by reason of such obligations, the trustee may be entitled to disclaim it."

Their Lordships also negatived the plea that because the agency was liable to be terminated at short notice no trust could be created in respect thereof, observing that the plea proceeded upon a confusion between charity and properties devoted to charity. In their Lordships' opinion, a public charity was perpetual in character even though some of the objects may become incapable of performance or the trust property itself may be destroyed by reason of operation of law and that the circumstance that the trustees had the option at any time to throw up the agency was not a legal impediment to its being property which could be held on trust.

Following the observations made by their Lordships of the Supreme Court in *J. K. Trust's* case, we are of the view that the principal agency conducted by the assessee was a business and, therefore, "property" within the meaning of s. 4(3)(i) of the Income-tax Act. Being property which is capable of being settled upon trust, by the deed of trust, dated February 17, 1951, it was lawfully settled upon trust for charitable purposes.

But Mr. Joshi for the Revenue contends that by the agreement dated September 28, 1950, the partnership of Kilachand brothers was appointed the prin-

principal agents, and that at some time after the appointment of Kilachand brothers as principal agents there was a change in the constitution of the firm Dharma Vijaya Agency and certain partners dropped out of the management of the principal agency business and certain other persons entered the agency and that in the absence of any evidence to show that the persons, who had been newly introduced in the Dharma Vijaya Agency and upon whom the right to conduct the principal agency business was conferred, were introduced with the consent of the company, it cannot be said that the same business continued or that the trust in respect of the business endured after the alteration in the constitution of the agency. Indisputably in the Dharma Vijaya Agency, of which Kilachand brothers were originally the partners, at some time after their appointment as principal agents two of the original partners ceased to be interested and an outsider was introduced into the agency. It appears, however, clear from the record that intimation was given to the company about the alteration in the constitution of the firm and the company approved of the same. There is on the record a letter dated February 6, 1953, addressed by the company to the Income-tax Officer in answer to the latter's communication, dated January 20, 1953, by which the General Manager of the company informed the Income-tax Officer that the principal agency in the name of Dharma Vijaya Agency was applied for by Messrs. Tulsidas Kilachand, Ramdas Kilachand, Ambalal Kilachand and Chinubhai Kilachand as partners, that the principal agency was given to Dharma Vijaya Agency and that the agency could not be transferred to other persons. Thereafter by letter, dated July 13, 1954, in reply to the Income-tax Officer's letter dated July 8, 1954, the General Manager of the company informed the Income-tax Officer that the company was aware of the creation of a trust and it did not consider the formation of the trust a violation of the agreement as it was not a transfer of the agency. The General Manager also stated that the company was not aware of the internal working of the agency, but papers were being signed from time to time on behalf of the Dharma Vijaya Agency by one or the other of the trustees in charge of the administrative functions. The Assistant Controller of Insurance also by his letter, dated August 11, 1954, informed the Income-tax Officer that he had been informed by the company that the Dharma Vijaya Agency had been converted into a trust and that the company had forwarded a copy of the trust-deed, dated February 17, 1951. On the record there is no clear evidence as to whether at the time of renewal of the principal agency certificate, intimation was given to the authorities concerned about the alteration in the constitution of the agency. But evidently neither the company nor the Assistant Controller of Insurance raised any objection to the conduct of the trust business of principal agents by the Dharma Vijaya Agency, from which some of the original trustees had ceased to function and in which another trustee was introduced. Even assuming that there arose some irregularity by the alteration in the constitution of the Dharma Vijaya Agency, we are unable to hold that this circumstance affects the character of the income received as remuneration for conducting the business of the agency as income received from property held for a public charitable trust. The taxing authorities are primarily concerned with the question whether the income sought to be taxed is income from property which is held on trust for a religious or charitable purpose. If the business of the principal agency was transferred to the trustees under a deed of settlement, and from that business income was received, the income will fall within s. 4(3)(i) of the Act and be exempt from tax in the hands of the trustees. We are, therefore, of the view that under the terms of appointment made with the company Dharma Vijaya Agency became the principal agents conducting a business and that business was property within the meaning of s. 4(3)(i) of the Income-tax Act, and that the alteration, sometime after their appointment as principal agents, in the constitution of the Dharma Vijaya Agency does not alter the character of the income earned in the course of the business.

Clause (i) of s. 4(3) of the Indian Income-tax Act was amended by Act 25 of 1953. Section 4(3), as it originally stood, provided in so far as it is material:

"Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:

(i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto.

(i-a) Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and—

(a) the business is carried on in the course of the carrying out of a primary purpose of the institution, or

(b) the work in connection with the business is mainly carried on by beneficiaries of the institution."

It is undisputed that under s. 4(3), before it was amended by Act 25 of 1953, cl. (i-a) was not intended to derogate from cl. (i); i.e., the two clauses were independent of each other, and if a certain income fell within either cl. (i) or cl. (i-a), it was entitled to exemption. It was observed in *Gadodia Swadeshi Stores v. Commr. of Inc.-tax, Punjab*² (p. 390):

"Clause (i-a) as it stands cannot in any way derogate or subtract anything from clause (i). It rather adds to the list of exceptions and provides immunity for a certain kind of business which in the view of the Legislature had not already been provided for. A new clause inserted by the Legislature cannot be presumed to be inconsistent with or repugnant to a foregoing clause in the same sub-section unless it is so expressly provided. Viewed in its proper perspective, therefore, clause (ia) can be taken to apply only to such business as is carried on on behalf of religious or charitable institutions which were not held under trust and not to such business as was itself held under trust or was conducted by or on behalf of such charitable or religious institutions as were held under trust."

These observations were approved of by this Court in *J. K. Trust v. Commr. of Income-tax*³, after it was remanded by the Supreme Court. The income from the trust in the present case clearly falls within the terms of cl. (i) of s. 4(3) before it was amended by Act 25 of 1953, and it was, therefore, exempt from payment of tax.

By Act 25 of 1953, s. 4(3)(i) was substantially altered. In so far as it is material, that section (as it now stands) provides:

"Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:

(i) ...any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, in so far as such income is applied or accumulated for application to such religious or charitable purposes as relate to anything done within the taxable territories...

Provided that such income shall be included in the total income—

(a) ...

(b) in the case of income derived from business carried on on behalf of a religious or charitable institution, unless the income is applied wholly for the purposes of the institution and either—

(i) the business is carried on in the course of the actual carrying out of a primary purpose of the institution; or

(ii) the work in connection with the business is mainly carried on by beneficiaries of the institution;

(c) if it is applied to purposes other than religious or charitable purposes or ceases to be accumulated or set apart for application thereto in which case it shall be deemed to be the income of the year in which it is so applied or ceases to be so accumulated or set apart."

Clause (i-a) of s. 4(3) of the Act, as it stood before it was amended by Act

25 of 1953, was deleted by the amendment as a substantive provision under which exemption could be claimed, and the Legislature incorporated a proviso to cl. (i) of s. 4(3) whereby any income from property held under a trust or other legal obligation wholly for religious or charitable purposes was liable to be included in the total income of the assessee (i) if it was applied to religious or charitable purposes without the taxable territories, and (ii) in the case of income derived from business conducted on behalf of a religious or charitable institution, unless the income was applied wholly for the purposes of the institution and one of the two conditions prescribed therein was fulfilled. By the amendment income received from property held under trust for a religious or charitable purpose is not exempt from taxation if such income is to be applied outside the taxable territories. Similarly, income received from a business conducted by a religious or charitable institution is liable to be included in the total income of the assessee unless the income is applied wholly for the purposes of the institution and the business is carried on in the course of the actual carrying out of a primary purpose of the institution or the work in connection with the business is mainly carried on by beneficiaries of the institution.

Mr. Joshi for the Revenue contends that the Legislature intended by the proviso merely to incorporate certain conditions cumulative with those prescribed by the operative part of cl. (i), and not to prescribe an excepted category. Mr. Joshi says that where property held under trust is a business, the income derived from that business is exempt from tax only if the business is carried on on behalf of a religious or charitable institution and the income thereof is applied wholly for the purposes of the institution and one of the two conditions prescribed by cl. (b) of the proviso is fulfilled. In asking us to accept this interpretation, Mr. Joshi is asking us substantially to re-write the material provisions. The Legislature has attempted to carve out certain categories of income from the operative part of the exception and has made them liable to tax despite the fact that they are derived from property held under a trust created for religious or charitable purposes. Mr. Joshi's argument is that if business is property within the meaning of s. 4(3)(i), and that business is held on trust, the business in cl. (b) of the proviso must also be held on trust, and if it is not so held on trust the income thereof will not be exempted as income derived from property held under a trust for religious or charitable purposes. But we do not think that there is any warrant for this submission on the plain language used by the Legislature. The income, which is liable to be included in the total income of the assessee, is income derived from business carried on on behalf of a religious or charitable institution, unless that income fulfils the conditions prescribed by cl. (b). The expression "such income" in the proviso refers to the income derived from property (which expression includes a business) held for religious or charitable purposes. But that does not, in our view, justify the submission that the business which is referred to in cl. (b) of the proviso must be business which is held for charitable or religious purposes. In our view, the business referred to in cl. (b) of the proviso need not be business which is held for religious or charitable purposes, provided it is business carried on on behalf of a religious or charitable institution.

Mr. Joshi invited our attention to the objects and reasons and to the notes on the clauses of the Bill which was enacted as Act 25 of 1953 and submitted that it was the intention of the Legislature to provide that income derived from business is exempt under the amended Act only if the business is carried on on behalf of a religious or charitable institution and it is carried on in the course of implementation of a primary purpose of the institution or the work in connection with the business is mainly done by beneficiaries of the institution. It is not possible for us to interpret the words of the section by reference to the objects and reasons or to the notes on clauses of the Act, especially when the words are plain and we are not confronted with any am-

biguity in their interpretation. It may also be pertinent to observe that the clause as finally enacted by the Legislature is not in the same form in which it was presented as a Bill. In any event, we do not think that where the Legislature has by using definite phraseology expressed its intention clearly it will be open to us to fall back upon the objects and reasons for enacting legislation and to construe the provisions of the Act in the light of the objects and reasons.

We are, therefore, of the view that the business of the assessee, not being one which is carried on on behalf of a religious or charitable institution, is not governed by the proviso to s. 4(3)(i) of the Income-tax Act as amended by Act 25 of 1953 and that the income is governed by the operative part of s. 4(3)(i). On that view of the case, the answer to the question submitted by the Tribunal will be in the affirmative in respect of all the four assessment years. The Commissioner of Income-tax to pay the costs of the assessee.

S. T. DESAI J. A question of construction, rather fine and not without some difficulty, arises for our determination on this reference. The facts leading up to this reference have been stated by my learned brother and I need not refer to the same. The question submitted to us has invited rather elaborate arguments on either side, and the arguments really fall to be considered under two heads: firstly, whether the insurance agency business which was carried on by the assessee firm and in respect of which a charitable trust was created is "property" within the meaning of that expression to be found in s. 4(3)(i) of the Income-tax Act; and secondly, what is the exclusion in respect of income derived from property held under trust wholly for religious or charitable purposes enacted by the Legislature in s. 4(3)(i)?

The first head need not detain me at any length. A Division Bench of this Court had to interpret cls. (i) and (ii) of s. 4(3) as they stood prior to the amending Act of 1953. The language of those two clauses of sub-s. (3) of s. 4 was, if not wholly in *pari materia*, very similar to the provisions which we are called upon to interpret on this reference. But we are not concerned in this reference with the interpretation of those provisions which have now been amended. One question which arose in that case was whether the managing agency of a textile concern was property within the ambit of the expression "property" used in s. 4(3)(i). The decision of the Bombay High Court did not directly touch that point: but the point was canvassed at great length before their Lordships of the Supreme Court, and the decision of their Lordships is reported in *J. K. Trust v. Commr. of Inc.-tax*¹. Mr. Justice Venkatarama Aiyar examined the question at some length, and it was laid down in that case (p. 541):

"... 'Property' is a term of the widest import, and subject to any limitation or qualification which the context might require, it signifies every possible interest which a person can acquire, hold and enjoy. Business would undoubtedly be property, unless there is something to the contrary in the enactment."

At page 543 of the report, Mr. Justice Venkatarama Aiyar after referring to some cases observed:

"... even an office of trusteeship was held to be property especially when emoluments were attached to it, and that must *a fortiori* be the position in the case of office of managing agency, which is clearly one of profit and even alienable under certain circumstances. The office requires no doubt the performance of services; but there is no antithesis between service and business, as there are several kinds of business, which involve the performance of services, such as insurance and commission agency."

Of course, it was not necessary for their Lordships to decide whether the business of commission agency was property within the meaning of that expression in s. 4(3)(i). But here is a very clear and weighty observation of the Supreme Court, and there is every reason why I should find myself in respectful and

¹ (1957) 32 I. T. R. 535, S.C..

dutiful agreement with that observation of the Supreme Court. A valiant attempt was made by Mr. Joshi, learned counsel for the Department, to persuade us to take a view different from the view expressed in the passage just quoted by me. The distinction sought to be drawn was rather fine and not permissible in the context of the expressions "business" and "property" which have a very wide connotation in income-tax law. Therefore, the conclusion seems inescapable to me that the business of insurance agency carried on by the assessee-firm is property within the meaning of that expression in the relevant provision before us.

To turn to the other head on which considerable arguments have been urged before us on either side. It will be convenient to set out the relevant and material part of sub-s. (3) of s. 4. Section 4(3) of the Income-tax Act, as amended by Act 25 of 1953, provides in so far as it is material:

"Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:

(i) ...any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, in so far as such income is applied or accumulated for application to such religious or charitable purposes as relate to anything done within the taxable territories...

Provided that such income shall be included in the total income—

(a) ...

(b) in the case of income derived from business carried on on behalf of a religious or charitable institution, unless the income is applied wholly for the purposes of the institution and either—

(i) the business is carried on in the course of the actual carrying out of a primary purpose of the institution; or

(ii) the work in connection with the business is mainly carried on by beneficiaries of the institution;

(c) if it is applied to purposes other than religious or charitable purposes or ceases to be accumulated or set apart for application thereto in which case it shall be deemed to be the income of the year in which it is so applied or ceases to be so accumulated or set apart."

It has been urged before us by Mr. Palkhivala, learned counsel for the assessee, that the language of cl. (i) of s. 4(3) in terms applies to the facts of this case, if once the conclusion is reached that the insurance agency business, of which a trust was created, is property within this enactment. The argument proceeded that the proviso to s. 4(3)(i), which relates to income derived from business carried on on behalf of a religious or charitable institution, is restricted to income derived from business carried on by or on behalf of a religious or charitable institution, and that in the case before us there is no religious or charitable institution: and the conclusion based on this premise pressed for our acceptance has been that the case is not touched by the proviso and clearly falls within the purview of cl. (i) of s. 4(3) read without the proviso. It seems convenient to refer briefly to the scheme of s. 4. Sub-section (1) of s. 4 lays down that subject to the provisions of the Act the total income of a person includes all his income, profits and gains from whatever source derived. Then follow words which are not material for our present purpose. Sub-section (2) is not material. Then comes sub-s. (3) which is a very important provision. It lays down that income, profits or gains falling within the classes enumerated in that sub-section are not to be included in the total income of the person receiving them. That is clearly an exclusion from the total income of an assessee to be computed in accordance with the provisions of the Act. A perusal of s. 4, which follows upon s. 3 (which is the charging section) and itself defines the gamut of total income, shows that its arrangement is not logical and its provisions have no lucidity of expression. It was for this reason that we permitted ourselves to be taken to the history of the legislation contained in sub-s. (3), though I propose to be very brief in examining it.

Before, however, I do so, I should prefer to examine the language of the section as it stands today.

It is now established law that business itself may be held on trust. If a business itself may be held on trust, as, for instance, in the present case, where a trust is created of property which consists of a business, it is abundantly clear and not now disputable that income derived from property consisting of business held on trust for religious or charitable purposes is within the ambit of the exclusion contained in cl. (i) of s. 4(3). As I have already pointed out, the decision of their Lordships of the Supreme Court leads to the inescapable conclusion that an insurance agency business must be treated as a business within the ambit of this section. Therefore, the short question that remains for consideration is, is there any qualification, any modification or any exception to that exclusion? The contention of the assessee, as I have already mentioned, is that there is nothing in the section which prevents the application of cl. (i) to the present case. On the other hand, it has been strenuously urged before us by Mr. Joshi that the proviso, if properly and carefully scrutinised, confines the exclusion, so far as it relates to income derived from business, only to the cases of religious or charitable institutions and where the conditions stipulated in proviso (b) are fulfilled. To put it differently the argument of Mr. Joshi is that income of a business held on trust is primarily liable to tax and the only exception to that rule is the case of a religious or charitable institution for which provision is made in proviso (b). Ultimately learned counsel had to agree that the argument urged on behalf of the Department could only succeed if an equation could be established between "income derived from business carried on on behalf of a religious or charitable institution" referred to in proviso (b) to cl. (i) and "income derived from property (consisting of business) held under trust... wholly for religious or charitable purposes" to be found in cl. (i). The words in bracket have been added by me since the argument has been pressed before us in the context of a business which, in our view, is property. The question I put to myself is, are the words "income derived from business carried on on behalf of a religious or charitable institution" in proviso (b) wide enough to carve out from cl. (i) all such property as consists of business? A business which falls within the ambit of cl. (i) may be carried on by persons in whom it is vested under a trust, and the trustees may still not be carrying on the business on behalf of any religious or charitable institution. Of this, there seems to be little doubt. Therefore, it is impossible to equate the scope of proviso (b) with the scope of property consisting of business held under trust wholly for religious or charitable purposes. It must of necessity mean that we have in cl. (i) a very wide category of business which is trust property, and we have in proviso (b) a restricted and a lesser category of business which is carried on by or on behalf of a religious or charitable institution. This, to my mind, is the plain reading of cl. (i) of s. 4(3) read with the proviso: and if this be the position, it is extremely difficult to accede to the argument pressed before us on behalf of the Department that although the insurance agency business, of which a trust was created, is within the operation of cl. (i) of s. 4(3), it is yet hit by the initial words of proviso (b) to cl. (i).

I have stated that the observations which I have made follow from a plain reading of s. 4(3)(i) read with the relevant proviso. I have also mentioned that there was an amendment in s. 4(3)(i) in 1958, and it is on the language of s. 4(3)(i) as it stood before the amendment that learned counsel for the Department has very strongly relied. Learned counsel has also relied on a decision of the Lahore High Court in a case to which I shall presently refer. He has also relied on certain observations in a judgment reported in *J. K. Trust v. Comm'r. of Income-tax*,² to which I was a party. Now, I must confess that there are some observations in that judgment which do lend some support to some part of the argument urged before us by Mr. Joshi: but, as I

shall presently point out, those observations were made in a rather distinct and different context and cannot have any real bearing on the interpretation of the provisions after their amendment. Our attention was also drawn to the decision of the Punjab High Court in the case of *Gadodia Swadeshi Stores v. Commr. of Inc.-tax, Punjab*³ and in *J. K. Trust's* case decided by my brother Tendolkar and myself we quoted a passage from that judgment.

In *J. K. Trust v. Commr. of Income-tax*, after referring to the case of *Gadodia Swadeshi Stores* and to a decision of the Allahabad High Court, to which also our attention was drawn in that case, we pointed out that words in s. 4(3)(i-a) as it stood before the amendment did not refer to business which fell within the ambit of cl. (i) of s. 4(3) as it then stood. We observed in that case that s. 4(3)(i-a) was not intended to be an exclusion to s. 4(3)(i) and that it dealt with a different class of income, viz., income from business carried on on behalf of a religious or charitable institution. We observed (p. 1257):

"...since the requirement that the business should be held on trust does not appear in cl. (ia), would it not be reasonable so to interpret cl. (ia) as to restrict it to a business carried on on behalf of a religious or charitable institution which is not held on trust? Such a construction leads to the result that whilst s. 4(3)(i) includes within its scope income from business held under trust, the true scope of s. 4(3)(ia) is to include within its scope business carried on on behalf of a religious or charitable institution, which business is itself not held under trust, although the words used in cl. (ia) are *prima facie* capable of including within its scope business which may be held under trust."

Now, these observations were made by us in an attempt to reconcile the two clauses of s. 4(3), and I may emphasize that we were not examining the language of any proviso in that case, though, it is true, the language of the two clauses is, if not identical, almost in *pari materia* with the language of cl. (i) of s. 4(3) and the proviso with which we are here concerned. The passage from the decision of the Lahore High Court which we quoted is as follows:

"Clause (ia) as it stands cannot in any way derogate or subtract anything from clause (i). It rather adds to the list of exceptions and provides immunity for a certain kind of business which in the view of the Legislature had not already been provided for. A new clause inserted by the Legislature cannot be presumed to be inconsistent with or repugnant to a foregoing clause in the same sub-section unless it is so expressly provided. Viewed in its proper perspective, therefore, clause (ia) can be taken to apply only to such business as is carried on on behalf of religious or charitable institutions which were not held under trust and not to such business as was itself held under trust or was conducted by or on behalf of such charitable or religious institutions as were held under trust. If it was intended to narrow down the scope of clause (i) so as to withdraw the exemption enjoyed by a business held in trust or conducted by or on behalf of a religious or charitable trust, the new clause should have been added as a proviso to the old clause. It would then have mentioned that the scope of the original clause was being restricted to that extent. But this is not being the case here, it cannot reasonably be urged that something that was already included in clause (i) has been removed by the insertion of an additional clause."

Now, it is true that it would appear from the passage just quoted that Mr. Justice Din Muhammad seemed inclined to take the view that the scope of cl. (i) had been narrowed down by inserting similar words in the form of a proviso, and that since they were in the form of a separate clause that would make a difference in interpretation. The argument of Mr. Joshi before us has been that by inserting proviso (b) in s. 4(3)(i) the scope of cl. (i) has been considerably narrowed down, and the exemption from inclusion of such income from the total income of an assessee is restricted only to such business as is carried on by or on behalf of a religious or charitable institution: and in the case of other business which may be trust property and the income of which may be applied to religious or charitable purposes there

would be the liability to pay tax as it would be included in the total income of the trustees. I am unable to accede to this argument, and I am unable to agree that the effect of the amendment and the proviso is as urged on behalf of the Department. It does not seem necessary to examine at any length the provisions which were considered in the decisions to which I have made a reference. A reference to those decisions, as I have already pointed out, was made in drawing our attention to the history of the legislation relating to this sub-section. There is nothing in the history of the legislation which lends support to the argument so strongly pressed for our acceptance by Mr. Joshi. In these cases, where the language is clear, we have to look merely at what is stated. As has often been said, there is no room for any intendment in such cases and it is not permissible to us to read in the relevant provisions something which is not there. We can only look at the language used and construe the provision on a fair reading of the same. On a fair reading of cl. (i), it must be held, in my judgment, that there is nothing in proviso (b) to cl. (i) of s. 4(3) which in any manner touches the case of a business which is held under trust for religious or charitable purposes. The income derived from such business is not to be included in the total income of the person receiving it.

Our attention was sought to be drawn by Mr. Joshi to the Statement of Objects and Reasons when amendments were made in s. 4(3) in 1953. It is not permissible to us to look at the same. It is rather difficult to see the reason or the object of permitting income derived from property consisting of business held under trust wholly for religious or charitable purposes being excluded from the total income of the person receiving it as enacted in cl. (i) of s. 4(3) and not permitting such exclusion if the business is carried on on behalf of a religious or charitable institution and it does not satisfy the requirements which are inserted in the latter part of proviso (b) to cl. (i). It does appear that income derived from business carried on on behalf of a religious or charitable institution can very well be income of a business which is itself the subject-matter of a religious or charitable trust: but it is not for us to enter into this enquiry or allow ourselves to speculate on the reasons.

The construction of the relevant provisions must be as already mentioned by me, and on that view the answer to the question referred to us will be in the affirmative.

Solicitors for the applicants: *Daphtary Ferreira & Diwan.*

Solicitor for the respondent: *P. G. Gokhale.*

ORIGINAL CIVIL.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

MAHAVIRPRASAD BADRIDAS v. M. S. YAGNIK.*

Wealth-tax Act (XXVII of 1957), Sec. 3—Constitution of India, Seventh Schedule, List I, entries 86, 97; art. 248—Indian Income-tax Act (XI of 1922), Sec. 3—Whether s. 3 of Wealth-tax Act in so far as it levies wealth-tax on Hindu undivided families ultra vires Parliament—Expression “individuals” in entry 86, List I, Seventh Schedule to Constitution whether includes Hindu undivided family—Hindu undivided family whether a corporation—Whether entries in Lists contained in Seventh Schedule to Constitution circumscribe or define ambit of art. 248—Construction of statute—Legislative practice as an aid to construction of word or phrase in statute—When may Court avail itself of such assistance.

Section 3 of the Wealth-tax Act, 1957, which authorises the levy of wealth-tax on the net wealth of a Hindu undivided family is not ultra vires the Union Parliament.

*Decided, July 27, 1959. O.C.J. Miscellaneous Application No. 401 of 1958.

The expression "individuals" used in entry No. 86 in List I of the Seventh Schedule to the Constitution of India includes an association of individuals such as a Hindu undivided family.

Apaji Narhar Kulkarni v. Ramchandra Ravji Kulkarni,¹ *Narainchandra Mafatlal v. The Commissioner of Income-tax, Bombay City*,² *Commissioner of Income-tax, Bombay v. Trustees of Sir Currimbhoy Ebrahim*,³ *Commissioner of Income-tax, Bombay v. Ahmedabad Millowners' Association*,⁴ *Commissioner of Income-tax, Madras v. Salem District Urban Bank, Ltd.*⁵ and *Chukun Lall v. Poran Chunder*,⁶ referred to.

Quære: Whether in the residuary powers of the Union Parliament power to legislate on a topic which is partially dealt with by a specific entry in the first List may be regarded as included.

Per S. T. Desai J. The entries in the Lists contained in the Seventh Schedule to the Constitution of India are legislative heads primarily designed to demarcate the areas of legislative competence of the Union and the State Legislatures. They give *simplex enumeratio* of categories of legislation and are not designed to circumscribe or logically define the ambit of art. 248 of the Constitution. It would be difficult, therefore, to read in any entry in List I any restriction by implication or otherwise on the residuary legislative power conferred on the Union Legislature by art. 248.

If the Legislature of a country has been accustomed to use any word or expression with a more restricted or extended meaning than might be commonly attributed to it in its ordinary sense, the Court should not blandly shut out that consideration but should avail of that assistance, albeit limited, in the process of interpretation. Legislative practice is one of the accepted aids to construction and furnishes extrinsic evidence to which resort may legitimately be had when the Court has to construe a word or phrase and the task of preferring one meaning to another can really be said to have arisen.

THE facts appear in the judgments.

Sir Noshirwanji Engineer, with *K. K. Koticha* and *M. N. Shah*, for the petitioner.

M. C. Setalvad, Attorney General of India, with *R. J. Joshi*, for the respondent.

SHAH J. By this petition the competence of the Union Parliament to enact the Wealth-tax Act (Act XXVII) of 1957, in so far as that Act seeks to levy wealth-tax on Hindu undivided families, is challenged. The petitioner, who is the *karta* of a Hindu undivided family and is being assessed to wealth-tax in the status of Hindu undivided family was, by notice dated July 12, 1958, issued in exercise of powers conferred by s. 14(2) of the Wealth-tax Act, called upon by the Second Wealth-tax Officer, C-II Ward, Bombay, to furnish a return of the net wealth of his undivided Hindu family. The petitioner claims that the notice is invalid because s. 3 of the Wealth-tax Act is *ultra vires* the Union Parliament in so far as that section authorises the levy of wealth-tax on the net wealth of a Hindu undivided family.

By s. 3 of Act XXVII of 1957 liability to pay for every financial year commencing on and from April 1, 1957, a tax referred to as the wealth-tax in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule is imposed. The petitioner contends that to the extent the Union Parliament authorised the levy of wealth-tax on Hindu undivided families as units, the legislation is *ultra vires*, and in support of that contention reliance

1 (1891) L. L. R. 16 Bom. 20.

2 [1955] 1 S. C. R. 829, s.c. 57 Bom. L.R.

3 628. (1981) 83 Bom. L. R. 1549.

4 (1839) 41 Bom. L. R. 650.

5 [1940] Mad. 627, F.B.

6 (1868) 9 W. R. 483.

is placed upon entry No. 86 in List I of the Seventh Schedule to the Constitution of India. That entry reads as follows:

"Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies."

It is submitted that legislation imposing taxes on the capital value of the assets only of individuals and of companies but not of Hindu undivided families can, under the authority of entry No. 86, be enacted by the Union Parliament.

A Hindu undivided family in essence is an association of male Hindus lineally descended in the male line from a common ancestor and includes their wives and their unmarried daughters. The property belonging to the family is of the ownership of the co-parceners in that family, and whilst the family remains undivided no individual member of the family can predicate his share in the family property. A Hindu undivided family is not a corporation; it is not a juridical entity distinct from the members who constitute it; it cannot sue or be sued in the joint family name and cannot convey the property held by it in its joint character. The co-parceners who are members of the Hindu undivided family are undoubtedly owners of the property, and there is corporate enjoyment of the property: but a Hindu undivided family has no independent existence apart from the individuals who constitute the same. Statements sometimes made in decided cases and text books that a Hindu joint family is a "sort of corporation" in dealing with questions relating to enjoyment of the property of the family (see for instance *Apaji Narhar Kulkarni v. Ramchandra Ravji Kulkarni*¹ and Mayne's Hindu Law, 11th edn., art. 243, at p. 305) do not justify the view that a Hindu undivided family is a corporation. In a Hindu undivided family there is community of interest and unity of possession between all the members of the family, and until partition takes place there is common enjoyment and common possession of the family property. The family property is the property of the co-parceners who for the time being constitute the Hindu undivided family. We are, therefore, unable to agree with the contention of Sir Nasserwanji Engineer that a Hindu undivided family is a corporation.

Entry No. 86 in List I of the Seventh Schedule to the Constitution confers authority upon the Union Parliament to enact legislation for levy of taxes on the capital value of assets of individuals: and if a Hindu undivided family is in substance a body of individuals, the Parliament will unquestionably be competent to legislate in respect of levy of wealth-tax upon Hindu undivided families. It is a cardinal rule of interpretation that the words used in a statute should be read in their ordinary, natural and grammatical meaning, subject to the rule that the words in a constitutional enactment conferring legislative powers should be construed most liberally and in their widest amplitude (see *Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City*).² The Lists in the Seventh Schedule to the Constitution have been so framed that subject to the distribution of powers they cover, as far as possible, the entire field of legislation. By entry No. 86 it was intended to confer upon the Union Parliament power to impose tax on the capital value of the assets, exclusive of agricultural land, belonging to individuals and companies. If the expression "individual" includes an association or body of individuals, there is nothing in the context in which entry No. 86 occurs to justify the view that within the connotation of the expression "individuals" a body of individuals which is known as a Hindu undivided family was not intended to be included.

Referring to entries Nos. 82 to 89 in List I of the Seventh Schedule to the Constitution by which authority is conferred upon the Union Parliament to impose taxes and duties of diverse descriptions, counsel for the petitioner pointed out that whereas entries Nos. 82 to 85 and 87 to 89 do not refer to the persons on whom the tax is to be imposed, entry No. 86 expressly provides that the levy of taxes on the capital value of the assets is to be on the assets of indivi-

1 (1891) I.L.R. 16 Bom. 29, at pp. 39 and 78.

2 [1955] 1 S.C.R. 829, a.c. 57 Bom. L.R. 623.

duals and companies. This, it is urged, is a limitation upon the power conferred by the topic of taxation which cannot be ignored by implications. By entry No. 86 power to tax capital assets is undoubtedly conferred: and even assuming that the assets to be taxed must be of individuals or of companies before they could be taxed under a law enacted in exercise of the power under that entry the assets of a Hindu joint family will still be liable to be taxed.

Counsel for the petitioner submits that the word "individuals" must be read, in the light of what he calls a settled legislative practice in enacting taxing statutes, as meaning individual human beings only. By the Indian Income-tax Act, by s. 3 which is the charging section income-tax, it is true, is made chargeable in respect of the total income of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually. But the use of this form of legislation does not justify the inference that in taxing statutes a Hindu undivided family is distinct from the individuals who constitute the same. Our attention has not been invited, apart from the use in juxtaposition of the expressions "individual" and "Hindu undivided family" in s. 3 of the Income-tax Act, to any settled legislative practice, supporting the contention that the word "individual" used in a taxing statute means only a single human being.

Even on the interpretation of the expression "individual" as used in the Indian Income-tax Act there is no consensus of judicial opinion. In *Commissioner of Income-tax, Bombay v. Trustees of Sir Currimbhoy Ebrahim*,³ Sir John Beaumont C.J., in delivering the judgment of the Court, held that a corporation constituted by a special Act was an "individual" within the meaning of s. 3 of the Indian Income-tax Act. But in a later judgment the learned Chief Justice appeared to express a somewhat different view. In *Commissioner of Income-tax, Bombay v. Ahmedabad Mill-owners' Association*,⁴ he expressed the view that the expression "association of individuals" as used in s. 3 of the Indian Income-tax Act, 1922, before it was amended by the Indian Income-tax (Amendment) Act (Act VII) of 1939, meant an association of human-beings and not an association of companies. In that case, it was held that an association which consisted of limited companies and one natural person was not an "association of individuals" within the meaning of s. 3 of the Income-tax Act. In *Commissioner of Income-tax, Madras v. Salem District Urban Bank, Ltd.*,⁵ a full bench of the Madras High Court held that a co-operative society registered under the Indian Co-operative Societies Act was an "individual" within the meaning of the Indian Income-tax Act. Evidently there is not only no settled legislative practice as to the meaning of the expression "individual" in taxing statutes, but there is not even unanimity of judicial opinion as to the meaning of that expression in the Indian Income-tax Act. I am, therefore, unable to hold that the expression "individuals" used in defining the topic of legislation in the Constitution does not include an association of individuals such as a Hindu undivided family.

The learned Attorney General appearing for the Union of India contended that even assuming that by the 86th entry in List I of the Seventh Schedule the Union Parliament was not invested with power to legislate for levying wealth-tax on the assets of Hindu undivided families, the Union Parliament was still invested with that authority by art. 248 of the Constitution and entry No. 97 in List I of the Seventh Schedule to the Constitution. By art. 248 it is declared that the Union Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List, and that such power includes power to make any law imposing a tax not mentioned in either of those Lists. Relying upon the amplitude of the residual powers conferred upon the Parliament to make any law imposing a tax, it was urged that the power to tax the capital value of the assets of Hindu

³ (1931) 33 Bom. L. R. 1549.

⁵ [1940] Mad. 627, r.n.

⁴ (1939) 41 Bom. L. R. 656.

undivided families was, if not derived from entry No. 86, exercisable by entry No. 97 which confers upon the Union Parliament power to legislate in respect of "any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists." There being no matter enumerated in List II or List III whereby power to legislate in respect of wealth-tax to be levied on the capital value of the assets of Hindu undivided families is invested, relying upon the powers conferred by art. 248 and upon the amplitude of the powers conferred by entry No. 97, the validity of the Wealth-tax Act, even on the argument advanced by counsel for the assessee, was sought to be upheld by the learned Attorney General. For the assessee it was submitted that where the Constitution, in defining powers to legislate on a topic, has by incorporating words of limitation expressly placed a restriction upon the competence of the Union Parliament to enact legislation, relying upon the residuary powers contained in art. 248 and entry No. 97 in List I of the Seventh Schedule the restriction cannot be ignored. On the view I have taken on the interpretation of the expression "individuals" in entry No. 86, I do not think it necessary to express any opinion on the question whether in the residuary powers of the Union Parliament, power to legislate on a topic which is partially dealt with by a specific entry in the first List may be regarded as included.

On the view we have taken, this petition must fail and it is dismissed with costs. Costs to be taxed on long cause scale; two counsel allowed.

S. T. DESAI J. This is a Rule obtained at the instance of the petitioner, calling upon the respondent, a Wealth Tax Officer under the Wealth-tax Act, 1957 (to be referred to by me as the Act), to show cause why a writ of *certiorari* should not issue quashing a notice issued by him under s. 14 of that Act and further to show cause why a writ of prohibition should not issue restraining him from taking any steps against the petitioner by way of assessment or otherwise in pursuance of that notice. The petitioner is the *Karta* and manager of a Hindu undivided family which is being assessed under the Income-tax Act in the status of Hindu undivided family. In July 1958 the petitioner received a notice from the respondent requiring him to furnish a return of net wealth of his Hindu undivided family, as on valuation date. The petitioner has thereupon moved this Court for relief by issuance of appropriate writ or writs under art. 226 of the Constitution. The petitioner challenges the competence of the Union Legislature to charge tax on the net wealth of a joint Hindu family on the ground that s. 3 of the Act is *ultra vires* the Union Legislature in so far as it purports to levy tax on net wealth of the petitioner in his capacity as the *Karta* of his joint family.

In opposition to the rule the respondent has filed an affidavit resisting the contentions of law pleaded by the petitioner. His case is that the Union Legislature is fully competent to levy the impugned tax on the net wealth of a joint Hindu family under entry 86 of List I to the Seventh Schedule to the Constitution. It is also his case that in any event the tax is covered by entry 97 of that List. No facts are in dispute and I shall, therefore, immediately set out the relevant provisions of the Act in respect of which the contention of *ultra vires* has been raised.

Section 3, which is the charging section in the Act, is as follows:

"Subject to the other provisions contained in this Act, there shall be charged for every financial year commencing on and from the first day of April, 1957, a tax (hereinafter referred to as wealth-tax) in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule."

Section 14 deals with return of wealth. Sub-section (1) of that section imposes a duty on every person liable to pay tax under the Act to furnish a return in prescribed form. Section 14(2) is as follows:

"If the Wealth-tax Officer is of the opinion that the net wealth of any person is of such an amount as to render him liable to wealth-tax under this Act, then, notwith-

standing anything contained in sub-section (1), he may serve a notice upon such person requiring him to furnish within such period, not being less than thirty days, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be required in the notice, the net wealth of such person as on the valuation date mentioned in the notice."

It will be convenient to state here the relevant provisions of the Constitution, the interpretation of which has been debated before us by learned counsel on either side.

Article 248 of the Constitution is as under:

"(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

Entry 86 in List I (Union List) of the Seventh Schedule to the Constitution is as follows:

"Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies."

Entry 97 in List I of that Schedule is as follows:

"Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

It has been contended before us by Sir Noshirwan Engineer, learned counsel for the petitioner, that s. 3 of the Act, which levies the tax upon every individual, Hindu undivided family and company is *ultra vires* the Union Legislature in so far as it charges the Hindu undivided family with this tax and the argument has been that entry 86 in List I authorises the Union Legislature to impose a tax of the nature under consideration only upon individuals and companies. The pivotal point of the argument was that the expression "individuals" cannot include a joint Hindu family because a joint Hindu family is not in the eye of law a group of individuals. It was urged that a Hindu coparcenery is a sort of a corporation and coparcenery property belongs to a unit having corporate existence and not to the individual coparceners or members of the joint family. It will be necessary to examine this argument in some detail, but before doing so I shall turn to the other aspects of this question of interpretation of entry 86 on which arguments were advanced before us by learned counsel for the petitioner.

Our attention was drawn to a number of entries in List I of the Seventh Schedule to the Constitution. It was said that while entries 82, 83, 84, 87 and 88, which relate to taxation and levy of duties upon commodities and goods, were all in such general terms as made them applicable to every person such as individual or individuals, Hindu undivided family, company, local authority, partnership firm and other association or group of persons, entry 86 was quite differently worded. The archstone of this contention was that there was a contrast in the language used in those entries on the one hand and entry 86 on the other which latter entry while empowering the Union Legislature to levy tax on capital value of assets expressly confined such imposition to "individuals" and "companies". It was said that if it was intended to empower the Union Legislature to impose wealth-tax on a Hindu undivided family, the simplest thing to do would have been to say so categorically as was done in s. 3 of the Income-tax Act. The argument proceeded that the makers of the Constitution must be regarded as fully aware of the legislative practice of the country and the legislative practice relied upon was that in s. 3 of the Income-tax Act (XI of 1922) the units of taxation had categorically been stated to be every individual, Hindu undivided family, company and local authority, every firm and other association of persons or the partners of the firm or the members of the association individually.

The argument of the learned Attorney General on this aspect of the case was that the word "individual" had been interpreted in cases arising under the

Income-tax Act and been given wide amplitude and it was said that the word "individuals" in entry 86 must be read so as to include a body or group of individuals. It was also argued that no legislative practice as contended by the petitioner had been established.

This topic of legislative practice as an aid to construction was keenly debated before a division bench of this Court consisting of Chagla C.J. and Tendolkar J. in the case of *Col. Sir Duggan v. Comr. I. T.*¹ and there was some cleavage of opinion on this point but it is not necessary for me to refer to the judgments in that case on this point and I shall restrict myself to a few observations on the subject.

Where the language of an enactment is plain and clear upon its face and of itself fairly susceptible of one meaning the task of interpretation can hardly be said to have arisen. *Absoluta sententia expositore non indiget*. But language at best is not a perfect medium of expression and a variety of significations often lie in a word or expression. Any examination of cases involving construction of statutes must reveal that "few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension". So if the Legislature of a country has been accustomed to use any word or expression with a more restricted or extended meaning than might be commonly attributed to it in its ordinary sense the Court should not blandly shut out that consideration but should avail of that assistance, albeit limited, in the process of interpretation. Legislative practice is one of the accepted aids to construction and furnishes extrinsic evidence to which resort may legitimately be had when the Court has to construe a word or phrase and the task of preferring one meaning to another can really be said to have arisen.

What then is this legislative practice so much sought to be relied upon by Sir Noshirwan Engineer? It was said that the units of assessments enumerated in s. 3 of the Income-tax Act (XI of 1922) categorically mentioned the Hindu undivided family. It was pointed out that prior to its amendment in 1939 also that section expressly enumerated *inter alia* as units of assessment "every individual" and "Hindu undivided family". The argument was stressed in the form of an interrogation: "Where was the necessity of doing so unless the Legislature took the view that the expression individual which of necessity meant 'individual' in the singular or plural did not embrace a Hindu Undivided Family?" Therefore, the legislative practice relied upon on behalf of the petitioner is none other than that to be gathered from s. 3 which is the charging section in the Income-tax Act of 1922 and which expressly mentions Hindu undivided family as a unit of taxation along with other units such as individual, company, firm and association of persons.

In course of his argument I asked learned counsel for the petitioner if the legislative expression "individuals" which would apply both to an individual or group of individuals was to be found in any enactment, preferably a taxing enactment, and understood to exclude a Hindu undivided family on the ground that it had a corporate existence distinct from its members. The answer was that he was unable to say so and that he relied on the language of s. 3 of the Income-tax Act. I have examined the relevant provisions of the Indian Income-tax Acts of 1860, 1886, 1918 and 1922 and the amendments incorporated from time to time in s. 3 of the Act of 1922. It appears from Schedule 2 to the Act of 1860 that the unit of assessment under it was any "person". The expression "person" in that enactment obviously embraced *inter alia* any association or body or group of persons by virtue of the definition in s. 3(42) of the General Clauses Act. The position under the Act of 1886 was similar. There was nothing in the language of the relevant provisions of the Act of 1918 which can support the present contention of the petitioner. Section 3 of the Act of 1922 has been amended from time to time and one thing is clear that the expressions "individual" and "Hindu undivided family" have at all times been expressly mentioned in it along with other units of taxation such for

instance as "company", "firm" and "associations of individuals". Therefore, it is on the tenuous basis, that in s. 3 of the Income-tax Act of 1922 there is express mention of "Hindu undivided family" after the expression "individual" has been expressly stated as a unit of taxation, that this argument wholly rests. There can be more than one answer to it but only one will suffice. An obvious answer is that there is no principle of taxation law or general law which prevents income-tax being charged on a group of individuals like members of a joint Hindu family as a unit of taxation. The Hindu undivided family, though not a juridical person, is intended to be taxed as a unit and the tax on the income of the joint family is not intended to be levied separately on each member or coparcener for that would raise considerable difficulty and give scope for legal ingenuity and disputations. It does not at all follow from this that the Hindu undivided family is by legislative practice understood to be a legal person or an artificial person distinct from the individuals who are its members or coparceners. No legislative practice as argued has been established and the contention is not well founded.

To turn to the contention of the petitioner that a joint Hindu family is not a group of individuals but a distinct unit which is a sort of a corporation and, therefore, not within the scope of the expression "individuals" to be found in entry 86. Learned counsel for the petitioner drew our attention to the following statement in para. 243 in Mayne's Hindu law:

"Three forms of the corporate system of property exist in India: The Patriarchal Family, the Joint Family and the Village Community. The two former, in one shape or other, may be said to prevail throughout the length and breadth of India...The Joint Family is a corporate body, of which the members are individuals."

It will suffice to note that this statement was made by the learned author in tracing the history of early Hindu law of property and was obviously intended as a background to the proper understanding of the nature and incidents of joint family property and for the purpose of drawing attention to misleading effect of English analogies from previous notions drawn from English law relating to joint tenancy. Reliance was also placed on behalf of the petitioner on the following observations of Telang J. in *Apaji Narhar Kulkarni v. Ramchandra Ravji Kulkarni*² at pages 39 and 77-78:

"...The family property', to borrow the language of Mr. Mayne, 'is owned by the whole co-parcenership as a sort of corporation'."

"...The Mitakshara joint property scarcely presents any points upon which a comparison between it and joint tenancy could be instituted. No doubt the joint family is a corporate body, a sort of corporation, but a corporation in which there are shareholders, but no shares. It is, therefore, not correct to suppose that when the joint ownership of father and son was established the joint family ceased to be a corporation with perpetual succession, and became a mere partnership terminable at will. The right of the sons as against their father does not change the fundamental nature of the corporate body. It does not become a partnership formed by volition."

Reliance was also placed by learned counsel on the following observations in *Chukun Lall Singh v. Poran Chunder Singh*³ (p. 484):

"...It appears to me that the joint-family is, as regards the enjoyment of the joint-property, a single entity. As long as the members, who have, what may be termed, vested interests in the property, choose to continue in a state of commensality and in joint-fruition and enjoyment of the profits of the property, they cannot be said to possess individually any several proprietary right other than the right to call for partition—a right which they may alien. For proprietary purposes, they exist as a whole, somewhat in the character of a corporation. They manage the property together, and the Karta is but the mouthpiece of the body, chosen and capable of being changed by themselves."

I agree that in a sense it is permissible and sometimes even helpful to speak of the joint Hindu family as a sort of a corporate body, but that is in no manner decisive of, or even of particular cogency to, the crucial point which

arises for our determination. Since, however, so much reliance is placed on the statement from Mayne's Hindu Law and the observations from decisions of Courts quoted above, it becomes necessary to examine the question whether a Hindu undivided family is a corporate unit by itself and not a group of individuals or to put the question slightly differently does coparcenary property of a joint Hindu family vest in the Hindu coparcenary as a corporate unit distinct from the individual coparceners who constitute the coparcenary. I shall do so as succinctly as possible.

In Hindu law the joint family system comes first in historical order. The law of inheritance was of later growth and, in general, applied only to property held in absolute severalty as distinguished from property held by the joint family. The joint and undivided Hindu family is the normal condition of Hindu society and the fundamental conception of the Hindu joint family is a common ancestor with his lineal descendants in the male line and so long as that family is in its normal condition, that is, its undivided state, it forms a corporate unit, though not a juridical person. The joint family traces its origin to the ancient patriarchal system and the transition from that system to the joint family was a natural and logical development. In the joint family also the paterfamilias was the unquestioned ruler and the authority of the father of the family and some of his exclusive privileges are even now traceable in the rights of the father as the *Karta* of the joint family, though the principle of *patria potestas* has long ceased to be recognized. The earlier concept of the joint family was somewhat analogous to that of a corporate body and the tendency was to sink the individual in the family. Social conditions, however, underwent considerable transformation and there grew up a body of rules of inheritance under the title of Dayavibhaga which as explained by Vijnaneshwara means division of property which becomes the property of another solely by reason of his relation to the owner. Even under early Hindu law rights of sons (as junior members of the family) were recognised and they acquired equal interest with the father in the ancestral property as coparceners. I had to refer to this historical aspect of the matter on another occasion and have only recapitulated what I then stated.

The rights of sons to equal interest with the father in the ancestral property being recognized by early Hindu law the inevitable corollary that emerged was the recognition and establishment of that right by birth and the right to claim partition. It is not necessary to burden this brief conspectus with reference to the texts of the Smritikars and the commentators which show how the law on the subject was developed in what came to be described later on as the Mitakshara and the Dayabhaga Schools. The nature and incidents of coparcenary property under the Mitakshara and the rights and extent of interest of the members of such coparcenary and the basic principles of this branch of the law have been examined in numerous decisions of the High Courts and the Privy Council and now also by the Supreme Court. The principles, now firmly established, which are relevant for the purpose of the examination of the present contention of the petitioner, need no elaborate discussion. They will be found in the following statement of the law in Article 216 of Sir Dinshah Mulla's Hindu Law:

"The essence of a coparcenary under the Mitakshara law is *unity of ownership*. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share, one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family. It is *only on a partition* that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is 'undivided coparcenary interest'... The rights of each coparcener until a partition takes place consist in a *common possession and common enjoyment* of the coparcenary property. As observed by the Privy Council

in *Katama Natchiar v. The Rajah of Shrivagunga* 'there is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession.'

Now, the contention of the petitioner that a Hindu undivided family is outside the scope and ambit of the expression "individuals" and therefore of entry 86 can possibly succeed only if the property of such family can be shown to vest not in the individuals who are members or coparceners of the family but in a jural entity which is in the eye of law distinct from its members or coparceners. The incidents of joint family or coparcenary property do not in the present context in the least affect the vesting of the property. When it is said that the ownership of the coparcenary property is in the whole body of coparceners, it does not mean that it vests in any corporate legal entity apart from the coparceners. The property vests in all the coparceners. The interest of a coparcener is "undivided coparcenary interest". It is interest which vests in him and with which, subject to certain limitations, which are not relevant for the present purpose, he is entitled to deal as he likes. Joint family or coparcenary property, therefore, is that in which every coparcener has a vested joint interest and joint possession. *Cadit questio* it is not property which is of the ownership of any jural person or entity distinct from individual coparceners who as a group constitute the joint family. A joint Hindu family, it may be observed, is not entitled to sue as such nor can the joint family be sued as a legal person in respect of any joint family property.

The argument that a Hindu undivided family is owner of the joint family property as a corporate body was evidently presented by the learned counsel only in the context of a Mitakshara family and on the footing that the joint family of the petitioner is governed by the Mitakshara school. Since, however, the argument can apply to members of a joint family governed by the Dayabhaga law and members of a Tarwad, Tavazhi, Ilom, Kutumba or Kavaru governed by the Marumakkattayam, Aliyasantana or Nambudri law it becomes necessary to consider whether the expression "individuals" in entry 86 can embrace members of such joint Hindu families. The contention of the petitioner would, of course, derive support if the property of any such joint Hindu family can be said to belong not to the members but to the family as a corporate legal entity. If the expression "individuals" in entry 86 could not embrace the members of any such joint Hindu family it would be extremely difficult to attribute to the makers of the Constitution the intention to empower the Parliament to impose capital levy on members of some joint Hindu families as a unit of taxation and not in case of members of some other joint Hindu families. I would have found myself faced with some difficulty in examining the contention from this angle since this aspect of the matter was not mooted by learned counsel for the petitioner and the learned Attorney General was not called upon to present any argument on the same. I confess this aspect of the matter did not strike me at the time but it is not absolutely necessary to invite further arguments on the same. No difficulty arises since, as I shall very briefly point out, the position seems clear that the property of any such joint Hindu family vests in individuals who are members of the joint family and not in the family as a juridical person apart from its members.

The conception of a coparcenary and of coparcenary property according to the Dayabhaga law is entirely distinct from that according to the Mitakshara law. The essence of a coparcenary under the Dayabhaga law is unity of possession and it is not possible even in a general manner to say that under that system the ownership of the coparcenary property is in the whole body of coparceners. Every coparcener takes a defined share in such property and he is the owner of that share. Even before partition any coparcener can say that he is entitled to a particular share. Therefore, there is not even scope for

the argument that Dayabhaga joint family can own property as a jural person distinct from its members.

The existence of a system founded on matriarchy in certain parts of Southern India in contradistinction to that in the rest of the country which is patriarchal having the common ancestor as the founder of the family and in which relationship is primarily by agnation has been well established and judicially recognized for a long time. The joint family in one form or another does exist under the systems prevalent in Southern India known as Marumakkattayam, Aliyasantana and Nambudri Laws. While the incidents of the joint family property under the laws of those who favour the matriarchate must in certain respects be different it is abundantly clear that the members of any Tarwad, Tavazhi, Ilom, Kutumba or Kavaru have vested interest in the joint family property. Although it is not unusual to refer to these families as family corporations, it cannot be said that ownership of the joint family property vests in a corporate body as a juridical person as distinct from the members of the joint family. On an aspect of the matter not argued before us it is unnecessary, however, to pursue this point any further.

The conclusion, therefore, seems inescapable that the property of a Hindu undivided family is within the ambit of entry 86. It is property of the "individuals" who are members or coparceners of the joint family. It must follow, therefore, that it was within the competence of the Union Legislature to impose wealth tax on the Hindu undivided family as a unit of taxation and that the impugned legislation in s. 3 of the Wealth-tax Act, 1957, affecting a Hindu undivided family cannot be struck down on the score of *vires*. The Court will not declare any enactment as unconstitutional or *ultra vires* unless the repugnance to the Constitution is clear and beyond doubt, and in case of the legislation challenged before us, I do not see any repugnance.

A further point was stated by Sir Noshirwan Engineer, rather as an apprehension of the respondent's counsel than as an argument actually advanced for the petitioner, that if the word "individuals" in entry 86 be interpreted in the restricted sense urged on behalf of the petitioner, the respondent cannot seek to uphold the impugned legislation by resorting to entry 97 which is the residuary entry in List I. The learned Attorney General strongly relied on this residuary entry and art. 248 and pressed for our acceptance the contention of the respondent founded on the same. The argument was that the three Lists in the Seventh Schedule embraced the entire gamut of legislation and that it was art. 248 to which the Court must in the first instance turn for ascertainment of the residuary powers of the Parliament when any question arises in the field of the exclusive powers of the Union Legislature to make any law and particularly the power of making any law imposing a tax not mentioned in the Concurrent List or the State List. Article 248, it was said, gave unfettered power of taxation to the Union Legislature in its own domain of legislation and could not be controlled by the language of entry 86. The rejoinder to this on behalf of the petitioner was that the scope of entry 86 cannot be expanded by recourse to the residuary entry. The argument, of course, was on the footing that the expression "individuals" in entry 86 did not include a Hindu undivided family. It was said that if the construction of entry 86 pressed on behalf of the petitioner is accepted the word "individuals" must be read as laying down a restriction upon the powers of the Union Legislature to impose capital levy by confining it to individuals and companies. Now it would appear that the entries in the Lists are legislative heads primarily designed to demarcate the areas of legislative competence of the Union and the State Legislatures. They give *simplex enumeratio* of categories of legislation and are not designed to circumscribe or logically define the ambit of art. 248. It would be difficult, therefore, to read in any entry in List I any restrictions by implication or otherwise on the residuary legislative power conferred on the Union Legislature by art. 248. But in the view I have already taken on the

interpretation and effect of entry 86 it is not necessary to decide this interesting question.

For reasons I have already stated, I agree with my learned brother that this petition fails and must be dismissed with costs.

Petition dismissed.

Solicitors for the petitioner: *Matubhai Jamietram & Madan.*

Solicitor for the respondent: *P. G. Gokhale.*

SUPREME COURT.

Present: The Hon'ble Mr. S. R. Das, Chief Justice, Mr. Justice Bhagwati and Mr. Justice M. Hidayatullah.

SARUPCHAND HUKAMCHAND & CO. v. THE UNION OF INDIA.*

Indian Income-tax Act (XI of 1922), Secs. 23(5)(b), 24(2) proviso (d), 31—Income-tax Officer applying s. 23(5)(b) to unregistered firm on finding that firm had made profit during relevant assessment year—Assistant Appellate Commissioner on appeal holding that loss sustained by firm in assessment year and directing Income-tax Officer to modify assessment—Income-tax Officer carrying loss to partners of firm in their assessments—Maintainability of Income-tax Officer's Order—Applicability of proviso (d) to s. 24(2).

The Income-tax Officer in assessing a partnership firm which was unregistered found that it had made a profit during the relevant assessment year and applying s. 23(5)(b) of the Indian Income-tax Act, 1922, he assessed the partners of the firm carrying the profit into their individual returns and made no demand upon the firm. On appeal by the firm the Appellate Assistant Commissioner found that there was error in the computation of income made by the Income-tax Officer and held that in the assessment year there was a loss in the total world income of the firm. The Appellate Assistant Commissioner directed the Income-tax Officer to modify the assessment made by him. The Income-tax Officer thereafter gave effect to the order of the Appellate Assistant Commissioner under s. 31 of the Act and carried the loss to the partners in their assessments and granted a refund to them. On the question whether the order of the Appellate Assistant Commissioner left the Income-tax Officer free of his earlier order and whether he was under a duty to re-consider the position under s. 23(5)(b) of the Act:—

Held, that the reversal of the finding of profit destroyed the substratum of the jurisdiction of the Income-tax Officer to act under s. 23(5)(b) and his order automatically fell through, and

that in the light of the losses determined by the Appellate Assistant Commissioner, the Income-tax Officer was under a duty to apply his mind *de novo* to determine whether he should, in the altered circumstances, apply s. 23(5)(b) to the case or not.

Section 23(5)(b) and proviso (d) to s. 24(2) of the Indian Income-tax Act, 1922, must be read in harmony, and when so read, yield the only result that proviso (d) is to be invoked, subject to the conditions under s. 23(5)(b) to obtain more revenue for the State by applying s. 23(5)(a) of the Act.

Proviso (d) to s. 24(2) could only be resorted to when, in spite of taking the losses to the accounts of the partners, more revenue would be available to the State. The proviso is an enabling one. An unregistered firm, treated as such in the previous years, may, during any year, be treated as a registered firm provided the Revenue would benefit. It may be that the firm may have a loss in that year or was carrying a loss from the previous years but, if by treating the firm as registered, the Revenue would be benefited, the proviso can be used.

Commissioner of Income-tax, Bombay v. Khemchand¹ and Commr. I.T., Punjab v. Tribune Trust, Lahore,² referred to.

*Decided, May 5, 1959. Civil Appeal No. 172 of 1955.

¹ (1938) 40 Bom. L. R. 854, P.O.

² (1947) 50 Bom. L.R. 566, P. O.

THE facts are stated in the judgment.

R. J. Kolah, with *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, for the appellant.

H. N. Sanyal, Additional Solicitor General of India, with *K. N. Rajagopal Sastri* and *D. Gupta*, for the respondents.

HIDAYATULLAH J. This appeal, by special leave of this Court, is directed against the judgment and order of the High Court of Judicature at Bombay dated February 26, 1953, in Appeal No. 108 of 1952. By that judgment, the Divisional Bench (Chagla C.J. and Shah J.) declined to interfere, in Letters Patent Appeal, with the judgment of Tendolkar J. dated July 8, 1952, in Miscellaneous Application No. 48 of 1952. In the petition which was originally filed in the High Court under art. 226 of the Constitution, a writ of *mandamus* was asked against the Union of India and two Income-tax Officers to compel them to give effect to the appellate order of the Appellate Assistant Commissioner of I.T.F. Range, Bombay, dated April 29, 1949. The High Court in both the judgments declined the writ.

The facts of the case are as follows: The appellant, Messrs. Sarupchand Hukamchand and Co., (hereinafter referred to as the assessee firm) was carrying on business, *inter alia* as shroffs, merchants and commission agents at Bombay, Indore, Ujjain and Calcutta. It had, in the relevant account years, two partners, Sir Sarupchand Hukamchand and Sri Hiralal Kalyanmal. The two partners were also separately liable to income-tax, the former as a Hindu undivided family and the latter as an individual. We are concerned here with the assessment years 1940-41, 1941-42 and 1942-43. These correspond to the account years, 1995-1996 (Samvat) to 1997-1998 (Samvat). When the assessment of the assessee firm was made, the Income-tax Officer, Section VIII (Central), Bombay, treated the firm as "resident and ordinarily resident". For the assessment year 1940-41 the Income-tax Officer found a profit of Rs. 80,358, and applying s. 23(5)(b) of the Indian Income-tax Act (hereafter called the Act), he proceeded to treat the firm which was unregistered as registered for the purpose of assessment. On March 15, 1945, he, therefore, assessed the two partners carrying the profit into their individual returns and made no demand upon the firm. It appears that an application for registration had already been filed under s. 26A of the Act before the Income-tax Officer, but it was rejected—and quite correctly—because no instrument of partnership was disclosed. That order was also passed on the same date.

For the assessment years 1941-42 and 1942-43, the Income-tax Officer by his orders dated July 31, 1945, and October 31, 1945, respectively, treated the firm as "resident and ordinarily resident" and as an unregistered firm. For the first of the two assessment years, he assessed the firm on a total income of Rs. 2,30,798 to income-tax and super-tax, and for the second year, its British Indian income was taken at Rs. 2,62,827 and the total income at Rs. 7,00,116 and was also treated accordingly.

The assessee firm appealed against these assessments. The Appellate Assistant Commissioner by his order passed in the consolidated appeals on April 29, 1949, held that the assessee firm was non-resident and excluded the income of the firm outside British India, though it was included in the total world income for the purpose of computing the rate of tax. He also found error in the computation of income made by the Income-tax Officer, and held that in the assessment year 1940-41 there was a loss of Rs. 1,61,084 in the total world income of the assessee firm. For the subsequent years also there were slight variations in the amounts determined by the Income-tax Officer, but it was held that the assessee firm had made profits in those years. The following is the summary of the findings of the Appellate Assistant Commissioner, as given by him in his order:

Assessment year	Income in British India	Income outside British India	Total world income.
1940-41	Loss Rs. 2,26,028	Rs. 74,944	Loss Rs. 1,61,084
1941-42	.. Rs. 1,27,062	Rs. 1,08,236	.. Rs. 2,35,298
1942-43	.. Rs. 2,62,827	Rs. 4,41,789	.. Rs. 7,04,616

In addition to these findings, the Appellate Assistant Commissioner added a direction to the following effect:

“The Income-tax Officer is directed to modify the assessments accordingly.”

When the matter reached the Income-tax Officer, he gave effect to the order of the Appellate Assistant Commissioner under s. 31 of the Act and carried the loss to the partners in their assessment for the year 1940-41, and granted a refund of Rs. 16,977-11-0 to Sir Sarupchand Hukamchand and Rs. 68,339 to Sri Hiralal Kalyanmal. The assessee firm, however, was not satisfied, and embarked upon voluminous correspondence beginning with a letter dated September 10, 1949, by which it claimed that inasmuch as it had been shown to have incurred a loss in the first of the three assessment years, it could not for that year be treated as a registered firm, and that as an unregistered firm it was entitled, therefore, to carry forward the loss to the subsequent years. In addition to the correspondence, the assessee firm moved in turn the Income-tax Officer as well as the Appellate Assistant Commissioner respectively under s. 35 of the Act for rectification of the assessment to the same effect. The officers of the Department at both levels declined to interfere, and stated that the direction of the Income-tax Officer under s. 23(5)(b) was not appealable, and had become final. They also pointed out that the period during which the original order of the Income-tax Officer could be rectified (viz. 4 years) had already run out, and that the petitions were accordingly out of time. The assessee firm moved the Commissioner as well as the Central Board of Revenue, but failed to get the desired order.

Finally, after the receipt of the order of the Central Board of Revenue, the assessee firm applied on July 16, 1951, to the Additional Income-tax Officer, Section VIII (Central) to give effect to an order which the assessee firm had secured from the Appellate Assistant Commissioner earlier. By that order, the Appellate Assistant Commissioner had, at the request of the assessee firm, directed the Income-tax Officer to take the losses of the first assessment year into the accounts of the partners, which direction, in the opinion of the Appellate Assistant Commissioner, his predecessor had omitted to make in the first instance. It was after this that fresh assessment forms were drawn up, and the refund was determined. It may be pointed out here that the partners withdrew the amount of refund, though in making the request to the Additional Income-tax Officer the assessee firm had reserved its right “to move further in the matter as may be advised”, and had pointed out that the action was without prejudice to such rights.

Having failed to obtain relief from the Department, the appellate authorities and the Central Board of Revenue, the assessee firm filed the petition under art. 226 of the Constitution in the High Court of Judicature at Bombay. That petition was heard by Tendolkar J., and he declined to interfere mainly on the ground that it was possible to take two views of the matter whether after a profit assessment was turned into a loss assessment by the Appellate Assistant Commissioner, the original order of the Income-tax Officer under s. 23(5)(b) remained outstanding or not. He thought that this was not a fit case for the issuance of a writ of *mandamus* by the High Court. In appeal which was taken from this decision, Chagla C.J. looked at proviso (d) to s. 24(2), and also came to the view that there was a possibility of two views being taken in the matter, and that the learned single Judge was right in not interfering. Shah J. in a concurring judgment explained what he considered was the meaning of s. 23(5)(b) read with s. 24(2), proviso (d), but he also felt that this was not a case in which a writ could be claimed against the Union of India or the Income-tax Officers. Chagla C.J., however, expressed the hope that the tax-

ing authorities would not deny the assessee firm its rights under the Act on any technical ground, such as limitation, or failure to pursue a particular procedure. In the result, the Divisional Bench sustained the order of Tendolkar J., who had dismissed the petition earlier. This Court on May 3, 1954, granted special leave to appeal against the judgment of the Divisional Bench.

Before arguing on merits of the appeal, the learned Additional Solicitor General and subsequently Mr. Rajagopala Sastri who took over the argument, raised three objections to the present appeal. According to them, the petition in the High Court was directed against the Union of India and the two Income-tax Officers who had dealt with this matter, and the relief which was claimed could be granted by none of them. They further argued that *mandamus* was an inappropriate writ to issue in this matter when the order passed by the Income-tax Officer under s. 23(5)(b) was not appealable and the Appellate Assistant Commissioner could do nothing about it in the appeal against the quantum of assessment. They also stated that the relief asked for in the petition could not be granted by the High Court, and that the powers of this Court were accordingly limited.

We shall deal with these objections, when we have determined the essence of the matter. Under s. 23(5)(b), a power is conferred on the Income-tax Officer to treat an unregistered firm as a registered firm, if by adopting that method more tax and super-tax would be realisable from the individual partners in their own assessments than in assessing the firm. The clause may be quoted *in extenso* for ready reference here:

23. (5) "Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4), as the case may be,—...

(b) in the case of an unregistered firm, the Income-tax Officer may, instead of determining the sum payable by the firm itself, proceed in the manner laid down in clause (a) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm."

The contention of the assessee firm is that the action of the Income-tax Officer in treating an unregistered firm as a registered firm is mainly in the interests of the revenue and he can act if more revenue would be available and not otherwise. When an unregistered firm makes a loss, it is entitled to carry forward the loss for a certain number of years till it is absorbed in the profits, if any, of subsequent years. By carrying the loss to the account of the individual partners, relief is afforded to them in their own income-tax payment, and there is presently a loss of revenue to the State. This, according to the assessee firm, is outside the jurisdiction of the Income-tax Officer, because his action is conditioned upon realisation of more revenue and not creating loss for the State. Learned counsel for the Department agree that there would be, in the assessment year in which there is a loss by an unregistered firm, a loss to the Revenue if it is carried into the accounts of the partners; but they contend that there is no inhibition against the action and refer to proviso (d) to s. 24(2) as indicating that such a course is perfectly valid. The assessee firm also contends that the moment loss was determined by the Appellate Assistant Commissioner, the previous order made by the Income-tax Officer under s. 25(5)(b) of the Act automatically fell to the ground and the loss could only be carried forward in the future assessments of the unregistered assessee firm and not in the account of the partners. The assessee firm contends that the direction by the Appellate Assistant Commissioner to modify the assessments of the three years accordingly implied the re-opening of the entire question whether this unregistered firm could be treated as a registered firm for purposes of assessment in the first year. The Department, on the other hand, refers to the provisions of s. 80 of the Act to show that an appeal lies to the Appellate Assistant Commissioner on the grounds expressly mentioned there and

none other. It further points out that this is not one of the grounds on which the appeal could have been taken, and the Act cannot by implication be deemed to have conferred on the Appellate Assistant Commissioner a power which he ordinarily did not possess under the Act. The order of the Income-tax Officer to treat the unregistered firm as registered must, therefore, be held to be outstanding, and all that has happened in the case is to take that order to its logical conclusion in the light of the assessed loss of the firm, in the three years under assessment.

This question was urged before us in great detail, as apparently it had also been in the Court below. There is no doubt that the matter is one of some complexity, which is not unusual in a statute of the type we are considering, but, in our opinion, only one correct view of the matter was possible, and with all due respect, the High Court made but little attempt to determine it. We shall now attempt to lay down the interpretation of the various sections bearing upon the matter. Section 23(5)(b) has already been quoted. It will appear from it that the Income-tax Officer is given the option to apply the procedure laid down in cl. (a) to an unregistered firm, if, in his opinion, the aggregate amount of tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount of tax which would be payable by the firm and the partners individually, if the firm was assessed as an unregistered firm. Clause (a) provides that the sum payable by the firm shall not be determined, but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined. To put it simply, in the case of a registered firm its assessable income is first determined, but is not processed further to determine the tax. Instead, the shares of the partners in the assessable income are determined in accordance with the particulars furnished by them, and the resultant amounts are respectively carried to each partner's return and included in his income, and the tax on the total is determined. In the case of an unregistered firm, the assessable income is found out, and then the tax payable by the unregistered firm is determined and a demand issued. If there is a loss, then the loss is carried forward to the succeeding years till it is absorbed or for six (now, eight) years but no further. Previously, the number of years ranged from one to six, but there is no need to refer to the provision in detail.

What happened in this case was that for the assessment year 1940-41, the Income-tax Officer determined the assessable income at Rs. 80,358. He felt that more tax was likely to be realised if the partners were assessed instead of the firm, and he accordingly decided to apply the procedure laid down in s. 23(5)(b) to the firm. In passing his order, the Income-tax Officer observed as follows:

"The firm is an unregistered one but the aggregate amount of tax payable by the partners would be greater by applying the procedure laid down in s. 23(5)(a) of the Act than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered one. I, therefore, order under s. 23(5)(b) of the Act that the procedure laid down in s. 23(5)(a) should be applied and the firm declared N.D. for the assessment year 1940-41."

It is no doubt true that if the Income-tax Officer had determined a loss, he could not and probably would not have passed this order, which would have had the immediate effect of loss to the Revenue of the sums which have now been ordered to be refunded to the partners of this unregistered firm. The Department, however, says that the assessment for 1940-41 except in so far as profit was converted into loss has become final and cannot be set aside now. It relies on *Commissioner of Income-tax, Bombay v. Khemchand*¹ and *Commr. I.T., Punjab v. Tribune Trust, Lahore*.² There is no doubt that an assessment which has once been made does become final, subject only to the powers exercisable under ss. 34 and 35 of the Act. The position, however, is different

1 (1938) 40 Bom. L.R. 854, P.O.

2 (1947) 50 Bom. L.R. 566, P.O.

when the assessment itself is subject to appeal, and the Appellate Assistant Commissioner passes an order converting the profit into a loss, and gives a direction to the Income-tax Officer to modify the assessment accordingly.

The position then was that the Income-tax Officer had exercised his powers under s. 23(5)(b) as there was a profit. When the Appellate Assistant Commissioner found a loss it became clear that the Income-tax Officer had, by an erroneous finding of profit, assumed jurisdiction to act under s. 23(5)(b). The reversal of the finding of profit destroyed the substratum of the jurisdiction of the Income-tax Officer to act under that clause and his order automatically fell through.

The Department's contention that such an order is referable to cl. (a) of s. 31(3) and does not involve the setting aside of the order under s. 23(5)(b) passed earlier by the Income-tax Officer is not correct. No doubt, the right of appeal given to the assessee under s. 30 is limited to the matters therein contained, but the relief which the appellate authority can give is to be found in s. 31(3). The assessment order having come before the Appellate Assistant Commissioner, he can, under cl. (a), confirm, reduce, enhance or annul the assessment. Under cl. (b) he can set aside the assessment and direct the Income-tax Officer to make a fresh assessment, after making such further enquiries as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner directs, and the Income-tax Officer must thereupon proceed to make fresh assessment and determine the amount of tax payable on the basis of such fresh assessment. It is contended by the Department that the order of the Appellate Assistant Commissioner was passed under cl. (a) and not cl. (b), and there being no fresh assessment ordered, the only thing that the Income-tax Officer could do was to re-determine the tax within the limits of his own order under s. 23(5)(b) of the Act, which applied cl. (a) of that sub-section to this case.

In our opinion, this is not a correct approach. Even if the order be referred to cl. (a) of s. 31(3), the effect, in law, was the annulment of the assessment which had been made in the case, and the necessary consequence of the determination of the loss in the assessable income remained to be worked out. The Income-tax Officer worked it out by carrying the losses to the return of the partners. Under what section could he do so except under s. 23(5)(b)? There was no authorisation under s. 31(4) of the Act and the second proviso to s. 24 was clear. In such a case, the Income-tax Officer was required once again to apply his mind to determine whether it would be in the interests of Revenue to proceed, as he had done before. It is manifest that if he had done this duty in the interests of the Revenue, as the law indeed contemplates, he would never have passed the order that the loss of the firm should be carried to the accounts of the partners immediately in that year of assessment. Learned counsel for the Department admits that no Income-tax Officer would have, with a loss by the firm, given relief on the basis of that loss to the partners, but he contends that this is not illegal in view of the special provisions of proviso (d) to s. 24(2) of the Act. We accordingly proceed to consider the effect of that proviso, which reads as follows:

"Provided that—

(d) where an unregistered firm is assessed as a registered firm under clause (b) of sub-section (5) of section 23, during any year, its losses shall also be carried forward and set off under this section as if it were a registered firm."

From this, it is argued, as it was argued in the High Court, that even the losses of an unregistered firm can be carried to the partners' account, as if the firm were registered. No doubt, if the proviso is read in an extended manner, the result asked for would follow; but a careful reading of it would show that it was not designed to enable the Income-tax Officer to forego the obligation laid on him by cl. (b) of s. 23(5), to find out the interests of the Revenue. To read this proviso as enabling the Income-tax Officer to overlook the said clause is to give no meaning to the words "during any year". Those words form a material part of the proviso, because the proviso with or without those words

makes an entirely different sense. Without those words, it gives a general power to carry the losses to the partners' account. With those words, it only provides for a contingency in which an unregistered firm treated as such in the previous years, is sought in any particular year to be treated as a registered firm, and by reason of its carrying some business losses in the past, arrangement for the carrying forward and absorption of those losses has to be made for the year in which it is to be treated as a registered firm. In that event, the proviso provides that its losses shall be carried to the partners' account, as if it were a registered firm. It is inconceivable that if the firm was carrying heavy business losses, it would suddenly be treated in a year of assessment as a registered firm, so that its losses might give relief to the partners and not give revenue to the State. This proviso would only be resorted to, when, in spite of taking the losses to the accounts of the partners, more revenue would be available to the State. The proviso is an enabling one. An unregistered firm, treated as such in previous years, may, during any year, be treated as a registered firm provided the Revenue would benefit. It may be that the firm may have made a loss in that year or was carrying a loss from the previous years but, if by treating the firm as registered, the Revenue would be benefited, the proviso can be used. But there is no general power to act this way to the detriment of the Revenue. To give any other interpretation to this proviso will mean that the words "during any year" have not received any meaning and that the proviso is interpreted to make it not incumbent on the Income-tax Officer to consider the interests of the Revenue, as required by cl. (b) of s. 23(5). The two provisions must be read in harmony, and when so read, yield the only result that proviso (d) is to be invoked, subject to the conditions under s. 23(5)(b) to obtain more revenue for the State by applying s. 23(5)(a).

It would appear, therefore, that the Income-tax Officer in the light of the losses determined by the Appellate Assistant Commissioner, was under a duty to apply his mind *de novo* to the problem which he had undertaken, when he resorted to s. 23(5)(b). It is admitted that if the matter had been so plain to him, he would not have, if he did his duty correctly under that provision, carried the losses to the partners' account.

The only question, therefore, which survives for determination is whether the order of the Appellate Assistant Commissioner left the Income-tax Officer free of his earlier order, and whether he was under a duty to reconsider the position under s. 23(5)(b). When the basis for assessing a profit was gone, it is manifest that there was nothing but loss to carry forward to the partners' account. With the fall of the assessment in this manner, fell the need for applying the special provisions of cl. (b) of s. 23(5) to the case. Indeed, the duty of the Income-tax Officer indicated a contrary course, if he was to act under s. 23(5)(b) at all. The order of the Appellate Assistant Commissioner was passed in respect of three years' assessment, and was a consolidated order. He set out in parallel columns the income and losses of the firm and not of the partners and directed the Income-tax Officer to modify the assessments accordingly. The intention obviously underlying that order was to put the matter at the stage at which the assessable income of the assessee firm was determined before computing the tax thereupon. To compute the tax, the Income-tax Officer had to determine whether the loss occasioned in the first year should be carried forward to the assessee firm in the subsequent year, and he could not give effect to the order of the Appellate Assistant Commissioner fully, unless he determined once again the question under s. 23(5)(b). In other words, the implication of the appellate order was to take the matter prior to the order regarding the treatment of the unregistered firm as a registered firm, and of necessity, that order fell to the ground as being passed beyond that stage.

It is contended on the strength of the ruling of the Privy Council in *Commr. I.T., Punjab v. Tribune Trust, Lahore* that once the assessment is final and valid, it remains so until it is set aside, but once it has become final, it cannot

be altered except under ss. 34 and 35. No exception can be taken to the statement of the law by the Privy Council, which, with all due respect, is absolutely correct, but it is impossible to hold, on analogy, that the order determining that this unregistered firm should be treated as registered, had equally become final and open to further consideration. Learned counsel for the Department also urged on the strength of *Commr. Inc.-tax v. McMillan & Co.*³ and *Commr. Inc.-tax v. Amritlal Bhogilal*⁴, that if the powers of the Appellate Assistant Commissioner did not involve a review of the determination by the Income-tax Officer under s. 23(5)(b), this result could not indirectly follow. No doubt, the Appellate Assistant Commissioner could not, if the matter had gone before him in appeal against the order under that section, have interfered. But the Appellate Assistant Commissioner was exercising his powers under s. 31 of the Act and annulling the assessment of the first year and converting a profit in that year into a loss. None can deny that he had that power in the appeal which was before him. Section 31(4) of the Act enjoins that where as the result of an appeal any change is made in the assessment of a firm the Appellate Assistant Commissioner may authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm. This power was implicit in the order which the Appellate Assistant Commissioner passed, namely, that there was a loss in the assessment year in question and the assessments for the three years had to be modified. The Income-tax Officer, therefore, was under a duty to modify the assessments of the partners accordingly, and to take the matter up again from the point at which the order of the Appellate Assistant Commissioner had placed it. He had once again to determine whether he would, in the altered circumstances, apply s. 23(5)(b) to this case or not.

In our opinion, the Income-tax Officers in question did not do their duty as required by law, and we should, therefore, by a writ compel them to do so.

As regards the argument that the petition is directed against wrong persons and for a wrong relief, we do not think that it is so. The petition sought relief against the Union of India, which, in any event, was not concerned with this matter, and was wrongly joined. But the two Income-tax Officers, who dealt with this matter, were required under the statute to do their duty once again in the matter of the application of s. 23(5)(b) of the Act. That they failed to apply their mind to this matter under a wrong apprehension of the law is manifest, and they did not give effect to the orders of the Appellate Assistant Commissioner. The assessee firm having failed to secure this relief from all the authorities superior to the Income-tax Officers, it was open to the High Court by a writ to order the Income-tax Officer concerned to hear and determine this matter in accordance with law. This is precisely the relief which was claimed in the High Court and is now claimed in the present appeal. We think, with due respect, that the High Court should have, on a correct appraisal of the legal situation, ordered this relief, and we accordingly, after explaining the law applicable to the case, order the appropriate Income-tax Officer to hear and determine this matter in the light of our observations.

We may set down here that the two partners of the firm to whom relief has been given by way of refund after the Appellate Assistant Commissioner's order undertook unconditionally to refund the amounts, before the matter is considered by the Income-tax Officer. We order that the two partners shall return the amounts in the manner to be ordered by the Income-tax Officer, before action is taken to determine the matter.

In the result, the appeal is allowed with costs throughout to be paid by respondents Nos. 2 and 3. The Union of India shall, however, bear its own costs. It may be noted that no separate costs were incurred by it either in this Court or in the Court below. It joined respondents Nos. 2 and 3 in the statement of the case filed in this Court and also appeared through the same counsel in both the Courts.

Appeal allowed.

³ (1957) 60 Bom. L.R. 636, S.C.

⁴ (1958) 61 Bom. L.R. 541, S.C.

Present: The Hon'ble Mr. S. R. Das, Chief Justice, Mr. Justice N. H. Bhagwati and Mr. Justice M. Hidayatullah.

THE TRUSTEES OF THE CHARITY FUND v. THE COMMISSIONER OF INCOME-TAX, BOMBAY.*

Indian Income-tax Act (XI of 1922), Sec. 4(3)(i)—Trust created for relief of members of Jewish or other communities and other public charitable purposes—Trust-deed providing that preference to be given to relations and members of settlor belonging to Jewish faith and not less than half the income of trust fund to be given to members of Jewish faith including settlor's relations—Whether such trust a public charitable trust and exempt from taxation under s. 4(3)(i).

Under a Deed of Declaration of Trust executed by Sir Sassoon David, Bart. and others, the trust fund was declared to be held by the trustees upon trusts to apply the net income thereof, for all or any of the six purposes enumerated in clause 13 therein, namely, (a) the relief and benefit of the poor and indigent members of Jewish or any other community of Bombay or other parts of India, or of the world, (b) the institution, maintenance and support of hospitals and schools, colleges or other educational institutions, (c) the relief of any distress caused by the elements of nature such as famine, pestilence, fire, tempest, flood, earthquake or any other such calamity, (d) the care and protection of animals useful to mankind, (e) the advancement of religion and (f) other purposes beneficial to the community not falling under any of the foregoing purposes. Clause 13 contained certain provisos which *inter alia* stated: "Provided always that in applying the income as aforesaid the Trustees shall give preference to the poor and indigent relations or members of the family of the said Sir Sassoon David, Bart., including therein distant and collateral relations; provided further that in the application of the income of the said Charitable Trust Fund the said Trustees for the time being shall observe the following proportions, viz: that not less than half the income of the said funds shall at all times be applied for the benefit of the members of the Jewish Community of Bombay only (including the relations of Sir Sassoon David, Bart. as aforesaid) and Jewish objects and particularly in giving donations to the members of the Jewish Community of Bombay on the anniversary of the death of the said Sir Sassoon David, Bart. and his wife... and the remaining income for the benefit of all persons and objects including Jewish persons and objects and in such proportions as the said Trustees may think proper." On the question whether the trust fund was exempt from taxation under s. 4(3)(i) of the Indian Income-tax Act, 1922, it was contended by the Department that the trust was primarily for the benefit of the relations or members of the family of Sir Sassoon David, Bart.:—

Held, that the earlier part of cl. 13 of trust-deed, omitting the provisos, constituted a public charitable trust,

that the circumstance that in selecting the beneficiaries under cl. 13(a) preference is given under the provisos to the relations or members of the family of Sir Sassoon David, Bart., did not affect that public charitable trust, and

that, therefore, the income from the trust properties came within the scope of s. 4(3)(i) of the Act, and was entitled to exemption from tax.

Koettgen's Will Trusts, In re¹, applied.

Trustees of G. G. Trust v. Comr. I-T,² referred to.

THE facts appear in the judgment.

B. J. Kolah, with *J. B. Dadachanji* and *S. N. Andley*, for the appellants.
K. N. Rajagopal Sastri and *D. Gupta*, for the respondent.

DAS C.J. This is an appeal brought on a certificate granted on September 19, 1956, by the High Court of Bombay under s. 66(A)(2) of the Indian Income-tax Act (hereinafter referred to as "the said Act") against its order dated February 21, 1956, in Income-tax Reference No. 32 of 1954 answering

*Decided, May 5, 1959. Civil Appeal No. 896 of 1957.

1 [1954] Ch. 252, 257.

2 (1951) 54 Bom. L.R. 178.

in the negative two questions of law referred to it under s. 66(1) of the said Act at the instance of the appellants.

The appellants are the trustees of a charity fund known as "The Charity Fund Founded by Sir Sassoon David, Baronet of Bombay". The said Sir Sassoon David, Bart. and four other persons, who were holding certain securities of the value of Rs. 24,25,000 for the purpose of charity and had been applying the same for and towards charitable purposes, executed, on June 8, 1922, a Deed of Declaration of Trust declaring that the said trust fund would be held by them on trusts more specifically therein mentioned. Clause 13 of the said deed, on the true construction of which depends the answer to the referred questions, runs as follows:—

"13. The Trust Fund shall be held by the Trustees upon the trusts to apply the net income thereof after providing for all necessary expenses in relation to the management of the Trust Funds for all or any of the following purposes that is to say,

(a) the relief and benefit of the poor and indigent members of Jewish or any other community of Bombay or other parts of India or of the world either by making payments to them in cash or providing them with food and clothes and/or lodging or residential quarters or in giving education including scholarships to or setting them up in life or in such other manner as to the said Trustees may seem proper or...

(b) the institution, maintenance and support of hospitals and schools, colleges or other educational institutions or...

(c) the relief of any distress caused by the elements of nature such as famine, pestilence, fire, tempest, flood, earthquake or any other such calamity or...

(d) the care and protection of animals useful to mankind or...

(e) the advancement of religion or...

(f) other purposes beneficial to the community not falling under any of the foregoing purposes...

Provided always that in applying the income as aforesaid the Trustees shall give preference to the poor and indigent relations or members of the family of the said Sir Sassoon David, Bart., including therein distant and collateral relations; provided further that in the application of the income of the said Charitable Trust Fund the said Trustees for the time being shall observe the following proportions, viz.: that not less than half the income of the said funds shall at all times be applied for the benefit of the members of the Jewish Community of Bombay only (including the relations of Sir Sassoon David, Bart. as aforesaid) and Jewish objects and particularly in giving donations to the members of the Jewish Community of Bombay on the anniversary of the death of the said Sir Sassoon David, Bart. and his wife Lady Hannah David which falls on the Twenty-second day of June and the remaining income for the benefit of all persons and objects including Jewish persons and objects and in such proportions as the said Trustees may think proper. Provided further that if the income of the Trust Funds for any year shall not be wholly applied during that year on the Trusts aforesaid such surplus income may be carried forward to the subsequent year or years and be applied as the income arising during that year or years. Provided also that during the lifetime of Sir Sassoon David, Bart., in the application of the said income the Trustees shall have regard to the wishes of the said Sir Sassoon David, Bart., who shall also be entitled to direct if he so desires that the income for the time being of the Trust-Funds or any part thereof may be applied to such charitable object or objects as the said Sir Sassoon David, Bart. shall direct and in such case the Trustees shall so apply the income."

This Deed of Declaration of Trust was, on June 4, 1953, registered under the Bombay Public Trusts Act, 1950.

The Trust Fund had been invested by the trustees in *inter alia* 3½ per cent. Government securities. In the year 1930 a certificate was issued by the Income-tax Officer, A Ward, Bombay, whereby the Reserve Bank of India was authorised not to deduct at source the tax on the interest on the said securities so held by the trustees. It was mentioned in the said certificate that it was to enure till its cancellation. In 1946 the 3½ per cent. Government securities were redeemed by the Government of India and were converted into 3 per cent.

Conversion Loan, 1946. Accordingly in February 1948 the said certificate of exemption was cancelled, as the securities covered thereby had been redeemed by the Government. The trustees thereupon asked for a fresh certificate of exemption from the Income-tax Officer, Bombay Refund Circle, in respect of the 3 per cent. Conversion Loan, 1946. But the said Income-tax Officer refused to issue such certificate on the ground that the income from the trust fund in question was not exempt from taxation under s. 4(3)(i) of the said Act which, at the material time, was as follows:—

"4. (1) ...

(2) ...

(3) Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:

(4) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto:—"

Upon the fact of the withholding of the certificate by the Income-tax Officer, Refund Circle, being intimated to the Income-tax Officer, A-V Ward, Bombay, the latter Officer started proceedings against the appellants under s. 34 of the said Act in respect of the assessment years 1944-45 to 1947-48. He also started regular proceedings for the assessment year 1948-49 and the succeeding years up to 1952-53.

In the assessment proceedings for those nine years the Income-tax Officer took the view that the income from the trust fund was not exempt from taxation under s. 4(3)(i), and accordingly he assessed the appellants for the first four assessment years (1944-45 to 1947-48) on the ground that the income for those years had escaped assessment. He also assessed the appellants to tax for the subsequent five years (1948-49 to 1952-53). On appeal the Appellate Assistant Commissioner confirmed the said assessments. On further appeal by the appellants, the Income-tax Appellate Tribunal set aside the assessments for the first four years (1944-45 to 1947-48) holding that s. 34 had been wrongly invoked, for it was only a case of difference of opinion of one Income-tax Officer from his predecessor on the same set of facts. The Department did not take any further steps in the matter and accepted that view of the Tribunal as regards the assessments of those years and we are not in this appeal concerned with them. As regards the assessments for the five years (1948-49 to 1952-53) the Tribunal upheld the decision of the Appellate Assistant Commissioner who had confirmed the assessments made by the Income-tax Officer.

On application being made by the appellants, under s. 66(1) of the said Act, the Tribunal drew up a statement of case and referred two questions of law arising out of its order to the High Court for its opinion. The said questions are as follows:—

(1) Whether the Trust property is held wholly for religious or charitable purposes within the meaning of section 4(3)(i) of the Indian Income-tax Act?

(2) If the answer to question (1) is in the negative, whether the trust property is held in part only for religious or charitable purposes?

The said reference came up for hearing before the said High Court and both the referred questions were answered in the negative. The High Court, however, gave the appellants a certificate of fitness for appeal to this Court and the present appeal has been filed on the strength of such certificate.

A perusal of cl. 13 of the deed shows that the trust fund is declared to be held by the trustees upon trusts to apply the net income thereof for all or any of the six purposes enumerated therein. It was conceded before the High Court—and it has not been disputed before us—that if there was nothing else in this clause, then each of these six purposes would have to be upheld as a charitable purpose involving an element of public utility and consequently within the protection of s. 4(3)(i). The fact that the trustees could expend the net income on any of the six purposes to the exclusion of the other five purposes would not, it is also conceded, have made the slightest difference in the

matter of such exemption from income-tax. For instance, if the trustees spent the net income solely and wholly for the purposes mentioned under sub-cl. (a) to the exclusion of those mentioned in sub-cl. (b) to (f) such income would still be exempt from taxation under s. 4(3)(i). The High Court, however, took the view that cl. 13 should be read as a whole along with the provisos and that so read the trust is primarily for the benefit of the relations or members of the family of Sir Sassoon David, Bart. It is pointed out that in applying the net income for the purposes mentioned in sub-cl. (a), the trustees are bound, under the first proviso, to give preference to the poor and indigent relations or members of the family of the said Sir Sassoon David, Bart., including therein distant and collateral relations. The second proviso, it is urged, makes it further clear that in the application of the income for the said purpose, the trustees are enjoined to apply not less than half the income for the benefit of the members of the Jewish community of Bombay only "including the relations of Sir Sassoon David, Bart., as aforesaid" and the Jewish objects. Emphasis is laid on the words "not less than half" as indicating that it is permissible for the trustees to spend more than half and indeed the whole of the net income for the benefit of the said relations or members of the family of the said Sir Sassoon David, Bart. It is also pointed out that, although the remaining income, if any, has to be spent for the benefit of all persons and objects including Jewish persons and objects, the trustees could, if they so wished, spend the same also for the relations or members of the family of Sir Sassoon David, Bart. as Jewish persons. The argument, which found favour with the High Court, is that the provisos impose a mandatory obligation on the trustees (i) to give preference to the poor and indigent relations or members of the family of Sir Sassoon David, Bart. and (ii) to spend not less than half the income, which may extend to the entire income, for the benefit of the relations or members of the family of Sir Sassoon David, Bart. The High Court points out that in view of the language of cl. 13 of the deed read as a whole, it is open to the trustees, without being guilty of any breach of trust, to spend the entire net income of the trust fund for the purpose of giving relief to the poor and indigent relations or members of the family of the said Sir Sassoon David, Bart., including therein the distant and collateral relations and such being the position, the High Court came to the conclusion that it could not be said that the property was held wholly or partly for religious or charitable purposes involving an element of public utility. The High Court, accordingly, held that the income from the trust fund was not exempt from taxation under s. 4(3)(i) and answered both the questions in the negative. The problem before us is whether the High Court was right in so answering the questions.

In coming to the decision that it did, the High Court relied on its own earlier decision in the case of *Trustees of G. G. Trust v. Comr. I. T.*¹ The facts in that case, however, were somewhat different from the facts now before us. In that case the trust was significantly enough described as "Gordhandas Govindram Family Charitable Trust". Clause 2 of that trust deed provided for the application of the net income in giving help or relief to such poor Vaishyas and other Hindoos as the trustees might consider deserving of help in the manner and to the extent specified in the said trust deed and subject to the conditions and directions stated in the next following clauses. Sub-clause (a) of cl. 3 provided that Vaishya Hindoos who were members of the Seksharia family should be preferred to poor Vaishyas not belonging to the said family. Maintenance had to be provided under sub-cl. (b) for the poor male descendants of the settlor and under sub-cl. (c) for the poor female descendants of the settlor. Marriage expenses were provided under sub-cl. (d) for the poor male descendants and under sub-cl. (e) for the poor female descendants of the settlor. There were other sub-clauses providing for payment of money to the poor male or female descendants of the other members of the

Sekaria family. In the present judgment now under appeal, the High Court recognises that the particular trust they were dealing with in the earlier case "was a fairly blatant illustration of a settlor trying to benefit his own family and his own relations" and states that in the earlier case it had pointed out "that the benefit to the public was too remote and too illusory and accordingly held that that was not a trust which had for its object a general public utility". Such, however, cannot be said of the provisions of the present Deed of Declaration of Trust. Under cl. 13 the trustees are at liberty to hold the trust fund and to apply the net income thereof for all or any of the six purposes mentioned therein. The relations or members of the family of the said Sir Sassoon David, Bart., including therein distant and collateral relations do not figure as direct recipients of any benefit under sub-cl. (b) to (f) and, therefore, in so far as those purposes are concerned the trust certainly involves an element of public utility. We are not unmindful of the fact that it is open to the trustees to spend the net income entirely for the purpose referred to in sub-cl. (a) to the exclusion of the other clauses. But the very fact that the relations or members of the family do not come in directly under any of those latter sub-clauses cannot be ignored, for they certainly have some bearing on the question as to who or what were the primary objects of the trust as a whole. In the next place, the purpose of sub-cl. (a) is the "relief and benefit of the poor and indigent members of Jewish or any other community of Bombay or other parts of India or of the world". It is conceded by learned counsel that this sub-clause clearly expresses a general charitable intention involving an element of public utility. It follows, therefore, that sub-cl. (a) constitutes a valid public charitable trust having as its beneficiaries the several classes of persons referred to therein. This is the first position. We then pass on to the provisos. The first proviso opens with the words "in applying the income as aforesaid". This takes us back to sub-cl. (a). The meaning of the proviso obviously is that in applying the income for the purpose of sub-cl. (a), the trustees shall give preference to the poor and indigent relations or members of the family of Sir Sassoon David, Bart. The proviso does not operate independently, but comes into play only "in applying the income as aforesaid". The provision for giving preference involves the idea of selection of some persons out of a bigger class envisaged in sub-cl. (a). The poor and indigent relations or members of the family can claim to participate in the benefits under the trust only if they come within one of the several classes enumerated in sub-cl. (a). To take an extreme example: If a poor and indigent relation of Sir Sassoon David, Bart., abjures the faith held by the Jewish community and does not adopt any other faith and thus ceases to be a member of the Jewish community but does not become a member of any other community, he will certainly not be entitled to the benefits of sub-cl. (a) although he is a poor and indigent relation or member of the family of Sir Sassoon David, Bart., within the meaning of the first proviso. In other words, sub-cl. (a) prescribes the primary class of beneficiaries out of which the actual beneficiaries are to be selected by the application of the provisions of the provisos, that is to say, by giving preference to the relations or members of the family of the said Sir Sassoon David, Bart. The case of *Koettgen's Will Trusts*, In re² appears to us, on the facts, to be more in point than the case of *Gordhandas Govindram Family Charity Trust* case (supra) relied on by the High Court. In the last mentioned English case the testatrix bequeathed her residuary estate upon trust for the promotion and furtherance of commercial education. The persons eligible as beneficiaries under the fund were stated to be

"persons of either sex who are British born subjects and who are desirous of educating themselves or obtaining tuition for a higher commercial career but whose means are insufficient or will not allow of their obtaining such education or tuition at their own expense..."

"The testatrix further directed that in selecting the beneficiaries

"It is my wish that the...trustees shall give a preference to any employees of John Batt & Co. (London) Ltd. or any members of the families of such employees; failing a sufficient number of beneficiaries under such description then the persons eligible shall be any persons of British birth as the...trustees may select.

Provided that the total income to be available for benefitting the preferred beneficiaries shall not in any one year be more than 75 per cent of the total available income for that year." (p. 254)

It was held, on a construction of the will, that the gift to the primary class from which the trustees could select the beneficiaries contained the necessary element of benefit to the public and that it was when that class was ascertained that the validity of the trust had to be determined, so that the subsequent direction to prefer, as to the 75 per cent. of the income, a limited class did not affect the validity of the trust which was accordingly a valid and effective charitable trust. Referring to the first part of the will Upjohn J. at p. 257 said:—

"If the will concluded there, the trust would clearly be a valid charitable trust, having regard to the admission that a gift for commercial education is for the advancement of education."

Then after stating that the next task was to make a selection from that primary class of eligible persons, the learned Judge continued (p. 257):—

"It is only when one comes to make a selection from that primary class that the employees of John Batt & Co. and the members of their families come into consideration, and the question is, does that direction as to selection invalidate the primary trust? In my judgment it does not do so."

Further down he said (p. 258):—

"In my judgment it is at the stage when the primary class of eligible persons is ascertained that the question of the public nature of the trust arises and falls to be decided, and it seems to me that the will satisfies that requirement and that the trust is of a sufficiently public nature."

The learned Judge then concluded (p. 259):—

"If, when selecting from that primary class the trustees are directed to give a preference to the employees of the company and members of their families, that cannot affect the validity of the primary trust, it being quite uncertain whether such persons will exhaust in any year 75 per cent. of the trust fund. On the true construction of this will, that is not (as to 75 per cent.) primarily a trust for persons connected with John Batt & Co., and the class of persons to benefit is not 'confined' to them, and in my judgment the trust contained in clauses 7 and 8 of the will of the testatrix is a valid charitable trust."

It is true that this is a judgment of a single Judge, but it does not appear to have been departed from or over-ruled in any subsequent case and appears to us to be based on sound principle. Applying this test, there can be no question—indeed it has been conceded—that the earlier part of cl. 13, omitting the provisos, constitutes a valid public charitable trust. The circumstance that in selecting the beneficiaries under sub-cl. (a) preference has to be given, under the provisos, to the relations or members of the family of Sir Sassoon David, Bart., cannot affect that public charitable trust. In our judgment, the facts of this case come nearer to the facts of the English case referred to above than to the facts of the earlier decision of the Bombay High Court in *Gordhandas Govindram Family Charity Trust* case. As we have already stated the relations or members of the family are clearly not the primary object contemplated by sub-cl. (b) to (f). The first part of sub-cl. (a), omitting the provisos, is not said to be too wide or vague and unenforceable. The provision for giving preference to the poor and indigent relations or the members of the family of Sir Sassoon David, Bart., cannot affect the public charitable trust constituted under sub-cl. (a). In our opinion the income from the trust properties comes within the scope of s. 4(3)(i) and is, therefore, entitled to exemption. Therefore the negative answer given by the High Court to question No. 1 cannot be supported and that question should be answered in the affirmative. In this view of the matter, question No. 2

does not arise and needs no answer. The result is that this appeal must be allowed and question No. 1 must be answered in the affirmative. The appellants will have the costs of the reference in the High Court and of this appeal in this Court.

Appeal allowed.

Present: The Hon'ble Mr. S. R. Das, Chief Justice, Mr. Justice Bhagwati and Mr. Justice M. Hidayatullah.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY II, BOMBAY
v.
RANCHHODDAS KARSONDAS.*

Indian Income-tax Act (XI of 1922), Secs. 34, 22—Assessee making 'voluntary' return showing income below maximum not chargeable to tax—Income-tax Officer issuing notice under s. 34 upon assessee to submit return—Assessee submitting similar return and Income-tax Officer completing the assessment of assessee—Whether notice under s. 34 and assessment thereon valid.

For the assessment year 1945-46 a public notice under s. 22(1) of the Indian Income-tax Act, 1922, was published on May 1, 1945. On January 5, 1950, the assessee submitted a "voluntary" return of his income for the assessment year 1945-46 showing a total net income which was below the maximum not chargeable to tax. The Income-tax Officer did not act on this return, but on February 27, 1950, he issued a notice purporting to be under s. 34 of the Act calling upon the assessee to submit his return. This notice was served on the assessee on March 3, 1950, and the assessee submitted a return similar to his previous return. The Income-tax Officer then completed the assessment of the assessee for the assessment year 1945-46 on February 28, 1951. On the question whether the notice issued under s. 34 and the assessment thereon were valid in law:—

Held, that as the return was already filed by the assessee on January 5, 1950, there was neither an omission nor a failure on the part of the assessee nor was there any question of assessment 'escaping' and, therefore, the notice under s. 34(1) and the consequent assessment were invalid.

*Harakchand Makani & Co. v. Commr. of Inc.-tax,*¹ approved.

*Commr. of Agri. Inc.-tax v. Sultan Ali,*² *R. K. Das & Co. v. Commr. of Inc.-tax*³ and *Commr. of Inc.-tax v. Govindlal Dutta,*⁴ overruled.

*All India Groundnut Syndicate v. Comr. I.T.*⁵ and *P. S. Rama Iyer v. Commr. of Inc.-tax,*⁶ referred to.

THE facts are stated at 56 *Bombay Law Reporter* 722.

K. N. Rajagopal Sastri and *D. Gupta*, for the appellant.

R. J. Kolah and *Ram Ditta Mal*, for the respondent.

HIDAYATULLAH J. This appeal on a certificate of fitness granted by the High Court of Judicature at Bombay has been filed by the Commissioner of Income-tax, Bombay, against Ranchhoddas Karsondas of Bombay (hereinafter referred to as the assessee) under s. 66A of the Indian Income-tax Act.

The facts leading up to this appeal are as follows: For the assessment year 1945-46, a public notice under s. 22(1) of the Income-tax Act (hereinafter called the Act) was issued, requiring every person whose total income during the previous year exceeded the maximum amount which was not chargeable to income-tax to furnish, within such period not being less than sixty days as might be specified in the notice, a return of his income in the prescribed form and verified in the prescribed manner. This notice was published on or about May 1, 1945.

*Decided, May 8, 1959. Civil Appeal No. 281 of 1955.

¹ (1948) 16 L. T. R. 119, s.o. 50 Bom. L.R. 315.

² (1951) 20 L.T.R. 432.

³ (1956) 30 L.T.R. 439.

⁴ (1957) 33 L.T.R. 630.

⁵ (1953) 55 Bom. L.R. 970.

⁶ (1957) 32 L.T.R. 453.

The assessee did not make a return of his income. The Income-tax Officer, while examining the books of account of a partnership called the "Assar Syndicate" of which the assessee was a partner, found that in the account year corresponding to the assessment year 1945-1946, there were six cash credits aggregating to Rs. 59,026 in the name of the assessee's wife. Before, however, the Income-tax Officer could take any action, the assessee submitted a "voluntary" return on January 5, 1950, of his income for the accounting year 1944-1945 (assessment year 1945-1946) showing a total net income of Rs. 1,935. He added a footnote to the return to the following effect:

"My wife has sold her old ornaments and deposited the sum of Rs. 59,026 in the firm of Assar Syndicate in which I am a partner."

The Income-tax Officer did not act on this return, but on February 27, 1950, he issued a notice purporting to be under s. 34 of the Act calling upon the assessee to submit his return. This notice was served on the assessee on March 3, 1950, and in answer thereto, the assessee submitted a similar return on March 14, 1950, showing the same income and adding the same footnote. The Income-tax Officer then issued and served upon the assessee notices under ss. 22(4) and 23(2) of the Act asking him to produce his books of account and to tender any evidence he cared to lead. It appears from the record that these notices were complied with, but on February 26, 1951, the Income-tax Officer included the sum of Rs. 59,026 in the total income of the assessee and assessed him on it for the assessment year 1945-1946.

The assessee appealed, in turn, to the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal. His contentions were three, viz., that the amount of Rs. 59,026 could not and should not have been included in his income, that the amended s. 24 of the Act had no retrospective effect, and that the assessment completed on February 26, 1951, was invalid, inasmuch as it was completed four years after the end of the relevant assessment year. Both the Appellate Assistant Commissioner as well as the Tribunal rejected his contentions, but the Tribunal on being moved by him, raised and referred two questions of law under s. 66(1) of the Act to the High Court of Judicature, Bombay, for its decision. These questions were:

"(1) Whether the notice issued under Section 34 of the Act by the Income-tax Officer on 27-2-1950 after the assessee had filed a voluntary return was valid in law?

(2) Whether the assessment made on 26-2-1951 is valid in law?"

This reference was heard by the High Court on March 18, 1954, and by a judgment delivered on the same day, Chagla C.J. and Tendolkar J. answered both the questions in the negative. Before the High Court, it was again contended by the assessee that since he had submitted a return under s. 22(3) of the Act on January 5, 1950, the assessment, if any, had to be completed before March 31, 1950, as required by s. 34(3) of the Act. He also contended that he was entitled under s. 22(3) to make a "voluntary" return on the date he did, and with a voluntary return before the Income-tax Officer, there was no scope for the issuance of a notice under s. 34. The High Court upheld the contentions of the assessee, and gave its opinion that the Department ought to have issued a notice under s. 22(2) within the assessment year, and if no return was made within the time fixed by the notice, the Department should have proceeded under s. 23(4) to a 'best judgment' assessment. The other alternative for the Department was to issue a notice under s. 34 of the Act, if the period for sending a notice under s. 22(2) had expired. But it could not issue a notice under s. 34 after a return was already made before it, and the benefit of the extended period of limitation for assessment available under the first proviso to sub-s. (3) of s. 34 of one year from the service of the notice under sub-s. (1) of that section was not available in this case. The High Court granted a certificate of fitness, and hence this appeal.

The arguments which were urged before the High Court were all raised in this Court by the parties. The case of the Department was supplemented by an argument that, inasmuch as the assessee had suppressed his income or given

incorrect particulars thereof, the period during which action under s. 34 could be taken was the extended one of eight years.

In the arguments before us, our attention was drawn to a cleavage of opinion between the Bombay High Court on the one hand and the Calcutta High Court on the other. While the Bombay High Court seems to be of the view that a "voluntary" return showing a non-taxable income is still a good return for all purposes under the Act, the Calcutta High Court is of the view that what s. 22(1) of the Act requires is a return of taxable income and not a return of income, which shows a loss or is below the taxable limit. It appears that at one time the Calcutta High Court also entertained the view that such a return was no return at all, but it was explained later that this meant that the return was ineffective for the purposes of s. 22(1) of the Act, though it might be a "return" being in the prescribed form. The Bombay High Court also entertains the view that the assessment proceedings commence with the issue of a public notice, and that s. 34 of the Act cannot apply, where in answer to the public notice a return is made whether of taxable income or not. The view of the Calcutta High Court is that assessment proceedings commence either with a notice under s. 22(2) of the Act or with the filing of a return showing taxable income.

We are not here concerned with the quantum but only with the legality of the assessment. The side issue whether, in point of fact, the cash credits in the name of the wife represented the income of the husband does not survive for decision. Thus, the only question is whether the notice issued under s. 34 of the Act on February 27, 1950 (after the assessee filed his "voluntary" return on January 5, 1950) and the assessment thereon, were valid in law. Section 24(3) of the Act provides that no assessment except the assessment within cl. (a) of sub-s. (1) thereof or under s. 23 to which cl. (c) of sub-s. (1) of s. 28 applies, shall be made after the expiry of four years from the end of the year in which income, profits or gains were first assessable. A proviso, however, allows one year from the date of the service of the notice for the completion of the assessment. It reads, omitting matters not relevant here:—

"...where a notice under sub-section (1) has been issued within the time therein limited, the assessment or reassessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if such period exceeds the period of...four years..."

It is, therefore, quite clear that the extra period is available only if a notice under sub-s. (1) of s. 34 has been issued within the time therein limited. This takes us to s. 34(1).

Section 34(1), omitting parts not relevant, reads:—

"(1) If...

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22, for any year..., or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year,...

he may in cases falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, ...a notice...and may proceed to assess such income..."

It would appear from this that if the return filed on January 5, 1950, was a return of income, there was no failure or omission on the part of the assessee, so as to bring the matter within s. 34(1)(a) of the Act, and sub-s. (3) of s. 34 would then apply to the case limiting the period to four years. In that event, the assessment should have been completed on or before March 31, 1950. But if the return made by the assessee was no return to all, then the conditions under the first sub-section of s. 34 obtained, and the assessment could be completed within one year of the date of service of the notice (March 3, 1950) i.e. on or before March 2, 1951. In that event, the assessment would be valid.

The validity of the return in this context is tied to the validity of the notice and also *vice versa*.

Section 22 of the Act (omitting the parts not relevant) may now be quoted:

"(1) The Income-tax Officer shall, on or before the 1st day of May in each year, give notice, by publication in the press..., requiring every person whose total income during the previous year exceeded the maximum amount which is not chargeable to income-tax to furnish, within such period not being less than sixty days...a return, ...setting forth...his total income and total world income during that year:...

(2) In the case of any person whose total income is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax, the Income-tax Officer may serve a notice upon him requiring him to furnish, within such period, not being less than thirty days...a return...setting forth...his total income and total world income during the previous year....

(3) If any person has not furnished a return within the time allowed by or under sub-section (1) or sub-section (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return, as the case may be, at any time before the assessment is made."

It will be seen from this, that, as the Bombay High Court correctly pointed out, there is a time limit provided in sub-ss. (1) and (2) and the failure or omission occurs when that period passes, but sub-s. (3) allows a *locus poenitentiae* before the assessment is actually made. There is no dispute that a return could be filed in this case, late though it was. The controversy centres round the fact that the return, when it was filed, disclosed an income which was below the maximum not chargeable to tax, and the question is whether in such an event the Income-tax Officer was precluded from issuing a notice under s. 34 of the Act. There has been in the past a well-marked difference of opinion between the Bombay and the Calcutta High Courts, the leading cases in Bombay being *Harakchand Makanji & Co. v. Commr. of Inc.-tax*¹, *All India Groundnut Syndicate v. Comr. I.T.*² and the decision under appeal here, while the Calcutta view is to be found in *Commr. of Agri. Inc.-tax v. Sultan Ali*,³ *R. K. Das & Co. v. Commr. of Inc.-tax*⁴ and *Commr. of Inc.-tax v. Govindalal Dutta*⁵. To these may be added *P. S. Rama Iyer v. Commr. of Inc.-tax*,⁶ in which the Madras High Court has accepted the Bombay view.

No useful purpose will be served in discussing these cases in detail. In some of them, the point need not have been taken up for decision, though it was. We shall refer very briefly to the two rival views and the grounds on which they are rested, and in doing so, we begin with the Calcutta decisions. In *Sultan Ali Gharami's* case, a notice under s. 24(1) of the Bengal Agricultural Income-tax Act (corresponding to s. 22(1) of the Act) was issued. No return was filed. Three years later, a notice under s. 24(2) of that Act (corresponding to s. 22(2) of the Act) was served, and a return showing an income below the taxable minimum was filed. The contention was that without a notice under s. 24(2) within the assessment year or a notice under s. 38(1) (corresponding to s. 34(1) of the Act) the 'best judgment' assessment was bad. The contention further was that the return could be taken to be under s. 24(1) or s. 24(3). Chakravarti J. (as he then was) and Das Gupta J. held that a person who had no assessable income was not placed under a duty to file a return, that the return whether filed under s. 24(1) or s. 24(3) which had failed to show an assessable income could not possibly be 'treated' as a return under s. 24(1) or even s. 24(3) when filed in answer to a notice under s. 24(2). They further observed (p. 442):

"A return under section 24(1) is a return filed by a person who decides for himself that he had an assessable income in the previous year and by filing the return he

1 (1948) 16 I.T.R. 119, s.c. 50 Bom. L. R.

315.

2 (1953) 55 Bom. L.R. 970.

3 (1951) 20 I.T.R. 432.

4 (1956) 30 I.T.R. 439.

5 (1957) 33 I.T.R. 630.

6 (1957) 32 I.T.R. 458.

offers that income for assessment. A person who had no assessable income in the previous year is placed under no duty by a notice under section 24(1) to furnish a return and a person who thinks, rightly or wrongly, that he had no assessable income will furnish none. A return under section 24(1), whether filed within the time allowed under the section or filed subsequently under the provisions of section 24(3), will therefore show an assessable income... A return, which showed no assessable income, could not possibly be 'treated' as a return filed under section 24(1) or a return called for under that section but filed under section 24(3), when in fact it was filed in response to a notice under section 24(2)."

The opinion here expressed was criticised in the judgment under appeal, and in the next case, *R. K. Das & Co. v. Commr. of Inc.-tax*, the Calcutta High Court (Chakravarti C.J. and Sarkar J.) explained what was really meant. It is not necessary to refer to the facts of that case. This is what Chakravarti C.J. observed at p. 449:

"It should be remembered", I observed, 'that the return in the present case is being sought to be treated as a return under section 24(1), belatedly filed.' And then I went on to say that a return under section 24(1) would only be filed by a person who thought that he had a taxable income and therefore a return showing an income below the taxable limit could not be held, on a construction thereof, to be a return under section 24(1) and consequently the return in the case we were then considering could not be treated as such a return filed under section 24(3). To say that, was not so say that even a return filed in compliance with a notice under section 22(2), if filed belatedly under section 22(3), could not be a return showing an income below the taxable limit."

This left the matter somewhat ambiguous as to what was really meant, and in *Commr. of Inc.-tax v. Govindalal Dutta*, Chakravarti C.J. and Guha J. again explained the true import of the law laid down. They referred to s. 22(1) of the Act as it stood prior to the amendment of 1953, and observed that under that section a person was required to file a return only if his total income during the preceding year exceeded the maximum amount which was not chargeable to tax. The return contemplated was thus only a return of income and not a return of loss and not even a return of income, but a return of taxable income. Not only had a person no duty but he had even no right to file a return voluntarily, if he had suffered a loss, to 'report' that loss. The learned Judges concluded that it was a complete mistake to think that s. 22(3) provided for the filing of a voluntary return showing loss, at any time, before assessment. That section, they opined, contemplated the filing of a return of taxable income, and a return not showing such income was not a return at all in law.

The Calcutta view, as shown above, really proceeds upon the wording of s. 22(1). It lays down that the public notice requires only persons having an income above the taxable limit to make a return. A person who has no such income need not make a return, and if he does make a return, it is not a return which need be considered, being not a return in law.

It is a little difficult to understand how the existence of return can be ignored, once it has been filed. A return showing income below the taxable limit can be made even in answer to a notice under s. 22(2). The notice under s. 22(1) requires in a general way what a notice under s. 22(2) requires of an individual. If a return of income below the taxable limit is a good return in answer to a notice under s. 22(2), there is no reason to think that a return of a similar kind in answer to a public notice is no return at all. The conclusion does not follow from the words of s. 22(1). No doubt, under that subsection only those persons are required to make a return, whose income is above taxable limits, but a person may legitimately consider himself entitled to certain deductions and allowances, and yet file a return to be on the safe side. He may show his income and the deductions and allowances he claims. But it may be that on a correct processing his income may be found to be above the exempted limit. No doubt, it is futile for a person not liable to tax to rush in with a return, but the return in law is not a mere scrap of paper. It is a return, such as the assessee considers, represents his true income.

We are unable (and we say this with due respect) to accept the view adumbrated in the Calcutta cases. The contrary view is expressed by the Bombay High Court in the earlier case of *Harakchand Makanji & Co. v. Commr. of Inc.-tax* and in the judgment under appeal. That view was accepted by the Madras High Court in *P. S. Rama Iyer v. Commr. of Inc.-tax* and also, in our opinion, is the sounder view of the two. In the earlier of the two Bombay cases, Chagla C.J. and Tandolkar J. held (as stated in the headnote):

"Notice under section 34 is only necessary if at the end of the assessment year no return has been made by the assessee, and the authorities wished to proceed under section 22(2), but where the assessee himself chooses voluntarily to make a return, no question can arise under section 34 of assessment escaping, and therefore there is no necessity to serve any notice under section 34."

This represents the law applicable to the facts as they are to be found in this case. In the assessment year no return of income was filed, nor was any notice served under s. 22(2). There was, however, the general notice under s. 22(1). A return in answer to that notice could be filed under s. 22(3) before assessment, and for this there is no limit of time. It was filed on January 5, 1950. There was nothing to prevent the Income-tax Officer from taking up the return and proceeding to assess the income of the assessee. It was open to him, if there was sufficient justification for it, to hold that the amount noted in the footnote was really the assessee's income, in which case an assessable income would have been found and the tax could be charged thereon. If the Income-tax Officer had acted on that return and assessed the assessee before March 31, 1950, the assessment would have been valid. He chose to ignore the return, and served on the assessee a notice under s. 34(1). This notice was improper, because with the return already filed, there was neither an omission nor a failure on the part of the assessee, nor was there any question of assessment 'escaping'. The notice under s. 34(1) was, therefore, invalid and the consequent assessment, equally so. We accordingly agree with the judgment under appeal.

Before leaving this case, we may refer to two other arguments, which were raised. Mr. Rajagopala Sastri pointed out that an assessee might file the 'voluntary' return on the last day showing income less than the taxable limit, and the Department would, in that case, be driven to complete the assessment proceedings within a few hours or lose the right to send a notice under s. 34(1). An argument *ab inconvenienti* is not a decisive argument. The Income-tax Officer could have avoided the result by issuing a notice under s. 23(2) and not remaining inactive until the period was about to expire. Further, all laws of limitation lead to some inconvenience and hard cases. The remedy is for the Legislature to amend the law suitably. The Courts can administer the laws as they find them, and they are seldom required to be astute to defeat the law of limitation. This argument is thus no answer to the clear meaning and implications of the Act.

The other argument was that the return was not a true one, and fell within the mischief of cl. (c) of sub-s. (1) of s. 28, and that, therefore, the period during which action could be taken was the extended one of 8 years. The short answer to that is that this was not a part of the Department's case at any prior stage, and cannot be allowed to be raised now.

In our opinion, the answers given by the High Court of Bombay were correct in all the circumstances of this case.

The appeal thus fails, and is dismissed with costs.

Appeal dismissed.

Present: The Hon'ble Mr. S. R. Das, Chief Justice, Mr. Justice Bhagwati and Mr. Justice M. Hidayatullah.

THE NEW JEHANGIR VAKIL MILLS LTD. v. THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH, CUTCH AND SAURASHTRA.*

Indian Income-tax Act (XI of 1922), Sec. 66(4)—Nature, scope and extent of jurisdiction vested in High Court under s. 66(4)—Whether High Court can raise a new question of law not arising out of Tribunal's order and submit supplementary statement of case—Scope of directions given by High Court under s. 66(4).

Section 66(4) of the Indian Income-tax Act, 1922, does not enable the High Court to raise a new question of law which does not arise out of the Tribunal's order and direct the Tribunal to investigate new or further facts necessary to determine this new question which had not been referred to it under s. 66(1) or s. 66(2) of the Act and direct the Tribunal to submit a supplementary statement of case.

Even though the terms of s. 66(4) are wide enough to comprise "such additions thereto or alterations therein as the Court may direct in that behalf" the scope of such directions has got to be read in the context of and in conjunction with the provisions of ss. 66(1) and 66(2) and under the guise of that direction the High Court cannot refer the case back to the Tribunal to find new facts or embark upon a new line of enquiry which would enable either the assessee or the Commissioner to make out a case which had never been made during the course of the proceedings before the Income-tax authorities or the Tribunal so far. Such additions thereto or alterations therein as the Court may direct in that behalf are additions of facts to the statement of case or alterations therein which though they were part of the record before the Income-tax authorities or the Tribunal, were not incorporated in the statement of case drawn up by the Tribunal either because such facts or statements though contained in the record were not found by the Tribunal or were omitted to be incorporated in the statement of case drawn up by it.

Craddock (H. M. Inspector of Taxes) v. Zevo Finance Co., Ltd.,¹ *Commr. of Inc.-tax v. State Bank of India*,² *Indl. Development Etc. Co. Ltd. v. Commr. of E.P.T.*,³ *Vadilal Ichhachand v. Commr. of Inc.-tax*,⁴ *Commissioner of Inc.-tax v. Bhurangya Coal Co.*,⁵ *Commr. of Inc.-tax, B. & O. v. Visweshwar Singh*,⁶ and *Sunder Singh Majithia v. Commr. of Inc.-tax*,⁷ referred to.

THE facts are stated in the judgment.

R. J. Kolah and *I. N. Shroff*, for the appellant.

H. N. Sanyal, Additional Solicitor General of India, with *K. N. Rajagopala Sastri* and *D. Gupta*, for the respondent.

BHAGWATI J. This appeal with special leave arises out of a judgment and order of the High Court of Judicature at Bombay dated September 23, 1955, delivered in Income-tax Reference No. 19 of 1955 made by the Income-tax Appellate Tribunal (hereinafter referred to as "the Tribunal") to the High Court under s. 66(1) of the Indian Income-tax Act (XI of 1922)—(hereinafter referred to as "the Act")—whereby the High Court directed the Tribunal to submit a supplementary statement of case on the points mentioned therein.

The appellant is a limited liability company manufacturing textile goods at Bhavnagar which was an Indian State during the assessment years 1943-44 and 1944-45. For the said assessment years the appellant was held to be a non-resident, its years of account being calendar years 1942 and 1943. For the assessment years 1943-44 and 1944-45 (account years 1942 and 1943), the Income-tax Officer computed the British Indian Income of the appellant on a

*Decided, May 12, 1959. Civil Appeal No. 50 of 1957.

1 (1946) 27 T.C. 267.

2 (1957) 31 I.T.R. 545, 551.

3 (1957) 31 I.T.R. 688, 695.

4 (1957) 32 I.T.R. 569, 573.

5 (1958) 34 I.T.R. 802, 805.

6 (1939) 7 I.T.R. 536, 554.

7 (1942) 10 I.T.R. 457, s.c. 45 Bom. L.R.

9, P. C.

proportionate basis under s. 4(1)(a) of the Act. In the account year 1942 its total sales amounted to Rs. 66,14,852 out of which sale proceeds amounting to Rs. 35,92,157 as detailed below were held by the Income-tax Officer to have been received in British India:—

Cheques on the Imperial Bank issued by the Supply Department of the Government of India	Rs. 2,58,987
Sale proceeds received through Trikamlal Mahasukhrum	Rs. 20,24,190
Other cheques received at Bhavnagar but drawn on Banks in British India	Rs. 13,08,980
	Rs. 35,92,157

The Income-tax Officer computed the income of the appellant at Rs. 27,11,136 on a proportionate basis i.e. proportionate to the sales in and outside British India. He held that the income amounting to Rs. 14,72,267 was received in British India under s. 4(1)(a) of the Act. There was no dispute in regard to the sale proceeds received through Trikamlal Mahasukhrum.

In respect of the assessment year 1944-45 corresponding to the account year 1943 the Income-tax Officer held that sale proceeds amounting to Rs. 16,72,693 received by the appellant by cheques from the Supply Department of the Government of India on British India Banks were taxable under s. 4(1)(a) of the Act. The figure of Rs. 16,72,693, according to the appellant, was a mistake for Rs. 12,97,631.

The appellant had contended that the amounts had been received at Bhavnagar, by cheques drawn on banks in British India. The Revenue had not disputed the fact that the cheques had been actually received at Bhavnagar, but had contended that payments by cheques, though such cheques were received at Bhavnagar, were received in British India at the time and the place where the cheques were ultimately cashed and honoured by the banks on which the cheques were drawn and that until such encashment of the cheques, the monies could not be said to have been received by the appellant.

The appellant preferred appeals to the Appellate Assistant Commissioner, Ahmedabad Range, against this order of the Income-tax Officer for the said two assessment years. The Appellate Assistant Commissioner by his two separate orders confirmed the orders of the Income-tax Officer and held that the cheques were not legal tender and were not monies or monies worth as such and that the receipt of cheques at Bhavnagar was not receipt of money. The receipt of money, according to the Appellate Assistant Commissioner, took place on actual payments by the drawee banks and he, therefore, held that the said amounts were taxable under s. 4(1)(a) of the Act.

A further appeal was taken by the appellant to the Tribunal against the said orders of the Appellate Assistant Commissioner and the Tribunal by its consolidated order for both the years, dated July 17, 1952, held that the cheques for the said amounts of Rs. 2,58,987 and Rs. 13,08,987 in respect of the assessment year 1943-44, were received at Bhavnagar and that the sale proceeds were also received in Bhavnagar. The Tribunal stated *inter alia* as follows:—

“There is no evidence that the cheques from Government were received in Bhavnagar. It is not the Department's case that the assessee company has a registered office elsewhere. The presumption is that the letters containing the cheques were addressed to the assessee company at Bhavnagar. We therefore hold that the cheques were received from Government at Bhavnagar and that the money was also received in Bhavnagar.”

In doing so, the Tribunal followed the judgment of the Bombay High Court in the case of *Kirloskar Bros. v. Commr. I.T.*¹ In view of the fact, however,

that an appeal had been filed in this Court against that decision of the Bombay High Court the Tribunal further stated:—

"We might point out that in case the Supreme Court does not uphold the Bombay High Court decision in *Kirloskar* case an enquiry will have to be made as to whether the ~~assessee~~ company's banks at Ahmedabad acted as the ~~assessee~~ company's agents for collecting the money due on the cheques."

In respect of the assessment year 1944-45, the Tribunal, after directing the Income-tax Officer to verify the correctness of the figure of the amounts received by the appellant by cheques from the Government (i.e., whether it was Rs. 12,97,631 as contended for by the appellant or Rs. 16,72,693 as held by the Income-tax Officer or any other figure), held that the cheques representing the said amount were received at Bhavnagar and the monies or sale proceeds were also received in Bhavnagar. The Tribunal also held that another amount of Rs. 5,53,447 in respect of the said latter year, being the aggregate amount of the cheques received at Bhavnagar from other merchants was also received in Bhavnagar.

It may be pointed out that neither did the Income-tax Officer, when the proceedings were before him, or when the proceedings were before the Appellate Assistant Commissioner, nor did the Revenue, when the proceedings were before the Tribunal, at any stage contend that the cheques aggregating to the said amounts in the said two years were not received at Bhavnagar because of the alleged posting of the cheques in British India and/or by reason of the allegation that the cheques were sent by post and/or that the post office was the agent of the appellant and that too, in spite of the decision in the case of *Kirloskar Bros.* which decision had already been pronounced by then and where the said question had been debated and argued by the Revenue. The only ground urged by the Revenue at all material stages was that because the amounts which were received, from the merchants or the Government, were received by cheques drawn on banks in British India which were ultimately encashed in British India, the monies could not be said to have been received in Bhavnagar though the cheques were in fact received at Bhavnagar.

Being aggrieved by the said decision of the Tribunal, the respondent (Commissioner of Income-tax) filed two applications under s. 66(1) of the Act requesting the Tribunal to draw up a statement of the case and refer the question of law arising out of the order of the Tribunal to the High Court.

In the said applications the facts which were admitted and/or found by the Tribunal and which were necessary for drawing up a statement of the case were stated as under:—

"Regarding items of Rs. 2,58,987 and Rs. 12,97,631 received from the Government of India in the accounting years relevant to the assessment for 1943-44 and 1944-45 respectively the amounts were received by cheques drawn on the Imperial Bank of India. No evidence was produced by the ~~assessee~~ at any stage even before the Appellate Tribunal, that the cheques were received at Bhavnagar, nor was any evidence produced to show that these cheques were received as unconditional discharge of debtor's liability. These cheques were collected by the Company's bankers in British India. The Income-tax Officer, therefore, held that the amount was received in British India. The Appellate Assistant Commissioner confirmed the Income-tax Officer's action. The Tribunal, however, relied upon the Bombay High Court decision in *Kirloskar Brothers'* case and held that the amount was received in Bhavnagar."

"As regards items of Rs. 13,08,980 and Rs. 5,53,447 received in the accounting years relevant to the assessments for 1943-44 and 1944-45 respectively, the relevant facts are that the company received these cheques and sent them to their bankers in Ahmedabad for collection...The Tribunal held that the sale proceeds were received at Bhavnagar on the basis of the Bombay High Court's decision in the *Kirloskar Brothers'* case without enquiring as to whether the cheques were received by the company in unconditional discharge of the drawer's liability."

On these facts the respondent submitted that the following questions of law arose out of the order of the Tribunal:—

"(i) Was there any evidence on the record to justify the Tribunal's finding that the mere receipt by the assessee of cheques of Rs. 2,58,987 and Rs. 13,08,980 in Bhavnagar amounted to receipt of the above amounts in Bhavnagar even though the said cheques had actually been cashed in British India and the proceeds thereof were credited to the assessee's accounts with certain Banks in British India?

(ii) Whether in the circumstances of this case, the income, profits and gains in respect of the sales amounting to Rs. 15,67,967 made to the Government of India and other customers were received in British India within the meaning of section 4(1)(a) of the Indian Income-tax Act?"

A similar statement of facts which were admitted and/or found by the Tribunal was also made in regard to the assessment year 1944-45 and similar questions of law were asked to be referred as in the case of the assessment year 1943-44 except in regard to the change in the figures necessitated by the differences in the amounts received.

These reference applications being Reference Applications Nos. 615 and 616 of 1952-53 were kept pending until the decision of this Court in the case of *Commissioner of Income-tax v. Kirlskar Bros. Ltd.*² This Court decided that appeal and the companion appeal *The Commissioner of Income-tax, Bombay South, Bombay v. Messrs. Ogale Glass Works Ltd., Ogale Wadi*³ on April 17, 1954, and the said Reference Applications were thereafter heard and decided by the Tribunal on November 8, 1954.

It is worthy of note that the decision of this Court in the said two cases proceeded on the basis that on the particular facts of those appeals the Post Office had acted as the agent of the assessee and that though the cheques were in fact received by post by the assessee outside British India, nevertheless, by reason of the fact that the assessee in the said two appeals had expressly requested the Government to remit the amounts by cheques, the assessee had constituted the Post Office their agent to receive, on their respective behalves, the said cheques which were posted by the Government at Delhi having addressed them to the assessee outside British India.

In spite of the said decisions, the Revenue did not urge before the Tribunal that the said aspect of the matter should in the present case also be referred to the High Court for its decision and the Reference applications were heard on the materials which were on the record before the Tribunal when it made its orders dated July 17, 1952. The said order of the Tribunal was based on the facts admitted and/or found by the Tribunal as stated in the Reference Applications made by the Revenue as aforesaid and this aspect of the case viz., whether any portion of these cheques were received by post and if so whether there was any request by the appellant express or implied that the amounts of those cheques should be remitted to Bhavnagar by post, had certainly not been canvassed before any of the income-tax authorities or before the Tribunal and did not find its place in the order of the Tribunal and any question of law appertaining thereto could not be said to arise out of the said order of the Tribunal.

On the materials as they stood on the record then, the Tribunal drew up on November 5, 1952, a statement of case in which all the facts and events above referred to were set out. Besides the same the Tribunal also referred in para. 8 thereof to two letters on the record which showed that the cheques from the Supply Department were received by post. It also annexed a sample agreement form on record between the appellant and its customers other than the Government and annexed thereto the copies of the Appellate Assistant Commissioner's orders for the assessment years 1943-44 and 1944-45. The two letters showing that the cheques from the Supply Department were received by post were evidently put in with a view to show that the order of the Tribunal dated July 17, 1952, was correct in making the presumption that the letters containing the cheques were addressed to the appellant at Bhavnagar and in

² [1954] 25 I.T.R. 547.

³ [1955] 1 S.C.R. 185, s.c. 56 Bom. L.R.

holding that the cheques were received from the Government at Bhavnagar. There was no other reason, so far as the record then stood, to make any reference to the said two letters. Out of the facts stated above the Tribunal raised the following question of law:—

“Whether the receipt of the cheques in Bhavnagar amounted to receipt of sale proceeds in Bhavnagar?”

The said Reference was heard by the High Court on September 23, 1955, and judgment was delivered the same day whereby the High Court held that it was not possible to answer the question in the absence of materials as to whether the cheques which were received in Bhavnagar were posted by the Government at the request of the appellant and the High Court observed:—

“The question that has been submitted to us by the Tribunal is whether the receipt of the cheques in Bhavnagar amounted to receipt of sale proceeds in Bhavnagar. This question over-looks the important aspect which was dealt with both by us in *Kirloskar's* case and also by the Supreme Court. Assuming that the cheques were received in Bhavnagar, the question still remains as to whether if the cheques were received by post, the post office was constituted the agent of the assessee or not. The mere receipt of cheques by post in Bhavnagar is not conclusive of the question raised by the Tribunal. Unless we are in a position to say whether the cheques were sent to Bhavnagar by post without there being a request express or implied by the assessee the mere receipt of the cheques in Bhavnagar would not constitute receipt of sale proceeds in Bhavnagar. When we look at the statement of the case there is no reference at all to this aspect of the case.”

The High Court further observed that the burden would be upon the Revenue to establish that the cheques which were received by post were so received at the request express or implied of the appellant and that therefore the Post Office was the agent of the appellant. But it observed in this context:—

“But we cannot shut out the necessary inquiry which even from our own point of view is necessary to be made in order that we should satisfactorily answer the question raised in the Reference. It must not be forgotten that under sec. 86(4) of the Income-tax Act we have a right independently of the conduct of the parties to direct the Tribunal to state further facts so that we may properly exercise our advisory jurisdiction.”

In the result, the High Court directed that a supplementary statement of case should be submitted by the Tribunal on the following points:—

“On the finding of the Tribunal that all the cheques were received in Bhavnagar, the Tribunal to find what portion of these cheques were received by post, whether there was any request by the assessee, express or implied, that the amounts which are the subject matter of these cheques should be remitted to Bhavnagar by post. Mr. Joshi concedes that to the extent that the cheques were not received by post but by hand, the receipt will be for the purpose of tax in Bhavnagar.”

The appellant filed a petition in the High Court on November 22, 1955, for the grant of a certificate under s. 66A(2) of the Act to appeal to this Court from the said judgment and order of the High Court. This application was dismissed by the High Court by its order dated December 8, 1955, with the result that the appellant presented on December 22, 1955, a petition in this Court for special leave to appeal from the said judgment of the High Court dated September 23, 1955. This Court by its order dated March 12, 1956, granted special leave to appeal, such leave being limited to the question whether the High Court had jurisdiction under s. 66(4) of the Act to call for a supplemental statement of case. This is how the appeal has come up for hearing and final disposal before us.

We have narrated the facts and events leading up to this appeal in such detail in order that we may have the proper perspective and the background against which the High Court directed the Tribunal to submit a supplementary statement of case on the points mentioned therein. The appeal raises an important question as to the nature, scope and extent of the jurisdiction vested in the High Court under s. 66(4) of the Act and we shall now address ourselves to that question.

The relevant provision of s. 66 of the Act may now be referred to:—

"66. (1) Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33 the assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court:

Provided that, if, in the exercise of its powers under sub-section (2), the Appellate Tribunal refuses to state a case which it has been required by the assessee to state, the assessee may, within thirty days from the date on which he receives notice of the refusal to state the case, withdraw his application and, if he does so, the fee paid shall be refunded.

(2) If on any application being made under sub-s. (1) the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner, as the case may be, within six months from the date on which he is served with notice of the refusal, apply to the High Court, and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition the Appellate Tribunal shall state the case and refer it accordingly...

(4) If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Appellate Tribunal to make such additions thereto or alterations therein as the Court may direct in that behalf."

It is clear on a plain reading of the terms of s. 66(1) that the only question of law which the assessee or the Commissioner can require the Tribunal to refer to the High Court is "any question of law arising out of the order of the Tribunal" so that if the question of law which the assessee or the Commissioner requires the Tribunal to so refer to the High Court does not arise out of its order the Tribunal is not bound to refer the same. What has, therefore, to be looked at in the first instance is whether the question of law thus required to be referred arises out of the order of the Tribunal. The Tribunal no doubt has got before it the facts which are admitted and/or found by the Tribunal and which are necessary for drawing up a statement of the case and it is the facts admitted and/or found by it that would form the basis on which the statement of case would be drawn and references of the question of law made by the Tribunal to the High Court. If such facts were not there whether in the order of the Tribunal or in the record before it there would certainly not be any foundation for the raising of any question of law either in the abstract or otherwise and it is only a question of law which would arise out of such facts which are admitted and/or found by the Tribunal that would be the substratum of the reference to the High Court. The facts admitted and/or found by the Tribunal would really be the foundation or the basis on which such questions of law could be raised and neither party would be entitled to require the Tribunal to refer to the High Court any question of law which could not thus arise out of the order of the Tribunal. Section 66(2), which gives the power to the High Court to require the Tribunal to state the case and refer the question of law to it, also proceeds on the same basis, and even where the High Court exercises the power under s. 66(2) it can only require the Tribunal to state the case on any question of law arising out of such order. The scope and subject-matter of the reference under s. 66(2) therefore is co-extensive with that of the reference under s. 66(1) of the Act and the High Court has no power or jurisdiction under s. 66(2) to travel beyond the ambit of s. 66(1). Section 66(2) comes into play only when the Tribunal refuses to state the case on the ground that no question of law arises and if the High Court is not satisfied of the correctness of the decision of the Tribunal, it has got the power and jurisdiction to require the Tribunal to state the case and refer the same to it.

On the conditions of s. 66(1) and s. 66(2) being thus complied with the statement of case has to be drawn up by the Tribunal and the question of law arising out of its order referred to the High Court for its opinion. This statement of case which is based, as stated above, on the facts which are admitted and/or found by the Tribunal may not contain sufficient material to enable the High Court to determine the question raised thereby and in that case the High Court under s. 66(4) is vested with the jurisdiction to refer the case back to the Tribunal to make such additions thereto or alterations therein as the Court may direct in that behalf only for the purpose of determining the question referred to it. If the question actually referred does not bring out clearly the real issue between the parties, the High Court may reframe the question so that the matter actually agitated before the Tribunal may be raised before the High Court. But s. 66(4) does not enable the High Court to raise a new question of law which does not arise out of the Tribunal's order and direct the Tribunal to investigate new or further facts necessary to determine this new question which had not been referred to it under s. 66(1) or s. 66(2) and direct the Tribunal to submit a supplementary statement of case. This power and jurisdiction which is vested in the High Court is to be exercised within the four corners of s. 66. If under s. 66(1) and s. 66(2) the statement of case has to be drawn up on the basis of the facts which are admitted and/or found by the Tribunal and this is the requirement also of para. 3 of the prescribed form—the scope of such statement of case cannot, in our opinion, be in any manner enlarged by the power which is given to the High Court under s. 66(4) to make such additions thereto or alterations therein in the statement of case as the Court may direct in that behalf. The jurisdiction of the High Court under s. 66 is a consultative or advisory jurisdiction. In order to satisfactorily discharge that advisory jurisdiction the High Court must have before it all the facts which are admitted and/or found by the Tribunal properly set out in the statement in the case. It is only in those cases where the statement of case referred to the High Court under s. 66(1) and s. 66(2) are not sufficient to enable the High Court to determine the question raised thereby that the High Court is empowered to refer the case back to the Tribunal, so that the Tribunal within the four corners of s. 66(1) and s. 66(2) may make such additions to those statements or alterations therein as may be directed by the Court. Even though the terms of s. 66(4) are wide enough to comprise "such additions thereto or alterations therein as the Court may direct in that behalf" the scope of such directions has got to be read in the context of and in conjunction with the provisions of s. 66(1) and s. 66(2) and under the guise of that direction the High Court cannot refer the case back to the Tribunal to find new facts or embark upon a new line of enquiry which would enable either the assessee or the Commissioner to make out a case which had never been made during the course of the proceedings before the Income-tax authorities or the Tribunal so far. Such additions thereto or alterations therein as the Court may direct in that behalf are additions of facts to the statement of case or alterations therein which though they were part of the record before the Income-tax authorities or the Tribunal were not incorporated in the statement of case drawn up by the Tribunal either because such facts or statements though contained in the record were not found by the Tribunal or were omitted to be incorporated in the statement of case drawn up by it.

That this is the scope, nature and extent of the jurisdiction of the High Court under s. 66(4) of the Act is amply borne out by the authorities. In *Craddock (H. M. Inspector of Taxes) v. Zeno Finance Co., Ltd.*⁴ Lord Greene, M. R., observed at p. 277:

"The Crown, therefore, failed before the Commissioners to establish the only measure of value for which it was contending. It was, however, suggested that this difficulty could be avoided by sending the matter back to the Commissioners, so as to give

the Crown an opportunity of setting up a different measure of value supported by different evidence. Even assuming that this was the only difficulty in the way of the Crown's argument, it would not, in my opinion, have been proper to take this course. The Crown failed in its contention on a matter of fact and it must abide by the result: it would be contrary to all principle to give it another chance to establish by fresh and different evidence a quite different contention which, if it was desired to rely upon it, ought to have been advanced in the first instance. Our task is to deal with the case on the basis of the facts as found by the Commissioners upon the submissions made to them, and on this basis the value of the investments has not been established."

In *Commr. of Inc.-tax v. State Bank of India*,⁵ Chakravarti C.J., who delivered the judgment of the High Court at Calcutta, said at p. 551:—

"We intimated to Mr. Meyer as soon as he formulated his points that he could not be allowed to take the first of them, since it did not appear to have been taken on behalf of the Department at any stage of the proceedings and certainly not before the Tribunal. It could not therefore, be said to arise out of the Tribunal's order. The practice followed in this Court in references under section 68(1) of the Act has always been to limit the party, at whose instance a reference has been made, to the points raised and canvassed before the Tribunal. Questions are often framed in a general form, such as whether the assessment for a particular year made in a certain manner was valid in view of the provisions of a certain section of the Act. A question framed in that form might be said to comprise all possible contentions to which the terms of the relevant section might give rise, but this Court has always refused to treat matters arising out of questions so framed as entirely at large. It has adopted and acted on that view for reason that this Court is only an advisory body and the advice which it can be properly asked to give is only advice on matters which had been in contention before the Tribunal and which had been decided in one way or another such advice being sought in order that the parties interested might know whether the decision on those contentions had been in accordance with law. In hearing a reference under section 68(1), this Court does not sit in appeal from the assessment and it is not called upon to give its advice on matters which the Tribunal was not asked to decide and which the Tribunal neither decided, nor included in the statement of case for the opinion of this Court."

The Bombay High Court also expressed the same opinion in the case of *Indl. Development Etc. Co. Ltd. v. Commr. of E.P.T.*,⁶ Chagla C.J., who delivered the judgment of the Court, pointed out to the Tribunal what the correct procedure was with regard to the submission of a statement of the case and observed (p. 695):—

"It is true that very often the Tribunal may not refer to all the evidence and all the facts in its appellate order. We quite appreciate the difficulty of the Tribunal as it has to deal with a large number of cases, and it may be that in many cases the decision may seem obvious to the Tribunal and it might dispose of an appeal by a very short order. If a statement of the case is subsequently called for, naturally the Tribunal would want to elaborate its decision by pointing out various materials and pieces of evidence to which it had not referred in the appellate order. But all that can be referred to in the Statement of the case are materials and evidence which were before the Tribunal when it heard the appeal. A statement of the case is not intended for the purpose of buttressing up the order of the Appellate Tribunal or further fortifying it by requisitioning to its aid materials and evidence which were not before the Tribunal but which it discovers by investigation after the order was passed in appeal."

Much more so would be the case where no such material and evidence were at all in existence when the High Court in exercise of its jurisdiction under s. 66(4) of the Act referred the case back to the Tribunal and asked it to make such additions thereto or alterations therein as the Court may direct in order to enable it to determine the question raised thereby. Adopting such a procedure would involve, in effect, raising fresh issues and taking fresh evidence in order that fresh facts may be found which facts certainly were not

there at the time when the matter was heard before the Income-tax authorities or before the Tribunal in the first instance.

Two more decisions may be referred to in this context. One is a decision of the Bombay High Court in *Vadilal Ichhachand v. Commr. of Inc.-tax*⁷ where Tendolkar J. dealt with an argument advanced by counsel that the Court should send the matter back to the Tribunal for determining the quantum of penalty, and observed:—

“...Then Mr. Palkhivala says that we should, therefore, send this matter back to the Tribunal for determining that question. We do not find any power in this Court under the provisions of section 66 of the Income-tax Act to remand a matter back to the Tribunal for determining what might have been left undetermined by them, because they took a particular view of the law. We have merely the jurisdiction to answer the question of law referred to us, and we are not concerned with any questions which are pure questions of fact or its determination by the Tribunal.”

The other is the decision of this Court in *Commissioner of Inc.-tax v. Bhuranga Coal Co.*,⁸ where Venkatarama Aiyar J. dealt with a similar argument which was addressed before this Court at p. 805:—

“The matter then came before the High Court of Patna on a reference under section 66(1) of the Income-tax Act, at the instance of the appellant. There the contention was raised that the differentiation between movables and immovables on which the judgment of the Tribunal rested had not been made at any time in the prior stages of the proceedings and that was a matter on which further evidence would have to be taken to ascertain the intention of the parties and that, therefore, the matter should be remanded for further enquiry to the Appellate Tribunal. The learned Judges refused to accede to this contention for the reason that no such application was made before the Tribunal and that it was a point which ought not to be allowed to be taken for the first time in the High Court. On behalf of the appellant, it is stated that the question as to what are immovables and what are movables, arises only on the judgment of the Tribunal and that, therefore, an opportunity ought to be given for an investigation of this aspect of the question. We are not impressed by this argument. Surely, before the Tribunal there must have been a discussion as to the position with reference to the movables as distinct from the immovables, under the transaction and if the appellant considered that in view of that distinction, further enquiry was called for, it was incumbent upon it to apply to the Tribunal itself to order it and not having done so, it had no right to call upon the High Court to remand the matter for that purpose. In our opinion the High Court was justified in declining to entertain this point.”

If there is no power in the High Court to remand the case to the Tribunal for fresh findings of facts on further enquiry in the manner stated above, much less would the High Court have the power while exercising its jurisdiction under s. 66(4) of the Act to refer the case back to the Tribunal to make such additions thereto or alterations therein as the Court may direct as would require the Tribunal to embark upon a fresh line of enquiry which had never been canvassed at any time before the Income-tax authorities or the Tribunal in the first instance and record fresh findings on evidence adduced by the parties in that behalf.

Our attention was drawn on behalf of the Revenue to the observations of Fazl Ali J. (as he then was) in *Commr. of Inc.-tax, B. & O. v. Visweshwar Singh*⁹ where the learned Judge dealt with the procedure adopted by the Commissioner of Income-tax in sending up the reference in question. The High Court sent the matter back to the Commissioner in order that he may re-state the statement of case. When the matter went back to the Commissioner he sent up a re-statement of the case, but unfortunately without hearing the assessee. The High Court sent the re-stated case back to the Commissioner once again in order that the case might be re-stated with such further finding of fact as the Commissioner may consider necessary after hearing the assessee.

⁷ (1957) 32 I.T.R. 569, 573.

⁸ (1958) 34 I.T.R. 802, 805.

⁹ [1959] 7 I.T.R. 536, 554.

The matter then went back to another Commissioner, who instead of re-stating the case, as he was ordered by the High Court to do, sent up a letter to the High Court stating that he had not heard the party in regard to the opinion of the Commissioner, and that in any event he should not consider that he had power within s. 66(4) to vary an opinion given under s. 66(2) if no new facts were admitted. The learned Judge pointed out that the Commissioner was in duty bound to carry out the order of the High Court and he should have reheard the parties, admitted such further evidence as he considered relevant on the point at issue and re-stated the case with his opinion thereon. It is not clear, however, from the record as to whether the re-hearing of the parties and the recording of such further finding as was considered relevant on the point at issue embraced a fresh line of enquiry which had not been entertained at any earlier stage of the proceedings or was merely by way of elucidation of the very same points at issue which had been canvassed earlier but had not been thrashed out completely and properly reflected in the finding of the Tribunal. These observations, in our opinion, do not make any difference to the position that we have adopted herein, viz., it is not open to the High Court in the exercise of its jurisdiction under s. 66(4) of the Act to raise a new question and to require the Tribunal to entertain a fresh line of enquiry, hear the parties in regard to the same and record fresh finding of fact which would enable either the assessee or the Commissioner to advance a case which had never been made by it before the Income-tax authorities or the Tribunal and which, therefore, could not be said to arise out of the order of the Tribunal.

The decision of the Privy Council in *Sunder Singh Majithia v. Commr. of Inc.-tax*¹⁰ was also referred to by the Revenue in this context. In that case the question of law which was formulated was in the following terms (p. 461):

"In all the circumstances of the case, having regard to the personal law governing the assessee and the requirements of the Transfer of Property Act (IV of 1882) and the Stamp Act (II of 1899) has the deed of partnership dated February 12, 1933, brought into existence a genuine firm entitled to registration under the provisions of section 28-A of the Act?"

The High Court while answering this question did not advert to the relevant aspect of the question and this result was brought about because the Commissioner had taken pains to state some matters very fully, but he had not found the material facts as he should have done. The various essential facts were not found and stated by the Commissioner and the Privy Council observed that the referred question could not be answered until the High Court had exercised its powers under sub-s. (4) of s. 66 of the Act and left it to the discretion of the High Court to specify the particular additions and alterations which the Commissioner should be directed to make. Here also the nature, scope and extent of the jurisdiction of the High Court under s. 66(4) of the Act was not specifically discussed and the only order which was passed was that the case be remanded to the High Court for disposal after taking such action under sub-s. (4) of s. 66 of the Act as the High Court might think fit in the light of the judgment.

The same observations which we have made earlier while discussing the case of *Commissioner of Income-tax v. Visweshwar Singh* (supra) would apply to this case also and the observations of the Privy Council really do not militate against the position as we have laid down above.

On the facts of the present case before us it is abundantly clear that the only question which was canvassed before the Income-tax authorities and the Tribunal before it made its order dated July 17, 1952, was whether the cheques which were received at Bhavnagar having been cashed in British India, the monies in respect of the same should be said to have been received in British India and the Tribunal had held following the case of *Kirloskar Brothers'* case that the cheques were received from the Government at Bhavnagar and the receipt of money in respect of these cheques from banks in British India related back to

the receipt of the cheque at Bhavnagar and, therefore, was also received in Bhavnagar.

At no time was the question as regards the posting of the cheques in British India (Delhi) at the request, express or implied, of the appellant and the consequent receipt of the sale proceeds in British India ever mooted before the Income-tax authorities or the Tribunal before the Tribunal made its order on July 17, 1952, or even in the reference applications filed on September 15, 1952, nor was the said question mooted before the Tribunal when it heard the reference and drew up the statement of case on November 5, 1954, even though this Court had pronounced its decision in *Kirloskar Brothers'* case (supra) and the *Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd.* (supra) on April 19, 1954. The facts admitted and/or found by the Tribunal as stated in the said applications for reference took count of the position as it had been adopted by the Revenue in all these proceedings and it could not by any stretch of imagination be urged that the question now sought to be mooted was ever in the minds of the Revenue. The question of law which was referred by the Tribunal to the High Court for its decision was:—

“Whether the receipt of the cheques at Bhavnagar amounted to receipts of sale proceeds in Bhavnagar.”

and it was only based on the facts admitted and/or found by the Tribunal which had relevance only to that question and not to the question which was sought to be mooted by the High Court in its judgment under appeal. If the latter question was allowed to be entertained the question would have to be recast as under:—

“Whether the posting of the cheques in British India at the request, express or implied of the appellant, amounted to receipt of sale proceeds in British India.”

—a question quite distinct and separate from the question of law which was actually referred by the Tribunal to the High Court in the statement of case drawn on November 5, 1954.

We are, therefore, of opinion that the High Court was in error in not deciding the reference before it and answering the question on the facts disclosed in the statement of case. We are also of opinion that in the circumstances of this case the High Court had no jurisdiction under s. 66(4) to direct the Tribunal to submit a supplementary statement of case on the points mentioned in its judgment.

The result, therefore, is that the appeal will be allowed and the matter remanded to the High Court to arrive at its decision on the question of law referred to it in the statement of case already submitted to it by the Tribunal. The respondent will pay the appellant's costs throughout.

Appeal allowed.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chatnani, Chief Justice, and Mr. Justice V. S. Desai.

BAI JIVIBEN v. BOMBAY REVENUE TRIBUNAL.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 31, 2(6), 8, 37
—Whether widow can terminate tenancy of her tenant—Words “cultivating personally” in s. 31(1)(a) whether include cultivation through tenant.

Under s. 31 of the Bombay Tenancy and Agricultural Lands Act, 1948, a widow can terminate the tenancy of her land and can apply for possession of the land under s. 29 of the Act.

The words “cultivating personally” occurring in s. 31(1)(a) of the Bombay Tenancy and Agricultural Lands Act, 1948, do not in the case of a widow include cultivation through a tenant.

Padmakar Ramchandra Pethakar v. Murlidhar Hari Jadhav,¹ referred to.

THE facts appear in the judgment.

Special C.A. No. 217 of 1959.

N. R. Osa, for the petitioner.

Y. V. Chandrachud, Government Pleader, for respondent No. 1.

S. M. Bengali, with *J. B. Nagarseth*, for respondent No. 2.

Special C.A. No. 243 of 1959.

Rajni Patel, with *B. Rajda*, *D. L. Rajda* and *B. A. Desai*, for the petitioner.

Y. V. Chandrachud, Government Pleader, for respondent No. 2 (1 & 2).

CHAINANI C.J. The point involved in both these applications is whether a widow can terminate the tenancy of her land under s. 31 of the Bombay Tenancy and Agricultural Lands Act. The Bombay Revenue Tribunal has taken the view that a widow has no such right and that the right to maintain such an application is available only to the successor-in-title of the widow under sub-s. (3) of s. 31. This view is in accordance with the decision of the Full Bench of the Revenue Tribunal in *Parvati Bhaui Patil v. Nagu Ragho Patil*, decided on October 22, 1958.

The question to be determined, therefore, is whether this view is correct. Sub-section (1) of s. 31 provides that a landlord may, after giving notice and making an application for possession as provided in sub-s. (2), terminate the tenancy of any land, if the landlord bona fide requires the land for cultivating personally, or for any non-agricultural purpose. Sub-section (3) of s. 31 provides *inter alia* that where a landlord is a minor, or a widow, or a person subject to mental or physical disability or a serving member of the armed forces, then such notice may be given and an application for possession under s. 29 may be made,

(i) by the minor within one year from the date on which he attains majority,

(ii) by the successor-in-title of a widow within one year from the date on which her interest in the land ceases to exist,

(iii) within one year from the date on which mental or physical disability ceases to exist; and

(iv) within one year from the date on which a serving member of the armed forces ceases to be a serving member.

There is a proviso to this sub-section with which we are not concerned. Sub-section (1), therefore, gives a right to every landlord to terminate the tenancy of his land, if he requires it bona fide for personal cultivation. There

*Decided, June 24, 1959. Special Civil Application No. 217 of 1959 (with Special Civil Application No. 243 of 1959).

¹ (1959) Special Civil Application No. 3747 of 1958, decided by Chainani C. J. and S. T. Desai J., on March 17, 1959 (Unrep.).

is nothing in this sub-section, which states that this right shall not be available to a widow or that it cannot be exercised by her in the manner provided. Clause (ii) in sub-s. (3), no doubt, gives a similar right to the successor-in-title of a widow, but it does not in any way restrict the right, which the widow herself possesses, of terminating the tenancy under sub-s. (1) of s. 31. The object of this clause is to protect the rights of the successor-in-title of the widow and to ensure that he does not suffer owing to negligence or inaction on the part of the widow. But there are no words either in this clause or in any other part of the section, which deprive a widow of the right conferred upon every landlord under sub-s. (1). It could never have been the intention of the Legislature that even though a widow may require additional income from her land for her maintenance, she should not be able to obtain possession of the land during her lifetime and that this right should only be available to her successor-in-title.

The full bench of the Bombay Revenue Tribunal has given two reasons for the view taken by it. The first is based on the special meaning given to the expression "cultivate personally", when the landlord is a widow. Clause (6) in s. 2 of the Act defines the expression "to cultivate personally" as meaning

"to cultivate land on one's own account—

(i) by one's own labour, or

(ii) by the labour of any member of one's family, or

(iii) under the personal supervision of oneself or any member of one's family by hired labour or by servants on wages payable in cash or kind but not in crop share,..."

Explanation I to this section states that a widow or a minor or a person, who is subject to physical or mental disability, or a serving member of the armed forces, shall be deemed to cultivate the land personally, if such land is cultivated by servants, or by hired labour, or through tenants. This provision creates a legal fiction, under which cultivation through a tenant is to be deemed to be personal cultivation. Consequently, if a land belonging to a widow is leased to and cultivated by a tenant, it is to be regarded as being cultivated by her personally. It has, therefore, been urged that as in law a land leased to a tenant is to be deemed to be cultivated by the widow personally, she cannot terminate the tenancy under s. 31 on the ground that she requires the land for personal cultivation. Sub-section (1) of s. 31, which gives a landlord a right to terminate the tenancy on the ground that he wants the land for personal cultivation, no doubt contemplates that the land must not previously be in the personal cultivation of the landlord. But under cl. (6) of s. 2, read with the Explanation, "personal cultivation" in the case of a widow includes five different modes of cultivation. She may let it out to a tenant or she may cultivate it by her own labour, or by the labour of any member of her family, or she may engage servants, or she may hire labour in order to cultivate it. If she desires to terminate the tenancy on the ground that she wants to lease the land to another tenant, she will not be able to do so, because she will then be cultivating the land by the same mode by which it was being cultivated previously. The entire scheme of the Act is to provide security of tenure for a tenant and to prevent a landlord from substituting one tenant by another. The object of the Act would, therefore, be defeated, if a widow is allowed to replace one tenant by another. But there is no reason why a widow should not be able to terminate the tenancy on the ground that she wants to cultivate the land by her own labour or the labour of a member of her family or through servants or by hired labour. Section 8 of the Act provides that the rent payable by a tenant shall not exceed five times the assessment payable in respect of the land or twenty rupees per acre, whichever is less. The maximum rent, which a widow can, therefore, get from her land by letting it out to a tenant is, therefore, limited by the Act. It cannot exceed five times the assessment or rupees twenty per acre. On the other hand, it is not in dispute that she will realise very much more income, if she works on the land herself or gets it cultivated through servants or by hired labour.

The intention of the Legislature in enacting sub-s. (3) of s. 31 was not to

deprive widows, minors or other persons subject to disabilities of any rights, which they possess in common with other landlords, but to confer certain additional rights on them. On the view taken by the Revenue Tribunal, a widow can never obtain possession of a land from a tenant, even though she requires additional income from it for her maintenance. We are certain that the Legislature could not have intended to cause such hardship, particularly in these days, when the general tendency is to enlarge and not restrict the rights of widows and other persons subject to disabilities.

In our opinion, therefore, in the case of a widow, the words "cultivating personally" in cl. (a) in sub-s. (1) of s. 31 mean cultivation through her own labour or the labour of any member of her family or through servants or by hired labour. It has been contended that this interpretation will not be in accordance with the rule that a word or expression must be given the same meaning in every part of the statute. This, however, is not a universal rule. (See *Shamrao V. Parulekar v. The District Magistrate, Thana*,¹ and *Shamrao Vishnu Parulekar v. The District Magistrate, Thana*²). As observed in Craies' Statute Law, 5th edn., p. 159,

"The presumption that the same words are used in the same meaning is however very slight, and it is proper if sufficient reason can be assigned, to construe a word in one part of an Act in a different sense from that which it bears in another part of an Act."

Similar remarks appear in Maxwell on Interpretation of Statutes, Tenth Edition (p. 322):

"But the presumption is not of much weight. The same word may be used in different senses in the same statute and even in the same section."

Section 2 also states that the words defined in this section shall have the special meanings given in the section, unless there is "anything repugnant in the subject or context." Having regard to the context, in which the words "cultivating personally" occur in cl. (a) of sub-s. (1) of s. 31, they will not in the case of a widow include cultivation through a tenant.

The other ground given by the Tribunal has reference to s. 37 of the Act. Sub-section (1) of this section states that if after the landlord takes possession of the land after the termination of the tenancy under s. 31, he fails to use it for any of the purposes specified in the notice given under s. 31 within one year from the date on which he took possession or ceases to use it at any time for any of the aforesaid purposes within twelve years from the date on which he took such possession, the landlord shall forthwith restore possession of the land to the tenant whose tenancy he had terminated. The difficulty felt by the Tribunal was that if a widow obtains possession of a land from her tenant on the ground that she requires it for personal cultivation and subsequently leases it to another tenant, the first tenant would not be able to avail himself of the right conferred by s. 37, as he cannot contend that the widow is not cultivating the land personally. The position then would be that a widow would be able to replace one tenant by another. This difficulty will also not arise in the view which we take that a widow cannot obtain possession under s. 31 on the ground that she wants to lease the land to another tenant. It is also not likely that a Tenancy Court will hold her requirement to be *bona fide* when she only wants to substitute one tenant for another. Her income is not likely to be augmented in this manner, for the maximum rent which she can realise is five times the assessment or rupees twenty per acre, whichever is less. If, however, after obtaining possession of the land from her tenant on the ground that she wants to cultivate it, not through a tenant, but in some other way, she leases it to another tenant, it would perhaps be possible to say that she has not used it for the purpose for which she had taken possession of the land. In that case, the former tenant would be entitled to obtain back possession of the land under s. 37.

¹ [1952] S. C. R. 683, at p. 690; 54 Bom. L. R. 877.

² [1956] S. C. R. 644, at p. 649; 59 Bom. L. R. 83.

I may add that the view, which we are taking, is in accordance with the view, which Mr. Justice S. T. Desai and myself had taken in *Padmakar Ramchandra Pethakar v. Murlidhar Hari Jadhav*.³ That was a case of a minor landlord, but the principle of that decision will also apply in the present case, because the explanation to the definition contained in cl. (6) of s. 2 and sub-s. (3) of s. 31 apply not only to minors but also to widows.

We are accordingly of the opinion that the view taken by the Bombay Revenue Tribunal is wrong. In our opinion, the widow-petitioners in the two cases were competent to terminate the tenancies of their tenants under s. 31 and to make applications to the Mamlatdar under s. 29 for obtaining possession of their lands.

The orders passed by the Bombay Revenue Tribunal in the two cases will be set aside and the matters will be remanded to the Revenue Tribunal for disposal in accordance with law. No order as to costs.

Order accordingly.

CRIMINAL APPELLATE.

Before Mr. Justice Gokhale and Mr. Justice Tarkunde.

THE STATE v. BABULAL FAKIRCHAND GANDHI.*

Bombay Agricultural Produce Markets Act (Bom. XXII of 1939), Sec. 17—Bombay Agricultural Produce Markets Rules, 1941, r. 74—Kolhapur Market Committee, Bye-law 35A, r. 12—Whether term “trade allowance” in s. 17 comprises allowance not consisting of a deduction—Explanation to s. 17 whether exhaustive of meaning of “trade allowance.”

The term “trade allowance” in s. 17 of the Bombay Agricultural Produce Markets Act, 1939, means deductions allowed by custom either in the weight of goods sold or in the purchase price.

Arunachala Nadar v. State of Madras,¹ referred to.

Quaere: Whether the Bombay Agricultural Produce Markets Act, 1939, the Rules made thereunder and the Bye-laws of the Kolhapur Market Committee apply to the sale of agricultural produce by one trader to another.

THE facts appear in the judgment.

In Criminal Appeal No. 13 of 1959.

V. H. Gumaste, Assistant Government Pleader, for the State.

H. R. Gokhale, for the respondent-accused.

In Criminal Application No. 1591 of 1959.

N. S. Shrikhande and N. V. Varerkar, for the complainant.

V. H. Gumaste, Assistant Government Pleader, for the State.

TARKUNDE J. This appeal has been filed by the State against the order of the Judicial Magistrate, First Class, Kolhapur, by which the respondent-accused was acquitted of an offence consisting of the alleged contravention of certain provisions of the Bombay Agricultural Produce Markets Act, 1939, and the Rules and Bye-laws made thereunder. The accused was the working partner of a firm which did business at Kolhapur. The city of Kolhapur is included in a “Market” under the Bombay Agricultural Produce Markets Act, 1939, and transactions of the sale and purchase of agricultural produce in the market are governed by the provisions of that Act. The firm of the accused held a

³ (1959) Special Civil Application No. 3747 of 1958, decided by Chaimani C. J. and S. T. Desai J., on March 17, 1959. (Unrep.).

*Decided, July 21, 1959. Criminal Appeal No. 13 of 1959 (with Criminal Application No.

1591 of 1958), against the order of acquittal passed by S. N. Joshi, Judicial Magistrate, First Class, Kolhapur, in Case No. 366 of 1955. 1 [1959] A. I. R. S. O. 300.

licence which enabled it to function as a trader as well as a commission agent in the market. On February 23, 1955, the accused, as a partner in his firm, sold 491 lumps of jaggery to the Sabarkantha District Co-operative Purchase and Sale Union, Himatnagar. He sent a bill for the dues of that transaction, which included certain items in addition to the price of the lumps of jaggery, and the items which are claimed by the prosecution to have been unauthorised were: (1) Rs. 3-1-6 as "Sadharan"; (2) Rs. 6-3-0 as "Vatav"; (3) Rs. 7-10-9 as "Panjarpol"; and (4) Rs. 12-1-0 as "Marfat". The prosecution case was that the accused, by including the above items in the bill, contravened three provisions: firstly, s. 17 of the Bombay Agricultural Produce Markets Act, 1939, a contravention of which is made punishable by s. 21; secondly, r. 74 of the Bombay Agricultural Produce Markets Rules, 1941, a contravention of which is made punishable under r. 77; and thirdly, r. 12 of Bye-law 35A of the Bye-laws made by the Kolhapur Market Committee, a contravention of which is made punishable under Bye-law 68.

In his defence, the accused admitted having included the aforesaid charges in the bill, but he claimed that he had not committed any offence by doing so. He contended that these charges were his trade expenses and were not "trade allowances" within the meaning of that phrase in s. 17 of the Act. His further defence was that the Bombay Agricultural Produce Markets Act, 1939, and the Rules and Bye-laws made thereunder, apply only to transactions in which an agriculturist producer sells his produce to a purchaser or commission agent, and that subsequent transactions of the sale and purchase of that produce are not covered by the Act and by the Rules and Bye-laws made thereunder.

In the Court below, the charge in respect of the item of Rs. 6-3-0 claimed as "Vatav" was not pressed. Regarding the remaining three items, the learned Magistrate held that they were in the nature of trade expenses and not trade allowances. He also held that re-sales between traders of agricultural commodities are not covered by the Act, the Rules and the Bye-laws. On these findings, he held the accused not guilty of the alleged offence.

None of the facts found by the learned Magistrate has been challenged before us. According to the learned Magistrate, "Panjarpol" is a charitable institution functioning in Kolhapur since 1906. Traders in Kolhapur who purchase jaggery from the primary producers pay "Panjarpol" charges to the institution at the rate of one pice per lump of jaggery, and these traders in their turn recover the amount so paid from those who purchase the jaggery from them. The learned Magistrate found that, in the present case, the accused had himself paid Rs. 7-10-9 as "Panjarpol" to two persons from whom he had purchased the 491 lumps of jaggery, and that in including the amount in the bill the accused merely tried to recover the expenses incurred by him in that behalf. "Marfat" is the name given to the charges of carting agents called *hundekaries*, and these charges are calculated at a rate related to the number of cartloads, each of 24 lumps of jaggery, handled by the *hundekaries*. It is not disputed in this case that the accused had to incur these charges in despatching the goods to the Sabarkantha District Co-operative Purchase and Sale Union, Himatnagar. "Sadharan" is a charge which represents the average of the expenses incurred by the local traders in Kolhapur for making arrangements for the lodging and boarding of their customers who come from outside places, and this charge is calculated at the rate of one anna for 24 lumps of jaggery purchased by the outside customers. The learned Magistrate found that this charge as well as the charges described as "Panjarpol" and "Marfat" were included in the bill by the accused according to a well-recognised custom in the Kolhapur market.

The main charge against the accused was that he contravened s. 17 of the Bombay Agricultural Produce Markets Act, 1939. Section 17 runs as follows:

"No person shall make or recover any trade allowance, other than an allowance prescribed by rules or bye-laws made under this Act, in any market area in any trans-

action in respect of the agricultural produce concerned and no civil Court shall, in any suit or proceeding arising out of any such transaction, have regard to or recognise any trade allowance not so prescribed."

An Explanation is included in the section and it is in the following terms:—

"Every deduction other than a deduction on account of deviation from sample when the purchase is made by sample or on account of deviation from standard when the purchase is made by reference to a known standard or on account of difference between the actual weight of the container and the standard weight or on account of the admixture of foreign matter, shall be regarded as a trade allowance for the purposes of this section."

It is clear from this Explanation that it applies to all deductions, and provides that deductions other than those specifically mentioned in the Explanation are to be regarded as trade allowances for the purpose of s. 17. It is also clear from the context that the word "deduction" in the Explanation means a deduction in the price which a purchaser has to pay or in the weight of the goods purchased. In the present case, the charges included in the bill by the accused are not deductions in any sense, but are items of expenditure added by the seller to the purchase price. It must, therefore, follow that they are not trade allowances under the Explanation to s. 17.

It was urged before us by the learned Assistant Government Pleader that the Explanation to s. 17 is not exhaustive of the meaning of the term "trade allowance" used in s. 17, and that, although the Explanation comprehensively covers "every deduction", the term "trade allowance" would comprise an allowance not consisting of a deduction. If we were to accept the argument of the learned Assistant Government Pleader and to hold that the Explanation to s. 17 does not purport to define what is meant by a trade allowance, it must follow that the Legislature has nowhere defined that term, although it is provided by s. 21 that whoever makes or recovers any trade allowance in contravention of the provisions of s. 17 shall be punishable with a fine which may extend to Rs. 200. It appears to us, however, that the word "allowance" in its commercial meaning implies only a customary deduction, and if that is the ordinary meaning of the term "trade allowance", it would follow that the Explanation, since it deals with "every deduction", is exhaustive of the meaning of "trade allowance" in s. 17 of the Act.

In Webster's New International Dictionary, 2nd edn., the meaning given to the word "allowance", when used in commerce, is "a customary deduction from the gross weight of goods, different in different countries, as *tare* and *tret*." The Dictionary further gives the meaning of "trade allowance" to be the same as "trade discount", and gives the meaning of "trade discount" as "a deduction from the retail or list price of goods allowed by a manufacturer or distributor to a merchant". It would thus appear that a trade allowance means a deduction either in the weight of goods or in the purchase-price. A similar meaning is found assigned to the terms "allowance" and "trade allowance" in Chambers' 20th Century Dictionary. In Wharton's Law Lexicon, 14th edn., the general meaning of the word "allowance" is given as a "deduction, an average payment, a portion", and it is further observed (p. 54):

"Also in selling goods, and in paying duties upon them, certain deductions are made from their weights, depending on the nature of the packages in which they are enclosed, and which are regulated in most instances by the custom of merchants, and the rules laid down by public offices. These allowances, as they are termed, are distinguished by the epithets *draft*, *tare*, *tret*, and *cloff*."

The terms "*draft*", "*tare*", "*tret*" and "*cloff*" are then explained, and the explanation of these terms shows that they apply to certain deductions from the weight of the goods.

It would thus appear that the term "trade allowance" applies to deductions allowed by custom either in the weight of goods sold or in the purchase price. If that is the correct interpretation of the term "trade allowance", it must

follow that the charges included by the accused in his bill, being in addition to the purchase-price, were not in the nature of trade allowances.

The learned Assistant Government Pleader relied on a recent decision of the Supreme Court in *Arunachala Nadar v. State of Madras*¹, in which the term "trade allowance" occurring in s. 14 of the Madras Commercial Crops Markets Act came up for interpretation. On the meaning of the term "trade allowance", the judgment of the Supreme Court says:—

"...Allowance means something given as compensation, rebate or deduction. Under the section (i.e. section 14 of the Madras Commercial Crops Markets Act), the said deduction should be in any transaction in respect of commercial crops. The deduction may be out of the commodity or out of the price. The recipient may be the seller, the buyer or a third party...The question whether a particular payment is a trade allowance or not, depends upon the facts of each case. Firstly, it must be a deduction in any transaction in respect of commercial crops. If it is a deduction out of the price or commodity agreed to be paid or transferred, it would be a trade allowance. On the other hand, if the payment is 'de hors' the terms of the transaction but made towards consideration for the use of the premises or services rendered, it would not be a deduction from the price or in any transaction."

This passage, in our opinion, also indicates that a trade allowance must be a deduction either in the weight of the goods sold or in the purchase-price. The learned Assistant Government Pleader pointed out that in the above passage it has been stated that the term "allowance" means something given as "compensation, rebate or reduction", and he argued that the trade allowance may not be a deduction, but may be an amount given by way of compensation or rebate without at the same time being a deduction. It appears, however, from the above passage that a trade allowance in all cases must be a deduction, though the deduction may have been given as compensation or rebate. The only substantial difference which we are able to find between the meaning of the term "trade allowance" as given in Webster's New International Dictionary, Chambers' 20th Century Dictionary and Wharton's Law Lexicon on the one hand, and the aforesaid judgment of the Supreme Court on the other, is that, whereas in the former the term "trade allowance" appears to imply an allowance made in favour of the purchaser, it is specifically stated in the latter that the recipient of the trade allowance may be the seller, the buyer or a third party. But in any case a trade allowance must be a customary deduction either in the weight of the goods sold or in the purchase-price, and the charges made by the accused are not of that nature.

Supposing, however, that the learned Assistant Government Pleader is right in his contention that the term "trade allowance" may have a wider meaning than what we have mentioned above, we must nevertheless put a narrow construction on that term, as it occurs in a provision the contravention of which has been made penal by the Legislature. If the Legislature intended that charges like "Panjarpol", "Marfat" and "Sadharan", which are customarily imposed in several markets in the State, should be abolished or otherwise restricted, it was necessary that the Legislature should have expressed its intention in clear and unambiguous terms.

Another reason why the acquittal of the accused must be confirmed is that, according to s. 17 read with s. 21 of the Act, what is made punishable is to "make or recover any trade allowance, other than allowance prescribed by rules or bye-laws made under this Act". In this case, the accused has merely included certain charges in the bill which he sent to the Sabarkantha District Co-operative Purchase and Sale Union. It is not the prosecution case that he has "recovered" the charges mentioned in the bill. Being the seller in the transaction, he cannot, of course, be said to have "made" the alleged trade allowances. The mere inclusion of the charges in the bill does not amount to an offence under s. 21 of the Act.

Turning next to r. 74 of the Bombay Agricultural Produce Markets Rules,

1941, the rule provides, in so far as it is material, that no licensed general commission agent shall solicit or receive fees other than those specified for his services in the bye-laws. Rule 77 penalises, amongst others, a licensed general commission agent who demands, receives or retains, on account of fees or under the colour of fees, any sum not due under the rules or the bye-laws. Now it is obvious that the charges made by the accused are not in respect of his fees as commission agent, nor are they made under the colour of fees of a commission agent. They are charges in respect of what he claims to have been his expenses. He cannot, therefore, be guilty under these Rules.

The last objection of the prosecution to the inclusion of these charges in the bill is that the accused thereby contravened r. 12 of the "Duties of General Commission Agents" mentioned in Bye-law 35A of the Bye-laws made by the Kolhapur Market Committee. Contravention of any of these bye-laws has been made punishable by Bye-law 68. Rule 12 in the aforesaid part of the bye-law reads as follows:—

"The general commission agent or purchaser shall not charge any amount which is not authorised by the Act, Rules and Bye-laws."

A reference to the context in which this rule appears makes it perfectly clear that the rule applies where a general commission agent or a purchaser purchases an agricultural commodity from a seller. Rule 12 prevents a general commission agent or a purchaser from charging to a seller any amount which is not authorised by the Act, Rules and Bye-laws. It has no application to the charges which may be made by a general commission agent as against a person who purchases agricultural commodities from him. In the present case, the accused has sold jaggery to the Sabarkantha District Co-operative Purchase and Sale Union, and obviously r. 12 has no application to this transaction.

In view of these findings, it is not necessary to deal with the other question, namely, whether the Bombay Agricultural Produce Markets Act, 1939, the Rules made thereunder, and the Bye-laws of the Kolhapur Market Committee, apply to the sale of agricultural produce by one trader to another.

The result is that this appeal fails and is dismissed.

No order on the application filed by the complainant.

Appeal dismissed.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

MESSRS. PARMAR & CO. v. V. R. GUPTE.*

Sea Customs Act (VIII of 1878), Secs. 167(37)(c), 167(8), 29, 30, 86, 87—Imports and Exports (Control) Act (XVIII of 1947), Sec. 3(2)—Constitution of India, Art 226—Expression "value" in s. 167(37)(c) whether means "real value" as defined in s. 30 or cost price—Value relevant for purpose of offence under s. 167(8)—Practice (Civil)—Prerogative writs—Rule Nisi when should Court grant—Construction of statutes—Penal statutes how to be construed.

The expression "value" in s. 167(37)(c) of the Sea Customs Act, 1878, means "real value" of the goods as required to be stated under s. 29 of the Act and as defined in s. 30 of the Act.

Where the import or export licence speaks only of c.i.f. value of the goods, it is the c.i.f. value of the goods and not the real value of the goods that is relevant for the purpose of the offence alleged to have been committed under s. 167(8) of the Sea Customs Act, 1878.

In cases where small penalties are imposed by the customs authorities and no fundamental right of the subject is violated, the Court should be slow in granting

*Decided, July 31/August 3, 1959. O. C. J. Appeal No. 430 of 1958.
Appeal No. 32 of 1959: Miscellaneous Appli-

Rule Nisi unless it is satisfied that a *prima facie* case has been made out for the interference of the Court by issuance of any of the extraordinary writs, and the circumstances of the case demand its interference. A petitioner who seeks relief from the Court by issuance of any of the prerogative writs should take care to set out in his petition the reasons why he approaches the Court instead of adopting the normal machinery available to him under the Act by appealing to higher authorities.

Penal statutes are construed with reference to the true meaning and the real intention of the Legislature.

T. KAKIUCHI AND CO. LTD. of Japan had issued a sale note dated December 21, 1957, for sale of 10,000 yards of Q/No. 25760 Spun Rayon Gaberdine at the rate of d. 30 per yard c.i.f. nett Bombay in favour of Messrs. Kishinchand and Co. of Bombay. Messrs. Kishinchand and Co. issued purchase advise No. 1162 dated January 4, 1958, to the Japanese company in respect of the aforesaid goods. In this purchase advice these goods were directed to be stamped after every two or three yards at selvedge "Kaybee Gaberdine No. 60 made in Japan." The petitioners desired to purchase and take delivery of 2,000 yards of the aforesaid goods directly from the Japanese company. The petitioners obtained an import licence No. 998614 dated January 15, 1958, and placed an indent dated January 24, 1958, with Kishinchand and Co. in respect of 1950 yards of the aforesaid goods. The petitioners ultimately received a sale note from the Japanese company for sale to the petitioners of 1950 yards of the aforesaid goods at d. 30 per yard c.i.f. Bombay less 1 per cent. insurance premium, shipment being February 1958. These goods were described in the sale note issued to the petitioners as "Kaybee 60 Spun Rayon Gaberdine 54" x 25 Yds non-resin finished". The petitioners opened a letter of credit for £241-7-0 being c.i.f. value of the said 1950 yards of the said goods in favour of the Japanese company. S. S. Kirsten Maersk carrying the consignment of 8 cases of the aforesaid goods for the petitioners arrived at Bombay on April 14, 1958. The petitioners submitted the bill of entry dated April 14, 1958, showing the real value of the said goods as Rs. 3,260 being the c.i.f. price of the said goods.

The examiner of the customs examined the goods and noted the bill of entry on about April 19, 1958, and forwarded the same to the Appraising Department. After more than two months respondent No. 1 issued two show cause notices respectively dated June 23, 1958, and July 1, 1958, against the petitioners. By the first notice it was recited that the value of the goods imported exceeded the value of the import licence by Rs. 325 and the import constituted an offence under s. 167(8) read with s. 3(2) of the Imports and Exports Control Act, 1947. The petitioners were called upon to explain the matter. By the second notice it was recited that the value ascertained by the Customs of the petitioners' import came to Rs. 3,588 whilst the value declared by the petitioners was Rs. 3,260. It was recited that though the value shown was d. 30 per yard, it was ascertained at d. 33 per yard. The petitioners' conduct had resulted into the loss of difference in duty amounting to Rs. 328 and that the same constituted an offence under s. 167(37). The petitioners were called upon to explain the matter. The petitioners were heard on July 9, 1958, and July 12, 1958. The petitioners submitted written explanations and also further addressed their counsel's letter dated July 12, 1958, to respondent No. 1. This letter contained all the arguments which the petitioners advanced and the explanation of the charge levelled against the petitioners. On July 16, 1958, an order was passed by respondent No. 1 under ss. 167(8) and 167(37) of the Sea Customs Act, 1878, whereby the petitioners were held guilty of both the charges levelled against them and it was ordered that the goods in question be confiscated under cls. (8) and (37) of s. 167 of the Act. Option was given to the petitioners under s. 183 of the Act to pay in lieu of such confiscation a fine of Rs. 325 for offence under s. 167(8) of the Act and a fine of Rs. 160 for offence under s. 167(37) of the Act and clear the goods for home consumption. This option was directed to be exercised within four months. By a foot note in the order it was also directed that the goods

were dutiable and proper duty would have to be paid before they were cleared.

The petitioners by the present petition challenged the validity of the order dated July 16, 1958, under art. 226 of the Constitution of India. Rule was granted by K. T. Desai J.

The petition came up for hearing before K. K. Desai J., who delivered the following judgment on April 8, 1959.

K. K. DESAI J. [His Lordship after stating the facts as above, proceeded.] It is apparent that the question before me relates to the jurisdiction of respondent No. 1 to proceed to investigate the charges made against the petitioners under cls. (8) and (37) of s. 167 of the Act. It is also apparent that the provisions relating to levy of customs duty as contained in Chap. V, ss. 20 to 41, of the Act have no direct bearing on the provisions relating to offences and penalties and procedure relating to offences, appeals etc. as contained in Chaps. XVI and XVII and ss. 167 to 193 of the Act. It is, however, true that the offences mentioned in s. 167 are related to questions of the evasion of duty and importation and exportation of goods in violation of prohibition or restrictions imposed and that all these provisions are indirectly connected with each other. The approach to the question before me, accordingly, in my view, must be to examine the question of jurisdiction and rights of respondent No. 1 under the provisions of Chaps. XVI and XVII. Mr. Lulla for the petitioners has argued the contentions made by the petitioners by laying great emphasis on the provisions contained in Chap. V without examining in detail the question of jurisdiction of respondent No. 1 under Chaps. XVI and XVII of the Act.

The first contention raised by the petitioners is that under the provisions of ss. 31 and 32 of the Act it is compulsory for the assessing authority, in every case where goods appear to be chargeable with a higher rate or amount of duty than that to which they would be subject according to the value thereof as mentioned in the bill of entry or shipping bill, to detain the goods. It is further contended that the assessing authority has upon detention to decide either to retain the goods for the Central Government at the value mentioned in the bill of entry or in default to deliver the goods in question on payment of duty charged according to the value mentioned in the bill of entry to the importer. Reference is thereupon made to the provisions for penalties of confiscation of goods in respect of offences in cls. (8) and (37) of s. 167. It is contended that having regard to the aforesaid scheme of compulsory detention and release of *ad valorem* goods the penalty of confiscation is impossible to be imposed on an importer of *ad valorem* goods. The contention is that it being compulsory for the assessing authority to detain and keep the imported goods under s. 32 for the Central Government or in default to deliver the goods on payment of duty charged according to the bill of entry, it is impossible that the goods should be liable to be confiscated as provided in respect of the offences under the aforesaid two clauses of s. 167. It is contended that the provisions of s. 32 are compulsory and confiscation being impossible there is no jurisdiction in the assessing authorities under Chaps. XVI and XVII to take proceedings against an importer of *ad valorem* goods.

In this connection reference may be made to the provisions of ss. 31 and 32 of the Act. The marginal notes to each of these sections run as follows:

"Examination of *ad valorem* goods."

"Procedure where such goods are under valued by owner."

"31. Goods chargeable with duty...shall, without unnecessary delay, be examined... If it appears that the real value of such goods is correctly stated in the bill-of-entry or shipping-bill, the goods shall be assessed in accordance therewith.

32. If it appears that such goods are properly chargeable with a higher rate or amount of duty than that to which they would be subject according to the value thereof as stated in the bill-of-entry or shipping-bill, such officer may detain such goods.

In every such case the detaining officer shall forthwith give notice in writing to

the owner of the goods of their detention, and of the value thereof as estimated by him; and the Customs-Collector shall, within two clear working days after such detention, or within such reasonable period as may with the consent of the parties be arranged, determine either to deliver such goods on payment of duty charged according to the entry of such owner, or to retain the same for the use of the Central Government."

Mr. Lulla contends that under s. 31 the assessing authority has to examine the goods without unnecessary delay, and if it appears that the goods are chargeable with a higher rate of duty under s. 32, there is no option left to the assessing authority, but to decide to retain the goods for use of the Central Government or to deliver the same upon payment of duty charged according to the value mentioned in the bill of entry. He stated that these two sections create obligations on the assessing authorities which are compulsory. The procedure prescribed in these two sections must be followed and there is no other procedure of any kind available to the assessing authorities where it is found that the goods are chargeable to a higher duty and the value mentioned in the bill of entry is not correct. Having regard to the scheme of these two sections, he says that the word "may" in para. 1 of s. 32 must be construed in the sense of "must".

In this connection it is important to notice that the word "may" has been used in para. 1 of s. 32 whilst the word "shall" is used in s. 31 and also in paras. 2, 3 and 6 of s. 32. In s. 33 the word "may" is used at several places while the word "shall" is used in ss. 34 and 34A, 35, 36 and 37 and other sections which need not be mentioned. This illustrates that the words "may" and "shall" are used in the Act advisedly and intentionally and the word "may" contained in para. 1 of s. 32 is not accidental but intentional. It is also relevant to notice that under the scheme of ss. 29, 29A, 29B, 86, 87, 88 and 89 of the Act all imported goods have to be entered in the bill of entries and the owner is not entitled to clearance thereof except upon payment of import duty. In the event of the detention under s. 32 unless the Collector of Customs decides to retain the goods for the Central Government the goods are directed to be released on payment of duty which is lesser than the duty payable in respect thereof in the opinion of the assessing authority. The provisions of s. 32, therefore, contemplate a situation which is contrary to the general scheme for payment of import duty as assessed by the authority on the value of import determined by the authority. It is difficult to accept the contention of the petitioners that the Legislature contemplated that this abnormal situation must arise and the benefit of payment of duty lesser than that assessed by the authorities should be available to an importer or owner in each and every case where in respect of *ad valorem* goods the assessing authority apprehends that the duty is chargeable at higher rate than that mentioned in the bill of entry or shipping bill.

Obligation is cast under s. 87 on the assessing authority to assess all goods imported where duty is leviable. Under s. 89 until there is an order for clearing subsequent upon the assessment made, goods cannot be cleared by any owner or importer. Under s. 167, cls. (8) and (37) the goods are liable to be confiscated for certain offences. It is, therefore, clear that the contention of Mr. Lulla that there is no procedure other than that mentioned in s. 32 available to the assessing authorities is not correct. The power to assess the duty payable in respect of any imports and for that purpose to ascertain the real value is not to be found only in s. 32, but is also implicit in the provisions of s. 87 read with s. 89 of the Act. Reference may be made in this connection to ss. 29, 29A, 29B, 89, 86 and 88 also. The question is whether there is any compulsory restriction imposed on the general power to ascertain "real value" and make assessment accordingly by reason of the provisions in s. 32 of the Act. In this connection it is important to note that the language of s. 32 does not create an obligation on the assessing authority to make the Central Government owners of all goods where duty is found to be chargeable at a higher amount than according to the value mentioned in the bill of entry. It would be anomalous to hold that the owner should be entitled to

delivery of goods at duty lesser than in fact found to be chargeable because the assessing authority does not think it desirable to acquire the imported goods for the ownership of the Central Government. In my view the detention under para. 1 of s. 32 is a condition precedent to the obligations cast on the assessing authority in the subsequent paragraphs of s. 32. As the construction put by Mr. Lulla leads to the curious result that the owner should be entitled to clearance of goods on payment of lesser duty than found to be chargeable, I am of the view that "may" in s. 32, para. 1, cannot be construed as "must". The provision in s. 32 does not cast any obligation on the assessing authority in respect of *ad valorem* goods to compulsorily detain the same. In my view this section is an enabling section which gives power which may be utilised at the discretion of the assessing authorities.

In the case of *Willaitiram Jaishiram v. Secy. of State*¹, the question of true construction of s. 32 directly arose. As regards the contention of the plaintiff in that case that the section empowered an importer to compel the customs officer either to accept his declared value as correct or if he challenges it to buy the goods on behalf of the Government at the declared value, it was held as follows (p. 130):—

"This is not what the section says, nor is it permissible to interpret it in that sense. The Act contemplates three different procedures which a Customs Officer may adopt if he finds the declared value to be incorrect. He may proceed to fix the real value in accordance with the provisions of s. 30 and levy customs duty accordingly. He may, if he so wishes, detain the goods, with the object of enabling the Collector of Customs to decide whether the goods should be delivered to the importer on payment of duty in accordance with the declaration made by him, or to buy the goods... Lastly, the customs officer duly authorised in that behalf may forfeit the goods and at the same time impose a penalty by way of fine as contemplated by S. 167 of the Act. The interpretation contended for by the plaintiff is not warranted by the provisions of the Act, and cannot possibly be accepted for more reasons than one. Such an interpretation would at once render the provisions of S. 167, Cl. 37(b) nugatory, as it would enable a fraudulent importer to avoid the forfeiture of his goods by offering to sell them to Government at their declared value. It would also make the provisions of Ss. 32 and 39 not easily reconcilable. An importer has no option given to him by S. 39 of the Act of compelling Government to purchase his goods at the declared value when excess duty is levied from him within three months after the goods have been taxed and even removed from the Customs premises. If that be so, there is no reason why he should have an option of compelling Government to purchase his goods at the declared value when such value is found to be incorrect before the proper duty is demanded from him.

The option lies with Government to buy the goods in fit cases and not with the importer. The use of the expression 'may' in the first part of S. 32 makes it abundantly clear that the option lies with the Customs Officer."...

I am in respectful agreement with the above observations contained in that decision.

Mr. Lulla developed his argument by relying upon certain decisions which may be referred to.

In the case of *Nazir Ahmad v. Emperor (No. 2)*², the question before the Privy Council related to a confession not recorded in accordance with the provisions of s. 164 of the Code of Criminal Procedure and it was observed (p. 993):

"...Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not less well recognised rule, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts—*Taylor v. Taylor*³—and although the Magistrate acting under this group of sections is not acting as a

1 [1936] A. I. R. Sind. 127.

2 [1936] 38 Bom. L. R. 987, P.C.

3 (1875) 1 Ch. D. 428, 431.

Court, yet he is a judicial officer, and both as a matter of construction and of good sense there are strong reasons for applying the rule in question to s. 164."

Mr. Lulla contends that the only procedure prescribed for assessment of *ad valorem* goods is in s. 32 of the Act and power to detain must be exercised in the prescribed manner. This contention of Mr. Lulla is based upon the construction which he has put upon s. 32, namely, that it creates a compulsory obligation on the assessing authority to detain the goods and that "may" should be held to mean "must" in that section. As I have already observed the scheme of the Act and particularly the provisions contained in Chaps. V, IX, XVI and XVII do not warrant any such construction of s. 32.

Mr. Lulla has also relied upon the case of *Emperor v. Bhana Makan*⁴. In that case it was observed that (p. 434):—

"It is a well recognised canon of construction that where there is a specific provision in a statute as well as general one, and the case is covered by the specific provision, it is that specific provision, which must govern the case and not the general one,..."

I do not accept that the provisions in s. 32 are compulsory or specific provisions applicable in all cases where *ad valorem* goods are found to be chargeable with a higher rate of duty than that mentioned in the bill-of-entry or shipping bill. I have already observed that this is an enabling power given to the assessing authority to be exercised at his discretion.

Mr. Lulla has also relied upon the case of *Wan Ten Lang v. Collector of Customs*⁵. The petition in that case was an application under s. 45 of the Specific Relief Act for an order upon the customs authority to proceed under s. 32 of the Sea Customs Act. The respondent contended that the Court had no jurisdiction and relief could not be granted under s. 45 of the Act. The petitioner contended that there was a statutory obligation on the customs authorities to proceed to determine his case under the provisions of s. 32 of the Act. The contentions of the respondent were upheld and it was held that the High Court had no jurisdiction and the relief could not be granted under s. 45. Tentative observations were, however, made in regard to the provisions of ss. 30 to 32 and 87 and 167 of the Sea Customs Act and it was intended that further arguments would be advanced on behalf of the respondent on the basis of such observations. No further arguments were, however, advanced. Whilst making these observations Ameer Ali J. has expressed grievance that assistance had not been received from the Advocate General in regard to the construction of these sections. After holding that s. 32 related to *ad valorem* goods, it is observed as follows (p. 176):—

"...It is therefore inferred that this Act intends to prescribe different procedure for different classes of goods. There is no question of option. If it is *ad valorem* goods there is a special class of procedure, Ss. 30 and 32. If it is tariff value goods then the assessment is under the general powers and the power to detain under the general power. If that view is right (and indeed upon any view) the action of the Customs in making a penal assessment, merely increasing it by 50 per cent. is not warranted by any provision of the Act. They can confiscate, they can impose a penalty under S. 167."

At p. 177 of the report after considering the decision of the Sind Court cited by the Advocate General, it is observed that:

"...The real point was whether S. 167 was excluded by S. 32, i.e. whether the Customs were precluded from proceeding criminally and were not bound to proceed under S. 32. The learned Judge does go on to say that there are three alternatives. Then he goes on to say 'there is an option on the part of the Customs Authorities,' and his point is not that there is an alternative procedure, or option to proceed under S. 32 or by way of some other Section, but that under S. 32, by reason of the word 'may', notwithstanding that he is applying S. 32, he need not follow the course there laid down. That was the learned Advocate-General's argument based on this case. That argument is I think wrong. If S. 32 applies, 'may' is 'must'. If S. 32 applies, there is no other procedure."

With great respect to the learned Judge I do not agree with the observations contained in that decision. As I have already discussed it is not possible to accept the view that s. 32 creates any obligatory procedure in respect of *ad valorem* goods found to be chargeable with higher duty than chargeable on the value mentioned in the bill of entry. It is only an enabling section which may be resorted to at the discretion of the assessing authority. The general power to assess the 'real value' of the goods and to accordingly charge duty payable as contained in the other parts of the Act has not been in any manner affected by the provisions in s. 32.

In the case of *Glaxo Laboratories v. A. V. Venkateswaran*⁶ whilst considering the provisions of ss. 30 and 39 of the Act and also the scheme of the Act in connection with the assessment and recovery of the duty I held that "with the knowledge that the goods are liable to be charged with a higher amount of duty than mentioned in the bill of entry" the customs were bound to proceed under s. 29B to make a provisional assessment or detain the goods under s. 32 and that they had no right to release the goods and allow the same to be cleared with that knowledge without proceeding in the aforesaid manner. In that connection I observed "From the scheme of the Act the word 'may' in section 32 appears to have been used in the sense of 'must'". On further considerations as mentioned above, this observation made by me appears to be incorrect.

The second contention urged on behalf of the petitioners is based on the provisions in s. 183 which provides:

"Whenever confiscation is authorized by this Act, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit."

Under s. 184 when anything is confiscated under s. 182 such thing upon confiscation vests in Government and the officer adjudging confiscation is directed to take and hold possession of the thing confiscated. Mr. Lulla contends that in respect of penalty of confiscation imposed against the petitioners on the footing of their having committed offences under items (8) and (37) of s. 167 of the Act, the petitioners are deprived of the option which must be available to them to a release of the goods upon payment of fine. He contends that even if the petitioners paid the fine of Rs. 325 levied in respect of offence under s. 167(8), because of penalty of confiscation imposed in respect of the offence under s. 167(37), the petitioners would not get a release of goods in accordance with s. 183. He also contends that the same argument with equal force applies in respect of penalty of fine of Rs. 160 and confiscation for the offence under s. 167(37). He also contends that the direction to the petitioners contained in the foot note of the impugned order that proper duty will have to be paid before the goods are cleared contravenes the provisions of s. 183. He contends that the result of this direction is that the goods will not be allowed to be cleared in spite of the payment of fine. He further contends that this direction involves payment of duty in respect of the goods ownership whereof by reason of confiscation has vested in the Government. He says that there is no provision in the Act enabling the customs to recover duty from the petitioners in respect of goods vested in Government by reason of the order of confiscation. In my view the directions in the impugned order are in consonance with the provisions of s. 183. Confiscation is authorised in respect of the offences under s. 167(8) and (37). It is ordered that in respect of each of the offences under items (8) and (37) of s. 167 respectively a fine of Rs. 325 and Rs. 160 should be paid. It is directed that in lieu of confiscation upon payment of fine in respect of offence under each of the aforesaid items the petitioners be entitled to claim the goods for home consumption. The order, therefore, does not contravene the provisions of s. 183 and on the contrary provides for payment of fine in lieu of confiscation as contemplated

⁶ (1958) O. C. J. Miscellaneous No. 245 ber 24, 1958 (Unrep.).
of 1957, decided by K. K. Desai J., on Novem-

under s. 183. Section 183 has nothing to do with the release or clearance of the goods. The true effect of the section is that a single order of confiscation and payment of fine in lieu of confiscation has to be made in every case where penalty of confiscation is adjudged. This section creates an artificial situation whereunder upon payment of fine the confiscation and vesting of goods in the Government ceases to be effective altogether, and the goods continue to belong to the owner as if there was no intervention in ownership of the goods in consequence of the order of confiscation. That being the true construction the contention of Mr. Lulla that in respect of the goods ordered to be confiscated there is no provision for payment of import duty by the owner for the purpose of clearance thereof is not sustainable. I have not been able to appreciate why by reason of provisions of s. 183 more than one order of confiscation and payment of fine in lieu thereof cannot be made if circumstances of the case warrant such orders.

In support of his second contention Mr. Lulla has relied upon the decision in *Seopujanrai I. Ltd. v. Collector of Customs*⁷. The petitioners in that case were held to be the owners of certain smuggled gold though they were not concerned in smuggling. An offence under s. 167(8) of the Sea Customs Act was held to have been committed and order of confiscation of the gold was made. It was further *inter alia* ordered that upon payment of certain fine and the import duty payable the petitioners should be entitled to delivery of the goods. One of the grounds on which the petitioners challenged the order was that the condition directing payment of duty was invalid. In that case it was held that (p. 852):

"...The point to note is that so far as the confiscation of the goods is concerned, it is a proceeding *in rem* and the penalty is enforced against the goods whether the offender is known or not known."

As regards the question of invalid condition directing payment of duty as it was not clear from the facts as to how the goods were imported into India and who was the importer, the direct question which arose was regarding the provisions in the Act under which an obligation for payment of duty could be imposed against the petitioners. On behalf of the Union of India the only section which was relied upon by the Solicitor-General for India was s. 88 of the Act. Under that section if any goods are not entered and cleared for home consumption, or warehoused within four months from the date of entry of the vessel, the customs is authorised to sell off the goods and apply the sale proceeds *inter alia* for payment of duty leviable on such goods. In respect of that contention raised by the Solicitor General it was observed (p. 854):

"...As to the second condition of payment of customs duty etc., the learned Solicitor-General referred us to a decision of the Bombay High Court in *Keki Hormusji Elavia v. The Union of India*^{7a} and submitted that customs duty was payable under S. 88 of the Sea Customs Act, as in the Bombay case. The facts of the Bombay case were entirely different; it was found there that the goods, which were toilet and perfumery goods, had been smuggled through the port of Kantilal near Surat without payment of any duty and in those circumstances, it was held that S. 88 applied. In the case before us there is no finding by what means the gold was smuggled—by sea or land—and it is difficult to see how S. 88, which relates to goods not cleared or warehoused within four months after entry of vessel, can be of any help in the present case.

We are, therefore, of the view that the Collector of Customs had no jurisdiction to impose any of the two conditions mentioned above."

It is apparent that the Supreme Court considered the provisions of s. 88 and found that as there was no evidence as to the entry of any vessel in the case before them, the provisions in s. 88 were not applicable. If the provisions of s. 88 were applicable to the case before the Supreme Court, the decision might have been the same as the decision of this Court in *Keki Hormusji v. Union of India*.

7 [1958] A. I. R. S. C. 845.

7a (1953) Special Civil Application No.

L. R.—64

1296 of 1953, decided by Chagla C. J., and Shah J., on August 18, 1953 (Unrep.).

In the case before me the facts are altogether different. The petitioners are the importers and owners of the goods which were imported by s.s. Kirsten Maersk. The goods are admittedly liable to pay import duty. The petitioners have been found to be guilty under ss. 167(8) and (37). In my view the existence of the impugned order of confiscation does not in any manner affect the liability of the petitioners to pay duty in respect of the goods imported by them. Section 183 cannot be construed to affect the rights of the customs to recover duty in respect of these goods prior to the clearance thereof.

In this connection it is relevant to point out that the petitioners and the respondent have both submitted that the directions in the foot note do not form part of the impugned order and that in the event of the petitioners paying the fine as mentioned in the order the question of payment of duty would arise and will require to be decided in future. Mr. Mehta has, therefore, contended that the petitioners are not entitled to raise their second contention in the present proceeding and the contention is premature. Having regard to the views already expressed by me it is unnecessary to decide this contention of the respondent.

The third contention raised for the petitioners is that as regards the offence under s. 167(8) the expression "real value" as defined in s. 30 of the Sea Customs Act has no relevance at all. The contention is that prohibition and restriction as contained in the licence of the petitioners as regards the value of the goods permitted to be imported relates to c.i.f. value or cost in fact incurred and paid. The same is not to be ascertained on the artificial basis in respect of the value to be found in s. 30.

As regards the levy of import duty the cost incurred is not the value and the duty is to be levied on the "real value" ascertained in accordance with the definition in s. 30. A copy of the licence of the petitioners meant for exchange control purposes has been produced before me. The licence mentions the name of the importer, country of consignment and origin, description of goods and also contains conditions of the licence. Clauses 6 and 8 of licence provide as follows:—

"(6) Approximate value c.i.f. Rupees forty-eight thousand five hundred and thirty-eight only.

(8) Limiting factor for purposes of clearance through customs:—'value.'
Printed condition No. 2 runs as follows:—

"(H) It is a condition of this licence that where an irrevocable letter of credit is opened by the holder of the licence to finance the import of any goods covered thereby, then the authorised dealer in foreign exchange through whom the credit is opened shall be deemed to be a joint holder of this licence to the extent of the goods covered by the credit."

Relevant parts of the typed conditions provide as follows:—

1. 10 per cent. of the face value of the licence may be utilised for import of permissible spare parts...

2. 15 per cent. of the face value of the licence may be utilised for import of art silk fabrics...

The licence holders will not be permitted to utilise more than 10 per cent. of the face value of their licence for import of 120 deniers art silk yarn in bright finish...

The bond is to be guaranteed by a scheduled bank of at least 30 per cent. of the c.i.f. value of the goods... Processed manufactured goods of a minimum value equal to twice c.i.f. value of the imported raw materials are required to be exported.

At the back of the licence there is a stamped endorsement with reference to £241.7 equal to Rs. 3,260 for which letter-of-credit was opened in respect of the petitioners' goods by the Union Bank of India Ltd., as authorised exchange bank.

The adjudication in respect of offence under item (8) of s. 167 related in this case to the importation of the petitioners' goods contrary to the restrictions as contained in this licence. The charge against the petitioners was that the value of the goods imported by them was in excess of Rs. 3,260 being the

amount for which the letter-of-credit had been opened by the petitioners in favour of the exporters in Japan and premia paid for insurance.

The finding in the order in respect of this charge is that the value of the goods imported exceeded the unutilised value of the licence by Rs. 325 for which amount the importers had no valid licence. It cannot be disputed that this finding is not based on any ascertainment of facts relating to the c.i.f. value or price in fact paid by the petitioners to the Japanese exporters. In fact the finding is based on the "real value" of the petitioners' import as defined in s. 30 of the Act. That, however, is entirely unjustified. Under cl. (a) of s. 30 the wholesale cash price in local market is the "real value" for levying customs duty. Under cl. (b) the cost of any other goods of the like kind and quality is the basis of "real value". Broadly stated "real value" as mentioned in s. 30 has no reference to the actual c.i.f. cost or price incurred, except in the case where there is no other "goods of the like kind and quality". This aspect of s. 30 has been discussed in decisions of this Court and the Privy Council and does not require any further elucidation here. The question that arises is whether in investigating an offence under s. 167(8) of the Act it is permissible for the authority to make a finding on the basis of "real value" as defined in s. 30 of the Act or whether the decision must be based on actual c.i.f. value or costs incurred. The offence obviously relates to violation of restriction as contained in the licence for import. The conditions in the licence and the language of the licence in various particulars as already quoted above have apparently reference only to the c.i.f. cost or price incurred. The same has direct reference to moneys transmitted outside India. The conditions in the licence as to value are not on the basis of artificial "real value" of imports. If that is the true position it is not permissible for the authority in proceedings under s. 167(8) to base its finding on the "real value" (of the goods imported) as defined in s. 30 of the Act. The finding must be based on actual c.i.f. value or cost incurred by the importers. There is in fact no attempt made in the findings contained in the impugned order to find the actual c.i.f. value incurred and paid or whether the same was in excess of that mentioned in the bill-of-entry. It appears to me that in fact the actual c.i.f. cost incurred was the same as moneys transmitted by letter-of-credit plus costs of insurance amounting to Rs. 3,260. True construction of the impugned order is that on the basis of the "real value" as defined in s. 30 of the Act it is found that there was violation of the condition as to value as contained in the licence. That appears to me to be an apparent error of law in the impugned order and the finding that the petitioners committed an offence under s. 167(8) is not sustainable. The order of confiscation and payment of fine of Rs. 325 in respect of that offence is accordingly not sustainable. It is, however, admitted by both sides that the order is severable in respect of two offences mentioned in the order and that even if my finding is against the respondents in respect of the offence under s. 167(8) the same does not affect in any manner the finding in the impugned order in respect of the offence under s. 167(37).

Mr. Mehta has in this connection relied upon s. 3(2) of the Imports and Exports (Control) Act, 1947, which runs as follows:—

"All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted under section 19 of the Sea Customs Act and all the provisions of that Act shall have effect accordingly."

These provisions, in my view, do not in any way enable the authority to base its findings in matters of an offence under s. 167(8) on the footing of the "real value" of the goods imported. In my view the conditions imposed under restrictions notified under s. 3 of the Imports and Exports Act, 1947, or s. 19 of the Sea Customs Act would have to be construed on the language of the restrictions whether in the licence or otherwise. The provisions in s. 30 as to "real value" cannot have any relevance to the restrictions as contained in the

import licence unless specifically incorporated by the language of the restrictions.

In this connection Mr. Lulla also argued that violation of restriction as to value related to the goods of the value of Rs. 325 only and that the penalty which could be imposed must relate to the goods of the equivalent value. He, therefore, contended that for an offence under s. 167(8) order for confiscation of all the goods imported could not be made. Having regard to the conclusion which I have come to in respect of the alleged offence under s. 167(8) it is unnecessary to decide this contention.

In respect of the finding that the petitioners committed an offence under s. 167(37) of the Act, the contention of the petitioners is that there were no other goods of the like kind and quality and, therefore, the "real value" of the imported goods under s. 30(B) must be held to be the actual c.i.f. costs incurred. The respondents deny that contention. The respondents' case is that in fact there were other goods of the like kind and quality and that accordingly the customs duty was payable in respect of the petitioners' import on the basis of the costs at which "the goods of the like kind and quality" could be delivered at Bombay at material times. In support of this contention, the respondents have produced before me by way of illustration documents relating to imports made by H. N. Pahilaj and Co. of Bombay from Yakota and Co. of Japan. These documents show that H. N. Pahilaj and Co. imported dyed spun rayon gaberdine 54" x 25" under a bill of lading dated January 21, 1958, at the price of d. 36 less 3 per cent. c.i.f. Bombay. The contract is dated December 12, 1957, and provides for shipment January/February, 1958. The

construction of goods in the contract is mentioned as $\frac{30/2 \times 20/s.}{104 \times 54}$. It is the case of the petitioners that their contract was also for spun rayon gaberdine 54" x 25 yards and of the construction of $\frac{30/2 \times 20/s.}{104 \times 54}$. The petitioners' contract is dated December 21, 1957, and the shipment is February 1958. The invoice and the contract of H. N. Pahilaj and Co. is relied upon in the impugned order. Substantially there is no difference of any kind in the goods of the petitioners and that of H. N. Pahilaj and Co. The respondents have also relied upon several other invoices and it is the respondents' case that slight differences in construction do not in any manner distinguish the spun rayon gaberdine imported by the petitioners from the gaberdine mentioned in other invoices relied upon by the respondents. Respondent No. 1 has in para. 31 of the affidavit in reply stated

"that the real value in the present case was ascertained on the basis of the c.i.f. value of goods of the like kind and quality imported at Bombay at the time of importation of the petitioners' goods."

Having regard to these facts I cannot accept the contention of the petitioners that there were no other goods of the like kind and quality on the basis whereof respondent No. 1 could make a finding in respect of goods of the petitioners as he in fact did by the impugned order. The petitioners had contended before respondent No. 1 that their goods were "kaybee gaberdine 60" and, therefore, respondent No. 1 was not entitled to hold that there were other goods of the like kind and quality. Respondent No. 1 has made a finding that the petitioner's contention could not be upheld. It is not for me in this writ petition to go behind that finding. There is no reason why I should hold that respondent No. 1 was not entitled in law to make that finding. In fact from the documents annexed to the petition it appears that Kishin Chand and Co. had not in the first instance provided for marking of the goods to be imported as "kaybee 60". That mark was subsequently agreed to be woven in the selvedge of the gaberdine to be imported. The petitioners' case that "kaybee 60" is the trade description of their goods does not on facts appear to be correct.

In this connection Mr. Lulla relied upon the decision of the Privy Council

in the case of *Vacuum Oil Company v. Secretary of State*². In that case the plaintiffs had imported from the United States of America lubricating oil known as Gargoyle. In that case it is observed as follows (p. 1060):—

"And, first, with reference to the position of the oils in the Bombay market, the outstanding fact is that, imported as they are under the trade description of 'Gargoyle', of no other oils can it be said, in Bombay, that, using the language of the Act, they are of 'the like kind and quality'. Accordingly, the relevant 'wholesale cash price' for the appellants' lubricating oils, if any there be, must be found in the actual sales of these oils in Bombay by the appellants themselves."

These observations, in my view, related to the facts of that particular case before the Privy Council. There is no general observation in that case which is applicable to the facts before me. In that case it appears to be admitted by both sides that Gargoyle was the trade description of the goods of the plaintiffs. It is denied by the respondents that "kaybee 60" is any trade description at all of the goods imported by the petitioners. In that view of the matter the decision of the Privy Council cannot in any manner support the contentions of the petitioners.

I, therefore, negative the contentions of the petitioners that there were no "goods of the like kind and quality" and/or that the finding made against the petitioners on the footing of the other invoices as mentioned in the impugned order and in the affidavit in reply is invalid.

Mr. Lulla has further contended that the impugned order does not contain any finding that the invoice value produced by the petitioners was false or incorrect and he, therefore, says that the finding that the petitioners had committed an offence under s. 167(37) is not sustainable. The inquiry before respondent No. 1 as regards the offence under s. 167(37) was that the assessable value of the goods was Rs. 3,588 and not Rs. 3,260 as mentioned in the bill of entry. In the enquiry the contention of the petitioners was that their invoice evidenced the "real value" of the petitioners' goods. The finding of respondent No. 1 is that the petitioners' contention cannot be accepted and that the goods had been under-valued involving a loss in revenue and that accordingly an offence had been committed under s. 167(37). That is the only correct way of reading the impugned order. I, therefore, cannot accept the contention of the petitioners that there is no finding in this order that the value of these goods as mentioned in the invoice produced by the petitioners is not correct "real value".

Having regard to the findings which I have made and the position accepted by the petitioners that the impugned order is severable as regards the two offences mentioned therein, the order that the petitioners are entitled to is that there will be a writ of prohibition and an order of injunction directing the respondents not to enforce against the petitioners the penalty of confiscation of the goods and the fine of Rs. 325 in respect of the offence under s. 167(8). The petitioners are under the circumstances entitled to an extension of time for payment of fine of Rs. 160 in lieu of confiscation ordered under s. 167(37). The time mentioned for the purpose in the impugned order will run from to-day. The petitioners have succeeded only in part, but have not by this petition acquired any substantial result for release of their goods. The fair order for costs accordingly will be that each party will bear its own costs.

The petitioners appealed. The respondents filed cross-objections.

R. Jethmalani, with *M. J. Mirchandani*, for the appellants.

Porus A. Mehta, with *P. K. Irani*, for the respondents.

S. T. DESAI J. An order was made by the Assistant Collector of Customs against the petitioners (appellants) on two counts on the facts and in the circumstances which we shall presently indicate. The first count was under s. 167(8) of the Sea Customs Act, to which we will hereafter refer as "the

Act", and a fine of Rs. 160 was imposed on the petitioners. The second count was under s. 167(37) of the Act, and the petitioners were given an option under s. 183 of the Act to pay, in lieu of confiscation, a fine of Rs. 325. The petitioners challenged the legality of the order and in their petition asked for an appropriate writ or writs under art. 226 of the Constitution.

A sale note, dated December 21, 1957, in respect of sale of 10,000 yards of Spun Rayon Gaberdine at the rate of d. 30 per yard c.i.f. Bombay, was passed by T. Kakiuchi and Co., Ltd., Japan, in favour of Messrs. Kishinchand and Co., Bombay, and in respect of those goods purchase advice was issued by the latter to the company in Japan. In the purchase advice it was mentioned that the goods should be stamped after every two or three yards at selvage "Kay-bee Gaberdine No. 60 made in Japan". The petitioners wanted to purchase a part of those goods and obtained the requisite import licence and thereafter placed an indent with Kishinchand and Co. in respect of 1,950 yards of the same. Ultimately the petitioners received a sale note from the company in Japan for the sale of 1,950 yards of the goods at d. 30 per yard c.i.f. Bombay. The goods were described in the sale note as "Kaybee 60 Spun Rayon Gaberdine 54". The petitioners opened a letter of credit for £241-7-0 being the c.i.f. value of the goods agreed to be sold to them. "S.S. Kirsten Maersk" carrying *inter alia* the goods sold to the petitioners arrived in Bombay on April 14, 1958. The petitioners submitted on the same day the bill of entry showing the real value of the goods as Rs. 3,260 being the c.i.f. price of the goods. The Customs Authorities examined the goods and after noting the bill of entry on or about April 19, 1958, forwarded the same to the Appraising Department. About two months thereafter, two notices were received by the petitioners from respondent No. 1 who is the Assistant Collector of Customs. The first notice related to the count under s. 167(8) of the Act read with s. 3(2) of the Imports and Exports Control Act, 1947. The other notice related to the other count already mentioned by us. According to respondent No. 1, the value ascertained by the Customs Authorities of the goods imported by the petitioners came to Rs. 3,588, whereas the value actually declared by the petitioners in the bill of entry was Rs. 3,260. It was stated in the notice that though the value shown was d. 30 per yard, it was ascertained at d. 33 per yard, and that the petitioners' conduct had resulted in the loss of difference in duty amounting to Rs. 328 and that constituted the offence under the second count. An opportunity was given to the petitioners to explain the matter as required by the provisions of s. 167(37) of the Act. After hearing the petitioners and after considering the written explanations submitted on their behalf which contained all the arguments of the petitioners on the two counts with which they were charged, respondent No. 1 on July 16, 1958, passed the order which was impugned in the petition. The effect of that order was that the goods in question would be confiscated. Option was given to the petitioners under s. 183 of the Act to pay in lieu of such confiscation a fine of Rs. 325 for the offence under s. 167(37) of the Act. That option was directed to be exercised within four months. There was a foot-note in the order to which the learned Judge has referred in his judgment. We do not think it is necessary to refer to it in this synopsis of the facts of the case. The view which we take of this case will not in any manner affect any contention that the petitioners may in any future proceedings be advised to take having regard to that foot-note.

The petition was heard by Mr. Justice K. K. Desai, and considerable arguments were advanced before him. He held in favour of the petitioners on the first count relating to the offence under s. 167(8) of the Act read with s. 3(2) of the Imports and Exports Control Act, 1947. On the other count relating to the offence under s. 167(37) of the Act, the learned Judge dismissed the petition, and the petitioners have preferred this appeal. There are cross-objections filed on behalf of the respondents to the petition and they relate to the count which was decided against them by the learned Judge.

Various contentions have been pressed for our acceptance by Mr. Jethmalani, learned counsel for the petitioners. We shall examine them in the same order in which they were urged before us. It was argued by learned counsel that s. 167(37) of the Act cannot have any application to the facts of the petitioners' case. That section is as under:

"The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:—

Offences	Section of this Act to which offence has reference	Penalties
37. If it be found, when any goods are entered at, or brought to be passed through, a custom-house, either for importation or exportation, that—	86 & 137	such packages, together with the whole of the goods contained therein, shall be liable to confiscation, and every person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees.
(a) the packages in which they are contained differ widely from the description given in the bill-of-entry or application for passing them; or		
(b) the contents thereof have been wrongly described in such bill or application as regards the denominations, characters or conditions according to which such goods are chargeable with duty, or are being imported or exported; or		
(c) the contents of such packages have been mis-stated in regard to sort, quality, quantity or value; or		
(d) goods not stated in the bill-of-entry or application have been concealed in, or mixed with, the articles specified therein, or have apparently been packed so as to deceive the officers or Customs,		
and such circumstance is not accounted for to the satisfaction of the Customs-Collector.		

It was said that s. 167(37)(c) contemplated mis-statements about "value" of the goods and not about the "real value" of the goods as defined in s. 30(b) of the Act. Our attention was drawn by learned counsel to ss. 29, 30, 31, 32 and 87 of the Act. Before we deal with the argument as it was developed by learned counsel, it will be convenient to examine the scheme of the section, in so far as it is necessary to do so in the context of the present contention which was strongly pressed before us.

Chapter V of the Sea Customs Act deals with levy of, and exemption from, customs-duties. Section 20 deals with the subject of "goods dutiable", and lays down that except as provided in the Act, customs-duties shall be levied at such rates as may be prescribed by or under any law for the time being in force, and then goes on to refer to various categories of goods. Section 21 relates to goods partially composed of dutiable articles. Section 22 empowers the Central Government, from time to time, by notification in the Official Gazette, to fix, for the purpose of levying duties, tariff-values of any goods

exported or imported by sea on which customs-duties are by law imposed. Sections 23 to 28 are not material for the present purpose, nor are ss. 29A and 29B. Sections 29 and 30 are crucial, and the controversy before us relates *inter alia* to the meaning and effect of those sections. Section 29 imposes on the owner of the goods an obligation to declare the "real value" of the goods in the bill of entry or shipping bill. The material and relevant part of that section is as under:

"On the importation into, or exportation from, any customs-port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill-of-entry or shipping-bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill."

It will be seen that the duty cast on the owner of the goods is to declare not his cost price or the value paid by him but the "real value" of the goods. The expression "real value" has, for the purposes of the Act, been defined in s. 30. It is a notional definition. That section lays down as follows:

"For the purposes of this Act the real value shall be deemed to be—

(a) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof; or,

(b) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place without any abatement or deduction except as aforesaid."

Section 86 relates to entry for home consumption or ware-housing and is as under:—

"The owner of any goods shall, after the delivery of the manifest by the master of the vessel in which they are imported, make entry of the goods for home consumption or warehousing by delivering to the Customs-Collector a bill of entry thereof with such number of copies, in such form and containing such particulars, in addition to the particulars specified in section 29, as may, from time to time, be prescribed by the Chief Customs-officer.

The particulars of such entry shall correspond with the particulars given of the same goods in the manifest of the ship."

Section 87, which is also one of the material sections for the present purpose, relates to assessment of dutiable goods and is as under:

"On the delivery of such bill the duty (if any) leviable on such goods shall be assessed, and the owner of such goods may then proceed to clear the same for home consumption, or warehouse them, subject to the provisions hereinafter contained."

We have already set out the provisions of s. 167(37) of the Act. It will be noticed that the initial words of the section which relates to punishments for offences are, "the offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:—". The schedule, it will be noticed, is in three columns. The first column enumerates the various offences and the third column lays down the penalty to be imposed in case of any contravention of the provisions of the Act which amounts to an offence under the Act. Column 2 is headed "section of this Act to which offence has reference". It will be noticed from s. 167(37) that the second column of the schedule mentions ss. 86 and 137. They are sections of the Act to which, according to that column, the offence has reference. Some argument has been advanced before us about the effect of column 2 and the reference to ss. 86 and 137 of the Act in the second column relating to s. 167(37). There is a note at the end of the section which is as under:

"Nothing in the second column of the above schedule shall be deemed to have the force of law."

In the view we take of the construction of s. 167(37), it will not be necessary for us to attach any importance to the second column and to the fact that the second column, so far as it relates to s. 167(37), makes reference to ss. 86 and 137. We intend to construe s. 167(37) without seeking any assistance from the second column.

To turn to the argument of Mr. Jethmalani. It is said that cl. (c) of s. 167(37) is the only provision relating to offences which can, if at all, be applicable to the facts of the case before us and that is the clause which was applied by the Customs Authorities to the case of the petitioners. The argument has proceeded that the clause only speaks of mis-statements in regard to the value of the contents of the packages in which the goods were contained. The expression "value", it is said, must be construed in its plain, ordinary and natural sense; and the plain, ordinary and natural sense of the expression "value", according to learned counsel for the petitioners, is the cost price of the goods, or, to put it differently, the value of the goods paid by the petitioners. It is strongly urged that it would be importing words into this clause to interpret the word "value" as the "real value" and then to incorporate into the penal clause the somewhat artificial definition of the expression "real value". The argument was stressed in the form of an interrogation: "What have I mis-stated?" It was said that the petitioners did not make any mis-statement in regard to the value of the goods when they declared the value of the goods which they themselves had paid and of which fact there was abundant evidence and the correctness of which had not been challenged by the Customs Authorities. It has also been urged that we are examining a penal statute and the language of a penal statute should be strictly interpreted in favour of the subject and against the Revenue.

Now at first blush the argument may seem somewhat attractive, but an examination of the relevant provisions and particularly the language of s. 167(37) shows that it is not well-founded. In coming to a determination as to the meaning of a particular word or expression in a statute, it is permissible to consider two points: (i) the external evidence derived from extraneous circumstances such as the previous legislation and decided cases, and (ii) the internal evidence derived from the statute. This is of particular cogency when the internal evidence is afforded by the other clauses of the section itself. As we shall presently point out considerable light is thrown on this question of interpretation of cl. (c) when we scrutinise the provisions contained in the other clauses which are relevant for the purpose of ascertainment of the true meaning and effect of s. 167(37)(c) of the Act. A good deal has been said about the broad principles on which penal statutes should receive interpretation. In a general sense it is true to say that a penal statute should be strictly interpreted in favour of the subject. But the distinction between a strict and a liberal construction has considerably dwindled with regard to all classes of statutes, whether penal or not, and the rules of interpretation are now substantially the same rules when one has to deal with modern enactments; and the reason for this is that all modern Acts are framed having regard to equitable as well as legal principles. Penal statutes are construed with reference to the true meaning and the real intention of the Legislature as is done in the case of other statutes. It is not our purpose to suggest that there are no special considerations which weigh with the Court when it is interpreting a penal statute. The considerations indubitably are there, but when we speak of the canons of construction there is no distinction between a strict and a liberal construction of a penal statute. Of course, in a penal statute, "where you depart from an ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense must plainly appear". It is well established that those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it *shall* be incurred in the present circumstances. They must fail if the words are equally capable of a construction that would, and one that would not, inflict the penalty. The more correct version of this doc-

trine, it has been said, appears to be that the statutes of this class are to be fairly construed and faithfully applied according to the intent of the Legislature, without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the Courts inclining to mercy." (see, Craies on Statute Law, 5th edn., p. 504).

Clause (c) of s. 167(37) cannot be read in isolation as the argument of learned counsel for the petitioners seems to ask us to do. The language of cl. (c) itself shows that it is a part of one whole sentence and one comprehensive statement and it has to be read in the context of the preceding clauses of that section. Section 167(37) is enacted under four sub-heads, and cl. (c) is one of them. Clause (a) rules that in case the packages in which the goods are contained differ widely from the description given in the bill of entry or application for passing them, the packages together with the whole of the goods contained therein shall be liable to confiscation and the person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees. Clause (b) speaks of "the contents thereof", meaning thereby the contents of the packages in which the goods are contained, and rules that if the contents have been wrongly described "in such bill or application as regards the denominations, characters or conditions according to which such goods are chargeable with duty", a like penalty will be imposed. Clause (c) rules that if "the contents of such packages have been mis-stated in regard to sort, quality, quantity or value," a like penalty shall be imposed. The question must immediately arise: "mis-stated where?" The answer to that is furnished by the contexture of what has been expressed in the preceding clauses. Clause (c) read with the preceding clauses as part of one whole statement of law in s. 167(37) makes it clear beyond doubt that the mis-statement is a mis-statement as to sort, quality, quantity or value of the goods in the bill of entry or application for passing of the goods. Both cls. (a) and (b) in terms express and explicit refer to the bill of entry and application for passing of the goods. Therefore, the mis-statement in respect of which a penalty can be imposed under cl. (c) must be a mis-statement in the bill of entry or application for passing of the goods. Section 167(37) of the Act does not in terms refer to the provisions of the Act relating to the contents of the bill of entry or application for passing of the goods. True, column 2 in the schedule refers to ss. 86 and 137. But we propose in this case to ignore the content of column 2 and examine the point solely from the language of the enacting parts of the statute. Section 29, which states the crucial law, requires the owner of the goods to declare "in his bill of entry" or shipping bill, as the case may be, the "real value" of the goods to the best of his knowledge and belief. That section imposes an obligation on the owner of the goods to declare the "real value" of the goods in his bill of entry; and if in the bill of entry the owner of the goods fails to declare the "real value" of the goods to the best of his knowledge and belief, that obviously would be a mis-statement. The other relevant section is s. 86, the provisions of which we have already stated in examining the scheme of the Act. That section in terms refers to s. 29. Therefore, s. 167(37)(c) must be read along with ss. 29 and 86 of the Act.

If that be the law, and we have little doubt that it is, the expression "value" in cl. (c) of s. 167(37) must mean, in the light of the cognate sections, the "real value" of the goods; and the real value of the goods can only be the value of the goods in accordance with the definition contained in s. 30. Although we have stated in our judgment that we will not look at the contents of column 2 in the schedule, we do not intend to be understood to say that it is not permissible to the Court, in interpreting any of the provisions of s. 167, to look at column 2; but that would only be for facilitating reference, and in doing so, the Court would take care to see that nothing in the second column of the schedule is deemed to have the force of law. In fairness to Mr. Jethmalani we may observe that he stated in the course of his arguments that the second column may be looked at as a sort of a marginal note and the Court

may derive some assistance from the second column for the purpose of viewing the drift of the section. For the reasons discussed above, we have reached the conclusion that the expression "value" in s. 167(37)(c) means "real value" of the goods as required to be stated under s. 29 and as defined in s. 30.

The next contention pressed before us by learned counsel for the petitioners has been that the mis-statement referred to in s. 167(37)(c) means an intentional mis-statement. It is urged that there can be no mis-statement where the owner of the goods has stated the value of the goods actually paid by him. It is said that there must be *mens rea* established before it can be held that there was a mis-statement in regard to the value of the goods made by the owner of the goods. We shall assume for the purpose of examining the present argument that there should be the element of *mens rea* in a case of this nature, viz., an offence under s. 167(37)(c). But as we have already observed, the words "mis-stated" and "value" in cl. (c) must be read in the context of the other cognate provisions of the Act, and when we turn to s. 29 it is clear that it enforces a duty on the owner of the goods to state the "real value" of the goods in the sense in which that expression is defined in s. 30. So if the real value of the goods is not stated by the owner in the bill of entry that would be a mis-statement deliberately made by him. Therefore, there is little substance in the contention that the expressions "mis-stated" and "value" can only embrace the actual value of the goods paid by the owner therefor and not the real value of the goods as required by s. 29.

It is next argued that the order made by the customs authorities is not in accordance with s. 30(b) of the Act. It is said that the goods bore upon them the trade mark of the indenting agent and the trade mark was printed after every two or three yards at selvedge, and the trade mark was "Kaybee 60". The trade mark of the indenter, so it has been argued, had the effect of putting these goods in a class by themselves, because goods of other merchants, even though they may in a general sense be said to be of like kind and quality, cannot strictly be regarded as goods of like kind and quality because they would not bear the distinctive mark of the indenting agent. The crux of the argument is that these goods purchased by the petitioners are *sui generis*, and if they are *sui generis*, they can by themselves be regarded as goods of "like kind and quality" within the meaning of that expression as used in both the cls. (a) and (b) of s. 30. Reliance in this connection has been placed by learned counsel for the petitioners on the decision of their Lordships of the Privy Council in the case of *Vacuum Oil Co. v. Secretary of State for India*.¹ Now, that was a case in which by any reasonable standard the goods in question had to be treated as *sui generis*. Another case to which our attention has been drawn by Mr. Jethmalani is *Ford Motor Co. of India v. Secretary of State for India*.² The goods in that case were motor vehicles. It is extremely difficult for us to see how the doctrine of *sui generis*, which found favour with their Lordships of the Privy Council in the two cases mentioned above, can possibly apply to the facts of the case before us. The goods in question are Spun Rayon Gaberdine, and it is impossible to treat these goods as a class by themselves for the purpose of the enquiry before us. Therefore, the present argument must be negatived. In the view we take of the matter, it is not necessary to examine some other decisions to which our attention was drawn by learned counsel.

The case before us was dealt with by the authorities under s. 30(b) of the Act, as indeed they were bound to do, and the last argument of learned counsel is founded on the effect of s. 30(b). It is said that the words "goods of the like kind and quality" in s. 30(b) would include the goods of the owner himself. This proposition pressed by learned counsel for our acceptance is, as we shall immediately point out, based on a fallacy. Support was sought to be derived for the argument from the above decisions of the Privy Council

1 (1932) L. R. 59 I. A. 258, s.c. 56 Bom. L. R. 313, s.c. 34 Bom. L. R. 1057. 2 (1937) L. R. 65 I. A. 32, s.c. 40 Bom. L. R. 269.

that the words "like kind and quality" in s. 30(a) could very well apply to the goods of the owner himself if the goods were *sui generis*. It was said that the words "like kind and quality" in s. 30(b) would also include goods which are *sui generis*. For the purpose of the present case, we shall assume that learned counsel is right in this first premise of his syllogism. Then it was said, and this was his second premise, that the goods of the petitioners bearing trade mark "Kaybee 60" are goods which fall in a class by themselves and *sui generis* and, therefore, they should be regarded as goods of like kind and quality. This second premise is wholly unsound, and one has only to look at the language of s. 30(b) to see that it is so. Section 30(b) requires that, where the price is not ascertainable the real value of the goods shall be deemed to be the cost at which goods of the like kind and quality could be delivered at such place. This must, of necessity, mean in a case of the nature before us goods other than those the real value of which has to be determined by application of the definition given in s. 30. It was on the footing of the above-mentioned two premises that the argument proceeded that in ascertaining the value of goods of like kind and quality the customs authorities should have taken into consideration the price paid by the petitioners themselves. Our attention was drawn by learned counsel to certain observations made in some reported cases. But we do not deem it necessary to examine them because those observations were made in different contexts and the question which arises for our determination did not directly arise for the decision of the Court in any of those cases. It is extremely difficult for us to see how goods of the nature before us, of which the real value has to be ascertained, can themselves be the data for the application of s. 30(b). But the submission of Mr. Jethmalani is otherwise. That appears to us to be the fallacy underlying the whole argument.

These were the contentions raised before us in support of the appeal by learned counsel for the petitioners-appellants. In our judgment, they fail and the appeal must be dismissed with costs.

There are cross-objections brought by the respondents to the appeal. The cross-objections relate to the offence under s. 167(8) of the Act read with s. 3(2) of the Imports and Exports Control Act, 1947. The brief argument of Mr. Porus Mehta, learned counsel for the respondents to the appeal, who has urged these cross-objections before us, is that for the purposes of s. 167(8) of the Act and s. 3(2) of the Imports and Exports Control Act the value of the goods must be the "real value" and that the licence of the petitioners permitted them to import goods only of the "value" of Rs. 3,260. The real value of the goods was ascertained to be Rs. 3,588 and, therefore, goods of the value of Rs. 328 more were imported by the petitioners. In our opinion, Mr. Justice K. K. Desai was right in the conclusion reached by him when he allowed the petitioners' contention on this part of the case. The licence of the petitioners speaks only of c.i.f. value of the goods and it is the c.i.f. value of the goods and not the real value of the goods, which, as we have said, is a notional value, that is relevant for the purpose of the offence alleged to have been committed under s. 167(8) of the Act read with s. 3(2) of the Imports and Exports Control Act, 1947. We are in agreement with the reasons which found favour with the learned trial Judge on this part of the case to which the cross-objections relate. There is, in our judgment, no substance in the cross-objections, and they will be dismissed with costs.

Before we part with this appeal, we should like to note that the petition related to two amounts of penalty—Rs. 325 and Rs. 160. We may observe that it was open to the petitioners to appeal to the higher authorities under the machinery contained in the Act itself. But the petitioners did not choose to adopt that course which they would normally be expected to do, but sought relief through this Court by way of an extraordinary writ. In a number of cases we have said that these are matters of discretion with the Court and a party cannot come before us as a matter of right. We have also said that we would be very slow to entertain these matters where the disputes relate to

small penalties, unless some question of principle was involved or the nature and circumstances of the case were such as would invite the ready interference of this Court in order to do substantial justice between the parties. We were informed by Mr. Jethmalani that the present petition was filed in Court as a test case because similar goods of very large value were being imported into the country and it was felt desirable that the expeditious remedy by way of a writ should be sought by the petitioners. We have proceeded with the hearing of this appeal on that assurance given by learned counsel. In this case we have also assumed that when *Rule Nisi* was granted in this matter the learned Judge must have taken into consideration this aspect of the matter. We may observe that in cases where small penalties are imposed by the customs authorities and no fundamental right of the subject is violated, the Court should be rather slow in granting *Rule Nisi* unless it is satisfied that a *prima facie* case has been made out for the interference of this Court by issuance of any of the extraordinary writs, and the circumstances of the case demand its interference. We may also observe that a petitioner who seeks relief from this Court by issuance of any of the prerogative writs should take care to set out in his petition the reasons why he approaches this Court instead of adopting the normal machinery available to him under the Act by appealing to higher authorities.

On the view taken by us, both the appeal and the cross-objections will be dismissed with costs. Costs to be taxed on long cause scale. Two counsel certified.

Appeal and Cross-objections dismissed.

Solicitors for the appellants: *Vachha & Co.*

Solicitor for the respondents: *G. M. Divakar.*

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Patel.

VAKRATUNDA CHINTAMAN DEO v. THE SPECIAL LAND ACQUISITION OFFICER, POONA.*

Land Acquisition Act (I of 1894), Secs. 3, 23, 24—Land assessed as agricultural land and valued as such in assessing compensation payable to occupants—Whether such land can be treated as fit for non-agricultural use in valuing interest of claimant—Whether Land Acquisition Officer can assess compensation payable to occupants and claimant in separate proceedings—Compensation whether can be awarded to claimant on account of circumstance that land may be put to non-agricultural use after acquisition—Whether compensation payable to claimant Inamdar can be awarded as market value or as compensation for damage.

Lands which are assessed to land revenue as agricultural land and which are valued in assessing compensation payable to the occupants as land fit only for agricultural use, cannot in valuing the interest of the claimant therein be treated as fit for non-agricultural use.

When land is acquired, all the interests of the owners of the land but not the interest of the State are notified for acquisition and after the composite value for all these interests is assessed the compensation is distributed amongst the owners of the diverse interests in the land in apportionment proceedings. Where, therefore, the Land Acquisition Officer proceeds to assess the compensation payable to the occupants in one proceeding and the compensation payable to the claimant in a separate proceeding, such proceedings would be irregular.

The circumstance that the land under acquisition may be put to non-agricultural use after it is acquired by the State has to be ignored under s. 24 of the Land Ac-

*Decided, March 16/August 26, 1959. First Appeal No. 505 of 1956 (with First Appeals Nos. 506 and 507 of 1956), from the orders

passed by A. A. Badshah, Civil Judge, Senior Division, Poona, in Land Reference No. 132 of 1953.

quisition Act, 1894, and compensation cannot be awarded to the claimant on that account.

A benefit to arise out of land is "land" within the meaning of s. 23 of the Land Acquisition Act, 1894, and by the acquisition of that interest the claimant becomes entitled to the market value thereof on the date of the publication of the notification. Therefore, compensation payable to a claimant for extinction of his interest as Inamdar of the land can be awarded as market value of that interest and not as compensation for damage and he is entitled to the 15 per cent. solatium on the amount awarded to him.

Every piece of land within a municipal area may not be assumed to have an immediate building potentiality.

THE facts are stated in the judgment.

V. J. Gharpure and *D. V. Dharap*, for the appellant.

Y. V. Chandrachud, Government Pleader, for respondent No. 1.

SHAH J. These are three appeals from awards made by the Civil Judge, S.D., Poona, in a group of land acquisition references. By a notification published on December 12, 1946, in exercise of powers under s. 4 of the Land Acquisition Act, the Government of Bombay notified for acquisition 276 acres and 35 gunthas of land out of the village of Aundh, in the district of Poona, for the National Chemical Laboratory. The lands at the date of the notification were in the possession of occupants. The claimant, who is one of the Inamdars of the village, was awarded Rs. 4,093-9-6 as capitalised value of agricultural assessment receivable by him in respect of the lands from the occupants. The occupants were separately awarded compensation for compulsory acquisition of their interest in the lands. We are, in these appeals, not concerned with the compensation which was awarded to the occupants of the lands. It may be noticed, however, that compensation was awarded to the occupants on the footing that the lands were assessed and put to agricultural use and had no immediate building potentiality. The claimant, who is one of the Inamdars of the village and is entitled to a six anna share in the Inam, prayed for a reference to the District Court at Poona, claiming that he was entitled to the capitalised value of the non-agricultural assessment of the land. A reference was accordingly made and was transferred for trial to the Civil Judge, Senior Division, and was numbered 132 of 1953. Before the Civil Judge, Senior Division, the claimant demanded compensation for extinction of his rights to mines, minerals etc. in the land and he also demanded compensation for extinction of the Inamdar's right to receive non-agricultural assessment on the footing that the lands had at the date of the notification acquired a building potentiality. The Civil Judge, Senior Division, rejected both the claims. He held that the claimant failed to establish that he was the owner of any mines or minerals in the lands, and that the lands had at the date of the notification not acquired any building potentiality. It appeared, however, that the Land Acquisition Officer committed an error in stating that the assessment of Survey No. 100B out of the lands notified for acquisition for the National Chemical Laboratory was Rs. 9 per annum and in capitalising the assessment at 30 times and in awarding to the claimant compensation accordingly. The assessment of the land S. No. 100B was Rs. 90 and not Rs. 9. The trial Judge rectified that mistake and awarded an additional amount of Rs. 2,430 to the claimant for his six anna share in the compensation. But the learned trial Judge did not award the 15 per cent. solatium in addition to the amount awarded nor did he award any interest on that amount to the claimant. Against the award made by the Civil Judge, the claimant has preferred appeal No. 505 of 1956 and has claimed that out of the total area of 273 acres and 35 gunthas, even if it be assumed that only 2 per cent. of the area be taken to be developed and assessed to non-agricultural use, at the rate of Rs. 49-8-0 per acre the Inamdars will be entitled to 30 times Rs. 287-12-0 and that the claimant's six anna share out of the same will be Rs. 3,374-3-0.

By another notification published on December 2, 1948, 5 acres and 19 gunthas, an area of land in village Aundh in the possession of occupants, was notified for acquisition for the Fruit Experimental Station. Compensation was awarded to the occupants who were in occupation of the land on the footing that the land was agricultural land and had no building potentiality. The claimant was awarded Rs. 222-3-0 by the Land Acquisition Officer as his six anna share in the capitalized value of the agricultural assessment. The claimant feeling dissatisfied with the award made by the Land Acquisition Officer applied for a reference to the District Court at Poona. A reference was accordingly made and was numbered 72 of 1953. In this reference also the claimant demanded the capitalized value of non-agricultural assessment of the land. The trial Judge negatived the claim and dismissed the reference. It may be observed that in this case the Land Acquisition Officer had awarded to the claimant 15 per cent. solatium on the capitalized value of his share of the assessment and the right of the claimant to that compensation was though somewhat reluctantly affirmed. Aggrieved by the award made by the Civil Judge, Senior Division, Appeal No. 506 of 1956 is preferred to this Court by the claimant.

By a third notification published on May 11, 1950, the Government of Bombay notified for acquisition 29 acres and 26 gunthas out of the village Aundh for a Serum Institute. The land was in the possession of occupants who were awarded by the Land Acquisition Officer compensation on the footing that the land was capable of agricultural use and had no building potentiality. The claimant was awarded Rs. 599-1-0 for his six anna share of the capitalized value of the agricultural assessment. The claimant was dissatisfied with the award made by the Land Acquisition Officer and applied for a reference to the District Court and a reference was accordingly made and transferred to the Civil Judge, Senior Division, for trial. That reference was No. 26 of 1953. Before the Civil Judge, Senior Division, the claimant demanded a six anna share in the capitalized value of the non-agricultural assessment at the rate of Rs. 50 per acre. The Civil Judge, Senior Division, rejected that claim and confirmed the award made by the Land Acquisition Officer and dismissed the reference. It may be noticed that in this case the Land Acquisition Officer did not award to the claimant 15 per cent. solatium on the claimant's share of compensation and the learned Judge affirmed that order. Against this award Appeal No. 507 of 1956 has been filed in this Court.

In Appeal No. 506 of 1956 the claim is restricted to Rs. 163-2-0 on the plea that out of the total area of 5 acres and 19 gunthas a minimum area of 2 per cent. had a building potentiality and the claimant claimed an additional amount of Rs. 163-2-0 being his share in the capitalized value of the non-agricultural assessment.

In Appeal No. 507 of 1956 the claim is restricted to Rs. 330 on the plea that out of the total area of 29 acres and 26 gunthas, 2 per cent. of the area had a building potentiality and capitalizing the non-agricultural assessment of that area the claimant claimed for his share an additional amount of Rs. 330.

In these three appeals Mr. Gharpure, who appears on behalf of the claimant, has contended that the trial Court erred in holding that the lands under acquisition had no immediate building potentiality. Mr. Gharpure has invited our attention to the fact that a substantial area out of the land of the village Aundh covered by Survey No. 25 is occupied by the Government House, Poona, and that in the year 1941 an Institute known as Spicer College was constructed in a part of the land of this village. Mr. Gharpure has also pointed out that the lands, which have been notified for acquisition for the National Chemical Laboratory, were requisitioned by the Government of Bombay for the use of the Defence forces and buildings had been constructed thereon. Mr. Gharpure says that the village of Aundh is in the vicinity of the developed area of the Town of Poona and is included within the limits of the Corporation of Poona, and having regard to the extensive building activity in the town, contends Mr. Gharpure, there was a reasonable possibility of the lands

of the village of Aundh being converted to non-agricultural use in the near future and that the claimant was, therefore, entitled to the capitalized value of non-agricultural assessment on 2 per cent. of the total area acquired. Mr. Gharpure submits that because the lands have been acquired by the State of Bombay for non-agricultural use the market value of the interest of the claimant in the lands should be capitalized on the basis that his right to non-agricultural use is extinguished. As we have stated earlier, value of all the lands have been assessed in arriving at the compensation payable to the occupants of the lands on the footing that they were agricultural lands having no building potentiality. It is difficult to hold that the lands, which are assessed to land revenue as agricultural land and which are valued in assessing compensation payable to the occupants as land fit only for agricultural use, should in valuing the interest of the Inamdar therein be treated as fit for non-agricultural use. The claimant is, it appears, seeking to take advantage of the somewhat unusual method of valuation adopted by the Land Acquisition Officer of separately valuing the interest of the occupants and of the Inamdars. Normally when land is acquired, all the interests of the owners of the land but not the interest of the State are notified for acquisition and after the composite value for all those interests is assessed the compensation is distributed amongst the owners of the diverse interests in the land in apportionment proceedings. We are of the view that in this case the interest of the occupants in that land and the interest of Inamdars should have been valued in one proceeding for a consolidated amount and thereafter the amount of compensation should have been apportioned between the occupants and the Inamdars. But the Land Acquisition Officer proceeded to assess the compensation payable to the occupants in one proceeding and the compensation payable to the Inamdar in a separate procedure. This, in our judgment, was irregular. As however, the Land Acquisition Officer has separately valued the claim of the Inamdar in the land and separate references have been made to the District Court on the assumption that the Inamdars are entitled to claim compensation apart from the compensation, which is payable to the occupants, we do not think that sitting in appeal we will be justified in discarding the laborious enquiry, which has been made for assessing the compensation payable to the Inamdars. However irregular the procedure may be, we are of the view that the assessment of the value of the interest of the claimant as owner of a share in the Inamdar's rights may not at this late stage be interfered with.

It is conceded by the claimant, who have been examined in the Courts below, that in respect of the land which has been occupied by the Government House non-agricultural assessment is not received by the Inamdars. It is also conceded by him that the lands, acquired for the National Chemical Laboratory, which were originally requisitioned by the Government of Bombay for the Defence forces and on which hutments were constructed, had to be returned to the owners in their original condition, i.e. as agricultural lands. The circumstance, therefore, that some temporary hutments had during the period of requisition been constructed on this land will not, in our judgment, attribute to this land a building potentiality at the date of acquisition. The land at the date of the notification must be regarded as agricultural land. It is true that after the Bombay Provincial Municipal Corporation Act was enacted the limits of the Poona Corporation were extended and the village of Aundh is included therein. There is no clear evidence on the record to show that under the Bombay Municipal Boroughs Act this area was included within the Poona Municipal area. Even assuming that these lands were so included, in our view, every piece of land within the Municipal area may not be assumed to have an immediate building potentiality. It is conceded by the claimant in his evidence that the building development of the Poona Town had extended upto the boundary of the village Bopodi, which is to the East of the Government House. The village Bopodi is separated from the remaining lands of the Aundh village by an extensive area, which is covered by the Government House. It cannot be said that because upto the village Bopodi the building

activity had extended at the date of the notification for acquisition, it was in the near future likely to reach the area under acquisition.

Strong reliance was placed by Mr. Gharpure on the evidence relating to construction of the Spicer College in the years 1941-42 in support of the plea that the claimants' lands have an immediate building potentiality. But these lands of the Spicer College are at a considerable distance from the lands which are acquired for the National Chemical Laboratory. Again it appears from the order passed by the Mamlatdar that the lands on which the Spicer College stands were converted to non-agricultural use without the sanction of the Collector, and fine and non-agricultural assessment were levied for unauthorised conversion. It was admitted by the claimant Deo in his evidence that without the order of the Collector he was not entitled to receive the altered assessment. Agricultural lands within the Inam village can normally be converted to non-agricultural use with the sanction of the Collector, and in the present case, on the admission made by the claimant, it cannot be said that he could have claimed non-agricultural assessment merely because the land was intended to be used for non-agricultural purpose by some one. Unless the conversion was sanctioned by the Collector, the non-agricultural user could not be made and assessment on that basis could not be claimed by the claimant. There is on the record no evidence to show that the Collector was approached for conversion of the land which it is alleged the intending purchaser or purchasers had a desire to convert to non-agricultural use. Even if we accept the evidence of the claimant which is not supported by any documentary evidence, that some Sindhi refugees had purchased lands in the village of Aundh for a co-operative society and some other persons had also purchased plots of land in that village for the same purpose, unless the sanction of the Collector was obtained permitting conversion, the assessment could not be regarded as altered. Admittedly in respect of the lands under acquisition, there has not been an attempted conversion to non-agricultural use and no part of that land was transferred or attempted to be transferred for non-agricultural purposes. The circumstance that the land under acquisition may be put to non-agricultural use after it is acquired by the State has to be ignored under s. 24 and compensation cannot be awarded to the claimant on that account. In our view, the Land Acquisition Officer and the learned trial Judge were right in holding that the lands under acquisition for the National Chemical Laboratory were agricultural lands and compensation payable to the claimant can only be assessed by capitalizing the agricultural assessment.

It is true that the lands, which are notified for acquisition for the Fruit Experimental Station and the Serum Institute, are adjacent to the Government House and that the Spicer College has been constructed in the vicinity of these lands. But, in our judgment, for reasons already stated while dealing with the lands acquired for the National Chemical Laboratory, these lands also cannot be regarded as having acquired any building potentiality and must be valued in awarding compensation to the claimants on the footing that only agricultural assessment is receivable in respect thereof.

The claimant is, therefore, not entitled in the three appeals to the capitalized value of non-agricultural assessment. It is urged by Mr. Gharpure that the Land Acquisition Officer and the trial Judge were in any event in error in not awarding to the claimant in references Nos. 132 of 1953 and 26 of 1953, the 15 per cent. solatium. In our view, that contention is correct and must be upheld. The trial Judge in the course of his judgment observed in para. 9 that he had to find out the "present value" of the loss suffered by the Inamdars due to acquisition of the lands and not the market value of their lands and he thought that the 15 per cent. solatium could not be awarded to the claimant on the loss suffered by the claimant. In our view, the learned trial Judge was in error in so holding. Under s. 3 of the Land Acquisition Act the expression "land" is defined as inclusive of benefits to arise out of land. When the Land Acquisition Officer assessed compensation to be paid to the claimant for the acquisition of their interest in the land he proceeded in sub-

stance to value land. Under s. 23 of the Land Acquisition Act, the Court in determining the amount of compensation to be awarded for land acquired under the Act has to take into consideration the market-value of the land at the date of the publication of the notification under s. 4, sub-s. (1) and certain other specified heads on which compensation for damage may be awarded. Compensation payable to the claimant for extinction of his interest as Inamdar of the land can, in our judgment, be awarded as the market value of that interest and not as compensation for damage. If the view taken by the learned trial Judge is correct the claimant will not be entitled to any compensation whatever. But a benefit to arise out of land is "land" within the meaning of s. 23 and evidently by the acquisition of that interest, the claimant became entitled to the market value thereof on the date of the publication of the notification. This view is supported by the form of the award prescribed by s. 26, which requires the Judge making an award to specify the amount awarded under clause first of sub-s. (1) of s. 23 and also the amounts, if any, respectively awarded under each of the other clauses of the same sub-section. It is evident that the Legislature has not contemplated any compensation to be awarded which does not fall within the six clauses of s. 23.

We are, therefore, of the view that the claimant was entitled to the 15 per cent. solatium on the amount awarded to him. The learned Judge in the Court below also has not awarded interest to which the claimant is in law entitled. The claimant will, therefore, be entitled to interest at the rate of 4 per cent. on the amount awarded. The award made by the Civil Judge, Senior Division, in reference No. 132 of 1953 is modified by awarding to the claimant 15 per cent. solatium on Rs. 2,430-0-0 and interest thereon at 4 per cent. per annum from November 6, 1949, and in reference No. 26 of 1953, i.e. Appeal No. 507 of 1956, the claimant is awarded 15 per cent. solatium on Rs. 599-1-0 and interest at the rate of 4 per cent. from the date on which possession was taken. In reference No. 72 of 1953 i.e. Appeal No. 506 of 1956, the claimant is awarded interest on Rs. 222-3-0 at the rate of 4 per cent. from the date on which possession was taken till payment. There will be no order as to costs in all the three appeals.

Order accordingly.

CRIMINAL REVISION.

Before Mr. Justice Miabhoj.

KANAKMAL LALCHAND MUNOT v. THE STATE.*

Bombay Provincial Municipal Corporations Act (Bom. LIX of 1949), Sec. 313†—Machinery of printing press completely destroyed except treadle machines—Printing press started again in newly constructed shed after electric installation and purchase of new machinery—Applicability of s. 313(1)—Whether a factory newly established or old factory re-opened or renewed.

Section 313(1) of the Bombay Provincial Municipal Corporation Act, 1949, comes into operation if the facts disclose that a particular factory is completely destroyed

*Decided, April 18, 1958. Criminal Revision Application No. 205 of 1958, against the decision of N. D. Kamat, Additional Sessions Judge, Poona, in Criminal Appeal No. 125 of 1957, confirming the order of conviction and sentence passed by R. K. Pujari, Special Magistrate, First Class, Poona (Municipal Corporation), in Criminal Case S. T. No. 9280 of 1956.

†The relevant section runs thus :

313. No person shall—

- (i) newly establish in any premises,
- (ii) remove from one place to another,
- (iii) re-open or renew after discontinuance for a period of not less than three years, or
- (iv) enlarge or extend the area or dimen-

sions of,

any factory, workshop or workplace in which it is intended to employ steam, water, electrical or other mechanical power or any bakery except with the previous written permission of the Commissioner nor shall any person work or allow to be worked any such factory, workshop, workplace or bakery without such permission :

Provided that for the purpose of clause (iii) no such permission shall be required if during the period of discontinuance the machinery has not been removed from the place where the factory, workshop or bakery was originally established.

and that, in substance, a new factory has been brought into existence. If, on the other hand, the facts establish that the factory was not completely destroyed, but that there was only discontinuance of the factory, then, if the factory comes to be re-opened or renewed, the offence will not be committed unless the prosecution shows that discontinuance was for more than three years, or unless the case comes within the proviso to s. 313 of the Act. The test to be applied in each case is to discover whether the functions performed or capable of being performed by the undestroyed parts are such that the factory cannot efficiently function as a unit and can perform the task of producing the final result or product for the production of which it was erected and for which alone it was intended to exist. The substance of the matter has got to be considered. If, on the evidence, the substance of the matter turns out to be that the old factory has come to be destroyed in the sense that the old factory cannot, in substance, perform its function, then, it would come within the purview of s. 313(i). On the contrary, if the substance of the whole matter is that the factory has not come to be destroyed but it has only come to be discontinued, then, in that case, s. 313(ii) would apply.

THE facts appear in the judgment.

M. A. Bame, for the applicant-accused.

Y. V. Chandrachud, for the complainant.

V. H. Gumaste, Additional Assistant Government Pleader, for the State.

MIABHOY J. The petitioner has been convicted for the offence under s. 392 of the Bombay Provincial Municipal Corporations Act, 1949, and sentenced to pay a fine of Rs. 100. The conviction is based on the finding that the petitioner committed a breach of s. 313, cl. (i), of the aforesaid Act. The facts which are not in dispute are as follows: The petitioner, before March 30, 1956, was conducting a printing press in the name and style of "Prakash Printing Press" in house No. 1461-62, Raviwar Peth, Poona City, since the year 1934. On March 30, 1956, there was a big fire in that locality and many houses, shops and other establishments, situated in that locality including the printing press of the petitioner, were completely destroyed. The finding of the learned Additional Sessions Judge, Poona, is that, in the aforesaid fire, the building in which the press was housed fell down completely and that the machinery was completely destroyed, except two treadle machines which escaped the blaze. The further finding is that, thereafter, on or about April 23, 1956, the petitioner constructed a new shed, installed electric installation, purchased some machinery and started the printing press. On the aforesaid facts, both the lower Courts have come to the conclusion that the petitioner had committed a breach of s. 313 of the Bombay Provincial Municipal Corporations Act, 1949. The clause which the petitioner is found to have contravened is cl. (i). In effect, that clause states that no person shall "newly establish, in any premises, any factory". The contention of the prosecution is that, by the aforesaid acts, which the petitioner has done, he has newly established a factory in the premises. On the other hand, the contention of the petitioner is that his case comes within the purview of cl. (ii) of s. 313. Under that clause, a person is prohibited from re-opening or renewing a factory after discontinuance thereof for a period of not less than three years. Therefore, the contention of the petitioner is that he has only re-opened or renewed his old factory, and that, as he has done this, within a period of three years, he is not liable under s. 313 of the Act. In my opinion, this is a mixed question of law and fact. If the facts disclose that a particular factory is completely destroyed and that, in substance, a new factory has been brought into existence, then, cl. (i) of the Act comes into operation. If, on the other hand, the facts establish that the factory was not completely destroyed, but that there was only discontinuance of the factory, then, if the factory comes to be re-opened or renewed, the offence will not be committed unless the prosecution shows that discontinuance was for more than three years, or unless the case comes within the proviso to s. 313 of the Act.

The argument which was advanced by Mr. Rane was that, in spite of the fact that the building and the machinery had been completely destroyed, the factory continued to be in existence. His argument was that the lands on which the factory-building was situated had remained intact, that, at least, two treadle machines had survived, and that the workers of the factory had not been discharged. In support of his argument, Mr. Rane drew my attention to the definition of the word "factory" as given in the Bombay Provincial Municipal Corporations Act, 1940. That definition refers to the definition of the word "factory" as given in the Indian Factories Act. In order that there may be a factory, it is necessary that there should be premises, that there should be ten or more persons working on those premises; and that, in any part thereof, manufacturing process must be carried on with the aid of power. The word "premises" has been defined in the Bombay Provincial Municipal Corporations Act also, and the definition includes a "land". Therefore, the argument of Mr. Rane was that a factory does not merely mean a building in which the business of manufacturing is being carried on. He contended that, in order that a thing may be a factory, it is necessary that there should be premises, workers and mechanical power, and inasmuch as in the present case the workers had not been discharged, the land had remained intact, and two machines were saved, the old factory was there and, therefore, it cannot be said that a new factory had come to be established. In my opinion, it would not be proper to look at the matter piecemeal in the manner urged by Mr. Rane. A factory is not merely a juxtaposition or a conglomeration of premises, power and workmen, so that if some of these only disappear and one or the other of them happens to survive, a factory is still in existence; but a factory is an organism, an independent unit performing various functions, and in discharge of these functions a part or a function may be so vital in a given case that the question for consideration in each case would be whether, in the circumstances, the parts destroyed are such that the factory must be deemed to be dead or whether the undestroyed parts keep the thing alive in spite of the loss of some of the parts. The test to be applied in each case is to discover, whether the functions performed or capable of being performed by the undestroyed parts are such that the factory can efficiently function as a unit and can perform the task of producing the final result or product for the production of which it was erected and for which alone it was intended to exist. In my opinion, the substance of the matter has got to be considered. If, on the evidence, the substance of the matter turns out to be that the old factory has come to be destroyed in the sense that the old factory cannot, in substance, perform its function, then, it would come within the purview of cl. (i) aforesaid. On the contrary, if the substance of the whole matter is that the factory has not come to be destroyed but it has only come to be discontinued, then, in that case, cl. (ii) would apply, and, unless the prosecution establishes that the factory was discontinued for more than three years, a conviction cannot be recorded. In the present case, in my opinion, having regard to all the circumstances, the learned Judges below were justified in holding that what had taken place was that the old factory had substantially disappeared and that it did not remain in existence, and, therefore, when the petitioner erected a new shed, and brought new machinery on the premises, a factory had come to be newly established.

A distinction was sought to be made between the establishment of a new factory and newly establishing a factory. It was contended that cl. (i) applies only to those cases where a fresh factory, which was never in existence, is brought into existence for the first time, and that clause is inapplicable to cases where there was a factory once in existence and a new factory is brought into existence in place of old. I am not in agreement with this submission. In my opinion, that would be putting an unnatural construction upon the aforesaid clauses. Reading cl. (i) and (ii) together, the substance of the whole matter appears to be that the task in each case is to determine whether

the old factory is completely destroyed or whether the old factory has only been discontinued. If the old factory is discontinued, cl. (iii) applies; and, if the old factory is completely destroyed, and a new factory has come into existence, then cl. (i) applies. Therefore, in my opinion, the conviction which has been recorded against the petitioner is correct.

[The rest of the judgment is not material to this report.]

Fine reduced: Rule discharged.

CRIMINAL REFERENCE.

[NAGPUR BENCH]

Before Mr. Justice Kotval.

THE STATE OF BOMBAY v. GAYA DEEPCHAND.*

Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956), Sec. 3(1)

—Women and girls used for immoral traffic in houses of prostitution whether can be charged under s. 3(1).

Section 3(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956, penalises persons who establish and maintain houses of prostitution or act or assist in keeping or managing them. But women or girls who are used for immoral traffic in such houses of prostitution are not liable to punishment under this section.

THE facts appear in the judgment.

N. L. Abhyankar, Special Government Pleader, for the State.

D. L. Jayavant, for opponents Nos. 1 to 4.

KOTVAL J. This is a reference by the Sessions Judge, West Berar Division, Akola, recommending that a charge under s. 3 of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (No. 104 of 1956), framed against the four opponents Gaya, Saru, Subhadra and Bani by the Sub-Divisional Magistrate, Akola, in Criminal Case No. 82 of 1958 should be quashed. The prosecution case was that on the outskirts of Akola town near the temple of Kala Maroti there is a house of prostitution being run by one Janabai, accused No. 1, who is the mistress of one Brahmanand. On August 20, 1958, the Sub-Divisional Police Officer, City Division, Akola, decided to send a customer into this house. He was Sheikh Kasam. He was given five currency notes of Re. 1 each in the presence of *panchas* and ordered to go to the brothel and have sexual intercourse with one of the girls in that brothel on payment. It was the prosecution case that accordingly Sheikh Kasam went to the brothel, talked to Janabai, accused No. 1, and asked for a girl or woman for sexual intercourse. Accused No. 1 showed him four girls, the opponents before this Court, and Sheikh Kasam selected the opponent Saru, wife of Vikram. He agreed to pay Rs. 3 which accused No. 1 accepted. She then allowed Sheikh Kasam to have sexual intercourse with Saru in one of the rooms in the brothel. The Sub-Divisional Officer and the *panchas* were hiding themselves in the darkness round about the brothel waiting for Sheikh Kasam to come out. It was the prosecution case that Sheikh Kasam, after having sexual intercourse, came out of the brothel and lighted a cigarette which was a pre-arranged signal that he had done his job. Thereupon the police officers and the *panchas* raided the brothel and the house of accused No. 1. Three currency notes of Re. 1 each were seized from the possession of accused No. 1 and they were attached under a seizure memo.

It was upon these facts that the four opponents along with Janabai were put up for trial before the Sub-Divisional Magistrate who framed charges under s. 3 of the Act against all of them.

**Decided, June 26, 1958. Criminal Reference No. 9 of 1959.*

I am not concerned here with sub-s. (2) of s. 3 of the Act but only with sub-s. (1) thereof which runs as follows:—

"Any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with fine which may extend to two thousands rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine which may extend to two thousand rupees."

The sub-section penalises the keeper or manager or the person who acts or assists in the keeping or managing of a brothel. It is clear that it is intended to hit at persons who establish and maintain houses of prostitution or act or assist in keeping or managing them. There is absolutely nothing in the complaint so far as the four opponents are concerned, from which it can be held that they were either keeping or managing or acting or assisting in the "keeping or management" of a brothel. On the other hand, it appears that these four girls were the unfortunate victims and were the persons who were being used by those who kept or managed the brothel or acted or assisted in keeping or managing it.

The Act was passed in pursuance of the International Convention signed at New York for the suppression of immoral traffic in women and girls. It was never intended that the women or girls used for such traffic should be liable to punishment. In this case the accused Janabai was alleged to be keeping or managing the brothel and was, therefore, rightly charged; but I am unable to see what was the offence which the four opponents had committed. I accept the reference and quash the charge framed against the four opponents by the Sub-Divisional Magistrate on November 5, 1958. The Magistrate will decide for himself whether or not to take action in respect of these girls under any of the other provisions of the Act. As to that I express no opinion.

I cannot part with this case without a word as to the nature of the investigation undertaken by the police and by an officer of the rank of Sub-Divisional Police Officer. The averments in the challan itself are that the police officer asked Sheikh Kasam to go into the brothel, ask for a girl on payment, make payment and have sexual intercourse with her. It is further admitted that under the very auspices of the police, this Sheikh Kasam did enter the brothel and have sexual intercourse with the youngest of the four girls, namely, Saru, wife of Vikram. While all this was happening under the guise of lawful investigation, the Sub-Divisional Police Officer and the *panchas* stood in the darkness roundabout the brothel and after some time, Sheikh Kasam came out and announced by a pre-arranged signal that he had had sexual intercourse with the girl.

To my mind, nothing can be more reprehensible than the conduct of this investigation. Under the very auspices of the officers charged with the duty of suppressing immoral traffic in women and girls, Sk. Kasam had sexual intercourse with Saru. Rather than suppress such traffic, the investigation encouraged it. If investigations under this Act are to proceed in this manner, in conceivable cases it will be difficult to determine whether a person was committing an offence under the Act or carrying on an investigation. Such investigations also will not have any salubrious effect upon the public mind and will not achieve the object for which the Act was passed. I think it my duty to bring the facts of this case to the notice of the State Government for such action as they may choose to take in regard to investigations under the Act.

Reference accepted.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Raju.

THE SAWATRAM RAMPRASAD MILLS CO., LIMITED, AKOLA (BERAR)

v.

KUNDANMAL SARDARMAL JAIN.*

Central Provinces and Berar Industrial Disputes Settlement Act (XXIII of 1947), Secs. 2(10), (12), (13), 23(1), 41†—C.P. and Berar Industrial Disputes Settlement Rules, rr. 36(b) & (c)††—Industrial Disputes Act (XIV of 1947), Sec. 2(a)—Employee as defined in s. 2(10) whether must be an employee on date he moves District Industrial Court—Whether under Standing Order 14(1) employee entitled to money compensation for period of accumulated sick leave after date of his retirement.

An employee as defined in s. 2(10) of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, need not in fact be an employee on the date he moves the Industrial Court. So long as he was employed by the employer against whom he wishes to raise the industrial dispute or a dispute relating to an industrial matter and the dispute raised by him is of the nature required by the definitions of 'industrial dispute' and 'industrial matter' in the Act, he is an employee falling within the definition of s. 2(10) of the Act.

P. L. Mayekar v. Amichand, applied.

Under clause 14(1) of the Standing Orders††† an employee is entitled to receive after retirement money compensation in lieu of the accumulated sick leave.

R. S. Rekchand v. Mohammad Kasam, followed.

THE facts are stated in the judgment.

G. R. Mudholkar, for the petitioner.

V. P. Sathé, for respondent No. 1.

TAMBE J. This is a petition under arts. 226 and 227 of the Constitution of India in which the petitioner the Sawatram Ramprasad Mills Co. Ltd., Akola,

*Decided, July 2, 1959. Special Civil Application No. 318 of 1958.

† The relevant sections are as under :—

Sec. 2(10)—'employee' means any person employed by an employer to do any skilled or unskilled manual or clerical work for contract or hire or reward in any industry and includes an employee discharged on account of any dispute relating to a change in respect of which a notice is given under section 31 or 32 whether before or after the discharge.

Sec. 2(12)—'industrial dispute' means any dispute or difference connected with an industrial matter arising between employer and employee, or between employers or employees.

Sec. 2(13)—'industrial matter' means any matter relating to work, pay, wages, reward, hours, privileges rights or duties of employers or employees, or the mode, terms and conditions of employment or refusal to employ and includes questions pertaining to—

(a) the relationship between employer and employee, or to the dismissal or non-employment of any person,

(b) the demarcation of function of any employee or class of employee,

(c) any right or claim under or in respect of or concerning an agreement, submission or award made under this Act, and

(d) what is fair and right in relation to any industrial matter having regard to the interest of the person immediately concerned and of

society as a whole

Sec. 23(1) The Provincial Government may constitute a District Industrial Court for any local area to determine such industrial disputes and to deal with such other industrial matters under the provisions of this Act as may be prescribed.

Sec. 41. The Provincial Industrial Court or a District Industrial Court shall, on a reference made by the Provincial Government, and may, on an application by any employer or employee concerned or by a representative of the employees concerned or by the Labour Officer, decide whether any strike or lock-out or any change of which notice has been given or which has taken place is illegal.

†† Rule 36. The District Industrial Court within the local area for which it is constituted shall have jurisdiction to hear and adjudicate upon—

(b) the propriety or legality of an order passed by an employer under the standing orders :

(c) the application and interpretation of standing orders;

††† Standing Orders for clerical staff employed in Textile Mills in Madhya Pradesh, effective from August, 1949, as certified under the Industrial Employment (Standing Orders) Act, 1946.

1 (1955) 57 Bom. L. R. 1000.

2 [1957] N. L. J. 488.

seeks to get quashed order dated May 7, 1958, made by the State Industrial Court, Nagpur, respondent No. 2 hereto.

Facts in brief are that respondent No. 1 Kundanmal Sardarmal Jain was employed as a clerk in the petitioner mills and at the material time he was drawing Rs. 130 inclusive of all allowances. It appears that certain disputes relating to the Textile Mills between the employers and the employees of the Textile Mills in Berar were referred to an arbitration of Mr. Justice Mangal-murti and the award was made by him sometime in the year 1949. In pursuance of that award Standing Orders were framed for different mills. We are here concerned with sub-cl. (1) of cl. 14 of the Standing Orders. It reads:

"Sick leave on full average pay shall be granted to clerks upto a maximum of eight days in a completed period of one year's service. This leave is cumulative upto a maximum of eight months in the whole service of 30 years on the certificate, each time, either of Doctor attached to the establishment or any Registered Medical Practitioner. If the clerk is under the treatment of any Registered Medical Practitioner other than the Doctor attached to the establishment, he shall send intimation of his illness to the management at once by registered post. If such intimation is delayed without reasonable cause, he shall forfeit the right to medical leave on that occasion. It shall be open to the Manager to get the condition of the employee certified by the Doctor attached to the establishment. A clerk shall be entitled to the balance of any sick leave due to him on his retirement either before or after completion of 30 years' service or 55 years of age or on termination of his services before the expiry of 30 years' service or 55 years of age on any grounds except that of misconduct under Standing Order No. 24."

On January 11, 1956, the petitioner mills served a notice on respondent No. 1 informing him that he (respondent) would be 55 years of age on January 12, 1956, and, therefore, under the aforesaid Standing Order his services would stand terminated and that he would be paid one month's salary. The Standing Order is not before us, but Mr. Mudholkar, learned counsel for the petitioner, says that these were roughly the contents of the notice dated January 11, 1956.

On June 22, 1956, respondent No. 1 made an application in the District Industrial Court purporting to be one under s. 23 read with r. 36 of the C.P. and Berar Industrial Disputes Settlement Act, 1947, wherein he contended that the termination of his services was wrong and in the alternative he claimed that termination of his services without payment of money compensation in lieu of 4 months 6 days accumulated sick leave was wrongful.

This application of respondent No. 1 was contested by the petitioner mills. It was contended by the mills that respondent No. 1 was not entitled to claim money compensation for the accumulated sick leave after the date of retirement. He had completed the age of 55 and was, therefore, validly retired as and from January 12, 1956. The District Industrial Court did not accept the contention of respondent No. 1 that he was wrongfully retired but accepted his contention negating that of the petitioner that he was entitled to money compensation for the accumulated sick leave and consistently with this finding it ordered that Rs. 585 be paid by the mills to respondent No. 1 as money compensation in lieu of the accumulated sick leave of respondent No. 1. Feeling aggrieved by this order both the petitioner mills as well as respondent No. 1 took appeals to the State Industrial Court. Respondent No. 1 challenged the correctness of the finding of the District Industrial Court that the termination of the services was not wrongful. The petitioner in their appeal challenged the finding of the District Industrial Court that respondent No. 1 was entitled to money compensation in lieu of the accumulated sick leave. The appeal filed by respondent No. 1 was dismissed. The appeal of the petitioner partly succeeded. The State Industrial Court held that respondent No. 1 was entitled to get money compensation for the accumulated sick leave but in its view the District Industrial Court could not order payment of the compensation. The State Industrial Court to that extent modified the order of the District Industrial Court. It is necessary to mention that though the question of jurisdiction was not raised before the District Industrial Court the petitioner raised that question at the appellate

stage before the State Industrial Court. The contention of the petitioner was that respondent No. 1 not being an employee on the date he moved the District Industrial Court, the District Industrial Court had no jurisdiction to entertain the application. The State Industrial Court in its order appears to have allowed the question to be raised before it and has decided it against the petitioner. The petitioner, therefore, has preferred this petition.

Mr. G. R. Mudholkar, learned counsel for the petitioner, has raised two questions before us. In the first instance he contends that respondent No. 1 not being an employee on the date he moved the District Industrial Court, the District Industrial Court had no jurisdiction to entertain an application under s. 23 read with r. 36 or s. 41 of the Act and in the alternative Mr. Mudholkar contended that respondent No. 1 was not entitled to claim money compensation for the period of accumulated sick leave after the date of his retirement. In our opinion both the contentions have no force and are covered by two authorities of this Court.

As regards the first contention regarding jurisdiction of the District Industrial Court, it is true that respondent No. 1 was not an employee on the date he moved the District Industrial Court but then that is not a condition precedent for moving the Industrial Court. On the language of s. 41 which authorises certain persons to move the Industrial Court an employee is entitled to move it in respect of an industrial dispute. The definition of employee is contained in s. 2(10) of the Act. It reads:

“‘employee’ means any person employed by an employer to do any skilled or unskilled manual or clerical work for contract or hire or reward in any industry (and includes an employee dismissed, discharged or removed on account of any industrial dispute).”

This definition of employee is in *pari materia* with the definition of ‘workman’ contained in s. 2(s) of the Industrial Disputes Act, 1947. Under the Act, i.e. the Industrial Disputes Act, 1947, matter was taken to this Court in *P. L. Mayekar v. Amichand*.¹ A certain dispute between dismissed employees and an employer arose. The employees were dismissed prior to September 16, 1952. The State Government on September 16, 1952, made a reference about an industrial dispute to the Industrial Tribunal. Consequent thereon the Tribunal made an award and directed the employer to reinstate the dismissed employees. An appeal against that order failed. This Court was then moved and the contention raised by Mr. Gupte, learned counsel on behalf of the employer, was that looking to the definition of workman contained in s. 2(s) of the Industrial Disputes Act, 1947, and inasmuch as the workmen were dismissed prior to the date of reference by the State Government, they did not fall within the definition of workman and, therefore, no industrial dispute could be raised with regard to them. Repelling this contention of Mr. Gupte, the learned Chief Justice observed (p. 1004):

“...There is no reason whatever, looking to the definition of ‘workman’, to restrict the expression ‘employed’ to the point of time which Mr. Gupte suggested it should be restricted. So long as the workman was employed by the employer against whom he wishes to raise the industrial dispute and the dispute is of the nature required by the definition of ‘industrial dispute’, he is a workman falling within the definition of s. 2(s).”

We are in respectful agreement with the aforesaid observations. They however will have to be read with slight modification in view of the fact that the field covered by the expression ‘industrial dispute’ used in the Industrial Disputes Act is included in the expressions ‘an industrial dispute’ and ‘an industrial matter’ used in the C. P. and Berar Industrial Disputes Settlement Act, 1947. The ratio of the said decision so far as the C. P. and Berar Industrial Disputes Settlement Act is concerned, in our opinion, should be:—

“There is no reason whatever, looking to the definition of an ‘employee’ to hold that he must in fact be an employee on the date he moves the Industrial Court. So long

as the employee was employed by the employer against whom he wishes to raise the industrial dispute or a dispute relating to an industrial matter and the dispute raised by him is of the nature required by the definition of 'industrial dispute' and 'industrial matter', he is an employee falling within the definition of section 2(10) of the C.P. and Berar Industrial Disputes Settlement Act."

Section 23(1) provides that the State Government may constitute a District Industrial Court for any local area to determine such industrial disputes and to deal with such other industrial matters under the provisions of this Act as may be prescribed, and these matters are prescribed by r. 36 of the rules framed under the Act. We are here concerned with cls. (b) and (c) of r. 36. Under these clauses, the District Industrial Court is empowered to interpret a Standing Order and adjudicate upon the propriety or legality of an order passed by an employer under the Standing Order. The dispute raised in the instant case by respondent No. 1 relates to the interpretation of cl. 14 of the Standing Order and the legality of the order made by the petitioner mills on January 11, 1956, under that clause, whereunder the petitioner mills had ordered that respondent No. 1 should be retired from January 12, 1956, on payment of one-month's salary only. In these circumstances, in our opinion, there is no substance in the contention of Mr. Mudholkar that the District Industrial Court had no jurisdiction to entertain the application.

The second question that respondent No. 1 is not entitled to money compensation in lieu of the accumulated sick leave after the date of retirement is also covered by a decision of a division Bench of this Court reported in *B. S. Rekhandani v. Mohammad Kasam*² to which one of us (Tambe J.) was a party. The Standing Order which fell for construction in that case was in identical terms with the Standing Order in the present case and though the dispute raised in that case was under the Payment of Wages Act one of the questions raised in that case was the same as is raised before us and it was held therein that an employee was entitled to receive after retirement money compensation in lieu of the accumulated sick leave under the aforesaid Standing Order. We see no reason to take a different view.

In the result, therefore, the petition fails and is dismissed with costs.

Petition dismissed.

INCOME-TAX REFERENCE.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

M/S SULTAN BROTHERS PRIVATE LTD. v. THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY II, BOMBAY.*

Indian Income-tax Act (XI of 1922), Sec. 12(4)—Applicability of s. 12(4)—Whether section applies where there is letting of building for running hotel and furniture and fixtures installed therein for such purpose.

Section 12(4) of the Indian Income-tax Act, 1922, will apply only if the primary letting is of machinery, plant or furniture and the secondary letting is of the buildings and the two lettings are inseparable.

THE facts appear in the judgment.

N. A. Palkhivala, with B. J. Kolah, for the petitioner.

G. N. Joshi, with R. J. Joshi, for the respondent.

SHAH J. The assessee, who are a limited company, obtained on lease a plot of land at the Backbay Reclamation in Bombay and put up a residential building which could be adapted for use as a hotel, and furnished the same by installing furniture and fixtures and let it out to a tenant under a deed dated

² [1957] N. L. J. 483.

*Decided, July 2, 1959. Income-tax Refe-

rence No. 69 of 1958.

August 30, 1943, for six years for using it as a hotel. After the expiry of the period of the lease another deed of lease was executed on August 13, 1949. By that lease the lessee agreed to pay a net monthly rental of Rs. 5,950 for the lease of the building and Rs. 5,000 for the hire of furniture and fixtures. Initially, the Income-tax Officer assessed the rental income under s. 12 of the Income-tax Act. For the assessment year 1952-53, the assessment proceedings were brought before the Tribunal and the Tribunal observed in the course of its judgment, though that question did not arise in that case, that "the question whether income from that property should be computed under Section 9 or under Section 12 deserves further scrutiny". The Income-tax Officer then computed for the assessment year 1953-54 the income out of the building under s. 9 of the Income-tax Act and the income derived from hiring of the furniture and fixtures under s. 12 of the Act. Against the order passed by the Income-tax Officer, the assessee appealed to the Appellate Assistant Commissioner. That Officer substantially confirmed the order passed by the Income-tax Officer. There was an appeal by the assessee to the Income-tax Appellate Tribunal and the Tribunal affirmed the view of the taxing authorities. At the instance of the assessee, the Tribunal has referred the following question:

"Whether on the facts and circumstances of the case, the income derived from letting of the building constructed on Plot No. 7 is property to be computed under section 9, 10 or under section 12 of the Income-tax Act?"

The question whether the income derived from the letting of the building and the furniture can be assessed under s. 10 is easily answered. Neither before the Income-tax Officer nor before the Appellate Assistant Commissioner was the contention ever advanced that the assessee was letting out the building as a business venture. This contention was advanced for the first time before the Appellate Tribunal and the Tribunal negatived it holding that there were no materials which justified it. It was urged that from the ownership of the property used as an asset of a business concern income was being obtained. In our view, there is nothing in the deed of lease which supports the contention of the assessee, nor are there any materials on the record which justify that view. The income derived from the letting of the building and the furniture and fixtures cannot therefore be computed under s. 10 of the Act.

Section 9 of the Income-tax Act makes provision for computation of income under the head "Property". Section 10 makes provision for computation of income received from business and s. 12 for computation of income received from other sources. By cl. (3) of s. 12 which was added by Act VII of 1939 it was enacted that where an assessee lets on hire machinery, plant or furniture belonging to him, he shall be entitled to allowances in accordance with the provisions of cls. (iv), (v), (vi) and (vii) of sub-s. (2) of s. 10. Evidently by enacting this clause, the Legislature intended to give the benefit of those four clauses of s. 10(2) to an assessee who was not carrying on a business of letting out on hire machinery, plant or furniture but who had as an owner of the property let out the same. By cl. (4), which was added by Act XXIII of 1941, an additional provision was made granting the benefit of the provisions of cls. (iv), (v), (vi), and (vii) of sub-s. (2) of s. 10 to the owner of the building when he had let on hire machinery, plant or furniture belonging to him, and also the building, and the letting out of the building was inseparable from the letting of the machinery, plant or furniture. For computation of income received from buildings under s. 9, a provision for granting allowances in accordance with cls. (iv), (v), (vi) and (vii) of sub-s. (2) of s. 10 has not been made. Evidently by cl. (4) of s. 12, a different category was sought to be created in respect of which the prescribed allowances were to be given to the owner of certain buildings in the computation of his income. Clause (3) and (4) of s. 12 have, in our judgment, to be read together. By cl. (3) an assessee becomes entitled to the prescribed allowances before the income received from

letting out of machinery, plant or furniture is included in his total income and to a similar allowance in respect of certain buildings under cl. (4). But that benefit can only be given in respect of buildings, provided the conditions prescribed by sub-s. (4) of s. 12 are fulfilled; and those conditions are that there is a letting on hire of machinery, plant or furniture belonging to the assessee, that along with that letting the buildings are let out and that the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture. In our judgment, it was intended by the Legislature that the primary letting must be of the machinery, plant or furniture and that together with or along with such letting there is a letting of buildings, the two lettings being inseparable from each other. It is only if these conditions are fulfilled that the taxable income of the buildings will be computed under sub-s. (4) of s. 12. We are unable to accept the argument of Mr. Palkhivala that if there is a letting on hire of machinery, plant or furniture and there is also a letting of a building and that the two lettings are inseparable, in computing the income from the building, the lessor will be entitled to the allowances under cls. (iv), (v), (vi) and (vii) of sub-s. (2) of s. 10. The condition of inseparability of the lettings is not the only condition prescribed by the Legislature to enable the lessor of the building to qualify for the benefits of the allowances under the specified clauses of s. 10(2). We are, therefore, of the view that if the primary letting is of machinery, plant, or furniture and the secondary letting is of the buildings, and the two lettings are inseparable, then only will the provisions of sub-s. (4) of s. 12 apply.

Mr. Palkhivala contends that even if that be the true interpretation of sub-s. (4) of s. 12, in the present case, the primary letting is of the furniture and fixtures and the letting of the building is incidental thereto. He invites our attention to the fact that a substantial sum has been spent for providing furniture and fixtures, and the monthly rental of the furniture and fixtures alone is Rs. 5,000 whereas the rental of the building is Rs. 5,950. Mr. Palkhivala contends that under the terms of the lease no special importance having been given to the letting of the building on the one hand or furniture and fixtures on the other, the Court must have regard to the fact that the entire unit was intended to be let for the purpose of a hotel and was in fact let out for the purpose of running a hotel, boarding and lodging house or a restaurant, and that the intention was to let out the unit in which the primary letting was of the furniture or fittings or fixtures. We are unable on the plain words used in the document to accept that contention. What has been let out is the building constructed by the assessee, and for making the building fit for running a hotel or a boarding and lodging house or a restaurant, furniture and fixtures have been installed. It cannot be said in the case of such a lease that the lease was primarily of furniture and not of the building.

Mr. Palkhivala says that in para. 7 of the judgment of the Tribunal, an erroneous statement was made as to the true effect of s. 10(2)(vi) and (v), but we do not think that anything turns in this case upon the alleged erroneous statement relating to the true effect of these clauses.

On the view taken by us, the question will be answered as follows:

"the income from the building will be computed under Section 9; income from furniture and fixtures under Section 12(3); and that no part of the income is taxable under Section 10."

The assessee to pay the costs of the Commissioner.

No order on the Notice of Motion.

Solicitors for the petitioner: *Mulla & Mulla & Craigie Blunt & Caroe.*

Solicitor for the respondent: *P. G. Gokhale.*

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Raju.

RAISAHEB SETH GOPIKISAN AGARWAL MINE OWNERS AND EXPORTERS v. SALES TAX OFFICER, GONDIA CIRCLE, GONDIA.*

Central Provinces and Berar Sales Tax Rules, 1947, Rr. 67, 19—Central Provinces and Berar Sales Tax Act (XXI of 1947), Sec. 11(2)—Whether Sales Tax Officer can transfer case to Assistant Commissioner—Validity of issue of notice under s. 11(2) by Sales Tax Officer when case transferred by him to Assistant Commissioner.

Under the relevant rules framed under the Central Provinces and Berar Sales Tax Act, 1947, the Sales Tax Officer or the Assistant Commissioner has jurisdiction in the first instance to deal with all the cases of registered dealers in the Vidarbha region and scrutinize their returns, and it is only when he finds from the material on record or it is established that the gross turnover or taxable turnover of the assessee in the year preceding the year of assessment exceeds the pecuniary limit, he has to transfer the case to the Assistant Commissioner. The Act has by necessary implication conferred jurisdiction on the Sales Tax Officer to determine what are the cases which fall within his jurisdiction. Therefore, whatever he does upto that stage e.g. issue of a notice under s. 11(2) of the Act, is done by him within his jurisdiction, even if he thereafter reaches a conclusion that the case is triable by an Assistant Commissioner.

THE facts appear in the judgment.

S. W. Dhabe, for the petitioner.

N. L. Abhyankar, Special Government Pleader, for the respondents.

TAMBE J. This judgment in Special Civil Application No. 401 of 1958 shall also govern the decision of Special Civil Application No. 402 of 1958. Both these petitions arise out of the matter arising out of the Central Provinces and Berar Sales Tax Act, 1947. Petition No. 402 relates to the year 1952-53 and petition No. 401 relates to the year 1953-54.

Rai Saheb Seth Gopikisan Agarwal, petitioner in both the cases, was a registered dealer at the material time within the meaning of the Sales Tax Act. The petitioner is a proprietor of the business known as Rai Saheb Gopikisan Agarwal Mine Owners and Exporters, having his office at Tumsar, a place in Vidarbha region. The petitioner's firm, according to him, carries on business of extracting manganese and exporting the ore outside India. The petitioner's accounting year is from Diwali to Diwali. The petitioner, therefore, has chosen this year for the purpose of the sales tax. Accordingly the year 1952-53 was for purposes of accounting from October 19, 1952, to November 6, 1953, and the year 1953-54 was from November 7, 1953, to October 26, 1954. During both these years the petitioner filed before the Sales Tax Officer, Gondia Circle, (respondent No. 1 in both the petitions) quarterly returns, but those returns were blank, as according to the petitioner no sale having taken place within the Vidarbha region he was not liable to pay any amount by way of sales tax under the Act. It appears that both these cases were taken together by the Sales Tax Officer though separate orders in each case were passed. On July 20, 1955, the Sales Tax Officer issued two notices in respect of the two years under sub-s. (2) of s. 11 of the Act to the petitioner calling upon him to:—

"(i) to produce evidence or have it produced in support of the returns;

(ii) to produce or cause to be produced accounts, registers, cash memoranda, or other documents out of those shown in the appended list."

The cases were then heard and it appears that on December 23, 1955, Mr. S. N.

*Decided, July 3, 1959. Special Civil Application No. 402 of 1958).
Application No. 401 of 1958 (with Special Civil

Agarwal, agent of the petitioner, made a statement before the Sales Tax Officer, in the case relating to the year 1953-54, that for the year under assessment the gross turnover was more than Rs. 20,00,000. On the basis of the statement it appears the Sales Tax Officer transferred both the cases to the Assistant Commissioner, Sales Tax, for necessary action. The Assistant Commissioner later on gave notice on September 25, 1957, to the petitioner. A copy of the notice filed by the petitioner in Special Civil Application No. 401 of 1958 (Annexure B) shows that it was a notice under sub-s. (3) of s. 10 of the Act. It appears that the Assistant Commissioner treated the blank returns filed by the petitioner as failure on his part to furnish the returns. By this notice, therefore, the Assistant Commissioner called upon the petitioner to show cause why action should not be taken against him. The proceedings continued before the Sales Tax Commissioner for some time and under the order of the Commissioner of date May 23, 1958, both these cases were transferred back to the Sales Tax Officer. On July 4, 1958, the Sales Tax Officer issued a notice under sub-s. (2) of s. 11 against the petitioner in respect of the year 1952-53, and he issued another notice on the same day, purported to be one under sub-s. (3) of s. 10, sub-ss. (4)(a) and (5) of s. 11, and sub-s. (1) of s. 22-C of the Central Provinces and Berar Sales Tax Act, 1947. By both these notices the petitioner was called upon to appear on July 24, 1958, in both the cases.

The petitioner appeared in response to the notices and it appears that the cases were not taken up on July 24, 1958, but were taken up on August 26, 1958. On behalf of the petitioner an objection was raised that the notices dated July 4, 1958, having been issued after the expiry of a period of three years for which it was proposed to make the assessment, were bad in law and, therefore, no action could be taken against the petitioner. This objection of the petitioner was overruled by the Sales Tax Officer by his order dated August 27, 1958, on the ground that the notice under s. 11(2) of the Act was first issued to the petitioner on July 20, 1955. This notice was within the period of three years and hence the proceedings against the petitioner were tenable. It is these two orders of August 27, 1958, against which these two petitions are filed.

Mr. Dhabe, learned counsel for the petitioner, contends that the notices of date July 20, 1955, have no validity in the eye of law. Admittedly, the Sales Tax Officer himself held that he had no jurisdiction to deal with the cases and has transferred the cases to the Assistant Commissioner on December 23, 1955. The notices of July 20, 1955, given by the Sales Tax Officer have, therefore, no legal validity and no proceedings could be founded on the basis of those notices. The only notices which are legal and valid, according to Mr. Dhabe, are the notices of July 4, 1958. Those notices were given after a period of three years, are therefore bad in law and no proceedings could be founded on the strength of those notices. Reliance is placed in support of this contention on a Full Bench decision of this Court reported in *Bisesar House v. State of Bombay*.¹

Mr. Abhyankar for the respondents contends that the notices of date July 20, 1955, are valid. The Sales Tax Officer had jurisdiction to deal with the cases. It has not been shown by the petitioner that the Sales Tax Officer was incompetent on July 20, 1955, to deal with the cases. The action and the proceedings could be founded, therefore, on the basis of those notices. The proceedings commenced on the basis of those notices are, therefore, valid. In the alternative Mr. Abhyankar contends that even if it is held that the only valid notices in these cases are of date July 4, 1958, then the effect of the aforesaid decision of this Court is taken away by virtue of s. 6 of the Bombay Sales Tax Laws (Validating Provisions and Amendment) Act, 1959 (Act XXII of 1959) which came into force on April 18, 1959.

The first question that arises is whether the notices issued by the Sales Tax Officer under sub-s. (2) of s. 11 of the Sales Tax Act on July 20, 1955, were valid notices. As already stated, the petitioner is a registered dealer. The

petitioner had in fact filed returns for both the years 1952-53 and 1953-54 though the returns were blank. Section 11 reads:—

"11. (1) If the Commissioner is satisfied that the return furnished by a dealer in respect of any period are correct and complete, he shall assess the dealer on them.

(2) If the Commissioner is not satisfied he shall serve the dealer with a notice appointing a place and day and directing him—

(i) to appear in person or by an agent entitled to appear in accordance with the provisions of section 11B;

(ii) to produce evidence or have it produced in support of the returns; or

(iii) to produce or cause to be produced any accounts, registers, cash memoranda or other documents as may be considered necessary by the Commissioner for the purpose."

Sub-section (3) of s. 11 provides that after hearing the dealer or his agent and examining the evidence produced in compliance with the requirements of cl. (ii) or cl. (iii) of sub-s. (2) and such further evidence as the Commissioner may require, the Commissioner shall assess him to tax. Section 11 when read together with the provisions of s. 3 and the rules makes it clear that the powers conferred by s. 11 could also be exercised by other Sales Tax Officers to the extent they are conferred on them by the State Government. It is not in dispute that the Sales Tax Officer is one of such persons appointed under the Sales Tax Act. It is to be seen whether on July 20, 1955, the Sales Tax Officer was an authority competent to deal with the cases of the petitioner and issue the notices of that date. Sub-section (2) of s. 3 provides that persons appointed under sub-s. (1) (the Sales Tax Officer is one of such persons), shall, within such areas as the State Government may specify, exercise such powers as may be conferred and perform such duties as may be imposed, by or under the Act.

In exercise of these powers certain rules have been framed. Clause (1) of r. 19 provides that every registered dealer shall furnish to the appropriate Sales Tax Officer quarterly returns in the prescribed form within one calendar month from the expiry of the quarter to which the return relates. Rule 67 prescribes the powers which could be exercised by the various persons appointed by the State Government under sub-s. (1) of s. 3. The entry relevant to this case is entry No. 8. The relevant part thereof, as it then stood, reads as follows:—

Sr. No.	Section	Description of power	Designation of officer and conditions of delegation.
8.	11, 11-A, 12 and 12A	To make an assessment or reassessment of tax or penalty or to fix a date for payment or to extend the date for payment of such tax or penalty or to allow the payment of tax or penalty by instalments and to exercise all other powers under these sections—	
		(a) in respect of a dealer other than a dealer having no place of business in Vidarbha region whose gross turnover of the year preceding the period of assessment exceeds 20 lakhs or taxable turnover of the year preceding the period of assessment exceeds Rs. 4 lakhs.	Assistant Commissioner (with the previous approval of the Commissioner for imposition of penalty).
		(b) In respect of a dealer other than a dealer having no place of business in Vidarbha region whose gross turnover of the year preceding the period of assessment does not exceed Rs. 20 lakhs or whose taxable turnover of the year preceding the period of assessment does not exceed Rs. 4 lakhs or in respect of a dealer who has no "year" preceding the period of assessment or in respect of any other dealer not falling in clause (a) or (c).	Sales Tax Officer (with the previous approval of the Assistant Commissioner for imposition of penalty).

Under the provisions of r. 19 the Sales Tax Officer was competent to receive the returns filed by the petitioner before him, and looking to the 8th entry in r. 67 it is clear that the Sales Tax Officer had jurisdiction to deal with all cases of the assessee in Vidarbha whose gross turnover of the year preceding the year of assessment did not exceed Rs. 20 lakhs or whose taxable turnover of the year preceding the period of assessment did not exceed Rs. 4 lakhs. Now, on July 20, 1955, two notices were issued by the Sales Tax Officer under s. 11(2) to the petitioner, one relating to the year 1952-53 and another relating to the year 1953-54. It has not been shown that there was any material on record to show that the gross turnover of the year preceding these relevant years exceeded Rs. 20 lakhs. It has also not been averred that there was any material before the Sales Tax Officer at the time he issued notices, from which it was possible for him to ascertain that the gross turnover or the taxable turnover of the year preceding exceeded Rs. 20 lakhs or Rs. 4 lakhs respectively. It is no doubt true that on December 23, 1955, the agent of the petitioner for the first time stated before the Sales Tax Officer that the sales during the year 1953-54 were more than Rs. 20 lakhs, but this statement can hardly have any bearing in considering the position obtaining on the material on record on July 20, 1955. Further, this is only a statement of an agent made in the case. It does not mean that it is true. In these circumstances and on these facts, in our opinion, the Sales Tax Officer had jurisdiction to deal with the petitioner's case and issue notices under s. 11(2) to him on July 20, 1955. Proceedings initiated on those notices were, therefore, validly started. These notices were issued within a period of three years. The petitioner was made aware within a period of three years that the Sales Tax Officer was not satisfied with the returns filed by him and that he would have to satisfy the Sales Tax Officer about the correctness of the returns or otherwise would have to pay tax in respect of the taxable turnover during those years. The petitioner was thus proceeded against within three years of the expiry of the periods for which he is being assessed. The Full Bench decision, in our opinion, has therefore no application to the facts of the case.

Mr. Dhabe then argues that the Sales Tax Officer having transferred the cases to the Assistant Commissioner of Sales Tax on December 23, 1955, on the basis of the petitioner's agent's statement that the sales during the year under assessment were more than Rs. 20 lakhs, all what was done by the Sales Tax Officer prior to the date was wiped out and, therefore, the notices issued by the Sales Tax Officer on July 20, 1955, lapsed.

We find it difficult to accept this contention. The Sales Tax Officer on the view he took transferred these two cases pending before him to the Assistant Commissioner. True, there is no express provision enabling the Sales Tax Officer to transfer a case to the Assistant Commissioner, but it is inherent in the relevant provisions of the rules made under the Act. The relevant provisions are that all the returns filed by registered dealers are received first by the Sales Tax Officer, but the cases of registered dealers in the Vidarbha region get dealt with either by the Sales Tax Officer or the Assistant Commissioner depending on the amount of gross turnover or taxable turnover of the assessee in the year preceding the year of assessment. By necessary implication it follows that the Sales Tax Officer has jurisdiction in the first instance to deal with all the cases of registered dealers in the Vidarbha region and scrutinize their returns, and it is only when he finds from the material on record or it is established that the gross turnover or taxable turnover of the assessee in the year preceding the year of assessment exceeds the pecuniary limit, he has to transfer the case to the Assistant Commissioner. As already stated, it has not been established or even pleaded that there was any material on record before the Sales Tax Officer on July 20, 1955, when he issued notices under s. 11(2) from which he could infer that the petitioner's gross turnover or taxable turnover in the respective preceding years was above the aforesaid pecuniary limit. He

was, therefore, acting within his powers in issuing the said notices dated July 20, 1955.

The Sales Tax Officer is an officer appointed under the Act and owes existence to the Act. The Act has by necessary implications conferred jurisdiction on him to determine what are the cases which fall within his jurisdiction. It, therefore, cannot be said that whatever he does up to that stage is done by him without jurisdiction, even when he reaches a conclusion that the case is triable by an Assistant Commissioner. In our opinion, therefore, the fact that the Sales Tax Officer transferred the cases of the petitioner to the Assistant Commissioner on December 23, 1955, cannot have the effect of rendering invalid what had been previously done by the Sales Tax Officer. The contention of Mr. Dhabe that the notices issued by the Sales Tax Officer on July 20, 1955, under s. 11(2) of the Act lapsed on December 23, 1955, must fail. In view of our finding on this question it is not necessary for us to consider the validity or otherwise of the notices of July 4, 1958, in view of s. 6 of the Bombay Sales Tax Laws (Validating Provisions and Amendment) Act, 1959, which came into force on April 18, 1959.

The position then that emerges is that the notices dated July 20, 1955, under s. 11(2) of the Act were validly given and they had at no time lapsed. The proceedings that are being taken against the petitioner were thus initiated under the said notices within three years of the expiry of the assessment periods. It, therefore, cannot be said that the proceedings that are being taken against the petitioner are bad in law or that the Sales Tax Officer has no jurisdiction to deal with them. Subsequent notices given on July 4, 1958, cannot affect this position. They are not notices initiating the proceedings against the petitioner and, therefore, are not liable to be quashed.

In the result, both the petitions fail and are dismissed with costs. Only one set of costs is allowed.

Petitions dismissed.

INCOME-TAX REFERENCE.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY-I, BOMBAY

v.

PURSHOTTAMDAS THAKURDAS.*

Indian Income-tax Act (XI of 1922), Secs. 18A(6), 18—Dividend income of resident assessee whether falls within s. 18—Whether penal interest can be levied on such income under s. 18A(6).

Dividend income of an assessee who is a resident is not exempt from the operation of s. 18A(6) of the Indian Income-tax Act, 1922, and, therefore, penal interest can be levied under that section in case of such income.

S. T. Desai J. The words "income to which the provisions of section 18 do not apply" in s. 18A(6) of the Indian Income-tax Act, 1922, read contextually can only mean that while determining the amount of penal interest under s. 18A(6) and applying the ratio of eighty per cent to the amount of tax paid in advance and the amount of tax determined at the regular assessment, the Income-tax Officer must exclude from the amount of tax determined at the regular assessment the amount of tax for which provision is made under s. 18, that is the amount of tax which is deducted at source under sub-s. (2) to (3D) and the amount of tax which is to be treated as paid by the assessee under sub-s. (5) of s. 18.

THE facts appear in the judgment of Shah J.

*Decided, July 3, 1959. Income-tax Reference No. 45 of 1958.

G. N. Joshi, with *R. J. Joshi*, for the applicant.
N. A. Palkhivala, for the respondent.

SHAH J. The assessee has a large dividend income beside income from securities, property, business and other sources. By notice under s. 18A(1) of the Income-tax Act the assessee was called upon to make advance payment of tax on so much of his income from which tax was not deducted at source as was included in his total income of his latest previous year in respect of which he had been assessed. The assessee submitted a statement of his income for S.Y. 2002 and estimated his total income including foreign income at Rs. 4,64,000. He claimed that to Rs. 3,64,000 out of his total income s. 18 of the Income-tax Act applied and the income to which s. 18A applied was Rs. 1,00,000. He estimated that Rs. 32,940 were payable as income-tax on the income to which s. 18A applied and Rs. 2,44,812 were payable as super-tax on the total income of Rs. 4,64,000. After claiming credit for Rs. 10,000 for double income-tax relief, the assessee estimated Rs. 2,67,752 as payable by him as advance tax. The Income-tax Officer holding that the assessee had paid tax under sub-s. (2) of s. 18A, on the basis of his estimated income, which was less than 80 per cent. of the tax determined on the basis of regular assessment, ordered him to pay penal interest under s. 18A(6). Against that order an appeal was preferred to the Appellate Assistant Commissioner, and that Officer held that to the dividend income received by the assessee s. 18 did not apply and that the assessee was bound to include his dividend income in his estimate under s. 18A(2), and he accordingly confirmed the order passed by the Income-tax Officer. The assessee appealed to the Income-tax Appellate Tribunal, and the Tribunal by its order, which is somewhat cryptic, appeared to take the view that dividend income was income to which the provisions of s. 18 applied and, therefore, in assessing liability to pay penal interest on the estimate made by the assessee dividend income was not liable to be taken into account; and as s. 18A(6) of the Income-tax Act did not apply to dividend income, the assessee was "not liable to pay penal interest in respect of the dividend income". At the instance of the Commissioner of Income-tax this reference has been made, and the question which falls to be determined is whether dividend income of an assessee who is a resident falls within s. 18 of the Income-tax Act.

Under the Indian Income-tax Act, tax is assessed and paid in the succeeding year upon the result of the previous year of account. This makes a departure from the scheme of the English Income-tax Act under which the subject of assessment is the income of the year of assessment though the amount is computed by reference to the income of the preceding year. But the Legislature has by enacting s. 18A made a provision for imposing liability upon tax-payers who have been previously assessed and even upon those who have not been assessed to make advance payment of tax in respect of income for which provision is not made under s. 18 for deduction of tax at the time of payment. Sections 18 and 18A between themselves exhaust all the categories of taxable income. At the relevant time, by sub-s. (2) of s. 18 the person responsible for paying any income chargeable under the head "salaries" was required to make deduction of income-tax and super-tax on the amount payable at a rate representing the average of the rates applicable to the estimated total income of the assessee under that head. By sub-s. (3) the person responsible for paying any income chargeable under the head "interest on securities" was, unless otherwise prescribed in the case of any security of the Central Government, required at the time of payment to deduct income-tax but not super-tax on the amount of interest payable at the maximum rate. By sub-s. (3A) income-tax at the maximum rate was required to be deducted by the person responsible for paying interest, not being interest on securities, to any person not being a resident in British India. By sub-ss. (3B) and (3C) super-tax was to be deducted at the time of payment by the person responsible for payment of interest not being interest on securities payable to a person

not resident in British India. The tax was liable to be paid on the amount by which the amount of interest exceeded the maximum amount chargeable with super-tax, unless the rate was determined by order of the Income-tax Officer. Similarly, under sub-ss. (3D) and (3E) super-tax was liable to be deducted at the time of payment out of dividends payable to a shareholder who was not a resident in British India. The tax was to be deducted at the appropriate rate applicable to the total dividend income, unless the rate was determined by order of the Income-tax Officer. The provisions relating to deduction at the time of payment of tax under s. 18, at the material time, accordingly applied to the head of salaries from which income-tax and super-tax were required to be deducted at source, the head of interest on securities from which income-tax but not super-tax was liable to be deducted at source and the head of interest other than interest on securities payable to non-residents from which income-tax and super-tax were liable to be deducted at source, and to the head of dividend on shares payable to non-residents from which super-tax was liable to be deducted. Section 18A, which was incorporated for the first time by Act XI of 1944, provides for advance payment of tax. By the first sub-section it is provided that the Income-tax Officer may require an assessee to pay advance tax in specified instalments in the case of so much of his income, in respect of which provision is not made under s. 18 for deduction of income-tax at the time of payment, as is included in the total income of the latest previous year in respect of which he is assessed. By sub-s. (2) it is provided that if the assessee ordered to pay advance tax, estimates that the part of his income to which sub-s. (1) applies for the next following year is less than the income on which he is ordered to pay tax, and he wishes to pay an amount less than the amount ordered, he may submit his own estimate of the tax payable by him calculated in the manner prescribed by sub-s. (1). Sub-sections (1) and (2), however, provide for advance payment of tax in the case of income in respect of which provision is not made under s. 18 for deduction of tax at the time of payment, and provision for deduction of income-tax at the time of payment is made under s. 18 only in respect of the categories of income set out hereinbefore, dividend income payable to a resident being not one of such categories.

Mr. Palkhivala for the assessee conceded that in the assessment of income for the assessment year 1947-48 the assessee's dividend income was computed at Rs. 3,11,376, and that even the assessee had returned a gross amount of Rs. 3,24,275 under the head dividends. If s. 18 did not apply to the dividend income, evidently the estimate made by the assessee on September 13, 1946, of his dividend income was grossly inadequate. Dividend income being not income in respect of which provision is made in s. 18 for deduction of income-tax at the time of payment, the assessee was bound in estimating his income to include the entire income in the estimate and to pay appropriate tax thereon.

There is nothing in s. 18(5), on which reliance was placed by Mr. Palkhivala, which supports the view that dividend income received by a shareholder is income in respect of which provision is made for deduction of income-tax at the time of payment. Section 18(5) of the Income-tax Act provides *inter alia* that any sum by which dividend has been increased under sub-s. (2) of s. 16 is to be treated as payment of income-tax on behalf of the shareholder and that credit shall be given to him for that amount in the assessment of the following year. By s. 49B, where any dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed to any person who is a shareholder of a company which is assessed to income-tax in the taxable territories, such person shall, if the dividend is included in his total income, be deemed in respect of such dividend himself to have paid income-tax (exclusive of super-tax) of an amount equal to the sum by which the dividend has been increased under sub-s. (2) of s. 16. It is evident that a company pays tax on its own profits, but when dividend is distributed out of those profits, with a view to avoid double taxation, income-tax which has been paid by the company on that dividend is deemed to have been paid by the share-

holder if the dividend income grossed up under s. 16B by the addition of the tax paid is included by the assessee in his total income. There is in truth in the case of dividend income no deduction of income-tax at the time of payment, but by a fiction the Legislature regards the income-tax paid by the company as paid on behalf of the assessee on the latter's dividend income. Section 18(5) of the Income-tax Act undoubtedly provides that the sum by which dividend has been increased under s. 16(2) shall be treated as a payment of income-tax on behalf of the shareholder; but provision is not made under s. 18 in respect of dividend for deduction of income-tax at the time of payment. Under s. 18A(2), therefore, when the assessee estimated his income in respect of which provision was not made for deduction of income-tax under s. 18, he was bound to include therein all his dividend income and to pay tax thereon computed in the manner prescribed by sub-s. (1) of s. 18A.

Mr. Palkhivala submits that even if that view be correct, the assessee could not, for failure to pay tax on dividend income, be ordered to pay penal interest under s. 18A(6). Counsel invites our attention in support of his argument to the difference in the phraseology used in sub-s. (1) and in sub-s. (6), and submits that liability to pay penal interest may, by virtue of s. 18A(6), be incurred if the tax paid is less than 80 per cent. of the tax payable under the regular assessment on income which does not include dividend income. By sub-ss. (1) and (2) of s. 18A the Legislature has imposed an obligation upon assesseees to pay advance tax "in the case of income in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment", and by sub-s. (6) an assessee may be ordered to pay penal interest when the tax paid by him on his own estimate is less than 80 per cent. of the tax determined, so far as such tax relates to "income to which the provisions of section 18 do not apply". Mr. Palkhivala submits that the Legislature having included in sub-s. (6) a wider category of income, if there is some provision in s. 18 relating to a head of income even though that provision does not provide for deduction of tax at the time of payment, failure to pay advance tax on that head of income will not attract the penal provisions of s. 18A(6). In my judgment, the expression "income in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment" in sub-s. (1) of s. 18A and the expression "income to which the provisions of section 18 do not apply" in sub-s. (6) of s. 18A have substantially the same connotation. If in the total income on which advance tax may be ordered to be paid under sub-s. (1), or in the estimate whereof made under sub-s. (2), the dividend income must be included, it is difficult to hold that in making a provision for imposing a penalty for not paying adequate advance tax the Legislature intended that the ratio of 80 per cent. was to be applied between tax on an estimated income which included dividend income and tax on regular assessment on income which did not include dividend income. It is expressly provided that if the assessee pays tax on his own estimate under sub-s. (2), and the tax paid is less than 80 per cent. of the tax determined on the basis of regular assessment on income to which the provisions of s. 18 do not apply, the assessee is exposed to the liability to pay penal interest. The Legislature having imposed an obligation to pay advance tax on the estimated income on which tax is not deducted at source, and also having prescribed a penalty for making on an erroneous estimate, payment of tax which is less than 80 per cent. of the tax determined on regular assessment, I am unable, in the absence of compelling reasons, to make a distinction between dividend income and other heads of income on which by s. 18A(2) advance tax is required to be paid.

Mr. Palkhivala invited our attention to sub-s. (3) of s. 18A in which also the Legislature has used the expression, "that part of his income to which the provisions of section 18 do not apply". Sub-section (3) applies to assesseees who have not been previously assessed. If the argument of Mr. Palkhivala that the expressions used in sub-s. (1) on the one hand and in sub-ss. (3) and (6) on the other have not the same meaning has any substance,

it would lead to the rather incongruous result that assesses, who had been previously assessed, are liable to estimate for the purpose of the sub-section income inclusive of dividend income and pay tax thereon, while assesses who were being assessed for the first time will be exempt from that liability in respect of their dividend income. No rational ground is suggested which may support the distinction that an assessee who has been previously assessed shall include in his estimate dividend income and pay advance tax thereon, but an assessee newly assessed may not include dividend income in the estimate of his income for payment of advance tax.

Sub-sections (2) and (3) of s. 18A impose an obligation on the assessee to pay advance tax on the estimated income in respect of which no provision for deduction of tax at source is made. Under s. 18(5) the amount by which the tax is grossed up under s. 16(2) which is equivalent to the income-tax paid by the company on the dividend is alone treated as made on behalf of the shareholder: but the penalty prescribed by s. 18A(6) is attracted when the tax paid on income estimated under sub-s. (2) or sub-s. (3) is less than 80 per cent. of the tax determined on the basis of the regular assessment in so far as it relates to income to which the provisions of s. 18 do not apply. If the argument of Mr. Palkhivala that in computing the tax on income to which the provisions of s. 18 do not apply, dividend income is to be excluded is accepted, there can be no basis for comparison of the tax paid on the income assessed and the tax paid on the income estimated. When in making payment of tax on the estimated income under sub-ss. (2) and (3) dividend income is to be included, comparison will be impossible if, in computing whether the advance tax paid directly or treated as paid on the estimated income is less than 80 per cent. of the tax on regular assessment, the income on which that tax is computed does not include dividends.

For reasons afore-mentioned, I am unable to agree with the view of the Tribunal that the assessee was not liable to pay penal interest for failing to include in the estimate his dividend income.

The question framed by the Tribunal may, however, be reframed. We are not concerned in this case with the total income of the assessee under the various heads, nor with the correctness of the estimate made by him. The only question which we were called upon to decide is "whether in the circumstances of the case the assessee is liable to pay penal interest in respect of his dividend income under section 18A(6) of the Income-tax Act." We answer the question in the affirmative. The assessee to pay the costs of the Commissioner.

S. T. DESAI J. I have arrived at the same conclusion but by a different path. A question of importance and some nicety arises for our determination on this Reference. Learned counsel both for the Revenue and the assessee are agreed that the statement of the case does not give a complete idea of the relevant facts. They are also agreed that the point of controversy turns wholly on the construction of certain provisions of law and it is whether an assessee, who is required to make payment of tax by an order under sub-s. (1) of s. 18A but chooses to send an estimate of his income under sub-s. (2) of that section on the ground that on his own estimate the income would be less than that on which he is required to make such advance payment, is liable to pay interest in respect of dividend income under s. 18A(6) of the Act. The contention of the assessee was that he was not liable to pay such interest and his reason in support of that contention was that s. 18A(6) did not apply to dividend income. Section 18A(6), the provisions of which I shall presently state, so far as it affects the case before us, lays down that an assessee, who has paid advance tax on the basis of his own estimate and the tax so paid is less than eighty per cent. of the tax ultimately determined on regular assessment "so, far as such tax relates to income to which provisions of section 18 do not apply", is liable to pay interest upon the amount by which the tax so paid falls short of that eighty per cent. The Income-tax Officer and the Appellate

Assistant Commissioner negated that contention of the assessee about income from dividends and levied penal interest as provided in the section. An appeal carried by him to the Tribunal was, however, allowed and the Commissioner of Income-tax has come before us on this Reference.

It has been argued before us by Mr. G. N. Joshi, learned counsel for the Revenue, that the provisions of s. 18A(6) apply to dividend income for both income-tax and super-tax. It has also been argued that in any case that section must apply to dividend income for purpose of super-tax since there is no reference whatever to super-tax on dividend income of a resident in any of the provisions of s. 18. The argument of Mr. Palkhivala, learned counsel for the assessee, is that no penalty interest can be levied under s. 18A(6) in case of dividend income because s. 18(5) does in terms apply to such income. The point of the argument is that dividend income is wholly exempt from the operation of s. 18A(6), that is both as to income-tax and super-tax.

Before examining the arguments strongly pressed for our acceptance on either side, it is necessary at the outset to turn to the relevant provisions of ss. 18A and 18 and to examine the scheme of those sections. We have to view the scheme of ss. 18A and 18 only in the context of their correlative aspects. Section 18A deals with advance payment of tax. Obviously it could not be ruled that an assessee should be ordered to make advance payment of tax under s. 18A in respect of any part of his income if tax on such income had already been deducted at its source or had already been paid by him or he is in law to be deemed to have paid the same. Section 18 *inter alia* provides for levy by deduction of tax at the source in certain specified cases, to mention only one, 'salaries'. It is as I have already said in the aspect of their correlation that the scheme of the two sections particularly requires to be examined by us. I shall do so as succinctly as possible.

Section 18A, a comparatively recent innovation in taxation law, lays down a series of rules relating to advance payment of tax. Charge of income-tax under our Act is on actual income of the previous year and the subject of assessment is not the income of the assessment year but that of the 'previous year'. For reasons which it is unnecessary to consider the Legislature has in this section ruled for advance payment of tax in respect of the income of the 'previous year' in stated instalments to be made before the completion of the actual assessment. Sub-section (1) of the section authorises the Income-tax Officer to pass an order in any financial year requiring the assessee to make advance payment in accordance with the provisions of the sub-section relating to quantum and instalments. The initial part of the sub-section confines its operation to "income in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment", that is at the source. It is open to the assessee called upon to make advance payment to submit his own estimate at any time before the last of such instalments is due if he wishes to pay an amount less than the amount which he is required to pay and he may pay such amount (instalments) as accords with his own estimate. Sub-section (2) enables him to make his own estimate if, in his opinion, the income of the year is likely to be less than that on which he has been asked to make advance payment of tax in accordance with the machinery for assessment of advance tax contained in sub-s. (1). Then sub-s. (3) rules for the case of a new assessee. In his case he has to make an estimate himself if his income exceeds the amount there mentioned. He has to make the estimate, send a return voluntarily and pay advance tax in the manner there laid down. For the purpose of examination of the scheme, it is not necessary to refer to sub-ss. (4) and (5). Sub-section (6), which is material, provides for cases where the assessee's estimate turns out to be too low and it lays down that where an assessee has paid advance tax under sub-ss. (2) or (3) and the amount so paid is less than 80 per cent. of the final assessment of his income for the particular year he is liable to pay interest of 6 per cent. There is the necessary qualification that this is in the context of "income to which the provisions of section 18 do not apply". Sub-sections (7) and (8) relate to

cognate matters affecting cases where there is a failure to make advance payment of tax. These and the subsequent sub-sections are not material for the present purpose.

Section 18 contains a fasciculus of rules which are exceptions to the general mode or method of direct collection of tax, that is from the assessee himself, and they provide in the main for what is generally referred to in tax parlance as levy by deduction at source of income. This levy is confined to cases expressly stated in the section. Deduction at source is made: Of both income-tax and super-tax on salaries (sub-ss. (2), (2A) and (2B)): Of income-tax only on interest on securities (sub-ss. (3) and (3A)): Of income-tax and super-tax in case of non-residents in respect of interest on securities, dividends and other sums chargeable under the Act and paid to a non-resident. There is now no sub-s. (1) in s. 18 as the original sub-s. (1) has been repealed. It is abundantly clear that incomes of various types in respect of which tax is to be deducted at source are dealt with categorically in sub-ss. (2) to (3D) of the section. It is equally clear that they do not include 'dividends' of companies for the purpose of deduction of tax at source except in case of a non-resident. Sub-section (5) so far as it is relevant lays down that any sum by which a dividend has been increased under sub-s. (2) of s. 16 shall be treated as payment of income-tax or super-tax on behalf of the person from whose income the deduction was made. For the purpose of inclusion in the total income of an assessee the amount of actual dividend received by him is to be 'grossed up', as laid down in s. 16(2). Speaking generally a company when it pays tax does not do so on behalf of its shareholders. It is chargeable to tax on its profits as a distinct entity and not as an agent or on behalf of its shareholders. But by a *fictio juris* introduced in tax law by s. 49B, in case of dividend paid to a shareholder of a company which is assessed to income-tax, the shareholder is deemed in respect of such dividend himself to have paid income-tax (but not super-tax) of an amount equal to the sum by which the dividend is increased for the purpose of 'grossing up' under s. 16(2). It is not necessary to go into the arithmetic of grossing up and it will suffice to observe that income-tax in respect of dividend income is deemed to have been paid by the shareholder although in fact it is the company which has paid tax to which it was assessed. But be it noted that it is only the income-tax in respect of the dividend and not super-tax to which the fiction of law applies. Therefore, it is only income-tax in respect of his dividend income that the assessee is to be deemed to have himself paid the same.

Now a plain reading of the language of s. 18A(1) under which the assessee was required to make advance payment of tax on his income "in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment" that is at the source, clearly shows that the advance payment which an assessee can be called upon to make in accordance with the express provisions of that sub-section embraces all income save that expressly dealt with in s. 18 for the purpose of deduction at the source. The language of the sub-section also makes it clear that the advance payment of tax is to be made in respect not only of income-tax but both income-tax and super-tax. The assessee furnished an estimate of his income under sub-s. (2) as he was entitled to do for the purpose of showing that in his opinion the income would be less than that on which he was required to pay tax and one aspect of his contention was that in submitting his estimate of income under sub-s. (2) of this section he was not bound to include in it for the purpose of ascertainment of the quantum of advance payment, his income from dividends either for income-tax or super-tax, because the provisions of s. 18 applied to dividend income. As I shall presently point out there is nothing in sub-s. (2) to support this contention. But the argument has been that it is sub-s. (6) of s. 18A which is material as it was under sub-s. (6) of s. 18A that the assessee was charged with levy of penal interest and that sub-section speaks merely of "income to which the provisions of section 18 do not apply". The crux of the argument is that s. 18(5) does apply to dividend income of a resident and,

therefore, sub-s. (6) of s. 18A does not apply to the case of the assessee and that he was in effect exempt from making any advance payment—even of super-tax—on his dividend income. Since the argument is founded on the language of sub-s. (6) of s. 18A it will be convenient to set out the relevant part of that sub-section. But sub-s. (6) cannot be read in any manner divorced from its context and must be read with other relevant provisions of s. 18A. I have already stated the initial words of sub-s. (1) of this section and referred to its provisions and need not set out sub-s. (1). Sub-section (2) is material and has to be read with sub-s. (6). Indeed sub-s. (6) begins with a reference to it. The relevant and material part of the two sub-sections is as under:

“(2) If any assessee who is required to pay tax by an order under sub-section (1) estimates at any time before the last instalment is due that part of his income to which that sub-section applies for the period which would be the previous year for an assessment for the year next following is less than the income on which he is required to pay tax and accordingly wishes to pay an amount less than the amount which he is so required to pay, he may send to the Income-tax Officer an estimate of the tax payable by him calculated in the manner laid down in sub-section (1) on that part of his income for such period; and shall pay such amount as accords with his estimate...

(6) Where in any year an assessee has paid tax under sub-section (2) or sub-section (3) on the basis of his own estimate, and the tax so paid is less than eighty per cent. of the tax determined on basis of the regular assessment, so far as such tax relates to income to which the provisions of section 18 do not apply...simple interest at the rate of six per cent. per annum...shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty per cent.”:

The crucial question relates to the extent of exclusion in the computation to be made for the purpose of applying the ratio of eighty per cent. under the provisions of sub-s. (6) quoted above. Sub-section (6) of s. 18A, it was argued by Mr. Palkhivala, excludes from its operation all categories of income to which the provisions of s. 18 apply, and relying on sub-s. (5) of s. 18 the argument proceeded that provisions of that sub-section do apply to the category of dividend income and, therefore, the case of the assessee does not fall within the operation of s. 18A(6). I have already pointed out that incomes of various types in respect of which tax is to be deducted at source are dealt with categorically in sub-ss. (2) to (3D) of s. 18 and they do not include dividend income of a resident assessee. I have in examining the scheme of the two sections made some reference to sub-s. (5) of s. 18 but for convenience I shall set out here the relevant and material part of it:

“...any sum by which a dividend has been increased under sub-section (2) of section 18 shall be treated as a payment of income-tax or super-tax on behalf of the person from whose income the deduction was made, or of the owner of the security or of the shareholder as the case may be, and credit shall be given to him therefor on the production of the certificate furnished under sub-section (9) of section 20, as the case may be, in the assessment, if any, made for the following year under this Act.”

The greatest reliance was placed on behalf of the assessee on this sub-s. (5) of s. 18 and it was urged that in this sub-section provision is made for income arising from dividend. It was said that the sub-section in terms provides for giving credit to the assessee in respect of tax on the assessee's income from dividend deemed to have been paid by him. It was said that this is all that is relevant and it is immaterial to examine the nature of the provisions in s. 18(5) or the object and effect of that sub-section. ‘Dividend’ has been mentioned in this sub-section and credit is to be given to the assessee shareholder for a proportionate amount of the tax paid by the company and, therefore, so the argument ran, it must be said that since provision is made in this sub-section for income from dividend all income from dividend is excluded from operation of s. 18A(6). It was urged that any category of income for which any provision is made in any part of s. 18 is to be excluded from the operation of sub-ss. (2) and (6) of s. 18A. At first blush it may seem that the words “income to which the provisions of section 18 do not apply” in s. 18A(6) have

the effect of excluding from its ambit any category of income for which provision is made in any part of s. 18 because in a sense it can be said that some provision is made in s. 18(5) for income arising from dividend. But indubitably these words "income to which the provisions of section 18 do not apply" have to be read in their context and proper setting. Section 18A(6) as the initial words of it state in unmistakable manner, deals with the case of an assessee who has paid tax under sub-s. (2) or sub-s. (3). Now we are dealing with a case in which estimate of income and advance payment of tax had been made by the assessee under sub-s. (2). Confining, therefore, the examination of the language of sub-s. (6) to a case of tax paid under sub-s. (2), I read sub-s. (6) as laying down that where an assessee has paid tax under sub-s. (2) on the basis of his own estimate the Income-tax Officer has to see whether the amount of advance tax paid by the assessee is less than eighty per cent. of the amount of tax ultimately determined at the regular assessment but after excluding from the computation the amount of tax on any income already deducted at the source and the amount of tax on any income which the assessee is to be deemed to have already paid by operation of any of the provisions of s. 18. If on such computation he finds that there is a shortfall he can hold that penalty interest is payable by the assessee. The tax ultimately determined at the time of the regular assessment would include both income-tax and super-tax and would be computed on the whole income of the assessee under the charging sections and would be in respect of all the heads of income mentioned in s. 6 and that would include income from dividends. But the ratio of eighty per cent. is to be applied not to the entire amount of tax determined on such regular assessment for that would be arrived at after having regard to the total income of the assessee under all the heads of income and the tax would include both income-tax and super-tax. The ratio is to apply to the amount of advance payment of tax actually made and the amount of tax determined at the regular assessment but excluding from the latter the amount of tax which relates to income to which the provisions of s. 18 apply. These considerations, in my opinion, lead to the conclusion that the words "income to which the provisions of section 18 do not apply" read contextually can only mean that while determining the amount of penal interest under s. 18A(6) and applying the ratio of eighty per cent. to the amount of tax paid in advance and the amount of tax determined at the regular assessment, the Income-tax Officer must exclude from the amount of tax determined at the regular assessment the amount of tax for which provision is made under s. 18, that is the amount of tax which is deducted at source under sub-ss. (2) to (3D) and the amount of tax which is to be treated as paid by the assessee under sub-s. (5) of s. 18. According, however, to learned counsel for the assessee the question to be considered, on a proper reading of s. 18A(6), should be not whether any income-tax or super-tax was deducted at the source or is to be deemed to have been paid by the assessee but simply: 'Is any provision made in section 18(5) for income from dividend?' and according to him this would be regardless of any content of that provision. It is impossible to read s. 18A(6) and the words under discussion in the manner urged by counsel. No words in a statute can be construed effectively without reference to their context and for the obvious reason that even the grammatical meaning of words must largely depend on their collocation. The argument of learned counsel wholly ignores the words in s. 18A(6) which immediately precede "income to which the provisions of section 18 apply" and they are "eighty per cent. of the tax determined on the basis of the regular assessment, so far as such tax relates to...". Obviously effect must be given to the words "so far as such tax relates to...". They are crucial. We have here a rule which lays down a ratio between two amounts of tax, the estimated amount of tax and the amount of tax ultimately arrived at on the basis of regular assessment. The question, therefore, that we have to put to ourselves is not baldly and simply whether there is any provision relating to income from the category of dividend in s. 18(5) but whether under the provisions of s. 18(5) there was any deduction of tax made at the

source in respect of the dividend income and whether there was any tax in respect of dividend income the amount of which "shall be treated as a payment of income-tax or super-tax on behalf of the person from whose income the deduction was made, or of...the shareholder as the case may be". I have reproduced here the language of s. 18(5) itself as in my judgment the solution to the question raised for our determination becomes easier if due regard is had to the content of sub-s. (5) itself on which sub-section counsel for the assessee so heavily leaned.

Reference to the provisions of s. 18 in s. 18A(6) is in terms and evidently in the context of tax determined on the basis of regular assessment and for the purpose of exclusion. It is equally evident that the exclusion is from the amount of tax so determined. The exclusion is not of one category or head of income from all the categories or heads of income on which the regular assessment is made but of an amount of tax from the total amount of tax ultimately determined on the basis of the regular assessment. This to my mind is the focal point and indeed the substance of the whole matter. If this be the real point, and I have no doubt that it is so, it seems extremely difficult to read into this sub-section the bald exclusion of any category as we are asked to do. The exclusion can only be of the amount of tax. It may be of the amount of income-tax or super-tax or of both as the case may be. But it is such tax and not the entire category of income to which it relates that is to be excluded. It is in the context of the ratio of the two amounts of tax after giving proper effect to the words "so far as such tax (determined at the regular assessment) relates to income to which the provisions of section 18 do not apply" that the matter has to be decided. It does not need to be stressed that in construing this sub-section we cannot isolate words or give them their abstract meaning or consider any part of the sub-section separately and independently of what has gone before. The words so strongly relied on by learned counsel for the assessee can be read only as an integral part of the whole sub-section and if this be done, as indeed we must do so, it is not possible to see how in applying the ratio of eighty per cent., the exclusion from the amount of tax determined on the basis of the regular assessment can mean anything more than the amount of tax on income for which provision is made in s. 18 and for the purpose of the present contention of the assessee anything more than the amount of income-tax for which credit had to be given to him as a shareholder by operation of sub-s. (5) of s. 18. It is not the entire amount of tax—which would include both income-tax and super-tax—on the income of the assessee from dividends to which the exclusion can reach but only the amount of income-tax for which credit is to be given to him by operation of s. 18(5). The assessee was only entitled to credit as a shareholder for a proportionate amount of the income-tax paid by the companies and not any amount of super-tax on his dividend income and in my judgment he was not justified in his contention that the entire category of dividend was to be excluded from computation in the determination of the question of liability to pay interest under the relevant provision of s. 18A(6).

The view I take on this question of construction derives some support from the scheme and the correlation of the two ss. 18A and 18 which I have already considered and also some support from the provisions of sub-s. (3) of s. 18 which rules for deduction of "income-tax but not super-tax" on the amount of interest on securities. In the course of the arguments at the Bar I put it to learned counsel for the assessee whether advance payment of super-tax would or would not have to be paid by an assessee in respect of such income and the answer was that provision having been made for the category of "interest on securities" in that sub-section of s. 18 there would be no question of penalty interest under s. 18A(6) in his case and for the identical reasons pressed for our acceptance in support of the case of the assessee before us relating to income from dividends. Having regard to the language of the provisions of sub-ss. (1), (2), (3) and (6) of s. 18A and s. 18(3) it is not possible for me to accede to this submission. I need not, however, discuss the point any

further since I have already examined the relevant provisions and particularly the meaning and effect of s. 18A(6) at some length.

For all these reasons I have reached the conclusion that on a proper construction of s. 18(6) an assessee is liable to pay interest in respect of tax on dividend income to the extent that s. 18(5) does not apply to the same. That section only applies to income-tax and not to super-tax. An assessee who is called upon to make advance payment of tax under s. 18A(1) may under sub-s. (2) of that section pay such amount as accords with his own estimate. If he excludes the amount of super-tax on dividend income from his estimate he takes the risk of the application of the ratio of eighty per cent. resulting in a short fall and he would have to pay interest "upon the amount by which the tax so paid falls short of the said eighty per cent." The eighty per cent. would be of the amount of tax determined on the basis of the regular assessment so far as such tax relates to income to which the provisions of s. 18 do not apply. The provisions of s. 18(5), as I have already pointed out, do not apply to super-tax and the amount of super-tax on the dividend income must be included and taken into consideration in the computation necessary for the purpose of fixing the quantum of tax to which the ratio of eighty per cent. is to be applied. I would, therefore, answer the question as reframed by us in the affirmative.

Solicitor for the applicant: *P. G. Gokhale.*

Solicitors for the respondent: *Crawford Bayley & Co.*

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Raju.

MESSRS. "JAISWAL MEDICAL STORES", NAGPUR

v.

ASSISTANT DRUGS CONTROLLER, NAGPUR.*

Drugs Rules, 1945, Rr. 64, 59(2)—Drugs Act (XXIII of 1940)—Whether r. 64(1) governs application for renewal of licence—Licensing authority whether can refuse renewal of licence on ground that licensee has committed breach of Act or Rules.

Rule 64(1) of the Drugs Rules, 1945, governs both an application for initial grant of licence as well as an application for renewal of licence.

*Jayantilal Sampatlal Jayaswal v. The State of Bombay,*¹ agreed with.

The opinion of the licensing authority that the licensee has contravened any of the provisions of the Drugs Act, 1940, or any of the Drugs Rules framed under the Act, by itself, is not a ground under r. 64 of the Rules for refusing renewal of a licence. The grounds on which renewal of a licence could be refused are the inability of the licensee to fulfil the conditions mentioned in r. 64(1) to the satisfaction of the authority concerned and the conviction of the applicant of an offence under the Act or rules or previous cancellation or suspension of his licence.

THE facts appear in the judgment.

P. G. Phadke, for the petitioner.

N. L. Abhyankar, Special Government Pleader, for respondents Nos. 1 and 2.

TAMBE J. This is a petition under arts. 226 and 227 of the Constitution of India wherein the petitioner prays that (1) a writ of *certiorari* be issued quashing the order dated December 26, 1958, made by the Assistant Drugs Controller, respondent No. 1 hereto, and quashing the appellate order dated

*Decided, July 8, 1959. Special Civil Application No. 126 of 1959.

¹ (1958) Special Civil Application No. 1160

of 1958, decided by Vyas and Tambe JJ., on August 8, 1958 (Unrep.).

April 27, 1959, made by the State of Bombay, respondent No. 2 hereto; (2) a writ of *mandamus* directing the respondents to renew the licences of the petitioner and (3) any other suitable writ or order.

It is not in dispute that since about the year 1952 the petitioner has been granted licences in Forms 20 and 21 under the Drugs Act, 1940, to sell, stock or exhibit for sale or distribute drugs by retail other than those specified in Schedules C and C(1), as well as those mentioned in Schedules C and C(1). In other words, the petitioner has been granted licences to sell, stock or exhibit for sale or distribute drugs which are both biological and special products as well as those which are not biological and special products. It is not in dispute that these licences are to be renewed every two years. The last licence granted to the petitioner in Form 21 was on November 25, 1955, and the last licence issued to the petitioner in Form 20 was on August 20, 1956. On November 24, 1957, the petitioner made an application to respondent No. 1 for the renewal of the licence in Form 21. Subsequent to the date of this application, respondent No. 1 paid an inspection visit to the shop of the petitioner on January 21, 1958. He then by his letter (Annexure I) dated February 14, 1958, pointed out various defaults noticed by him in the inspection, one of the things noted by him was that the refrigerator in the shop was out of order and that the petitioner had not provided necessary cold storage facilities for the drugs requiring cold storage, many liver extract injectible preparations requiring cold storage were kept outside in day temperature. By this letter respondent No. 1 further pointed out that in view of the various things found by him it will not be in the public interest and in the interest of public health to grant to the petitioner a licence to stock and sell drugs. Respondent No. 1 further called upon the petitioner to explain and show cause why the application made by him on November 24, 1957, should not be rejected and why licence in Form 20 which at that time was in force should not be cancelled.

The petitioner by his letter (Annexure II) dated February 24, 1958, showed cause and gave his explanation in respect of the various defects found by respondent No. 1. The explanation given by the petitioner regarding the refrigerator was that it had gone out of order and the unit was sent to the Bombay Garage for repairs and its return was awaited. It was further stated by the petitioner that he had made arrangements to keep an ice box for storage of medicines requiring cold storage and that he is keeping all liver extract and injectible preparations in it. On August 18, 1958, as two years' period of the licence in Form 20 was also coming to an end, the petitioner applied for the renewal of the licence in Form 20. On August 29, 1958, the petitioner applied for the grant of fresh licences in Forms 20B and 21B to sell, stock or exhibit for sale or distribute by wholesale the drugs relating to which he had licences to sell them by retail. On October 22, 1958, respondent No. 1 again visited the shop of the petitioner and again found that various things were not in order. On October 24/25, 1958, respondent No. 1 wrote a letter to the petitioner pointing out the various defects noted by him in his inspection and by this letter the petitioner was informed that unless satisfactory explanation is received by him within 7 days all the four applications would be rejected.

It will be pertinent to note that in this letter it was also observed that the refrigerator has still remained unrepaired, there was no ice in the ice box and drugs like Whooping Cough Vaccine and Liver Extract Injections requiring cold storage were lying in a room in ordinary temperature. The petitioner by his letter dated November 8, 1958, submitted his explanation with regard to the various points raised by respondent No. 1. Regarding the refrigerator, the explanation given by the petitioner was that it was out of order and could not be repaired and that the petitioner was unable to get a new refrigerator in the market either in Nagpur or in Bombay. As regards the ice box, the explanation given was that ice in the ice box had melted just before the time the officer came for inspection. It was, however, promised that ice would be continuously

kept in the ice box and thus cold storage secured for the medicines requiring cold storage. The petitioner's premises were again inspected on December 11, 1958, and again certain defects were noticed by respondent No. 1, one of them being that there was no ice in the ice box and certain drugs requiring cold storage were kept at ordinary room temperature. Respondent No. 1 by his order made on December 26, 1958, in the interest of public health, rejected all the four applications of the petitioner, i.e. applications for renewal of licences in Forms 20 and 21 and applications for the grant of fresh licences in Forms 20B and 21B. Material part of the order reads as follows:

"Now, therefore, I, S. R. Telang, Assistant Drugs Controller, Nagpur, in exercise of the powers delegated to me by r. 60 of the Drugs Rules, 1945, hereby order that for the reasons mentioned in this office letter No. ADCN/sI/L-830 of 1958, dated 23/24-10-1958, the said applications for licences to stock and sell drugs are rejected."

The petitioner took an appeal from the said order of respondent No. 1 to the State Government which was dismissed by it, vide order dated April 27, 1959. The petitioner has, therefore, preferred this petition seeking the reliefs mentioned above.

The arguments advanced by Mr. P. G. Phadke, learned counsel for the petitioner, were restricted only in respect of the grant of renewal of licences in Forms 20 and 21. No arguments were advanced by him before us regarding the rejection of applications for licences in Forms 20B and 21B.

As regards the rejection of applications for renewal of licences in Forms 20 and 21, Mr. Phadke, relying on the proviso to sub-r. (2) of r. 64, in the first instance contended that an application for initial grant of a licence and an application for renewal of a licence have to be treated on a different footing and the only ground on which an application for renewal of the licence could be rejected is when the licensee has been convicted of an offence under the Act or the Rules framed under the Act or when the licence granted to the licensee has been previously cancelled or suspended and on no other ground an application for renewal could be rejected. It is not possible for us to sustain this contention raised by Mr. Phadke. We are here dealing with the topic of a licence to sell, stock or exhibit for sale or distribute drugs by retail. The relevant provisions are contained in rr. 59 to 67 of the Rules framed under the Drugs Act, 1940. The relevant rule which relates to applications for the grant or renewal of a licence is sub-r. (2) of r. 59, and it provides that applications for the grant or renewal of a licence to sell, stock, exhibit for sale, or distribute drugs shall be made in Form 19 or Form 19A, as the case may be, to the licensing authority and shall be accompanied by a fee of rupees twenty. It is necessary to mention that for obtaining a licence in Form 20 or Form 21, or its renewal an application is to be made in Form 19. Looking to this sub-rule it is clear that the form of application provided for initial grant of a licence as well as renewal of a licence is the same. The fee prescribed for an application for initial grant of a licence as well as renewal of a licence is also the same though, no doubt, if the application for renewal is made beyond the period of duration of the subsisting licence, penalty also is imposed. These applications are to be dealt with in accordance with the provisions of r. 64. Rule 63 provides that licences to sell drugs shall, unless sooner suspended or cancelled, be in force for two years from the date of issue provided that if application for a fresh licence is made before the expiry of the period of validity of the licence, the licence shall continue to be in force until orders are passed on the application. It is obvious that the application referred to in the proviso to r. 63 is the application for renewal of the licence. The rule in terms mentions it as an application for a fresh licence. It is thus clear that on the language of the rule as well as that of the provisions of sub-r. (2) of r. 59 the rule-making authorities have treated an application for a licence and an application for the renewal of a licence on the same footing. The conditions required to be fulfilled by the applicant for the grant of licence are contained in r. 64(1). We will advert to them later. There can be no doubt that they are in the interest of public health and

must be satisfied by him to the satisfaction of the licensing authority. There is then no good reason to assume that these conditions need not be fulfilled to the satisfaction of the licensing authority by the licensee at the time of the renewal of his licence. We also see nothing in the language of the proviso to sub-r. (2) of r. 64 to sustain the argument that an application for renewal has to be treated on a different footing than an application for initial grant of licence or that renewal of licence could be refused only when conditions mentioned in the proviso exist. The proviso in terms has application both to the initial grant as well as to the renewal of a licence.

This question previously arose for decision before a Division Bench of this Court in *Jayantilal Sampatlal Jayaswal v. The State of Bombay*¹ to which one of us (Tambe J) was a party. In the judgment it was observed:

"...In our view, r. 64 relates both to the initial grant of licence as well as to the renewal of the licence. The words of the proviso itself 'may refuse to grant or renew', on which reliance was placed, show that the whole r. 64 relates to the initial grant of the licence as well as renewal of the licence. To interpret otherwise would mean that though a person may not be entitled to an initial grant of licence on account of his failure to satisfy the conditions of r. 64, yet he would be entitled to get his licence renewed."

We see no reason to take a view different from that taken in that case.

It is, therefore, not possible for us to accept the contention of Mr. Phadke that the application for renewal of licence could only be rejected if the conditions mentioned in the proviso to sub-r. (2) of r. 64 exist and not otherwise. In our opinion, r. 64(1) governs both application for initial grant of licence as well as application for renewal of licence. It is not the case of either party that the case falls under sub-r. (2) of r. 64. The case falls according to the respondents within sub-r. (1) of r. 64. Material part thereof reads as follows:

"Conditions to be satisfied before a licence in Form 20, 20B, 21 or 21B is granted:

(1) A licence in Form 20, 20B, 21 or 21B to sell stock or exhibit for sale or distribute drugs shall not be granted to any person unless the authority empowered to grant the licence is satisfied that the premises in respect of which the licence is to be granted are adequate, equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies and are in charge of a person competent in the opinion of the licensing authority to supervise and control the sale, distribution and preservation of drugs."

It is very strenuously contended on behalf of the respondents that on the facts found the case falls within sub-r. (1) of r. 64. On behalf of the petitioner it is equally strongly contended that even assuming that it was open to respondent No. 1 to reject the application for renewal of licence on account of non-compliance of the conditions mentioned in sub-r. (1) of r. 64, yet the rejection of the applications of the petitioner had not been on that ground. The rejection had been on account of non-compliance of the provisions of the Drugs Act, 1940, and rules framed thereunder and also on account of non-compliance of the conditions of the licence granted. It is the contention of Mr. Phadke that on this ground the application for renewal cannot be rejected. It must be conceded that the order made in this case is not happily worded. We have already reproduced the operative part of the order made on December 26, 1958. This order does not specifically mention the reasons for rejection of the application for renewal. It is stated there that for reasons mentioned in the letter of October 24, 1958, the applications of the petitioner are rejected.

This brings us to the letter of October 24, 1958. The facts found by respondent No. 1 and mentioned in that letter are:

"(1) Schedule E and H drugs i.e. Poisons are not stored by you in a separate cupboard under lock and key. Some drugs which are not poisons have also been kept in the cupboard in which poisons are kept."

¹ (1958) Special Civil Application No. 1160 of 1958, decided by Vyasa and Tambe, JJ. on August 8, 1958 (Unrep.).

(2) Refrigerator which as informed by you on December 12, 1957 was sent for repairs, has not been received back by you.

(3) There was no ice in the ice-box and you were stocking for sale drugs like Whooping Cough Vaccine and Liver Extract Injections at ordinary room temperature in that ice-box without providing any cold storage facilities for the drugs.

(4) Records and registers required to be maintained under Drugs Rules, 1945, have not been maintained by you at all. Statement made by you in this connection in your reply dated February 24, 1958 is not correct. No record has been maintained of the retail sales of spirituous medicines containing 3 per cent. or more of alcohol.

(5) Qualified person Shri Motilal Mohanlal Jaiswal was absent. He came later and the premises were in the meantime in charge of other persons who have not been approved as qualified persons. In this connection, I have to state that your statement as made in your letter dated February 24, 1958 that your Shri Jayantilal Shah is a qualified person is not correct. Name of Shri Motilal Mohanlal Jaiswal alone appears in the space for names of qualified persons in your licences in Forms 20 and 21."

It is urged by Mr. Abhyankar, Special Government Pleader, that the facts found in items 2 and 3 are that the refrigerator was out of order and that there was no proper arrangement made for keeping medicines requiring cold storage in the ice-box. It thus shows that there was no adequate and proper storage arrangement for preserving the properties of the drugs made by the petitioner. Respondent No. 1 was, therefore, entitled to reject the applications in terms of sub-r. (1) of r. 64. It is also contended by Mr. Abhyankar that other facts found show that the petitioner was contravening provisions of certain rules in the conduct of his business and he was, therefore, not a competent person in the opinion of respondent No. 1 to supervise and control the sale, distribution and preservation of drugs. It is true that the facts found relating to the conditions of the refrigerator and the ice-box show that the petitioner was not in a position or was unable to satisfy one of the requisite conditions mentioned in sub-r. (1) of r. 64 at the time he appealed for renewal of his licence. But it is not possible for us to accept the argument of Mr. Abhyankar that from the other facts found we should hold that the petitioner is not a competent person to supervise and control the sale, distribution and preservation of drugs. Contravention of rules may in certain cases be deliberate, in certain other cases it may arise out of incompetence or negligent supervision. It is not the question of the satisfaction of this Court. What is really material under sub-r. (1) of r. 64 is the satisfaction of the authority granting the licence. It may have been open to respondent No. 1 to reach a conclusion on those facts that the petitioner was not a competent person to supervise and control the sale, distribution and preservation of drugs, but he has not found so. We are, therefore, not inclined to accept Mr. Abhyankar's contention that respondent No. 1 has rejected the application on the ground that the petitioner is not a competent person to supervise and control the sale, distribution and preservation of drugs.

The tenor of the letter dated October 24, 1958, shows that in the opinion of respondent No. 1 reasons for refusing the licence were (1) inadequate arrangements for storing drugs requiring cold storage (items 2 and 3) and (2) certain other contraventions on the part of the petitioner of the provisions of the Act and rules framed thereunder (items 1, 4 and 5).

Now, on the language of r. 64, the opinion of the licensing authority that the licensee has contravened any of the provisions of the Act or the rules does not afford a ground to refuse renewal of a licence. The grounds on which renewal of licence could be refused are the inability of the licensee to fulfil the conditions mentioned in r. 64(1) to the satisfaction of the authority concerned and the conviction of the applicant of an offence under the Act or rules or previous cancellation or suspension of his licence. The difference between the two is of a substantial nature. In case a person is prosecuted for having contravened any of the provisions of the Act or rules he has an opportunity of defending himself in a Court of law and in case his licence is can-

celled or suspended he has again a remedy in a Court of law by way of an appeal to the District Court. These provisions thus afford him safeguards before he is deprived of his business. There would be no such safeguard if the licensing authority refuses renewal of the licence on the ground that in his opinion the licensee has contravened the provisions of the Act or the rules. It must be kept in view that art. 19(1)(g) of the Constitution guarantees to the citizen of India the right to practise any profession, or to carry on any occupation, trade or business. Exercise of this right can of course be subjected to certain restrictions but only to the extent and in the manner provided in cl. (6) of the article. And when we turn to the material part of the said cl. (6) we find that restrictions on the exercise of this right could only be imposed by enacting a law in the interests of public and further that the restrictions imposed by law are reasonable. It cannot be disputed that the Drugs Act imposes restrictions on the exercise of a citizen's right to carry on trade or business in drugs. The authorities appointed under the Act, therefore, would not be justified in imposing any restrictions on the exercise of the aforesaid right by a citizen which are not authorised by the provisions of the Act or the rules made thereunder. As already stated the opinion of the licensing authority that the licensee has committed a breach of any of the provisions of the Act or any of the rules framed under the Act by itself is not a ground under r. 64 for refusing renewal of a licence. In our opinion, therefore, respondent No. 1 was in error in taking into consideration the alleged breaches of the provisions of the Act and the rules mentioned in items 1, 4 and 5 of his letter dated October 24, 1958, in rejecting the two applications of the petitioner for renewal of licences in Forms 20 and 21.

It is next to be seen whether the order of respondent No. 1 refusing to grant licence is thereby vitiated. From the facts stated above refusal to renew the licence is not solely founded on the ground of alleged contravention on the part of the petitioner of the provisions of the Act or rules made thereunder mentioned in items 1, 4 and 5 of letter dated October 24, 1958. The refusal is also founded on the ground that the refrigerator was not in order, that there had been no proper arrangement made for keeping in cold storage drugs required to be kept in cold storage for the preservation of their properties. Looking to the language of sub-r. (1) of r. 64 it would be seen that two conditions are required to be satisfied by the applicant before a licence could be granted to him and those conditions are that the licensing authority must be satisfied that the premises are adequate, equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies and that the premises must be in charge of a person competent in the opinion of the licensing authority to supervise and control the sale, distribution and preservation of drugs. In the instant case, respondent No. 1 was not satisfied that the petitioner's premises were equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies on account of the failure on the part of the petitioner to provide a refrigerator or an ice-box for storing the drugs required to be kept in cold storage. In the circumstances of the case, it cannot be said that the aforesaid conclusion reached by respondent No. 1 is capricious. The premises of the petitioner were visited by respondent No. 1 on January 21, 1958. It was found that the refrigerator was out of order. The premises were again inspected on October 22, 1958. The refrigerator remained unrepaired. The petitioner had promised to make adequate arrangements to keep certain drugs in cold storage by providing an ice-box. The undertaking given by the petitioner was found not to have been fulfilled. The premises were again visited on December 11, 1958. The conditions remained just the same. For a period of nearly 12 months there were no satisfactory arrangements made by the petitioner to keep in cold storage drugs required to be kept in cold storage for preservation of their properties. In these circumstances, in our opinion, it cannot be said that respondent No. 1 acted in any capricious manner in

reaching the conclusion that the premises were not equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies. This being the position, on the language of sub-r. (1) of r. 64, which is mandatory in form, no option was left to respondent No. 1 but to reject the aforesaid two applications of the petitioner for renewal of licences in Forms 20 and 21. In our opinion, therefore, it cannot be said that respondent No. 1 was in error in rejecting the aforesaid applications of the petitioner. For reasons stated above, in our judgment, the petitioner is not entitled to any of the reliefs claimed by him.

In the result, the petition fails. The rule is, therefore, discharged with costs.

Rule discharged.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Raju.

MADHOSINGH DAULATSINGH v. THE STATE OF BOMBAY.*

Master and servant—Disciplinary action—Whether misconduct of servant must arise within his employment to enable master to take disciplinary action—Public servants—Whether disciplinary action can be taken against them for their misconduct outside their employment—Central Provinces and Berar Police Regulations, Rr. 64(11), 214, 217, 226—Police Act (V of 1861), Sec. 7.

In order to enable a master to take disciplinary action against his servant it is not a condition precedent that the misconduct on the part of the servant must arise within his employment and not outside his employment. The test in each case will be whether the servant is conducting himself in a way inconsistent with the faithful discharge of his obligations undertaken by him either expressly or impliedly in accepting the service. The inconsistency may arise on account of any act of the servant, either in the course of his employment or outside it, which injures or has the tendency to injure his master's business or interests or reputation. In the case of a private servant it is the master who in his own discretion decides the question of the disciplinary action to be taken against his servant. In the case of a public servant it is not the master but certain officers of the common master who decide this question, but their powers in that respect are regulated by the Act or rules framed thereunder.

On a Departmental Inquiry being held by the District Superintendent of Police, Wardha, on the conduct of a police constable, it was found that he had behaved very rudely with a member of the public, outside his employment. The District Superintendent of Police passed an order whereunder the police constable was reduced in pay by a certain amount per month for a period of two years and it was further ordered that the reduction would postpone his future increments. On the questions whether it was open to the Police authorities to take any disciplinary action against the police constable as the misconduct as found was committed by him not during the course of employment but was outside the employment and whether the District Superintendent of Police had acted within his authority in awarding the punishment which he had awarded for the misconduct found:—

Held, that the police constable had conducted himself in a way inconsistent with the faithful discharge of his service inasmuch as he had acted contrary to the discipline prescribed for a police officer in cl. (11) of Regulation 64 of the Central Provinces and Berar Police Regulations, and as his conduct was likely to bring disrepute to the police force, he had exposed himself to a disciplinary action, but,

that the punishment awarded by the District Superintendent of Police was in excess of the authority and powers conferred on him under the provisions of Regulation 226, and that the punishment awarded contravened the specific provisions of cl. (a) of Regulation 217.

*Decided, July 13, 1959. Special Civil Application No. 39 of 1959.

There is no provision either in the Police Act, 1861, or Regulations to restrict recourse to taking disciplinary action against a police officer's action to acts done by him during the course of employment only.

*Pearce v. Foster,*¹ referred to.

THE facts appear in the judgment.

B. B. Ranade, for the petitioner.

G. R. Mudholkar, Assistant Special Government Pleader, for opponents,
Nos. 1 to 4.

TAMBE J. This is a petition under arts. 226 and 227 of the Constitution of India, by police constable Madhosingh. It is directed against the order of the District Superintendent of Police, Wardha, respondent No. 2 hereto, made on May 8, 1958, whereunder the petitioner is reduced in pay by Rs. 2 per month for a period of two years beginning with the month of May 1958 and with a further order that this reduction will have the effect of postponing his future increments, and the affirming orders in appeal and revision made on July 29, 1958, and January 17, 1959, by the Deputy Inspector General of Police and the Inspector General of Police respondents Nos. 3 and 4 respectively.

Facts in brief are that the petitioner at the material time was posted as police constable in Wardha, a district place in the Vidarbha region. The petitioner was residing on the ground floor of a house. In the same house on the upper floor Shri Desai, Company Commandant of the Home Guards, Wardha, and one Bhagwansingh were residing. This house had no *pacca* latrine. A temporary latrine was, therefore, put up by the said Bhagwansingh and it was used by Bhagwansingh and Shri Desai. They also did not raise any objection to the use of that latrine by the petitioner. It appears that on February 9, 1958, the petitioner was trying to prevent Shri Desai's children from using the latrine and there was some altercation in this respect between the petitioner and Dashrath, peon of Shri Desai. Shri Desai who was nearabout, getting ready to go out, intervened and asked the petitioner as to what the matter was. The petitioner then lost his temper and replied "Have you no eyes, the latrine is full, it is smelling and who is going to clean it." Shri Desai told him that there was a sweeperess and that she would clean it. The petitioner then advanced towards Shri Desai in a threatening attitude and talked to him rudely in the first person singular. Shri Desai then went to the Police Lines and reported the matter to the Lines Officer. Later Shri Desai also reported the incident to the District Superintendent of Police, who asked the Station House Officer to inquire into the matter. The Station House Officer submitted his report on February 10, 1958, and the petitioner was suspended on that very day by the District Superintendent of Police, Wardha. On February 11, 1958, a charge sheet was served on the petitioner and the charge the petitioner was called upon to answer was "rude and improper behaviour with Shri Desai, Company Commandant, Home Guards, Wardha, on 9-2-1958 over the use of common latrine in the house of one Bhandekar of Gandhi Nagar." A Departmental Inquiry was then held by the District Superintendent of Police, Wardha. It was *inter alia* contended by the petitioner that the misbehaviour, even if any, being outside the employment, disciplinary action could not be taken against him. The District Superintendent of Police held that there was no proper justification for the petitioner to behave as he did with Shri Desai, Company Commandant, Home Guards. He further took the view that the default on the part of the petitioner was of a very serious nature. He negatived the contention of the petitioner that no disciplinary action could be taken against him for misconduct outside the employment. The District Superintendent of Police, therefore, issued a notice on April 17, 1958, calling upon the petitioner to show cause why he should

not be dismissed from the police force. The petitioner by his reply showed cause. Respondent No. 2 then made the following order on May 8, 1958:

"Constable Mahadevsing No. 125 of Lines is reduced in pay by Rs. 2 p.m. for a period of two years beginning with the month of May 1958. The reduction will have the effect of postponing his future increments. The constable is reinstated in service but his period of suspension so far will be treated as such."

The petitioner then took an appeal to the Deputy Inspector General of Police and the same contention was again reiterated by the petitioner in appeal. The contention was negatived by the Deputy Inspector General of Police and he dismissed the appeal on July 29, 1958. In the course of the order he observed:

"It is true that there is an appreciable distinction between the two capacities of a Police Officer, one as a member of the public and the other as police officer. At the same time, these cannot be regarded as watertight compartments. The appellant's acts as a member of the public do have a bearing on his character as a Police Officer and being a police officer the appellant should have acted with unfailing patience, courtesy and tact and refrained from losing his temper."

The petitioner then filed a revision application before the Inspector General of Police. This application was dismissed by the Inspector General of Police on January 17, 1959. The petitioner has, therefore, preferred this petition in this Court.

Mr. Ranade, learned counsel for the petitioner, in the first instance, contends that the misconduct as found was committed by the petitioner not during the course of the employment but was outside the employment and, therefore, it was not open to the Police authorities to take any disciplinary action against the petitioner in that respect. We find it difficult to accept this contention. It is true that the misconduct in respect of which disciplinary action is taken against a servant must have reasonable relation to the nature of the service, but it need not necessarily arise in the course of employment. When a person accepts an employment by necessary implications he agrees to so conduct and behave himself as would not be inconsistent with the nature of his service. If he behaves and conducts himself in a manner which would be inconsistent with the nature of his service then that would affect or at any rate would be likely to affect the interests or good name of his employer. If and when it happens it is reasonable to hold that it would entitle the employer to take such disciplinary action against his employee as the nature and degree of misconduct would require and law would permit. It is not that interests or good name of an employer is likely to be adversely affected only by an act of an employee during the course of an employment. We also do not find any provision either in the Police Act or Regulations to restrict recourse to taking disciplinary action against a police officer's action to acts done by him during the course of employment only.

Regulation 64 of the Police Regulations deals with general conditions of service of a police officer and cl. (11) thereof provides that the police officer shall act with respect and deference towards all officers of Government, and with forbearance, kindness and civility towards private persons of all ranks. In a private life he shall set an example of peaceful behaviour and shall avoid all partisanship. This clause makes it clear that it is one of the conditions of his service that a police officer conducts himself both during the course of his employment as well as outside his employment with civility and courteousness. It necessarily follows that his acting otherwise, though in private life, would be inconsistent with the general conditions of his service. The law relating to the disciplinary action which could be taken by a private individual against his servant is not that no disciplinary action can be taken by his master against the servant for any misconduct of his servant outside the employment. In considering the case of dismissal of a private servant Lord Esher M. R. in *Pearce v. Foster*¹ observed (p. 539):

"The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him....What circumstances will put a servant into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances which never have yet occurred, will occur, which also will fall within the proposition. But if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him."

Dealing with the same question in the same case Lord Justice Lopes observed (p. 542):

"If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master."

We are not aware of any decision taking a contrary view, and none is shown to us.

The ratio deducible then is that in order to enable a master to take disciplinary action against his servant it is not a condition precedent that the misconduct on the part of the servant must arise within his employment and not outside his employment. The test in each case will be whether the servant is conducting himself in a way inconsistent with the faithful discharge of his obligations undertaken by him either expressly or impliedly in accepting the service. The inconsistency may arise on account of any act of the servant, either in the course of his employment or outside it, which injures or has the tendency to injure his master's business or interests or reputation. There is no reason why this principle should not apply to public servants. There is however one very material difference between the two and that must be kept in view. In case of a private servant it is the master who in his own discretion decides the question of the disciplinary action to be taken against his servant. In the case of a public servant it is not the master but certain officers of the common master who decide this question, but their powers in that respect are regulated by the Act or rules framed thereunder.

In the instant case, as we have already shown, it was expected of the petitioner, being a police officer, to behave with civility and courteousness with a member of the public even in his private life. It has been found that he has very rudely behaved with Shri Desai. There is no doubt that the petitioner has conducted himself in a way inconsistent with the faithful discharge of his service inasmuch as he acted contrary to the discipline prescribed for a police officer in cl. (11) of Regulation 64. Such a conduct is likely to bring disrepute to the police force. He has, therefore, exposed himself to a disciplinary action.

The second contention raised relates to the jurisdiction or powers of respondent No. 2 to impose the punishment he has imposed for the offence of which the petitioner has been found guilty. It has, therefore, to be seen whether respondent No. 2 has acted within his authority in awarding the punishment which he awarded for the misconduct found. If he has, we are not concerned with its quantum.

Section 7 of the Police Act provides that subject to such rules as the Provincial Government may from time to time make the Inspector General of Police, Deputy Inspector General of Police, Assistant Inspector General and District Superintendent of Police may impose on police officers certain punish-

ments mentioned therein. In exercise of the powers conferred by this section the Provincial Government has made certain rules (referred to as Regulations). They are contained in Chapter VIII of the book 'C. P. & Berar Police Regulations' published under the authority of the Government of the Central Provinces and Berar. Regulation 214 enumerates the various kinds of punishments which could be imposed on police officers belonging to the Subordinate Police Service. The punishment imposed on the petitioner is twofold: (1) there is reduction in his pay by Rs. 2 p.m. for a period of two years beginning with the month of May 1958 and (ii) this reduction is to have the effect of postponing his future increments. On the language of regulation 214 the punishment imposed falls within cl. (ii) and (iii) of Regulation 214, that is, withholding of increments and reduction to a lower stage in a time scale. Regulation 215 deals with certain additional penalties which could be imposed on non-gazetted officers. We are, however, not concerned with those punishments in the instant case. Regulation 216 enumerates certain additional punishments which could also be imposed on Head Constables and Constables. Regulation 217 enumerates some more punishments which could also be imposed on Constables. In the instant case, the petitioner is a constable. Clause (a) of this regulation provides that a constable may also be punished with deprivation or withholding of increment (for a period not exceeding one year at any one time). In the instant case, the punishing authority, i.e. respondent No. 2, has at one time withheld the increment of the petitioner for a period of two years, which is contrary to the provisions of cl. (a) of regulation 217. Regulations 219 to 223 deal with the powers of punishment conferred on various officers. Regulations 224 and 225 contain general instructions relating to award of punishment. Regulation 226 lays down rules to be observed by the disciplinary authority in determining what penalty should be awarded for any particular offence.

It would thus be seen that the power of the disciplinary authority to impose a penalty is regulated and controlled by the provisions of the aforesaid regulation which is a complete Code by itself. It would therefore, be not open to it to impose a penalty which it deems proper, unless it is authorised by the regulation.

The offence of which the petitioner has been found guilty by respondent No. 2 is that his (petitioner's) behaviour was rude and improper towards Shri R. B. Desai, Company Commandant of the Home Guards, and in the words of respondent No. 3 the appellant (petitioner) being a police officer he should have acted with unfailing patience, courtesy and tact and refrained from losing his temper. It has to be seen whether the penalty imposed by respondent No. 2 on the petitioner and confirmed by respondents Nos. 3 and 4 is warranted under any one or more clauses of regulation 226.

It will be convenient at this stage to refer to certain other facts that weighed with respondent No. 2 in awarding the punishment which he has awarded. From paras. 21 and 22 of the preliminary order dated April 17, 1958, it appears that respondent No. 2 after coming to the conclusion that the petitioner was guilty of the aforesaid offence, looked into his service record and from it he found that during his 12 years' service he had received two major punishments and 11 minor punishments and had received 18 rewards. Miscellaneous remark in his service record was that the petitioner was a constable of an average calibre. One of the previous major punishments which was awarded in 1950 related to misbehaviour with a member of the public and for disciplinary conduct in the presence of his Station Officer. The punishment imposed was reduction in pay from Rs. 31 to Rs. 30 p.m. for a period of six months. Second default occurred in 1952 when he was reduced from Rs. 32 to Rs. 31 p.m. for a period of 12 months for conniving at a breach of Motor Vehicle Rules committed in his presence and for insolently refusing to submit his explanation to the Station Officer. Two of the minor punishments related to quarrelling and disciplinary behaviour towards the Station Officer (years not mentioned). On account of this previous record respondent No. 2 thought that the previous punishments have not deterred the petitioner from impro-

per, rude and indisciplinary behaviour towards others and in his opinion it was not likely that he would improve thereby. He further was of opinion that the present default was of a very serious nature and he did not see any case for showing any leniency to the petitioner. He, therefore, issued a notice to the petitioner to show cause why he should not be dismissed from the police force. In the final order in awarding the punishment respondent No. 2 observed:

"I, however, feel that the punishment of dismissal stated in my show cause notice is a little too severe especially in view of the fact that in Vidarbha area constables have not yet become fully used to the idea of police behaviour towards the members of the public. I, therefore, feel that one more chance may be given to the accused constable to mend his ways. If such behaviour is repeated in future, it will be necessary to dismiss him from service."

And in this view of the matter, respondent No. 2 imposed on the petitioner the aforesaid punishment. It, therefore, appears that the punishment imposed by respondent No. 2 is not merely on account of the offence of which the petitioner has been found guilty but also on account of the previous record which, in the opinion of respondent No. 2, merited dismissal but on second thought he thought it too severe and, therefore, imposed the aforesaid punishment.

Now, turning to the provisions of Regulation 226, rude or discourteous behaviour towards a member of the public in private life outside employment, even if repeated, does not afford a ground for even imposing any penalty under cl. (ii) to (iv) of Regulation 226 much less of dismissal under cl. (i) of Regulation 226. Reading first and second clauses together it appears that the punishment of dismissal or reduction in rank is awarded or could be awarded for incompetence, or cases of serious dereliction of duty. Clause (iii) provides that punishment of withholding of increment, either temporary or permanent, can be imposed only in the case of serious dereliction of duty or for culpable ignorance of police procedure, laziness or apathy in conducting the work of the station-house, and the like. Clause (iv) provides that an increment which has fallen due may be withheld for a definite period for inefficiency or unsatisfactory service. It, however, specifically prohibits withholding of increments of constables for a period more than one year in the first instance. Discourteous or rude behaviour towards a member of the public in private life can hardly be termed as incompetence in the discharge of his duty as police constable or serious dereliction of duty, or culpable ignorance of police procedure or other offences mentioned in clauses (iii) and (iv). Clause (v) relates to imposition of fines. It, however, prohibits fining of constables.

After going through the entire Regulation 226 we do not find any clause under which the instant case would fall, except clause (vi). We have no advantage of knowing from the orders of any of the respondents the clause or clauses of the Regulation 226 under which respondent No. 2 purported to act in imposing the punishment on the petitioner. We asked the learned counsel for the respondents to point out to us the clause which would be attracted to the facts of the present case. He frankly conceded that there is no clause in Regulation 226 which would get attracted to the facts of the case except clause (vi). It reads:

"(vi) In the case of head constables and constables, minor offences against discipline should be dealt with, firstly, by warning, and if this proves ineffectual, by the infliction of the minor punishments specified in Regulations 216 and 217(b), or by detaching the offender to a course of more irksome and unpopular duties."

Now, punishments specified in Regulations 216 and 217(b) are not withholding of increment or reduction to a lower stage in a time scale, but, on the other hand, they are (i) confinement to quarters for a term not exceeding 15 days, (ii) punishment drill, (iii) extra guard duty, (iv) tent pitching, (v) drain digging, (vi) cutting grass, clearing jungle and cleaning parade grounds, (vii) repairing huts and butts and similar work in the lines, (viii) cleaning arms.

In our opinion, therefore, though the conduct on the part of the petitioner

entitled respondent No. 2 to take a disciplinary action against him the punishment awarded by him to the petitioner is in excess of his authority and powers conferred on him under the provisions of Regulation 226, and further the punishment awarded contravenes the specific provisions of cl. (a) of Regulation 217. The orders of respondents Nos. 2, 3 and 4, therefore, cannot be sustained.

In the result, the petition is allowed, and the aforesaid orders of May 8, 1958, July 29, 1958, and January 17, 1959, are quashed. We want to make it clear that we should not be understood to have said that it is no more open to the respondents to take such disciplinary action against the petitioner as could be taken against him under the regulations.

We make no order as to costs as, in our opinion, the petitioner is not free from blame.

Petition allowed.

INCOME-TAX REFERENCE

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

THE COMMISSIONER OF INCOME-TAX (CENTRAL), BOMBAY

v.

MULRAJ KARSONDAS.*

Indian Income-tax Act (XI of 1922), Sec. 60, Notification No. 878F of March 21, 1922 and Notification No. 8 of March 24, 1928—Managing Director receiving monthly salary from company—Certain amount out of salary disallowed in assessment of company—Whether such amount liable to be taxed in hands of assessee managing director—Applicability of Notifications.

The assessee, who was the managing director of a private limited company, received a certain amount per month as salary from the company. In the relevant assessment year the Taxing Authorities disallowed the claim of the company for a certain amount out of the salary paid to the assessee, as in their view, it was not an expenditure laid out or expended wholly or exclusively for the company's business within the meaning of s. 10(2)(xx) of the Indian Income-tax Act, 1922. In the hands of the assessee, his entire remuneration received from the company was sought to be taxed and it was contended by the assessee that the salary paid to him in excess of the amount allowed as deduction in the assessment of the company having already been taxed in the hands of the employers was not liable to be taxed over again in his hands. In support of his contention the assessee relied upon Notification No. 878F dated March 21, 1922, as amended by Notification No. 8 of March 24, 1928:—

Held, that under the Notification it is only where the sum paid is out of or determined with reference to the profits of the business and that by reason of the mode of payment or determination of the sum paid, the same has not been allowed as a deduction but has been included in the profits of the business, that the benefit of the Notification may be given to the assessee,

that, in the instant case, the salary was paid at a stipulated rate per month to the assessee and was not paid out of or determined with reference to the profits of the business, and the disallowance of the amount was not by reason of the mode of payment or determination of the salary out of the profits of the business, and

that as these conditions under the Notification were not fulfilled, the assessee could not have the benefit of the Notification and the amount in question could be taxed in the hands of the assessee.

Commissioner of Income-tax, Bombay v. R. R. Jacques,¹ distinguished.

*Decided, July 22, 1959. Income-tax Reference No. 18 of 1957.

1 (1954) Income-tax Reference No. 30 of

1953, decided by Chagla C. J. and Tendolkar J., on March 11, 1954 (Unrep.).

Commr. of Inc.-tax v. M. K. Kirtikar,² and *M. K. Kirtikar v. Commr. of Inc.-tax*,³ referred to.

THE facts appear in the judgment.

G. N. Joshi, for the applicant.

S. P. Mehta, for the respondent.

SHAH J. This Reference relates to two assessment years 1947-48 and 1948-49. A private limited company known as "Chidambaram Mulraj & Co.", which will hereafter be referred to as the company, was incorporated on April 30, 1943, with the object of acquiring the managing agency of the Elphinstone Spinning & Weaving Mills Co. Ltd. The company appointed the assessee Mulraj Karsondas as its managing director and agreed to pay him 25 per cent. of the annual managing agency commission and also a salary of Rs. 1,000 per month. The salary was later increased to Rs. 2,000 per month because Chidambaram, who was the Director-Chairman of the company, retired from active management and the assessee was "saddled with higher burden and responsibilities". In completing the assessment of the company for the assessment year 1946-47, the Taxing Authorities disallowed the salary paid to the assessee in excess of Rs. 1,100 as a business deduction. In the assessment years 1947-48 and 1948-49 the Taxing Authorities disallowed the claim of the company for Rs. 8,700 and Rs. 7,500 respectively out of the salary paid to the assessee, as in their view, it was not an expenditure laid out or expended wholly or exclusively for the company's business within the meaning of s. 10(2)(zv). In the hands of the assessee, his entire remuneration received from the company was, however, sought to be taxed. The assessee contended that the salary paid to him in excess of the amount allowed as deduction in the assessment of the company having already been taxed in the hands of his employers was not liable to be taxed over again in his hands, and in support of that contention he relied upon Notification No. 878F, dated March 21, 1922, as amended by Notification No. 8 of March 24, 1928, issued by the Central Government in exercise of the powers under s. 60 of the Income-tax Act. The Income-tax Tribunal was of the view following the judgment of this Court in *Commissioner of Income-tax, Bombay v. R. B. Jacques*⁴ and *M. K. Kirtikar v. Commr. of Inc.-tax*⁵ that on the amounts which were disallowed in the assessment of the company, tax could not be levied over again in the hands of the assessee. At the instance of the Commissioner, the Tribunal has referred the following question:

"Whether the sums of Rs. 8,700 and Rs. 7,500 were exempt from tax in the hands of the assessee for the assessment years 1947-48 and 1948-49 respectively, the claim for exemption being based upon the Notification No. 878F dated 21-3-1922, as amended by Notification No. 8 of 24-3-1928 issued by the Central Government under section 60 of the Indian Income-tax Act, 1922?"

Mr. Joshi for the Department contends that the view taken by this Court in *M. K. Kirtikar's* case has now been overruled by their Lordships of the Supreme Court and, therefore, the judgments in *Commissioner of Income-tax v. R. B. Jacques* and *M. K. Kirtikar v. The Commissioner of Income-tax* are overruled and no reliance can be placed upon the principle of those cases in support of the view that the two amounts referred to in the question are not liable to be taxed in the hands of the assessee.

The Notification issued by the Government of India on March 21, 1922, as amended on March 24, 1928, in so far as it is material stands as follows:

"The following classes of income shall be exempt from the tax payable under the

² (1959) 36 L.T.R. 360.

³ (1955) 28 L.T.R. 908, s.c. 58 Bom. L.R.

122.

⁴ (1954) Income-tax Reference No. 30 of

1953, decided by Chagla C. J. and Tendolkar J., on March 11, 1954 Unrep.).

⁵ (1955) 28 L.T.R. 908, s.c. 58 Bom. L.R.

122.

said Act, but shall be taken into account in determining the total income of an assessee for the purpose of the said Act:

(1) Sums received by an assessee on account of salary, bonus, commission or other remuneration for services rendered or in lieu of interest on money advanced to a person for purposes of his business, where such sums have been paid out of, or determined with reference to, the profits of such business and by reason of such mode of payment or determination, have not been allowed as a deduction but have been included in the profits of the business on which income-tax has been assessed and charged under the head 'business'".

As observed by their Lordships of the Supreme Court in *Commr. of Inc.-tax v. M. K. Kirtikar*,⁶ exemption from taxation in respect of the sum received by an assessee from a business on account of commission etc. could be claimed under the Notifications only on fulfilment of the following three cumulative conditions:

"(1) Where such sum has been paid out of or determined with reference to the profits of the business;

(2) Where by reason of such mode of payment or determination the sum paid has not been allowed as a deduction but has been included in the profits of the business; and

(3) Where on the sum so disallowed in the computation of the profits of the business, income-tax has been assessed and charged under the head 'business'".

The purpose of the Notification was undoubtedly to avoid double taxation of the same profits. If the amount was paid out of or determined with reference to profits, and was assessed and charged in the hands of the employer, the same was not to be assessed and charged over again in the hands of the assessee.

There can be no dispute that the two amounts referred to in the question have been disallowed as permissible deductions in the computation of the profits of the company and income-tax has been assessed and charged thereon from the company. On the scheme of the Notification, it is evident that it is only where the sum paid is out of or determined with reference to the profits of the business and that by reason of the mode of payment or determination of the sum paid, the same has not been allowed as a deduction but has been included in the profits of the business, that the benefit of the notification may be given to the assessee. The two amounts have admittedly not been allowed as deductions and have been included in the profits of the business of the company, but the amounts disallowed have not been paid out of the profits nor determined with reference to the profits of the business, nor is the reason for the disallowance the mode of payment or determination of the amounts. The profits of the business may normally be ascertained only after deducting therefrom the outgoings for the purpose of earning the profits. The gross receipts of a businessman are not his profits: from the gross receipts deductions of necessity are to be made of the various outgoings which contributed to the earning of the profits. Salary paid to an employee for conducting the business in which the profits are earned if it bears no direct relation thereto must be deducted in ascertaining the profits. It is true that in cases when it is so stipulated the quantum of salary may be determined by reference to the quantum of profits made by an employer. In such cases, the salary may be held to be paid out of profits or determined with reference to the profits of the business. But, in this case, the salary is paid at a fixed rate per month and is not paid out of or determined with reference to the profits of the business. Nor is it that by reason of the mode of payment or determination of the salary so paid that the deductions have not been permitted. The three conditions under the Notification being cumulative, if one or more of the conditions are not fulfilled, evidently, the assessee cannot claim the benefit of the notification.

But Mr. Mehta, who appears on behalf of the assessee, contends that their Lordships of the Supreme Court in *Commr. of Inc.-tax v. M. K. Kirtikar* did not decide the question whether salary paid at a stipulated rate to an assessee can be regarded as a sum paid out of or determined with reference to the profits of the business; and we are bound by the decision in *Commissioner of Income-tax v. R. R. Jacques* in which it was held that payment of bonus to an employee is by virtue of the notification of the Government of India exempt from tax if the same or a part thereof has been taxed in the hands of his employer.

In *M. K. Kirtikar v. Commr. of Inc.-tax*, this Court was called upon to consider whether certain amounts paid to an employee as commission which were disallowed as permissible deductions under s. 10(2)(xv) in assessing the tax payable by the employer, were liable to be taxed in the hands of the employee. In that case, the employers of the assessee had paid certain commission to their employees beside the stipulated monthly salary. In the assessment proceeding of the employers of the assessee, a part of this commission was disallowed. Thereafter, the employers ceased doing business and the business was transferred to a limited company and by reason of s. 25(4) of the Income-tax Act, the business having been charged to income-tax, though the tax was not paid, it was held that the employees were entitled to claim exemption on the commission received by them under the Notification. It was held by this Court that the commission was paid out of the profits and the tax was charged to the employer, though they were exempted from paying the same. In appeal, their Lordships of the Supreme Court referred to the three component conditions for the application of the Notification, and observed that on the view that they took it was not necessary to express any opinion on the question whether the commission had been paid out of the profits and it was also unnecessary to consider whether the second condition was fulfilled, but, in their view, the third condition not having been fulfilled, the assessee could not claim relief under the Notification. Evidently, this case does not decide the question whether the salary paid to an assessee by his employer, which is disallowed in the assessment of the employer by the Income-tax Department, exemption granted by the Notification will be attracted.

In *Commissioner of Income-tax, Bombay v. R. R. Jacques*, Chagla C.J. in delivering the judgment of the Court observed that

"... 'profits' in this notification is not used in the sense of taxable profits, but is used in the commercial sense. If a company makes profits and then out of those profits decides to pay a certain amount to his employee for the work done by him, the employer is undoubtedly paying the bonus out of the profits of the business".

Relying upon these observations, Mr. Mehta contends that in this case also the salary was part of the commercial profits of the company and tax having been levied on the company, the Notifications relied upon are attracted. Undoubtedly, exemption from payment of tax under the Notification is claimable in respect of sums paid out of or determined with reference to the commercial profits, but in computing even the commercial profits, the salaries paid to the employees must be taken into account. It is only after the expenses incurred for earning the profits are deducted that the commercial profits of a business can be ascertained, and if for ascertaining the commercial profits, the salary paid to the employee is deducted, the salary will not be a sum paid out of or determined with reference to the profits of the business. In *Jacques's* case, the Court came to the conclusion that the amount paid to the assessee was not liable to be taxed in his hands; but in that case the amount sought to be taxed was received by the employee as bonus and not as salary. Payment by the employer of a sum of money to his employee as bonus is in its very nature gratuitous. It is made as a payment *ex gratia* having regard to the profits earned by him in his business and the services rendered by the employee, and in its very nature bonus is a payment out of the profits or determined with reference to the

profits and is related directly to profits and is not deducted before ascertainment of the profits. *R. R. Jacques's* case is clearly distinguishable from the facts of the present case. In the present case, if the salary paid to the assessee is to be deducted from the gross earnings of the company before ascertaining the commercial profits, the payment to the assessee is not out of or determined with reference to the profits of the business. Again, the disallowance is not by reason of the mode of payment or determination of the salary out of the profits of the business; it is disallowed because it is not an expenditure laid out or expended wholly or exclusively for the purpose of the business. In that view of the case, the second condition is also not fulfilled. We are, therefore, of the view that the principle of the case of *R. R. Jacques* is not applicable to the facts of the present case.

On that view of the case, the answer to the question will be in the negative: Assessee to pay the costs of the Commissioner.

Solicitor for the applicant: *P. G. Gokhale.*

Solicitors for the respondent: *Amarchand & Mangaldas.*

SUPREME COURT.

Present: Mr. Justice Syed Jafer Imam and Mr. Justice J. L. Kapur.

ABDUL RAHIM ISMAIL C. RAHIMTOOLA v. THE STATE OF BOMBAY.*

Indian Passport Act (XXXIV of 1920), Sec. 3—Indian Passport Rules, 1950, Rr. 3, 4—Whether s. 3 of Act and rr. 3 and 4 of Rules apply to Indian citizens.

The provisions of s. 3 of the Indian Passport Act, 1920, and rr. 3 and 4 of the Indian Passport Rules, 1950, apply to all persons including Indian citizens.

THE facts are stated in 59 *Bombay Law Reporter* 857.

O. N. Srivastava and *J. B. Dadachanji*, for the appellant.

G. C. Mathur and *R. H. Dhebar*, for the respondent.

IMAM J. The appellant was convicted under r. 6(a) of the Indian Passport Rules, 1950, hereinafter referred to as the Rules, made under s. 3 of the Indian Passport Act, (XXXIV of 1920), hereinafter referred to as the Act, and was sentenced to pay a fine of Rs. 100. The High Court in exercising its revisional jurisdiction upheld the conviction but reduced the sentence to a fine of Rs. 25. It granted a certificate to the appellant that the case was a fit one for appeal to this Court.

It is beyond dispute now that the appellant is a citizen of India. Admittedly he entered the territories of India without a passport. The sole question for determination is whether his act in so entering the territories of India amounted to an offence punishable under r. 6(a) of the Rules.

The Act was passed in 1920 and has been the subject of amendment and modification thereafter. Its preamble states "whereas it is expedient to take power to require passports of persons entering India, it is hereby enacted as follows." "Passport" has been defined as a passport for the time being in force, issued or renewed by the prescribed authority and satisfying the conditions prescribed relating to the class of passports to which it belongs. Section 3 states:

(1) The Central Government may make rules requiring that persons entering India shall be in possession of passports, and for all matters ancillary or incidental to that purpose.

(2) Without prejudice to the generality of the foregoing power such rules may—

*Decided, May 14, 1959. Criminal Appeal No. 182 of 1957.

(a) prohibit the entry into India or any part thereof of any person who has not in his possession a passport issued to him;

(b) prescribe the authorities by whom passports must have been issued or renewed, and the conditions with which they must comply, for the purposes of this Act; and

(c) provide for the exemption, either absolutely or on any condition, of any person or class of persons from any provision of such rules.

(3) Rules made under this section may provide that any contravention thereof or of any order issued under the authority of any such rule shall be punishable with imprisonment for a term which may extend to three months or with fine or with both.

(4) All rules made under this section shall be published in the Official Gazette, and shall thereupon have effect as if enacted in this Act.

Rule 3 of the Rules states:

"Save as provided in rule 4, no person, proceeding from any place outside India, shall enter, or attempt to enter, India by water, land or air unless he is in possession of a valid passport conforming to the conditions prescribed in rule 5."

Rule 4 specifies the persons who shall be exempted from the provisions of r. 3. Clause (b) of r. 4 exempts members of the Naval, Military or Air Forces of India on duty, and members of the family of any such person when accompanying such person to India on a Government transport. Clause (c) exempts persons domiciled in India proceeding from any of the French establishments in India (other than Pondicherry in Karaikal) or from any of the Portuguese establishments in India or Pakistan. Clause (f) exempts persons domiciled in India entering India by land or by air over the Nepalese or Tibetan frontier. Clause (h) exempts *bona fide* Mahomedan pilgrims returning from Jeddah or Basra and cl. (i) exempts other persons or classes of persons specified by general or special orders of the Central Government.

The date of the appellant's entry into India is not known. He was certainly arrested on February 26, 1955, and it is his case that he entered India sometime after the decision of this Court in the case of *Ebrahim Vazir Mavat v. The State of Bombay*¹. The judgment of this Court in that case was delivered on February 15, 1954. On that basis the appellant entered India sometime after February 15, 1954, and before February 26, 1955. It is unnecessary to specify in great detail the movements of the appellant between November 19, 1948, when he went to Karachi for the first time, and his arrest on February 26, 1955, as his movements during this period are not relevant in determining whether the appellant has committed an offence punishable under r. 6(a) of the Rules. The case must be decided on the footing that sometime before his arrest on February 26, 1955, the appellant entered India without a passport.

Two contentions were raised on behalf of the appellant: (1) that r. 3 of the Rules and s. 3 of the Act were *ultra vires* the Constitution in so far as they purported to affect the right of an Indian citizen to enter India without a passport and (2) that on a proper interpretation of the provisions of s. 3 of the Act and r. 3 of the Rules, these provisions did not apply to an Indian citizen. They applied only to non-Indian citizens.

As to the first contention it was urged that s. 3 of the Act and r. 3 of the Rules in so far as they purported to relate to an Indian citizen were *ultra vires* the Constitution, as they offended against the provisions of art. 19(1)(d) and (e). Article 19(1)(d) confers the fundamental right on all Indian citizens "to move freely throughout the territory of India" and art. 19(1)(e) "to reside and settle in any part of the territory of India." This fundamental right, however, is subject to reasonable restrictions under cl. (5) of art. 19. In the case of *Ebrahim Vazir Mavat v. The State of Bombay* (supra) the majority judgment of this Court held that an Indian citizen visiting Pakistan for any purpose whatsoever and returning to India may be required to produce a permit or a passport as the case may be before he can be allowed to enter India, and this requirement may well be regarded as a proper restriction

upon entry. This Court, however, held that it was quite a different matter to say that if he enters India without a permit he may on conviction for such offence be ordered to be removed from India. It was the order directing his removal from India which was held by this Court to be tantamount to taking away his fundamental right guaranteed under art. 10(1)(e), "to reside and settle in any part of the territory of India". It is clear, therefore, that so far as this Court is concerned it has already decided that to require an Indian citizen to produce a passport before he can be allowed to enter India may be regarded as a proper restriction upon entering India. This decision is binding on us and we must follow the decision of this Court in the case referred to. It was, however, urged that as a constitutional question has been raised this matter cannot be decided by Judges less than five in number. Therefore, the case should be referred to what is described as the Constitution Bench. Article 145(3) of the Constitution states that the minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of the Constitution or for the purpose of hearing any reference under art. 143 shall be five. It is clear that no substantial question of law as to the interpretation of the Constitution arises in the present case as the very question raised has been decided by a Bench of this Court consisting of five Judges. As the question raised before us has been already decided by this Court it cannot be said that any substantial question of law arises regarding the interpretation of the Constitution.

As to the second submission made we have no hesitation in saying that the words used in s. 3 of the Act and rr. 3 and 4 of the Rules make it quite clear that they apply to every person including an Indian citizen. Under s. 3(1) of the Act the word "Persons" has been stated without any qualification. Under s. 3(2)(a) the words employed are "any person" and in r. 3 the words employed are "no person". Clause (b) of r. 4 obviously applies to Indian citizens but those mentioned in that clause have been specifically exempted from the operation of r. 3. Clause (h) of r. 4(1) can apply to Indian citizens who are by religion Mahomedan. They have been exempted. Therefore, on a reasonable interpretation of s. 3 of the Act and rr. 3 and 4 of the Rules there can be no manner of doubt that these provisions apply to all persons including Indian citizens.

In our opinion, there can be no manner of doubt that the appellant's entry into India without a passport was in contravention of r. 3 of the Rules and, therefore, punishable under r. 6(a) and the appellant was rightly convicted. The appeal is accordingly dismissed.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

MEENA *alias* MOTA LACHMAN UTAMCHAND KIRPALANI

v.

LACHMAN UTAMCHAND KIRPALANI.*

Hindu Marriage Act (XXV of 1955), Secs. 10, 23(1)—Desertion—Essential ingredients of,—Wilful neglect, what amounts to—Whether animus deserendi necessary where offence charged is wilful neglect—Reasonable excuse or just cause as answer to charge of desertion.

Under s. 10 of the Hindu Marriage Act, 1955, proof of the requisite *animus deserendi* is necessary where the matrimonial offence charged is wilful neglect of the petitioner by the other party to the marriage.

*Decided, July 15, 1959. First Appeal No. 802 of 1957, from the decision of G. A. Thakkar, Judge, City Civil Court, Bombay, in Matrimonial Petition No. 2129 of 1956.

Conduct of a spouse to amount to wilful neglect must be deliberate and intentional failure to perform the obligations of married life indicative of a total repudiation of the obligations of marriage. Mere neglect of opportunities of consorting or every indifference or want of proper solicitude for the other spouse is not wilful neglect within the meaning of the Explanation to s. 10(1) of the Act.

The burden of proving desertion is upon the spouse who alleges desertion.

In order to establish a plea of desertion there must be a separation in fact between the two spouses and there must also be, on the part of the deserting spouse, an intention to forsake or abandon the other spouse. From the point of time when it is claimed that desertion has commenced, the two conditions must co-exist, though it is not necessary that when separation commenced there must be *animus deserendi*, i.e. intention to forsake or abandon the other spouse. But it is not merely on proof of separation and the existence of the requisite *animus deserendi* that a decree for judicial separation will be passed. There must be two other elements on the co-existence of which alone the deserted spouse will be entitled to a decree for judicial separation, and those elements are (i) the absence of consent on the part of the deserted spouse and (ii) the absence of conduct on the part of the deserted spouse giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention.

Bipin Chander Jaisinghbhai Shah v. Prabhawati,¹ referred to.

In a matrimonial dispute, the matrimonial offence must be established to the satisfaction of the Court beyond reasonable doubt, and, though not as a matter of law, as a rule of prudence, independent corroboration of the version of the parties is sought. Such corroboration, however, need not be by direct testimony: it may be obtained from the conduct of the parties and the surrounding circumstances.

Per S. T. Desai J.: Wilful neglect, in the context of the matrimonial offence of desertion, must be such neglect as can be regarded as the "withdrawal from a state of things." The neglect, wilful neglect, must be in the discharge of matrimonial obligations, and there must be such a failure of the fulfilment of those obligations—the common obligations of the marital state—as would amount to a total forsaking or abandonment of those obligations. Therefore, this failure, this total forsaking or abandonment of consortium evidences the factum of separation and the wilful manner of inflicting it evidences the requisite *animus deserendi*. It would not be appropriate to dissociate *animus deserendi*, which is the essence of desertion even when one speaks of desertion by wilful neglect. It is implicit in the concept of desertion, and it is implicit in wilful neglect. *Animus deserendi* is not merely an attribute or an incidence of the matrimonial offence of desertion. It is of the very nature of that offence and of the essence of it. Therefore, it would be fallacious to say that there need be no proof of *animus deserendi* in a case of desertion founded on the plea of wilful neglect.

A petition founded on the charge of desertion can be resisted by the opponent-spouse if she or he is able to show that there was reasonable excuse or just cause for the separation. The "just cause" must be "grave and weighty" or "grave and convincing". But it can be something which falls short of a matrimonial offence.

The facts are stated in the judgment of Shah J.

Sir Noshirwan Engineer, with *H. G. Advani*, instructed by *Gagrat & Co.*, for the appellant.

B. Jethmalani, *B. K. Hirani* and *M. G. Mirchandani*, for the respondent.

SHAH J. In Matrimonial Petition No. 2129 of 1956 of the file of the Bombay City Civil Court the learned trial Judge passed a decree in favour of the petitioner for judicial separation. Against that decree this appeal has been preferred.

The petitioner and the opponent were married according to Hindu rites on November 10, 1946, at Hyderabad (Sind). At the time of his marriage, the petitioner was residing as a member of a joint Hindu family with his parents,

brothers and sisters. After the marriage the opponent lived with the petitioner. On July 19, 1947, the opponent gave birth to a male child who was named Ashok. In October 1947 the parties, on account of the Partition of India, migrated to Bombay. As they were unable to obtain suitable accommodation in Bombay, the petitioner took his mother, his sisters and one of his brothers as also the opponent and the child Ashok to Ceylon and left them in the care of one Narain—his maternal uncle. The petitioner and his mother stayed in Colombo for some time and thereafter returned to Bombay. On January 17, 1948, the opponent left Colombo with her son Ashok in company of one Khubchand—a cousin of hers—and arrived on January 21, 1948, at Lonavala, where her mother was residing. About the month of April 1948 the petitioner and his mother went to Lonavala and fetched the opponent to Bombay. The opponent stayed at Bombay with the petitioner for about fifteen days and again returned to Lonavala. Sometime in the month of September 1948, the opponent came to Bombay and lived with the petitioner for about three months, but in the month of December 1948, the opponent again left for Poona to live with her father. At that time, it is undisputed, the opponent went to Poona with the consent of the petitioner. Sometime in the month of February 1949 the opponent returned to the petitioner and continued to live with him till February 26, 1954. During this interval, the opponent visited her parents at Poona occasionally, but on the frequency of these visits there is dispute between the parties. On February 26, 1954, the opponent left the matrimonial home and went to Poona and continued to reside with her parents till July 7, 1954. On July 7, 1954, without informing the petitioner, the opponent left for Hongkong where her father was conducting his business, and till sometime in the month of April 1956 she continued to live at different places—Hongkong, Singapore, Manila and Djakarta. On April 8, 1956, the opponent returned to Bombay and after some time she left for Kashmir. No attempt was made on either side, after the opponent returned to Bombay, to make a rapprochement and the opponent even did not try to meet her minor son Ashok who was then about nine years old and living with the petitioner. On September 20, 1956, the petitioner filed a petition in the City Civil Court at Bombay for a decree for judicial separation alleging that the opponent had deserted him for a continuous period of not less than two years immediately before the presentation of the petition, that the desertion was without reasonable cause and without the consent and against the wishes of the petitioner and that he—the petitioner—was accordingly entitled to a decree for judicial separation.

The petitioner's claim was resisted by the opponent. She contended that she had left the matrimonial home on account of harassment from her parents-in-law and also on account of the conduct of the petitioner, that after going to Poona she accompanied her father to Hongkong, but she had at all material times a desire to return to the matrimonial home which she could not put into effect on account of her ill-health. She stated that the petitioner had shown "gross and complete indifference" to her and that was why she did not go to reside with him after she returned to India and that the rupture between her and the petitioner was on account of the latter's refusal to live with her. She also stated that during the time she was out of India the petitioner had made "undignified allegations" against her in the correspondence stating that she was living "a life of guilt and degradation". She submitted that in view of the conduct of the petitioner and her intention evidenced by her conduct at all material times to return to the matrimonial home and live with the petitioner, a decree for judicial separation could not be passed against her.

The learned trial Judge, in an elaborate judgment wherein he has dealt with the incidents in the married life of the parties since the commencement and has considered the material evidence and the arguments advanced before him, came to the conclusion that for many years before she left the matrimonial

home on February 26, 1954, the opponent entertained *animus deserendi*, that when she left the matrimonial home on February 26, 1954, she did so without the consent of the petitioner, that she left India and failed to return ignoring the letters and cables from the petitioner and that the protestations made by the opponent in her letters and at the time of giving evidence that she was at all material times ready and willing to live with the petitioner were not made *bona fide*. The learned Judge was not willing, on points of conflict between the testimony of the petitioner and the testimony of the opponent, to accept the testimony of the opponent in preference to that of the petitioner. Referring to the correspondence, on which reliance was placed on behalf of the opponent, the learned Judge observed that the petitioner had not charged the opponent with immoral conduct and, therefore, it was unnecessary to consider whether the opponent was entitled to live apart from the petitioner on that ground. He further observed that it was not even the case of the opponent in her written statement that because she had been charged by the petitioner with immoral conduct she was entitled to live apart from him and that the petitioner was not entitled to a decree for judicial separation on that account. Holding, therefore, that there was no reasonable cause for the opponent to leave the matrimonial home and to continue to remain away from the matrimonial home for a continuous period of more than two years contrary to the expressed wishes of the petitioner, the learned Judge passed a decree in favour of the petitioner for judicial separation from the opponent.

Section 10 of the Hindu Marriage Act, 1955, enables either party to a marriage, whether solemnized before or after the commencement of the Act, to present a petition praying for a decree for judicial separation on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. By the Explanation to sub-s. (1) of s. 10 of the Act the expression "desertion" is defined to mean desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and to include the "wilful neglect of the petitioner by the other party to the marriage." Mr. Jethmalani for the petitioner submits that by this Explanation it was intended to extend what he calls the "traditional connotation of desertion", and that by the inclusion in the expression "desertion" of "wilful neglect of the petitioner by the other party to the marriage" it was intended that *animus deserendi*, which is otherwise an essential element of desertion, need not be proved by the petitioner before qualifying for a decree for judicial separation. The submission is that if on the part of either party to the marriage there has been wilful neglect to perform the marital obligations, even if such neglect is not accompanied by the *animus* to forsake or abandon cohabitation, the Court will be justified in granting to the aggrieved spouse a decree for judicial separation. By the Explanation to sub-s. (1) of s. 10, within the connotation of the expression "desertion", "wilful neglect of the petitioner by the other party to the marriage" is undoubtedly included: but on that account proof of the requisite *animus* to establish desertion is, in my judgment, not dispensed with. Neglect to amount to desertion must be wilful neglect of the other party to the marriage: i.e., there must be a failure to perform the essential obligations of marriage. Conduct of a spouse to amount to wilful neglect must, in my judgment, be deliberate and intentional failure to perform the obligations of married life indicative of a total repudiation of the obligations of marriage. Mere neglect of opportunities of consorting or every indifference or want of proper solicitude for the other spouse is not wilful neglect within the meaning of the Explanation. By the Explanation the connotation of the expression "desertion" was somewhat extended; but thereby the basic concept of desertion, viz., intentional and permanent abandonment of one spouse by the other without reasonable cause and without the consent of such spouse, is not altered.

The burden of proving desertion is upon the spouse who alleges desertion. In a recent judgment of the Supreme Court, *Bipin Chander Jaisinghbhai Shah v. Prabhawati*¹ their Lordships examined in detail the conditions which go to make "desertion" in the matrimonial law. At p. 850 of the Report, their Lordships quoted with approval a passage from Halsbury's Laws of England (3rd edn.), Vol. XII, (pp. 242-243). It is necessary before dealing with the evidence in this case to bear in mind the following principles which have been set out by their Lordships of the Supreme Court:

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion: there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'...

The person who actually withdraws from cohabitation is not necessarily the deserting party....

The offence of desertion is a course of conduct which exists independently of its duration... Desertion is a continuing offence."

Their Lordships then observed (p. 850):

"Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid... If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. But it is not necessary that they should commence at the same time. The *de facto* separation may have commenced without the necessary *animus* or it may be that the separation and the *animus deserendi* coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close."

In order to establish a plea of desertion there must be separation in fact between the two spouses and there must also be, on the part of the deserting spouse, an intention to forsake or abandon the other spouse. From the point of time when it is claimed that desertion has commenced, the two conditions must co-exist, though it is not necessary that when separation commenced there must be *animus deserendi*, i.e., intention to forsake or abandon the other spouse. This elaboration is necessary because Mr. Jethmalani has strenuously contended that on February 26, 1954, when the opponent left the petitioner, there was not only separation of the two spouses in fact but there was also on the part of the opponent *animus deserendi*, and, therefore, desertion commenced on that date. Alternatively, as we understood Mr. Jethmalani, he contended that the conduct of the opponent subsequent to February 26, 1954, showed that she had entertained a desire to terminate cohabitation, and the separation having taken place on February 26, 1954, the subsequent intention entertained by the opponent enabled the petitioner to obtain a decree for judicial separation. But it is not merely on proof of separation and the existence of the requisite *animus deserendi* that a decree for judicial separation will be passed. There must be two other elements on

1 [1956] S.C.R. 838, s. c. 59 Bom. L. R. 322.

the co-existence of which alone the deserted spouse will be entitled to a decree for judicial separation, and those elements are (i) the absence of consent on the part of the deserted spouse and (ii) the absence of conduct on the part of the deserted spouse giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention.

We may now briefly set out the case of the respective parties. It was the case of the opponent that since the commencement of her married life she was ill-treated in the petitioner's house because her mother-in-law was dissatisfied with the dowry given by her parents and that at the instigation of her mother-in-law even the petitioner ill-treated her. She further alleged that the petitioner had "little individuality of his own" and that he was, in his relation and attitude towards her, guided by his mother and his sisters. On the other hand, it was the case of the petitioner that the opponent was a daughter of a rich family accustomed to unorthodox ways of life and that she was given to drinking, to ball-room dancing, to playing cards at stakes and to otherwise living "a gay life", and having regard to the orthodox mode of living of the members of his family the opponent found herself in an atmosphere which was not congenial to her and, therefore, she could not adapt herself to the life in the marital home and was dissatisfied with her marriage with the petitioner. Says the petitioner, the opponent was rude, insulting and indifferent in her behaviour towards himself and his parents, that she did not pay any attention to his comforts or to the comforts of the child and spent her days reading magazines and novels and "lazily lying down" and that she used to go out at any time of the day and absent herself for hours from home without informing him or any other members of his family and did diverse things deliberately to irritate him. He also alleged that she used to insult him and tell him that he should mind his own business and that in order to win the sympathy of the guests who visited his place she picked up quarrels with him on petty grounds and shouted and wept before them. He also stated that she had an aversion to sexual intercourse because she did not desire to be "burdened with another child".

Evidently, in a matrimonial dispute, when the relations between the spouses have become bitter, in their respective versions by the spouses there is bound to be some exaggeration. It is, therefore, a settled rule of law that the matrimonial offence must be established to the satisfaction of the Court beyond reasonable doubt, and, though not as a matter of law, as a rule of prudence, independent corroboration of the version of the parties is sought. Such corroboration, however, need not be by direct testimony: it may be obtained from the conduct of the parties and the surrounding circumstances.

[The rest of the judgment is not material to this report.]

S. T. DESAI J. I agree with my learned brother that this appeal must succeed. I also agree with him on the conclusions on facts reached by him and the reasons given by him for the same. The evidence—and particularly the documentary evidence—on the record of this case has been examined by him in some detail and I need not rehearse the same.

A rather ingenious contention has been raised before us by Mr. Jethmalani, learned counsel for the petitioner, as to the essential ingredients of the matrimonial offence of desertion, and I shall permit myself some observations on the point. But before I do so I shall examine one or two other legal submissions made by him. It was argued that the learned Judge below had before him the evidence of a number of witnesses and had the opportunity of watching their demeanour. It was said that having regard to all that oral testimony before him he reached his findings of fact and this Court would not readily disturb those findings. I wholly agree that this Court would not readily disturb the findings of fact arrived at by the trial Court. It has often been said, and I have myself said it on more than one occasion, that where a case turns entirely on questions of fact and the credibility of witnesses, the Court

of Appeal will hesitate a good deal before it disturbs the findings of the trial Judge based on verbal testimony of conflicting witnesses whom he has seen and heard. In such a case, a heavy burden of necessity is thrown upon those who challenge those findings. On the other hand, as has so often been said, where findings as regards facts have been drawn from argumentative inferences drawn from the testimony—oral and documentary—and depend upon the weight of the evidence, and the inherent probability of the story, and not merely on credibility of witnesses induced by their demeanour or the manner in which they answer questions, and where the documentary evidence has to be taken into consideration and weighed, the trial Court is in no better position than the Court of Appeal in discovering the truth. Two principal reasons have weighed with me in this case in deciding that this is one of those appeals in which the ordinary practice followed by this Court should not apply. Firstly, I am convinced that the approach of the learned trial Judge to this question of desertion and that essential ingredient of it—*animus deserendi*—was erroneous. After examining certain facts relating to the married life of the spouses from the date of the marriage till February 26, 1951—which he undoubtedly was entitled to bear in mind and have on record for certain purposes—he stated his conclusion as follows:

"From the facts and circumstances aforesaid and from the acts and conduct on the part of the respondent prior to the date of the actual act of separation, I am of the opinion that there was *animus deserendi* on the part of the respondent."

Now, in the case before us, there was no dispute that separation did exist. But the crucial question for the determination of the Court was whether there co-existed with that separation the ingredient of *animus deserendi* on the part of the opponent-wife. That *animus deserendi* could obviously not be prior to the factum of separation. *Animus deserendi* may co-exist with the factum of separation, or, as it happens in some cases, it may be subsequent to the factum of separation. But it appears that the learned trial Judge misdirected himself in law when he took the view that it was open to him to reach the conclusion that the acts and conduct of the opponent prior to the date of the actual act of separation could lead him directly to the determination of the question relating to *animus deserendi*. Secondly, in this case it is not as if the evidence consists of oral testimony alone. The oral testimony, I may observe, is indeed very conflicting. When there is a mass of conflicting oral testimony, it is always desirable—and indeed safe—to let the documents speak for themselves: and in this case there is documentary evidence which throws a flood of light on the vital question of *animus deserendi*. That documentary evidence consists of certain correspondence which took place between the contesting spouses. It has been carefully examined by my learned brother and I have nothing to add to the observations made by him while examining that evidence. I am in agreement with him on the interpretation and effect of that correspondence.

I may make one or two observations on the question of the standard of proof required in matrimonial cases. It is a firmly established rule that the ground for relief in a matrimonial cause should be strictly proved. The standard of proof in cases arising under the Hindu Marriage Act is that the Court must be *satisfied* beyond reasonable doubt that the ground for relief is proved, and normally the Court requires that the evidence of a spouse, who charges the other spouse with a matrimonial offence, should be corroborated. This expression "*satisfied*" is to be found in s. 23(1) of the Act which deals with decree in proceedings and contains some vital clauses of considerable importance and consequences relating to the power and duty of the Court in the matter of granting any of the reliefs recognised under the Act. It is true that in some decisions of Courts, both in England and in India, analogies have been drawn and precedents of criminal law referred to; but it is now wholly recognised that the standard of proof in matrimonial cases cannot be the same as is required in criminal cases. While such analogy is not permissible, the Court does, in matrimonial causes, ordinarily require—not as a matter of law but

as a rule of prudence—that where possible corroborative evidence should be led in order to satisfy the Court that the allegations made are well-founded. It is in this sense that it is said that the ground for relief in a matrimonial case should be strictly established. The oral evidence in the case and the documentary evidence to which I prefer to attach greater importance does show to my mind that the petitioner has failed to discharge the burden of proof which rested on him.

It has been strenuously argued before us by learned counsel for the petitioner that we have to decide this question of desertion having regard to the provisions of s. 10(1)(a) of the Hindu Marriage Act, 1955, and the Explanation to that sub-section. I wholly agree that such is the position. It will be convenient here to set out the relevant provisions of that section and the Explanation.

Sec. 10. (1) "Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district Court praying for a decree for judicial separation on the ground that the other party—

(a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition...

Explanation.—In this section, the expression "desertion", with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage."

Argument of learned counsel proceeded that the Explanation to sub-s. (1) of s. 10 has widened the definition, described by counsel as the traditional definition, of "desertion". Sub-section (1)(a) of s. 10 states that a decree for judicial separation may be granted *inter alia* on the ground that the other party to the marriage has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. The Explanation states that to amount to a matrimonial offence, desertion must be without reasonable cause and without the consent and against the wish of the petitioner and that wilful neglect of one spouse by the other is desertion within the meaning of that section. It will be seen that the meaning given is somewhat tautological but the Explanation has the merit of making it abundantly clear that the Legislature intended to give to the expression "desertion" wide import which includes wilful neglect of the petitioner by the other party to the marriage. So far, I find myself in agreement with the submission made by learned counsel for the petitioner.

But the argument ran that though ordinarily one of the essential ingredients of desertion is *animus deserendi* the position in law is different where the matrimonial offence charged is wilful neglect of the petitioner by the other party to the marriage. In the latter case, it was urged, there need be no proof whatever of *animus deserendi*. It was argued that this was the only manner in which the Explanation to sub-s. (1) of s. 10 could be read. That, it was said, was the material language of the section. The material language of the section has, of course, in these matters to be always borne in mind, for if a Court is prone too much to indulge in exposition and attempted definition, there will be substituted for the language chosen by Parliament some other form of words and in an attempt at wide survey some essential factor be omitted or some inessential factor be substituted or added. This seems peculiarly applicable to the matrimonial offences of desertion and cruelty, cases relating to which are by far the most common of the matrimonial causes contested before the Courts. The circumstances vary infinitely from case to case and the modes of life involved at times present sharp contrasts. The importance, therefore, of satisfying the language of the section cannot be overstressed in a branch of the law which has been predominantly Judge-made. In view of the observations which I have already made, I shall refer only to one decision on the subject in a case which was carried to the Supreme Court.

In *Bipin Chander Jaisinghbhai Shah v. Prabhawati*,¹ their Lordships of the Supreme Court made some general observations and summed up some important principles which afford considerable guidance in deciding cases arising under the Hindu Marriage Act. It was observed by their Lordships (p. 851):

"...Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. But it is not necessary that they should commence at the same time. The *de facto* separation may have commenced without the necessary *animus* or it may be that the separation and the *animus deserendi* coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close."

To turn to the argument of Mr. Jethmalani. I am prepared to read s. 10(1)(a) and the Explanation to that sub-section as he asked me to do, as laying down the rule, that wilful neglect of the petitioner by the opponent without reasonable cause and without the consent or against the wish of the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition is tantamount to desertion.

When the allegation is desertion by wilful neglect, two requirements must be satisfied: (i) the conduct must amount to neglect of the petitioner by the opponent, and (ii) the conduct complained of must be wilful. What is neglect need not present any difficulty, but difficulty sometimes arises in determining what neglect can be said to be wilful. The expression "wilful neglect" has not been defined in the Act. An act or omission done by accident or inadvertence is not wilful; nor is it on the other hand absolutely necessary in the present context that to be wilful, the act or omission which constitutes neglect should be deliberate and intentional. In the context of matrimonial law, wilful neglect seems to me to mean that the person charged with it is consciously acting in a reprehensible manner in the discharge of his marital obligations or is consciously failing in a reprehensible manner in the discharge of those obligations; and connotes that degree of neglect which is shown by an abstention from an obvious duty, attended by a knowledge of the likely results of the abstention. Breach of every tie of marriage or failure to discharge every marital obligation cannot be regarded as wilful neglect. The neglect to become desertion must be such as amounts to forsaking or abandonment of one spouse by the other by a conscious disregard of the duties and obligations of the married state considered as a whole. I had occasion to state these principles in another place, and have here recapitulated the same.

Wilful neglect, in the context of the matrimonial offence of desertion, must be such neglect as can be regarded as the "withdrawal from a state of things". The neglect, wilful neglect, must be in the discharge of matrimonial obligations, and there must be such a failure of the fulfilment of those obligations—the common obligations of the marital state—as would amount to a total forsaking or abandonment of those obligations. Therefore, this failure, this total forsaking or abandonment of consortium evidences the factum of separation and the wilful manner of inflicting it evidences the requisite *animus deserendi*. In my judgment, it would not be appropriate to dissociate *animus deserendi*, which is the essence of desertion even when one speaks of desertion by wilful neglect. It is implicit in the concept of desertion, and it is implicit in wilful neglect. *Animus deserendi* is not merely an attribute or an incidence of the matrimonial offence of desertion. It is of the very nature of that offence and

¹ [1956] S.C.R. 838, s.c. 59 Bom. L.R. 322.

of the essence of it. Therefore, it would be fallacious to say that there need be no proof of *animus deserendi* in a case of desertion founded on the plea of wilful neglect.

There remains for consideration one more legal aspect of the matter. Referring to the conduct of the opponent, learned counsel for the petitioner argued that even if there was no *animus deserendi* on the part of the opponent when she left the petitioner's home on February 26, 1954, there was such *animus deserendi* sometime later when she left Poona for Singapore and other foreign places and, in any event, so the argument ran, there was *animus deserendi* when she refused to return to the matrimonial home and hearth after the cables sent by the petitioner which were of a peremptory nature. Learned counsel in this context found himself faced with the petitioner's letter dated April 1/2, 1955, in which the petitioner had made the most serious allegations against the character of the opponent. The contents of that letter have been fully dealt with by my brother and I do not propose to refer to any part of that letter in this discussion. The argument of learned counsel was that assuming that there were serious allegations made by the petitioner against the character of the opponent, that did not *per se* entitle the opponent to keep away from the matrimonial home, and her conduct in doing so was tantamount to evidence of *animus deserendi*. Now, a reference to s. 23(1) of the Hindu Marriage Act, which as I have already mentioned, contains some vital clauses of considerable importance and consequence, will clearly show that the Court, before granting relief, must be satisfied that the ground for granting relief exists and the petitioner is not in any way taking advantage of his or her wrong or disability for the purpose of such relief, and there is no other legal ground why relief should not be granted. If a husband makes serious allegations of unchastity against his wife and the allegations are unfounded, and if the wife in consequence of such allegations refuses to cohabit with the husband and goes away from him, can it be said that she has committed the matrimonial offence of desertion? Can it be said, in such a case, that the husband, who is himself the cause of the conduct on the part of the wife complained of by him, is not taking advantage of his own wrong when he seeks relief? The answers to these seem to me to be against the contention of learned counsel for the petitioner. The way I read the relevant sections, it seems to me that a petition founded on the charge of desertion can be resisted by the opponent-spouse if she or he is able to show that there was reasonable excuse or just cause for the separation. It has sometimes been said that nothing short of a matrimonial offence such as cruelty would suffice in such cases. This question has been much debated in England and judicial opinion on the question is not wholly uniform. But the more recent and acceptable view seems to be that a just cause should suffice. Of course, the "just cause" must be "grave and weighty" or, as it is sometimes said, "grave and convincing". But it can be something which falls short of a matrimonial offence. It may be distinguished from cruelty to the extent that it falls short of what is legal cruelty, but nonetheless the reasons for withdrawal from the society of the petitioner must be "grave and weighty". Therefore, one important question that we have to consider in this case is whether there were "grave and weighty" reasons on which the opponent-spouse can rely in resisting the charge of desertion levelled against her. As I have already stated, I do not propose in this judgment to examine again the evidence of allegations made against the respondent and I have expressed my agreement with the reasons given by my learned brother for the conclusions reached by him. Being wholly in agreement with him on those points, I need only add that, in my judgment, in this case the wife had "grave and weighty" reasons for living apart from the husband after he levelled those serious and unfounded allegations against her character.

In the result, I am satisfied that the petitioner has failed to establish the case of desertion.

Appeal allowed.

Before the Hon'ble Mr. H. K. Channani, Chief Justice, and Mr. Justice V. S. Desai.

PHIRDOSH SAROSH KOTHAWALLA v. THE STATE OF BOMBAY.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Sec. 76A—Bombay Tenancy and Agricultural Lands (Second Amendment) Act (Bom. XXXVIII of 1957), Secs. 25, 34—Orders made by Mamlatdar or Tribunal before coming into force of s. 76A whether can be revised under that section.

Orders made by a Mamlatdar or Tribunal before the coming into force of s. 76A of the Bombay Tenancy and Agricultural Lands Act, 1948, cannot be revised under this section.

THE facts appear in the judgment.

Vithalbhai B. Patel, with *J. B. Patel*, for the petitioner.

M. A. Bane, Assistant Government Pleader, for the State.

CHANNANI C.J. The petitioner is the owner of several lands situate at Changanodar. These lands had been leased by him to eleven tenants. On March 19, 1957, the petitioner made 11 applications to the Tenancy Avval Karkun, Sanand, in which he stated that his tenants were willing to surrender their tenancy rights and that orders for possession should be passed in his favour. The Tenancy Avval Karkun inquired into the applications made by the petitioner. He examined the tenants and came to the conclusion that the tenants had voluntarily surrendered their tenancy rights. He also found that the petitioner did not own lands in excess of the ceiling area. He then passed orders for possession of the lands being handed over to the petitioner. In his orders he has stated that he was satisfied that the surrenders of tenancy rights had been made voluntarily and that the petitioner's attorney had deposed that the lands would be taken under personal cultivation. These orders were passed by the Tenancy Avval Karkun in March-April 1957, except in one case, in which it was passed on August 5, 1957. The petitioner subsequently obtained possession of the lands. On November 22, 1957, the Assistant Collector, purporting to act under s. 76A of the Act, passed an order, by which he remanded the above cases to the Tenancy Avval Karkun for deciding them "after taking into consideration the conditions for termination of tenancies mentioned in s. 31A of the Bombay Tenancy and Agricultural Lands Act". This order was challenged by the petitioner before the Bombay Revenue Tribunal. The Revenue Tribunal set aside the order passed by the Assistant Collector on the ground that the petitioner had not been heard and remanded the cases to the Assistant Collector for issuing notices to the parties and thereafter passing final orders in them. Against this order passed by the Revenue Tribunal, the present Special Civil Application has been filed.

The first question, which arises for consideration, is whether s. 76A can be used so as to revise orders, which were passed before this section was enacted. The section is in the following terms:—

"Where no appeal has been filed within the period provided for it, the Collector may, *suo moto* or on a reference made in this behalf by the Divisional Officer or the State Government, at any time,—

(a) call for the record of any inquiry or the proceedings of any Mamlatdar or Tribunal for the purpose of satisfying himself as to the legality or propriety of any order passed by, and as to the regularity of the proceedings of such Mamlatdar or Tribunal, as the case may be, and

(b) pass such order thereon as he deems fit."

A proviso was added to this section in 1958, but we are not concerned with it in this case. The well-settled rule of construction is that unless the Legislature has manifested a clear intention to the contrary, every statute is presumed to be prospective in its effect and is to be so construed as to respect vested rights (see *Nilkanth Ramchandra v. Basikhal*.¹) In *Sudhya Ramji v. Mahammed Isak*,² which

*Decided, July 23, 1959. Special Civil Application No. 75 of 1959.

1 (1948) 51 Bom. L.R. 280, F.B.
2 (1948) 52 Bom. L.R. 123.

was a case under the Bombay Tenancy Act, 1939, it was observed that no statute should be construed so as to have a retrospective operation unless its language is such as plainly to require that construction, and that when the effect of the adoption of what may be called the literal construction would be to take away a vested right, the Court will be slow to accept such a construction and insist upon its being satisfied that that was the intention of the Legislature. Section 76A was inserted in the Act by s. 25 of the Bombay Tenancy and Agricultural Lands (Second Amendment) Act, Bombay Act XXXVIII of 1957. Section 34 of the amending Act provides that the amendments made in the principal Act by certain sections of the amending Act shall be deemed to have been made and to have come into force on the date on which the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1955, came into force. This section, therefore, gave retrospective effect to certain amendments made in the principal Act by the amending Act of 1957. Section 25 of the amending Act, by which s. 76A was inserted in the principal Act, was, however, not given retrospective effect. It is, therefore, clear that the Legislature did not intend that this section should operate retrospectively. There are also no words in the section, which would indicate an intention on the part of the Legislature to give retrospective operation to this section.

Mr. Rane, who appears on behalf of the State, has relied on the words "order passed by" used in cl. (a). These words are capable of meaning "an order passed after the section came into force". The words are not such as would justify an inference that the Legislature intended to reopen cases in which final orders had been already made. On the other hand, as I have pointed out, the fact that s. 25 is not included amongst the sections, which were given retrospective effect by s. 34 of the Amending Act of 1957, would indicate that the section was intended to provide for the future. It cannot, therefore, be used in respect of orders made before the enactment of this section.

We are accordingly of the opinion that orders made before the coming into force of s. 76A cannot be revised under this section.

In ten applications made by the petitioner, the orders of the Tenancy Avval Karkun were passed in March/April, 1957. In the remaining case it was made in August 1957. All the cases had been disposed of before s. 76A came into force on September 28, 1957. By virtue of these orders, the petitioner had acquired vested rights to the possession of the lands, before s. 76A was enacted. Consequently no action could be taken in respect of these orders under this section.

[The rest of the judgment is not material to the report.]

ORIGINAL CIVIL.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

MANORDAS KALIDAS v. V. V. TATKE.*

Bombay Sales Tax Act (Bom. III of 1953), Secs. 15, 31—Bombay Sales Tax Laws (Validating Provisions and Amendment) Act (Bom. XXII of 1959), Sec. 3—Power of revision under s. 31 whether can be exercised beyond period prescribed under s. 15.

The widest retrospective operation is given to the provisions made in s. 15(2)(a)(i) of the Bombay Sales Tax Act, 1953, by the Bombay Sales Tax Laws (Validating Provisions and Amendment) Act, 1959. The retrospective operation is given to all proceedings and notices and even to proceedings which have been concluded by judgments, decrees or orders of Courts or Tribunals. Therefore, in construing the provisions of s. 31 of the Act, the obligation to initiate proceedings within the period not longer than the period prescribed by s. 15 will be implied.

*Comr. I.T. v. Narsee Nagsee & Co.*¹ and *Bissar House v. State of Bombay*,² referred to.

*Decided, July 24, 1959. O.C.J. Miscellaneous Application No. 448 of 1958.

1 (1956) 58 Bom. L.R. 950.

2 (1958) 60 Bom. L.R. 1395, F.B.

THE facts appear in the judgment.

M. J. Mistree, with *B. A. Palkhivala*, for the petitioner.

H. D. Banaji, for the respondents.

SHAH J. Messrs. Manordas Kalidas, who will hereafter be referred to as "the assessee"; carry on business in cloth in Bombay, and are registered dealers under the Bombay Sales Tax Act. For the assessment years 1948-49 and 1949-50 corresponding to the assessment period from October 7, 1948, to March 31, 1950, the Sales Tax Officer, C-I-J Ward, Bombay, assessed the assessee on May 4, 1951, under s. 11 of the Bombay Sales Tax Act, 1946. The Sales Tax Officer accepted the gross turnover returned by the assessee at Rs. 1,15,50,858-10-3 and determined sales-tax payable thereon. On June 13, 1958, the Assistant Collector of Sales Tax issued a notice to the assessee informing them that they had suppressed sales of Rs. 20,00,000 from their regular books of account for the year 1948-49 and it was proposed to revise the order passed by the Sales Tax Officer for the said year by incorporating and adding sales of Rs. 20,00,000 to the turnover, and subject the same to sales-tax at the rate of one anna in a rupee. A similar notice was also issued on the same day in respect of the year 1949-50. The assessee then applied under art. 226 of the Constitution of India claiming a writ in the nature of *certiorari* or other writ, direction or order against the Assistant Collector of Sales Tax calling for the records relating to the assessment, re-assessment or revision of assessment of the assessee for the assessment years 1947-48, 1948-49 and 1949-50, and, after making enquiries and looking into the matter, setting aside the notices issued by the Assistant Collector of Sales Tax. The assessee also claimed a writ in the nature of prohibition or *mandamus* or other writ or direction prohibiting or restraining the Assistant Collector of Sales Tax and his successors in office from taking any action or proceeding for assessment, re-assessment or revision of assessment of the assessee in respect of the assessment years 1947-48, 1948-49 and 1949-50 and from enforcing the notices. The Assistant Collector of Sales Tax, who has appeared before us in pursuance of the notice, has challenged the right of the assessee to obtain the writ or writs claimed by them.

Mr. Mistree on behalf of the assessee has raised two contentions: (i) that whereas the assessment proceedings for the years in question against the assessee for assessment of sales-tax were taken under the Bombay Sales Tax Act, 1946, the notices to revise the assessment were issued under the provisions of the Bombay Sales Tax Act, 1953, and as such the notices were illegal and could not form the basis of proceedings for revising the assessments made under the Act of 1946, and (ii) that the notices for revision of assessment were issued more than eight years after the expiry of the period of assessment and in view of the provisions contained in s. 15 of the Bombay Sales Tax Act, 1953, and the corresponding provisions contained in s. 14 of the Sales Tax Act, 1946, they are barred by limitation, and that, in any event, the notices are issued after an unreasonable lapse of time.

The two impugned notices were issued in form No. XXIV prescribed under the Sales Tax Act of 1953: and in terms it is stated that it is a "notice to a person when it is proposed to pass an order which affects him adversely under section 31 of the Bombay Sales Tax Act, 1953," and reference is made to r. 41 of the Bombay Sales Tax (Procedure) Rules, 1954. In the notice itself there is no reference to the provisions of the Act of 1953. The two notices which are substantially in identical terms state that whereas it was proposed to pass an order to the effect "mentioned below" the assessee was informed that if they wished to prefer any objection against such order they should attend either personally or by a legal practitioner or by an agent duly authorised for the purpose at the time and place mentioned in the notice: and the gist of the order proposed to be passed was stated as follows:

"You have suppressed sales of Rs.... from the regular books of accounts for the year... and as such it is proposed to revise the orders passed by the Sales Tax Officer for the said year by incorporating and adding sales of Rs.... subject to sales tax at the rate of one-anna in the rupee."

The mere heading or the use of the form prescribed for issuing a notice for taking action under s. 31 of the Sales Tax Act, 1953, will not, in our judgment, alter the true character of the notices issued by the Assistant Collector of Sales Tax. The Assistant Collector of Sales Tax had authority under the Act of 1946 to issue notices of the nature of the impugned notices. Even assuming that the notices had to be issued in exercise of the powers conferred under the Act of 1946, in the absence of any indication in the body of the notices that they were intended to be issued under the Act of 1953 and not under the Act of 1946, the notices were not unauthorised.

By sub-s. (1) of s. 48 of the Bombay Sales Tax Act, 1953, the Bombay Sales Tax Act, 1946, was repealed. By sub-s. (2) it is provided that the repeal does not affect or will not be deemed to affect any right, title, obligation or liability already acquired, accrued or incurred, and also the recovery of any tax or penalty which may have become payable under the Act of 1946; and that such taxes or penalties or arrears thereof shall be assessed, imposed and recovered, so far as they may be, in accordance with the provisions of the Act of 1953. Evidently by virtue of the provisions contained in the Sales Tax Act, 1946, the assesses, for any evasion of tax, incurred an obligation to pay that tax, liability to pay which had arisen by reason of the sales effected but of which the particulars were concealed. The repeal of that Act does not, by virtue of the provision contained in s. 48(2), affect that obligation; and the recovery of that tax which was payable under the Act of 1946 is, by the express provision made in s. 48(2), not affected by the repeal of the Act of 1946, and all such taxes are to be assessed, imposed and recovered in accordance with the provisions of the Act of 1953. The Assistant Collector of Sales Tax had, therefore, authority to issue the notices and to conduct the proceedings for re-assessment of the liability, if any, of the assesses under the Act of 1953.

To appreciate the second contention, it is necessary to set out certain provisions of the Sales Tax Acts of 1946 and 1953. By s. 10 of the Act of 1946 it was provided that every dealer who may be required so to do by the Commissioner by notice served in the prescribed manner and every registered dealer shall furnish such returns by such dates and to such authority as may be prescribed. By s. 11 the procedure for assessment of taxes was prescribed. Authority was given under that section to the Commissioner to make "best judgment assessment" in certain specified cases. There was no provision enacted by the Sales Tax Act, 1946, about the period within which the notice requiring a dealer or a registered dealer to make a return was to be issued. By s. 11A, which was added by Act I of 1949, authority was given to the Collector to issue a notice within the period prescribed, where that Officer was satisfied that any turnover in respect of sales or supplies of any goods chargeable to tax under the Act had escaped assessment in any year or had been under-assessed or assessed at a lower rate or any deductions had been made wrongly therefrom and in any case where the Collector had reason to believe that the dealer had concealed the particulars of such sales or supplies or deliberately furnished incorrect returns. By that section authority was also conferred upon the Collector to proceed to assess or re-assess the tax due by such dealer and the provisions of the Act were to apply as if the notice were one served under s. 11. Even though no period was prescribed for issue of a notice under s. 11, re-assessment under s. 11A could be made within the period of five years or three years as prescribed. By s. 22 power was conferred upon the Collector, subject to the rules which may be prescribed and for reasons to be recorded in writing, either upon application or of his own motion, to revise any order passed under the Act or the rules made thereunder by a person appointed under s. 3 to assist him. By this pro-

vision authority was evidently conferred upon the Collector to revise the orders of his subordinates who were authorised to act as Sales Tax Officers, but the Legislature did not prescribe any period for revising the orders of the subordinate authorities when the Collector proceeded *suo motu*. Under the Bombay Sales Tax Act, 1958, the corresponding provision relating to the making of returns was s. 13; the provision relating to the assessment of taxes was s. 14 and the provision relating to the issue of notice and re-assessment of dealers in respect of turnover escaping assessment was s. 15. By s. 31 authority was conferred upon the Collector, subject to the rules prescribed and for reasons to be recorded in writing, to revise the orders passed under the Act or the rules made thereunder by a person appointed under s. 8 to assist him.

This Court has taken the view in *Comr. I.T. v. Narsee Nagsee & Co.*,¹ in dealing with provisions which are analogous to those of the Sales Tax Act, that a notice calling for a return from a tax-payer under the Business Profits Tax Act may not issue after the expiry of the period prescribed by the Legislature for re-assessment. It was held in that case that even though the Legislature had not prescribed any period for issuing a notice calling for a return, inasmuch as the Legislature had prescribed a period of four years from the close of the accounting period for re-assessment, the notice issued more than four years after the close of the accounting period was beyond the time mentioned in s. 14 of the Business Profits Tax Act and hence the notice was not a valid notice under s. 11 of that Act. Chagla C.J. observed (at p. 954 of the report):

"...although the Legislature has not imposed any limitation of time with regard to the issue of a notice under s. 11 and although as a canon of construction it may be said that if the Legislature has not imposed any limitation it is not for the Court to restrict the power conferred by the Legislature upon the Income-tax Officer, it is well settled that if statutory powers are conferred upon an authority, the Court must hold that those statutory powers must be exercised reasonably, and, in our opinion, if statutory power is conferred upon the Income-tax Officer to issue a notice for the purpose of assessment under s. 11, that power must be exercised reasonably, and looking to the provisions of s. 14 it could not be said that when the Income-tax Officer issued this notice four years after the close of the chargeable accounting period he was exercising his statutory authority in a reasonable manner."

In the view of the learned Chief Justice eventhough the Legislature had not prescribed any period for issuing a notice calling for return, a notice issued after the expiry of the period prescribed for re-assessment was a notice issued beyond a reasonable period and, therefore, unauthorised. This view, which was expressed in considering the scheme of the Business Profits Tax Act, was adopted by the learned Chief Justice in dealing with a case under the Sales Tax Act. In *Biscar House v. State of Bombay*,² a full bench of this Court held that eventhough no period of limitation was prescribed for issue of a notice under s. 11(2) of the Central Provinces and Berar Sales Tax Act, 1947, calling for a return from a dealer, because an order for re-assessment under s. 11A may not be made after the expiry of three years, the notice under s. 11(2) issued more than three years after the expiry of the period for which it was proposed to make the assessment was incompetent. Chagla C.J., who delivered the judgment of the Court in that case, applied the principle of the case in *Comr. I.T. v. Narsee Nagsee & Co.*, to the interpretation of s. 11 of the Central Provinces & Berar Sales Tax Act. In both the aforesaid cases the Court took the view that eventhough not expressly prescribed, a period of limitation for the issue of a notice calling for a return must be regarded as implied when the Legislature has prescribed a period of limitation for re-assessment of escaped income. In neither of those two cases revisional powers were sought to be exercised, but the principle of those cases must, in our judgment, apply for the same reasons to the exercise of revisional jurisdiction, and that jurisdiction must be exercised within a reasonable period, and the yardstick of reasonableness will be the period prescribed for re-assessment.

¹ (1950) 58 Bom. L.R. 950.

² (1958) 60 Bom. L.R. 1395. F.B.

If the Legislature had not intervened, we might have held that the notices issued beyond the period prescribed by s. 11A of the Bombay Sales Tax Act, 1946, or by s. 15 of the Act of 1953, were invalid and no proceeding for review or revision could lie at the instance of the Assistant Collector of Sales Tax. But the Legislature has by Act XXII of 1959 amended the Bombay Sales Tax Act, 1953. By s. 3 of Act XXII of 1959 it is provided that—

"Section 15 of the Bombay Sales Tax Act shall be renumbered as sub-section (1) of that section, and in that section after sub-section (1), the following sub-section shall be inserted, namely:—

'(2) (a) Nothing in sub-section (1),—

(i) shall apply to any proceeding (including any notice issued) under section 14 or 31, and

(ii) notwithstanding any judgment, decree or order of a Court or Tribunal, shall be deemed ever to have been applicable to such proceeding or notice.

(b) The validity of any such proceeding or notice shall not be called in question merely on the ground that such proceeding or notice was inconsistent with the provisions of sub-section (1)."

On the principle of the two cases, to which we have referred, the taxing authority was obliged to issue a notice requiring a dealer to make a return within the period prescribed by s. 15 of the Bombay Sales Tax Act before it was amended, but the Legislature has now expressly provided by sub-s. (2) of s. 15 that nothing in s. 15 as it originally stood shall apply to any proceeding under s. 14. Evidently since the enactment of Act XXII of 1959, the principle applied by this Court in the interpretation of provisions relating to calling for a return, even though no period of limitation has been prescribed in that behalf by a taxing statute, must be regarded as superseded. The Legislature has also referred to s. 31 in sub-s. (2)(a)(i) of s. 15 as amended, and by that reference evidently the view which we have taken, viz., that the power of revision has to be exercised within a reasonable period and such period is not to exceed the period prescribed by s. 15 as it originally stood, must also be regarded as superseded. Clause (a)(i) of sub-s. (2) of s. 15 is undoubtedly prospective in terms, but by cl. (b) of sub-s. (2) the validity of any such proceeding or notice is not liable to be called in question merely on the ground that such proceeding or notice was inconsistent with sub-s. (1). It is again provided by cl. (a)(ii) of sub-s. (2) that notwithstanding any judgment, decree or order of a Court or Tribunal, nothing in sub-s. (1) shall be deemed ever to have been applicable to such proceeding or notice. The widest retrospective operation is, therefore, given to cl. (a)(i) of sub-s. (2) of s. 15. The retrospective operation is given to all proceedings and notices and even to proceedings which have been concluded by judgments, decrees or orders of Courts or Tribunals. It is evident that the Legislature intended by the amendment that in construing the provisions of s. 31 of the Bombay Sales Tax Act, 1953, the obligation to initiate proceedings within the period not longer than the period prescribed by s. 15 will not be implied.

Mr. Mistree for the assesses contends that even on that view, the rule that revisional jurisdiction will be exercised within a reasonable period is not abrogated by legislation. But by s. 31 no period has been prescribed for the exercise *suo motu* of the jurisdiction of the Collector to revise the order of authorities appointed under s. 3: and by Act XXII of 1959 the rule of interpretation adopted by this Court in *Narses Nagsee's* case and applied in cases under the Sales Tax Act has been expressly superseded.

We are, therefore, of the view that the petitioners have made out no case for the issue of a writ. The petition fails and is dismissed. Having regard to the circumstances, there will be no order as to costs of this application.

Solicitors for the petitioner: *Rustomji & Ginnwalla.*

Solicitors for the respondents: *Little & Co.*

Petition dismissed.

Before Mr. Justice Mody.

SUMATIBEN v. JASVANT BHOGILAL SUTARIA.*

Bombay Hindu Divorce Act (Bom. XXII of 1947), Secs. 15, 8(1)—Hindu Marriage Act (XXV of 1955), Secs. 29(3), 30, 26, 25—Decree for dissolution of marriage passed before coming into operation of Central Act—Petition under s. 15 of Bombay Act for custody of minor filed after coming into operation of Central Act—Prayer for custody of minor not made in suit for dissolution of marriage—Maintainability of petition.

Where in a proceeding under the Bombay Hindu Divorce Act, 1947, the relief in respect of the marriage itself had already been decreed before the coming into operation of the Hindu Marriage Act, 1955, and there was no prayer for custody of children in the plaint as originally filed, a subsequent petition under s. 15 of the Bombay Hindu Divorce Act, 1947, for custody of children is maintainable after the coming into operation of the Hindu Marriage Act, 1955.

THE facts appear in the judgment.

M. V. Desai, with *Sir Noshirwanji Engineer* and *M. B. Parpia*, for the petitioner.

M. P. Amin, with *Arun H. Mehta*, for the respondent.

MODY J. The petitioner in this case is the wife, the respondent being her former husband, her marriage with whom has been dissolved. The petitioner was married to the respondent in 1942 and of that marriage a son since named Tarang was born to the petitioner on August 10, 1948. On or about March 11, 1955, the petitioner filed Suit No. 116 of 1955, being the suit in which this petition has been filed, against the respondent for divorce and dissolution of the said marriage on the ground of desertion under the provisions of the Bombay Hindu Divorce Act, 1947, which was then in force. In the suit there was a prayer for dissolution of marriage but there was no prayer for the custody of the son Tarang, although since prior to the filing of the suit Tarang was in the custody of the respondent. A decree for dissolution of marriage was passed in the suit on April 12, 1955. The petitioner in November 1958, filed the present petition praying *inter alia* for the custody of Tarang, and in the alternative, for an order directing the respondent to allow the petitioner access to Tarang and to allow the petitioner to take away her minor son Tarang to live with her at Bombay during the school vacation and/or during suitable school holidays.

The respondent is resisting this petition on several grounds one of which is by way of a preliminary objection. That preliminary objection is that the petition in so many words states that the same has been filed under s. 15 of the Bombay Hindu Divorce Act, 1947, (which I will hereafter refer to as "the Bombay Act"), that the Bombay Act stands repealed by s. 30 of the Hindu Marriage Act, 1955 (which I will hereafter refer to as "the Central Act") and that, therefore, this petition is misconceived and must be dismissed.

Section 15 of the Bombay Act provided as follows:

"In any suit under this Act, the Court may from time to time pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, the marriage of whose parents is the subject of such suit, and may, after the decree, upon application by petition for the purpose, make, revoke, suspend or vary from time to time all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the suit for obtaining such decree were still pending."

It is this section under which the present petition has been made. The Central Act, however, came into operation on May 18, 1955, that is, prior to the filing of this petition.

*Decided, August 17, 1959. M. J. Petition in O.C.J. Suit No. 116 of 1955.

Section 30 of the Central Act provides as follows:

"The Hindu Marriage Disabilities Removal Act, 1946 (XXVIII of 1946), the Hindu Marriage Validity Act, 1949 (XXI of 1949), the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (Bombay Act XXV of 1946), the Bombay Hindu Divorce Act, 1947 (Bombay Act XXII of 1947), the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Madras Act VI of 1949), the Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950 (Saurashtra Act V of 1950) and the Saurashtra Hindu Divorce Act, 1952 (Saurashtra Act XXX of 1952) are hereby repealed."

Only sub-s. (3) of s. 29 of the Central Act is relevant for the purposes of this petition and the same provides as follows:

"Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed."

On a simple reading of the said s. 30, it is quite clear that the Bombay Act stood repealed at the date of the filing of this petition and that, therefore, this petition would be incompetent under s. 15 of the Bombay Act unless such a petition is saved under the provisions of sub-s. (3) of s. 29 of the Central Act.

What Mr. Amin, the learned counsel for the respondent, contended was that what are saved by the said sub-s. (3) are proceedings under the Bombay Act for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of the Central Act and that only such proceedings may, by virtue of the provisions contained in the said sub-s. (3), be continued and determined as if the Central Act had not been passed. What Mr. Amin contended was that under sub-s. (3) of s. 29 a proceeding under the Bombay Act would be saved only if that proceeding was for seeking relief for declaring any marriage to be null and void or for annulling or for dissolving any marriage or for judicial separation—which reliefs, may it be noticed, are in respect of the marriage itself—and if such a proceeding was pending at the commencement of the Central Act. Mr. Amin further contended that what must be pending at the commencement of the Central Act must be the adjudication as to such a relief in respect of the marriage itself and what would be saved would be only that part of such a proceeding which sought such a relief in respect of the marriage itself but not any other part of such proceeding which sought any other relief, e.g., for custody of children. In order to test Mr. Amin's argument I put a hypothetical case to him, viz., if a suit under the Bombay Act was filed before May 18, 1955, praying for dissolution of marriage and for custody of children and was pending in respect of both these reliefs at the commencement of the Central Act, would the suit in respect of the relief for custody of children be saved? Mr. Amin thereupon made a concession that it would be saved. I thereupon put a further hypothetical case to Mr. Amin that if in a suit of the nature mentioned in the first hypothetical case a decree for the dissolution of the marriage had already been passed before May 18, 1955, but the suit stood over in respect of the other relief for custody of children—and I may state from my experience that it was not infrequent that in such suits decrees for dissolution of marriage used to be passed first and the suit in respect of the relief for custody of children used to be adjourned for some time—and the suit in respect of that other relief reached hearing after May 18, 1955, would the suit for that relief be saved? Mr. Amin stated that it would be saved because the relief for custody of children had been asked for in the plaint itself along with the relief for dissolution of marriage. Mr. Amin's final argument narrowed down to a contention that if in a proceeding under the Bombay Act the relief in respect of the marriage itself had already been decreed before May 18, 1955, and there was no prayer for custody of children in the plaint itself, a subsequent petition could not be made for the first time after May 18, 1955.

although such a subsequent petition would have been permissible under s. 15 of the Bombay Act before its repeal. With respect to Mr. Amin, the said concessions made by Mr. Amin later in his argument are, in my opinion, not logical and I must ascertain the correct position in law and see whether Mr. Amin had to make such concessions because of his very first contention not being justifiable in law.

For a clearer understanding of the position it is necessary to consider first the provisions of s. 15 of the Bombay Act. In respect of that section, in the initial stages, Mr. Amin contended that even when the Bombay Act was in force no orders in respect of the custody, maintenance or education of children could for the first time be passed after a decree was passed in respect of the marriage of the parents of such children. What he contended was that in a suit for dissolution of marriage, an order in respect of the custody, maintenance and education of children could be made only by way of an interim order or by way of a provision in the decree dissolving the marriage, but that once a decree was passed in respect of the marriage but that decree did not contain any provision for the custody, maintenance and education of children, no order for such custody, maintenance and education of children could be made after the passing of such decree. In other words, according to Mr. Amin's contention, once a decree for the dissolution of the marriage was passed the only power which the Court would have under s. 15 in respect of the custody, maintenance and education of children would be a power in the nature of varying or altering such provision in that behalf as may already be contained in the decree. The words in s. 15, however, are:

"may, after the decree, upon application by petition for the purpose, make, revoke, suspend or vary from time to time all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the suit for obtaining such decree were still pending."

The words "revoke, suspend or vary" would support Mr. Amin's contention, because in their grammatical sense they presuppose an existing order in that behalf, but the word "make", however, implies that a power is given to make such an order for the first time even after the decree, although there may be no such order already existing in the decree which has already been passed. Similarly, the words "as might have been made by such decree or interim orders in case the suit for obtaining such decree were still pending" suggest that even after passing of a decree which does not contain any provision with respect to the custody, maintenance and education of children the Court has still the same powers in that behalf as it had before the passing of the decree. The effect of these words is that even after the passing of the decree the suit is, as it were, notionally to be deemed to be still pending and the Court can exercise the same powers even after the decree as it could exercise before or at the time of the passing of such decree. Having realised the force of these provisions in s. 15, Mr. Amin later on did not press his point that a fresh order could not be made by a Court under s. 15 with respect to the custody, maintenance and education of children even after the decree was passed dissolving the marriage of the parents.

But Mr. Amin maintained that the last portion of s. 15 indicates that it applied only in those cases in which there was in the plaint not only a prayer for dissolution of marriage but also a prayer with respect to the custody, maintenance and education of children. In other words, his contention was that in those cases where in the plaint there was only a prayer for dissolution of marriage and thereafter a decree was passed granting that prayer, because there was no prayer with respect to the custody, maintenance and education of children in the original plaint the Court would have no jurisdiction under s. 15, after the passing of the decree for dissolution, to make any order with respect to the custody, maintenance and education of children. In my opinion, there is no justification for reading s. 15 in the manner contended for by Mr. Amin. As noted earlier, in my opinion, on its proper interpretation, s. 15 provides,

as it were, for a notional pendency of the suit even after the passing of the decree for dissolution of marriage. Even though the plaint contained a prayer only for dissolution of marriage and even if a decree is passed granting that prayer, by reason of the provisions of s. 15 the suit is notionally deemed to be still pending with a view to enable either of the parents to make an application, at any time after the passing of such decree, in that very suit for obtaining an order with respect to the custody, maintenance and education of children. If there was in the original plaint a prayer with respect to the custody, maintenance and education of children, then normally when the Court granted a decree for dissolution of marriage, it would have made some order in connection with that other prayer also, either granting it or rejecting it or ordering the same to stand over to be dealt with in future. In the latter eventuality, if that prayer was stood over, there would be no necessity for a fresh petition for an order with respect to the custody, maintenance and education of children as provided for in s. 15. Section 15, however, does provide for an application to be made by a petition and that provision in s. 15 indicates that such a petition could be made even when there was originally no prayer in that behalf in the plaint. If full effect is given to these words in s. 15: "upon application by petition for the purpose", "make" and "as might have been made by such decree or interim orders in case the suit for obtaining such decree were still pending", it is clear that it is open under s. 15 to a Court to make an order with respect to the custody, maintenance and education of children even after the passing of the decree for the dissolution of the marriage and even though in the plaint as originally filed there was no prayer for such custody, maintenance and education of children.

I will now turn to sub-s. (3) of s. 29 of the Hindu Marriage Act, 1955, and for a proper appreciation of the same, it is necessary to bear in mind certain other provisions of the Bombay Act and the Central Act. Under the Bombay Act, when it was in force, there could have been filed a suit for dissolution of marriage. Even after a decree was passed dissolving the marriage an application could have been made under s. 15 in respect of the custody, education and maintenance of the children of the marriage and under s. 8(1) for permanent alimony. I have already stated that the language of s. 15 shows that an application for custody, education and maintenance of children could be made, even for the first time, after the passing of the decree for dissolution of marriage. Similarly, it is quite clear, that an application for permanent alimony also could be made even for the first time after the passing of the decree for dissolution of marriage, because the material words of s. 8(1) are: "at the time of passing any decree under this Act or subsequent thereto". The provision in the Central Act in respect of applications for custody, education and maintenance of children is contained in s. 26 and in respect of applications for permanent alimony is contained in s. 25 and for the purposes of the present consideration the language of ss. 26 and 25 of the Central Act is similar, though not absolutely identical, to that of ss. 15 and 8 respectively of the Bombay Act. The intention of the Bombay Legislature as gathered from the language of ss. 15 and 8 of the Bombay Act appears to be that applications for custody, education and maintenance of children and for permanent alimony could and should be made in the very suit or proceeding for dissolution of marriage even after the passing of the decree for dissolution of marriage. The same appears to be the intention of the Central Legislature as gathered from the provision enacted in ss. 28 and 25 of the Central Act. The reason for that intention of the two Legislatures and the scheme of the two enactments is also natural, because the very necessity to provide for the custody, education and maintenance of children and for permanent alimony arises because a decree for the dissolution of the marriage has been granted and is but consequential upon and incidental to such decree. When that intention and that scheme of the Bombay Act has been adopted and continued in the Central Act can it be said that the Central Act in enacting the repealing provision in s. 30 and the saving

provision in s. 29(3)—which two provisions must be read together—intended that after the repeal of the Bombay Act no application should be made for custody, education or maintenance of children or for permanent alimony after the repeal of the Bombay Act in suits under the Bombay Act in which decrees for dissolution of marriage had already been passed before the repeal of the Bombay Act? It can be argued that after the repeal of the Bombay Act, it was not intended that applications for custody, maintenance and education of children should be made in the very suits in which decrees for dissolution of marriage had already been passed before the repeal of the Bombay Act because it is possible to make such applications, though not under the repealed Bombay Act, but under other provisions of law, e.g., the Guardians and Wards Act. But what about applications for permanent alimony? If a decree for dissolution of marriage had already been passed, but no application for permanent alimony had been made before the repeal of the Bombay Act, was the right to subsequently apply for alimony completely taken away by repealing the Bombay Act? If by reason of the repeal of the Bombay Act the right to apply under s. 8 for permanent alimony was taken away, it appears to me that the inevitable result would be that the right to apply for permanent alimony would completely disappear, as there appears to be no other provision of law which would enable an application being made in such a case for permanent alimony. Such an unreasonable intention to take away that right to permanent alimony cannot be ascribed to the Legislature. And if the right to make such a subsequent application for permanent alimony cannot have been intended to be taken away, why should there have been a different intention in respect of a subsequent application for custody, education or maintenance of children although it may be possible to obtain such latter relief under some other law?

In my opinion, all these difficulties would arise if too narrow a construction is placed on the language of sub-s. (3) of s. 29 of the Central Act. That subsection provides:

"Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act...."

The Bombay Act was a "law for the time being in force" within the meaning of that phrase in sub-s. (3). Now what would be saved would be a proceeding under the Bombay Act "for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of the Central Act". The Bombay Act did not provide for "declaring any marriage to be null and void", nor did it provide for "annulling any marriage" and these phrases would, therefore, not be applicable to the Bombay Act. The presence of those two phrases in the said sub-s. (3) is due to the other enactments repealed by s. 30 of the Central Act. The phrase "dissolving any marriage" is tantamount to "divorce", which is the word used in the Bombay Act. Therefore the relevant words in the said sub-s. (3) are "any proceeding" under the Bombay Act "for dissolving any marriage or for judicial separation" and "pending at the commencement of this Act". It is clear that in order to be saved, it must be a proceeding for dissolving any marriage or for judicial separation pending at the commencement of the Central Act. But what is the interpretation of these words? It is clear that the said sub-s. (3) would save all proceedings in which the relief was for dissolving any marriage or for judicial separation and the adjudication as to such relief had not yet been made and was still pending at the commencement of the Central Act. But would that sub-s. (3) also save a second category of proceedings which were initially for dissolving a marriage or for judicial separation and in which that relief had been granted before the commencement of the Central Act, but which were at the commencement of the Central Act still pending because a relief already prayed for therein for cus-

tody, education or maintenance of children, or for permanent alimony had remained to be adjudicated upon? And would that sub-s. (3) also save a third category of proceedings in which even though there was no such relief originally prayed for and could not therefore be said to have remained unadjudicated upon, but yet, from the very nature of the original proceeding, it was notionally to be deemed to be pending for any subsequent application for and adjudication of the necessary relief or reliefs in respect of custody, education and maintenance of children or permanent alimony as and when occasion for the same arises. In my opinion, on a correct interpretation, even the said second and third categories of proceedings would also be saved. Sub-section (3) of s. 29 saves all proceedings which were initially for dissolution of marriage or for judicial separation under the Bombay Act. It is not that they would be saved only if the relief for dissolving the marriage or for judicial separation was still pending at the commencement of the Central Act. If in a proceeding a relief for custody of children or for permanent alimony was asked for but remained unadjudicated upon at the commencement of the Central Act, or even if no such relief was in fact asked for before the commencement of the Central Act, the proceeding must be deemed to be pending at the commencement of the Central Act and even such a proceeding having initially been "for dissolving a marriage" or "for judicial separation" is also saved. The reason why even the said second and third categories of proceedings would be saved is that all the said three categories of proceedings would essentially be for dissolving a marriage or for judicial separation, and the granting of relief in respect of custody, education or maintenance of children or for permanent alimony would be merely incidental thereto and by reason of the provisions of ss. 15 and 8 such incidental relief was capable of being granted at any time even after a decree for the essential relief was passed and the proceeding must even thereafter be deemed to be pending for such incidental relief being granted therein. The present petition, even though it falls within the said third category, is therefore competent and maintainable although it has been filed after the Bombay Act stood repealed.

Under the circumstances, the respondent fails in the preliminary point taken by him.

[The rest of the judgment is not material to this report.]

Solicitors for the petitioner: *Matubhai Jamietram & Madan.*

Solicitors for the respondent: *Haridas & Co.*

ORIGINAL CIVIL.

Before Mr. Justice K. K. Desai.

NURJEHAN v. SULTAN AHMED.*

Guardians and Wards Act (VIII of 1890), Secs. 25, 3—Petition under s. 25 by Muslim woman for custody of her minor child—Whether Court can make order for such custody under its general and inherent jurisdiction—Circumstances under which such order can be made.

In a case where the Court has no jurisdiction to make an order under s. 25 of the Guardians and Wards Act, 1890, the Court can exercise its general and inherent jurisdiction where an order for custody is necessary for the welfare and in the interest of the minor.

THE facts appear in the judgment.

A. K. Dharama Raj, for the petitioner.

M. B. Chitre, for the respondent.

*Decided, January 19, 1959. O. C. J. Miscellaneous Application No. 420 of 1958.

K. K. DESAI J. This is an application of one Nurjehan, the mother of the minor mentioned in the petition, for delivery of the custody of the minor to her. It appears that prior to the petitioner Nurjehan's marriage with the respondent he was married to another lady who was at the time of Nurjehan's marriage absent from the house of the respondent. Nurjehan discovered the existence of the first marriage of the respondent subsequent to her marriage with the respondent. The parties appear to have lived together for some time and it is alleged in para. 5 of the petition that on July 31, 1957, the respondent drove the petitioner out of the house though she was pregnant at that time after snatching away the minor child from the petitioner's hands.

The minor is 3 years old. *Prima facie* it must be for the welfare and in the interest of any minor that it should be with the natural mother during tender age and I have therefore requested Mr. Chitre who appears for the respondent to tell me how it is for the welfare and in the interest of the minor that the child should not be delivered over to the petitioner. Mr. Chitre made only the following points:

1. Nurjehan has no means of maintenance.
2. Nurjehan is staying with her two brothers Dadamiya and Abdul Hamid in a small hut and there are altogether five persons residing in the hut.
3. It is alleged in the affidavit in reply that Nurjehan left shelter of the respondent on her own accord leaving the child behind and she was moving with others.

As regards the question of income of the respondent, Mr. Chitre pointed out that he is earning Rs. 145 per month and some times extra for extra work. As against that Mr. Dharmaraj has pointed out that Dadamiya is earning about Rs. 5 per day and Abdul Hamid is earning about Rs. 100 per month. Both of them are willing to give an undertaking to the Court that they will during the child's residence with Nurjehan make provisions for the maintenance of the child in the usual way.

As regards this contention made by Mr. Chitre, it appears to me that both the sides appearing before me are poor and there is no question of a very rich existence for the child with either of the parties. Since the mother wants the child to be with her and since both her brothers are willing to give an undertaking as mentioned above, I do not see how the child being left with the father is to be more benefited than its being with the mother.

As regards the allegations against Nurjehan, they seem to be frivolous and I am informed even by Mr. Chitre that it would certainly be very difficult to prove any such allegations. Mr. Dharmaraj has rightly pointed out that if left with the respondent the minor will receive the usual treatment from its stepmother.

In my view it is for the benefit and welfare of the child that the child must remain with the mother and I should make an order as asked for in the petition.

Mr. Chitre has, however, argued that the petition is made under s. 25 of the Guardians and Wards Act and that a Muslim woman is only entitled to custody and is not a natural guardian within the meaning of the Act and the petition is, therefore, misconceived. Since it is in the interest and for the welfare of the child that the custody of the child must be given to the mother I will treat this application as an application under the general and inherent jurisdiction of this Court in matters relating to minors. (Under s. 3 of the Act that jurisdiction has continued to vest in the Court.) It cannot be that the Court is powerless where an order is necessary for the welfare and in the interest of a minor and the application is of the kind as in this petition. I am of the view that if the Court has no jurisdiction to make this order under s. 25 of the Act, the Court should exercise its general and inherent jurisdiction for the purpose and make the order as prayed for.

There will, therefore, be an order in terms of the prayer in the petition. The respondent will pay costs of the petitioner fixed at Rs. 100. This order is made

on the basis of the undertaking given to the Court by Dadamiya and Abdul Hamid being the brothers of the petitioner that they undertake to provide for the maintenance of the minor Mahomed Rafiq during his stay with Nurjehan, the petitioner. There will be liberty to apply if it becomes necessary to change the custody of the minor for any other circumstances.

Solicitors for the respondent: *Vasant & Co.*

APPELLATE CIVIL.

Before Mr. Justice Mudholkar and Mr. Justice Patel.

THE PARBHANI TRANSPORT CO-OPERATIVE SOCIETY, LIMITED
v.

G. V. BEDEKAR.*

Motor Vehicles Act (IV of 1939), Secs. 47, Chap. IVA, 68B, 68C, 68F(2)(a), 68, 64—Constitution of India, Art. 19(6)—Road Transport Corporations Act (LXIV of 1950), Secs. 3, 19—Whether State Transport Undertaking can apply under s. 47 for grant of permit—Regional Transport Authority whether can grant permit to State Transport Undertaking and refuse it to private undertaking solely on ground of giving effect to policy of nationalisation of Government—Construction of statute—General and special provisions relating to public matter—How effect to be given to.

It is open to a State Transport Undertaking to make an application for grant of a stage carriage permit under s. 47 of the Motor Vehicles Act, 1939.

Section 68C of the Motor Vehicles Act, 1939, contemplates the preparation of a scheme by the Corporation, and it is only when such a scheme is decided upon that the provisions of that section apply. Where the Corporation does not prepare a scheme, the provisions of s. 68C cannot be availed of. In those circumstances, the provisions of s. 47 which are wide and general in their terms can be availed of by the Corporation.

It is not open to the Regional Transport Authority in exercising its powers under Chapter IV of the Motor Vehicles Act, 1939, to grant a permit to a State Transport Undertaking and to refuse it to a private undertaking solely with the object of giving effect to the policy of nationalisation of road transport which has been decided upon by the Government. The comparative merits of both must be considered and the applications for grant of permit must be decided bearing the respective merits in mind.

Where there are two sets of provisions dealing with some public matter, one section being unqualified and the other containing a qualification, effect must be given to those provisions containing qualifications. But for this principle to apply, the general and special provisions must be applicable to the same set of circumstances. Where the general principles deal with one set of circumstance and the special provisions deal with another set of circumstance, the latter provisions will apply only where those other circumstances exist.

THE facts are stated in the judgment.

Special C.A. No. 33 of 1959.

C. K. Jaisingani and H. C. Subnani, for the petitioner.

R. L. Agarwal, with *N. A. Mody*, for respondents Nos. 1 to 13.

R. J. Joshi, instructed by *Little & Co.*, for No. 14.

Special C.A. No. 3673 of 1958.

S. A. Hegde, for the petitioner.

R. J. Joshi, instructed by *Little & Co.*, for respondent No. 14.

P. P. Khambata, instructed by *Crawford Bayley & Co.*, for respondent No. 4.

* *Decided, February 17-18, 1959.* Special Civil Applications Nos. 3673 of 1958 and 1^k of Civil Application No. 33 of 1959 (with Special 1959).

Special C.A. No. 15 of 1959.

S. A. Hegde, for the petitioner.

E. J. Joshi, instructed by *Little & Co.*, for respondents Nos. 1 to 3.

P. P. Khamata, instructed by *Crawford Bayley & Co.*, for respondent No. 4.

MUDHOLKAR J. This is a petition under art. 226 of the Constitution, and is directed against the order of the Appellate Committee of the State Transport Authority. The relevant facts are as follows: The petitioner is a co-operative society registered under the Hyderabad Co-operative Societies Act XVI of 1952, and is carrying on the business of plying Stage Carriage Bus Service in the Parbhani District (Marathwada) of Bombay State, since December 1954. From October 2, 1955, the petitioner has been plying the stage carriage service on four routes: (1) Parbhani to Jintoor, (2) Jintoor to Sailu via Mantha, (3) Aundh to Hingoli, (4) Jintoor to Aundh, under substantive permits granted to it by the State Transport Authority of the former Hyderabad State. These permits were for a period of three years and expired on October 1, 1958.

On or about May 19, 1958, the Divisional Controller of the State Transport, Marathwada, who is respondent No. 14 to this petition, made an application to the Regional Transport Authority, Marathwada, for the grant of fresh stage carriage permits for the following three routes: (1) Jintur to Parbhani, (2) Jintur to Sailu, and (3) Aundh to Hingoli, that is, over the routes where the petitioner is already operating its stage carriage service on substantive permits. The application of respondent No. 14 was published on May 29, 1958, in the manner provided under the Act. The petitioner, after coming to know of this, filed its objections on June 26, 1958, to the grant of the application of respondent No. 14.

On May 27, 1958, the petitioner also filed an application for renewal of its permits, which were due to expire on October 1, 1958. This application was published by the Regional Transport Authority on July 8, 1958.

The application of respondent No. 14 came up for consideration before the Regional Transport Authority along with the petitioner's objections, on July 4, 1958. At that meeting it was brought to the notice of the Regional Transport Authority that the petitioner had filed an application for renewal of its permits and that that application should be heard along with that of respondent No. 14. The Regional Transport Authority, however, proceeded with the hearing of the application made by respondent No. 14, but deferred its decision thereon till such time as the petitioner's application became ready for being considered. Both the applications came up for hearing on August 13, 1958. Some of the members of the Regional Transport Authority who were present at the earlier meeting were not present at the second meeting. One person, respondent No. 9, who was not present at the meeting of July 4, 1958, was present at the meeting of August 13, 1958, and took part in the deliberations. According to the petitioner, the Regional Transport Authority granted the application of respondent No. 14 without hearing any fresh arguments. Thereafter the petitioner's application was taken up for consideration, but it was rejected because the Regional Transport Authority had decided to grant permit to respondent No. 14. No other ground was stated by the Regional Transport Authority in this connection.

The petitioner thereupon preferred an appeal before the Appellate Committee of the State Transport Authority. The Appellate Committee observed that the Regional Transport Authority decided the question in the light of the provisions of s. 47 of the Motor Vehicles Act; that the Regional Transport Authority had further come to the conclusion that permits should be granted to respondent No. 14 in preference to the petitioner, because it was in the public interest to so order, and that the Appellate Committee did not see any reason to interfere with the decision of the Regional Transport Authority. Thereupon the petitioner has come to this Court under art. 226 of the Constitution.

A large number of contentions have been raised by the petitioner in the.

petition before us; but the contentions which were pressed before us in argument by Mr. Jaisingani on behalf of the petitioner are as follows: (1) That the provisions of Chap. IVA could alone be resorted to by a State Transport Undertaking, if it was desirous of operating a stage carriage service in any area, and that it was not open to the State Transport to make an application for grant of a permit under s. 47 of the Motor Vehicles Act, which section falls in Chap. IV of the Act. (2) While deciding the question as to who should be granted a permit, the Regional Transport Authority and the Appellate Committee of the State Transport Authority must confine themselves to the considerations set out in s. 47 of the Act, and that it is not open to any authority exercising its powers under the Motor Vehicles Act to grant a permit to a State Transport because of the policy of nationalisation, which is accepted by the State, or because of any instructions given to it by circulars received from the Government. (3) That the Regional Transport Authority erred in dealing with the applications of the petitioner and that of respondent No. 14 separately, even though at its earlier meeting it had decided to hear both the applications simultaneously.

Along with this petition we also heard two others: Spl. C.A. 3673/58 and Spl. C.A. 15/59. In both these petitions permits have been granted to the B.E.S.T. Undertaking for establishing its services along certain routes within the limits of Greater Bombay. The petitioners in these two petitions had also applied for permits to operate the services along the same routes. It may be mentioned that each of the petitioners was operating these services at the date of his application and that each of them is operating those services even now, by virtue of an injunction issued by this Court. The only point raised in these petitions by Mr. Hegde is that the B.E.S.T. Undertaking was incompetent to apply for permits under s. 47 of the Motor Vehicles Act, and that unless it prepared a scheme under the provisions of Chap. IVA of the Act and such scheme had been approved by the Government, it could not seek to obtain permits nor could it be granted permits by the Regional Transport Authority.

The argument that State Transport as well as the B.E.S.T. Undertaking will be incompetent to make an application under s. 47 of the Motor Vehicles Act is based on the fact that by Act 100 of 1956 the Motor Vehicles Act was considerably amended. Amongst other things, special provisions relating to State Transport Undertakings were incorporated therein by the addition of Chap. IVA. Mr. Jaisingani contended strenuously that the Legislature has clearly excluded the operation of the provisions of Chap. IV of the Act in so far as the State Transport and Municipal Undertakings are concerned, and, in this connection, he relied upon the provisions of s. 68B of the Act. He also relied upon the general principle that where a statute makes a special provision regarding a particular matter, then the general provisions contained therein must give way to those special provisions.

Mr. Hegde contended that where only one object is intended to be secured to a person by any law, the provisions of that law must not be construed in such a way as to entitle that person to achieve that object in two ways. He further contended that the word 'otherwise' occurring in s. 68C after the words "whether to the exclusion, complete or partial, of other persons or" clearly shows that an application of the State Transport Corporation for a permit, even in circumstances not involving the creation of a monopoly, must conform to the provisions of s. 68C. Further, according to him, the provisions of s. 68F(2) would be meaningless, if where a State Transport Corporation merely wants to establish a service along a particular route, it can resort to provisions of s. 47, and that it is not necessary for it to obtain such a permit under Chap. IVA of the Act.

We may refer at the outset to the history of the legislation regarding the operation of transport services of the States and nationalisation of transport services. As long ago as in the year 1936 the Government of Bombay had contemplated nationalisation of all transport services. With a view to achieve it, instructions were given to the Regional Transport Authorities, as has been pointed out by

Chagla C.J. in *Dhulia-Nardhana Motor Owners Union v. The State of Bombay*,¹ to intimate all private operators of buses who held regular permits that such permits will not be renewed, but only temporary permits would be issued from time to time. The object of this was to ensure that at a given point of time the whole motor transport in the State of Bombay would be nationalised. That policy was abandoned, and a new policy was formed. That policy was to create a State Corporation, and leave it to that corporation to apply for permits to the Regional Transport Authority in the same manner as other operators. This corporation was to have the backing of the Government, and its function was to co-ordinate all transport services in the State. Such a corporation was set up in the year 1949. But this Court held that the corporation was not validly constituted. That was in October 1950. The corporation was however validated by the enactment of the Road Transport Corporations Act, 1950, which received the assent of the President on December 4, 1950.

After the formation of the corporation, the Regional Transport Authorities in the State started granting what is known as temporary permits for four months to a number of operators on those routes which were intended to be taken over by the State Transport Corporation. Similar things were done in other States. A number of operators in the U.P. had challenged the right of the State to operate its services. It was also contended on their behalf that the Regional Transport Authorities were being used by Government as a machine for giving effect to their policy of nationalisation, and that since the enforcement of that policy infringed the rights of the citizens conferred by art. 19(1)(g) of the Constitution, the actions of the Regional Transport Authority were unconstitutional. The whole question came up for consideration before a Full Bench of the Allahabad High Court in *Moti Lal v. Uttar Pradesh Govt.*² It was pointed out there that the State has a right to carry on a trade or business as an ordinary incident of its Governmental functions but that in exercising that right it could not act contrary to law or infringe the rights of citizens. It was further pointed out that nationalisation has two implications: (1) the State will carry on the business, and (2) that no one else will be allowed to carry it on. Where nationalisation took away from a citizen the right to carry on a business, there was infringement of the right of the citizen guaranteed by art. 19(1)(g) of the Constitution. It was further pointed out that although an executive act of the State Government may not be authorised by a legislative enactment, it will nevertheless be within the executive powers of the State if (1) it is not an act which has been assigned in the Constitution of India to other authorities, (2) it is not contrary to the provisions of any law, and (3) it does not encroach upon or otherwise infringe legal right of any member. The learned Judges also pointed out that the mere fact that the Government launched upon the policy of nationalisation of motor transport services and had put in its own buses in the field to achieve that end is not a valid consideration for the Regional Transport Authority in determining an application under s. 47.

The question as to the extent of rights enjoyed by citizens and the State to ply buses was considered by the Supreme Court in *Veerappa Pillai v. Raman and Raman Ltd.*³ There it was held that no one is entitled to a permit as of right even if he has satisfied all conditions prescribed in the Motor Vehicles Act, and that the grant of a permit is entirely within the discretion of the Transport Authority, and depends upon several other circumstances which should be taken into account.

It may be mentioned that according to the Full Bench of the Allahabad High Court the right of a citizen to the use of a highway for running stage carriages for profit, subject of course to his complying with the provisions of the Motor Vehicles Act or any other law for the time being in force, cannot

1 (1951) Special Civil Application No. 631 of 1951, decided by Chagla C.J. and Gajendragadkar J., on December 5, 1951 (Unrep.).

2 [1951] A.I.R. All. 257, F.B.

3 [1952] S.O.R. 583.

be abrogated by an executive action, even though that action was actuated by a desire to nationalise road transport. The Legislature, therefore, stepped in and amended cl. (6) of art. 19. Clause (6) of art. 19 prior to its amendment was as follows:—

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

This has now been substituted by the following:—

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(4) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(4) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

Now, by virtue of this amendment, two things are made clear. One is the right of the State or of a corporation owned or controlled by the State, to carry on a trade, business, industry or service, and the other thing is the right of the State to carry on the said trade, business, industry or service even to the exclusion of the other citizens. In other words, this provision now entitles the Legislature to make an appropriate law for creation of State monopolies. Now, since cl. (6) is a limitation on sub-cl. (g) of art. 19, it follows that the right of a citizen guaranteed by the sub-clause is subordinated to the right of the State to create a monopoly in its own favour.

Finally, we would refer to the decision of the Supreme Court in *Saghir Ahmad v. The State of U.P.*⁴ In that case, their Lordships were dealing with the provisions of the U.P. Road Transport Act of 1951, which was enacted prior to the amendment of cl. (6) of art. 19. Their Lordships laid down the following propositions in that case: (1) All public streets and roads vest in the State, but the State holds them as trustees on behalf of the public. (2) The members of the public are entitled as beneficiaries to use them as a matter of right and this right is limited only by the similar rights possessed by every other citizen to use the pathways. (3) The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally; but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied to him on the ground that the State owns the highways. (4) Within the limits imposed by State regulations any member of the public can ply motor vehicles on a public road. To that extent he can also carry on the business of transporting passengers with the aid of vehicles. (5) The guarantee in art. 19(1)(g) is attracted to the carrying on of the trade or business by the State, and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under cl. (6) of that article. (6) Article 19(6) as the result of the Constitution (First Amendment) Act, 1951, enables the State to carry on any trade or business either by itself or through corporation owned or controlled by the State to the exclusion of private citizens wholly or in part. (7)

This amendment does not, however, affect the validity of the provisions of the U.P. Road Transport Act, 1951, because it was passed prior to the amendment and must, therefore, be regarded as unconstitutional when it was so passed.

It is in the light of this history that we must examine the provisions of Chap. IV(A). The argument on behalf of the respondents is that the sole object of enacting the provisions of Chap. IV(A) was to deal with an application for grant of a permit by a State Corporation in pursuance of the scheme of nationalisation of road transport. Where the State Transport Corporation wants merely to introduce a stage carriage service along a particular route and nothing more, it is not necessary for the Corporation to resort to the provisions of Chap. IV(A) and that it can make its application under s. 47 as it used to prior to the enactment of the provisions contained in Chap. IV(A). It is pointed out on behalf of the respondents that s. 47 is wide in its terms, and enables the State or a State owned corporation to make an application for grant of a permit to the Regional Transport Authority and that if it was the intention of the Legislature, when it enacted the provisions of Chap. IV(A), to restrict the provisions of s. 47 in any way, it would have expressed that intention by making an appropriate amendment to s. 47 when it enacted the provisions of Chap. IV(A). In particular, a reference was made to the fact that s. 47 itself was amended in regard to one matter, and nothing was easier for the Legislature than to further amend s. 47 and say that the provisions contained in it will not apply to a State Transport Corporation.

Where a Legislature amends a statute, it may either abrogate or modify certain provisions therein or may add to them. Whether it has done one or the other must necessarily be ascertained in the first instance from the new provisions in the background of the old ones. If there be some doubt about the matter, the Court will have to resort to the usual canons of construction.

The heading of Chap. IV(A) is: "Special Provisions Relating to State Transport Undertakings." It is contended before us on behalf of the petitioners that the provisions contained in Chap. IV(A) are the only ones which govern the granting of permits to State Transport Undertakings. It seems to us that such an inference does not follow from the title given to the chapter. That title does not indicate that these are the only provisions which govern the grant of permits to State Transport Undertakings. It is true that the provisions of this chapter are limited to State Transport Undertakings, that is to say, they would apply only to State Transport Undertakings and to no other. But it is one thing to say this, and another to say that the Legislature by so describing the provisions intended that these are the only provisions which were to govern the grant of the permits to State Transport Undertakings. These are, as the heading would indicate, only additional provisions which relate to State Transport Undertakings, and are not the only ones which apply to such undertakings. Section 68B clearly supports this conclusion. That section reads thus:

"68B. Chapter IVA to override Chapter IV and other laws. The provisions of this Chapter and the rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in Chapter IV of this Act or in any other law for the time being in force or in any instrument having effect by virtue of any such law."

Now, if the Legislature had intended that the provisions of Chap. IV(A) could alone govern applications for permits made by State Undertakings, s. 68B would not have been worded in this manner. What it does say is that the provisions in Chap. IV or any other law which are inconsistent with the provisions of Chap. IV(A) will have to give way to the provisions of Chap. IV(A). Therefore, it is clear that the provisions of Chap. IV and also any other law for the time being in force are kept intact, but they are overridden in their application to State Transport Undertakings only to the extent of inconsistency between them and the provisions of Chap. IV-A.

A consideration of the provisions of s. 68C does, in our opinion, indicate

that those provisions govern a matter which does not clearly fall within the ambit of s. 47. We may quote that section here in extenso:

"68C. *Preparation and publication of scheme of road transport service of a State transport undertaking.* Where any State transport undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State transport undertaking, whether to the exclusion, complete or partial, of other persons or otherwise, the State transport undertaking may prepare a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed, and shall cause every such scheme to be published in the Official Gazette and also in such other manner as the State Government may direct."

The marginal note to this section shows that this section applied only to a scheme prepared by a State Transport Undertaking. Now, a scheme is something quite different from a mere application for grant of permit. Before resorting to the provisions of Chap. IV-A, the State Transport Undertaking has to form an opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that a scheme should be prepared. Now, forming an opinion of this kind is not a pre-requisite for making an application under s. 47 of the Act. This is sufficient to show that ss. 47 and 68C apply to different circumstances and not to identical ones. Mr. Hegde, however, argued that so far as road transport corporation of the State is concerned, it must always form an opinion of the kind which is referred to in s. 68C because of the objects set out in s. 3 of the Road Transport Corporations Act. According to him a State Road Transport Corporation can be constituted only for carrying on the objects which are set out in s. 3 of the Road Transport Corporations Act, 1950. These objects are identical with the matters regarding which an opinion is required to be formed by the terms of s. 68C. He further said that a State Transport Corporation being a creature of a statute can do only that which the statute entitles it to do and no more. Now, the objects with which a State Transport Corporation can be formed as set out in s. 3 are as follows: Section 3 of the Act provides that the State, having regard to—

(a) the advantages offered to the public, trade and industry by the development of road transport;

(b) the desirability of co-ordinating any form of road transport with any other form of transport;

(c) the desirability of extending and improving the facilities for road transport in any area and of providing an efficient and economical system of road transport service therein;

may establish a Road Transport Corporation.

Indeed s. 19 of the Act, which is relevant, makes the point clear. That section deals with the powers of the Corporation. Under that section, the Corporation shall have power—

(a) to operate road transport services in the State and in any extended area;

(b) to provide for any ancillary service;

(c) to provide for its employees suitable conditions of service, etc.

Certain other powers are also conferred on the Corporation, which it is not necessary to refer. This section clearly confers an unrestricted power on the State Transport Corporation to operate road transport services in the State, and that power is exercisable by the Corporation not merely in the limited cases which are dealt with in s. 68C but in all other cases.

It was then contended by Mr. Hegde that the provisions of Chap. IV-A, and in particular those of s. 68C, must by implication be deemed to exclude the provisions of s. 47, because these provisions are special provisions; while those of

s. 47 are general provisions. No doubt, the law is that where there are two sets of provisions dealing with some public matter, one section being unqualified and the other containing a qualification, effect must be given to those provisions containing qualifications. But for this principle to apply, the general and the special provisions must be applicable to the same set of circumstances. Where the general principles deal with one set of circumstance and the special provisions deal with another set of circumstance, the latter provisions will apply only where those other circumstances exist. Now, I have already stated that s. 68C contemplates the preparation of a scheme by the Corporation, and it is only when such a scheme is decided upon that the provisions of that section apply. Where the Corporation does not prepare a scheme, clearly the provisions of s. 68C cannot be availed of. In those circumstances, the provisions of s. 47 which are wide and general in their terms could certainly be availed of by the Corporation.

It is, however, contended that s. 68C makes it obligatory upon the State Corporation, whenever it thinks of establishing a road transport service, to prepare a scheme, and that, therefore, only the provisions of s. 68C are available to the Corporation and not those of s. 47. We cannot, however, lose sight of the fact that for the application of s. 68C a certain opinion has to be formed by the State Transport Undertaking. Now, s. 68C does not in terms make it obligatory upon the Corporation to form the necessary opinion every time it intends to start a bus service. This is clear from the fact that the word used in s. 68C is 'may' and not 'shall'. The section says:

"Where any State transport undertaking is of opinion...the State transport undertaking may prepare a scheme..."

Now, the word 'may' is used in the permissive sense, and not in an imperative one, and therefore we cannot accede to the argument that every time a State Transport Undertaking contemplates starting a road transport service, it is bound to prepare a scheme. After all a scheme is something which is generally elaborate and intricate. It takes time to prepare a scheme, and then the sanction of the Government has to be obtained as referred to. Objections are invited from persons affected by this scheme, and it is only after considering these objections that the Government sanctions the scheme. The procedure prescribed in Chap. IV-A being in itself elaborate, we cannot assume that the Legislature intended that such a procedure had to be followed in each and every case where the State Transport Undertaking desires to start a bus service.

Mr. Hegde then referred us to the use of the word 'otherwise' in s. 68C, after the words "whether to the exclusion, complete or partial, of other persons or", and said that the word 'otherwise' is used to cover a case of an application made by a State Transport Undertaking for running a bus service without excluding any other operator. In other words, his argument is that even where the State Transport Undertaking did not seek a monopoly over a route, it had to comply with the provisions of s. 68C. In our opinion, the word 'otherwise' was used to cover a case which did not seek the exclusion of any other person either completely or partially as a result of the operation of the scheme prepared by the State Road Transport Undertaking and that it was not intended to cover a case of the kind indicated by Mr. Hegde. We can conceive of a case where a State Transport Undertaking has prepared a scheme for co-ordinated road transport service in a territory where no road transport service at all exists. In such a case, the scheme may seek to exclude other persons, either wholly or partly, or it may not want to exclude them at all. Now, a case of the latter kind could not be covered by the expression "whether to the exclusion, complete or partial, of other persons". To cover such a case it was necessary to add the word 'otherwise'. As we have pointed out, this expression is similar to that which has been used by the Legislature in the amended cl. (6) of art. 19, and has probably been copied therefrom by the Legislature by way of caution.

It was contended by Mr. Hegde that the fact that s. 68F(2)(a) confers a discretion on the Regional Transport Authority to refuse to entertain any application for renewal of any other permit, or to cancel the existing permit or to modify the terms of any existing permit, clearly shows that even an ordinary application by the State Transport Undertaking for grant of a permit to run its buses on a particular route must be made under Chap. IV-A. In our opinion, no such inference can be drawn from this provision. In the first place, as the opening words of the sub-s. (2) show, the Regional Transport Authority is required to give effect to the approved scheme in respect of a notified area or a notified route. The powers given by cls. (a), (b) and (c) of that sub-section are intended to be used only in that connection. Sub-section (1) of s. 68F provides that after a scheme made by the State Transport Undertaking is approved by the State Government, the Regional Transport Authority has no option but to issue a stage carriage permit to the State Transport Undertaking. The opening words of sub-s. (2) show that the Regional Transport Authority is required to give effect to the approved scheme. Now, in the scheme as approved by the Government, there may be a provision regarding the exclusion of other operators from the notified area or along a notified route. In such a case, the Regional Transport Authority, which is bound to give full effect to the scheme, must refuse to entertain any application for renewal of any other permit, or cancel an existing permit, as the provisions of the scheme may require. Where, on the other hand, the scheme does not seek to exclude any other person, either wholly or partially, the Regional Transport Authority may entertain other applications for renewal of permit or may modify the terms of an existing permit. It is to be borne in mind that this sub-section does not refer to a new application made by any person for grant of a permit, and it, at least in this respect, does not overlap the provisions of s. 47.

For all these reasons, we are of opinion that the provisions of Chap. IV-A do not touch the same matter as is dealt with in s. 47.

Now, under s. 47 the State Transport Undertaking used to be granted permits before the enactment of Chap. IV-A, because the language of that section is wide enough to enable a State Transport Undertaking to make an application thereunder. This section does not deal with schemes at all, whereas Chap. IV-A does. It would follow therefrom that the amendment made by the Legislature in the Motor Vehicles Act by enacting the provisions of Chap. IV-A merely added to the rights of a State Transport Undertaking. The right conferred by this chapter is to run bus services by excluding wholly or partially other operators. This right is quite distinct from the right of the State Transport Undertaking to institute its bus service in competition with other operators.

It is argued by Mr. Hegde that if after the amendment of the Motor Vehicles Act it was intended that s. 47 should also apply to a State Transport Undertaking, a provision would have been made therein for according preferential treatment to such an undertaking, *vis-a-vis* an individual owner, as has been done in respect of co-operative societies. It is true that the proviso to sub-s. (1) of s. 47 does accord a preferential treatment to the co-operative society over an individual owner; but that may be because the Legislature thought it fit to give encouragement to a co-operative endeavour. It seems that the Legislature did not think that in view of the provisions of Chap. IV-A, whereunder a State Transport Undertaking was enabled to secure a partial monopoly, there was any need to give it any further preferential treatment where it entered the field along with individual owners.

Upon this view, we hold that the application for a permit made by the State Transport Undertaking was maintainable. What we have said would also apply to the applications made by the B.E.S.T. Undertaking, because that undertaking falls within the definition of State Transport Undertaking contained in s. 68A of the Motor Vehicles Act.

Though the petitions fail on this point, there are other grounds on which we must allow these petitions. Now, in regard to Special C.A. No. 33 of 1959,

we have already said that Mr. Jaisingani had contended that the application of the petitioner was rejected on a ground which does not arise out of the circumstances set out in s. 47 of the Act and that, therefore, his application for a permit should be granted and the permit granted to respondent No. 14 should be cancelled. It may be remembered that the Regional Transport Authority had decided at the meeting held on July 4, 1958, to deal with the applications of the petitioner and of respondent No. 14 together. Though both those applications were considered at the same meeting, they were not taken up simultaneously but one after the other. This was itself improper, because the comparative merits of the petitioners, and respondent No. 14, were not considered, and indeed could not be considered, by the Regional Transport Authority. Fresh permits were granted to respondent No. 14 on the following grounds:

"Having regard to clauses (a), (b), (d) and (e) of sec. 47 of the Motor Vehicles Act, 1939, it was decided unanimously to grant fresh permits to the State Transport, Marathwada, to operate Stage Carriage services on the following routes valid from 2-10-1958..."

Now, it does not appear that when the Regional Transport Authority came to this conclusion it had considered the question as to whether the petitioner was also in a position to satisfy the requirements of this very clause, and whether what the petitioner was able to do was something better or inferior to that which respondent No. 14 was able to do. The petitioner's application was dismissed on the following grounds:

"The application of the Parbhani Transport Co-operative Society Ltd., for renewal of the permits held by them was rejected by a majority vote because it has been decided to grant permits to the State Transport. Two of the members did not agree with the majority decision and desired it should be recorded that they were in favour of renewal of the permits held by the Parbhani Transport Co-operative Society, on the following grounds:—

(1) As the Co-operative transport Societies in Saurashtra were being excluded from the scope of nationalisation of bus transport there should not be any discrimination against the Parbhani Transport Co-operative Society in Marathwada, which like Saurashtra, had recently integrated with Bombay State.

(2) The Parbhani Transport Co-operative Society was established with the encouragement of Government; their operation has so far been quite successful, satisfactory and in accordance with the requirements of law.

(3) The Society was rendering public service and it was therefore desirable that they should be afforded an opportunity to render greater public service."

It would thus appear that what was on the top of the mind of the Regional Transport Authority when he preferred the application of respondent No. 14 to that of the petitioner was the policy of nationalisation of road transport which has been decided upon by the Government, and that it was for this reason that the Regional Transport Authority followed this peculiar procedure. The petitioner has stated in para. 7 of the petition:

"In the said meeting (meeting of 4-7-58) the Divisional Controller on behalf of the said State Transport Authority submitted that the permit be granted to the said State Transport 'in pursuance of the policy of extension of nationalised services'. In the said meeting the Divisional Controller on behalf of the said Transport further submitted that it was the policy of the Government of Bombay that the State Transport undertaking may 'take over routes operated by co-operative societies from the date of expiry of the permit.' The said Controller further submitted that 'in the pre-organised State of Bombay, the Regional Transport Authorities had cancelled permits to similar co-operative societies and issued the same to the State Transport.'"

This statement has been accepted by Mr. Deshmukh in para. 8 of his affidavit. We further find the following in Part II of the proceedings of the meeting of the Regional Transport Authority dated July 4, 1958:

"In arguing his case Shri Deshmukh stated that in pursuance of the policy of ex-

tension of nationalised services to areas not served by the State Transport, the application for the grant of permits on the above routes, had been submitted... He further argued that the fact that the respondent in this case happens to be a co-operative society should not be a bar to the grant of permits to the State Transport in the pre-organised State of Bombay, the Regional Transport Authorities had cancelled permits issued to similar co-operative societies and issued the same to the State Transport."

From all this and also from the fact that the application for permit made by the petitioner was rejected on the ground that the permit has already been granted to respondent No. 14 only one conclusion emerges and that is that the petitioner's application was rejected and that of respondent No. 14 was granted solely with the object of giving effect to the policy of nationalisation. Now, that is an object which is foreign to the provisions of Chap. IV of the Motor Vehicles Act, and, therefore, that cannot be a ground for granting a permit to a State Transport Undertaking and refusing one to a private undertaking. The comparative merits of both had to be considered and the applications for grant of permit had to be decided bearing the respective merits in mind.

The Appellate Committee which confirmed the decision of the Regional Transport Authority did no better. Before the Appellate Committee the argument based on the State policy of nationalisation was also advanced. There is nothing in the proceeding before us to show that this argument did not weigh with the Appellate Committee. The Appellate Committee has given no reasons for its decision, but has come to the following conclusion only:

"The Appellate Committee observed that the R.T.A. decided the question in the light of the provisions of sec. 47 of the M. V. Act. The R.T.A. came to the conclusion to grant permits to the S.T. Marathwada, unanimously and preferred the S.T. to the Society, for the operation of services on the routes in question in the public interest. The Appellate Committee, therefore, did not see any reason to interfere with the decision of the R.T.A. and were pleased to pass the following decision:—

Decision:—Heard both the parties. The stay order is vacated and the appeal is rejected."

Now, in coming to this conclusion the Appellate Committee has made two mistakes. In the first place, the decision of the Regional Transport Authority was not unanimous with respect to the petitioner's application. In the second place, the Regional Transport Authority has not said that for any particular reasons it preferred the State Transport Undertaking to the petitioner.

The petitioners in Spl. C.A. 3673/58 and 15/59 preferred Second Appeals to the State Government, but they were rejected by it. In our opinion, a second appeal did not at all lie to the State Government. These appeals were preferred by virtue of the provisions of r. 76(1A) of the rules framed by the Bombay Government and notified on August 26, 1949. That rule no doubt provides that a second appeal shall lie to the State Government against any order made by the Appellate Committee under sub-r. (1) of r. 76 framed under the rule making power conferred on the State Government by s. 68 of the Motor Vehicles Act. Under s. 68(2)(b) a State Government is empowered to make rules for the conduct and hearing of appeals that may be preferred under Chap. IV. The right of appeal is conferred by s. 64, which section as it stood at the date of the amendment read thus:

"64. Appeals.

Any person—

- (a) aggrieved by the refusal of the State or a Regional Transport Authority to grant a permit, or by any condition attached to a permit granted to him, or
- (b) aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof, or
- (c) aggrieved by the refusal to transfer the permit to the person succeeding on the death of the holder of a permit, or
- (d) aggrieved by the refusal of the State or a Regional Transport Authority to countersign a permit or by any condition attached to such countersignature, or

- (e) aggrieved by the refusal of renewal of a permit, or
- (f) being a local authority or police authority or an association which; or a person providing transport facilities, who, having opposed the grant of a permit, is aggrieved by the grant thereof or by any condition attached thereto, or
- (g) aggrieved by the refusal to grant permission under sub-section (1) or sub-section (2) of section 59, or
- (h) aggrieved by a reduction under sub-section (1A) of section 60 in the number of vehicles or routes or are covered by a permit, or
- (i) aggrieved by any other order which may be prescribed,

may, within the prescribed time and in the prescribed manner, appeal to the prescribed authority who shall give such person and the original authority an opportunity of being heard."

It would appear from the section that only one appeal is contemplated by it, and that appeal is from the original order made by any authority referred to in s. 47. Therefore, the rules framed by the State Government under s. 68 had to confine themselves to the appeals contemplated by s. 64. It was clearly beyond the powers of the State Government to make a rule providing for a second appeal when the Act itself provided for one appeal only. Section 68 has since been amended, but since sub-r. (1A) of r. 76 was made prior to the amendment, it is not necessary for us to consider whether a second appeal can be provided by the rules now. The addition of sub-r. (1A) when it was made was beyond the powers of the State Government, and, therefore, it never had any validity in law. What was invalid when made cannot be validated subsequently unless the Legislature intends to do so expressly or by necessary implication. There is nothing to show that the Legislature intended to do anything of the kind in regard to r. (1A). We, therefore, hold that the appeal to the State Government was incompetent. However, that makes no difference to the case of the petitioner.

The position, therefore, would be; In Spl. C.A. 33/59 we quash the orders of the Regional Transport Authority and the Appellate Committee and send the matter back to the Regional Transport Authority with the direction that it should consider the applications of the petitioner as well as respondent No. 14 simultaneously and decide them on merits.

Now, as regards the other two petitions, the position is that by virtue of the facts referred to by the petitioner before the State Government, the matters are directed to go back to the Regional Transport Authority. Since in our opinion no appeals lay to the State Government, the orders made in appeal against both the petitioners in second appeal are in effect bad. We, however, agree with the petitioners that the comparative merits of the petitioner's claims and those of the B.E.S.T. Undertaking have not been considered by the Regional Transport Authority and that it is necessary for the Regional Transport Authority to apply its mind to them. It may be mentioned that the petitioners' applications were rejected by the Regional Transport Authority and the petitioners' complaint is that the rejection of those applications was based on certain information which the Regional Transport Authority had obtained from certain sources. Now, the petitioners' petitions were not heard with respect to this matter at all, when the Regional Transport Authority decided to take that information into consideration. The petitioners' appeals from the decision of the Regional Transport Authority were rejected by the Appellate Committee. Second Appeals preferred by the petitioners against the decision of the Regional Transport Authority rejecting their applications are still pending with the State Government. It is rather strange that though these second appeals were preferred by the petitioners long before their appeals against the order granting a permit to the B.E.S.T., the latter have been decided but the former have not been decided yet. It is, however, not necessary for us to make any directions regarding this as these appeals are not competent. We leave it open to the petitioners to make appropriate applications to this Court, if so advised, by February 23. If the petitioners move this Court within this time, we would

consider the issue of further directions to the Regional Transport Authority. We quash the orders of the State Government, the Appellate Committee and also the Regional Transport Authority. The costs of these petitions will be borne by the respondents.

Order accordingly.

INCOME TAX REFERENCE.

Before Mr. Justice Shah and Mr. Justice S. T. Desai.

P. H. DIVECHA v. THE COMMISSIONER OF INCOME-TAX,
BOMBAY CITY, BOMBAY.*

Indian Income-tax Act (XI of 1922), Sec. 4(3)(vii)—Manufacturing company agreeing to sell certain electrical goods only to firm doing business in electrical goods and firm undertaking not to deal in any competing business in such goods—Agreement determined by notice served by company and firm continuing its original business in electrical goods—Compensation paid by company to partners of firm for apprehended loss to firm by determination of agreement—Amount of such compensation received by partners, capital receipt or revenue receipt—Whether monopoly rights under agreement constitute asset of firm—Such amount whether exempted under s. 4(3)(vii).

Under an agreement a manufacturing company agreed to sell their electric lamps only through a partnership firm, which was doing business in electrical goods and as commission agents, in a specified territory and the firm in its turn undertook not to sell the lamps sold to it to any one outside the territory nor to deal in any competing business in electric lamps. This agreement was determined by notice served by the company on the firm. The firm continued to carry on its original business in electric goods including electric lamps and could sell the company's lamps as regular lamp dealers. The company "as a gesture of goodwill" offered to compensate for the loss which it was apprehended would be caused to the firm by agreeing to pay a certain amount per annum to each of the partners for a period of three years and this compensation was expressly designated "three years remuneration". On the questions whether the amount so received by each of the partners was a taxable receipt for the purpose of the Indian Income-tax Act, 1922, and if so, whether it was liable to be not included in the total income of the recipient by reason of s. 4(3)(vii) of the Act:—

Held, that as the monopoly rights under the agreement did not constitute an asset, the extinction of those rights did not affect the conduct of the business of the firm and, therefore, the compensation paid for extinguishing the rights cannot be regarded as a capital asset, and the receipt of the amount was a taxable receipt for the purpose of the Act, and

that the amount being receipt arising from business, has to be included in the total income notwithstanding s. 4 of the Act.

*Commr. of Inc.-tax v. Vastir Sultan & Sons,*¹ *Bush, Beach & Gent, Ltd. v. Road* (H. M. Inspector of Taxes),² *John Smith & Son v. Moore* (H. M. Inspector of Taxes),³ *Commr. I.T. v. Asiatic Textile Co., Ltd.*,⁴ *H. S. Captain v. Commr. of Inc.-tax*⁵ and *Van Den Berghs Limited v. Clark* (H. M. Inspector of Taxes)⁶, referred to.

THE facts are stated in the judgment.

N. A. Palkhivala, with S. P. Mehta and B. A. Palkhivala, for the assessee.
G. N. Joshi, with R. J. Joshi, for the Commissioner.

SHAH J. This Reference raises the vexed question whether certain amounts received by the assessee are capital receipts or revenue receipts. Elaborate

*Decided, June 23, 1959. Income-tax Reference No. 51 of 1958.

1 (1959) 36 I.T.R. 175.

2 (1939) 22 T.O. 519.

3 (1930) 12 T.O. 266.

4 (1954) 57 Bom. L.R. 105.

5 (1959) 36 I.T.R. 84.

6 (1934) 19 T.O. 390.

arguments have been advanced before us by Mr. Palkhivala for the assessee in support of the plea that the amounts received by the assessee were capital receipts and not liable to tax and he has invited our attention to several decisions of the Supreme Court as well as of other Courts. Before we refer to the arguments advanced at the Bar, we may set out the facts which give rise to this Reference.

Prior to the year 1938, three persons, Jehangir A. Irani, Pirojsha H. Divecha and Khurshed A. Irani were conducting in partnership a business in "electrical goods" and as commission agents and merchants in the name and style of "Precious Electric Co." The duration of the partnership was initially limited to a certain period but was from time to time renewed. Jehangir A. Irani died on August 22, 1942, and in his place his son Noshir J. Irani was admitted to the partnership. In June 1938, the three partners of Precious Electric Co. entered into an agreement with Philips Electrical Co. (India) Ltd. (which will hereafter be referred to as "Philips"). Under that agreement, the Precious Electric Co. (which will be hereafter referred to as "the firm") was given the monopoly rights to sell electric lamps manufactured by Philips in the Bombay Presidency, Rajputana, Central India, Central Provinces and the Berars. By cl. 2 of the agreement, Philips undertook to deliver lamps of their manufacture, for sale in that territory exclusively to the firm. If any buyer refused to purchase lamps from the firm, Philips had the right to supply such buyers directly allowing compensation to the firm at the rate of 5 per cent. on the net amount of invoice. By cl. 3, the firm undertook only to sell lamps as were supplied to them by Philips and to sell the lamps supplied to them only in that territory and to do "everything possible to prevent their re-exportation by third parties". By cl. 7, the firm undertook to promote the sales of lamps in the territory always according to the directions given by Philips and in no way whatever to act against their interests and not to sell during the continuance of the agreement either directly or indirectly lamps other than Philips lamps and to refrain from doing any business, "either directly or indirectly", in articles competing with Philips articles and "not to support and/or to participate in, either directly or indirectly, competing firms in any way". By cl. 4, the firm undertook in reselling lamps purchased from Philips, not to deviate under any circumstances, either directly or indirectly from the prices, rebates, selling terms and/or conditions as established by Philips. By cl. 6 right was reserved to Philips to refuse orders and/or cancel or to suspend deliveries for any reason whatsoever and in case of such cancellation, cessation or suspension of deliveries the firm was not to receive any compensation. By cl. 8, it was provided that the firm was to buy and sell Philips lamps on their own account and at their own risk and that the lamps were to be purchased by the firm at prices and on conditions which from time to time may be communicated to them by Philips. Authority was reserved to Philips to refuse delivery or to cancel orders in the event of the firm being in arrears. By cl. 12, the agreement was deemed to have come in force from July 1, 1938, and was to "continue unless determined by either party giving to the other 3 months' prior notice...of such party's intention to determine the agreement on the 30th of June, 1939 or any subsequent 30th of June".

Under this agreement, till August 21, 1942, the three original partners carried on the business of the firm. After the death of Jehangir A. Irani, his son Noshir was admitted as a partner in the firm. Early in the year 1954, Philips decided to reorganise its selling organisation in India and to open a branch in Bombay with a view to taking over the distribution of lamps. On March 8, 1954, Philips served a notice upon the firm terminating the agreement of June 28, 1938, as from June 30, 1954. By that notice, the firm was informed that it was intended to terminate the agreement as from June 30, 1954, and that the notice shall be considered as the official notice of termination of the existing agreement in accordance with cl. 12 thereof, and that it

was intended to substitute a new agreement to be called the "New Lamp Agreement" a draft whereof was appended to the letter. After this notice was received by the firm, meetings were held on May 28, 1954, and May 29, 1954, between their representatives and the representatives of Philips. It was agreed at the meetings that after June 28, 1954—the date on which the existing agreement expired—there will be no substitution of a new agreement about distribution of lamps and that with effect from that date, Philips Bombay branch will take over the distribution of lamps. There were negotiations then about the period of transition and certain terms were agreed upon, which are not material. Arrangement was also made about the disposal of the stocks held by the firm. The question of compensation was then discussed and the terms finally agreed upon were recorded as follows:

"Miscellaneous: As a gesture of goodwill, Messrs Philips are prepared to pay in quarterly instalments to each of the three partners during a period of three years, Rs. 40,000 per annum from the date of the expiry of the existing contract. The three partners referred to above as far as Messrs Philips Electrical Co. understand are:—

1. Mr. Phirojsha H. Divecha.
2. Mr. Khurshedji A. Irani.
3. Mr. Noshir J. Irani.

Finally, Mr. Van Rijn stated that Messrs Philips are quite willing to continue Messrs Precious as regular lamp dealers and the profit they realise therefrom will be in addition to the three years' remuneration referred to above."

The minutes of the meeting which recorded the terms of the settlement were signed on behalf of Philips and they were seen and approved on behalf of the firm.

In the account year 1954-55 each partner received Rs. 20,000 in two quarterly instalments under the terms of the settlement whereby the original agreement of the year 1938 was terminated. The Income-tax Officer brought to tax the amounts of Rs. 20,000 received by each of the three partners. Separate appeals were preferred by the three partners to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner confirmed the order passed by the Income-tax Officer. The order of assessment was then taken in appeal at the instance of two partners—P. M. Divecha and K. A. Irani—to the Income-tax Appellate Tribunal. The Tribunal held that the amount of Rs. 20,000 received by each of the assesseees was taxable as revenue receipt. The Tribunal negatived the contention raised for the assesseees that the payment was compensation paid for termination of the agreement which constituted the "frame work of the company's business". They observed that the payment was not an *ex gratia* payment "by way of testimonial" and that it was unnecessary to express their opinion upon the question whether payments made to individual partners did not represent receipt in the course of the company's business.

In this Reference, the Tribunal have, at the instance of the assesseees, referred the following three questions:

(i) Whether the receipt of Rs. 20,000 is a taxable receipt for the purpose of the Indian Income-tax Act?

(ii) If so, is it liable to be not included in the total income of the recipient by reason of s. 4(3)(vi)?

(iii) Does the said receipt fall within the mischief of s. 10(5A)(d) and as such liable to tax accordingly?

The agreement of the year 1938 brought into existence what may loosely be called a right of monopoly purchase. Under this agreement, Philips undertook to sell to the firm (and to no other person) lamps for sale in the territory specified in the agreement and the firm in its turn undertook to advance the business of Philips in electric lamps and not to sell during the subsistence of the agreement either directly or indirectly any lamps other than Philips lamps and not to sell those lamps outside the territory assigned. The relation between Philips and the company was evidently of principal and principal and

not of principal and agent. The substance of the agreement was that Philips agreed to sell their electric lamps only through the firm in the assigned territory and the firm in its turn undertook not to sell the lamps sold to them to any one outside the territory nor to deal in any competing business in electric lamps. This agreement was determined by notice served on March 8, 1954. Even before the date of the agreement, the partners of the firm were carrying on business in electric lamps and other electric goods, and that business was continued after the agreement, but the firm acquired their stock-in-trade under a special agreement on favourable terms which ruled out competition in respect of one of the lines of their business. In the territory assigned to the firm, by the termination of the agreement in the year 1954, the business of the firm was not destroyed. The firm continued to carry on its original business in electric goods including electric lamps, and even Philips lamps could be sold by the firm as "regular lamp dealers". In substance the alteration made by the agreement of May 29, 1954, was that the firm lost its rights as monopoly purchasers for the assigned territory and became regular dealers in lamps without any obligation not to deal in any other competing brand of lamps and "as a gesture of goodwill" Philips offered to compensate for the loss, which it was apprehended may be caused to the firm, by agreeing to pay them Rs. 40,000 per annum to each of the partners for a period of three years and this compensation was expressly designated "three years' remuneration".

It is urged by Mr. Palkhivala that this amount was in the nature of capital payment to the partners of the firm. It is urged that the monopoly rights conferred by the agreement of the year 1938 were, by the notice and the subsequent agreement of May 29, 1954, withdrawn. That is, by the notice the very source of the business of the firm was extinguished, the profit making apparatus of the firm was destroyed, their assets became sterilised, and any payment made, to compensate for the loss of the rights, must be regarded as capital payment. We are unable to agree with the contention raised by Mr. Palkhivala that, by the notice dated March 8, 1954, and the subsequent agreement between Philips and the firm on May 29, 1954, any attempt either to sterilise the assets of the firm or to destroy the profit making apparatus of the firm's business was intended. The firm's original business before the year 1938 was in electrical goods including electric lamps, and even after the agreement dated June 28, 1938, the same business was continued. There is also no doubt that after May 29, 1954, the same business and in the same line was carried on by the firm. Whereas under the agreement dated June 28, 1938, the firm was obtaining a part of its stock-in-trade on specially favourable terms which simultaneously ruled out competition in the territory assigned by the agreement, after May 29, 1954, the favourable terms on which the lamps were obtained ceased to be available to the firm and the firm without any obligation not to carry on any competing line of business in lamps became a regular lamp dealer. By such an arrangement, we are unable to hold that the "profit making apparatus" of the assessee's business was destroyed. We are of the view that by the agreement which created monopoly rights a specially favourable method of acquiring stock-in-trade of the firm was designed, and if that method was substituted by an agreement less favourable, thereby the compensation paid could not be regarded as a capital asset.

Mr. Palkhivala has strongly relied upon the judgment of their Lordships of the Supreme Court in *Commr. of Inc.-tax v. Vazir Sultan & Sons*.¹ We have carefully considered the facts of that case and the observation made by their Lordships and we have no doubt that the principle of that case has no application to the facts of the present case. In that case, originally the assessee company was appointed the sole selling agent and sole distributor of a brand of cigarettes for the Hyderabad State and was allowed a discount of 2 per cent. on the gross selling price. In 1939 another arrangement was made between the assessee and the manufacturers whereby the assessee was allowed a discount of 2 per cent.

¹ (1959) 86 I.T.R. 175.

not only on the goods sold in the Hyderabad State but also on all goods sold outside the Hyderabad State. In 1950, the assessee and the company by mutual agreement reverted to the old arrangement in force prior to the year 1939 and the manufacturing company paid to the assessee a sum of Rs. 2,19,343 "by way of compensation" for the loss of agency for the territory outside the Hyderabad State. A question then arose whether the amount paid was a revenue receipt assessable to income-tax. In delivering his judgment Mr. Justice Bhagwati (with whom Mr. Justice Sinha agreed) held that the agency agreement in respect of the territory outside the Hyderabad State was as much an asset of the assessee's business as the agency business within the Hyderabad State and though the expansion of the territory of the agency in 1939 and the restriction thereof in 1950 could be treated as grant of additional territory in 1939 and withdrawal thereof in 1950, both those agency agreements constituted but one employment of the assessee as the sole selling agent of the manufacturers and, therefore, the agency agreements were not in the conduct of their business by the assessee but formed the capital assets of the assessee's business which was exploited by entering into contracts with various customers and dealers in the respective territories. In the view of their Lordships, it formed part of the fixed capital of the assessee's business and was not the circulating capital or stock-in-trade of their business and payment made by the company as and by way of compensation for terminating or cancelling the agreement was a capital receipt. With this view Mr. Justice Kapoor disagreed. It is pertinent to note that, in the majority view, the sole selling agents' rights before the year 1939 and after the year 1939 were an asset of the assessee, in the nature of a fixed capital of the assessee's business and for loss of a part thereof, the compensation received was a capital receipt. At p. 185 of the report, after considering cases cited at the bar, their Lordships observed:

"The position as it emerges on a consideration of these authorities may now be summarised. The first question to consider would be whether the agency agreement in question for cancellation of which the payment was received by the assessee was a capital asset of the assessee's business, constituted its profit-making apparatus and was in the nature of its fixed capital or was a trading asset or circulating capital or stock-in-trade of his business. If it was the former the payment received would be undoubtedly a capital receipt; if, however, the same was entered into by the assessee in the ordinary course of business and for the purpose of carrying on that business, it would fall into the latter category and the compensation or payment received for its cancellation would merely be an adjustment made in the ordinary course of business of the relation between the parties and would constitute a trading or a revenue receipt and not a capital receipt."

Applying the test set out, we have no doubt that on the facts of the present case the contract of the year 1938 between the firm and Philips and the modification thereof in the year 1954 were made in the ordinary course of business of the assessee as dealers in electric goods and for the purpose of carrying on their business; and compensation paid for withdrawing the benefits conferred by the agreement of the year 1938 constituted a trading or revenue receipt and not a capital receipt. In truth the benefit conferred upon the firm by the agreement of the year 1938 did not constitute a trading asset and the modification thereof did not extinguish the whole or a part of the trading assets. The initial contract was one in the ordinary course of business and the modification of the same was also in the ordinary course of business of the firm as dealers in electric goods. The circumstance that the contract of the year 1938 was one which enabled the firm to purchase its requirements of electric lamps on favourable terms does not, in our judgment, make that contract anyhow a contract made in the ordinary course of business nor does the modification of that contract amount to one otherwise than in the ordinary course of business.

We may refer to the cases cited at the Bar in which the Courts were called upon to ascertain whether a certain payment made was in truth a capital

receipt or revenue receipt. We may at once observe that no definite tests of universal application can be evolved or have been attempted to be evolved nor any infallible criterion can be or has been laid down which can be helpful in indicating the considerations which may relevantly be borne in mind in approaching the problem. The cases, which we shall presently refer to, abundantly show that no criterion or test is of universal or general application.

In *Bush, Beach & Gent, Ltd. v. Road (H. M. Inspector of Taxes)*,² the assessee was an incorporated company which carried on its business in industrial chemicals. In 1933 the assessee company entered into a contract for purchasing certain agricultural chemicals. The contract whereby the right to deal in agricultural chemicals was acquired conferred monopoly rights, i.e. the assessee was to sell the chemicals in certain specified areas and the suppliers undertook to debar their other customers from selling the same in those areas. For the purpose of these contracts, the assessee set up a new and independent sales organisation. Thereafter, the contract was terminated by agreement in the year 1935 and the assessee company received £4,750 out of which £3,000 were attributable to the year of assessment as compensation for termination of the agreement. It was held that the cancellation of the contract did not affect the structure of the company's business of chemical merchants and that the contract was made in the ordinary course of business and that the payment was made in consideration of the loss of profits which would have been earned under the contract. It was observed in that case that the sum paid to the assessee represented not the price of the contract itself, but profits which they might have made under the contract, and that the contract was made in the ordinary course of the company's business, although in a new field and the exclusion of competition was an ordinary incident of such contracts. The arrangement whereby the contract was terminated being in the ordinary course of the company's business, compensation paid as consideration for agreeing to that arrangement was revenue payment.

In *John Smith & Son v. Moore (H. M. Inspector of Taxes)*,³ the question which fell to be determined was whether the amount paid for purchasing the rights from the executors of the assessee's father's will under certain unexpired "coal contracts" was an admissible deduction in computing the profits for the purpose of Excess Profits Tax and it was held by the House of Lords (Viscount Finlay L.J. dissenting) that the expenditure was a capital expenditure. In that case, the question was decided on the view that the contracts for purchasing coal were the assets of the estate of the deceased and the price paid for purchasing the unexpired contracts was capital expenditure. There is nothing in this judgment which supports the view that the contract of the year 1938 in this case between the firm and Philips could be regarded as an asset, the consideration for extinguishing which may make the consideration a capital receipt.

Our attention was also invited to *Comr. I.T. v. Asiatic Textile Co., Ltd.*,⁴ where to the assessee compensation was paid for termination of the managing agency agreement for a period of 20 years, and it was held by this Court that the amount received by the managing agents as solatium for the termination of the managing agency could not be profits arising out of their business but constituted only a capital receipt. But even in that case, the Court regarded the managing agency as an asset and the compensation paid for extinction of that asset a capital payment. Mr. Palkhivala placed great reliance upon the fact that beside being managing agents, the assessees were brokers, muddadams and selling agents of the company and by the termination of the managing agency agreement, their authority as brokers, muddadams and selling agents was not extinguished. We fail to see how that circumstance may alter the nature of the managing agency agreement. If the benefit of the managing agency was an asset, the circumstance that *quoad* the company, of which the assesseees

² (1939) 22 T.C. 519.

³ (1930) 12 T.C. 266.

⁴ (1954) 57 Bom. L.R. 105.

were the managing agents, the assessee had certain other contractual rights which were not extinguished by the termination of the managing agency will not make the benefit under the managing agency anytheless an asset.

The case in *H. S. Captain v. Commr. of Inc.-tax*,⁵ on which reliance was also sought to be placed by Mr. Palkhivala has in our judgment no application. The question in that case which fell to be determined was whether an amount of money paid to the assessee for termination of his employment was covered by the terms of s. 7(1), Explanation 2, of the Income-tax Act and the Court held that the amount received by the assessee as compensation for loss of employment fell within Explanation 2 of s. 7(1) and was not, therefore, taxable.

Nor does the case of *Van Den Berghs Limited v. Clark*, (*H. M. Inspector of Taxes*),⁶ on which reliance was sought to be placed by Mr. Palkhivala, affect our conclusion. That was a case in which two companies, which were competitors, entered into an arrangement for a certain number of years for pooling and sharing profits under an elaborate scheme to promote their mutual commercial, pecuniary and other interests. One of the companies then agreed to a premature termination of the agreement as desired by the other company on receiving a sum of £450,000 as compensation: and it was held that this sum was a capital receipt and not income. The agreement far from being one made in the ordinary course of business provided a fundamental organization of the company's activities and affected the entire conduct of the assessee's business and, therefore, the receipt under the agreement terminating the arrangement was a capital receipt. If, however, we are of the view that the monopoly rights under the contract of the year 1938 do not constitute an asset, the extinction of those rights does not affect the conduct of the business of the assessee, or as it was called by Mr. Palkhivala, the "profit-making apparatus of the assessee's business" and if it is merely a contract entered into in the ordinary course of business, *Van Den Bergh's* case will have no application.

On the view taken by us, the first question will be answered as follows:

"The receipt of Rs. 20,000 is a taxable receipt for the purpose of the Indian Income-tax Act, 1922."

As we have already held that the amount is a taxable receipt, being receipt arising from business, s. 4(3)(vi) does not exempt it from liability to tax. We are in the view we have taken not called upon to consider whether even if the receipt of Rs. 20,000 is a capital receipt, by operation of s. 10(5A)(d) the amount can be regarded as a revenue receipt. We answer the second question as follows:

It is liable to be included in the total income notwithstanding s. 4 because it arose from business.

The third question does not fall to be answered.

The assessee to pay the costs of the Commissioner.

Solicitor for the assessee: *S. P. Mehta*.

Solicitor for the Commissioner: *P. G. Gokhale*.

APPELLATE CIVIL.

Before Mr. Justice Gokhale and Mr. Justice Tarkunde.

LAXMAN DHULSHET NARAYANPURE v. GANPAT NATA SHETE.*

Bombay Money-lenders Act (Bom. XXXI of 1947), Sec. 24—Court-fees Act (VII of 1870), Sch. II, item 17(vii)—Civil Procedure Code (Act V of 1908), Secs. 2(2), 47, 104; O. XLIII, O. XX, rr. 12, 11(2)—Whether order under s. 24 of Bom. Act XXXI of 1947 appealable—Proper Court-fee leviable on memorandum of appeal from such order.

An order under s. 24 of the Bombay Money-lenders Act, 1946, granting or refusing to grant instalments for the payment of the amount decreed, is appealable as a decree. The proper Court-fee to be levied on a memorandum of appeal from such an order would be the Court-fee mentioned in Sch. II, item 17(vii), of the Court-fees Act, 1870, as amended in the Bombay State.

The subject-matter in dispute in such an appeal is not the amount of the decree, but the mode in which the amount is to be paid. As such, it is not possible to estimate at a money value the subject-matter in dispute.

*Zaverchand Panaji v. Mayadevi, ¹ *Bilimoria v. Central Bank of India Ltd., Bombay, ² *Promode Nath Singha Ray v. Rameshwari Dasi, ³ *Dhanukdhari Singh v. Ramratan Singh, ⁴ *Saya Hattie v. Ma Pwn Sa, ⁵ *Shree Jagruteshwar Deosthan v. Atmaram, ⁶ and *Sitabai v. R. S. R. R. Abhyankar, ⁷ referred to.*******

V. H. Gumaste, Assistant Government Pleader, for the referor.

M. V. Paranjape and E. W. Adik, for the opponents.

TARKUNDE J. This reference has been made by the Taxing Officer under s. 5 of the Court-fees Act, and the learned Chief Justice has directed us to decide the question so raised. The question relates to the Court-fees chargeable on four appeals, each arising from an order passed under s. 24 of the Bombay Money-lenders Act, 1946. In three of the four cases, applications filed by judgment-debtors under s. 24 of the Act for making the decretal amounts payable by instalments were rejected by the Courts below. In the fourth case, the application of the judgment-debtor was partially granted and the judgment-debtor has come in appeal on the ground that the relief granted to him was inadequate. The Taxing Officer was of the view that no appeal could be filed from a decision under s. 24 of the Bombay Money-lenders Act and that the appellants in the four appeals may, if they so desired, convert the appeals into civil revision applications and that Court-fees may then be levied on that basis. The Taxing Officer, however, felt that the question involved was of general importance and hence he made this reference.

The question raised by the Taxing Officer is not free from difficulty. Section 24 of the Bombay Money-lenders Act, 1946, is in the following terms:—

"Notwithstanding anything contained in the Code of Civil Procedure, 1908, the Court may, at any time, on application of a judgment-debtor, after notice to the decree-holder, direct that the amount of any decree passed against him, whether before or after the date on which this Act comes into force, in respect of a loan, shall be paid in such number of instalments and subject to such conditions, and payable on such dates, as, having regard to the circumstances of the judgment-debtor and the amount of the decree, it considers fit."

The Bombay Money-lenders Act does not provide any appeal from an order granting or rejecting an application under s. 24. If the order is one not amounting to a decree, it is obviously not appealable, as it is not covered by s. 104 and O. XLIII of the Code of Civil Procedure. An appeal from the

*Decided, July 24/27, 1959. Civil Reference No. 3 of 1959, made by the Taxing Officer, in F. A. Stamp Nos. 12208, 12829, 12517 and 9700 of 1956.

1 (1955) 58 Bom. L.R. 619.

2 [1944] Nag. 1, r.B.

3 [1941] 2 Cal. 402.

4 (1940) I.L.R. 19 Pat. 862.

5 (1926) I.L.R. 4 Ran. 247.

6 [1943] Nag. 456.

7 [1938] Nag. 423.

order can be maintained only if the order is a "decree" as defined by s. 2(2) of the Code. That definition is in two parts. The first part defines "decree" as

"...the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

The second part of the definition includes in the term "decree" orders which may otherwise not be decrees. This part, so far as it is material, says that the term "decree" "shall be deemed to include...the determination of any question within section 47..." An order under s. 24 of the Bombay Money-lenders Act can be held to be a decree either if it determines a question relating to the execution, discharge or satisfaction of a decree under s. 47 of the Code, or if it comes within the first part of the definition of the word "decree". On behalf of the appellants in the four appeals, Mr. Paranjape and Mr. Adik urged that an order under s. 24 of the Bombay Money-lenders Act is a determination of a question within s. 47 of the Code and, alternatively, that it amounts to a decree according to the first part of the definition of that term.

We will deal first with the first of these alternative arguments. The Taxing Officer was of the view that a judgment-debtor seeking a direction under s. 24 of the Bombay Money-lenders Act seeks in effect a partial modification of the decree passed against him, and that, therefore, an order passed by the Court either allowing or rejecting his application cannot be regarded as an order relating to the execution, discharge or satisfaction of that decree. This view of the Taxing Officer assumes what undoubtedly is the general rule, namely, that an executing Court will execute a decree as it is, without any modification or qualification. Nothing, however, prevents the Legislature from modifying or qualifying the rights of decree-holders in executing the decrees passed in their favour. If the Legislature passes an enactment which limits the decretal rights of a decree-holder, the executing Court is bound to execute the decree subject to the limitations so placed by the Legislature. The Legislature may prevent decrees from being executed against certain classes of property (e.g. s. 10, Bombay Hereditary Offices Act, 1874); it may provide that no process shall be issued against certain classes of judgment-debtors for a specified period (e.g. the Bombay Small Holders Relief Act, 1938). Instances of this type are not few. An executing Court is required to execute the decree in accordance with the prevailing law, and an order passed by the executing Court on whether the decree under execution is limited or otherwise qualified by a legislative enactment does not cease on that account to be an order under s. 47 of the Code. It was argued before us by Mr. Paranjape that an order which is passed by the Court under s. 24 is an order of this nature. The Legislature, according to him, provided a qualification to the rights of the decree-holder in the case of decrees passed on loans, and it is well within the function of the executing Court to decide whether the qualification imposed by the Legislature was available in favour of a particular judgment-debtor. We might have accepted this argument if s. 24 of the Bombay Money-lenders Act were merely declaratory of the rights of judgment-debtors in the execution of decrees to which that section applies. In that case it would have been the duty of an executing Court to consider the rights of the judgment-debtor so declared by the Legislature and to execute the decree accordingly. The wording of s. 24, however, shows that it is not merely declaratory. It empowers the Court to

"direct that the amount of any decree...shall be paid in such number of instalments and subject to such conditions and payable on such dates, as...it considers fit."

Section 24 enables the Court to give a direction, and the direction so given may itself be executable. It must, therefore, follow that the Court, while exercising the powers under s. 24, does not merely act as an executing Court, does not merely consider the prevailing law as it applies to the execution of decrees already passed, but decides whether positive directions should be given

in partial supersession of the terms of decrees previously passed. Such an order cannot, therefore, be regarded as a determination of a question within s. 47 of the Code of Civil Procedure.

Turning next to the second alternative argument, an order under s. 24 of the Bombay Money-lenders Act would be a decree according to the definition of the term "decree" in the first part of s. 2(2) of the Code, if it amounts to an adjudication of "the rights of the parties with regard to all or any of the matters in controversy in the suit". The definition makes it clear that the adjudication need not be of all the matters in controversy in the suit in order that it may be a decree. Now, in a suit based on a "loan" as defined by the Bombay Money-lenders Act, one of the matters in controversy between the parties is the time before which and the manner in which the amount which may be found due to the plaintiff shall be paid by the defendant. An order under s. 24 is an adjudication which determines this matter in controversy between the parties to the suit. It is true that an application under s. 24 is necessarily filed after a decree in such a suit has already been passed by the Court, and as a rule the decree provides, expressly or by implication, the time within which the judgment-debtor must satisfy it. There is, however, no difficulty in treating an application subsequently filed by the judgment-debtor under s. 24 of the Bombay Money-lenders Act as an application filed in the suit itself. This is because the finality of the original decree, in so far as the decree relates to the time of payment of the decretal amount, is qualified by the Legislature and made dependent on an order which may subsequently be passed by the Court under s. 24. In this connection, it would be legitimate to compare an order under s. 24 of the Bombay Money-lenders Act with an order on an application of the decree-holder for ascertainment of mesne profits filed after the passing of a decree under O. XX, r. 12, of the Code. The application of the decree-holder in the latter case is regarded as an application in the suit, and the order of the Court awarding a specific amount of mesne profits to the decree-holder is deemed to be a decree and is appealable as such. The only substantial difference between such an order and an order under s. 24 of the Bombay Money-lenders Act is that, whereas a direction for the ascertainment of mesne profits is contained in the very decree passed under O. XX, r. 12, a direction for determining the time of payment is given by the Legislature in s. 24 of the Bombay Money-lenders Act. We do not think that this difference can justify the view that an order under s. 24 is any-the-less a decree than an order awarding a specific amount of mesne profits made after a decree passed under O. XX, r. 12.

It may be added that, in our view, an order under s. 24 of the Bombay Money-lenders Act is a decree even if it is an order rejecting the application, so that the order leaves the original decree unaffected. This is because, in our view, an application under s. 24 is not an application for the amendment of the original decree. The application seeks a fresh decision of the Court on the question whether the decretal amount should or should not be made payable by instalments and whether its payment should be subject to any conditions. Being a fresh decision on one of the matters in controversy in the suit, the order is appealable whether the application is rejected or allowed.

None of the cases cited before us deals directly with the question which we have to decide. In *Zaverchand Panaji v. Mayadevi*,¹ Bavdekar J. held that an order under s. 24 of the Bombay Money-lenders Act can be made only by the Court which passed the decree and not by the Court to which the decree is transferred for execution. This decision does not necessarily support the conclusion, to which we have reached on other grounds, that such an order is not a determination of a question under s. 47 of the Code. This is because even in matters which clearly relate to the execution, discharge and satisfaction of a decree, some orders can be made only by the Court which passed the decree and not by a Court to which the decree is transferred for execution.

A similar decision was given by a Full Bench of the Nagpur High Court in *Bilimoria v. Central Bank of India Ltd., Bombay*.² That case arose under s. 11 of the Central Provinces Money-lenders Act, which is in *pari materia* with s. 24 of the Bombay Money-lenders Act. The Full Bench held that the word "Court" used in s. 11 of the Central Provinces Act refers to the Court which passed the decree, and not to the Court to which the decree is transferred for execution. It may be noted that s. 11 of the said Act specifically provides that an order passed thereunder "shall be deemed to have been passed under s. 47 of the Code of Civil Procedure."

In *Promode Nath Singha Ray v. Rasheswari Dasi*,³ a Division Bench of the Calcutta High Court held that an order under s. 36, sub-s. (6), of the Bengal Money-lenders Act, 1940, either granting or refusing a prayer for reopening a decree, does not come under s. 47 of the Code of Civil Procedure and is not appealable as such. It was unfortunately not possible for us to see the provisions of the Bengal Act, and particularly the wording of s. 36 thereof. It appears from the judgment in the above case, however, that s. 36 of the Bengal Act is materially different from s. 24 of the Bombay Act. Section 36 of the Bengal Act apparently provides for the formal reopening of a former decree and the passing of a new decree. The Division Bench held that, if an application under s. 36 of the Bengal Act results in the passing of a new decree, an appeal lies from the new decree, but that no appeal lies directly from the order passed on the application under s. 36. The judgment shows that the only argument which was advanced before the Court in favour of the appealability of an order under s. 36 was that the order determines a question relating to the execution, discharge or satisfaction of a decree within s. 47 of the Code. The Court did not consider the question whether such an order determines the rights of the parties with regard to a matter in controversy in the suit itself and is a decree within the first part of the definition of that term in s. 2(2) of the Code.

The decision in *Dhanukdhari Singh v. Ramratan Singh*,⁴ proceeds on a different basis. The case arose under s. 11 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939, which it appears empowers an executing Court to grant instalments for the payment of amounts previously decreed. A Division Bench of the Patna High Court held in that case that an order under s. 11 of the Bihar Act is not a decree within s. 47 read with s. 2(2) of the Code of Civil Procedure, and is not, therefore, appealable. The learned Judges observed that every order passed in the course of execution proceedings is not necessarily a decree so as to be appealable, and that, in order to be a decree, it must in some way finally determine the rights of the parties with regard to all or any of the matters in controversy. The main judgment delivered in the case went on to say (p. 866):

"...The right of the decree-holder to be paid the decretal amount and the liability of the judgment-debtor are determined by the decree in the suit. The power conferred on the executing Court by section 11 of the Money-lenders Act is a discretion which the Court may exercise in derogation of the rights of the decree-holder to execute the whole of his decree immediately against the judgment-debtor. In deciding whether it shall or shall not exercise the discretion conferred upon it by this section the Court is not determining any question of the parties' rights, but merely whether an indulgence shall be shown to the judgment-debtor for the purpose of enabling him to meet the just demands of the decree-holder and at the same time avoid the forced sale of his own properties."

On this view, an order granting or refusing to grant instalments would not be appealable as a decree, because it would not be covered by either of the two parts of the definition of "decree" in s. 2(2) of the Code of Civil Procedure. With great respect, we do not agree with the view which appears to be implicit in the passage quoted above, that a decision given by the Court in the exer-

² [1944] Nag. 1, F.B.

⁴ (1940) I.L.R. 19 Pat. 862.

³ [1941] 2 Cal. 402.

cise of its discretion does not amount to a final determination of the rights of the parties with regard to a matter in controversy in the suit. If the time within which the plaintiff's dues shall be paid by the defendant is one of the matters in controversy between the parties to the suit, the fact that the Court exercises a discretion in deciding that question will not prevent the decision from being a decree. In a suit for specific performance, for instance, the decision of the Court is given in the exercise of its discretion, but the decision is a decree nonetheless.

A reference may next be made to certain decisions relating to the appealability of orders passed under O. XX, r. 11(2), of the Code of Civil Procedure. Order XX, r. 11(2), provides that, after the passing of a money decree, the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit. Since an order under O. XX, r. 11(2), requires the consent of the decree-holder, it would normally be not appealable. The rule, however, was amended by the Rangoon and Nagpur High Courts so that an order thereunder could be passed after hearing the parties, but without the consent of the decree-holder. It will be noticed that O. XX, r. 11(2), so amended, is very similar to, though more restricted than, s. 24 of the Bombay Money-lenders Act. In *Saya Hattie v. Ma Pwon Sa*,⁵ a Judge of the Rangoon High Court, sitting singly, held that an order under the above amended provision was one relating to the execution, discharge or satisfaction of a decree and was, therefore, appealable as a decree. While we agree, with great respect, that such an order is a decree and is appealable, we do not think that it determines a question relating to the execution, discharge or satisfaction of the original decree. The above decision was followed in several subsequent decisions of the Rangoon High Court. In *Shree Jagruteshwar Deosthan v. Atmaram*,⁶ Bose J., sitting singly, held that an order under the above amended provision, granting or refusing to grant instalments for the payment of the decretal amount, is appealable. The learned Judge observed (p. 457):

"...It seems to me that whether the order be regarded as one under section 47 or as a decree in itself because it affects the decree, it must be appealable."

With great respect, we agree with the second alternative mentioned in this observation.

We, therefore, hold that an order under s. 24 of the Bombay Money-lenders Act, granting or refusing to grant instalments for the payment of the amount decreed, is appealable as a decree. The proper Court-fee to be levied on a memorandum of appeal from such an order would be the Court-fee mentioned in Sch. II, item 17(vii), of the Court-fees Act, as amended in the Bombay State. The subject-matter in dispute in such an appeal is not the amount of the decree, but the mode in which the amount is to be paid. As such, it is not possible to estimate at a money value the subject-matter in dispute. A similar view on the Court-fee payable in such cases was taken in *Sitabai v. R. S. B. R. Abhyankar*.⁷

Our decision on the reference, therefore, is that the Court-fee to be charged on the memoranda of appeal in the four appeals will be Rs. 18-12-0 each, as provided in Sch. II, item 17(vii), of the Court-fees Act.

Answer accordingly.

⁵ (1926) I.L.R. 4 Ran. 247.

⁶ [1943] Nag. 456.

⁷ [1938] Nag. 423.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Raju.

SHARDAPRASAD ONKARPRASAD TIWARI

v.

DIVISIONAL SUPERINTENDENT, CENTRAL RAILWAY,
NAGPUR DIVISION, NAGPUR.*

Master and Servant—Dismissal from service—Contravention of express or implied conditions of service by servant whether justifies his dismissal—Types of misconduct illustrative of contravention of implied conditions of service—Indian Railway Establishment Code—Discipline and Appeal Rules (Non-Gazetted), Rr. 1702, 1706, 1726.

To justify dismissal of a servant by his master, the servant must contravene the express or implied conditions of his service, irrespective of the fact whether such contravention was during or outside the course of his employment. The following types of misconduct are illustrative of the contravention of the implied conditions of service, viz., (i) where the act or conduct of the servant is prejudicial or likely to be prejudicial to the interests of the master or to the reputation of the master; (ii) where the act or conduct of the servant is inconsistent or incompatible with the due or peaceful discharge of his duty to his master; (iii) where the act or conduct of a servant makes it unsafe for the employer to retain him in service; (iv) where the act or conduct of the servant is so grossly immoral that all reasonable men will say that the employee cannot be trusted; (v) where the act or conduct of the employee is such that the master cannot rely on the faithfulness of his employee; (vi) where the act or conduct of the employee is such as to open before him temptations for not discharging his duties properly; (vii) where the servant is abusive or if he disturbs the peace at the place of his employment; (viii) where the servant is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant; (ix) where the servant is habitually negligent in respect of the duties for which he is engaged and (x) where the neglect of the servant, though isolated, tends to cause serious consequences.

*Pearce v. Foster,*¹ *Madhosingh v. State of Bombay,*² *Laws v. London Chronicle, Ltd.*³ and *Tomlinson v. L.M.S. Ry. Co.,*⁴ referred to.

*Laxminarayan Singh v. Nagpur Corpn.,*⁵ distinguished.

THE facts appear in the judgment.

D. L. Jayawant and *S. G. Kukdey*, for the petitioners.

K. V. Tambey and *W. K. Sheorey*, for the respondent.

RAJU J. This is a petition under arts. 226 and 227 of the Constitution by the three petitioners, who are non-gazetted employees of the Central Railway, for writs of *mandamus*, *certiorari* and other appropriate writs, orders or directions in the matter of disciplinary inquiries which are being held against them, by respondent who is the Divisional Superintendent of the Central Railway at Nagpur. Petitioner No. 1 is also the Honorary President of the Co-operative Society called the Central Railway Employees' Consumers Co-operative Society, Limited, Ajni, Nagpur, which will hereinafter be referred to as Society. Petitioner No. 2 is the Honorary Secretary of the Society. In the petition it is averred that petitioner No. 3 was a member of the Society and worked as a Treasurer only for 12 days from June 18, 1956, to June 30, 1956, when he was relieved of his charge as Treasurer by one Ramnarayan, that new office-bearers of the Society were elected on August 31, 1958, and that the new Committee of the Society sought the assistance of the respondent, namely, the Divisional Superintendent of the Central Railway at Nagpur, for getting pro-

*Decided, July 31/August 7, 1959. Special Civil Application No. 38 of 1959.

1 (1886) 17 Q.B.D. 536.

2 (1959) 61 Bom. L.R. 1537.

3 [1959] 2 All E.R. 285.

4 [1944] 1 All E.R. 537.

5 [1955] A.I.R. Nag. 206.

per accounts from the outgoing Committee of the Society on the allegation that the outgoing Committee had not handed over cash and accounts to the newly elected Committee. The Assistant Registrar of the Co-operative Societies also complained to the respondent that proper accounts of the Society were not forthcoming. The respondent thereupon ordered the suspension of petitioners Nos. 1 and 2 on February 27, 1958. Petitioner No. 3 was not suspended. Charges were framed against all the three petitioners by the respondent on November 2, 1958, November 8, 1958, and December 5, 1958 respectively. The charge against petitioner No. 1 was that while he was the President of the Society during the period from July 1, 1956 to August 31, 1958, he failed to discharge his duties and responsibilities as prescribed in the bye-laws of the Society, resulting in excess credits being granted to members and the non-recovery of credit dues from members; that he did not check the credit and proper posting of the cash book, stock book and other account books of the Society; that he did not hand over the cash balance as noted in the cash book, to the new Committee which took over charge on August 31, 1958, which was tantamount to embezzlement of the funds of the Society; and generally that the President contributed to the general mismanagement of the Society. The charge against petitioner No. 2 was almost in similar terms. The charge against petitioner No. 3 was that he committed serious misconduct while he was a Treasurer of the Society from July 1, 1956 to July 31, 1958; that he failed to discharge his duties and responsibilities as prescribed in the bye-laws of the Society; and that he did not hand over the cash balance to the new Committee which took over charge on August 31, 1958.

On these charges the respondent started disciplinary enquiry against the three petitioners, and intimated the petitioners that Officer's Enquiry would be held at Ajni on January 30, 1959. Petitioners Nos. 1 and 2 wrote to the respondent objecting to the legality of the proceedings. The respondent rejected these objections by a memorandum dated January 27, 1959. After the objections were rejected, the petitioners have approached the High Court for appropriate writs, challenging the order of suspension dated March 27, 1958, and the charge sheets filed against them on November 8, 1958, and December 5, 1958, as illegal on the grounds that the respondent had no jurisdiction to take any disciplinary action against the petitioners for any act or omission of theirs as members or office-bearers of the Society, that subsidiary rule No. 4, said to have been made under rule 1706 of the Discipline and Appeal Rules (Non-Gazetted) by the General Manager of the Central Railway, on the basis of which the disciplinary action is said to have been taken, had not been made or promulgated by the General Manager, that the action taken by the respondent was outside the scope of subsidiary r. 4 to 1706 of the Discipline and Appeal Rules, and that the subsidiary rule is further beyond the scope of the powers invested in the General Manager by r. 1726 of the Discipline and Appeal Rules. In the petition another ground was urged, that the power given to the General Manager by r. 1726, to make subsidiary rules, is an unlawful delegation of rule-making powers. But this point has not been urged before us by the learned counsel for the petitioners. On these grounds the petitioners pray for appropriate writs, orders and directions.

This is a case where the Central Railway wants to take disciplinary action against three of its servants for alleged serious misconduct. The Governor General has made rules under sub-s. (2) of s. 241 of the Government of India Act, 1935, which are to be found in the Indian Railway Establishment Code. These rules have continued to be in force after the Constitution of India by virtue of art. 313 of the Constitution. Rule 2 of Chapter XVII, which is numbered as 1702 in the Code, enumerates the penalties which may, for good and sufficient reasons, be imposed upon railway servants. The penalties enumerated include dismissal from service. Rule 6 in Chapter XVII, which is rule No. 1706 in the Code, enumerates the circumstances under which a rail-

way servant is liable to be dismissed from service, and these circumstances are:—

- (i) Conviction by a criminal Court, or by a court martial, or
- (ii) serious misconduct, or
- (iii) neglect of duty resulting in, or likely to result in, loss to Government or to a Railway Administration, or danger to the lives of persons using the railway.

It is, therefore, within the competence of the Central Railway to institute a disciplinary proceeding against a railway servant if according to it any of these aforesaid circumstances existed. One of these circumstances is serious misconduct.

The main contention of the learned counsel for the petitioners is that misconduct outside the sphere of duties of railway servant can never amount to a serious misconduct, justifying disciplinary action against the servant under these rules. The learned counsel relies on *Laws v. London Chronicle, Ltd.*,¹ and *Laxminarayansingh v. Nagpur Corpn.*²

There can be serious misconduct on the part of a railway servant during working hours and during the course of his employment. But that does not necessarily mean that there can be no misconduct or serious misconduct outside the working hours or outside the course of his employment. The act or conduct of a servant may amount to misconduct—

- (i) if the act or conduct is prejudicial or likely to be prejudicial to the interests of the master or to the reputation of the master;
- (ii) if the act or conduct is inconsistent or incompatible with the due or peaceful discharge of his duty to his master;
- (iii) if the act or conduct of a servant makes it unsafe for the employer to retain him in service;
- (iv) if the act or conduct of the servant is so grossly immoral that all reasonable men will say that the employee cannot be trusted;
- (v) if the act or conduct of the employee is such that the master cannot rely on the faithfulness of his employee;
- (vi) if the act or conduct of the employee is such as to open before him temptations for not discharging his duties properly;
- (vii) if the servant is abusive or if he disturbs the peace at the place of his employment;
- (viii) if he is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant;
- (ix) if the servant is habitually negligent in respect of the duties for which he is engaged;
- (x) if the neglect of the servant, though isolated, tends to cause serious consequences.

That such acts do amount to misconduct has been held in *Pearce v. Foster*.³ *Vide* also Halsbury's Laws of England, Third edn., Vol. 25, at pages 485 onwards. *Vide* also judgment of this Court in *Madhosingh v. State of Bombay*.⁴

The learned counsel for the petitioners however contends that these are not proper tests and that the proper test is that laid down in *Laws v. London Chronicle, Ltd.* According to the learned counsel, the test there laid down is that the misconduct must be inconsistent with the fulfilment of the express or implied conditions of service or such as to show that the servant has disregarded the essential conditions of the contract of service. No doubt the expression "whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service" is used in this case. This was a case of alleged act of disobedience on the part of an employee Miss Jean Maude who had been employed as an advertisement representative by a company. It was alleged that she left the conference room in defiance of the Manager's request to remain at the conference room, and it was held

¹ [1959] 2 All E.R. 285.
² [1955] A.I.R. Nag. 206.

³ [1946] 17 Q.B.D. 536.
⁴ [1959] 61 Bom. L.R. 1537.

that wilful disobedience to the lawful and reasonable order of the master justifies summary dismissal. It was also held that the servant can be dismissed if he is habitually negligent in respect of his duties for which he was engaged, but that for a single instance of insolence in the case of a servant in such a position as that of a newspaper critic, dismissal was hardly justified. It was also observed in that case as follows (p. 287):—

“...since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard—a complete disregard—of a condition essential to the contract of service, namely, the condition that the servant must obey the proper order of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.

In a passage which I have read from 25 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 485, para. 934, there is a statement ‘...there is no fixed rule of law defining the degree of misconduct which will justify dismissal’. That statement is derived from a passage in the judgment of the Privy Council delivered by LORD JAMES OF HEREFORD in *Clouston & Co., Ltd. v. Corry*,⁵ a case to which counsel for the plaintiff referred. I will read a rather larger passage which provides the context. LORD JAMES said (at p. 129):

Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.”

After referring to these cases it was held by the Court of Appeal that a single act of disobedience could justify dismissal only if it was such as to show that the servant was repudiating the contract of service or one of its essential conditions, as would an act of wilful disobedience: it was further held that the act of disobedience on the part of Miss Jean in leaving the conference room did not amount to such a wilful disobedience of an order, such a deliberate disregard of the conditions of service as justifying a summary dismissal. It is contended by the learned counsel for the petitioners that this case lays down the only correct test to be applied in regard to misconduct for which an employee can be dismissed by the employer.

No doubt in this case it is observed that if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. But, in our opinion, there is no real distinction between this test and the ten illustrative types of misconduct enumerated earlier in this judgment as types of misconduct for which a servant can be dismissed. In *Laws v. London Chronicle, Ltd.* the test laid down is that the misconduct must be inconsistent with the fulfilment of the express or implied conditions of service in order to justify dismissal. The ten illustrative types of misconduct enumerated earlier are illustrations of implied conditions of service. The implied conditions of service would include conditions that the servant would be trustworthy, that his acts would justify the confidence of the employer, that the employee will not so act as to prejudice or damage the interests of the employer, that the employee would not act or conduct or behave himself in a way, inconsistent or incompatible with the faithful discharge of his duties to the employer, that he would not behave in an insulting or insubordinate manner, that he would not habitually be negligent, etc. These are all

implied conditions of employment. In our opinion, the illustrative types of misconduct enumerated earlier are an application of the fundamental principle that to justify dismissal the servant must contravene the express or implied conditions of his service. The case *Laws v. London Chronicle, Ltd.*, however, related to an employee who disobeyed the orders of her employer and the test enunciated in that case related to the case of disobedience by an employee of the orders of her employer.

In *Tomlinson v. L.M.S. Ry. Co.*,⁸ which was a case where the servant created a disturbance at a canteen committee for setting up a canteen for the use of Railway workers, it was held that conduct which is calculated completely to make impossible the working of the machinery that the railway company was endeavouring to set up for the benefit of the workers and indirectly for the benefit of the company itself, might amount to serious misconduct even if it happened outside the working hours.

In support of his contention that the petitioners joined the Railway before the Society was formed and that, therefore, their duties to the Society are additional duties, learned counsel for the petitioners relied on *Lazminarayan-singh v. Nagpur Corpn.* where it was observed as follows:—

"It is one of the implied stipulations of a contract of service that the employer will not, by any act of commission or omission, add or suffer to be added to the employment new conditions involving obligations, dangers or inconveniences which were not incident to it and were not within the contemplation of the employee when he was engaged.

Normally, a change of duty may be possible without the consent of the employee if it does not entail any of the above consequences. But where they do, they can only be changed with the concurrence of the employee.

In every case, it will be a question of fact whether such a change of duty is derogatory, inconvenient, dangerous etc...."

But the case is distinguishable because there the employee was asked to do additional duties. Every employee is always expected to be faithful in the discharge of his duties and to justify the trust reposed in him by his employer. Every employee is expected to behave himself so as not to damage or prejudice the interest or reputation of his master, whatever be the sphere of activities of the employee. These principles will be applicable to every employee right from the beginning of his employment up to the termination of his employment. They are not additional duties. The case relied on by the learned counsel for the petitioners does not, therefore, come to his assistance.

As regards the contention that the General Manager of the Central Railway has not framed subsidiary r. No. 4, the learned counsel for the respondent has produced the Central Railway Weekly Gazette dated November 5, 1956, to show that the General Manager has himself framed the subsidiary r. No. 4. We, therefore, reject the contention that the General Manager of the Central Railway has not framed subsidiary r. No. 4.

Rule 1726 provides that the General Manager may, in respect of non-gazetted railway servants employed under his administrative control, make subsidiary rules not inconsistent with the rules in this section for the purpose of giving effect to them. Subsidiary r. 4 reads as follows:—

"Appropriate disciplinary action can be taken by the Administration against railway servants found guilty of charges of misappropriation and other irregularities amounting to serious misconduct in the discharge of their duties in connection with the affairs of institutions like Rly. Co-operative Societies, Rly. Institutes, Clubs and other similar bodies which are established and run by railway servants."

But it is not necessary to further discuss the effect and scope of subsidiary r. 4 or the question whether subsidiary r. 4 is beyond the scope of the powers vested in the General Manager by r. 1726, because r. 1706 itself provides that disciplinary action can be taken against a railway servant for serious miscon-

duct. Rule 1706 is framed by the Governor General, and if serious misconduct is proved, disciplinary action can be taken under r. 1706 irrespective of the provisions of subsidiary r. 4 framed by the General Manager. The subsidiary r. No. 4 does not add anything to the powers of the railway authorities given by the rules framed by the Governor-General, and its purpose must be only to give effect to the main rules.

It is also contended that under subsidiary r. 4 to r. 1706 disciplinary action can be taken against a person who is found guilty of misconduct, and that the expression "found guilty of misconduct" amounts to "found guilty by competent and independent authority, independent of the Railway". Subsidiary r. 4 does not and cannot either abridge or enlarge the scope of r. 1706, under which disciplinary action can be taken for serious misconduct on the part of a railway servant. The real question for determination is, therefore, whether it can be said that the charges framed against the petitioners can be said to amount to misconduct within the meaning of r. 1706. In law even acts done by a servant outside working hours and outside the course of the employment may amount to misconduct justifying dismissal. There is no fixed rule of law defining the degree of misconduct which will justify dismissal.

The question, therefore, is whether the alleged conduct of the three petitioners amounts to such serious misconduct. That question can be decided only after all the facts are brought on record. At this stage the enquiry has just commenced and all the necessary facts are not yet brought on record. It would be open to the employees (petitioners) at the time of the enquiry to show that there are facts to justify the inference that the alleged misconduct will not amount to serious misconduct within law. That would depend on the relations between the Co-operative Society and the Central Railway, the actual misconduct alleged and proved, and its gravity. Whether the conduct is such as to be prejudicial to the interest of the Central Railway depends on the proof or disproof of certain facts, such as the nature and degree of the interest of the Central Railway in the Society. At this stage, therefore, we are not prepared to hold that in this case facts have been proved to hold that the misconduct alleged against petitioners Nos. 1 and 2 does not amount to serious misconduct.

The petition filed by petitioners No. 1 and 2 will, therefore, have to be rejected. As regards petitioner No. 3, it is averred in the petition that he acted as a Treasurer of the Society only for 12 days from June 18, 1956, to June 30, 1956, and that he was relieved of his duties as Treasurer from July 1, 1956. But the charge sheet against him refers to alleged mismanagement during the period from July 1, 1956, to August 31, 1958, in his capacity as a Treasurer. If really petitioner No. 3 was not acting as a Treasurer during any part of this period, the Railway would not be justified in framing charges against him for conduct as a Treasurer during this period. The averment in the petition has not been controverted in the return made by the respondent which is silent on the point whether petitioner No. 3 acted as a Treasurer of the Society only from June 18, 1956, to June 30, 1956. The learned counsel for the respondent has, however, agreed to state within a week whether the averment in the petition regarding petitioner No. 3 is correct or not. If the averment is not challenged and is undisputed, then the petition of petitioner No. 3 will have to be allowed. We will, therefore, decide this point after a week. The petition of petitioners Nos. 1 and 2 is dismissed with costs.

August 7, 1959.

To day an affidavit has been filed on behalf of the Central Railway, denying the allegation of petitioner No. 3 that he was a Treasurer for only 12 days from June 18, 1956, to June 30, 1956, and also denying the allegation that petitioner No. 3 was relieved of his office as Treasurer on July 1, 1956. As these alleged facts are denied, it is not possible for us to hold that petitioner No. 3 was a Treasurer only for 12 days from June 18, 1956, to June 30, 1956, and that the Central Railway was not justified in framing a charge against him for the

period July 1, 1956, to August 31, 1958. The fact whether he was a Treasurer only for 12 days and not during any part of the period which is the subject-matter of the charge against him, will have to be decided in the first instance at the Disciplinary Enquiry. As the main fact on which the petition of petitioner No. 3 is founded, has not been proved or admitted, his petition also will have to be rejected. It is dismissed with costs. It is of course open to petitioner No. 3 to prove these facts at the Enquiry which is being held against him.

Petition dismissed.

SUPREME COURT.

Present: The Hon'ble Mr. S. R. Das, Chief Justice, Mr. Justice Bhagwati and Mr. Justice M. Hidayatullah.

MESSRS. GODREJ AND CO. v. THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY.*

Indian Income-tax Act (XI of 1922)—Payment made by managed company to managing agent of company for deterioration of the managing agency as a profit making apparatus—Character of such payment—Whether a revenue or capital receipt—Company agreeing to pay to its managing agent, appointed for certain period, commission at certain rate on its annual profits—Subsequent agreement between company and managing agent whereby rate of commission reduced for remaining term of managing agency—Compensation paid by company to managing agent for releasing company from onerous term as to remuneration in previous agreement—Whether such amount of compensation paid by company and received by managing agents a revenue or a capital receipt.

The assessee firm was appointed the managing agent of a company for a period of thirty years from November 9, 1933, and the company agreed to pay to the firm a commission during every year at the rate of twenty per cent. on the net profits of the company. Thereafter a supplementary agreement was made between the firm and the company whereby the remuneration of the firm from September 1, 1946, was reduced to ten per cent. of the net annual profits of the company and in consideration the company agreed to pay Rs. 7,50,000 as compensation, for the remaining term of the managing agency, "for releasing the company from the onerous term as to remuneration contained" in the previous agreement. The sum of Rs. 7,50,000 paid by the company and received by the firm was, for the relevant assessment year, treated by the Income-tax Officer as a revenue receipt in the hands of the firm and taxed as such. On the question whether this sum was a revenue receipt liable to tax:—

Held, that the sum of Rs. 7,50,000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be,

that so far as the company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the firm for the rest of the term of the managing agency and, therefore, a capital expenditure and so far as the firm was concerned, it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore, a capital receipt, and

that, therefore, the sum was not a revenue receipt liable to tax.

The Commissioner of Income-tax and Excess Profits Tax, Madras v. The South India Pictures Ltd., Karalkudi, Atherton v. British Insulated and Helsby Cables Ltd., Assam Bengal Cement Co., Ltd. v. Commissioner of Income-tax, West Bengal, Commr.

*Decided, August 4, 1959. Civil Appeal No. 183 of 1956.

1 [1956] 8 C.R. 223.

2 [1925] 10 Tax Cas. 155.

3 [1955] 1 S.C.R. 972.

of Inc.-tax v. Rai Bahadur Jitram Valji,⁴ Income-tax Commissioner v. Shaw Wallace and Co.,⁵ The Glenboig Union Fireclay Co., Ltd. v. The Commissioners of Inland Revenue,⁶ The Commissioner of Income-tax, Hyderabad-Deccan v. Messrs Vazir Sultan and Sons,⁷ Hunter v. Dewhurst,⁸ Prendergast (H. M. Inspector of Taxes) v. Cameron⁹ and Wales (H. M. Inspector of Taxes) v. Tilley,¹⁰ referred to.

THE facts are stated at 55 *Bombay Law Reporter* 998.

A. V. Viswanatha Sastri, with S. N. Andley and J. B. Dadachanji, for the appellants.

M. C. Setalvad, Attorney-General for India, with K. N. Rajagopal Sastri and D. Gupta, for the respondent.

DAS C.J. This is an appeal from the judgment and order of the High Court of Bombay delivered on September 11, 1953, on a reference made by the Income-tax Appellate Tribunal under s. 66(1) of the Indian Income-tax Act, whereby the High Court answered the referred question in the affirmative and directed the appellant to pay the costs of the respondent.

The appellant, which is a registered firm and is hereinafter referred to as "the assessee firm", was appointed the managing agent of Godrej Soaps Limited (hereinafter called the "managed company"). It has been working as such managing agent since October 1928 upon the terms and conditions recorded originally in an agreement dated October 28, 1928, which was subsequently substituted by another agreement dated December 8, 1933 (hereinafter referred to as "the Principal Agreement"). Under the Principal Agreement the assessee firm was appointed Managing Agent for a period of thirty years from November 9, 1933. Clause 2 of that Agreement provided as follows:—

"The company shall during the subsistence of this agreement pay to the said firm and the said firm shall receive from the company the following remuneration, that is to say:

(a) A commission during every year at the rate of twenty per cent. on the net profits of the said company after providing for interest on loans, advances and debentures (if any), working expenses, repairs, outgoings and depreciation but without any deduction being made for income-tax and super-tax and for expenditure on capital account or on account of any sum which may be set aside in each year out of profits as reserve fund.

(b) In case such net profits of the company after providing for interest on loans, advances and debentures (if any), working expenses, depreciation, repairs and outgoings and after deduction therefrom the commission provided for by sub-clause (a) shall during any year exceed a sum of rupees one lac the amount of such excess over rupees one lac up to a limit of rupees twenty-four thousand.

(c) In case such net profits of the company after providing for interest on loans, advances and debentures (if any), working expenses, depreciation, repairs and outgoings and after also deducting therefrom the commission provided for by sub-clause (a) shall during any year exceed a sum of rupees one lac and twenty four thousand one half of such excess over rupees one lac and twenty-four thousand shall be paid to the firm and the other half to the shareholders."

Some of the shareholders and directors of the managed company felt that the scale of remuneration paid to the assessee firm under cl. (2) of the Principal Agreement was extraordinarily excessive and unusual and should be modified. Accordingly negotiations were started for a reduction of the remuneration and, after some discussion, the assessee firm and the managed company arrived at certain agreed modifications which were eventually recorded in a special resolution passed at the extraordinary general meeting of the managed company

⁴ (1958) 35 I.T.R. 148.

⁵ (1932) L.R. 59 I.A. 308, s.o. 34 Bom. L.R.

1033.

⁶ [1922] 12 Tax Cases 427.

⁷ Civil Appeal No. 346 of 1957 decided on

March 20, 1959.

⁸ [1932] 16 Tax Cases 605.

⁹ [1940] 23 Tax Cases 122.

¹⁰ [1942] 25 Tax Cases 136.

held on October 22, 1946. That resolution was in the following terms:—

"Resolved that the agreement arrived at between the managing agents on the one hand and the directors of your company on the other hand, that the managing agents, in consideration of the company paying Rs. 7,50,000 as compensation, for releasing the company from the onerous term as to remuneration contained in the present managing agency agreement should accept as remuneration for the remaining term of their managing agency ten per cent. of the net annual profits of the company as defined in s. 87C, sub-s. (3) of the Indian Companies Act in lieu of the higher remuneration to which they are now entitled under the provisions of the existing managing agency agreement be and the same is hereby approved and confirmed.

Resolved that the company and the managing agents do execute the necessary document modifying the terms of the original managing agency agreement in accordance with the above agreement arrived at between them. Such document be prepared by the company's solicitors and approved by the managing agents and the directors shall carry the same into effect with or without modification as they shall think fit."

The agreed modifications were thereafter embodied in a Supplementary Agreement made between the assessee firm and the managed company on March 24, 1948. After reciting the appointment of the assessee firm as the Managing Agent upon terms contained in the Principal Agreement and further reciting the agreement arrived at between the parties and the resolution referred to above, it was agreed and declared as follows:

"1. That the remuneration of the managing agents as from the 1st day of September, 1946 shall be ten per cent. of the net annual profits of the company as defined in s. 87C, sub-s. (3) of the Indian Companies Act, 1913, in lieu of the higher remuneration as provided in the above recited cl. (2) of the Principal Agreement.

2. Subject only to the variations herein contained and such other alterations as may be necessary to make the Principal Agreement consistent with these presents the principal agreement shall remain in full force and effect and shall be read and construed and be enforceable as if the terms of these presents were inserted therein by way of substitution."

The sum of Rs. 7,50,000 was paid by the managed company and received by the assessee firm in the calendar year 1947 which was the accounting year for the assessment year 1948-49.

In the course of the assessment proceedings for the assessment year 1948-49, it was contended by the departmental representative, (i) that though the payment of Rs. 7,50,000 had been described as compensation, the real object and consideration for the payment was the reduction of remuneration, (ii) that that being the character of payment, it was a lump sum payment in consideration of the variation of the terms of employment and was, therefore, not a capital receipt but was a revenue receipt, and (iii) that there was, in fact, no break in service and the payment was made in course of the continuation of the service and, therefore, represented a revenue receipt of the managing agency business of the assessee firm. The assessee firm, on the other hand, maintained that the sum of Rs. 7,50,000 was a payment made by the managed company to the assessee firm wholly in discharge of its contingent liability to pay the higher remuneration and in order to discharge itself of an onerous contingent obligation to pay higher remuneration and it was, therefore, a capital expenditure incurred by the managed company and a capital receipt obtained by the assessee firm and was as such not liable to tax.

The Income-tax Officer treated the sum of Rs. 7,50,000 as a revenue receipt in the hands of the assessee firm and taxed it as such. On appeal this decision was confirmed by the Appellate Assistant Commissioner and thereafter, on further appeal, was upheld by the Tribunal by its order dated July 23, 1952. At the instance of the assessee-firm the Tribunal, under s. 66(1) of the Act, made a reference to the High Court raising the following question of law:—

"Whether on the facts and in the circumstances of the case the sum of Rs. 7,50,000 is a revenue receipt liable to tax."

The said reference was heard by the High Court, and by its judgment, pronounced on September 11, 1953, the High Court answered the referred question in the affirmative and directed the assessee firm to pay the costs of the reference. The High Court, however, gave to the assessee firm a certificate of fitness for appeal to this Court and that is how the appeal has come before us.

As has been said by this Court in *The Commissioner of Income-tax and Excess Profits Tax, Madras v. The South India Pictures Ltd., Karaikudi*¹,

"It is not always easy to decide whether a particular payment received by a person is his income or whether it is to be regarded as his capital receipt."

Eminent Judges have observed that "income" is a word of the broadest connotation and that it is difficult, and perhaps impossible, to define it by any precise general formula. Though in general the distinction between an income and a capital receipt is well recognised, cases do arise where the item lies on the borderline and the problem has to be solved on the particular facts of each case. No infallible criterion or test has been or can be laid down and the decided cases are only helpful in that they indicate the kind of consideration which may relevantly be borne in mind in approaching the problem. The character of payment received may vary according to the circumstances. Thus, the amount received as consideration for the sale of a plot of land may ordinarily be capital; but if the business of the recipient is to buy and sell lands, it may well be his income. It is, therefore, necessary to approach the problem keeping in view the particular facts and circumstances in which it has arisen.

There can be no doubt that by paying this sum of Rs. 7,50,000 the managed company has secured for itself a release from the obligation to pay a higher remuneration to the assessee firm for the rest of the period of managing agency covered by the Principal Agreement. *Prima facie*, this release from liability to pay a higher remuneration for over 17 years must be an advantage gained by the managed company for the benefit of its business and the immunity thus obtained by the managed company may well be regarded as the acquisition of an asset of enduring value by means of a capital outlay which will be a capital expenditure according to the test laid down by Viscount Cave, L.C. in *Atherton v. British Insulated and Helsby Cables Ltd.*² referred to in the judgment of this Court in *Assam Bengal Cement Co. Ltd. v. Commissioner of Income-tax, West Bengal*³. If the sum of Rs. 7,50,000 represented a capital expenditure incurred by the managed company, it should, according to learned counsel for the assessee firm, be a capital receipt in the hands of the assessee firm, for the intrinsic characteristics of capital sums and revenue items respectively are essentially the same for receipts as for expenditure. (See Simon's Income-tax, II edn., Vol. I, para. 44, p. 31). But, as pointed out by the learned author in that very paragraph, this cannot be an invariable proposition, for there is always the possibility of a particular sum changing its quality according as the circumstances of the payer or the recipient are in question. Accordingly the learned Attorney-General appearing for the respondent contends that we are not concerned in this appeal with the problem, whether, from the point of view of the managed company, the sum represented a capital expenditure or not but that we are called upon to determine whether this sum represented a capital receipt in the hands of the assessee firm.

In the Resolution adopted by the managed company as well as in the recitals set out in the Supplementary Agreement this sum has been stated to be a payment "as compensation for releasing the company from the onerous term as to remuneration contained" in the Principal Agreement. It is true, as said by the High Court and as reiterated by the learned Attorney-General, that the language used in the document is not decisive and the question has to be determined by a consideration of all the attending circumstances; nevertheless, the language cannot be ignored altogether but must be taken into consideration along with other relevant circumstances.

¹ [1956] S.C.R. 223, 228.

² [1925] 10 Tax Cas. 155.

³ [1955] 1 S.C.R. 972.

This sum of Rs. 7,50,000 has undoubtedly not been paid as compensation for the termination or cancellation of an ordinary business contract which is a part of the stock-in-trade of the assessee and cannot, therefore, be regarded as income, as the amounts received by the assessee in *The Commissioner of Income-tax and Excess Profits Tax v. The South India Pictures Ltd.* (supra) and in *Commr. of Inc.-tax v. Rai Bahadur Jairam Valji*⁴ had been held to be. Nor can this amount be said to have been paid as compensation for the cancellation or cessation of the managing agency of the assessee firm, for the managing agency continued and, therefore, the decision of the Judicial Committee of the Privy Council in *The Commissioner of Income-tax v. Shaw Wallace and Co.*⁵ cannot be invoked. It is, however, urged that for the purpose of rendering the sum paid as compensation to be regarded as a capital receipt, it is not necessary that the entire managing agency should be acquired. If the amount was paid as the price for the sterilisation of even a part of a capital asset which is the framework or entire structure of the assessee's profit making apparatus, then the amount must also be regarded as a capital receipt, for, as said by Lord Wrenbury in *The Glenboig Union Fireclay Co., Ltd. v. The Commissioners of Inland Revenue*⁶, "what is true of the whole must be equally true of part"—a principle which has been adopted by this Court in *The Commissioner of Income-tax, Hyderabad-Deccan v. Messrs Vazir Sultan and Sons*⁷. The learned Attorney-General, however, contends that this case is not governed by the decisions in *Shaw Wallace's* case (supra) or *Messrs Vazir Sultan and Sons' case* (supra) because in the present case there was no acquisition of the entire managing agency business or sterilisation of any part of the capital asset, and the business structure or the profit-making apparatus, namely, the managing agency, remains unaffected. There is no destruction or sterilisation of any part of the business structure. The amount in question was paid in consideration of the assessee firm agreeing to continue to serve as the managing agent on a reduced remuneration and, therefore, it bears the same character as that of remuneration and, therefore, a revenue receipt. We do not accept this contention. If this argument were correct, then, on a parity of reasoning, our decision in *Messrs Vazir Sultan and Sons' case* (supra) would have been different, for, there also the agency continued as before except that the territories were reduced to their original extent. In that case also the agent agreed to continue to serve with the extent of his field of activity limited to the State of Hyderabad only. To regard such an agreement as a mere variation in the terms of remuneration is only to take a superficial view of the matter and to ignore the effect of such variation on what has been called the profit making apparatus. A managing agency yielding a remuneration calculated at the rate of 20 per cent. of the profits is not the same thing as a managing agency yielding a remuneration calculated at 10 per cent. of the profits. There is a distinct deterioration in the character and quality of the managing agency viewed as a profit-making apparatus and this deterioration is of an enduring kind. The reduced remuneration having been separately provided, the sum of Rs. 7,50,000 must be regarded as having been paid as compensation for this injury to or deterioration of the managing agency just as the amounts paid in *The Glenboig's* case or *Messrs Vazir Sultan's* case (supra) were held to be. This case is also very nearly covered by the majority decision of the English House of Lords in *Hunter (H. M. Inspector of Taxes) v. Dewhurst*⁸. It is true that in the later English cases of *Prendergast (H. M. Inspector of Taxes) v. Cameron*⁹ and *Wales (H. M. Inspector of Taxes) v. Tilley*¹⁰, the decision in *Hunter v. Dewhurst* (supra) was distinguished as being of an exceptional and special nature but those later decisions turned on

4 (1958) 35 I.T.R. 148.

5 (1932) L.R. 59 I.A. 206, s.c. [34 Bom. L.R. 1033.]

6 [1922] 12 Tax Cas. 427.

7 Civil Appeal No. 346 of 1957 decided on

March 20, 1959.

8 [1932] 16 Tax Cas. 605.

9 [1940] 23 Tax Cas. 122.

10 [1942] 25 Tax Cas. 136.

the words used in r. I of Sch. E to the English Act. Further, they were cases of continuation of personal service on reduced remuneration simpliciter and not of acquisition, wholly or in part, of any managing agency viewed as a profit-making apparatus and consequently the effect of the agreements in question under which the payment was made upon the profit-making apparatus did not come under consideration at all. On a construction of the agreements it was held that the payments made were simply remuneration paid in advance representing the difference between the higher rate of remuneration and the reduced remuneration and as such a revenue receipt. The question of the character of the payment made for compensation for the acquisition, wholly or in part, of any managing agency or injury to or deterioration of the managing agency as a profit-making apparatus is covered by our decisions hereinbefore referred to. In the light of those decisions the sum of Rs. 7,50,000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be. In other words, so far as the managed company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the assessee firm for the rest of the term of the managing agency and, therefore, a capital expenditure and so far as the assessee firm was concerned, it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore, a capital receipt within the decisions of this Court in the earlier cases referred to above.

In the light of the above discussion it follows, therefore, that the answer to the referred question should be in the negative. The result, therefore, is that this appeal is allowed, the answer given by the High Court to the question is set aside and the question is answered in the negative. The appellant must get the costs of the reference in the High Court and in this Court.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Gokhale.

MADANLAL MULCHAND SONI v. SHAIKH MAHIBUB YAKUB.*

Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947), Secs. 51-A, 56, 14, 15, 4—Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 15D—Plaintiff filing applications under s. 4 but not mentioning therein mortgages executed by him and mortgagees as his creditors—General notice issued under s. 14—Plaintiff thereafter filing civil suit under D.A.R. Act for accounts of mortgages and civil Court passing decree—B.A.D.R. Court holding plaintiff debtor and his debts below Rs. 15,000—Plaintiff's suit for declaration that decree passed by civil Court void and not binding on plaintiff—Whether decree without jurisdiction in view of ss. 51A & 56—Civil Court whether had jurisdiction to pass decree—General notice under s. 14(b) whether binding on creditors whose names and debts not included in application under s. 4—Whether such creditors' debts governed by s. 15(1).

The plaintiff filed applications under s. 4 of the Bombay Agricultural Debtors Relief Act for adjustment of his debts, and in these applications he did not mention certain mortgages created by him in favour of the defendants and that the defendants were his creditors. A general notice under s. 14 of the Act was ordered to be issued by the Court. Thereafter the plaintiff filed a civil suit against the defendants under

*Decided, August 4/5, 1959. Civil Revision Application No. 2148 of 1957, against the decision of N. J. Bhupell, Assistant Judge, Ahmednagar, in Reg. Appeal No. 301 of 1955,

reversing the decree passed by D. L. Bhojawanl, 3rd Joint Civil Judge, Junior Division, Ahmednagar, in Civil Suit No. 222 of 1954.

s. 15-D of the Dekkhan Agriculturists' Relief Act, 1879, for taking accounts of the mortgages, and the civil Court decreed that a certain amount was due to one of the defendants from the plaintiff. In the meantime the Bombay Agricultural Debtors Relief Court held that the plaintiff was a debtor and his debts were below Rs. 15,000. A final award was then passed but the award did not mention the debts of the defendants nor did it mention the defendants as creditors. The plaintiff filed a suit for a declaration that the mortgage debts of the defendants were extinguished and that the decree in the civil suit was void and not binding on the plaintiff. On the question whether the decree in the civil suit was without jurisdiction in view of s. 51-A and s. 56 of the Bombay Agricultural Debtors Relief Act:—

Held, that the issue of the notice under s. 14 of the Bombay Agricultural Debtors Relief Act did not bring the debts under the mortgage before the Bombay Agricultural Debtors Relief Court, as neither the names of the defendants-creditors nor their debts were mentioned in the plaintiff's applications and in the award made, and, therefore, it could not be said that the civil suit was in respect of any matter pending before the Court within s. 51-A of the Bombay Agricultural Debtors Relief Act; but that, as the plaintiff was held to be a debtor and his debts did not exceed Rs. 15,000, the mortgage transactions in suit would be governed by the Bombay Agricultural Debtors Relief Act and could not have been made the subject-matter of any proceedings under the Dekkhan Agriculturists' Relief Act, and, therefore, the decree passed by the civil Court was without jurisdiction and did not bind the plaintiff.

Asaram Bapu Waghmode v. Bhanudas' and *Allemecya Dadu Saheb v. Hari,*¹ distinguished.

*Keshav Ganashyam v. Waman Rangaji,*² referred to.

Where the names of certain creditors and their debts are not mentioned in the application for adjustment of debts under s. 4 of the Bombay Agricultural Debtors Relief Act, and a general notice is issued under s. 14(b) of the Act, then the general notice will be binding on the creditors whose names and debts are not included in the application, and their debts would be governed by s. 15(1) of the Act.

Lazman Babaji v. Akharam Sahebram' and *Keshav Ganashyam v. Waman Rangaji,*³ referred to.

ONE Shaikh Mahibub Yakub (plaintiff) mortgaged a house at Ahmednagar on August 2, 1944. That mortgage was with possession and was for a consideration of Rs. 3,000, and therein the plaintiff described himself as a trader. Sometime in 1945, the Bombay Agricultural Debtors Relief Act, 1945, came to be applied to Ahmednagar Taluka, and though the plaintiff was himself a resident of Rahuri, he filed two applications to the Bombay Agricultural Debtors Relief Court at Ahmednagar for adjustment of his debts. Though the mortgage of Madanlal (defendant No. 1) was shown, defendant No. 1 was not made a party to the applications. These applications were numbered as 4224 of 1945 and 4232 of 1945, and they were decided on April 4, 1949, and therein the plaintiff was held to be a debtor. It was common ground that the plaintiff was a resident of Rahuri, and on that basis, the lower Appellate Court was inclined to doubt whether the Bombay Agricultural Debtors Relief Court at Ahmednagar had jurisdiction to entertain those applications, and held that that Court entertained those applications because of the representation made by the plaintiff that he was a resident both of Rahuri and Ahmednagar.

On February 22, 1947, the plaintiff created a second mortgage on the same house in favour of one Hiralal who was the father of defendants Nos. 2 to 7, again describing himself as a trader. This mortgage was for a consideration of Rs. 5,000, and a part of the consideration was for satisfying the mortgage debt of defendant No. 1. On May 27, 1947, the Bombay Agricultural Debtors Relief Act of 1947 was applied to Rahuri Taluka, and under that Act, debtors were required to make applications under s. 4 for adjustment of their debts on or before July 31, 1947. The plaintiff filed two applications under this Act

¹ (1955) 58 Bom. L.R. 95.

² (1956) 58 Bom. L.R. 641.

³ (1952) 55 Bom. L.R. 320.

⁴ (1956) 58 Bom. L.R. 804.

⁵ (1952) 55 Bom. L. R. 320.

also to the Bombay Agricultural Debtors Relief Court at Rahuri for adjustment of his debts, and in both these applications, neither the mortgage created in favour of defendant No. 1 nor the second mortgage created in favour of the father of defendants Nos. 2 to 7 was mentioned; nor were the defendants mentioned in these applications as the creditors of the plaintiff. These two applications were numbered as 528 of 1947 and 1390 of 1947. A general notice as contemplated under s. 14 of the Bombay Agricultural Debtors Relief Act was ordered to be issued by the Court under that Act, and it was ordered to be issued on September 8, 1947.

On May 26, 1950, the plaintiff filed Civil Suit No. 691 of 1950 in the Court at Ahmednagar against the defendants under s. 15-D of the Dekkhan Agriculturists' Relief Act, 1879, for taking account of the mortgages. On February 26, 1952, the Bombay Agricultural Debtors Relief Court at Rahuri held, on the basis of the purahises given by the other creditors, that the plaintiff was a debtor and his debts were below Rs. 15,000. A final award came to be passed in these Bombay Agricultural Debtors Relief Applications on April 2, 1952. The suit filed by the plaintiff under the Dekkhan Agriculturists' Relief Act was not got transferred by the plaintiff to the Bombay Agricultural Debtors Relief Court, and it was allowed to proceed, and ultimately on July 30, 1952, the Court held in that Suit No. 691 of 1950 that Rs. 4,630 were due to defendant No. 1 from the plaintiff. No appeal was filed against that decision; nor did the plaintiff file any application for redemption on the basis of this finding. In 1953, defendants Nos. 2 to 7 filed Civil Suit No. 292 of 1953 to enforce the mortgage created in favour of their father on February 22, 1947. On April 21, 1954, the plaintiff filed the present suit being Suit No. 222 of 1954 for a declaration that the mortgage debts of the defendants were extinguished, and for a further declaration that the decree in Civil Suit No. 691 of 1950 was void and not binding on the plaintiff. He further prayed for an injunction restraining the defendants from executing the decree or from recovering the rent of the suit house. Suit No. 292 of 1953 filed by defendants Nos. 2 to 7 resulted in an *ex parte* decree in their favour on August 23, 1954, but the same was set aside at the instance of the plaintiff. The plaintiff's suit was resisted by the defendants on the ground that the plaintiff was not a debtor, and as the defendants were not parties to the Bombay Agricultural Debtors Relief proceedings, the finding that he was a debtor in those proceedings could not bind the defendants. They also pleaded that the plaintiff's plea was barred by *res judicata* by virtue of the decision in Civil Suit No. 691 of 1950. They further contended that as they were not parties to the Bombay Agricultural Debtors Relief proceedings, their debts were not extinguished. They also urged that the suit as filed by the plaintiff was not maintainable, and that the plaintiff was not entitled to the declarations and injunctions sought.

The trial Court came to the conclusion that the plaintiff had not proved that he was a debtor under the Bombay Agricultural Debtors Relief Act, and that his debts did not exceed Rs. 15,000. It also came to the conclusion that the suit debt was not extinguished, and that the decree passed in Regular Civil Suit No. 691 of 1950 in the Court at Ahmednagar was not void and illegal. It further held that the suit of the plaintiff was barred by constructive *res judicata*. On these findings, the trial Court dismissed the plaintiff's suit. The plaintiff went in appeal, and the lower Appellate Court came to the conclusion that Civil Suit No. 691 of 1950 was not void on the ground that the suit was got filed fraudulently through the machinations of the defendants as alleged by the plaintiff, but on the ground that the Court had no jurisdiction to entertain it and proceed with it by reason of s. 51-A of the Bombay Agricultural Debtors Relief Act. The bar of s. 51-A was not in terms raised by the plaintiff in the trial Court but was raised for the first time in the lower Appellate Court. In view of this finding, the lower Appellate Court came to the conclusion that the decision in Suit No. 691 of 1950 was not a bar to the present suit. It also held that the decision of the Bombay Agricultural Debtors

Relief Court that the plaintiff was a debtor and that his debts did not exceed Rs. 15,000 was binding on the defendants. The Appellate Judge also found that in case he had jurisdiction to decide the question, he would have held that the plaintiff's debts exceeded Rs. 15,000. The Judge also gave a finding that in case he had jurisdiction to decide whether the plaintiff was a debtor, he would have held that the plaintiff did not prove that he was a debtor. As regards the defendants' plea that the plaintiff by his declaration, act or omission had intentionally caused or permitted the defendants to believe that the plaintiff was not a debtor, or that no application under s. 4 could be entertained in respect of the mortgage debts, as his debts exceeded Rs. 15,000, he negatived that contention. The defendants had raised a new plea in the lower Appellate Court, and that was that the plaintiff having asked merely a declaration and an injunction without praying for consequential relief of redemption, plaintiff's suit should be dismissed. It was, however, urged on behalf of the plaintiff that he should be given an opportunity to amend his plaint so as to convert the suit into one for redemption in case the Court came to the conclusion that the suit was not properly framed. The lower Court accepted the contention of the defendants that no declaration could be granted as prayed for by the plaintiff as he had failed to seek further consequential relief. It, however, allowed the plaintiff's request for being given an opportunity to amend the plaint. On these findings, the appeal was allowed by the Assistant Judge, Ahmednagar, the decree passed by the trial Court was set aside and the suit was remanded to the trial Court with a direction that it should give the plaintiff an opportunity to amend his plaint so as to convert the suit into one for redemption. It was against this order that the present Revision Application was filed by the defendants.

C. B. Dalvi, for *M. A. Rane*, for the applicants.

B. A. Jahagirdar, with *S. M. Hussein*, for the opponent.

GOKHALE J. [His Lordship after stating the facts of the case as above, proceeded.] Now the first point which arises in this revision application is whether the learned Judge's view, that the decree in Civil Suit No. 691 of 1950 was a nullity in view of s. 51-A of the Bombay Agricultural Debtors Relief Act, is right. It has been already mentioned that this point about the bar of s. 51-A was not specifically urged on behalf of the plaintiff in the trial Court but was urged for the first time in the lower Appellate Court. Under s. 51-A of the Bombay Agricultural Debtors Relief Act, which will hereafter be referred to as the Act, in so far as it is material—

“...no civil Court shall entertain or proceed with any suit or proceeding in respect of—

(i) any matter pending before the Court under this Act, or

(ii) the validity of any procedure or the legality of any award, order or decision of the Board established under section 4 of the repealed Act, or of the Court, or

(iii) the recovery of any debt made payable under such award.”

Now the view which prevailed with the lower Appellate Court was that when the plaintiff filed Civil Suit No. 691 of 1950 under the Dekkhan Agriculturists' Relief Act, his two applications for adjustment of his debts were already pending in the Bombay Agricultural Debtors Relief Court at Rahuri. It is true that in those applications the mortgage-debts of the petitioners were not mentioned nor were they shown in those two applications as creditors. But since a general notice must be presumed to have been issued under s. 14 of the Act, the question between the petitioners and the plaintiff regarding their mortgage-debts though not directly involved in the applications must be deemed to be pending before the Court when Civil Suit No. 691 of 1950 was filed, and, therefore, the civil Court had jurisdiction neither to entertain that suit nor to proceed with it.

Now, Mr. Dalvi, learned advocate appearing on behalf of the petitioners, contends that as the mortgage-debts of the petitioners were not mentioned in

the applications filed in the Rahuri Court nor were the petitioners made parties to those applications, it could not be said that Suit No. 691 of 1950 was in respect of any matter pending before the Bombay Agricultural Debtors Relief Court. As against this, Mr. Jahagirdar, learned counsel appearing on behalf of the opponent, has urged that since a general notice was published under s. 14 of the Act, even though the names of the petitioners were not mentioned in the applications, law will presume that the dispute between the petitioners and the opponent regarding the mortgage-debts was a matter which was pending before the Court under the Act. In support of his argument, Mr. Jahagirdar relied on the ruling in *Keshav Ganashyam v. Waman Rangaji*¹ where it was held that:

"The expression 'all creditors' used in s. 14 of the Bombay Agricultural Debtors Relief Act, 1947, is not limited to the class of creditors referred to in sub-cl. (a) of the section, but refers to all the creditors of the debtor. Therefore, an award made under the Act is not only an award between the debtor and such of the creditors as are mentioned in the application made under s. 4 of the Act or upon whom notice has been served under s. 14(a) of the Act, but it is also an award between the debtor and all his creditors, and the latter are bound by it."

Now, there is no dispute in this Court that a general notice was issued by the Rahuri Court under s. 14 of the Act, and Mr. Jahagirdar produced before me a certified copy of the order dated September 8, 1947, which shows that a general notice as contemplated under s. 14 to all creditors of the opponent was in fact issued. Admittedly, the Rahuri Court held that the opponent-plaintiff was a debtor, and his debts did not exceed Rs. 15,000. On the basis of the ruling cited above, the decision of the Rahuri Court would undoubtedly be binding on the petitioners. But it is admitted that the final award does not mention the debts of the petitioners at all nor does it mention the petitioners as creditors. The question is whether the fact that a general notice is issued under s. 14 would create a bar in the way of the Ahmednagar Court in entertaining and proceeding with Suit No. 691 of 1950, which was filed by the opponent-plaintiff himself. Section 51-A of the Act ousts the jurisdiction of the civil Court in certain matters, and, in my judgment, it will have to be strictly construed. Two applications were filed by the opponent in the Rahuri Court for adjustment of his debts, and admittedly he did not make the petitioners parties to those applications nor mention in them the mortgage-debts due to the petitioners. He himself filed Suit No. 691 of 1950 under s. 15-D of the Dekkhan Agriculturists Relief Act. He, no doubt, alleged that the suit was got filed fraudulently by the petitioners, but that allegation of his has not been held established by the lower Appellate Court, and no arguments have been addressed to me on that point. It is true that the issue of a general notice under s. 14 would make the award passed in the Rahuri Court on April 2, 1952, binding on the petitioners in the sense that the petitioners would not be able to dispute that the opponent was a debtor and his debts did not exceed Rs. 15,000. But, in my judgment, the issue of a general notice by itself would not bring the debts under the mortgages created in favour of the petitioners before the Bombay Agricultural Debtors Relief Court since neither the names of these creditors nor their debts were mentioned in the debtor's applications and in the awards that came to be subsequently made and it cannot, therefore, be said that Civil Suit No. 691 of 1950 was a suit in respect of any matter pending before the Court.

In support of his argument that s. 51-A of the Act ousted the jurisdiction of the civil Court, Mr. Jahagirdar has referred to two cases. In the case of *Asaram Bapu Waghmode v. Bhanudas*,² the facts were as follows: One Dhondiba, the father of three minor plaintiffs, had passed a possessory mortgage-deed of certain properties in favour of the defendants. Dhondiba then made an application to the Bombay Agricultural Debtors Relief Court for adjustment of his debts showing the defendants as creditors. Subsequently, he

1 (1952) 55 Bom. L.R. 320.

2 (1955) 58 Bom. L.R. 95.

passed a sale-deed in respect of the property in favour of the defendants. During the pendency of the Debt Adjustment Applications, the plaintiffs, through Dhondiba as their guardian, filed a suit *inter alia* for a declaration that the sale-deed passed by Dhondiba in favour of the defendants was void under s. 40 of the Act. The defendants contended that under s. 51-A of the Act, the civil Court had no jurisdiction to entertain the suit as the suit was filed in respect of a matter pending before the Court under the Act. It was held by Mr. Justice Vyas on these facts that the suit filed by the plaintiffs could be said to be in respect of matters pending before the Court established under the Act, and, therefore, the civil Court had no jurisdiction to entertain the suit under s. 51-A of the Act. This case is clearly distinguishable on facts. The property which was the subject-matter of the suit filed by the plaintiffs through their guardian Dhondiba was the same property that was involved in the application made by Dhondiba for adjustment of his debts under the Act.

The second case relied on by Mr. Jahagirdar is *Allemeeya Dadu Sahab v. Hari*.³ In that case the question involved was one of limitation and it arose in this way. The decree-holder had made an application under the Act for adjustment of his debts under a money-decree. On the date of the hearing of the application, the defendant was absent, and the Court held that defendant was not a debtor. An application was made by defendant to set aside the order passed in that case, but that application was dismissed. Thereafter plaintiff filed an application for execution, and the question was whether that application for execution was in time. Plaintiff contended that he was entitled to deduct the period occupied by the proceedings pending before the Debt Adjustment Court, when an *ex parte* order was passed, and also the time occupied during the determination of the application made by the defendant for setting aside the *ex parte* order, and it was held that he was entitled to exclude both these periods. As regards the period occupied for setting aside the *ex parte* order on the application of the defendant, that period was allowed to be excluded on the ground that the plaintiff could not have made an application for execution of the decree during that period by virtue of s. 51-A(i) of the Act. Here again, the decree that was sought to be executed by the plaintiff was the subject-matter of pending proceedings under the Act, and, therefore, s. 51-A was held to be applicable. The principle laid down in this case can have no application to the present case. The learned Judge's view that the decree passed in Civil Suit No. 691 of 1950 under the Dekkhan Agriculturists' Relief Act was a nullity by virtue of s. 51-A of the Act and was not binding on the plaintiff is, therefore, not correct.

But even though the bar of s. 51-A of the Act does not affect the petitioners, that by itself will not make the decree obtained by them in Suit No. 691 of 1950 binding on the opponent. As I have already indicated, there being a general notice issued to the creditors under s. 14(b) of the Act, the findings of the Debt Adjustment Court that plaintiff was a debtor and his debts did not exceed Rs. 15,000 would be binding on the petitioners, and the mortgage transactions in favour of the petitioners would then be governed by the provisions of the Act, and it would not have been open to the petitioners to file a suit under the Dekkhan Agriculturists' Relief Act. A reference has to be made in this connection to s. 56(1) of the Act which, in so far as it is material, provides as follows:—

"Notwithstanding the repeal of the Dekkhan 'Agriculturists' Relief Act, 1879, by the Bombay Agricultural Debtors Relief Act, 1939, the first mentioned Act shall, in so far as it applies to transactions and proceedings to which this Act does not apply, be deemed to have been re-enacted with effect from the date of the coming into operation of this Act (hereinafter in this section referred to as the said date) and shall continue in force for a period of three years from the said date:—"

The effect of this section is that on the date of the coming into operation of the Act, the Dekkhan Agriculturists' Relief Act, 1879, must be deemed to have been re-enacted and would be in force for a period of three years, but it will govern only those transactions and proceedings to which the Act does not apply. Once it is held that the opponent-plaintiff is a debtor and his debts do not exceed Rs. 15,000, then the mortgage transactions in suit would be governed by the Act and could not have been made the subject-matter of any proceedings under Dekkhan Agriculturists' Relief Act. In that view of the matter, it must be held that the decree passed by the civil Court in Civil Suit No. 691 of 1950 on July 30, 1952, was without jurisdiction and will not bind the opponent.

But then it is contended that the view of the learned Appellate Judge that the mortgage debts due to the petitioners were extinguished was not sound, and reliance is placed in this connection on s. 15(2) of the Act. Under s. 15(1), in so far as it is material, it is provided that every debt due from a debtor in respect of which a statement is not submitted to the Court by the creditor in compliance with the provisions of s. 14 shall be extinguished. In *Lazman Babaji v. Akharam Sahebaram*,⁴ it was held by a division bench of this Court that s. 15(1) of the Act applies in terms to 'every debt' and is not restricted to debts due to creditors, who are named in the application for adjustment of debts and are served with notice under s. 14 (a) of the Act. In the present case, admittedly the petitioners were not named in the applications for adjustment of debts filed by the opponent. But a general notice having been issued under s. 14(b), the debts of the petitioners also would be governed by the provisions of s. 15(1) of the Act. But then Mr. Dalvi contends that in the present case, it could not be said that he would be affected by the publication of the general notice under s. 14(b), because, according to him, the opponent was guilty of contravening some of the mandatory provisions of the Act. The applications for adjustment of debts in the Rahuri Court were filed under s. 4 of the Act. The application that has to be filed has to be in a prescribed form as mentioned in r. 4 of the Bombay Agricultural Debtors Relief Act Rules. The application has to be made in form No. 1 when it is filed by a debtor. Under s. 4(3) of the Act,

"Notwithstanding anything contained in section 3 an application made under this section shall contain the amounts and particulars of all debts specified in that section due by the debtor."

Mr. Dalvi contends that though under s. 3 certain debts and liabilities of a debtor mentioned in that section are saved, all those debts and liabilities have to be mentioned by the debtor when he makes an application under that section. Paragraph 5 of Form No. 1, which is the form to be used by a debtor, also provides that the applicant has to declare that all debts which are due or which to his knowledge any person claims to be due from him, and all his properties have been included in the statements contained in the application. Mr. Dalvi's argument is that if s. 4 and r. 4 of the Act require a debtor to submit a statement of all the debts, and if the debtor deliberately suppresses some of his debts in making his application for adjustment of debts, then a general notice issued under s. 14(b) will not be binding on the creditor whose name and debts have not been included in the application. I am not impressed by this argument. It may be that the creditor in certain circumstances may be able to challenge the decision of the Bombay Agricultural Debtors Relief Court on the ground of fraud, collusion or such other grounds, but merely because the names of certain creditors and their debts were not mentioned in the application for adjustment of debts by the debtor, I do not think, that it will in any way affect the validity of the general notice issued by the Bombay Agricultural Debtors Relief Court. By providing for the issue of a general notice under s. 14(b), the Legislature obviously intended that not only all those creditors, mentioned in the application who could not be served or were not

served for some reason or other, but also other creditors, who were not mentioned in the application by the debtor, should get an opportunity to come before the Court and prove their debts. See *Keshav Ganashyam v. Waman Bangaji*.⁵ It has also to be mentioned that the present petitioners did not allege in the written statement that the proceedings before the Bombay Agricultural Debtors Relief Court were vitiated by any collusion between the plaintiff and the creditors mentioned in those applications.

But then Mr. Dalvi contends that assuming that the provisions of s. 15(1) apply to the debts of the petitioners, their claim against the debtor would be saved by s. 15(2) of the Act. Section 15(2) provides as follows:—

"Nothing in this section shall apply to any debt due from any person who has by his declaration, act or omission intentionally caused or permitted his creditor to believe that he is not a debtor for the purposes of this Act or that no application under section 4 can be entertained in respect of any debt owed by such person to such creditor by reason of the provisions of section 11."

Now the learned Appellate Judge held that the claims of the petitioners were not saved under s. 15(2). Undoubtedly, evidence was given on behalf of the petitioners that certain representations were made by the opponent which induced them to believe that he was not a debtor. The lower Appellate Court has not accepted this evidence, and, in revision, I do not think that it would be open to me to re-appreciate that evidence. It is true that the applications were filed under the Act at Rahuri in February 1947, and the opponent himself filed Suit No. 691 of 1950 in the civil Court at Ahmednagar on May 26, 1950, under s. 15-D of the Dekkhan Agriculturists' Relief Act. But the filing of the suit would not amount to any misrepresentation, because the suit was filed long after the last date before which applications could be filed under the Act, and that date was July 31, 1947. Petitioner No. 1 is a pleader, and it is impossible to hold that there were any mis-representations on the part of the opponent which could have induced him to believe that the opponent was not a debtor. Besides, the preliminary issues in Application Nos. 528 of 1947 and 1390 of 1947 were decided on February 26, 1952, and the opponent was held to be a debtor and his debts were held not to exceed Rs. 15,000. The final awards came to be passed on April 2, 1952, and it seems that the awards were produced in Suit No. 691 of 1950. That is what is alleged in the plaint of the present suit, and that does not seem to have been disputed by the written statement filed by the petitioners.

Mr. Dalvi then contends that the suit under the Dekkhan Agriculturists' Relief Act should have been got transferred to the Bombay Agricultural Debtors Relief Court, because it was filed for the purpose of taking accounts, and if the opponent was a debtor and his debts did not exceed Rs. 15,000, then it was incumbent on the part of the civil Court to transfer the proceedings to the Bombay Agricultural Debtors Relief Court, and it was the opponent whose duty it was to apply for transfer, and he having failed to do so, he cannot now take advantage of the provisions of s. 15(1) of the Act. In support of his argument, Mr. Dalvi relies on the ruling in *Mohamad Sadik v. Hussein Miya*.⁶ In this case a division bench of this Court held that:—

"The failure on the part of a debtor to make the necessary allegations under s. 19(1) of the Act, which would lead to the transfer of a suit or appeal to the Bombay Agricultural Debtors Relief Act Court, must incur the penalty laid down in s. 15(2) of the Act and the penalty is that the debtor cannot contend that the debt which is the subject-matter of the suit or appeal is extinguished by reason of s. 15(1) of the Act."

That case again is distinguishable on facts. A partition decree was passed in that case on March 31, 1945, and defendant No. 1 filed an appeal. Ultimately the District Court, by its judgment dated October 18, 1947, modified the decree of the trial Court. Defendant No. 6 then filed two darkhastas, one against defendant No. 1 and the other against defendant No. 2, and the contention of

⁵ (1952) 55 Bom. L.R. 320.

⁶ (1954) 56 Bom. L.R. 902.

those two defendants was that the judgment-debt was extinguished, and, therefore, a darkhast could not be presented in respect of that judgment-debt. The last date for making application for adjustment of debts in that case was July 31, 1947, that is to say, before the District Court decided the appeal. The proceedings in appeal in that case, therefore, could have been got transferred to the Bombay Agricultural Debtors Relief Court if they had involved the questions referred to in s. 19(1) of the Act, but as the appeal did not involve any of these questions, the proceedings could not have been so transferred. It was in these circumstances that this Court held that the failure on the part of defendants Nos. 1 and 2 to make the relevant allegations before the District Court must have led the creditor to believe that they were not debtors and that the District Court had jurisdiction to dispose of the case.

Now, in the present case, the suit, which was filed under the Dekkhan Agriculturists' Relief Act, was filed on May 26, 1950, that is to say, long after the date before which applications to the Bombay Agricultural Debtors Relief Court could have been filed. Besides, it does appear that the awards passed in the Bombay Agricultural Debtors Relief proceedings were placed on the record of the Civil Suit by the opponent. I do not think, therefore, that there was any failure on the part of the opponent which could bring into operation the penalty laid down in s. 15(2) of the Act, even assuming that the proceedings in the Dekkhan Agriculturists' Relief Suit could have been validly transferred to the Bombay Agricultural Debtors Relief Court. I am, therefore, of the view that the finding of the learned Appellate Judge that the petitioners are not entitled to the benefit of s. 15(2) must be upheld.

The trial Court held that the defence of the opponent was barred by the principle of constructive *res judicata* since the opponent did not contend in Civil Suit No. 691 of 1950 under the Dekkhan Agriculturists Relief Act that the debts due to the petitioners were extinguished. Mr. Dalvi has fairly, and in my opinion rightly, conceded that in case I hold that the Court trying Civil Suit No. 691 of 1950 had no jurisdiction to try the suit under the provisions of the Dekkhan Agriculturists' Relief Act, that decree would be a nullity, and there would be no question of any constructive *res judicata*.

The last point that was urged is that the plaintiff brought the suit for certain declarations and an injunction, and he had not prayed for consequential relief of redemption and possession, and, therefore, the suit would be barred by the provisions of s. 42 of the Specific Relief Act. That contention was upheld by the lower Appellate Court, but it decided to give an opportunity to the plaintiff to amend his plaint so as to convert the suit into one for redemption. Mr. Dalvi says that this decision of the lower Appellate Court is erroneous in the circumstances of this case. Now, once it is held that the debts due to the petitioners are extinguished by reason of the provisions of s. 15(1) of the Act, it would be open to the plaintiff to seek redemption and possession. It is true that he could have obtained the same relief through the Bombay Agricultural Debtors Relief Court if he had made the petitioners parties to the proceedings before that Court, but there was no adjudication of the Bombay Agricultural Debtors Relief Court so far as the debts due to the petitioners are concerned, and if those debts are extinguished, the only right to which the plaintiff-opponent will be entitled will be the right of redemption and possession. In my judgment, the lower Appellate Court was right when it exercised its discretion in giving an opportunity to the plaintiff to amend his plaint so as to convert the suit into one for redemption. Unfortunately, the lower Appellate Court instead of allowing the plaintiff to make the necessary application for amendment remanded the suit to the trial Court after setting aside its decree and directed the trial Court to give an opportunity to the plaintiff to amend his plaint so as to convert the suit into one for redemption. In doing so, it has made the following curious remark:

"I am following this course not so much with a view to avoid multiplicity of pro-

ceedings but to give the defendants an opportunity to challenge the findings recorded by me in this appeal."

It is really difficult to appreciate the implications of this observation. As I have already stated, though both the lower Courts have come to the conclusion on the evidence that the plaintiff was not a debtor and that his debts exceeded Rs. 15,000, the lower Appellate Court held, and in my judgment rightly, that these questions could not be decided by the civil Court. The findings of the Bombay Agricultural Debtors Relief Court that the plaintiff is a debtor and that his debts do not exceed Rs. 15,000 are binding on the petitioners. The further finding by the lower Appellate Court that the decree in Civil Suit No. 691 of 1950 was without jurisdiction has been upheld by me though for a different reason. Another finding of the lower Appellate Court that the debts due to the petitioner are extinguished by virtue of the provisions of s. 15(1) and are not saved under s. 15(2) is also upheld by me. In my view, it would not be open to the petitioners to agitate these questions again in any proceedings subsequent to the amendment of the plaint if that amendment were allowed. Therefore the order of the lower Appellate Court remanding the suit was not necessary at the present stage. The lower Appellate Court should have itself allowed the plaintiff to file an application for amendment of the plaint and should have given an opportunity to the defendants to raise their contentions against this amendment. In case, it was then found by the lower Appellate Court that it was necessary to remand the case to the trial Court, then it would have been open to the lower Appellate Court to do so at that stage.

The result is that subject to the findings of the Appellate Court, which have been confirmed by me, I set aside the order remanding the suit and send down the case to the Appellate Court to entertain the application, if any, to be filed by the plaintiff for converting the present suit into one for redemption after payment of the necessary Court-fees. In case the application is allowed and the suit is converted into one for redemption, an opportunity will be given to the present petitioners to amend their written-statement and to take such defences as may be open to them in the light of the present judgment. In case the lower Appellate Court finds thereafter that it is necessary to remand the suit to the trial Court, then it would be open to the Appellate Court to do so. Otherwise, it will dispose of the appeal in accordance with law.

As regards the costs, it is quite apparent that the opponent has been largely responsible for the present proceedings. He filed the applications for adjustment of the mortgage-debts in the Bombay Agricultural Debtors Relief Court at Ahmednagar though he was a resident of Rahuri. He filed fresh applications for adjustment of debts in the Court at Rahuri without impleading the present petitioners and without mentioning their mortgage debts. He was himself responsible for filing Civil Suit No. 691 of 1950 for accounts under s. 15-D of the Dekkhan Agriculturist's Relief Act, and in allowing it to proceed which resulted in a decree under which Rs. 4,630 were found due to petitioner No. 1. Though the awards of the Bombay Agricultural Debtors Relief Court were filed in that suit, the attention of the civil Court was not drawn, it appears, to those awards. In 1952, petitioners Nos. 2 to 7 filed Civil Suit No. 292 of 1953 to enforce their second mortgage, and in that suit an *ex parte* decree was passed in their favour but it ultimately came to be set aside at the instance of the opponent and it was only in April 1954 that he filed the present suit. In my view the equities are wholly in favour of the present petitioners. Besides they are mortgagees. I, therefore, direct that the costs of the entire proceedings in the present suit and in the appeal below so far as well as the costs of this revision application will be borne by the respective contending parties.

Order accordingly.

CRIMINAL APPELLATE.

Before Mr. Justice Mudholkar and Mr. Justice Naik.

STATE v. M. M. PINTO.*

Factories Act (LXIII of 1948), Secs. 2(1), 2(k)(1), 2(m)(1), 7(1), 85—Partners of concern where manufacturing process going on working in such factory—Whether such persons workers within s. 2(1).

The factory inspector visited the premises of a saw mill where certain manufacturing process was going on with the aid of power and found thirty workers engaged in some job or other. The accused produced a register containing nineteen names in one place and nine additional names at another place. The factory inspector finding that all the thirty persons engaged in the factory were workers within the meaning of the Factories Act, 1948, lodged a complaint for the violation of s. 7(1) read with s. 92 of the Act and also of r. 4 of the Bombay Factories Rules, 1950. The accused contended that the mill was a partnership concern and the nineteen names mentioned in the register were the names of the partners, that the nine additional names appearing in it were the names of workers who were working on wages in the mill and that the remaining persons were partners of another concern which was situated on the same premises as the mill. It was contended for the prosecution that as the partners in the mill had engaged themselves in doing the work on the premises of the factory, they fell within the definition of the word 'worker' in s. 2(1) of the Act, and inasmuch as the number of such workers exceeded ten, the provisions of the Act were violated:—

Held, that the partners of the mill who were found working in the factory could not be considered as employees, because so far as they were concerned, there was neither any employer nor any contract of employment, and

that, therefore, they were not workers within the meaning of s. 2(1) of the Act.

Chintaman Rao v. State of M.P.,¹ followed.

State v. Allisahab Kashim,² *Ramnath Shankarlal Chandak v. State*,³ *The State v. Jhambhat*⁴ and *State v. Shri Krishna Pd.*,⁵ referred to.

THE facts appear in the judgment.

V. T. Gambhirwala, Assistant Government Pleader, for the appellant.
H. R. Pardiwalla, with S. G. Samant, for the accused.

NAIK J. This is an appeal by the State against the order of acquittal passed by the learned Presidency Magistrate, 6th Court, Mazagaon, Bombay. The material facts may, briefly, be stated as follows: On January 4, 1958, Factory Inspector Shinde visited the premises of a concern known as Western India Saw Mills situate at Reay Road, Bombay-10. His object was to inspect the factory under the Factories Act. He found that thirty workers were actually engaged in doing some job or the other on the premises of the factory. He also noticed that the manufacturing process of cutting, planing and shaping of wood was going on with the aid of power. The accused-respondent produced a register, exh. A, which contained 19 names in one place and additional nine names at another place. According to the Inspector, all the thirty persons, who were engaged in the factory were workers within the meaning of that word in the Factories Act, 1948. He, therefore, lodged a complaint in the learned Presidency Magistrate's Court, Mazagaon, Bombay, for the violation of the provisions of s. 7(1) read with s. 92 of the Factories Act, 1948, and also of r. 4 of the Bombay Factories Rules, 1950.

*Decided, August 14, 1959. Criminal Appeal No. 391 of 1959, against the order of acquittal passed by A. A. Shellim, Presidency Magistrate, 6th Court, Mazagaon, Bombay, in Case No. 180/S of 1958.

1 [1958] A.I.R.S.C. 338.

2 [1954] 57 Bom. L.R. 135.

L.R.—103

3 (1952) Criminal Revision Application No. 685 of 1952, with Criminal Revision Applications Nos. 686 and 687 of 1952, decided by Bavdekar J., on October 6, 1952 (Unrep.).

4 [1953] Nag. 67.

5 [1954] A.I.R. All. 44.

The defence of the respondent was simple. He contended that the Western India Saw Mills was a partnership concern and there were nineteen partners in this concern including himself. According to him, the nineteen names that are mentioned in exh. A are the names of the partners. He further stated that on the day in question eighteen persons were actually working. He asserted that, as a matter of fact, the nine names appearing in exh. A are the names of workers who were working on wages in the concern. He also explained that the remaining three persons, who are shown at serial Nos. 20, 25 and 30 in the register, exh. B, prepared by the Inspector, were partners of another concern known as Western India Joinery Works and that they had come there on the day in question, because some of the partners in the two concerns are common. He also pointed out that the premises for Western India Saw Mills, Western India Joinery Works and Western India Spray Painting and Polishing Works are the same.

The learned Presidency Magistrate accepted the contentions of the defence and acquitted the respondent. It is from that decision that the State has come up in appeal.

The respondent produced two partnership deeds in support of his contention that in all there were nineteen partners in the concern known as Western India Saw Mills and also in the other concern known as Western India Joinery Works. The defence has also examined two witnesses viz., Laxman Ramchandra, D.W. 2 and Ramchandra Hari, D.W. 3 in support of its contention that there were nineteen partners in the two concerns. Ramchandra Patil, D.W. 3, stated that, as a matter of fact, there were five such concerns including the Western India Saw Mills and the Western India Joinery Works and that he was looking after the work of attendance of the workers in all these concerns. He also asserted that he was one of the partners in these concerns. The trying Magistrate accepted the evidence of these two witnesses and also relied upon the terms of the two deeds of partnership and came to the conclusion that, as a matter of fact, there were nineteen partners including the respondent in the concern known as Western India Saw Mills.

The learned Assistant Government Pleader frankly conceded that he is not in a position to assail this finding of fact arrived at by the learned Magistrate on the basis of oral and documentary evidence led before him. He, however, contended that even assuming that there were nineteen partners in the concern, still if these partners or any of them engage themselves in doing the work on the premises of the factory, then everyone of them could fall within the definition of the word "worker" given in s. 2(l) of the Act, and inasmuch as the number of such workers exceeded ten, the provisions of the Factories Act are obviously violated.

In order to appreciate this line of argument, it is necessary to refer to a few provisions of the Factories Act. Section 2(l) defines the word "worker" to mean

"a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or..."

The term "manufacturing process" has been defined in s. 2(k)(i) as any process for

"making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or..."

The definition of the word "factory" is contained in s. 2(m)(i) and it means any premises including the precincts thereof

"whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on."

Clause (ii) of this sub-section is not relevant for our purpose in this case.

It is not disputed that manufacturing process with the aid of power was

going on in the premises of the Saw Mills. The only point to be considered is whether the number of workers engaged in that process exceeded ten, and for this purpose we have to consider the meaning and scope of the definition of the word "worker" contained in s. 2(1) of the Act. The learned Assistant Government Pleader emphasised the expression "whether for wages or not" in sub-s. (1) and argued that the essence of the matter consisted in the fact that a person is actually engaged in the work and the purpose for which he is engaged in that work is entirely immaterial. The worker may receive wages or may even work free or he may have an interest in the factory proprietary or otherwise. In support of this argument, he drew our attention to the decision of a Division Bench of this Court reported in *State v. Allisahab Kashim Tambohi*.¹ That decision overruled the previous decision of Mr. Justice Bavdekar sitting as a single Judge in *Ramnath Shankarlal Chandak v. State*.² In the unreported case decided by Mr. Justice Bavdekar, the view taken was that the word "employment" presupposes the relationship of master and servant. This view did not find favour with the Division Bench in *State v. Allisahab Kashim* and it came to the conclusion that whether the relationship of master and servant prevailed or not, what is necessary is that the person is actually engaged in carrying on the manufacturing process in a particular factory. The following observations of Mr. Justice Vyas at p. 147 are apposite:

"...The definition of a worker in cl. (1) is clearly enacted in terms of a person who is 'employed in' and not in terms of a person who is employed by. Under the definition, it is immaterial how or by whom he is employed so long as he is actually employed in a manufacturing process."

The logical corollary of the above view is that there can be an employee without an employer and all that is necessary is that there should be some employment in the sense of engagement. There need not even be a contract of employment.

Mr. Justice Dixit, who also took the same view of the definition of the term "worker" as that taken by his colleague, Mr. Justice Vyas, however, emphasised the expression "for wages or not". The words "or not" have apparently been used with a view to include apprentices and honorary workers within the definition of the term "worker". Mr. Justice Dixit, however, took the view that the words "or not" suggest that the idea of relationship of master and servant is not of the essence of the matter. A similar view was taken by the Nagpur High Court in the *The State v. Jiwabhai*,³ giving a wider connotation to the word "employed" under s. 66(1)(b) of the Factories Act. The learned Judges observed that the word "employed" in their opinion, did not only connote employed on wages but also being occupied or engaged in some form of activity. On the other hand, the Allahabad High Court took a contrary view in *State v. Shri Krishna Pd.*,⁴ holding that there must be a relationship of master and servant before a person engaged in carrying on a particular process can be considered to be a worker.

The meaning and scope of the definition of the term "worker" contained in s. 2(1) of the Act came up for consideration before the Supreme Court in *Chintaman Rao v. State of M.P.*⁵ The Supreme Court held that the concept of employment involves three ingredients: (1) employer, (2) employee and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision. It follows from the above that the term "employed" is a relative term and always has relation on the one hand to the employer and on the other to the contract of employment. In

1 (1954) 57 Bom. L.R. 185.

2 (1952) Criminal Revision Application No. 685 of 1952, with Criminal Revision Applications Nos. 686 and 687 of 1952, decided by

Bavdekar J., on October 6, 1952. (Unrep.).

3 [1953] Nag. 67.

4 [1954] A.I.R. All. 44.

5 [1958] A.I.R. S.C. 388.

the course of the judgment of the Court which was delivered by Mr. Justice Subba Rao, emphasis was laid on the presence of the circumstance viz., whether the workers are amenable to the control and supervision of the manager or not. Mr. Justice Subba Rao pointed out that if it is found that the workers are carrying on the work under the management and supervision of the manager of the factory then it can be safely concluded that each of them is a worker within the meaning of that term in the Factories Act. The decision of the Supreme Court is directly on the point and is, therefore, binding on us. Although the decision in *State v. Allisahab Kashim* was not referred to before the Supreme Court, nor was it considered, still the former must be deemed to have been over-ruled, by necessary implication, inasmuch as the Nagpur decision, in which a similar view was taken, was expressly over-ruled.

The position, therefore, boils down to this that the eighteen persons who were found working in the factory on the date of inspection were not workers within the meaning of s. 2(1) of the Factories Act, although they were actually carrying on the work on the premises of the factory. They were partners of the concern and as such cannot be considered as the employees, because so far as they were concerned, there was neither any employer nor any contract of employment. They were doing the work in their capacity as partners. The same view holds good in the case of three other persons who were partners in another concern whose premises are the same as the premises of the offending concern. The learned Assistant Government Pleader contended that if the term "worker" is narrowly interpreted as suggested above, then that will leave a loophole by having recourse to which the provisions of a social legislation like the Factories Act could be successfully violated. We are unable to accept this line of reasoning. Section 85 of the Act gives ample powers to the State Government to declare that all or any of the provisions of the Act shall apply to any place wherein a manufacturing process is carried on in spite of the fact that the number of persons employed therein is less than ten in one case and less than 20 in the other and also in spite of the fact that the persons working therein are not employed by the owner, but are working with the permission of or under an agreement with the owner. In a given case if the Government is satisfied that a partnership agreement has been entered into with a view to avoid the application of the provisions of the Factories Act, it can step in and declare the concern to be 'a factory' within the meaning of the Factories Act. The result is that the appeal fails and is dismissed.

Appeal dismissed.

Before Mr. Justice Shah and Mr. Justice Naik.

ALLIJAN MUNSHI v. STATE.*

Indian Evidence Act (I of 1872), Secs. 32(1), 8—Written complaint by deceased expressing apprehension of death at hands of accused who is subsequently charged with murder of such complainant—Whether complaint inadmissible under s. 32(1)—Admissibility of such complaint under s. 8—Statement made by person since deceased admissible under a provision other than s. 32—Whether such statement inadmissible because it does not fall under s. 32.

A complaint in writing made by a person who dies sometime thereafter, expressing apprehension of death at the hands of a person is admissible in evidence under s. 32(1) of the Indian Evidence Act, 1872, when the person whose conduct is the source of the apprehension is charged with the offence of murder of the person making the complaint.

If the fact to be proved is a statement made by a person since deceased, and it is admissible under a provision other than s. 32 of the Indian Evidence Act, its admissi-

*Decided, August 24, 1959. Criminal Appeal No. 898 of 1959, against the order of conviction and sentence passed by B. O. Vakil, Additional

Sessions Judge, Greater Bombay, in Case No. I, II Sessions 1959.

bility cannot be denied because it does not fall within the provisions contained in s. 32 of the Act.

The deceased had submitted a written complaint against her husband on August 15, 1958, to the Commissioner of Police which *inter alia* stated: "As this concerns with my whole life, I am afraid, if no prompt action is taken, a poor life would be destroyed." At the trial of the husband for the murder of his wife, which was committed on October 27, 1958, it was contended that the complaint submitted by the deceased was inadmissible in evidence under s. 32(1) of the Indian Evidence Act:—

Held, that the statement showing apprehension of death on account of the conduct of the husband was admissible as a statement relating to the circumstances of the transaction under s. 32(1) of the Act:

E. Venkatasubba Reddi, In re.,¹ Pakala Narayana Swami v. The King-Emperor² and Gokul Chandra v. The State,³ referred to; and

that the fact that the deceased had made a complaint against her husband, which may have constituted a motive for the husband to commit the offence charged, was a fact, which could be proved under s. 8 of the Indian Evidence Act, and production of the original complaint would be probative of that fact:

Golak Biharee Takal v. Emperor⁴ and Emperor v. Manchankhan,⁵ referred to.

ONE Rashida, who was aged about 18 years, was the wife of Allijan (accused) and the daughter of one Mohamed Natha by his wife Sakina. Mohamed Natha died about 17 years ago and Sakina contracted a marriage with one Mohamed Suleman who was a resident of the former state of Patiala. Mohamed Suleman and Sakina migrated to Bombay and took up residence in Bombay. The accused was the brother's son of Mohamed Suleman and he came to live with Mohamed Suleman sometime in the year 1950 and continued to do so till Rashida died. The accused was married to the daughter of one Jannat Bi, but he divorced her some six years before the date of the offence charged against him. On May 26, 1958, the accused married Rashida. Rashida was unwilling to marry the accused, but she was persuaded by her mother and step-father to marry the accused. The marriage proved unhappy and Rashida left her home at least on four occasions between May 26, 1958, and October 26, 1958. Rashida had an elder sister, Aziza, with whom she resided for some time. She had on one occasion addressed a petition to the Commissioner of Police, Bombay, on August 15, 1958, stating that she had been compelled to marry the accused, who was a "drunkard, gambler and a man of notoriously bad character". She also stated that "if no prompt action was taken for her protection, her life would be destroyed". After this petition was submitted on August 24, 1958, Rashida was brought home and was beaten by the accused. Thereafter a non-cognizable complaint was filed by Rashida against the accused. Rashida left home again and she was brought back on October 4, 1958. At that time the accused was out of Bombay attending to some business transactions. On October 25, 1958, Rashida went to the house of one Amina Bi Mohamed and on October 26 she was brought home by her mother Sakina. On the morning of October 27, 1958, the accused returned to Bombay at about 9 a.m. and it was the prosecution case that on that day at about 8 p.m. the accused poured kerosene oil over the clothes of Rashida, when she was sitting in the kitchen doing some household work, and set fire to her clothes as a result of which Rashida suffered extensive burns. Rashida was then removed to the Nanavati hospital and she made three dying declarations, one in presence of Dr. Tilak, another in presence of Sub-Inspector Irani and the third in the presence of a Magistrate, stating that the accused had poured kerosene oil on her person and had set fire to her clothes. Rashida died shortly after making these declarations. The accused was then prosecuted for the offence under s. 302 of the Indian Penal Code of murdering Rashida by causing her death by pouring kerosene oil on her and setting fire to her clothes.

1 (1931) I.L.R. 54 Mad. 931.

2 (1939) L.R. 66 I.A. 66, s.o. 41 Bom. L.R. 428.

3 [1950] A.I.R. Cal. 306.

4 [1938] 1 Cal. 290.

5 (1923) 34 Bom. L.R. 1087.

At the trial for the offence before the Additional Sessions Judge, Greater Bombay, on behalf of the prosecution, Dr. Koppikar—an Honorary Magistrate before whom a declaration as to the circumstances leading to injuries suffered by her was made by Rashida, Sub-Inspector Irani in whose presence also a similar declaration was made and Dr. Tilak were examined. The prosecution also examined Sakina, mother of Rashida and also Mohamed Suleman, her step-father beside certain other witnesses. The accused denied that he had poured kerosene oil over the person of Rashida or that he had set fire to her clothes. He stated that finding that Rashida's clothes had caught fire he rushed to her aid and rendered assistance to her and got her removed to the hospital. The defence of the accused was that being disgusted of married life, Rashida had committed suicide by pouring kerosene oil on her person and by setting fire to her clothes. The jury did not accept the defence of the accused, and brought in a unanimous verdict of guilty against the accused. The Additional Sessions Judge accepted that verdict and convicted the accused and sentenced him to suffer imprisonment for life.

The accused appealed to the High Court.

A. S. R. Chari, with L. G. Khare and M. S. Mirajkar, for the appellant-accused.

Y. V. Chandrachud, Government Pleader, for the State.

SHAH J. [His Lordship after stating the facts of the case, proceeded.] Then, it was urged by Mr. Chari that the learned Judge allowed inadmissible evidence to be admitted on the record and that evidence must have seriously prejudiced the mind of the jury against the appellant. Reliance was sought to be placed upon the complaint, exh. C, which was submitted by Rashida on August 15, 1958, to the Commissioner of Police. By that complaint the appellant was charged with being a drunkard, a gambler, a man of notoriously bad character and a "white slaver" who desired to dispose of his own wife (Rashida) for the purpose of prostitution and that he had committed rape upon his sister-in-law. The question about the admissibility of this complaint was, in appears, not raised before the trial Court, and the complaint was admitted in evidence. Mr. Chari contends that a statement made by the victim of an offence which is not proximate in time to the death and directly related to its cause is inadmissible in evidence under s. 32(1) of the Indian Evidence Act and apart from that provision such a statement made by a person who has since died is inadmissible in evidence, because s. 32 exhaustively deals with the relevance and admissibility of evidence of persons not examined before the Court. In support of his contention Mr. Chari invited our attention to a judgment of the Madras High Court in *Venkatasubba Reddi, In re.*¹ In that case it was held that a statement made by a deceased person which constituted a motive for another to commit a crime could not be proved by the person who heard the deceased make the statement. Such a statement, it was held, was admissible in evidence under s. 32(1) of the Indian Evidence Act if it be a statement as to the cause of death or as to any of the circumstances of the transaction which resulted in death or under explanation (1) to s. 8 of the Act, if it was shown to have accompanied or explained any act of the deceased. But, it was observed, there is nothing in s. 8 to indicate that a relevant fact can be proved by hearsay evidence. In that case, Mr. Justice Sundaram Chetti, who delivered the principal judgment of the Court, observed that at first he thought that if what the victim stated about her intention to cancel her will constituted a motive for the accused to commit murder, that statement could be proved by those who heard it from her, but after considering the provisions of s. 32(1) and s. 8 of the Act, the learned Judge observed that with some hesitation, he was constrained to accede to the contention that the evidence of the witnesses who deposed to the statements made by the victim was inadmissible.

1 (1931) I.L.R. 54 Mad. 931.

Beasley C.J. was, however, emphatic in the view expressed by him. The learned Chief Justice observed that if the intention of a person could be proved by direct evidence, then such evidence was clearly admissible to prove the relevant fact of motive, but there was nothing in the Evidence Act which rendered hearsay evidence of intention admissible. The learned Chief Justice also criticised the trial Court for failing to draw a distinction between the relevancy of evidence and its admissibility and observed that there is nothing in s. 8 of the Act which supports the contention that a relevant fact can be proved by hearsay evidence. The learned Chief Justice held that the statement alleged to have been made by the victim for altering her will was inadmissible in evidence.

Our attention was also invited to a judgment of the Privy Council in *Pakala Narayana Swami v. The King-Emperor*². In that case the victim of the offence, before he started to go to another village, made a statement to his wife that the wife of the accused had written and asked him to go and receive payments due to him. This statement was sought to be proved at the trial and the Privy Council held that such a statement was inadmissible in evidence under s. 32(1) of the Evidence Act as a circumstance of the transaction, which resulted in death. The Privy Council also observed that the phrase "circumstances of the transaction" in the section conveyed some limitations. It was not as broad as circumstantial evidence which includes evidence of all relevant facts and it is narrower than *res gestae*, and laid down the test that the circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. Both these were cases in which an oral statement, alleged to have been made by the victim sometime before the commission of the offence, which did not relate to the cause of death nor to the transaction which resulted in the death of the victim, was sought to be proved, and it was held in the Madras case that it was inadmissible under ss. 32(1) and 8 of the Evidence Act and in the Privy Council case under s. 32(1) of the Act.

Reliance was also placed upon the judgment in *Gokul Chandra v. The State*,³ in which Harris C.J. in delivering the judgment of the Court observed that letters written by a woman to members of her family during a period of five to nine months before her death showing that her state of mind was seriously affected by the cruel conduct of the members of her husband's family were not sufficiently nor closely enough connected with the actual transaction even though the statements thereon had some relation to the cause of her suicide, and hence they could not be said to be circumstances of the transaction which resulted in death and were, therefore, inadmissible. In that case the Court did not consider whether under s. 8 of the Evidence Act the statements could be regarded as admissible. Evidently, the statements were made several months before the date on which the woman died and in the view of the Court there was no proximate connection between the death of the woman and the incidents which were related in those letters showing that her mind was seriously affected by the cruel conduct of the members of the family. It is true that in that case the original letters were sought to be proved, but the Court having come to the conclusion that they were not proximate to and connected with the actual transaction which resulted in death, they were inadmissible.

These authorities, however, do not in our judgment support the view that a complaint in writing made by a person who dies sometime thereafter, expressing apprehension of death at the hands of some person is inadmissible in evidence under ss. 32(1) and 8 of the Evidence Act, when the person whose conduct is the source of the apprehension, is charged with the offence of murder of the person making the complaint. In the complaint, exh. C, it is stated: "As this concerns with my whole life, I am afraid, if no prompt action is taken, a poor life would be destroyed etc., etc....". The statement showing appre-

² [1939] L.R. 66 I.A. 66, s.c. 41 Bom. L.R. ³ [1950] A.I.R. Cal. 306.
428.

hension of death on account of the conduct of the appellant was admissible as a statement relating to the circumstances of the transaction. The complaint was, it is true, made nearly two months before the date of the death of Rashida, but, on that ground alone we are unable to hold that there was no proximate connection between the death and the making of this complaint. It appears to us, therefore, that this statement may be admissible under s. 32(1) of the Evidence Act. In any event the fact of the making of the complaint was admissible as explanatory of the conduct of Rashida under s. 8 of the Act. In *Golak Biharee Takal v. Emperor*,⁴ it was held by a division bench of the Calcutta High Court following a judgment of this Court in *Emperor v. Manchankhan*,⁵ that a complaint filed by the victim with the police is "conduct" and such conduct may be proved whether the person whose conduct is sought to be proved is alive or dead. In that case a complaint was filed with the Sub-Divisional Officer stating that the petitioner seriously apprehended danger to his life, liberty and reputation at the hands of certain persons. This complaint was filed six days before the day on which the petitioner was found missing and it was held that the complaint was admissible in evidence under s. 8 of the Evidence Act. In *Emperor v. Manchankhan*, it was held by Mr. Justice Fawcett that a letter addressed to the Commissioner of Police by the victim of the offence asking for protection and stating that he apprehended injury from one of the accused and that he was in fear of his life, was admissible in evidence under s. 8 of the Evidence Act as containing statements which accompanied and explained the conduct of the victim, such conduct having been influenced by a fact in issue and a relevant fact. It was pointed out that under Explanation 1 to s. 8 of the Act, statements that accompany and explain acts other than statements are included in the word "conduct" and so are themselves admissible under this section and that illustrations (j) and (k) to the section show that the terms of a complaint made by the victim of an offence are admissible. If the victim's act in petitioning the Commissioner is "conduct" relevant under s. 8, in the view of Mr. Justice Fawcett the terms of his petition are relevant by virtue of Explanation 1 to that section.

Under s. 8 of the Evidence Act any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. If the motive for the commission of the offence is relevant, we fail to appreciate why the making of a complaint by Rashida against the appellant charging him with serious offences may be regarded as inadmissible. The whole argument of Mr. Chari proceeded upon a fallacious assumption that s. 32 of the Evidence Act is a complete Code relating to admissibility of statements alleged to have been made by persons who could not be examined before the Court, and the admissibility of statements alleged to be made by persons who are not available to give evidence on account of circumstances set out in s. 32 is circumscribed by that section. In our view, if the fact to be proved is a statement made by a person since deceased, and it is admissible under a provision other than s. 32 of the Evidence Act, its admissibility cannot be denied because it does not fall within the provisions contained in s. 32. In *B. D. Sethna v. Mirza Mahmood Shirazi*,⁶ this Court held that s. 32 of the Indian Evidence Act imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court for giving evidence: but, if a statement is admissible under any other provision of the Act, it being altogether immaterial whether the person who made the statement was alive or dead, that statement will not become inadmissible because the person who is alleged to have made that statement is dead.

We must observe that by the mere production of a document, the truth of its contents cannot be regarded as established. But the fact that Rashida had made a complaint against the appellant, which may have constituted a

⁴ [1938] 1 Cal 290.

⁵ [1923] 34 Bom. L.R. 1087.

⁶ (1907) 9 Bom. L.R. 1047.

motive for the appellant, to commit the offence charged, is a fact, which can be proved under s. 8 of the Evidence Act and production of the original complaint is probative of that fact. We are, therefore, unable to agree with the contention of Mr. Chari that the complaint, exh. C, is inadmissible.

[The rest of the judgment is not material to this report.]

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice K. K. Desai.

D. A. KELSHIKAR v. STATE OF BOMBAY.*

Constitution of India, Arts. 311(2), 20(2)—Government of India Act, 1935, [25 & 26 Geo. V, Ch. 42], Sec. 240(3)—Departmental proceedings duly carried out against plaintiff, a police officer, and order of punishment made against him—Government issuing show cause notice against plaintiff for enhancement of punishment—Plaintiff dismissed from service by Government—Whether necessary for Government to mention and include in show cause notice grounds why it wanted to impose enhanced punishment—Plaintiff whether given a reasonable opportunity of showing cause against action proposed to be taken against him—Validity of show cause notice.

A departmental enquiry duly carried out satisfies the provisions of art. 311(2) of the Constitution of India so far as opportunity is to be afforded to a Government servant in connection with the investigation of charges levelled against him. After such an enquiry is duly carried out, it is unnecessary under the provisions of art. 311(2) to give a second opportunity to the Government servant (defaulter) to once again reargue the matter as regards the conclusions already reached in the departmental enquiry.

Certain departmental inquiry proceedings were duly carried out against the plaintiff who was a police officer and he was reduced in the pay-scale grade for a period of one year. This punishment was confirmed in appeal and the plaintiff accepted the order of punishment as binding and suffered the punishment. Thereafter, by a show cause notice, the State of Bombay considering that the punishment inflicted upon the plaintiff was inadequate, called upon him to show cause why he should not be dismissed from the police force. In reply to this notice the plaintiff in his representations raised all contentions as regards the merits of the charge levelled against him as also the quantum of punishment. The plaintiff was subsequently dismissed from the police force. In a suit filed by the plaintiff against the State it was contended that he was entitled to a show cause notice calling upon him to show cause against the decision arrived at in the departmental inquiry and also that the decision in the departmental inquiry was the ground on which the State had relied for the purpose of enhancement of punishment and that, therefore, he had not been given a reasonable opportunity of showing cause against the action proposed to be taken against him as required under art. 311(2) of the Constitution of India, and his dismissal was, therefore, invalid.

Held, that, in the circumstances of the case, the plaintiff had reasonable opportunity of showing cause in respect of the charge levelled against him as also the quantum of punishment that was intended to be inflicted upon him and that it was not necessary that further grounds regarding the intended punishment of dismissal ought to have been mentioned or included in the notice given by the Government, and

that the notice was in conformity with art. 311(2) and the order of dismissal was valid.

*Decided, September 19, 1958. O.C.J. Suit No. 719 of 1958.

*State of Bombay v. Gajanan Mahadev,*¹ *High Commr. for India & Pakistan v. Lall,*² *Khem Chand v. Union of India,*³ *G. B. Koparkar v. The State of Bombay,*⁴ and *Atindra Nath v. G. F. Gillot,*⁵ referred to.

THE facts appear in the judgment.

M. E. Mody, with *P. R. Vakil*, for the plaintiff.

J. B. Dubash, with *Murzbhan Mistry*, for the defendant.

K. K. DESAI J. The plaintiff, who was a Sub-Inspector of Police, filed this suit *inter alia* for declarations that the order dated April 5, 1952, removing him from the police force of the State of Bombay is void and inoperative and that he continues to be a member of the police force and for arrears of salary on that footing.

The main contentions on which the plaintiff prays for the aforesaid declarations are contained in para. 14(a) and 14(b) of the plaint. The plaintiff relies upon the provisions of art. 311(2) of the Constitution of India. The plaintiff's case is that he has not been given a reasonable opportunity of showing cause against the action proposed to be taken against him as required under the article and that the show cause notice tendered to him was not in conformity with the provisions of the article.

The plaintiff contends that the defendant did not give to the plaintiff any opportunity of showing cause against the accuracy of the facts found by the District Superintendent of Police in a departmental inquiry against the plaintiff. The second ground on which the plaintiff relies is that in January 1952 when the show cause notice was tendered to the plaintiff, in fact the plaintiff had already suffered the punishment inflicted upon him by the District Superintendent of Police and it was, therefore, not competent for the defendant to revise the punishment already inflicted after a lapse of two years. The plaintiff contends that the order of dismissal amounted to double punishment for the same offence and infringed fundamental rights of the plaintiff guaranteed under art. 20(2) of the Constitution of India.

There are several other grounds mentioned in para. 14 of the plaint for challenging the validity of the order of dismissal. These other grounds are, however, not pressed before me and it is unnecessary, therefore, to summarise them here.

The facts leading to this suit are shortly as follows: The plaintiff joined the police force of the State of Baroda in 1927. On the merger of the State of Baroda with the State of Bombay, the plaintiff was absorbed in the police force of the State of Bombay and on August 1, 1949, was confirmed as Sub-Inspector of Police and was at material times attached to the Karjan police station in Baroda district. On January 31, 1950, the plaintiff was found in the garden house of one Haribhai Ramdas at village Atali. At that house what is described as a wet party (drinking party) was then in progress. On February 2, 1950, the District Superintendent of Police, Baroda district, placed the plaintiff under suspension with effect from February 1, 1950. Thereafter, departmental inquiry proceedings were proceeded in connection with the said incident. Statements of several persons were taken and ultimately on March 21, 1950, the District Superintendent of Police, Baroda, framed a charge against the plaintiff. A copy of the charge framed was served on the plaintiff. The charge framed was as follows:—

"Serious misconduct in that you...attended a drinking party in the garden house of Mr. Haribhai Ramdas at village Atali on 31-1-1950 in flagrant violation of the policy laid down by Government for rigid observance by all public servants *vide* Government Circular, Political and Services Department No. 1581/34 dated 13-7-1948."

"Copies of the following documents are sent herewith in support of the charge."

1 (1953) 56 Bom. L.R. 172.

2 (1948) 50 Bom. L.R. 649, P.C.

3 [1958] S.C.J. 497.

4 (1958) O.C.J. Appeal No. 89 of 1957,

decided by Chagla C.J. and S. T. Desai J., on August 13, 1958 (Unrep.).

5 [1955] A.I.R. Cal. 543.

The documents referred to are copies of a panchanama, inquiry report, statements made by several persons, a letter addressed to the Collector by the Mamlatdar, Baroda, and the aforesaid circular dated July 13, 1948. It is admitted that the plaintiff received this charge-sheet and the documents referred to in the charge-sheet. All these documents were also forwarded to the Dy. Superintendent of Police, Dabhoi, for completing the departmental inquiry proceedings and submitting a report to the District Superintendent of Police for final orders.

The Sub-Divisional Police Officer one Shri N. C. Mistry thereafter appears to have proceeded with the departmental inquiry. It is relevant to point out that as regards the procedure in departmental inquiry, Rules have been framed. These Rules appear in Bombay Police Manual. It is admitted by the parties that the Rules provide for an elaborate procedure for departmental inquiry and *inter alia* provide for (1) giving a defaulter all opportunities to be present at the hearing and to hear the evidence led in proof of the charge and cross-examine the witnesses produced for the purpose, (2) for submitting the case for defence and for producing evidence in defence and for giving complete hearing to the defaulter.

It appears that the Sub-divisional Police Officer Shri N. C. Mistry proceeded with the departmental inquiry in accordance with the aforesaid Rules and provisions and in pursuance of those Rules made his report dated April 25, 1950. In his report he summarised the evidence led before him and also gave his opinion as he was entitled to do. In his opinion the explanations given by the plaintiff were acceptable and according to him, the charge against the plaintiff was not proved. The Sub-Divisional Police Officer appears to have forwarded his report in accordance with the Rules to the District Superintendent of Police who was the competent officer to deal with the matter. By his decision and order dated May 6, 1950, the District Superintendent of Police one Shri B. D. Shah after giving reasons therefor held that the charge against the plaintiff was proved on evidence on record beyond a shadow of any reasonable doubt. He, therefore, passed orders reducing the plaintiff from grade of Rs. 135 to Rs. 130 for a period of one year from May 1, 1950. This decision and order was served on the plaintiff and he was also informed that he had a right to appeal against the order within two months from the date of receipt of the order. The plaintiff was given opportunity to appear before and was heard by Shri B. C. Shah.

The plaintiff went in appeal against the aforesaid order on July 25, 1950. The Dy. Inspector General of Police, Northern Range, dismissed the plaintiff's appeal on September 13, 1950.

The plaintiff thereafter accepted the order of punishment dated May 6, 1950, passed by the District Superintendent of Police as binding and suffered the punishment awarded to him. The punishment which was for one year was completed on May 1, 1951.

By a show cause notice dated January 11, 1952, the defendant (the State of Bombay) referred to the departmental proceedings held against the plaintiff by the District Superintendent of Police, Baroda, and the punishment inflicted upon the plaintiff on May 6, 1950, as also to the appeal filed by the plaintiff and the confirmation of the punishment in the appeal and further stated as follows:

"And whereas the Government of Bombay consider that the punishment inflicted upon you is inadequate you are hereby required to show cause within one month from the date of receipt of this notice why you should not be dismissed from the Police Force; if you fail to show cause within the aforesaid period, Government will inflict such punishment or pass such order as it deems fit."

This is the show cause notice on which the main contentions of the plaintiff are based. It is at this stage necessary to note that in reply to the show cause notice, the plaintiff addressed a letter dated February 19, 1952, to the defendant through the Secretary, Home Department. By his letter the plaintiff

dealt in detail with the charge levelled against him and the departmental proceedings which had taken place. The plaintiff made diverse contentions to prove that he had not been guilty and that he had already suffered the punishment awarded to him. The plaintiff referred to his long past service and also that he had been the recipient of diverse awards from the Government of Baroda and of Bombay. The plaintiff prayed that the Government should take a lenient and humane view of the whole situation and use its authority with mercy. By its resolution dated April 5, 1952, the defendant after considering the representations made by the plaintiff by his letter dated February 19, 1952, passed orders dismissing the plaintiff from the police force.

In May 1952 the plaintiff appears to have made a representation to the Government of Bombay in connection with his dismissal. As the plaintiff did not succeed in his representation the plaintiff ultimately filed this suit on July 16, 1953.

The plaintiff's counsel mainly relied on the provisions of art. 311(2) of the Constitution of India in support of the plaintiff's contention that the order of dismissal was not valid. Provisions in art. 311(2) run as under:

"311. (2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided..."

The provision in art. 311(2) is a repetition of a similar provision in s. 240(3) of the Government of India Act, 1935. Both these provisions have been construed in several decisions of this Court as well as the Supreme Court of India. The provisions of s. 240(3) were the subject-matter of a decision of the Privy Council in what is popularly mentioned as *Lall's* case. Mr. Mody places reliance on these decisions and submits that "It was obligatory on the State to mention and include the grounds why they wanted to impose the punishment of dismissal in the notice dated 11th January 1952". Mr. Mody elaborated his contention by stating that the notice should have specified the charge against the plaintiff and should have referred to the evidence in support of the charge and should have given all the grounds with particulars as to why the Government (defendant) had tentatively decided upon inflicting the punishment of dismissal. Mr. Mody contended that as all the aforesaid matters had not been in detail specified in the notice dated January 11, 1952, the notice was not "real" but illusory. The notice did not give any reasonable or other opportunity to the plaintiff to make any contentions regarding the charge levelled against him. Nor did it give any information about the evidence available in support of such charge. Mr. Mody contended that the word "inadequate" in the notice was insufficient to convey to the plaintiff any information regarding the grounds of enhancement of punishment.

In connection with his aforesaid contentions, Mr. Mody relied upon the decision of Chagla C.J. in the case of *State of Bombay v. Gajanan Mahadev*.¹ Mr. Mody substantially relied upon the passage at p. 178 where it is stated as follows:

"...It is well settled law that it is not sufficient under this sub-section for the Government merely to inform the servant that it proposes to pass a particular punishment and to ask him to show cause against that punishment. The opportunity which the State has to furnish has to be a reasonable opportunity, and the Courts have held that a reasonable opportunity is only afforded to the servant when he can show cause not only against the punishment but also against the grounds on which the State proposes to punish him. Therefore, it is not sufficient that the State should call upon the servant to show cause against the quantum of punishment intended to be inflicted upon him; the State must also call upon the servant to show cause against the decision arrived at

by a departmental inquiry if that decision constitutes the ground on which the Government proposes to take action against the servant."

Mr. Mody, therefore, says that he was entitled to a show cause notice calling upon him to show cause against the decision arrived at in the departmental inquiry and also that the decision in the departmental enquiry was a ground on which the defendant relied for the purpose of enhancement of punishment.

In furtherance of his contention Mr. Mody relied upon the decision of the Privy Council in the case of *High Commr. for India & Pakistan v. Lall*.² He referred to the passage in the decision whereby their Lordships agreed with the view taken by the majority of the Federal Court in that particular case. Mr. Mody pointed out, from p. 655 of that report, that the majority of the Federal Court held

"...it seems to us that the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given a reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken."

Mr. Mody says that no grounds are mentioned in the notice dated January 11, 1952, and the notice is accordingly not in conformity with art. 311(2) and the dismissal of the plaintiff is invalid.

It appears to me that the contention of Mr. Mody is ill founded. As is pointed out in each of the aforesaid decisions it is for the Court to find out from facts of each case as to whether reasonable opportunity has been afforded to the defaulter or the plaintiff within the meaning of the provisions of art. 311(2). In the case of *State of Bombay v. Gajanan Mahadev*, it is pointed out by the learned Chief Justice as follows (p. 178):—

"...It may also be said that it may not be necessary in every case to issue a notice in terms calling upon the servant to show cause not only against the quantum of punishment but also against the grounds on which the proposed action is based. Even though, as in this case, the notice may be defective, if in fact the servant has been given the opportunity and has availed himself of the opportunity of showing cause against the grounds, then the mere fact that there is an irregularity about the notice may not lead to the Court holding that the Government servant did not have the opportunity required under s. 240(3). But we think that there can be no doubt that the Court must be satisfied on a review of all the facts of a particular case that the statutory obligation cast upon the State has been properly discharged by the State and the statutory obligation is to afford reasonable opportunity to the dismissed servant."

In *Lall's* case their Lordships of the Privy Council in approving the judgment of the Federal Court accepted the following (p. 655):

"...In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed."

Their Lordships further added (p. 655),

"...If the civil servant has been through an enquiry under r. 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry."

In the case of *Khem Chand v. Union of India*,³ *Lall's* case was considered in detail. The learned Chief Justice of India at p. 505 observed that:

"...It is true that the provision [311(2)] does not, in terms, refer to different stages at which opportunity is to be given to the officer concerned. All that it says is that

the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. He must not only be given an opportunity but such opportunity must be a reasonable one. ...If the opportunity to show cause is to be a reasonable one it is clear that he should be informed about the charge or charges levelled against him and the evidence by which it is sought to be established, for it is only then that he will be able to put forward his defence. ...he should be allowed to show that the evidence against him is not worthy of credence or consideration... All this appears to us to be implicit in the language used in the clause, but this does not exhaust his rights. In addition to showing that he has not been guilty of any misconduct so as to merit any punishment, it is reasonable that he should also have an opportunity to contend that the charges proved against him do not necessarily require the particular punishment proposed to be meted out to him."

At p. 507 the learned Chief Justice after quoting the passage from *Lall's* case as quoted above held as follows:—

"The above passage quite clearly explains that the point on which their Lordships of the Judicial Committee agreed with the majority of the Federal Court is that a further opportunity is to be given to the government servant after the charges have been established against him and a particular punishment is proposed to be meted out to him..., but a close reading of the rest of that passage will indicate that in their Lordships view the substance of the protection of rule 55 is also included in section 240(3) and to that is superadded, by way of further protection, the necessity of giving yet another opportunity to the government servant at the stage where the charges are proved against him and a particular punishment is tentatively proposed to be inflicted on him. Their Lordships referred to 'statutory opportunity being reasonably afforded at more than one stage', that is to say, that the opportunities at more stages than one are comprised within the opportunity contemplated by the statute itself. Of course, if the government servant has been through the enquiry under rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, which implies that if no enquiry has been held under rule 55 or any analogous rule applicable to the particular servant then it will be quite reasonable for him to ask for an enquiry."

It appears to me that what is laid down by the decisions in *State of Bombay v. Gajanan Mahadev* and *Khem Chand v. Union of India* is that in the event of a departmental enquiry having taken place according to the rules of procedure prescribed for the purpose, it would not be reasonable for any government servant to ask for a repetition of that enquiry at the stage of enquiry as to the nature and quantum of punishment. At that stage, it is only necessary by reason of art. 311(2) to give him an opportunity of showing cause against the punishment proposed to be taken in regard to him.

I read the aforesaid decisions to mean that the departmental enquiry duly carried out satisfies the provisions of art. 311(2) so far as opportunity is to be afforded to a government servant in connection with the investigation of charges levelled against him. After such an enquiry is duly carried out, it is unnecessary under the provisions of art. 311(2) to give a second opportunity to the Government servant (defaulter) to once again reargue the matter as regards the conclusions already reached in the departmental enquiry. In my view it is for that very reason that the learned Chief Justice observed in the case of *State of Bombay v. Gajanan Mahadev* that even though the notice may be defective, if the government servant has been given an opportunity and has availed himself of the opportunity of showing cause against the grounds then the mere fact that there is an irregularity about the notice may not lead to the Court holding that the government servant did not have the opportunity required under s. 240(3).

In this connection I must refer to the recent decision in *G. B. Koparkar v. The State of Bombay*.⁴ While dealing with the defective show cause notice in that case Chagla C.J. observed as follows:—

"The last contention urged by Mr. Thakore is that the show cause notice which was

⁴ (1958) O.C.J. Appeal No 69 of 1957, decided by Chagla C.J. and S. T. Desai J., on August 13, 1958 (Unrep.).

issued by the Commissioner of Police called upon him merely to show cause against the quantum of the sentence and not against the merits of the decision given. It is perfectly true that it is now well settled and well established law that a civil servant has a right to show cause both against the sentence and the merits of the decision when the final show cause notice is issued against him, and we would have taken a very serious view of the matter if the appellant had been deprived of the opportunity of showing cause against the findings arrived at both by the inquiry officer and the Commissioner of Police. But unfortunately for Mr. Thakore, the appellant was not deprived of this opportunity because whatever might have been the form of the show cause notice issued by the Commissioner of Police on the 12th December 1955, in fact the appellant showed cause and showed cause very vigorously against the findings both of the inquiry officer and the Commissioner of Police. In face of this, we cannot possibly accept the contention of Mr. Thakore that there was a contravention of article 311 of the Constitution."

It is relevant to point out that the contentions raised by the plaintiff in connection with the show cause notice dated January 11, 1952, appear to be merely technical. In fact in spite of the alleged defective character of the notice the plaintiff by his letter dated February 19, 1952, raised all contentions as regards the merits of the charge levelled against him as also the quantum of punishment. The plaintiff not only had reasonable opportunity in the said connection but took opportunity and dealt with the matter on the footing that it was open to the plaintiff to make contentions regarding all details of the charge and the evidence against him as also the quantum of punishment. The plaintiff has not suffered by the alleged defect in the notice. The plaintiff has not made any contentions in the plaint regarding the departmental enquiry and the same must be deemed to have been duly carried out.

Having regard to my reading as aforesaid of the decisions of this Court as well as of the Supreme Court, I have come to the conclusion that the plaintiff had reasonable opportunity of showing cause in respect of the charge levelled against him as also the quantum of punishment that was intended to be inflicted upon the plaintiff. I am unable to accept the contention of the plaintiff that further grounds regarding the intended punishment of dismissal ought to have been mentioned or included in the notice given by the defendant. I do not accept the contentions as made in para. 14(a) of the plaint that the plaintiff has not been given any reasonable opportunity of showing cause against the action proposed to be taken in regard to him as required by art. 311(2) of the Constitution of India or that the notice is defective and not in conformity with art. 311(2). The plaintiff had complete opportunity to meet the charge levelled against him. The plaintiff in fact led evidence in his possession before the proper authority in the said connection and failed to establish that he was not guilty. The plaintiff made all possible contentions regarding the quantum of punishment but failed to succeed.

As regards the contents of the show cause notice dated January 11, 1952, I do not think that the same should have been more elaborate. It is worthy of note that the plaintiff understood the meaning of this notice completely and took opportunity to deal with the whole of the matter. The quantum of punishment which was intended to be inflicted is mentioned in the notice. Prior punishment already inflicted is referred to as inadequate. The departmental enquiry proceedings in which the plaintiff was punished are also mentioned in the notice. The plaintiff was thereby made aware that having regard to its Prohibition Policy the Government took a serious view of defaults of its employees in connection with Prohibition Policy. I am unable to agree with the contention of Mr. Mody that the notice required to mention further grounds for intended enhanced punishment of dismissal.

Mr. Mody contended that he was having regard to delay in revision of punishment entitled to a new trial and investigation of the charge against him. He also contended that I should consider the true meaning and effect of the Government Circular regarding Prohibition Policy mentioned in the charge

and hold that the finding in the departmental inquiry was incorrect. I am of the view that the Court is not entitled to go into the facts to find out as to whether the finding is correct or not. I, therefore, do not think that it is necessary for me to go into these matters. I cannot accept these contentions of Mr. Mody.

The second contention of the plaintiff is that he having suffered punishment the State was not entitled to revise or enhance the punishment inflicted upon him. He contends that this case was a case of "double punishment". It is not denied that the State had a right to reconsider the whole of the charge levelled against the plaintiff and to inflict punishment in revision as it deemed necessary. The plaintiff has not raised any contention that the State had no jurisdiction to deal with the matter. Mr. Mody did not make any argument in support of such contention. The plaintiff has based all his arguments in support of this contention on art. 20(2) of the Constitution of India. That article runs as follows:—

"No person shall be prosecuted and punished for the same offence more than once." This article has been construed on several occasions. In the case of *Venkataraman v. Union of India*,⁵ following *Maqbool Husain v. State of Bombay*,⁶ it has been held that:—

"The language of Article 20 and the words actually used in Art. 20(2) afford a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of a criminal proceeding, before a court of Law or Judicial Tribunal, and not before a Tribunal which entertains a departmental or an administrative inquiry even though set up by a statute, but which is not required by law to try the matter judicially and on legal evidence."

In fact Mr. Mody is unable to carry his arguments further having regard to this judgment of the Supreme Court which was pointed out by Mr. Dubash. There was no question of a criminal prosecution in this case and/or double punishment and I cannot, therefore, accept the contention raised on behalf of the plaintiff.

In this connection Mr. Dubash also relied upon the judgment of Gajendragadkar J. in this Court in *Rajaram Narayan Tendulkar v. Inspector General of Police, Bombay, at Poona*,⁷ where it was held as follows:—

"It is then contended that this amounts to a double punishment. In our opinion this argument is wholly fallacious. There are not two punishments with which the petitioner is concerned. The petitioner received a minor punishment at the hands of the District Superintendent of Police and in the exercise of his revisional jurisdiction the Inspector-General of Police has enhanced that punishment. It is impossible to accede to the argument that enhancement of punishment made in exercise of revisional jurisdiction amounts to a second punishment and that in such a case the party is exposed to the risk of double punishment. Therefore we must reject the argument that in the present case the petitioner has been subject to the risk of double punishment." There is no substance in the contention of the plaintiff that he has suffered double punishment.

After I had delivered in Court this judgment, in another matter I have been referred to the decision in *Atindra Nath v. G. F. Gillot*.⁸ I have only to record that in that case also it has been held (as I have done in this case) that it is unnecessary to give a second hearing to a defaulter, in a case where departmental enquiries have been duly completed.

In the result the suit is dismissed with costs.

Suit dismissed.

Solicitors for the plaintiff: *Mulla & Mulla & Craigie Blunt & Caroe.*

Solicitors for the defendants: *Little & Co.*

⁵ [1954] A.I.R. S.C. 375.

⁶ (1953) 56 Bom. L.R. 13.

⁷ (1954) Special Civil Application No 180

of 1954, decided by Gajendragadkar and Shah J.J. on August 19, 1954 (Unrep.).

⁸ [1955] A.I.R. Cal. 543.

Before Mr. Justice K. K. Desai.

HUMAYUN ABDULLALI v. M. G. ABROL.*

Sea Customs Act (VIII of 1878), Sec. 188—Appeal filed and disposed of on merits under s. 188—Whether order against which appeal preferred merges in decision of appellate Tribunal—Effect of order of confirmation under s. 188.

Where an appeal is filed and disposed of on merits under the provisions of s. 188 of the Sea Customs Act, 1878, the order of the first tribunal against which the appeal is preferred merges in the decision of the appellate tribunal.

*Collector of Customs v. Rahiman,*¹ distinguished.

The effect of an order of confirmation under s. 188 of the Sea Customs Act is that the operative part of the order of the first tribunal is really the operative part of the order of the appellate tribunal.

IN 1955 the petitioner received an inquiry from some foreign customer for export and sale from India of coarse white goathair or wool. The petitioner had in that connection sent his material which was described as petitioner's type 100AA to that foreign customer. The petitioner was in doubt as to whether he could export his goods as wool waste without any export licence or as raw wool which required export licence. The petitioner's representative interviewed the Deputy Marketing Development Officer in Bombay with a sample. But the officer refused to give any opinion intimating to the petitioner that it was not his function to give opinions to the petitioner.

The petitioner thereafter shipped 25 bales of his goods outside India in the end of January 1956. The petitioner further shipped 10 bales of his goods outside India in May 1956. On October 15, 1956, the petitioner submitted his shipping bill No. 2402 in connection with 15 bales. These bales were described in the shipping bills as 5634 lbs. of Indian wool waste of the value of Rs. 11,000 to be shipped by S. S. Aagtedijk. In connection with these goods of the petitioner there being doubt as to whether it was waste wool, the customs took the opinion of the senior Marketing Development Officer, Wool Bristles and Goat Hair Grading Scheme, Bombay. The opinion of the officer was that the petitioner's goods were not wool waste. By a show cause notice dated October 22, 1956, the Assistant Collector of Customs gave notice to the petitioner that the shipping bill contained a misdeclaration of the description of the goods and involved an attempt to evade restriction on export of the articles in question. The petitioner was called upon to show cause as to why action should not be taken against the petitioner under s. 167, cl. (8), of the Sea Customs Act. The petitioner was informed that his goods were examined by the Officer mentioned above and were found to be "not wool waste". He was also informed that the goods were "Indian Wool Raw" and that they could not be allowed to be exported without a grading certificate from the competent authorities and without the endorsement from the Export Trade Control Authorities for having licensed the goods as "Indian Wool Raw".

By his letter dated October 22, 1956, the petitioner applied for permission to recover back the material from the docks. On October 23, 1956, the Assistant Collector of Customs gave a hearing to the petitioner. On October 27, 1956, the petitioner addressed a letter to the Agricultural and Marketing Adviser, Government of India, for the purpose of obtaining an opinion as regards the question whether the goods of the petitioner were wool waste or raw wool. By his letter dated October 29, 1956, the petitioner offered to execute a bond in terms of the draft annexed to that letter in connection with the return of the goods to the petitioner pending the decision of the question as to whether the petitioner's goods required "grading" and an export licence. On October 31, 1956, a second hearing was given by the Assistant Collector of Customs to the petitioner; and further hearing was fixed for November 6, 1956. By his letter dated November 1, 1956, the petitioner made his written submissions to the

*Decided, March 11, 1959. O.C.J. Miscellaneous Application No. 472 of 1958.

1 [1957] Mad. 642.

Assistant Collector of Customs as regards the facts which had arisen in the case of the petitioner. The petitioner informed the Assistant Collector of Customs that he did not accept the decision of the Senior Marketing Development Officer in Bombay as correct. The petitioner had challenged this decision by his letter addressed to the Agricultural and Marketing Adviser at Delhi and forwarded a copy of the letter to the Assistant Collector of Customs. The petitioner recorded that pending the decision of the question whether the petitioner's goods were or were not wool waste by the Marketing Adviser at Delhi it would not be possible to decide the question that had arisen in respect of the petitioner's goods and that the hearing by the Assistant Collector of Customs on November 5, 1956, should not, therefore, proceed. The petitioner desired that he should be permitted to remove his goods from the docks and that the Assistant Collector of Customs should consider the merits of the case after a final report had been obtained from the Marketing Adviser at Delhi. The petitioner thereafter executed a bond on November 7, 1956, relevant part whereof was as follows:—

"In consideration of the Assistant Collector of Customs allowing us to take the consignment in the schedule below, back into town, we hereby undertake in the event of the samples drawn from the consignment in our presence being found to be 'wool' and not 'wool waste' by the Agricultural and Marketing Adviser, Ministry of Food and Agriculture, Government of India, within three months.

(1) to pay such penalty as may be imposed by the custom authorities

(a) for not having produced the Export Trade Control Licence for the correct description 'Raw Wool',

(b) for not having got the wool graded in accordance with Wool Grading and Marking Rules, 1953,

(c) for having misdescribed the goods as 'wool waste' instead of 'wool raw'.

(2) to bring back the said goods to enable the Customs Authorities to confiscate the same or in default pay such fines in lieu of confiscation as may be adjudged by the Customs Authorities."

By his letter dated December 13, 1956, the Marketing Adviser of the Government of India gave his opinion in respect of the goods of the petitioner. The relevant part of that letter ran as follows:

"...it is found that the consignment is not of wool waste but consists of mixed wool containing pulled wool and skirtings, obtained from hairy type of South Indian sheep. This cannot be allowed for export unless graded under Agmark.

The waste wool known in commerce consists of noils, soft waste, hard waste and finishing wastes, these are obtained during different proceeding operations such as combing, carding, drawing, spinning and finishing.

The Senior Marketing Development Officer, Bombay, has been asked to grade this consignment under Agmark and allow it for export if it fulfils conditions under grade X."

By the first impugned order dated August 23, 1957, the Additional Collector of Customs recited the relevant facts; including the opinion of the Senior Marketing Officer, Bombay, and recited that it was ascertained that an export licence was not produced as necessary and that an offence attracting the provisions of s. 167, cl. (8), read with s. 19 of the Sea Customs Act was thereby established and a show cause memo was accordingly served on the exporter. He relied upon the findings of the Agricultural Marketing Adviser to the Government of India and in the operative part of his order he mentioned:—

"The explanation tendered by the exporters is not at all satisfactory and I am satisfied that Messrs Faiz and Company deliberately misdeclared the description of goods in order to evade grading of bales. Further the licensing policy of raw (Indigenous) wool is stricter than that for wool waste."

He, therefore, imposed a personal penalty of Rs. 1,000 under s. 167, cl. 8, of the Sea Customs Act and ordered payment thereof.

Against that order the petitioner filed an appeal under the provisions of s. 188 of the Sea Customs Act to the Central Board of Revenue contending

that the above order was illegal and invalid as passed without giving the petitioner a hearing or an opportunity to give his explanation, that the petitioner did not deliberately misdeclare the description of the goods and acted bona fide and that the Additional Collector of Customs should not have imposed a personal penalty or any penalty in the circumstances of this case even if export of the goods was not allowed.

The petitioner was called upon to appear before the Central Board of Revenue if he so desired. The petitioner, however, failed to appear before the Central Board of Revenue. By its decision dated August 13, 1958, the Central Board of Revenue held as follows:—

“The appellants were given an opportunity to appear for a personal hearing, asked for, but they did not avail of it. The Board has, therefore, considered the appeal with the help of records of the case.”

The Central Board of Revenue decided as follows:—

“All the arguments put forth in the appeal have been carefully considered but the Board sees no reason to interfere with the Order (original) passed by the Additional Collector of Customs, Bombay.”

The petitioner under art. 226 of the Constitution of India challenged the orders passed by the Additional Collector of Customs (respondent No. 1) and the Central Board of Revenue (respondent No. 2).

The petition was heard.

V. Rajgopal, with M. H. Thakkar, for the petitioner.

M. O. Chinoy, with S. J. Sorabjee, for the respondents.

K. K. DESAI J. [His Lordship after stating the facts as above and dealing with points not material to this report, proceeded]. It is well established that where appeal is provided for and is filed the whole of the case is rendered open for arguments before the appellate authority; and the decision in appeal ceases to be final. The order of the first Court would be subject to revision, alteration, variation and setting aside by a decision of the appellate tribunal. Except in the event of the appellate tribunal deciding the appeal on technical questions of law, such as, jurisdiction or limitation or other similar questions the order of the first tribunal would merge in the decision of the appellate tribunal. Technical or other defects existing in the proceedings before the first tribunal would be subject-matter of investigations by the appellate tribunal. The grievance of the petitioner that he had not been given a hearing after the opinion of the Marketing Adviser to the Government of India was received was before the appellate tribunal and I must assume that the same was considered by the appellate tribunal. I must further assume that the appellate tribunal considered the merits of the petitioner's case as appearing in the memo. of appeal as has been mentioned in the operative part of the order of the appellate tribunal, viz., Central Board of Revenue. It is significant that in his memo. of appeal the petitioner has developed in great detail every possible argument which could be advanced for arriving at a conclusion in favour of the petitioner. In spite of the petitioner being absent all these arguments are stated to have been considered by the Central Board of Revenue. The question, therefore, is (that though the Appellate Tribunal considered all the grievances of the petitioner including the grievance that the petitioner has had no hearing and opportunity of being heard before respondent No. 1) whether for the reason that in the proceedings before the first tribunal i.e. respondent No. 1, principles of natural justice were violated the findings of the Central Board of Revenue must be set aside. In my view the question is not of setting aside the order of respondent No. 1. The real question is whether there are any reasons why this Court should set aside the decision of the Central Board of Revenue.

In this connection Mr. Rajgopal had relied upon the decision in *Collector of Customs v. Rahiman*¹ and contended that if the proceedings before respondent

¹ [1957] Mad. 642.

No. 1 are held to be vitiated by reason of violation of principles of natural justice, the decision of respondent No. 1 must be held to be a nullity and that in the event of the decision of respondent No. 1 being held to be nullity, the decision of the Central Board of Revenue must fall altogether and need not be at all considered as regards the validity thereof. Mr. Rajgopal contends that the decision of respondent No. 1 is nullity and therefore does not merge in the decision of the appellate tribunal. The relevant part of the observations in that case are at p. 658 where, relying upon certain observations in the case of *Barnard v. National Dock Labour Board*,² it is held as follows:—

"We agree with what Rajagopala Ayyangar J., has said in the judgment under appeal, namely,

"If the order of the Collector was one passed with jurisdiction then there might be some basis for the argument that it got merged in the appellate order. But if that order was a nullity in that procedure dictated by natural justice was not followed, there was no order which could be the subject of confirmation by the appellate authority'".

The above observations came to be made because in the case before the Madras High Court it was found as a matter of fact that no notice was issued to the appellant before proceedings were taken to impose penalty and the appellant was not given an opportunity to show cause why the penalty should not be imposed, and even if it should be imposed, the circumstances which should be taken into account in determining the quantum. The contention that was raised was that by reason of failure to give notice the proceedings of the Collector were "void *ab initio*" and when an order of an inferior tribunal was a nullity by reason of the proceedings being "void *ab initio*" the order made by the first tribunal would not merge into the order of appellate tribunal. The ratio of that decision appears to me to be that where no notice of any kind is given in respect of the proceedings for imposing penalty the proceedings should be held to be void *ab initio* and in such a case the decision of the first Court would be entire nullity. Now the facts in this petition are in material particulars different. Admittedly the proceedings were commenced by the show cause notice dated October 22, 1956. The proceedings cannot, therefore, be held to be void *ab initio*. In fact admittedly the petitioner appeared before the Assistant Collector of Customs and had hearings and entered into correspondence for allowing the petitioner to withdraw the goods on execution of a bond. The petitioner gave an undertaking by the bond to accept the decision as regards penalty and forfeiture of his goods in the event of the opinion of the Marketing Adviser to the Government of India being contrary to the submissions of the petitioner. I cannot, therefore, make a finding that the proceedings which were undertaken in this case were "void *ab initio*". There is no doubt that at a much subsequent stage having regard to the undertaking given by the petitioner in the bond already referred to by me respondent No. 1 proceeded to levy penalty and make his findings without giving any further notice to the petitioner that respondent No. 1 was about to proceed to make his findings. If the petitioner had not filed an appeal he may have well argued that the decision of respondent No. 1 was vitiated by reason of failure of respondent No. 1 to give to the petitioner a further opportunity to be heard. The getting aside of the order of respondent No. 1 on that ground would not be setting aside the order on the ground of want of jurisdiction or on the ground that the proceedings were "void *ab initio*." The ground of failure to give a hearing having arisen at a much subsequent stage the proceedings were not "void *ab initio*." In my view the observations in the Madras case cannot be applicable to the facts in this petition and I would not be justified in accepting the contention of Mr. Rajgopal that the order of respondent No. 1 does not merge in the decision of the Central Board of Revenue.

It is also relevant in this connection to refer to the provisions of s. 188 of the Act. The relevant part of s. 188 runs as follows:—

"Any person deeming himself aggrieved by any decision or order passed by an officer

of Customs under this Act may, ... appeal therefrom to the Chief Customs Authority, ...

such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against: ...

Every order passed in appeal under this section shall, subject to the power of revision conferred by section 191, be final."

It is patent on the language of this section that once an appeal is filed the whole of the subject-matter of inquiry is open for decision by the appellate tribunal. The decision which the appellate tribunal has to arrive at would be confirming, altering or annulling the decision or order appealed against. The appellate tribunal for the purpose of deciding the subject-matter of inquiry has power to make such further inquiry as it deems fit. In my view this provision makes it abundantly clear that the appellate tribunal takes up the whole of the subject-matter of inquiry as if in original Court and both the parties to the appeal would be entitled to submit all relevant evidence before the appellate tribunal. This being the position in my view where an appeal is filed and disposed of on merits under the provisions of s. 188 of the Sea Customs Act it would not be possible to accept the contention that the order of the first tribunal does not merge in the decision of the appellate tribunal. It is in that connection important to bear in mind that the section provides that it is the order of the appellate tribunal which is final. In this case every grievance of the petitioner was recited as and by way of ground of appeal in his memo. of appeal and was before the appellate tribunal. The appellate tribunal after coming to the conclusion that respondent No. 1 had failed to give an opportunity to the petitioner to be heard was entitled to hear and would have heard every submission which the petitioner wanted to make in connection with the final order that should be passed in the matter of the case of the petitioner. The petitioner by his own conduct failed to appear before the appellate tribunal and his grievance appears to me to arise out of his own negligence. He has no explanation to give why he did not appear before the appellate tribunal. He is not in a position to contend that the appellate tribunal did not consider every aspect of his case which was argued in detail in his memo. of appeal. In my view the order of respondent No. 1 merged in the decision of the Central Board of Revenue. It is not contended that the Central Board of Revenue had no jurisdiction to consider the appeal. It is not possible to contend that the Central Board of Revenue violated any principles of natural justice. The order of the Central Board of Revenue is an order passed by a tribunal with jurisdiction and in accordance with the procedure prescribed by law. This is the final order in this case and must be held to be binding on the petitioner.

Mr. Rajgopal has relied upon the phraseology of that order and contended that the only effective order in existence is the order of respondent No. 1 and, therefore, I should set aside the order of respondent No. 1. The wordings of the operative part of the decision of the Central Board of Revenue are as follows:—

"the Board sees no reason to interfere with the Order (original) passed by the Additional Collector of Customs, Bombay."

Now, by reason of the provisions of s. 188 this is the final order. The question is whether I should, therefore, construe this order that there "is no reason to interfere with the order passed by the Additional Collector of Customs" as final, or whether I should hold that on a true construction of this order the effect of it is that the order as made by respondent No. 1 is the final order made by the Central Board of Revenue. The final order in every case must be an effective and operative order. There was authority in the Central Board of Revenue "to confirm" the order of respondent No. 1 or "to alter or to annul" it. When the Central Board of Revenue decided that it saw no reason to interfere with order passed by the Additional Collector of Customs what in effect it decided was to confirm the order of the Additional Collector of Customs.

toms. The effect of an order of confirmation under s. 188 of the Act in my view must be that the operative part of the order of the first tribunal is really the operative part of the order of the Central Board of Revenue. The true construction of the decision of the Central Board of Revenue is that the Board itself has passed the order the terms whereof are to be found in the order of respondent No. 1. In my view there is no outstanding existence of the order of respondent No. 1 in this case and the only subsisting and effective order is the order made by the Central Board of Revenue.

In this connection it is also relevant to point out that whilst granting the *rule nisi* in this petition on October 10, 1956, I had taken up the view that respondent No. 2 (Central Board of Revenue and the Tribunal) which made the final order being situate in Delhi, this Court had no jurisdiction at all to issue a writ against respondent No. 2. The rule that was given was granted only against respondent No. 1 though in terms of prayers (a) and (b) of the petition. I have already held that the final order which must be questioned and set aside for the petitioner to succeed in this petition is the order of the Central Board of Revenue. It is apparent that the *rule nisi* having not been issued against respondent No. 2 this Court would not proceed to set aside the order of respondent No. 2 and that for that purpose respondent No. 2 would be a necessary party to such a rule. Accordingly the petitioner must fail in this petition for two further reasons. This Court has no jurisdiction to proceed against respondent No. 2 and give relief by way of writ as against respondent No. 2 in respect of the order passed by respondent No. 2. This *rule nisi* also must fail as respondent No. 2 is not a party to the rule issued by this Court on October 10, 1956, though in the absence of respondent No. 2 relief for setting aside its decision cannot be granted.

[The rest of the judgment is not material to this report.]

Solicitor for the respondent: *N. B. Vakil.*

Petition dismissed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Kotval and Mr. Justice Badkar.

GANGARAM BALIRAM v. DHARAMCHAND PHULCHAND RANIWALE.*

Berar Land Revenue Code, 1928—Default in payment of land revenue—Land put up to auction and sold by revenue authorities without notice of sale to defaulter—Necessity of such notice—Whether sale void for want of notice—Applicability of principle of natural justice.

Though the provisions of the Berar Land Revenue Code, 1928, do not prescribe that a notice shall be given before the property of a defaulter is sold, it is a principle of natural justice that the defaulter must receive such a notice before his property is sold. In the absence of any notice the sale is liable to be set aside.

Kanhayalal v. Reginald,¹ Kanhayalal v. Dr. D. R. Banaji,² Cooper v. The Wardsworth Board of Works³ and Patner v. Liverpool Gas Company,⁴ referred to.

Provincial Government, Central Provinces and Berar v. Ramsing Onkardas,⁵ distinguished.

THE facts appear in the judgment.

*Decided, July 30, 1959. Letters Patent Appeal No. 24 of 1954, against the decision of P. P. Deo J., in Second Appeal No. 655 of 1952, affirming the decision of T. L. Jumankar, Second Additional District Judge at Amravati, in Civil Appeal No. 68-A of 1951, reversing the decision of B. N. Goshal, First Civil Judge, Class II, at Amravati, in Civil Suit No. 90-A of

1950.

1 [1951] Nag. 422.

2 [1958] A. L. R. 8. O. 725.

3 (1863) 14 O. B. 180.

4 (1836) 111 E. R. 478.

5 (1943) Second Appeal No. 320 of 1940, decided on March 15, 1943, by Pollock J. (Unrep.).

N. B. Chandurkar, for the appellant.

D. B. Padhye, for the respondent.

KOTVAL J. This is an appeal under CL 10 of the Letters Patent of the then High Court of Judicature at Nagpur upon leave granted by Mr. Justice P. P. Deo. The appeal comes before this Court pursuant to a certificate issued by the learned Chief Justice of the High Court of Madhya Pradesh under s. 59 of the States Reorganization Act.

The subject-matter in dispute in appeal is a field, survey No. 23, area 29 acres 25 gunthas, situated in the village Walki, tahsil and district Amravati. This field belonged to the respondent Dharamchand who is a resident of Calcutta. The appellant Gangaram was at all material times the working patwari of the village Walki. Under s. 140 of the Berar Land Revenue Code, the Deputy Commissioner, Amravati, having certified that the respondent was in arrears of land revenue amounting to Rs. 58-15-3 in respect of the year 1940-41, the said field was put to auction by the revenue authorities on April 24, 1941, at Badnera. At the auction the appellant patwari bid along with one other person and obtained the field for a sum of Rs. 85. The sale was originally fixed to be held on April 23, 1941, at Badnera, but the Additional Naib Tahsildar sitting at Amravati ordered its postponement to the next day, that is, April 24, 1941, on which day it was sold as stated above. The respondent's application to set aside the sale was rejected by the Sub-divisional Officer, and successive appeals to the Deputy Commissioner and the Commissioner, and a revision application to the Board of Revenue were dismissed, as a result of which the respondent filed the present suit on March 10, 1950.

The respondent alleged that the sale was for a very inadequate price and the field was worth Rs. 4,500. He also alleged that the appellant who was a patwari played a fraud upon him and upon the revenue authorities in so far as he suppressed his own identity as patwari of the village Walki and kept that fact and the publication of the sale suppressed, with the result that only one other bidder appeared at Badnera and the patwari himself was enabled to purchase it. Moreover, it was alleged that the respondent was a resident of Calcutta and had no notice whatsoever of the sale or that arrears of land revenue were being demanded from him, and that the appellant patwari falsely represented to the revenue authorities that the respondent had knowingly evaded payment of land revenue in spite of demand, though no demand was ever made.

The trial Court rejected these pleas of the plaintiff-respondent and dismissed his suit. But in appeal the Second Additional District Judge, Amravati, reversed this decision. The Second Additional District Judge held that the appellant patwari had incorrectly represented that the full address of the respondent was not known though he knew it, and therefore the Deputy Commissioner decided not to issue notice. The appellate Court also held that the field had fetched an extremely low price and that it was worth more than Rs. 4,000 even in 1941. Lastly, the appellate Court held—and it is this finding with which we are here primarily concerned—that no demand notice was ever issued to the respondent nor a notice of the sale proclamation. The appellate Court, relying upon the decision in *Kanhayalal v. Reginald*¹ applied the maxim *audi alteram partem* and held that though the Berar Land Revenue Code did not require such notice, that was a rule of natural justice and, therefore, the sale on that ground alone could be set aside. The appellate Court, therefore, did not go into the other questions involved in the suit.

In second appeal Mr. Justice Deo affirmed the decision of the Second Additional District Judge on the short ground that the decisions in *Wasudeo v. Namdeo*² and *Kanhayalal v. Reginald* (cit. sup.) concluded the main question in appeal before him. He however granted leave to appeal on the following ground:

"Since an appeal is pending before the Supreme Court from the decision in *Kan-*

1 [1951] Nag. 422.

2 [1952] Nag. 172.

hayalal v. Reginald, leave is granted to the appellant under clause 10 of the Letters Patent."

Now, before we proceed to consider the questions raised by Mr. Chandurkar on behalf of the appellant in this appeal, it is necessary to notice that upon the particular point raised before us, the Supreme Court of India did not give any decision. The judgment of their Lordships of the Supreme Court is reported in *Kanhaiyalal v. Dr. D. R. Banaji*.³ In *Kanhaiyalal's* case also the sale was under the Berar Land Revenue Code. In that case, the sale was challenged before the then Nagpur High Court on two grounds, one was that no notice had been given of the sale to the judgment-debtor and, therefore, the sale was void because a principle of natural justice had been infringed. The other point canvassed in that case was whether a sale made without the permission of the Bombay High Court which had appointed a receiver of the properties sold was void. The Division Bench held that a sale without the leave of the Court appointing the receiver was not void but was liable to be set aside by the receiver in appropriate proceedings. On the other point, it held that the sale was void for want of notice.

When the matter went before their Lordships of the Supreme Court, they reversed the decision of the Nagpur High Court on the former question. They held that a sale without leave of the High Court appointing the receiver was altogether void and not merely liable to be set aside at the instance of the receiver in appropriate proceedings. Having so held, their Lordships observed that they were, therefore, not called upon to decide the other question on which the sale was impugned, namely, the question whether a rule of natural justice had been infringed because no notice had been given to the judgment-debtor prior to the sale. In para. 13 of the judgment, Mr. Justice Sinha expressly observed as follows (p. 731):

"...The High Court has also relied upon the well-known rule of natural justice—*audi alteram partem*—as another reason for holding the sale to be illegal. It is not necessary for the purposes of this case to pronounce upon the difficult question of how far a principle of natural justice can override the specific provisions of a statute."

In view of these remarks, in our opinion, the question is open for consideration by us.

Mr. Chandurkar urged that in view of the decision of their Lordships of the Supreme Court in *Kanhaiyalal v. Dr. D. R. Banaji* (cit. sup.), the binding force of the authority of *Kanhaiyalal v. Reginald* (cit. sup.) has been taken away. It may be that upon the point before us the decision in *Kanhaiyalal v. Reginald* was not affirmed by the Supreme Court, but neither has the point decided therein been disapproved or reversed.

The principle of law expressed by the maxim *audi alteram partem* has been uniformly accepted in English Courts for over 150 years. The principle is thus expressed in Craies on Statute Law, fifth ed. (pp. 112-3):

"Again, it being a recognised right that 'no man is to be deprived of his property without his having an opportunity of being heard' [*Cooper v. The Wandsworth Board of Works*], it was laid down in that case by Byles, J. that, 'although there may be no positive words in a statute requiring that a party shall be heard, yet a long course of decisions, beginning with *Dr. Bentley's* case (2 Ld. Raymond 1334), established that the Justice of the common law will supply the omission of the Legislature."

In *Cooper v. The Wandsworth Board of Works* (cit. sup.), the Board of Works gave a notice to the owner of a partly built house to demolish it and when it was not complied with, the Board through its servants got the building demolished themselves without any notice to the builder of the house. The Board of Works sought to justify their action under the provisions of the 76th section of the Metropolitan Local Management Act which empowered them to take such action. In holding that although the words of the statute taken in their literal sense without any qualification at all would create a justification for

³ [1958] A. I. R. S. C. 725.

⁴ (1868) 14 C. B. 180, 187.

the act which the Board had done, the Court held that the powers granted by the statute were subject to a qualification which had been repeatedly recognised that no man is to be deprived of his property without his having an opportunity of being heard. Willes J. expressed the rule thus (p. 190):

"...I apprehend that a Tribunal which is by law invested with power to affect the property of one of her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principles of justice."

The same was the view taken in *Painter v. Liverpool Gas Company*.⁵ In that case, a gas light company established by statute made a demand for rent due from the appellant Painter for gas supplied to him. By the statute they were given powers in case of non-payment to recover the rent by issue of a warrant and the statute provided that it shall be lawful for the company to levy the sum so due by distress and sale of the goods of the party so neglecting or refusing to pay. After making a demand, the gas light company issued a warrant and without previously summoning or hearing the party to be distrained upon, realized the amount. Here again, the Court read into the provisions of the Act the duty to hear the party before issuing the warrant, founding it upon principles of natural justice. Lord Chief Justice Denman observed (p. 443):

"...But, in the present case, I am of opinion that the warrant ought to have been issued upon summons of the party. The warrant states that the plaintiff, having contracted with the defendants for a supply of gas from them, refused, after demand made in writing, to pay the rent due to them for gas consumed by him, whereof he was duly convicted. The very terms of this warrant, referring to a conviction, make it evident that the party ought to have been summoned to shew either that he had not refused to pay, or that he had an excuse for not paying. Therefore we are called upon by general principles to say that this warrant is illegal, because the party against whom it is issued had no opportunity given him of shewing that he ought not to be convicted."

In the same case, the learned Chief Justice referred with approval to the remarks of Lord Kanyon in *Harper v. Carr*⁶ as follows (p. 275):

"...It is an essential rule in the administration of justice that no man shall be punished without being heard in his defence; the party must be summoned before a warrant of distress is granted, as we decided in *R. v. Benn*; and on that summons many circumstances may appear to shew that a warrant of distress ought not to be granted."

In the instant case, such circumstances are also found proved. The Courts below found that the respondent was a resident of Calcutta and the field was sold at Badnera; no demand for the arrears was made by the patwari though the latter had falsely represented that he had made such a demand and had also falsely stated to the Tahsildar that he did not know the correct address of the respondent.

Mr. Chandurkar also brought to our notice a decision of the Nagpur High Court in *Provincial Government, Central Provinces and Berar v. Ramsing Onkardas*,⁷ where Pollock J. has observed that no notice to a defaulter is required by the Code. The observation was made in the peculiar circumstances of that case. There the recorded holder of a field had died but the legal representatives had carelessly not got his name removed from the revenue records nor substituted their own. Therefore, the revenue authorities issued a prohibitory order to the deceased recorded holder but without notice to his heirs and the field was sold. It was under these circumstances that the sale was upheld. In that case a prohibitory order had been served albeit on a dead person and in ignorance of his death and, therefore, that was not a case, as here, where no notice at all was ever served or attempted to be served. Moreover, in that case the want of notice to the legal representatives was not attacked upon the

5 (1836) 111 E. R. 478.

6 (1797) 7 T. R. 270.

7 (1943) Second Appeal No. 320 of 1940,

decided on March 15, 1943, by Pollock J. (Unrep.).

wider principle that it was opposed to natural justice, as it has been before us.

The decision of the learned single Judge was, in our opinion, a correct decision and we say so with respect. We hold that though the provisions of the Berar Land Revenue Code do not prescribe that a notice shall be given before the property of a defaulter is sold, it is a principle of natural justice that the defaulter shall receive such a notice before his property is sold. Therefore, in the absence of any notice the sale was liable to be set aside. This is sufficient to dispose of this appeal and we need not go into the other questions canvassed on behalf of the appellant by Mr. Chandurkar or any of the other questions which the Courts below left open upon the respective conclusions to which they came. The appeal is dismissed with costs.

Appeal dismissed.

CRIMINAL REVISION.

[NAGPUR BENCH]

Before Mr. Justice Kotval.

SHANKARLAL BHOLARAM v. MOHAMMAD AYYUB
MADARAN MOMIN.*

Criminal Procedure Code (Act V of 1898), Secs. 190(1), 203—Complaint filed before Magistrate and complainant examined—Subsequent police challan filed before same Magistrate alleging same facts and offence—Magistrate dismissing complaint on ground that there could not be two proceedings against same accused by same parties—Validity of order dismissing complaint—Whether grounds specified in s. 190(1) upon which Magistrate empowered to take cognizance of offence mutually exclusive.

The grounds upon which under s. 190(1) of the Criminal Procedure Code, 1898, a Magistrate is empowered to take cognizance of an offence are not mutually exclusive, and, therefore, if one of the grounds is already there, the Magistrate cannot reject a request to proceed on other grounds.

Mukania v. Achalla,¹ referred to.

THE facts appear in the judgment.

M. N. Phadke and *V. M. Golwalkar*, for the applicant.

N. S. Nandedkar, for the opponents-accused.

N. L. Abhyankar, for the State.

KOTVAL J. This is an application for revision directed against an order passed on January 20, 1959, by Mr. G. R. Dewaikar, Magistrate, First Class, Kamptee, dismissing a complaint filed by the applicant Shankarlal against the four opponents.

The complaint was filed on October 6, 1958, and the complainant Shankarlal was examined on October 13, 1958. Thereafter a police challan came to be filed before the same Magistrate on October 21, 1958. The challan alleged substantially the same facts and made out the same offences. The Magistrate, however, for some reason returned the challan. It was re-presented before him on October 27, 1958, when he felt that it was triable by a Second Class Magistrate and therefore ordered it to be sent to such a Magistrate after obtaining orders of the Additional District Magistrate. In consequence of this order, he further ordered on October 28, 1958, that the complaint filed on October 6, 1958, should be stayed to await the decision of the Additional District Magistrate upon the challan.

*Decided, August 7, 1959. Criminal Revision Application No. 171 of 1959, from the order passed by T. L. Jumankar, Additional Sessions Judge, Nagpur, in Criminal Revision No. 28 of

1959, confirming the order passed by G. R. Diwalkar, Magistrate, First Class, Kamptee, in Criminal Case No. Nil of 1958.

¹ [1952] A.I.R. Rajasthan 160.

Meanwhile the applicant applied for transfer of his complaint upon the ground, amongst others, that the Magistrate had already pronounced his opinion that the offences complained against in the complaint were triable by a Second Class Magistrate. The transfer application was dismissed by the Additional District Magistrate; but in passing the order the Additional District Magistrate observed that the offences disclosed both in the challan and in the complaint were triable by Mr. Dewaikar himself, that is to say, a First Class Magistrate. Thus both the challan and the complaint went back to the file of Mr. G. R. Dewaikar. Thereafter he passed the impugned order on January 20, 1959, which is as follows:

"Already case No. 1500 of 1958 has been registered on these very facts on the report of the police. There cannot be two proceedings on the same allegations against the same accused by the same parties. This complaint which is redundant is therefore dismissed. File."

Now, it is to be noticed that after the Additional District Magistrate had expressed the view that both the complaint and the challan were triable by Mr. Dewaikar, both of them were before the learned Magistrate. The complaint was filed earlier and if at all the Magistrate had a choice to make he might have exercised his choice in favour of retaining the complaint and dismissing the challan but it seems to me that the Magistrate had no such choice in the instant case.

The complaint could not have been dismissed. Section 203 of the Code of Criminal Procedure confers a power on the Magistrate to dismiss a complaint "If, after considering the statement on oath (if any) of the complainant...there is in his judgment no sufficient ground for proceeding."

The sufficient ground which the Magistrate advanced in the instant case was that there could not be two proceedings against the same accused by the same parties. I do not see how the Magistrate could have come to the conclusion that there would have been two proceedings having regard to the provisions of s. 190(1) of the Code of Criminal Procedure to which no reference appears to have been made by the Magistrate.

Under s. 190(1), a Magistrate is empowered to take cognizance of an offence upon three grounds: (a) upon receiving a complaint of facts which constitute such offence; (b) upon a report in writing of such facts made by any police officer; and (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed. Therefore, the Magistrate in the instant case could certainly have taken cognizance of the offence upon the complaint filed before him. There is nothing in sub-s. (1) of s. 190 to indicate that the grounds for proceedings are mutually exclusive, and that if one of the grounds is already there, the Magistrate must reject a request to proceed on other grounds as he has done in the instant case. I am fortified in my view by the decision of a Division Bench of the Rajasthan High Court reported in *Mukania v. Achalia*¹. Chief Justice Wanchoo delivering the judgment on behalf of the Division Bench, after quoting s. 190(1), laid down (p. 161):

"It is open to a Magistrate to act on any one of these three grounds but these three grounds are not, in our opinion, mutually exclusive and it is possible for a Magistrate to take cognizance of any offence upon two or more of such grounds e.g. both upon receiving a complaint and on a police report. We may, in this connection, refer to *BEHARAT KISHORE v. JUDHISTIR MODAK*,² which is a full bench decision. In that case it was held that the alternatives upon which a Magistrate might take proceedings could not be treated as mutually exclusive and it was not correct to say that a magistrate while taking cognizance of an offence should have done it under some one of the alternatives to the exclusion of the other. It follows, therefore, that if Magistrate has both a complaint and a police report before him about the same offence, he can take cognizance of that offence on the basis of both. The further question whether after

1 [1952] A.I.R. Rajasthan 160.

2 [1929] A.I.R. Pat. 473, F.B.

taking cognizance on the basis of both, he can amalgamate them and hold a joint trial of the accused named in the police report as well as in the complaint depends upon S. 239 of the Criminal P.C. and the discretion of the Magistrate, which has to be exercised according to the circumstances of each case."

The application for revision is allowed and the order dismissing the complaint is set aside. The complaint shall now be amalgamated and tried jointly with Criminal Case No. 1500 of 1959.

Application allowed.

[NAGPUR BENCH].

Before Mr. Justice Kotval.

THE STATE OF BOMBAY v. MOHAMADKHAN HASSANKHAN.*

Criminal Procedure Code (Act V of 1898), Secs. 286, 540, 207A(3)—Witnesses not examined before committing Magistrate—Whether prosecution can examine such witnesses in Sessions Court—Prosecutor's right to examine witness whether limited to witnesses summoned for examination by prosecution—Right given to accused by s. 207A(3) when exercisable.

Under s. 286 of the Criminal Procedure Code, 1898, the prosecution may examine in the Sessions Court witnesses other than those mentioned before the Committing Magistrate.

Section 286(2) of the Criminal Procedure Code, 1898, does not limit the right of the prosecutor to examine such witnesses as have been summoned only. If the prosecution have additional witnesses ready and available to them for giving evidence and keep them in attendance, their evidence can be recorded. Where the evidence of such witnesses is allowed to be led, the Court in its discretion may give sufficient time to the defence to prepare itself for cross-examination and if need be, the Court may ask the prosecution to state in writing the gist of what these witnesses are going to depose.

*Bhagwan Singh v. State of Punjab*¹ In re B. K. Narayana Reddi² and Niamat v. Emperor,³ referred to.

In re K. V. R. S. Mani,⁴ distinguished.

The right given to an accused by s. 207A(3) of the Criminal Procedure Code, 1898, to be furnished with copies of all the documents mentioned in s. 173 of the Code, particularly the case diary statements recorded by the police, can only arise where such statements are recorded and not otherwise.

THE facts appear in the judgment.

N. L. Abhyankar, Special Government Pleader, for the State.

S. R. Ahmad, for the opponent.

KOTVAL J. The opponent Mohamadkhan, son of Hassankhan, aged about 25, by occupation a bidi manufacturer, of Nagpur, is being prosecuted before the First Additional Sessions Judge, Nagpur, for an offence under s. 366 of the Indian Penal Code in Sessions Trial No. 34 of 1959. The prosecution alleged that he was responsible for kidnapping one Mst. Lila, wife of Karudas, who was a worker in the bidi factory owned by him. Mst. Lila had been working there during the year 1958 and on or about July 16, 1958, she had a quarrel with her husband Karudas. As a result of the quarrel she left her husband's place and was going to her grandmother's place at about 8-30 or 9 p.m. At about this time the opponent is said to have met her on the road and persuaded her to accompany him. She was taken to the house of Habibkhan (P.W. 5)

*Decided, August 14, 1959. Criminal Revision Application No. 297 of 1959, arising out of orders passed by T. L. Junankar, Additional Judge, Nagpur, in Sessions Trial No. 34 of 1959.

1 [1952] A. I. R. S.C. 214.

2 (1940) 42 Cr. L. J. 404.

3 (1936) 37 Cr. L. J. 742, F.B.

4 [1951] A. I. R. Mad. 707.

where she was kept for two days. With the merits of these allegations I am not here concerned.

After part of the prosecution evidence had been tendered before the Sessions Court, the sessions trial was by order dated July 22, 1959, of the Sessions Judge, Nagpur, transferred from the Court of Mr. B. V. Patwardhan, Extra Additional Sessions Judge, Nagpur, to the Court of Mr. T. L. Junankar, First Additional Sessions Judge. The order impugned in this revision application was passed on July 22, 1959.

A day before the case was transferred as stated above, the prosecution filed an application before Mr. Patwardhan that three witnesses whom the prosecution had not examined during investigation should be allowed to be summoned and examined in the interests of justice. The three witnesses were Dr. Kanikdaley, the Radiologist, Mayo Hospital, Nagpur, Karudas, the husband of the complainant Mst. Lila, and Rama, her father. In their application dated July 20, 1959, the prosecution indicated that the evidence of the husband was necessary on the question of the proof of marriage and lawful guardianship of Mst. Lila, on July 16, 1958, and the father's evidence was necessary in order to prove her age and the report relative to the birth of Mst. Lila made to the police on May 24, 1941. The Extra Additional Sessions Judge Mr. Patwardhan rejected this application so far as the last-mentioned two witnesses were concerned. Thereafter, as I have said above, the trial was transferred to the Court of Mr. T. L. Junankar, the First Additional Sessions Judge, Nagpur.

On July 22, 1959, the prosecution put in a further application before Mr. Junankar. By this application they prayed that they would produce Karudas and Rama before the Court and that they should be permitted to examine those witnesses for the prosecution. The application also stated that when the counsel for the prosecution opened the case, he had specifically referred to the evidence of Karudas and Rama and had stated that they would be examined as additional witnesses though they were not examined before or mentioned in the challan. The Additional Sessions Judge rejected this application for the following reason.

"A similar application was already made to Shri Patwardhan, Extra Addl. Sessions Judge, Nagpur, and was rejected by him on 21-7-1959. Parties heard. I do not think that I should review that order dated 20-7-1959 nor do I think that this Court has power to review the same. The application is rejected."

Thereafter on July 25, 1959, the prosecution made a further attempt to get in the evidence of those two witnesses. They made another application reiterating that in the opening address under s. 286 of the Code of Criminal Procedure, the Public Prosecutor had stated that additional evidence will be adduced by examining Karudas, the husband of the prosecutrix, and Rama, the father of the prosecutrix, for proving the fact of lawful guardianship at the time of the commission of the offence and the age of the prosecutrix at the day of the incident with reference to the birth date of Mst. Lila as shown in the register of births. The prosecution also explained that they were not seeking the help of the Court for issuing process to these witnesses to secure their attendance for giving evidence before the Court but that the prosecution would be producing those witnesses and would keep them in attendance without the aid of the Court and they claimed that under these circumstances they were entitled to examine these witnesses. This application also was rejected by the Additional Sessions Judge on the same day for the following reasons:

"The defence counsel opposes the application. It will be seen that this request was made to my predecessor Shri Patwardhan and was rejected. Today all the witnesses for the prosecution have been examined and the case has almost come to an end. To permit the prosecution to examine the said witnesses now would cause serious prejudice to the accused. The statements of the said witnesses were never recorded by the police and the accused cannot be said to have any effective material to cross-examine the witnesses with any success. To permit the prosecution to examine the witnesses at this stage will have

in fact the effect of filling up the gaps in the prosecution case. Further I am being asked to review my own order."

Now, it seems to me that the first reason given by the First Additional Sessions Judge that his predecessor had rejected a similar request is wholly incorrect. The request made to the predecessor of the First Additional Sessions Judge, namely, Shri Patwardhan, was not that the prosecution should be allowed to examine the witnesses they had produced but that the witnesses should be allowed to be summoned, a request which, as I shall presently show, could legitimately have been rejected by that Judge. The request made to the First Additional Sessions Judge, however, was merely that the witnesses whom the prosecution had themselves produced and who were actually present in Court on that day should be examined. The first reason given, therefore, for rejecting that application does not appear to me to be correct.

I also do not see much point in the second reason given in the order that all the witnesses for the prosecution had been examined that day and that the case had almost come to an end. The fact remains that on the day on which the request to examine the witnesses was rejected, the prosecution case had not been closed. That it had almost come to an end is hardly a relevant consideration. The third reason advanced was that the examination of these prosecution witnesses would seriously prejudice the accused because the statements of the witnesses were never recorded by the police and the accused would not have any effective material to cross-examine the witnesses with any success, and moreover, it would help the prosecution to fill up the gaps in the case. These were also the main grounds upon which the application for revision before me was contested on behalf of the opponent by Mr. Ahmed appearing on his behalf.

In cases of trial by a Court of Session, the procedure in this behalf is prescribed by s. 286(1) of the Code of Criminal Procedure. Under that section, when the Judge is ready to hear the case "the prosecutor shall open his case by reading from the Indian Penal Code the description of the offence charged and stating shortly by what evidence he expects to prove the guilt of the accused". Then sub-s. (2) prescribes that "the prosecutor shall then examine his witnesses". It is to be noted that in the instant case there is an averment that the prosecutor had in opening his case mentioned the names of these two witnesses as witnesses whom the prosecution will examine in addition to the witnesses mentioned before the Committing Magistrate. This statement in the application was never controverted on behalf of the accused.

Now, it seems to me that ordinarily in a criminal trial it is the right of the prosecution to examine as many witnesses as they choose unless their right is curtailed by some provision of law. There is nothing in the Code of Criminal Procedure to limit the right of the prosecution only to examining witnesses examined before the Committing Magistrate, and in so far as s. 286 gives the prosecutor an option to examine his witnesses after opening his case, it seems to me that the prosecution may examine in the Sessions Court witnesses other than those mentioned before the Committing Magistrate.

No doubt, at this stage, it would not be open to the prosecution to have fresh witnesses summoned for the purpose of their evidence being taken and considered in the trial. To that extent the rejection by Mr. Patwardhan of their application to summon new witnesses was, in my opinion, justified.

But the position here is that the prosecution realized their error and abiding by the order passed by Mr. Patwardhan, produced the two witnesses whom they wished to examine on July 25, 1959. This was done while the prosecution case was still being heard and had not been closed. Section 286, sub-s. (2), was therefore clearly attracted. It says that "the prosecutor shall then examine his witnesses" and that does not limit the right of the prosecutor to examine such witnesses as have been summoned only. If the prosecution have additional witnesses ready and available to them for giving evidence and keep

them in attendance, their evidence, in my opinion, can be recorded and there is no legal impediment to that course.

A consideration of the provisions of s. 540 of the Code of Criminal Procedure also leads to the same conclusion. That section, however, gives the Court a discretion to examine at any stage of any inquiry, trial or proceeding any person in attendance though not summoned as a witness. That however is the power vested in the Court itself. I refer to that power because it does not seem to me that the Additional Sessions Judge in rejecting the application dated July 25, 1959, in the instant case adverted to that power which he undoubtedly had.

Then I turn to the question of prejudice which is the main plank upon which the arguments in revision were based. I am in the first instance unable to see how any prejudice arises in the instant case. At the stage at which the request to examine the two witnesses was made, the prosecution case was still being unfolded and their summoned witnesses were being examined. Their case had not been closed. The so-called prejudice in the instant case appears to me no more and no less than the sort of prejudice—if at all it may be called prejudice—which is always occasioned when a prosecution is launched against an accused and prosecution witnesses are examined against the accused. Moreover, no grievance at all was made before the Additional Sessions Judge that the examination of these witnesses would prejudice the accused or that he was not prepared to cross-examine them.

It was then urged that if the witnesses had been allowed to be examined the accused would have been taken by surprise. If such an objection had been made before the trial Court or is even now made after the case goes back, I have no doubt that the First Additional Sessions Judge will in his discretion give sufficient time to the defence to prepare itself for the cross-examination. If need be, the trial Court may ask the prosecution to state in writing the gist of what these witnesses are going to depose. That such a course is permissible and proper is established by the Full Bench case of *Niamat v. Emperor*.¹ Thus the objection would be obviated that these witnesses were not examined by the police during the investigation, and surprise would be caused to the accused if they depose for the first time before the First Additional Sessions Judge. If these safeguards are observed, in my opinion there will be no prejudice caused to the accused by the mere fact of these three witnesses being examined as additional witnesses over and above those who have been summoned. I am fortified in the view that I have taken by the observations of their Lordships of the Supreme Court in *Bhagwan Singh v. State of Punjab*² and by an earlier case decided by the Madras High Court in *In re B. K. Narayana Reddi*.³

Mr. Ahmed relied on the decision of the Madras High Court in *In re K. V. R. S. Mani*.⁴ That was a case where a request to examine an additional witness was made after the examination of all prosecution witnesses and after the prosecution had closed their case. Obviously, different considerations would prevail under those circumstances.

Reference was then made to the provisions of s. 207A, sub-s. (3), of the Code of Criminal Procedure which was recently added by the amending Act No. XXVI of 1955. It was contended that the view I have taken above would take away the right conferred upon the accused by the said sub-section, to be furnished with copies of all the documents mentioned in s. 173 of the Code of Criminal Procedure, particularly the case diary statements recorded by the police. In my opinion, it is not necessary in the present case to consider to what extent these new provisions of law impinge upon the right of the prosecution to examine all such witnesses as they can keep in attendance and are willing to give evidence, because in the present case, the police have admittedly not made any

1 (1936) 37 Cr. L.J. 742, r.B.

2 [1952] A.I.R. S.O. 214.

3 (1940) 42 Cr. L. J. 404.

4 [1951] A.I.R. Mad. 707.

record of their statements during investigation. The new right given to an accused can only arise where such statements are recorded and not otherwise.

Mr. Ahmed then urged that by examining the two witnesses, the prosecution were merely trying to fill up gaps in the prosecution case in so far as they were trying to prove the age of the girl and the facts relative to her lawful guardianship. He urged that the Sub-Inspector who had investigated the case had been examined and in cross-examination he had admitted that the witnesses Karudas and Rama had been examined by him but they had nothing to state and that, therefore, a new case was now being sought to be made out through their evidence. Should it be found that the witnesses Karudas and Rama had been questioned by the police anent certain facts and had stated before the police that they had no knowledge of them and nevertheless that they are subsequently deposing to those facts before the Sessions Court, then that would be a circumstance which would affect the credibility of their evidence and may lead to a disbelief of it; but I am unable to see how upon that ground it can be held that the prosecution are not entitled to examine them at all. All the circumstances relative to the so-called prejudice which Mr. Ahmed has placed before me seem to be mere circumstances tending to show that these witnesses should not be believed, which is a matter which I have no doubt the learned First Additional Sessions Judge will consider after their evidence is recorded.

I allow the application for revision, set aside the orders dated July 22, 1959, and July 25, 1959, of the First Additional Sessions Judge in Sessions Trial No. 34 of 1959 and order that the two witnesses Karudas and Rama shall be examined as prosecution witnesses on their production by the prosecution and subject to what I have observed in this order.

Application allowed.

Before Mr. Justice Shah and Mr. Justice Naik.

RAMJI LAKHAMSI BUDHADEV v. HARSHADRAI NANDALAL BHUTA.*

Indian Penal Code (Act XLV of 1860), Secs. 415, 420, 24—Complainant entering into contract with accused on false representation by latter that they were partners of particular firm—Breach of contract by accused—Whether offence of cheating committed by accused.

A complaint was filed charging accused Nos. 1 and 2 with having committed an offence under s. 420, Indian Penal Code, 1860, and accused No. 3 with having abetted the commission of that offence. It was alleged in the complaint that accused No. 3 persuaded the complainant to enter into a contract shipping a certain quantity of goods with a firm on a representation that accused Nos. 1 and 2 were partners of that firm and that accused Nos. 1 and 2 confirmed the representation and it turned out, after the contract was broken and the consignment was not booked, that accused Nos. 1 and 2 were not the partners of the firm but some other persons were in truth the partners of that firm and that but for the representations made, the complainant would not have entered into the contract:—

Held, that the use of the expression "cause" in s. 415 of the Indian Penal Code postulates a direct and proximate causal connection between the act or omission and the harm and damage to the victim, and

that as, in the present case, there was no direct relation of cause and effect between the representation alleged to be made and the harm and damage to the complainant as a result of the breach of the contract, an offence under s. 415 of the Code was not committed in consequence of the accused persuading the complainant to enter into the contract for shipment.

Harendra Nath Das v. Jyotish Chandra Datta,¹ referred to.

*Decided, August 21, 1959. Criminal Revision Application No. 302 of 1959, against the order passed by V. M. Gehani, Presidency

Magistrate, 10th Court, Esplanade, Bombay, in Case No. 219/N of 1958.

¹ (1924) I. L. R. 52 Cal. 188.

THE facts appear in the judgment.

H. P. Dastur, instructed by *Dastur & Co.*, for the applicant-original complainant.

E. B. Ghaswala, instructed by *Jeshtaram & Co.*, for opponents Nos. 2 to 4.

V. T. Gambhirwala, Assistant Government Pleader, for the State.

SHAH J. The petitioner filed a complaint in the Court of the Presidency Magistrate, 19th Court, Bombay, charging accused Nos. 1 and 2 with having committed an offence under s. 420, Indian Penal Code, and accused No. 3 with having abetted the commission of that offence. It was alleged in the complaint that accused No. 3 persuaded the petitioner to enter into a contract shipping 2,000 tons of oil-cake on board s.s. "Dmitri Donskoy" with the Atlas Engineering Company on a representation that accused Nos. 1 and 2 were partners of that firm, and that accused Nos. 1 and 2 confirmed the representation and it turned out, after the contract was broken and the consignment was not booked, that accused Nos. 1 and 2 were not the partners of the Atlas Engineering Company, and that two other persons Babubhai Rikahchand and Lal bhai Babulal Shah were in truth the partners of that firm and that, but for the representations made, the petitioner would not have entered into the contract. Holding that no *prima facie* case was made out for issuing process against the accused, the trial Magistrate discharged the accused and dismissed the complaint. In the view of the learned Magistrate the possibility of the petitioner knowing that the proprietors of the Atlas Engineering Company were not the accused could not on the evidence be excluded and that in any event it could not be said that but for the representation made by accused No. 3 that accused Nos. 1 and 2 were partners of the Atlas Engineering Company, the petitioner may not have entered into the said contract. The correctness of the order of discharge is challenged in this revision application.

This is one of those cases, in which a civil dispute is sought to be litigated in a criminal Court under the guise of a charge of cheating. The substance of the complaint is that the petitioner entered into a contract for shipment with the Atlas Engineering Company, that that contract was broken and that the persons responsible for committing breach of the contract were accused Nos. 1 and 3, who, though they had no interest in the Atlas Engineering Company, held accused Nos. 1 and 2 out as partners of that firm. *Prima facie* such a plea will sustain in a civil Court a claim for damages for breach of contract and the petitioner may seek to hold accused Nos. 1 and 2 liable for holding themselves out as partners of the Atlas Engineering Company. An action may also lie in damages against accused No. 3 for the part alleged to have been played by him. But we fail to appreciate how, on the allegations in the complaint, an offence can be made out against the three accused or any of them.

Section 415, Indian Penal Code, defines cheating. That section is in two parts. Deception by fraudulently or dishonestly inducing a person to deliver any property to any person or to consent that any person shall retain property is cheating under the first part of the definition. Deception of any person by intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is cheating, under the second part. Under the first part, one of the important ingredients of cheating is that the act of the accused must be done fraudulently or dishonestly and the act must result in inducing the person deceived to deliver property or consent to retention of property. For the application of the second part two conditions must be fulfilled: a person must be intentionally deceived to do or omit to do something which he would not otherwise do and such act or omission causes or is likely to cause damage or harm to the person deceived in body, mind, reputation or property. Section 420, Indian Penal Code, is an aggravated form of cheating. If a person cheats another and thereby dishonestly induces the per-

son deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security and anything which is signed or sealed and which is capable of being converted into a valuable security, he is liable to be punished under this section. Evidently, in this case on the allegations made, there is no delivery of property to any person or the making, alteration or destruction of the whole or any part of a valuable security or anything which is signed or sealed. Nor can it be said that the delivery, if any, is by dishonest inducement. The accused are alleged merely to have induced the petitioner to enter into a contract of consignment of oil-cake. An act is done "dishonestly" if it is done with the intention of causing wrongful gain to one person or wrongful loss to another person (see s. 24, Indian Penal Code) and it is not the case of the petitioner that in inducing the petitioner to enter into a contract, there was any intention to cause wrongful gain to the accused or to cause wrongful loss to the petitioner.

The complaint does not make out a case that by fraudulently or dishonestly inducing the petitioner to deliver any property or to consent to the retention of any property, the petitioner has been cheated. Assuming on the allegations made in the complaint, that but for the representation that accused Nos. 1 and 2 were the partners of the Atlas Engineering Company, the petitioner may not have entered into the contract with that firm, an offence of cheating is not committed, unless the representation causes or is likely to cause damage or harm to the victim. The use of the expression "cause" postulates a direct and proximate causal connection between the act or omission and the harm or damage to the victim. There is in the case nothing in the complaint which may support the contention that damage or harm was caused or was likely to be caused by reason of inducement offered to the petitioner to enter into the shipping contract. The damage may, if at all, arise out of the breach of the contract, but, there is no direct or proximate connection between the inducement and the damage or harm to the petitioner arising out of the breach of contract.

The view that we have taken is supported by the view expressed by the Calcutta High Court in *Harendra Nath Das v. Jyotish Chandra Datta*¹, where the manager of a firm was induced by false representation of the accused to accept a bought note from a non-existent firm for the purchase of jute, and to sign a receipt for the note. It was held (as to the receipt) that the case did not fall within the first part of s. 415, Indian Penal Code, as the accused had no intention to cause wrongful loss or wrongful gain to any one by inducing the manager to make out or give a receipt for the bought note; and (as to the note) the case did not fall within the second part of s. 415, Indian Penal Code, as no loss to property or harm to the manager's reputation resulted proximately and necessarily from the act itself which he was induced to do, viz., acceptance of the contract.

There being in this case no direct relation of cause and effect between the representation alleged to be made and the harm or damage to the petitioner as a result of the breach of contract an offence under s. 415, Indian Penal Code, has not been committed in consequence of the accused persuading the petitioner to enter into the contract for shipment. The rule is, therefore, discharged.

Rule discharged.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Raju.

GULABRAO ANANDRAO v. RAMJI ANANDRAO.*

Hindu law—Joint family property—Nucleus of joint property—Burden of proof how discharged where plaintiff alleges that certain property acquired with help of nucleus of joint family property.

When a plaintiff files a suit alleging that a certain property belongs to a joint family, the initial burden is on the plaintiff to prove his assertion that the property in question is joint family property. This burden can be discharged by the plaintiff by showing that the property was purchased from joint family funds or by joint labour or by showing that the joint family possessed joint family property, that the nucleus of joint family property either proved or admitted was of such a nature that with its help the property in controversy could have been acquired. If the existence of a joint family nucleus or property is either admitted or proved, it must be shown that the nucleus was of such a character that with its help the property in controversy could have been acquired.

If the initial burden of proof resting on the plaintiff is thus discharged, then the burden would shift to the defendant to prove that the property in question was acquired by himself with his own self-acquired property and without the aid of the joint property or joint family funds or income, or that the income derived from the ancestral lands had been kept intact or was not available to him.

Shrinivas Krishnarao Kango v. Narayan Devji Kango,¹ referred to.

THE facts appear in the judgment.

N. B. Chandurkar, for the appellant.

B. K. Manohar, for the respondents.

RAJU J. This appeal arises out of a litigation between members of a Hindu family. The appellant Gulabrao, son of Anandrao Zade, is the original defendant No. 2.

The suit was filed by two plaintiffs, who are brothers of the appellant, namely plaintiff No. 1 Ramji and plaintiff No. 2 Gunderao, both sons of Anandrao Zade, who died on March 9, 1938, leaving behind four sons, Shamrao (defendant No. 1), Gulabrao (defendant No. 2—appellant), Ramji (plaintiff No. 1) and Gunderao (plaintiff No. 2), and three sons of a deceased son Vithoba. The three sons of the deceased Vithoba are defendants Nos. 3 to 5. Anandrao also left behind him his widow Radhabai who died on April 16, 1951. The two plaintiffs filed the suit for partition and separate possession of their 2/5ths share in the joint family properties mentioned in Schedules A and B attached to the plaint. Schedule A refers to the immovable property and Schedule B refers to the movable property i.e. ornaments, household utensils, cattle and cash. The immovable properties are fields at mouza Khumari, mouza Jirola, mouza Chargaon, mouza Raulgaon, and houses and kothas at mouzas Khumari and Dorli and an open site at Khumari.

In this appeal it is not necessary to refer to all the points of contention between the parties at the time of the suit because in appeal only one point has been urged. In appeal it is urged that the lower Court, namely, that of the 5th Additional District Judge, Nagpur, which had passed a preliminary decree in favour of the two plaintiffs, for their 2/5ths share in the joint family properties, erred in holding that the fields at Chargaon and Raulgaon and the houses and kotha at Dorli are joint family properties. The contest in appeal between the parties relates only to these properties.

*Decided, August 28/59, 1959. First Appeal No. 180 of 1953, from the decree passed by N. O. Trivedi, 5th Additional District Judge,

Nagpur, in Civil Suit No. 25-A of 1952.

¹ [1955] 1 S.C.R. 1, s.c. 57 Bom. L.R. 678.

With regard to these properties, the plaintiffs' case was that although the fields at Chargaon and Raulgaon were purchased in 1942-43 in the names of Shamrao, the eldest son of Anandrao, and Gulabrao, the second son, they were really purchased out of the income and savings of the joint family, that although Shamrao was the eldest brother the real *de facto* management was in the hands of Gulabrao. Similarly, as regards the house and kotha at Dorli, plaintiffs' case is that although these were purchased in November 1942 in the name of Gulabrao alone they were purchased from out of the joint family funds and are really joint family property.

On the date of the suit defendant No. 5 Nilkanth was a minor and his guardian-ad-litem was defendant No. 3 Damodhar. He filed a separate written statement wherein the pleas taken by defendants Nos. 1 to 4 were substantially repeated.

In their written statement so far as material for the purposes of this appeal, defendants Nos. 1 to 4 contended that Gulabrao was not the *de facto* manager but in fact ever since he was a child of 5 years Gulabrao has been residing at Dorli with his *mawasa* Manaji although occasionally he used to visit Khumari at the time of *hangam* or harvest to receive his share of the joint family income. The defendants denied that the properties at Raulgaon and Chargaon had been acquired from the income of the joint family properties. According to them these properties were purchased by Gulabrao with his separate funds although the sale-deed mentioned the names of Shamrao and Gulabrao as purchasers. It was averred in the written statement that Manaji had gifted his house to Gulabrao by a gift-deed dated March 9, 1934, that Gulabrao also managed and continued to manage the *kirana* shop of Manaji, that the property was acquired by Gulabrao for himself out of the income from the *kirana* shop at Dorli which belonged to him solely after the death of Manaji who died in 1940. In the written statement it is also affirmed that Gulabrao got from Manaji cash and movables worth Rs. 6,000. As regards the properties at Dorli, viz. the house and kotha, it was pleaded that these were also purchased by Gulabrao for himself with his own funds, by sale-deeds dated November 6, 1942, and November 11, 1942. The defendants denied that these properties had been acquired by Gulabrao from the joint family funds as alleged by the plaintiffs. As the appeal does not relate to the ornaments, household utensils etc. it is not necessary to refer to the plaint allegations and pleas in the written statement relating to them.

In appeal the learned counsel for the appellant has stated that he does not challenge the finding of the lower Court that there was no previous partition prior to the date of this suit, and it is, therefore, unnecessary to refer to the controversy between the parties at the time of the suit relating to the alleged earlier partition. The only point urged in appeal is that the lower Court erred in holding that the fields at Chargaon and Raulgaon, and the house and kotha at Dorli were joint family properties in which the two plaintiffs are entitled to 2/5th share. That the two plaintiffs were entitled to 2/5th share in the joint family properties is also not disputed in appeal. The only point for decision in this appeal is, therefore, whether the learned Additional District Judge erred in holding that the fields at Raulgaon and Chargaon and the house and kotha at Dorli which are shown as items 3 and 4 and items 5(d) and 5(e) in Schedule A attached to the plaint are also joint family property in which the two plaintiffs are entitled to 2/5th share.

We hold that the learned Additional District Judge was right in his finding on this point for the following reasons.

The two plaintiffs filed the suit for partition and separate possession of their 2/5th share in the joint family property of deceased Anandrao who died on March 9, 1938, leaving behind him his widow Radhabai, his four sons and three sons of his predeceased son Vithoba. In the plaint it was alleged that the properties in dispute in appeal were also joint family properties, although the two sale-deeds P-23 and D-5 in respect of Chargaon fields stand in the name

of Gulabrao and Shamrao and although the two other sale-deeds viz. D-6 and D-7 of November 1942, relating to the house and kotha at Dorli stand in the name of Gulabrao alone.

When a plaintiff files a suit alleging that a certain property belongs to a joint family, the initial burden is on the plaintiff to prove his assertion that the property in question is joint family property. See s. 103, Evidence Act. But this burden can be discharged by him in various ways, and when he discharges this burden, the burden of proof then shifts to the defendant who alleges that the property in question does not belong to the joint family but is the self-acquired property of the defendant. The initial burden which rests on the plaintiff who alleges that the property in question belongs to the joint family may be discharged by showing that the property was purchased from joint family funds or by joint labour. He can also discharge the burden by showing that the joint family possessed joint family property, that the nucleus of joint family property either proved or admitted was of such a nature that with its help the property in controversy could have been acquired. If the existence of a joint family nucleus or property is either admitted or proved, it must be shown that the nucleus was of such a character that with its help the property in controversy could have been acquired.

If the initial burden of proof resting on the plaintiff is thus discharged, then the burden would shift to the defendant to prove that the property in question was acquired by himself with his own self-acquired property and without the aid of the joint family property or joint family funds or income.

These principles are well settled by their Lordships of the Supreme Court. In *Shrinivas Krishnarao Kango v. Narayan Devji Kango*¹ their Lordships of the Supreme Court referred to the following observations of the Privy Council in *Appalaswami v. Suryanarayanamurti*² :—

"...The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property;..."

In such a case the defendant can discharge his burden of proof by showing, for instance, that the income derived from the ancestral lands had been kept intact or that the income derived therefrom was not available to him or that the purchase was made from his own earnings and from moneys obtained by him without the aid of joint family funds or joint family income.

These principles have to be applied to the facts of this appeal.

Admittedly, the joint family of Anandrao and his sons had both movable and immovable property. Admittedly, the fields at Khumari and Jirola are joint family properties. There is, therefore, a nucleus of joint family property, and the next question for consideration is whether in size and quality the nucleus was of such a character that with its aid the property in question would have been purchased. The properties in controversy are: (i) two fields bearing khasra Nos. 312 and 314 at Chargaon purchased for Rs. 200 by exh. P-23, dated May 26, 1942, from Krishnarao malguzar (1-4 D.W. 2); (ii) two fields khasra Nos. 2 and 3 of Raulgaon, purchased for Rs. 1,500 on November 17, 1943, by D-5, executed by Shankar (D.W. 3); (iii) an open site at Dorli, 30 cubits by 15 cubits, purchased on November 11, 1942, for Rs. 42 under D-6 which has been proved by Suryabhan (D.W. 4), the vendor; and (iv) the kotha at Dorli, 13 cubits by 36 cubits, purchased by Gulabrao in his own name on November 6, 1942, for Rs. 50 from Raghoji who has not been examined.

¹ [1955] 1 S. C. R. 1, at pp. 7 and 8, s.c.
57 Bom. L. R. 678.

² [1948] Mad. 440, at pp. 447, 448, s.c. 50
Bom. L. R. 628, r.c.

As regards the admitted nucleus of joint family property, they are (i) four fields at mouza Khumari viz. fields Nos. 346, 347, 19/4, and 418, measuring 10.13 acres, and (ii) two fields at mouza Jirola measuring about 13 acres.

Gunderao (plaintiff No. 2) in his evidence as P. W. 7 has deposed that there are two orange gardens in the fields at mouza Khumari and the trees began to bear fruit during the lifetime of his father Anandrao. When his father died, the garden used to yield Rs. 500 to Rs. 700 per year. The joint family also used to get produce of cotton from the fields worth about Rs. 400. Juar from the field was only sufficient to meet the needs of consumption for the family. In addition, the family used to get one or two khandis of *tur* from the fields. The family had two agricultural servants who were paid Rs. 200 and Rs. 100 per year. Admittedly, there are about 14 or 15 members of the family. This is admitted both by plaintiff No. 2 as well as Gulabrao (D.W. 13). Gunderao has also deposed that Gulabrao used to look after the entire family affairs and he used to sell oranges from the orange gardens. Shamrao, the eldest member, merely used to look after the cultivation of the fields.

The plaintiffs also adduced evidence of the witnesses Laxman (P.W. 1) and Bhagwan (P.W. 2) to show that the joint family had sufficient funds. Laxman (P.W. 1) who brought account books of one Mukundrao, in whose service he was employed, has deposed that there was a khata in the names of Anandrao, Vithoba, Shamrao, Gulabrao, Ramji and Gunderao, minors by guardian Anandrao, who borrowed Rs. 3,500 in 1927 from his master on a mortgage. On December 7, 1937, the whole mortgage debt was paid off. During the intervening 10 years Anandrao made various payments varying between Rs. 100 and Rs. 1,100. The final payment which was made in 1937 was of Rs. 553. The evidence of this witness is relied on by the plaintiffs for showing that Anandrao was able to save large amounts of money every year and to repay the entire debt of Rs. 3,500 which he had borrowed as early as 1927. In cross-examination the witness merely stated that he could not say from where Anandrao got money to make the last payment. It is not the case of the defendants that Anandrao incurred other debts in order to make repayments to Mukundrao.

The next witness relied on by the plaintiffs is Bhagwan (P.W. 2) who was in the service of Sheikh Subhan, an orange merchant of Nagpur. He has proved that in 1941-42 there was a khata of Gulabrao and also a khata of Shamrao, sons of Anandrao. In 1942-43 there was a khata of Gulabrao Anandrao of Khumari. In the khata of the year 1941-42 the figure of Rs. 3,007 is shown as price of oranges sold and paid to Gulabrao. It is unnecessary to refer to the evidence of this witness relating to the khatas subsequent to 1942-43 because the properties in question were purchased in 1942-43 and the question for determination is whether at about the year 1942-1943 the joint family had sufficient nucleus of property and sufficient surplus of income from which the property in question could have been purchased.

On the question of income from orange gardens Gulabrao has deposed that Gunderao was in charge of selling vegetables and oranges. In cross-examination he denied the suggestion that he used to send Gunderao to sell oranges to dalal Subhan, but he admitted that he used to send Gunderao to bring money for him from Subhan. According to Shamrao (D.W. 12), he, Gunderao and Ramji jointly used to sell orange crop. They did not sell the orange crops to Subhan. The orange garden used to fetch Rs. 200 to Rs. 400 per year. According to him in some years there was loss and in some years there was a saving of Rs. 200. In view of the admission of Gunderao that the orange garden used to yield about Rs. 500 to Rs. 700, the figure of Rs. 3,000 and other figures in Subhan's account running to several thousands could not have related to the orange garden of the plaintiff. Shamrao (D.W. 12) has admitted that from the orange garden there used to be a saving of about Rs. 200 in some years. There is, therefore, no reason to reject the evidence of Gunderao, the plaintiff who in his deposition as P.W. 7 has deposed that the orange garden used to yield about Rs. 500 to Rs. 700. According to Gunderao the cotton

crop used to fetch about Rs. 400. This fact is not traversed by either Shamrao (D.W. 12) or Gulabrao (D.W. 13). We, therefore, concur in the finding of the learned Additional District Judge that upon the evidence it is clear that there was joint family property which could yield substantial surplus to the family. In view of this finding the burden of proof would shift to the defendant i.e. Gulabrao to prove that the properties in question were his own self-acquired properties.

This is not a case in which properties have been acquired in the name of one of the members of the joint family. Two of the sale-deeds viz. P-23 and D-5 for Rs. 200 and Rs. 1,500, respectively, are in the names of both Shamrao and Gulabrao. Shamrao is the eldest member of the family and Gulabrao is the second eldest. The very fact that these two sale-deeds were taken in the names of two eldest members of the joint family would ordinarily raise a presumption that the properties purchased by these two sale-deeds were purchased for the joint family. Even when there is no joint family nucleus, if properties are jointly acquired by brothers, there would be a presumption that the joint acquisition by the brothers is joint family property: vide *Rampershad Tewarry v. Sheochurn Doss*,³ *Haridas Narayandas v. Dekuvarbai*⁴ and *Sitalprasad v. Ramprasad*⁵. As the sale-deeds were both in the names of Shamrao and Gulabrao and as both of them happen to be the two eldest members of the joint family, ordinarily the presumption would arise that the purchase was for the joint family.

Shamrao has, however, supported the case of Gulabrao. According to Shamrao, the fields purchased at Raulgaon viz. the fields purchased by sale-deeds P-23 and D-5, belonged to Gulabrao exclusively and he (Shamrao) had no share in them. According to him, Gulabrao purchased these fields with his own money and he (Shamrao) did not contribute any money. Shamrao also deposed that he executed a *farkatnama* (release deed D-2) dated March 29, 1951, in favour of Gulabrao. According to him the agreement to execute a release deed was entered into on February 1, 1951. Krishnarao (D.W. 5) of Dorli also deposes to the agreement dated February 1, 1951, by Shamrao in favour of Gulabrao, but there is no reference to this agreement in the final *farkatnama* or release deed executed by Shamrao on March 29, 1951. This was executed after Gunderao had demanded partition on March 20, 1951. It is not unlikely that the *farkatnama* was executed in view of the plaintiffs demand for partition on March 20, 1951.

The case of Gulabrao in his written statement is that the properties in dispute were acquired by him for himself out of the income from the *Kirana* shop at Dorli which solely belonged to him after the death of his *mawasa* Manaji in 1940. In the written statement he does state in addition that he had acquired cash and movables worth Rs. 6,000 from Manaji, but it is not the case made out in the written statement that he had purchased the property from out of the cash left by Manaji. In his evidence, however, Gulabrao deposed that he had purchased the fields out of the cash of Rs. 5,000 and 200 tolas of silver and 12 tolas of gold which had been gifted to him by his *mawasa* Manaji. Even in his deposition he does not make out a clear case whether he had used the cash for purchasing the fields or whether he had used the gold and silver for purchase. His deposition is counter to his written statement in which he stated that he had purchased the properties in question from the income of the *kirana* shop at Dorli belonging to Manaji and which belonged to Gulabrao after the death of Manaji. The case set out in the written statement with regard to all the properties in question has not been proved by the evidence. Gulabrao has not given evidence as to the nature of the income from the *kirana* shop, nor is there any other evidence on this point.

As already observed, the two main sale-deeds viz. P-23 and D-5, which are for Rs. 200 and Rs. 1,500 respectively, stand not only in the name of Gulabrao

³ (1866) 10 M.L.A. 490, at p. 508.

Bom. L. R. 637.

⁴ (1926) I. L. R. 50 Bom. 443, s.c. 28

⁵ [1944] Nag. 17.

alone but in the names of Gulabrao and Shamrao, the eldest members of the joint family. As in this appeal only one question has been argued, the evidence of all the witnesses examined at the hearing of the suit has not been referred to us but only the evidence of the relevant witnesses. We, therefore, concur in the appreciation of the evidence by the learned Additional District Judge and in his conclusion and finding that Gulabrao has not proved that he had purchased the properties in question with his own funds.

We, therefore, hold that the finding of the learned Additional District Judge that the properties referred to in the sale-deeds P-23, D-5, D-6 and D-7 are properties of the joint family in which the plaintiffs have admittedly 2/5th share, and that the properties are not the self-acquired properties of Gulabrao is correct. We, therefore, dismiss the appeal with costs.

Cross-objections have also been filed by respondent Ramji who was original plaintiff No. 1, in regard to an amount of Rs. 4,600 said to have been recovered by the appellant Gulabrao by selling the oranges in 1950-51 to Sheikh Subhan, a dealer in oranges. The respondent Ramji claimed Rs. 920 as 1/5th share in this amount of Rs. 4,600. The claim made in the cross-objections is clearly unfounded because in the plaint itself there is no reference to this amount of Rs. 4,600. In the Schedule B attached to the plaint, which refers to movable property, item No. 13 refers to cash and other miscellaneous articles in the possession of defendants Nos. 1 and 2 i.e. Shamrao and Gulabrao. This amount is shown only as Rs. 2,000. In the plaint no case has been made out that any amount representing sale proceeds of oranges is with defendants Nos. 1 and 2 and is subject to partition as joint family property. In the cross-objection the amount is referred to as Rs. 4,600 recovered by Gulabrao by selling oranges in 1950-51, but it is not the case of Gunderao (P.W. 7) that the orange garden of the joint family used to fetch Rs. 4,600 in any year. According to him the garden used to fetch only Rs. 500 to Rs. 700 per year. There is no evidence therefore to show that the amount shown in the account books of Subhan as sale price of oranges represents sale price of the oranges of the joint family gardens at Khumari. The cross-objections are clearly therefore ungrounded and are dismissed with costs.

In the result, both the appeal and the cross-objections are dismissed with costs.

Appeal and cross-objections dismissed.

CRIMINAL REFERENCE.

Before Mr. Justice Shah and Mr. Justice Nalk.

THE STATE. v. MURLIDHAR GOVERDHAN PATEL.

Criminal Procedure Code (Act V of 1898), Secs. 173, 190(1)(b)—Bombay Police Manual, Rule 203; Summary "A", "B", "C"—Investigating Officer in investigation of cognizable offence not filing charge-sheet and in submitting report under s. 173 requesting issue of Summary "A", "B" or "C"—Whether magistrate can direct such Officer to submit charge-sheet.

A magistrate has jurisdiction to direct an Investigating Officer to submit a charge-sheet when that officer in the investigation of a cognizable offence has not filed a charge-sheet and has in submitting his report under s. 173 of the Criminal Procedure Code, 1898, requested that Summary "A", "B" or "C" be issued.

A magistrate may not lightly pass an order that a charge-sheet be filed. It is only after a careful consideration of the materials placed by a police officer in his report

*Decided, September 2, 1959. Criminal Reference No. 199 of 1958 (with Criminal Revision Applications Nos. 1247, 1248, 1250 and 1253 of 1958, and Criminal Revision Application No. 1254 of 1958), made by

M. A. R. Khan, Sessions Judge, Thana, in Criminal Revision Application No. 50 of 1958, from the orders passed by V. N. Karnik, Joint Civil Judge, J. D. and Judicial Magistrate, F.C., Thana, in Pro. C.R. No. 929 of 1957

if a magistrate is satisfied that there are sufficiently compelling grounds which require him to disagree with the opinion of the police officer and to reject the prayer for a summary asked for that he will be justified in calling for a charge-sheet.

*Venkata Subba v. Anjanayulu*¹ and *Abdul Rahim v. Abdul Mulktadin*² differed from *Boywalla v. Sorab Engineer*,³ *State v. Shankar Bhaurao*,⁴ *Shukadeva Sahay v. Hamid Miyan*,⁵ *Raghunath Puri v. Emperor*,⁶ *Rama Shankar v. State of U.P.*,⁷ *Akshoy Kumar v. Jogesh Chandra*⁸ and *Hrushikesh v. Krishna Chandra*,⁹ referred to.

Cri. Reference No. 199 of 1958.

Y. V. Chandrachud, Government Pleader, for the State.

G. K. Phanse, for the accused (absent).

Cri. Rev. Applications Nos. 1247, 1248, 1250, 1253 of 1958.

Y. V. Chandrachud, Government Pleader, for the State.

Cri. Rev. Application No. 1254 of 1958.

Y. V. Chandrachud, Government Pleader, for the State.

D. A. Mundkur, for *S. G. Samant*, for the accused.

SHAH J. This reference raises a question of some importance about the jurisdiction of a Magistrate to direct an Investigating Officer to submit a charge-sheet when that Officer in the investigation of a cognizable offence has not filed a charge-sheet and has in submitting his report under s. 173 of the Code of Criminal Procedure requested that Summary "A", "B" or "C" be issued.

We may briefly set out the facts which give rise to this reference. Police Constable Murlidhar Goverdhan Patel, attached to the Thana Prohibition Department, was found drunk in the house of one Gunyabai. Investigation was commenced in respect of this incident and a final report was submitted by the Investigating Officer to the Judicial Magistrate, F. C., Thana, requesting that "A" summary be issued. The reasons in support of the request were:—

(1) That the accused was not found in personal possession of illicit liquor.

(2) That there was also no evidence to show if he was found drunk in a public place.

(3) That the main witnesses in the case were interested against the prosecution and they may turn hostile because they were themselves prosecuted for an offence under the Prohibition Act.

(4) That there was no evidence to connect the accused with the liquor bottles that were found in the house of Gunyabai.

The Judicial Magistrate, First Class, Thana, observed that the facts of the case did not warrant the assumption made by the Investigating Officer in asking for "A" Summary, and directed that a charge-sheet be sent up against the constable without making "the witnesses as hostile even before they were given a fair opportunity to come before the Court and depose on oath."

Against this order a revision application was preferred by the State to the Court of Session at Thana. The learned Sessions Judge has made a reference to this Court recommending that the order of the trial Magistrate be set aside, and in the alternative, "C" Summary be granted on the report made by the Investigating Officer.

The Government Pleader, appearing in support of the reference, contends that a Magistrate has no power to call for a charge-sheet from a Police Officer, who after investigating a cognizable case has submitted a report that a summary "A, B or C" be issued. It is urged that the opinion of the Investigating Officer investigating a cognizable offence that the evidence does not warrant the submission of a charge-sheet against the person accused of an offence is binding on the Magistrate and the latter is incompetent to call upon the Officer to

1 [1932] A. I. R. Mad. 673.

2 [1952] Assam 278.

3 [1941] 43 Bom. L. R. 529.

4 [1958] 61 Bom. L. R. 591.

5 (1927) I. L. R. 7 Pat. 561.

6 [1932] A. I. R. Pat. 72.

7 [1956] A. I. R. All. 525.

8 [1956] A. I. R. Cal. 76.

9 [1958] A. I. R. Orissa 104.

submit a charge-sheet when the Investigating Officer asks for a Summary. The learned Government Pleader has in support of his submission invited our attention to a number of decisions, but he has fairly conceded that some of these decisions contain mere dicta which were strictly not necessary for the decision of those cases. Before we refer to these authorities, we may examine the scheme of the Code relating to the investigation of offences. Chapter XIV of the Code falls in Part V which deals with the information to the police and their powers to investigate. A police-officer is empowered to investigate into any cognizable offence without the order of a Magistrate. In respect of a non-cognizable offence, the police-officer has no power without an order from a Magistrate to commence investigation. Where a police-officer receives information about, or has reason to suspect the commission of a cognizable offence, he must forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report and to proceed in person, or depute one of his subordinate officers to investigate the facts and circumstances of the case and, if necessary, to take measures, for the discovery and arrest of the offender (s. 157). A Magistrate receiving a report from a police-officer relating to the commission of a cognizable offence, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided by the Code (s. 159). Power is also conferred upon certain Magistrates to record statements or confessions in the course of the investigation under Chapter XIV (s. 164). When a search is made by the Investigating Officer, the record of the search must be sent to the nearest Magistrate empowered to take cognizance of the offence (s. 165). If the investigation cannot be completed within twenty-four hours, the Investigating Officer must send the accused forthwith to the nearest Judicial Magistrate together with a copy of the entries in the diary relating to the case and power is conferred upon the Magistrate, whether or not he has jurisdiction to try the case, to authorise the detention of the accused in such custody as the Magistrate thinks fit (s. 167). If the Investigating Officer, upon investigation comes to the conclusion that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, if such person is in custody, to release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial (s. 169). If it appears to the Investigating Officer that there is sufficient evidence or reasonable ground, the Officer is bound to forward the accused in custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial (s. 170). An Investigating Officer must maintain a diary of his proceedings, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation and a Criminal Court in the course of a case under inquiry or trial in such Court, has the power to call for the police diaries for the purpose of aiding it during such inquiry or trial (s. 172). It is also prescribed that every investigation shall be completed without unnecessary delay, and as soon as it is completed, the Investigating Officer shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case (s. 173).

From this resume of the relevant provisions of the Code, it is evident that at every stage of investigation by a police officer in a cognizable offence, the Magistrate has the opportunity of supervising the investigation. The Legislature has imposed a duty upon the police officer to give intimation to the Magistrate about the information received by him and to produce the accused within

24 hours after the commission of the offence, if the accused is arrested; if a search is made a report is required forthwith to be submitted to the Magistrate; and after the investigation is completed, the police officer is bound to submit a report to the Magistrate of his investigation. If during the course of the investigation by the police, in a cognizable case, a Magistrate has power to supervise the investigation, we are unable to accept the submission of the learned Government Pleader that the opinion formed by a police officer in the course of the investigation as to the complicity of a person charged with the commission of the offence, is conclusive and cannot be called in question by the Magistrate to whom a report is submitted under s. 173. The Legislature has not used the expression "Charge-sheet" anywhere in the Code. By s. 173, a final report is required to be made by a police officer making an investigation in a cognizable offence or when so directed in a non-cognizable offence. By such a report, the Investigating Officer may report that action be taken against the accused for the offence alleged to have been committed—and such a report is a charge-sheet—or that the papers be ordered to be filed because the evidence does not warrant the initiation of a judicial proceeding against the accused. The Bombay Police Manual classifies the orders which may be requested by the Investigating Officer when he is of the opinion that no judicial proceeding need be initiated, as Summaries "A," "B" and "C." A request for "A" Summary is to be made when the police officer investigating the case is of the view that the offence is true but undetected and where there is no clue whatever about the culprits or property or where the accused is known but there is no evidence to justify his being sent up for trial. Request for "B" Summary is to be made when the complaint is maliciously false and for "C" Summary when the complaint is neither true nor false, that is, due to mistake of facts or is of a civil nature.

An order passed by a Magistrate on a report under s. 173(1) of the Criminal Procedure Code requesting that a Summary "A," "B" or "C" be issued is in its very nature a judicial order and not an administrative order. When a report is submitted to a Magistrate under s. 173 of the Code of Criminal Procedure by a police officer praying that a Summary of the nature described in r. 203 of the Bombay Police Manual, the Magistrate must act judicially and pass such order on the report as the circumstances may warrant. The Magistrate is not bound to issue the Summary which is asked for; he is not bound to issue a Summary at all. In *Boywalla v. Sorab Engineer*,¹ Beaumont C.J. observed (p. 532):—

"...When, in the case of a man who has been arrested and released on bail the police-officer reports that there appears to be no case, and invites the Magistrate to discharge the man, the Magistrate is not bound to act upon the police view. He can undoubtedly say: 'I will have a further inquiry in this matter. I think the Police are wrong in suggesting that the accused should be discharged'."

Again it was held in *State v. Shankar Bhaurao*² that a Magistrate who is invited to give "B" Summary, may on the evidence issue "A" Summary. These authorities abundantly establish that a Magistrate dealing with a report of a police officer is not bound by the opinion formed by that officer, and is not bound to issue a Summary merely because it is asked for, and that the Magistrate is bound to deal with the report judicially.

The learned Government Pleader contends that jurisdiction with which the Magistrate is invested to deal with and dispose of the report judicially, does not import the power to order that a charge-sheet be lodged against the accused. The sole argument urged in support of this contention is that there is no such power conferred by the Code upon a Magistrate. In our view, absence of a provision expressly conferring such a power is not decisive. Upon a report of the facts which constitute an offence, by a police officer, a Magistrate has jurisdiction to take cognizance. The report may be one in the form of a charge-

1 (1941) 43 Bom. L. R. 529.

2 (1958) 61 Bom. L. R. 591.

sheet, or one inviting the Magistrate to issue a Summary. After taking cognizance the Magistrate may in exercise of the powers under s. 204 issue process, if in his view that course is warranted. Even though there is no express provision in that behalf, the Magistrate if he is satisfied that process may not issue, he may discharge the accused. The learned Government Pleader concedes—and in our judgment he is right in so doing—that if a Magistrate, on a report made under s. 173, that Summary be issued, decides to take cognizance of the offence in exercise of the powers under s. 190(1)(b), the police officer will be bound to assist the Magistrate in the inquiry and the trial by making available the witnesses. If a police officer is bound to assist the Magistrate in trying the case when the latter takes cognizance in exercise of power under s. 190(1)(b), we fail to appreciate why the police officer is not bound to submit a charge-sheet in a cognizable case when the filing of such a charge-sheet is ordered by the Magistrate. Normally, a Magistrate to whom a report is submitted will give the fullest consideration to the opinion of a police officer who has collected the evidence in the course of an investigation, and he may not lightly call for a charge-sheet when the police officer has on the opinion formed by him chosen not to file one. But the Magistrate has in a proper case power to demand that a charge-sheet be filed and, in our judgment, there is nothing in the scheme of the Code which justifies the view that the Magistrate who has power to supervise the investigation, has no power to correct the opinion of the police officer, though he has, as is conceded, power to ignore the police officer's opinion. We would require some strong indication in the Code which may justify the view which the learned Government Pleader is asking us to adopt, but none such is to be found in the Code.

We may now briefly refer in chronological sequence to the authorities to which our attention was invited. In *Shukadova Sahay v. Hamid Mian*³, it was assumed that a Magistrate has power to call upon the Investigating Officer to submit a charge-sheet, and that such an order was a judicial order. In *Venkata Subba v. Anjanayulu*,⁴ it was observed that (p. 673):

"...The Police must be allowed to form their own opinion of a case when submitting their report and a Magistrate cannot ask them to change their opinion merely because he does not agree with them."

It appears that in that case counsel for the accused and counsel for the prosecution, conceded that the order directing the police to submit a charge-sheet was not a legal order. The decision, given, without any reasons and on a concession made at the Bar, is of little assistance.

The next case to which our attention was invited is *Raghunath Puri v. Emperor*.⁵ In that case Mr. Justice Mohammad Noor observed that (p. 78):

"...An order calling for a charge-sheet on a report under S. 202 when the Police drew up a first information report is an order under S. 204, Criminal P.C., and in practice is an order for issue of process."

The learned Judge also observed that (p. 76):

"...When such a report is received by the Magistrate, empowered under S. 190(b) he takes cognizance of the offence under that section. Even if the accused is not sent up, i.e., not a charge-sheet but a final report is sent, the Magistrate when he applies his mind to that report may take cognizance of the offence and if he wants to place the accused on trial he can issue his process."

This case does not support the view that a charge-sheet cannot be demanded by a Magistrate when considering the report under s. 173. In fact, it is assumed that a charge-sheet may be ordered to be filed by a Magistrate, when a final report under s. 173, Criminal Procedure Code, is submitted to him. In *Abdul Rahim v. Abdul Mukhtadin*,⁶ a Division Bench of the Assam High Court held that (p. 274):

"...There is no provision of law by which a Magistrate is empowered to direct the

³ (1937) I. L. R. 7 Pat. 561.

⁴ [1932] A. I. R. Mad. 673.

⁵ [1932] A. I. R. Pat. 72.

⁶ [1952] Assam 273.

Police to send up a charge-sheet against an accused person against whom an information has been lodged. A Magistrate is only empowered to take cognizance of the case in accordance with s. 190, Code of Criminal Procedure."

In the view of the Court there is no provision of law by which a Magistrate is empowered to direct the police to send up a charge-sheet against an accused person against whom an information has been lodged, and that the Magistrate is only empowered to take cognizance of cases in accordance with s. 190, Criminal Procedure Code. As we have already stated, the absence of an express provision of this nature is not decisive of the competence of the Magistrate to call for a charge-sheet.

The next case to which our attention was invited is *Rama Shankar v. State of U.P.*⁷ In that case the Allahabad High Court took the view that (p. 527) :

"...An investigating officer is required by S. 173 of the Code to submit a charge-sheet, but this does not render his act of submitting a charge-sheet a judicial act.

A court has no judicial control over investigations and over the manner, or the circumstances, in which an investigating officer makes his report under S. 173. An investigating officer's act is wholly administrative. There is, therefore, nothing to prevent his submitting another report in supersession of an earlier one."

This case is not an authority for the proposition that a Magistrate who is asked to issue a Summary may not call for a charge-sheet. The observations relating to the absence of judicial control over the investigation by a police officer were made in support of the view that even when a report has been made and accepted, another report may be made by the police in the same investigation. In *Akshoy Kumar v. Jogesh Chandra*,⁸ it was observed by the Calcutta High Court that:

"...When a petition of complaint is filed before a Magistrate he has two alternative courses open to him and can follow either of them at his option. He may examine the complainant on oath and proceed under Chap. 18 or he may simply direct an investigation by the police under S. 156(3) and proceed under Chap. 14."

It was further observed that:

"When the police finds the case to be false and reports accordingly, the Magistrate has nothing further to do in the chain of that proceeding. He is in seisin of nothing and neither the police, nor anybody else is complaining before him and he could not entertain" a petition filed by the complainant.

This case again has no bearing on the question under examination; and even the observations relied upon do not support the contention of the Government Pleader.

In a recent judgment of the Orissa High Court in *Hrushikesh v. Krushna Chandra*⁹ it was observed that there is nothing illegal if a Magistrate revises his opinion and calls for a charge-sheet from the police even if the final report of the police is once accepted by him. Narsinham C.J. observed that the consistent view of the Patna High Court was that the Magistrate has the power to call for a charge-sheet after the final report has been accepted by him.

In our view, the power to call for a charge-sheet from the Investigating Officer who has asked for a Summary after investigating a cognizable case is vested in the Magistrate because the Magistrate is required by law to deal with the report made to him judicially and also because the Magistrate has supervisory control over the investigation by a police officer in the course of the investigation of an offence. With respect, we are unable to agree with the view of the Assam and the Madras High Courts that a Magistrate cannot order an Investigating Officer in a cognizable offence to submit a charge-sheet.

We may, however, observe that a Magistrate may not, even though he has the power, lightly pass an order that a charge-sheet be filed. It is only after a careful consideration of the materials placed by a police officer in his report if a Magistrate is satisfied that there are sufficiently compelling grounds which

7 [1956] A. I. R. All. 525.

9 [1958] A. I. R. Orissa 104.

8 [1956] A. I. R. Cal. 78.

require him to disagree with the opinion of the police officer and to reject the prayer for a Summary asked for that he will be justified in calling for a charge-sheet.

On the view taken by us, there will be no order on the Reference made by the learned Sessions Judge.

Rule in Revision Applications Nos. 1247, 1248, 1250, 1253 and 1254, all of 1958, in which the identical question arises, will be discharged.

CRIMINAL APPEAL.

Before Mr. Justice Shah and Mr. Justice Naik.

VITHAL KRISHNAJI NIVENDKAR v. THE STATE.*

Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Sec. 18(1)—Whether expression "consideration" in s. 18(1) restricted to consideration other than pecuniary consideration—"Other like sum," meaning of expression.

The expression "consideration" in s. 18(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, is used in its normal connotation and includes pecuniary as well as non-pecuniary consideration.

Karamsey Kanji v. Velji Virji,¹ (opinion to the contrary expressed in), not agreed with.

The expression "other like sum" in s. 18(1) of the Act must be read *ejusdem generis* with fine or premium.

THE facts appear in the judgment.

S. B. Bhasme, for the appellant-accused.

V. T. Gambhirwala, Assistant Government Pleader, for the State.

SHAH J. The accused, Vithal Krishnaji Nivendkar, was tried before the Presidency Magistrate, 7th Court, Dadar, Bombay, for an offence under s. 18(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act LVII of 1947. The learned Magistrate convicted the accused of the offence charged and sentenced him to suffer simple imprisonment for one day and to pay a fine of Rs. 3,251 and in default of payment of fine to suffer simple imprisonment for one month. Against that order of conviction and sentence, this appeal has been preferred.

The complainant is one Parduman Ramsingh, who migrated to Bombay sometime in the year 1949. In November 1957 the complainant came to learn that residential accommodation in Waghe Hall at St. Xavier Road at Parel was available. The complainant went to the office of the Tillori Kunbi Samajonnati Sangh and met the accused, who was the President of the Sangh and responsible for the management of the building of the Sangh. The accused demanded Rs. 4,000 as *pugree* and Rs. 85 p.m. as rent for granting on rent residential accommodation in the building of the Sangh to the complainant. There was some bargaining between the complainant and the accused and ultimately an amount of Rs. 3,251 was settled as the amount, to be paid by the complainant to the accused as consideration for granting the tenancy. The accused asked the complainant to write a letter dictated by the accused wherein it was recited that the amount of Rs. 3,251 was to be a donation by the complainant to the Sangh. At the date of these negotiations, the building of the Sangh was under construction and it was expected to be ready sometime in February 1958. In January 1958 the complainant paid three amounts of Rs. 1,000, Rs. 500 and Rs. 751, and he paid Rs. 1,000 on May 4, 1958. The complainant occupied two

*Decided, September 9, 1959. Criminal Appeal No. 916 of 1959, against the order of conviction and sentence passed by K. S. Dhurandhar,

Presidency Magistrate, 7th Court, Dadar Bombay, in Case No. 619/S of 1958.
1 (1954) 56 Bom. L. R. 619.

rooms leased to him in Tillori Kunbi Sangh Waghe Hall building on May 1, 1958. The accused gave to the complainant a consolidated receipt for Rs. 3,251. Thereafter the complainant also paid Rs. 85 as rent for one month and a receipt was given by the accused. The complainant then filed a complaint in the Court of Presidency Magistrate, 7th Court, against the accused charging the accused with having committed an offence under s. 18(1) of the Act LVII of 1947. The accused admitted that he had received the amount of Rs. 3,251. He, however, pleaded that he was not the landlord and that, in any event, the amount was received by him as a donation to the Trust and not as consideration for granting the tenancy. The learned Judge, on the evidence, rejected the contentions raised by the accused and convicted and sentenced him as stated hereinbefore.

Section 18(1) of the Act LVII of 1947 in so far as it is material provides:

"If any landlord either himself or through any person acting or purporting to act on his behalf or if any person acting or purporting to act on behalf of the landlord receives any fine, premium or other like sum or deposit or any consideration other than the standard rent or the permitted increases, in respect of the grant, renewal or continuance of a lease of any premises, ...shall, on conviction, be punished with imprisonment for a term which may extend to six months and shall also be punished with fine which shall not be less than the amount of the fine, premium or sum or deposit or the value of the consideration received by him..."

A landlord receiving unlawful charges or a person on behalf of the landlord receiving unlawful charges is liable to be punished under s. 18(1) of the Act. The accused is not the landlord within the meaning of s. 5 of the Bombay Act LVII of 1947, but admittedly he has received Rs. 3,251 from the complainant on behalf of the landlord.

Is the amount received by the accused fine or premium or other like sum or deposit or any consideration other than the standard rent? The amount is not received as fine, and we will assume that the amount was not received as premium: if it is not fine or premium it is not "other like sum" because in the context in which it is used the expression "other like sum" must be read *ejusdem generis* with fine or premium. But, in our judgment, the amount received by the accused is "any consideration other than the standard rent...in respect of the grant of a lease of...premises". The expression "consideration" is used in its normal connotation and is not restricted to consideration other than pecuniary consideration.

We are unable to agree with the opinion tentatively expressed by Chagla C.J. in *Karamsey Kanji v. Velji Virji*¹ on which Mr. Bhasme relies. In that case, the learned Chief Justice has observed that there was considerable force in the submission that the consideration contemplated in s. 18(1) of the Act LVII of 1947 is not a pecuniary consideration but consideration other than pecuniary. The observation was not strictly necessary for the purpose of that case; and, we may, with respect, observe that there is nothing in the context in which the expression "consideration" occurs in s. 18(1) of the Act, which warrants a restricted interpretation. In its normal connotation the expression "consideration" in the law of contracts, includes consideration pecuniary as well as non-pecuniary, and there is no sufficient indication in the context which may justify us in restricting its connotation to non-pecuniary consideration. We are unable to hold that the penalty clause, which requires the Court to impose a fine which shall not be less than the value of consideration, supports the view that the expression "consideration" was used in a restricted sense.

The contention of the accused that, in any event, there was no nexus between the donation of Rs. 3,251 and grant of the tenancy of the premises in Waghe Hall has no substance. There is clear evidence, on the record, of the complainant and it does not appear to have been shaken in cross-examination, that the accused had as consideration for granting a tenancy of premises in the

Waghe Hall demanded initially an amount of Rs. 4,000 as *pugree* and ultimately he reduced his demand to Rs. 3,251. The learned Magistrate accepted that evidence and we see no reason to differ from him. If acting on behalf of the Sangh, the accused, as its president, demanded from the complainant a certain amount for giving to the complainant in lease a part of the building of the Sangh, in our judgment, it is consideration in respect of the grant of a lease within the meaning of s. 18(1) of Act LVII of 1947. There is, on the evidence, a clear nexus established between the demand of what is called euphemistically donation, and the grant of the lease.

Our attention was invited by Mr. Bhasme to the decision of the Supreme Court in *Tolaram Belumal v. State of Bombay*², and reliance was placed upon the following passage (p. 1209):

"...The section does not make the intention punishable; it makes an act punishable which act is related to existence of a lease. It does not make receipt of money on an executory contract punishable; on the other hand, it only makes receipt of money on the grant, renewal or continuance of the lease of any premises punishable and unless the lease comes into existence, no offence can be said to have been committed by the person receiving the money", and also upon the view that the words "in respect of" used in s. 18(1) of the Bombay Act LVII of 1947, in their widest import must mean "relating to" or "with reference to" and that this relationship must be predicated of the grant, removal or continuation of a lease, and unless a lease comes into existence simultaneously or near about the time the money is received, it cannot be said that the receipt was "in respect of" the grant of a lease. In that case a person who was constructing a building, received from his prospective tenant Rs. 2,400 as consideration under an executory agreement to lease certain rooms in the building when completed, and it was held that the executory contract was not hit by the provisions of s. 18. But we are not, in this case, concerned with a mere executory contract pursuant to which a lease has not "actually come into existence". On May 1, 1959, the premises occupied by the complainant were in existence and a receipt was given by the accused in respect of the payments made and the premises were in fact given on lease to the complainant by the accused and the complainant occupied the same as tenant of the Sangh. In our view, the receipt of the money in respect of which an acknowledgment was given on May 1, 1958, coupled with the grant of the tenancy on and from that date made the payment of money consideration in respect of the grant of the lease of the premises within the meaning of s. 18(1) of the Act LVII of 1947.

On that view of the case, the learned Magistrate was, in our judgment, right in convicting the accused for the offence under s. 18(1) of the Act LVII of 1947. We, therefore, confirm the conviction of the accused and the sentence passed upon him. We give one month's time from this day to the accused to pay the fine. The appeal is dismissed. Interim stay vacated.

Appeal dismissed.

FULL BENCH.

Before the Hon'ble Mr. H. K. Chitambar, Chief Justice, Mr. Justice S. T. Desai and
Mr. Justice Tarkunde.

RAMCHANDRA YESHWANT SHRINGARPURE

v.

DIGAMBAR TEJIRAM PARDESHI.*

Civil Procedure Code (Act V of 1908), Secs. 73, 63(2); O. XXI, r. 72—Set off allowed by Court to decree-holder under O. XXI, r. 72, who has purchased property of judgment-debtor—Whether set off affects right, to rateable distribution of purchase money, of another decree-holder who had applied for execution of his decree to another Court and had attached same property before its sale—Liability cast upon decree-holder who is allowed set off to refund amount if required for rateable distribution whether affected by s. 63(2).

A set-off allowed by a Court under O. XXI, r. 72, of the Civil Procedure Code, 1908, to a decree-holder, who has purchased the property of his judgment-debtor, cannot affect the right under s. 73 of the Code to rateable distribution of the purchase money of another decree-holder, who had applied for execution of his decree to another Court and had got the same property attached before the date of its sale.

Section 63(2) of the Civil Procedure Code does not in any way affect the liability cast upon the decree-holder, who is allowed a set-off under O. XXI, r. 72(2), of the Code, to refund or pay back the amount, if it is required for rateable distribution under s. 73 of the Code.

Shidappa v. Gurusangaya,¹ overruled.

Iswardas v. Corporation of Madras,² agreed with.

Dhirendrarao Krishnarao v. Virbhadrappa,³ *Navaaj v. Totaram*,⁴ *Keshaorao v. Mulchand*⁵ and *Deekappa v. Chanbasappa*,⁶ referred to.

ONE Digambar (opponent No. 1) obtained a money decree in the Court of the Civil Judge, Senior Division, Poona, for Rs. 20,348, against opponents Nos. 2 and 3 on July 26, 1952. Opponent No. 1 had obtained interim attachment before judgment of two house properties of opponents Nos. 2 and 3 situate at Pen and Varsayi on April 19, 1951. This attachment was confirmed on July 26, 1952. Opponent No. 1 then got the decree transferred to the Court of the Civil Judge, Senior Division, Alibag, and filed a darkhast on September 9, 1952, for sale of the aforesaid properties. In the meantime Ramchandra (petitioner) obtained a money-decree against opponents Nos. 2 and 3 in the Pen Court and filed a darkhast in the Court of the Civil Judge, Junior Division, Pen, and attached the house at Pen and brought it for sale. The petitioner purchased the house with the Court's permission for the final bid of Rs. 7,100 and as he was allowed a set off he brought back in Court Rs. 4,430-15-9 out of the bid amount. The sale was confirmed on July 9, 1954, and the surplus was ordered to be paid to opponents Nos. 2 and 3. One Anandibai (opponent No. 4) filed a suit against opponent No. 3 and had the surplus amount attached. By a consent decree opponent No. 4 and opponent No. 3 both shared this amount half and half and withdrew that amount from the Court at Pen. Opponent No. 4 also filed a darkhast in the Court at Pen against opponent No. 2 and brought to sale the Varsayi house. Opponent No. 4 purchased it with the Court's permission for Rs. 3,001 and obtained a set off for that whole amount as her decree was for a larger amount.

Opponent No. 1 filed an application under s. 73 read with s. 63 of the Civil Procedure Code in respect of the assets realised in the two darkhasts in the

*Decided, April 15, 1959. Civil Revision Application No. 473 of 1956 (with Civil Revision Application No. 827 of 1956), from the decision of R. M. Kulkarni, Civil Judge, Senior Division, Alibag, in Special Suit No. 65 of 1951.

1 (1930) 33 Bom. L.R. 537.

L. R.—106.

2 (1936) I.L.R. 59 Mad. 1028.

3 (1934) I.L.R. 59 Bom. 310, s.c. 37 Bom. L.R. 78.

4 (1930) 33 Bom. L.R. 503.

5 [1937] A.L.R. Nag. 383.

6 (1925) 27 Bom. L.R. 917.

Court at Pen. This application was opposed by the petitioner. The trial Judge granted the application.

The petitioner applied in revision to the High Court. The application along with Civil Revision Application No. 827 of 1956 was heard by Shah and Gokhale JJ. Their Lordships referred the application to a larger bench. Shah J. delivered the following referring judgment on November 13, 1957:—

SHAH J. In these two revision applications against an order passed by the Civil Judge, Senior Division, Alibag, a question as to the true interpretation of s. 63(2) of the Civil Procedure Code arises. By s. 63(1) of the Code it is provided:

"Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached."

By sub-s. (2) of s. 63 it is provided:

"Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees."

The property of the judgment-debtor was sold by a Court of the lower grade and the decree-holder was given leave to bid and set off the amount due to him under the decree and the question arises whether the assets available for rateable distribution are the balance of the price bid at the auction after such set off. It was held by a Division Bench of this Court in *Shidappa Lazmanna v. Gurusangaya Akhandaya*¹ that the order of a Court of the higher grade calling upon the decree-holder, who has purchased the property and has been permitted to set off under O. XXI, r. 72(2), of the Civil Procedure Code by a Court of the lower grade, to refund the decretal amount which he was allowed to set off was without jurisdiction, as the decree must be considered to be satisfied to that extent under O. XXI, r. 72(2), of the Civil Procedure Code. It was further held that the expression "any proceedings" in s. 63(2) includes an order made under O. XXI, r. 72, for set off. This view appears to be inconsistent with the opinion of another Division Bench of this Court in *Dhirendrarao Krishnarao v. Virbhadrappa*². Sir John Beaumont C.J. delivering the judgment in that case, without referring to the earlier judgment in *Shidappa's* case on this point observed as follows (p. 313):

"A preliminary point was taken by the applicant that no rateable distribution could be ordered because of the direction that he be allowed to set-off the amount of his decree against the purchase money, such order being said to be 'proceeding' within section 63(2) of the Civil Procedure Code. That order was made under power conferred by Order XXI, rule 72(2), of the Code of Civil Procedure, and the order is, in my opinion, mere machinery, which does not affect the rights of third parties. Apart from the order allowing set-off, the decree-holder, who purchased, would have to bring the purchase money into Court and then he would be paid, as far as the moneys went, the amount due to him on his decree. To avoid this procedure the Court can allow set-off, but all that the order allowing such set-off means is that the decree-holder can exercise his right by setting off the amount of his decree against that portion of the proceeds of sale to which he is entitled. He cannot set-off against a portion of the proceeds of sale which belongs to other parties."

The learned Chief Justice expressly approved of a judgment of this Court in *Navaj v. Totaram*.³ It may be observed that *Navaj's* case was also decided by Mr. Justice Patkar and Mr. Justice Broomfield who decided *Shidappa's* case. But in *Navaj's* case the facts did not invite the application of s. 63 of the Code. In that case the property of the judgment-debtor was sold and the decree-holder was allowed set off. An application for rateable distribution

¹ (1930) I.L.R. 55 Bom. 473, s.c. 33 Bom. L.R. 78.
L.R. 537.

³ (1930) 33 Bom. L.R. 503.

² (1934) I.L.R. 59 Bom. 310, s.c. 37 Bom.

of the assets realised was thereafter made, and the Court held that the set-off allowed to the decree-holder was subject to the order for rateable distribution which the Court may make, and that the decree-holder who had purchased the property and was allowed set-off was liable to bring into Court the amount for which he was allowed set-off, and the entire amount realised at the sale must be rateably distributed. It was observed in that case that an order under O. XXI, r. 72, of the Civil Procedure Code is procedural and is meant only for the convenience of the decree-holder who is permitted to bid at an auction. The view taken by this Court in *Shidappa's* case has not been accepted by other Courts. In *Iswardas v. Corporation of Madras*⁴ the Madras High Court accepted the judgment in the case of *Dhirendrarao Krishnarao v. Virbhadrappa* as correctly laying down the law. Similarly, in *Vishnu Ram v. Bank of Bihar*,⁵ the Allahabad High Court also appears to have accepted the view of *Dhirendrarao's* case as correctly interpreting s. 63. The view of the Nagpur High Court in *Kesheorao Balwantrao Deshpande v. Mulchand Shekulal Agarwal*⁶ is also inconsistent with the judgment in *Shidappa's* case.

As the question is of some importance, we direct that this case be placed before the learned Chief Justice for constituting a larger Bench for decision of the question

"Whether an order for set-off passed under Order XXI, rule 72, of the Code of Civil Procedure, is a 'proceeding' within the meaning of section 63(2) of the Code."

The question was heard by a full bench composed of Chainani C.J. and S. T. Desai and Tarkunde JJ.

G. S. Gupta (Sr.), for the applicants, in both the Civil Revision Applications.

H. R. Gokhale, with V. N. Gadgil, for opponent No. 1, in both the Civil Revision Applications.

B. W. Adik, for opponent No. 4, in Civil Revision Application No. 473 of 1956.

CHAINANI C.J. The question referred to the full bench is:

"Whether an order for set-off passed under Order XXI, rule 72, of the Code of Civil Procedure, is a 'proceeding' within the meaning of section 63(2) of the Code?"

The real question which arises in the two cases, in which this reference has been made to the full bench and in other similar cases, however, is whether a decree-holder, who has been allowed a set-off under O. XXI, r. 72, can be called upon to pay in Court the amount of set-off so as to make it available for rateable distribution amongst all holders of decrees against the same judgment-debtor under the provisions of s. 73 of the Code. In consultation with the learned advocates for all the parties, we have, therefore, reformulated the question for our decision as under:

"Whether by reason of sub-section (2) of section 63 of the Code of Civil Procedure, a set-off allowed by a Court under Order XXI, rule 72, to a decree-holder, who has purchased the property of his judgment-debtor, can affect the right under section 73 to rateable distribution of the purchase money of another decree-holder, who had applied for execution of his decree to another Court and had got the same property attached before the date of its sale?"

The provisions with regard to rateable distribution are contained in s. 73. Sub-section (1) of this section provides that, where assets are held by a Court and more persons than one have, before the receipt of such assets, made applications to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed amongst all such persons. There is a proviso to this section "with which we are not concerned in this case. Sub-section (2) of this section states

⁴ (1936) I.L.R. 59 Mad. 1028.

⁵ [1946] All. 346.

⁶ [1937] Nag. 468.

that, where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. This section provides for rateable distribution of the assets realised by a Court amongst decree-holders, who have made applications to the same Court for execution of their decrees. Where, in execution of a decree, the Court sells a property belonging to the judgment-debtor, the assets become available to the Court and can, therefore, be said to be held by the Court as soon as the property is sold. (See *Navaj v. Totaram*.¹) If, therefore, the property belonging to a judgment-debtor is sold in execution of a decree passed against him, another creditor will not be entitled to rateable distribution of the sale proceeds, unless he has also applied for execution of his decree before the date of sale.

Order XXI, r. 72, which is one of the rules beginning with r. 64 relating to sale, provides that no holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property. Sub-rule (2) of this rule states that, where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of s. 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly. This sub-rule, which is a rule of convenience, empowers the Court to allow a decree-holder to set off against the purchase price the amount due to him on his decree. Instead of his having to deposit the entire amount of purchase money, he may then deposit only the excess, if any, of the purchase money over the decretal amount. The effect of this sub-rule, to use the words of Vivian Bose J. in *Kesheorao v. Mulchand*,² is that, instead of the Court actually taking the money in cash from the decree-holder and handing it back to him again, it treats this as having been done and its order amounts to what would be a credit and debit entry in a book of accounts. There are what have been called in some cases a notional receipt of the purchase amount by the Court and a notional payment of the decretal amount to the decree-holder. This concession, which is given to a decree-holder, cannot, however, affect the rights of other parties in respect of execution of their decrees. This is specifically provided in the sub-rule, which states that the set-off is subject to the provisions of s. 73. If, therefore, a decree-holder has been allowed a set-off, even though the applications for the execution of decrees made by the other decree-holders were pending at the same time, the former will have to make available the amount, which he has set off, so that it might be rateably distributed. He takes the amount by way of set-off subject to the rights of other decree-holders under s. 73. There is, therefore, an obligation upon him to refund the amount, if the other decree-holders, who are entitled to rateable distribution under s. 73, have made applications for execution of their decrees before the date of sale.

This is the legal position, when applications for execution of decrees by different decree-holders have been made to the same Court. Where, however, applications have been made to different Courts by persons, who have obtained decrees against the same judgment-debtor, the provisions of law, which are applicable, are those contained in s. 63. This section is in the following terms:

"63. (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees."

This section does not lay down the principles according to which or the mode in which rateable distribution is to be made. It only provides for the Court, which

¹ [1930] 33 Bom. L.R. 503.

² [1937] A.I.R. Nag. 383.

has to make rateable distribution, where applications for execution of decrees have been made to more than one Court. In such cases, the duty is cast upon the Court of highest grade or where there is no difference in grade between the Courts, on the Court under whose decree the property was first attached, to receive and realize the assets of the judgment-debtor. In effect, therefore, the duty of executing all decrees and distributing the assets rateably amongst different creditors is cast upon the Court of the highest grade or the Court under whose decree the property was first attached. In order to enable it to perform this duty, such Court may, if the property has been already sold by another Court, call upon that Court to send to it the sale proceeds of the property (See *Deekappa v. Chandasappa*³ and *Shidappa v. Gurusangaya*⁴). The manner in which the assets of a judgment-debtor are to be distributed between rival decree-holders is laid down in s. 73. Consequently, after receiving the sale proceeds from another Court, such Court will adjudicate upon the claims of the various decree-holders and distribute the amount between them in accordance with the provisions of s. 73.

We must next consider what the position is when the other Court has allowed a decree-holder to set off the decretal amount against the purchase money in satisfaction of his decree. If all the applications for execution of different decrees are made to the same Court and if that Court has, through mistake, oversight or otherwise, permitted one of the decree-holders to set-off the purchase money against the amount due to him on his decree, the Court is competent to direct him to deposit in Court the amount which he has been allowed to set-off, so that the other competing decree-holders may share it along with him. For under sub-r. (2) of r. 72 of O. XXI a set-off can only be allowed subject to the provisions of s. 73. This clearly means that the set-off is allowed on the condition that the decree-holder will pay back the amount, which he is allowed to set-off, if it is required for rateable distribution. The position will not in any way be different, when the applications for execution of different decrees have been made to different Courts and not to the same Court. Order XXI, r. 72 will apply in both the cases. The liability of the decree-holder to refund the amount arises under the condition on which he was allowed to set it off. It is not dependent on whether the applications for execution of various decrees were made to the same Court or to different Courts. Consequently, even when applications for execution of decrees have been made to different Courts, the decree-holder, who has been allowed a set-off, can be called upon to pay or deposit in Court the amount, if it is required for rateable distribution amongst various decree-holders under s. 73.

It has, however, been urged by Mr. Gupte that this cannot be done, because sub-s. (2) of s. 63 does not invalidate any proceedings taken by a Court executing any one of the various decrees against the same judgment-debtor. It is, however, not necessary to set aside or modify the order allowing a set-off before calling upon the decree-holder concerned to pay the amount, of which a set-off has been allowed to him. He was allowed to set-off the purchase amount subject to the condition mentioned in sub-r. (2) of r. 72, that is subject to the rights of other decree-holders to share the same amount under s. 73. The order permitting the set-off having been passed subject to the condition that the decree-holder would have to pay back the amount, if it is liable for rateable distribution under s. 73, in paying back the amount, he will only be complying with the order itself and the condition, subject to which by the order the set-off was allowed to him. The question of the order allowing the set-off being invalidated, therefore, does not arise.

This is also the view, which has been taken by the Madras High Court in *Iswardas v. Corporation of Madras*.⁵ At p. 1033 Venkatasubba Rao J. has observed as follows:

"...The fact that execution may be pending in more than one Court under section 63

³ (1925) 27 Bom. L.R. 917.

⁴ (1930) 33 Bom. L.R. 537.

⁵ (1936) I.L.R. 59 Mad. 1028.

can make no difference and the principle of that decision holds good. Now, turning to section 63(2), if the decree-holder purchaser is called upon to bring back the proceeds (as in our opinion he should be), what is the 'proceeding' that can be said to be thereby invalidated? As already stated, the purchase by the decree-holder does not confer upon him an unqualified right, but is subject to the terms of section 73; in other words, ... the very order of the Court, that is, the 'proceeding', did cast upon the decree-holder the duty to bring back any part of the proceeds when so required."

With respect, we agree with these observations.

Mr. Gupte has relied on the decision of Patkar and Broomfield JJ. in *Shidappa v. Gurusangaya*. In that case, it was held that if a decree-holder has been allowed a set-off and his decree is treated as satisfied, he cannot subsequently be called upon by another Court to refund the amount allowed to him as a set-off. It was observed that the word "proceeding" used in sub-s. (2) of s. 63 is wide enough to include not only the sale but also the order allowing the decree-holder to set off the decretal amount against the purchase price. Both Patkar J. and Broomfield J. delivered separate but concurring judgments. The learned Judges gave two reasons for the view that a Court could not direct a decree-holder to pay back the amount, which another Court had allowed him to set-off. The first reason was that there is no provision in the Code which entitles the other Court to order the decree-holder "to pay the amount of the set-off in Court in order that it might become assets held by the Court and available for rateable distribution." With respect, it seems that the learned Judges lost sight of the provisions contained in sub-r. (2) of r. 72, which specifically provide that every set-off, which is allowed under this rule, is subject to the provisions of s. 73. The other reason given was that the words "any proceeding" in sub-s. (2) of s. 63 mean not only the sale but also include the orders passed by the Court in connection with the sale. In regard to this second reason, a contrary view has been taken by another Division Bench of this Court in *Dhirendrarao Krishnarao v. Virbhadrappa*.⁶ In that case, Beaumont C.J. observed as follows (p. 313).

"A preliminary point was taken by the applicant that no rateable distribution could be ordered because of the direction that he be allowed to set-off the amount of his decree against the purchase money, such order being said to be 'proceeding' within section 63(2) of the Civil Procedure Code...and the order is, in my opinion, mere machinery, which does not affect the rights of third parties. Apart from the order allowing set-off, the decree-holder, who purchased, would have to bring the purchase money into Court and then he would be paid, as far the moneys went, the amount due to him on his decree. To avoid this procedure the Court can allow set-off, but all that the order allowing such set-off means is that the decree-holder can exercise his right by setting off the amount of his decree against that portion of the proceeds of sale to which he is entitled."

In the view, which we take, it is not necessary to decide whether the order made under sub-r. (2) of r. 72 allowing a set-off is "a proceeding" within the meaning of sub-s. (2) of s. 63. In our judgment, sub-s. (2) of s. 63 does not in any way affect the liability cast upon the decree-holder, who is allowed a set-off under sub-r. (2) of r. 72, to refund or pay back the amount, if it is required for rateable distribution under s. 73 of the Code. The object of s. 63 clearly is to avoid multiplicity of proceedings and to ensure equitable distribution of the assets of a judgment-debtor, which have been realised, amongst all his creditors. It does not lay down any principle of exclusion.

The reply to the question, which we have formulated for our decision, will, therefore, be in the negative.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Raja.

APPA SHIVLING v. VITHAL BABA.*

Berar Regulation of Agricultural Leases Act (XXIV of 1951), Secs. 2(b), 9(1)—Cultivation by servants under supervision of separated father on behalf of his minor son—Whether such cultivation personal cultivation by son within s. 2(b)—Whether notice terminating tenancy under s. 9(1) given by telegram a valid notice—Party inviting decision of Revenue Tribunal on question of fact and advancing elaborate arguments on it—Whether such party can later challenge decision of Tribunal on such question on ground of want of jurisdiction of Tribunal.

A cultivation by servants under supervision of a separated father on behalf of his minor son is personal cultivation by the son within the meaning of s. 2(b) of the Berar Regulation of Agricultural Leases Act, 1951.

Kisanlal Jivanlal Nathani v. Bombay Revenue Tribunal,¹ distinguished.

A notice given by telegram is a notice in writing within the meaning of s. 9(1) of the Berar Regulation of Agricultural Leases Act, 1951.

Where a party had advanced elaborate arguments on a question of fact before the Bombay Revenue Tribunal after having chosen to invite its decision on it and the arguments were considered by the Tribunal and the Tribunal had recorded its decision thereon, held that it was not then open to such party to say that the decision of the Tribunal on this question of fact was without jurisdiction.

Nagayya Gurupadayya v. Chayappa Santamappa,² *Gandhinagar Motor Transport Society v. State of Bombay*,³ distinguished.

THE facts appear in the judgment.

J. N. Chandurkar, for the petitioner.

S. V. Natu, for respondent No. 1.

TAMBE J. This is an application under arts. 226 and 227 of the Constitution of India by one Anna, son of Shivling of Pusad formerly a protected lessee of S. No. 130/1-B, situate at mouza Pusad. It arises out of a matter under the Berar Regulation of Agricultural Leases Act, hereinafter referred to as the Act. Originally the petitioner had taken a lease from the joint family consisting of Baba and his two sons Vithal and Sambha, third son Motiram had already separated. Facts germane to the point we have to consider in brief are: On December 27, 1954, a partition was effected between Baba, Vithal and Sambha. It should be mentioned that Vithal is a minor boy, aged about 9 or 10 years. In this partition the aforesaid field fell to the share of Vithal. This partition amongst the members of the family was reduced to writing on that date and the document was registered on December 29, 1954. It appears that prior to the execution of the deed of partition on December 27, 1954, a notice was sent by Baba on behalf of Vithal under s. 9(1) of the Act intimating to the petitioner that the land was required by Vithal for personal cultivation and therefore it was proposed to terminate the tenancy as and from March 31, 1955. To remove the lacuna that this notice was prior to the date of the execution of the deed of partition, another notice by telegram was given on December 28, 1954. The petitioner then moved the Sub-Divisional Officer under s. 9(3) for a declaration that the aforesaid notices had no effect. He *inter alia* contended that the alleged partition was a *mala fide* one, it was only a cloak, Baba, Vithal and Sambha were all joint, they had more than 50 acres of land and, therefore, they were not entitled to give notice. It was also

*Decided, August 13, 1959. Special Civil Application No. 103 of 1959. February 3, 1958 (Unrep.).

¹ (1958) Letters Patent Appeal No. 117 of 1955, decided by Tambe and Kotval JJ., on

² (1955) 58 Bom. L. R. 144.

³ (1953) 55 Bom. L. R. 922.

denied that Vithal wanted the land for personal cultivation. Another contention was also raised that the notice given after the partition by telegram was not a valid notice within the meaning of sub-s. (1) of s. 9. The Sub-Divisional Officer took a view that the notice dated December 22, 1954, being prior to the date of partition was not a valid notice; the notice dated December 28, 1954, being a notice by telegram was not a notice within the meaning of sub-s. (1) of s. 9 of the Act. In the alternative he held that the partition deed was registered on December 29, 1954; and therefore it took effect as and from December 29, 1954, the notice by telegram being a day before the date of partition was also not valid and in this view of the matter he allowed the application of the petitioner and gave a declaration that the notice given by the landlord Vithal under s. 9(1) of the Act was of no effect. Vithal took an appeal against this decision of the Sub-Divisional Officer to the Additional Deputy Commissioner, who disposed of the appeal on altogether a different ground. He did not agree with the finding of the Sub-Divisional Officer. He held that there was a partition, notice given on December 12, 1954, was a notice within the meaning of s. 9(1) and was perfectly a valid notice. He, however, took a view that even though the field in question had fallen to the share of Vithal he cannot be deemed to be a landholder inasmuch as his name was not recorded in the record of rights and he not having been recorded as a landholder was not a landholder within s. 9(1) of the Act competent to give notice. In this view of the matter and on grounds entirely different from those given by the Sub-Divisional Officer he dismissed the appeal. Vithal took a second appeal to the Bombay Revenue Tribunal. The learned Members of the Tribunal disposed of the second appeal again on a different ground. The Tribunal relying on its previous decision that partition was a transfer dismissed the appeal. Vithal then approached this Court by a petition under arts. 226 and 227 of the Constitution. The view taken by the Bombay Revenue Tribunal that partition was a transfer was not maintained in *Manabai Hasi v. Ramchandra Dama** and in view of that decision of this Court the order of the Bombay Revenue Tribunal was set aside and the case was remanded to the Tribunal for disposal according to law. On remand this appeal was disposed of by the Bombay Revenue Tribunal on November 26, 1958. It held that the partition was a genuine partition; notice dated December 28, 1954, was a valid notice within the meaning of s. 9(1) of the Act and consistently with this view it allowed the appeal, set aside the orders of the revenue authorities below and dismissed the application filed by the petitioner under s. 9(3) of the Act. It is against this order of the Bombay Revenue Tribunal that the petitioner has come to this Court.

Mr. J. N. Chandurkar, learned counsel for the petitioner, in the first instance contends that the Bombay Revenue Tribunal had committed an error of law in deciding the question of genuineness or otherwise of the partition; the Tribunal was not a Court of fact; there was no finding of fact recorded on this question either by the S. D. O. or the Collector and the Tribunal should, therefore, have remanded the case to the subordinate revenue authorities; it deciding this question of fact is beyond its jurisdiction, and the order of the tribunal is liable to be set aside. In support of his contention he relied on a decision reported in *Nagayya Gurupadayya v. Chayappa Santamappa*¹. In our opinion, this contention has very little merit. Even assuming that the Bombay Revenue Tribunal is not a Court of fact and had no jurisdiction to decide a question of fact the petitioner had never objected before the Tribunal that it should not go into this question of fact. On the other hand, from the order of the Tribunal it appears that elaborate arguments had been advanced on behalf of the petitioner on this question; the arguments had been considered by the Tribunal and ultimately it had recorded its aforesaid decision. A party who takes a chance before a Court or a Tribunal cannot later on turn round and

* (1958) Special Civil Application No. 24 of 1958, decided by Mudholkar and Kotval JJ., on June 24, 1958 (Unrep.).
¹ (1955) 58 Bom. L. R. 144.

say that the finding recorded is without jurisdiction. A division bench of this Court in *Gandhinagar Motor Transport Society v. State of Bombay*² has held that before a question of jurisdiction of a Tribunal is raised on a petition under arts. 226 and 227, objection to jurisdiction must be taken before the Tribunal whose order is being challenged. The petitioner not having done so, on the other hand, having chosen to invite a decision of the Tribunal on this question it is no more open to him to say that the decision of the Tribunal on this question of fact is without jurisdiction so far as this petition is concerned. The decision which is relied upon, *Nagayya Gurupadayya v. Chayappa Santamappa* is distinguishable on facts. Apart from the fact that it deals with another enactment, in that case the points which were argued before the Tribunal were only points of law, yet the Tribunal of its own accord recorded a finding on a question of fact on which there was no finding at all recorded by either of the revenue authorities below. That being the position, that order was set aside by the High Court in exercise of its jurisdiction under art. 227 of the Constitution and the case was remanded. Such is not the position here.

It is next contended by Mr. Chandurkar that Vithal, respondent No. 1, is only a minor; he is living with his father; the father is looking after his cultivation. In these circumstances it cannot be said that the landlord viz. Vithal requires the land for personal cultivation. Reference was made to certain extracts from a book on the basis of which he contends that the use of the expression 'requires' in sub-a. (1) of s. 9 connotes an element of necessity or urgency.

It cannot be said that there is any matter of urgency for the minor to cultivate the field when it is clear that it will not be possible for him to himself cultivate it. It is also contended by Mr. Chandurkar that the cultivation by the father is not the personal cultivation of the minor within the meaning of s. 2(b) of the Act. Now, it is not possible for us to accept that there could be no matter of necessity or urgency for the minor to get the field for personal cultivation even though he himself may not be able to cultivate it. It is a question of fact and that question has been decided against the petitioner. That finding has to be accepted.

In support of his other contention viz. that the cultivation by father is no personal cultivation by son within the meaning of s. 2(b), Mr. Chandurkar referred us to the decision in *Kisanlal Jiwanlal Nathani v. Bombay Revenue Tribunal*³, to which one of us (Tambe J.) was a party. This decision no doubt supports the contention that cultivation by the separated father on behalf of his minor son cannot be said to be a cultivation by a member of one's family. But, then, this is not the case here. The evidence is that cultivation is done by servants. It is only supervision over the servants that is done by the father on behalf of his minor son. That being the position, viz. that the actual cultivation being by the labour of servants it cannot be said that this is not a case of personal cultivation by son within the meaning of s. 2(b) of the Act. It cannot be also said that the minor does not require the land for his personal cultivation.

It is next contended that the notice given by telegram is not a notice in writing within the meaning of s. 9(1) of the Act. Mr. Chandurkar contends that what is intended is that the tenant must get a notice in writing from his landholder and he must be satisfied that it is really a notice sent to him by his landholder and his landholder wants the land. To accept such a contention, in our opinion, would be reading more than what s. 9 requires. The requirement of s. 9 is that the notice must be in writing. It cannot be disputed that the telegram is a writing. If at all any such dispute is raised that the telegram is not sent by the landholder it is a matter which could be decided as any other question of fact is decided. In our opinion, therefore, there is no case made out for interference with the findings of the Tribunal that the parti-

2 (1953) 55 Bom. L. R. 922.

3 (1958) Letters Patent Appeal No. 117 of

1955, decided by Tambe and Kotval JJ., on February 3, 1958 (Unrep.).

tion is genuine, that the land is required for personal cultivation by the minor and that the notice terminating the tenancy is a valid notice within the meaning of s. 9(1) of the Act.

In the result the petition fails and is dismissed with costs.

Petition dismissed.

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Nalk.

STATE v. KAMALKAR PRABHAKAR JUVEKAR.*

Indian Penal Code (Act XLV of 1860), Secs. 279, 337, 336—Accused prosecuted for offences under ss. 279 and 337—Offence under s. 337 compounded with Court's leave—Whether prosecution of accused under s. 279 can be continued.

Where the accused is prosecuted for offences under ss. 279 and 337 of the Indian Penal Code, 1860, the compounding of the offences under s. 337 of the Code will not prevent the prosecution from being continued under s. 279 of the Code.

*Homi Jehangir Lali v. The State,*¹ differed from.

THE facts appear in the judgment.

V. T. Gambhirwala, Assistant Government Pleader, for the State.

P. S. Nadkarni, for the respondent-accused.

SHAH J. One Kamalkar Prabhakar Juvekar, who will hereinafter be referred to as the accused, was charged before the Presidency Magistrate, 12th Court, Bandra, Bombay, in case No. 1953/P of 1958, for offences punishable under ss. 279 and 337, Indian Penal Code. It was the case for the prosecution that on October 10, 1958, the accused drove S. K. M. M. Co.'s Bus No. BYL 4441 in a rash and negligent manner and caused injuries to one Balkrishna Ramchandra Payale. At the trial Payale and the accused purported to compound the offence under s. 337, Indian Penal Code, and asked for the permission of the Court in that behalf. The trial Magistrate granted leave to compound and acquitted the accused of that charge. He then observed that the charge under s. 279, Indian Penal Code, also failed in view of the order of acquittal for the offence under s. 337, Indian Penal Code, and in support of that view he relied upon an unreported decision of this Court in *Homi Jehangir Lali v. The State*². Against the order of acquittal for the offence under s. 279, Indian Penal Code, the State has appealed to this Court.

Section 279, Indian Penal Code, penalises rash driving or riding on a public way. A person who drives any vehicle or rides on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person is liable to be punished under s. 279, Indian Penal Code. This offence falls within Chap. XIV of the Indian Penal Code which is a chapter dealing with offences affecting public health, safety, convenience etc. An offence under s. 279 is essentially an offence against public safety. By s. 337, Indian Penal Code, causing hurt by an act endangering life or personal safety of others is penalised. By that section, whoever causes hurt to any person by doing an act so rashly or negligently as to endanger human life or the personal safety of others is liable to be punished in the manner provided thereby. This section occurs in Chap. XVI, which deals with offences

*Decided, September 21, 1959. Criminal Appeal No. 1022 of 1959, against the order passed by M. M. Dhruv Presidency Magistrate, 12th Court, Bandra, Bombay, in Criminal case No. 1953/P of 1958.

¹ (1951) Criminal Application No. 672 of

1951, decided by Bhagwati and Vyas JJ., on October 1, 1951 (Unrep.).

² (1951) Criminal Application No. 672 of 1951, decided by Bhagwati and Vyas JJ., on October 1, 1951 (Unrep.).

affecting the human body. Under s. 279, Indian Penal Code, the maximum sentence which may be imposed is rigorous imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both. Under s. 337, Indian Penal Code, the maximum sentence which may be imposed is rigorous imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both. The offence punishable under s. 337 is the offence of hurt committed in certain defined circumstances. Undoubtedly, s. 279 penalises rash or negligent driving which endangers human life or is likely to cause hurt or injury to any other person, but on that account the offence under s. 337, Indian Penal Code, and the offence under s. 279 are not of the same nature or character. By s. 336, Indian Penal Code, an act, endangering life or personal safety of others, which is done rashly or negligently is penalised, and evidently the offence punishable under s. 337, Indian Penal Code, is an aggravated form of the offence defined by s. 336, Indian Penal Code. The offences under ss. 279 and 337, Indian Penal Code, are, however, offences of different nature and the conduct referred to therein is penalised with different objects. An act, which is rash or negligent or is likely to endanger human life, may be the result of driving any vehicle or riding on a public way. Undoubtedly the two sections overlap, but that does not, in our judgment, make those offences of the same character. The offence under s. 279, Indian Penal Code, is non-compoundable; and the compounding of the offence under s. 337, Indian Penal Code, will not prevent the prosecution from being continued under s. 279, Indian Penal Code. When compounding of an offence under s. 337, Indian Penal Code, is permitted, the Court permits the aggrieved party to accept private satisfaction for the injury caused to him, but thereby the Court is not seeking to permit composition of an act which is dangerous to the public. The composition of the offence under s. 337, Indian Penal Code, sanctioned by the learned Magistrate, therefore, did not result in the acquittal of the accused for the offence under s. 279, Indian Penal Code.

Mr. Nadkarni, for the accused, contended that whenever on account of rash or negligent driving simple hurt is caused to any other person, a charge under s. 337, Indian Penal Code, may be made, and if grievous hurt is caused, a charge under s. 338, Indian Penal Code, may be made against the accused and in neither case a prosecution for a charge under s. 279, Indian Penal Code, may be sustained. We are unable to accept this argument. If a person drives a vehicle or rides on a public way in a manner so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person, he commits an offence, against public safety. If, by so driving a vehicle or riding on any public way, he causes an injury to any other person, he also commits an offence punishable under s. 337, Indian Penal Code, and if he causes grievous hurt, he commits an offence punishable under s. 338, Indian Penal Code. If, by such rash or negligent driving the accused has caused injury to some person, offences punishable under ss. 279 and 337, Indian Penal Code, will be committed, and acquittal of the offence under s. 337 or s. 338, Indian Penal Code, as a result of the compounding will still leave the charge under s. 279, Indian Penal Code, outstanding.

Strong reliance was sought to be placed by Mr. Nadkarni upon a judgment of this Court in *Homi Jehangir Lali v. The State*. The accused in that case who was charged with offences under ss. 279 and 338, Indian Penal Code, was permitted by the trial Magistrate to compound the offence under s. 338, Indian Penal Code, with the complainant and was acquitted of that offence. An express order acquitting the accused of the offence under s. 279, Indian Penal Code, was not passed, but that charge was abandoned, and no proceeding in the case against the accused remained outstanding. A fresh summons was thereafter issued by the trial Magistrate to the accused for offences under ss. 279 and 338, Indian Penal Code, read with ss. 74, 124 and 116, of the Motor Vehicles Act. The accused then applied to this Court for quashing the pro-

ceedings on the ground that as he was acquitted of the offence under s. 338, Indian Penal Code, no fresh proceeding could lie against him for an offence alleged to be committed in the same incident for which a charge under ss. 279 and 338, Indian Penal Code, was made against him. This Court upheld the contention raised by the accused and quashed the charge observing, though it was not necessary for the purpose of the decision of the case to do so—that the offence under s. 338, Indian Penal Code, was an aggravated form of the offence under s. 279, Indian Penal Code. With respect, we are unable to agree with that view. An offence under s. 279, Indian Penal Code, is an offence against public safety and the fact that one of the component ingredients of the offence under s. 337, where this offence is the result of rash and negligent driving, may constitute independently an offence punishable under s. 279, Indian Penal Code, will not, in our judgment, justify the view that the offence under s. 337, Indian Penal Code, is an aggravated form of the offence penalized by s. 279, Indian Penal Code. It may appear somewhat incongruous if the argument of the petitioner be accepted that an offence punishable under s. 337 for which the maximum sentence of fine prescribed is lighter than the sentence prescribed by s. 279, Indian Penal Code, is an aggravated form of the latter offence. Where a person accused of one offence under s. 337, Indian Penal Code, is acquitted, the acquittal may mean that the accused was not guilty of causing hurt to the person or that he was not acting rashly or negligently. Where an offence under s. 337, Indian Penal Code is compounded, the composition can, in the very nature of the offence, be of causing hurt to the person so injured and not of doing a rash or negligent act, especially when the rash or negligent act is of driving a vehicle or riding on a public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to that person. We are, therefore, unable to agree with the view of the trial Magistrate that the order of acquittal passed in favour of the accused for the offence under s. 337, Indian Penal Code, precludes the prosecution of the case under s. 279, Indian Penal Code.

On that view of the case, we set aside the order of acquittal passed by the trial Magistrate for the offence under s. 279, Indian Penal Code, and direct that the accused be tried for that offence. The order of acquittal passed in favour of the accused for the offence under s. 337, Indian Penal Code, will, however, stand.

Order accordingly.

CRIMINAL REFERENCE.

Before Mr. Justice S. T. Desai and Mr. Justice Tarkunde.

SHANKAR BALAJI WAJE v. THE STATE OF BOMBAY.*

Factories Act (LXIII of 1948), Sec. 2(1), 79, 80—Bidi roller engaged in factory and paid at fixed rates on quantities of bidis turned out—No compulsion on him to attend factory during working hours and no actual supervision on his work—Whether such bidi roller a 'worker' within s. 2(1)—Right to claim wages for leave whether can be claimed by worker whose wages are paid according to quantity of work done by him.

A person was engaged as a bidi roller by the owner and occupier of a bidi factory and his hours of work were fixed, but there was no compulsion on him to attend the factory during those hours. He could attend the factory and leave it at any time he chose during the working hours and could remain absent. There was no actual 'supervision' on his work in the ordinary sense of that expression. He was not paid

*Decided, October 9, 1959. Criminal Reference No. 94 of 1959, made by N. S. Bhupali, Additional Sessions Judge, Nasik, in Criminal Revision Application No. 13 of 1959,

against the order of conviction and sentence passed by S. L. Dharurkar, Judicial Magistrate, First Class, Sinnar, in Summary Case No. 69 of 1958.

a fixed daily or weekly wage, but was paid at fixed rates on the quantities of bidis turned out by him. There was no express contract between the owner and occupier of the factory and the bidi roller about the 'work' and there was no stipulation about the minimum quantity of work to be done by him every day. On the question whether the bidi roller could be said to be 'employed' within the meaning of that expression in s. 2(1) of the Factories Act, 1948:—

Held, that in the instant case, the nature of the work being of the simplest and a well-defined task and the remuneration being on the basis of quantity of work done, little direct supervision was actually needed to be exercised but such supervision as was felt necessary by the management was there and there was the right to supervise the manner in which the work was to be done, and

that applying the *prima facie* test of the existence of right to supervise and control the manner in which the work is to be done as determinative of the existence of the relationship of employer and employee, the bidi roller, in the present case, was in the employment of the management and a 'worker' within the meaning of that expression in s. 2(1) of the Act.

Chintaman Rao v. State of M.P.,¹ *D. C. Works Ltd. v. State of Saurashtra*² and *Short v. J. and W. Henderson Ltd.*³ referred to.

Under ss. 79 and 80 of the Factories Act, 1948, the right to claim wages for leave can be claimed by a worker whose wages are regulated on the basis of the amount of work put in by him.

The facts appear in the judgment.

M. V. Paranjape, for the accused.

Y. V. Chandrachud, Government Pleader, for the State.

S. T. DESAI, J. This Reference by the Additional Sessions Judge, Nasik, raises the vexed question of the connotation of the expression "employed" in s. 2(1) of the Factories Act which gives the interpretation of a "worker". It involves a decision, trifling in pecuniary amount, but of considerable consequence to a large number of persons engaged as bidi rollers by manufacturers of bidis. The decided cases do not lay down any definition exclusive or inclusive of the expression "employed" nor any criterion of absolute applicability as to the exact conception of that expression used in the Factories Act (to be referred to by us as the Act). The question that we have to determine is whether the relationship of employer and employee subsisted between the owner of a bidi factory and a person rolling bidis in that factory and the question arose when the Inspector of Factories prosecuted the owner for contravening the provisions relating to leave in s. 79 of the Act. Four indices of a contract of service were discussed in a decision of the House of Lords in England and have been referred to in a recent decision of our Supreme Court. Of this more hereafter.

The accused is the owner and occupier of a bidi factory, Jay Prakash Sudhir Private Limited, and one Pandurang Londhe did the work of rolling bidis in that factory. The services of Pandurang Londhe and 59 other persons doing similar work were terminated by the accused as from August 17, 1957, by putting up a notice dated August 12, 1957. The Inspector of Factories paid a visit to the factory of the accused on August 22, 1957, and found that Pandurang Londhe had worked for 70 days and had earned leave for 4 days which he had not enjoyed and took the view that he should have been paid wages for the leave period. The position as regards the other 59 persons was similar and the Factory Inspector filed sixty complaints against the accused alleging contravention by him of the provisions of s. 79(1) of the Act. The principal defence of the accused and one with which we are here concerned was that Pandurang Londhe was not a "worker" within the meaning of that expression as defined in the Act as he was not "employed" by the accused. Accused is

1 [1958] A. I. R. S. C. 338.

2 [1957] A. I. R. S. C. 264

3 (1946) 62 T. L. R. 427.

the owner of a number of bidi factories where *inter alia* the work of rolling bidis is done by hundreds of persons. The learned First Class Magistrate, Sinnar, held against the accused and convicted and sentenced him to pay a fine of Rs. 10. The matter was carried in revision to the Sessions Court at Nasik and the learned Additional Sessions Judge being of the view that the order of conviction against the accused should be quashed has made a report to this Court under s. 438 of the Criminal Procedure Code.

Certain facts which are not in dispute and not disputable in this case are that in case of the persons who attend the factory of the accused for the work of rolling bidis the hours of work are fixed but there is no compulsion to attend the factory during those hours. They may attend the factory and may leave it at any time they choose during the working hours and can remain absent. There is no actual 'supervision' on their work in the ordinary sense of that expression. They are not paid a fixed daily or weekly wage but are paid at fixed rates on the quantity of bidis turned out by them. It is also clear from the evidence that there was no express contract between the accused and Pandurang Londhe about the "work" and there was no stipulation about the minimum quantity of work to be done by him every day. The learned Judge below has referred to a decision of the Supreme Court *Chintaman Rao v. State of M. P.*¹ and to some other decisions and observed that it is clear from the decided cases that the real test to find out if a person is a worker or not is to see whether the owner or occupier of the factory exercises any supervision and control over him as to the details of his work and on a consideration of the facts stated above he has expressed the view that Pandurang Londhe and the other persons who did the work of rolling bidis in the factory of the accused were not "workers" within the four corners of the Act. He has also pointed out that in the circumstances of the case it would be almost impossible for the accused to comply with some of the provisions of the Act.

It has been argued before us by the learned Government Pleader that the real test is not whether the owner or occupier of the factory actually exercises any supervision or control but whether he has the right to exercise the same. Given the existence of that right or authority its exercise or non-exercise during the actual work of rolling bidis is irrelevant. It is also urged that the operation of rolling bidis is one and so simple that no direct supervision is necessary. The work does not run into any details and the initial directions would be all that would be necessary and those also would be meagre. Having regard to the nature of the work and particularly the fact that payment was made on piece-work basis, so the argument ran, no direct supervision of the operation was at all necessary but the right or authority to control the work was all along there. The learned Government Pleader has relied on the following observations in the judgment of the Supreme Court in *D. C. Works Ltd. v. State of Saurashtra*² (p. 268):

"The principle which emerges from these authorities is that the *prima facie* test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at page 23 in *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.*, "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question."

The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. As has been noted above, recent pronouncements of the Court of Appeal in England have even expressed the view that it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that the test of control was not one of uni-

¹ [1952] A. I. R. S.C. 388.

² [1957] A. I. R. S.C. 264.

³ [1947] A. C. 1, at p. 23.

versal application and that there were many contracts in which the master could not control the manner in which work was done...

The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer..."

On the other hand, it has been argued by Mr. M. V. Paranjpe, learned counsel for the accused, that the facts of the case must lead to the conclusion that there was in this case no control and no supervision and the relationship of the accused and the bidi roller was not that of an employer and an employee or master and servant but that the bidi roller was really in the position of an independent contractor. Strong reliance has been placed on the following observations from a decision of the Madras High Court reported in *Palaniappa Mudaliar v. Addl. Ist Class Magistrate*⁴:

"A person working for the owner of an establishment on the conditions 'come when you like, go when you like, work when you like, stop when you like, work as fast as you can, work as slow as you like, work on what you like or not at all', cannot be said to be 'employed' by the owner of the establishment and will not fall within the definition of 'worker' in section 2(1) of the Factories Act, 1948."

Learned counsel for the accused has also relied on certain observations in the case of *Chintaman Rao v. State of M. P.* recently decided by the Supreme Court.

In *Chintaman Rao v. State of M. P.*, the Supreme Court has considered the concept of employment in s. 2(1) of the Act which defines the expression "worker" as under (p. 391):

"... 'worker' means a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process."

Their Lordships observed at p. 391:

"...The concept of employment involves three ingredients: (1) employer, (2) employee and (3) the contract of employment. The employer is one who employs, i.e. one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision."

Their Lordships went on to observe:

"...There is a well understood distinction between a contractor and a workman and between contract for service and contract of service..."

A 'contractor' is a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons without submitting himself to their control in respect to the details of the work."

From the current of the decisions on the subject and particularly the two decisions of the Supreme Court to which we have already referred, the following propositions are clearly deducible:

(1) The concept of employment in the definition of 'worker' in s. 2(1) of the Act involves three ingredients of employer, employee and the contract of employment. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision:

(2) The *prima facie* test for the determination of the relationship of employer and employee is whether or not the owner or occupier of the factory had right to supervise and control the manner of execution of the work in question:

(3) The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business:

(4). No distinction can be drawn from the circumstance of a person being remunerated at so much per day or by the job or piece-work:

(5). The circumstance that rules regarding hours of work, etc. applicable to other persons may not be conveniently applied to the case of persons doing particular work such for instance that of bidi rollers does not prevent the relationship of employer and employee existing between the management and the persons doing such work.

But there are many contracts of service where the management cannot be said ostensibly to control or supervise directly the manner in which the work is to be done by persons engaged for the purpose although it may be clear that the work done is an integral part of the business. The *prima facie* test of supervision and control is not always easy to apply in the context of modern industrial conditions. Though the broad principles governing the question have been affirmed in the decided cases no conclusive test and no definite criterion of universal applicability has been laid down for the determination of the question whether in a given case a person is a worker or an independent contractor. Doubt and difficulty must beset the question for contracts which fall under either category have at times many characteristics and features which are common and the inquiry no doubt perplexing must ultimately be resolved like any complicated question of fact.

The border line between an employee employed in service and an independent contractor is at times rather fine and a clear-cut demarcation is not always possible. At one end of the scale can be the case, to take the illustration of a bidi roller who attends and works in a bidi factory and is paid wages in the ordinary sense that is on periodical basis. The nature of the work being very simple little direct supervision would be necessary on the part of the employer except for the purpose of seeing that the bidi roller puts in full time and regular work. But the control and supervision is indubitably there, and no one would suggest that the bidi roller is not a worker employed by the owner or occupier of the factory. At the other end of the scale can be the case of a contract by the owner of a bidi factory with a *Sattedar* to whom the management supplies tobacco and bidi leaves and the *Sattedar* fulfils the contract by engaging persons to do the work of rolling bidis in his own place or in the houses of those persons. Such was the substantial position in the case of *Chintaman Rao v. State of M. P.* decided by the Supreme Court and as their Lordships held in that case the *Sattedar* cannot be said to have been employed as a 'worker' by the management. He only performs his part of the contract by making bidis and delivering them at the factory. But between these two cases can lie a number and variety of intermediate cases where the circumstances may point towards one conclusion or the other.

Four indices of a contract of service derived from authorities of Courts in England were recapitulated by Lord Thankerton in *Short v. J. and W. Henderson Ltd.*⁵ decided by the House of Lords (p. 429):

"...these are (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal."

After stating the four indicia Lord Thankerton observed (p. 429):

"Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor that, if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and to restate these indicia. For example, (a), (b) and (d), and probably also (c), are affected by the statutory provisions and rules which restrict the master's choice to men supplied by the labour bureaux, or directed to him under the essential work provisions, and his power of suspension or dismissal is similarly affected. These matters are all also affected by trade union rules, which are, at least primarily made for the protection of wage-earners. The statement

of Lord Justice Clerk Alness in *Park v. Wilsons and Clyde Coal Company* (1928 S.C. 121, at p. 134) that selection, payment and control are inevitable in every contract of service, is clearly open to reconsideration."

After referring to the four indicia of a contract of service and the observations quoted above Bhagwati J. observed in the case of *D. C. Works Ltd. v. State of Saurashtra*.⁶ (p. 268):

"...until the position is restated as contemplated in *Short v. J. & W. Henderson Ltd.* we may take it as the *prima facie* test for determining the relationship between master and servant."

It is not our purpose to suggest any precise orientation of those four elements or indicia of a contract of service but it seems permissible to us humbly to state that the principles enunciated in the decisions of the highest tribunals to which we have referred leave it open to the Court to evolve necessary corollaries albeit within the matrix of those principles. 'Supervision' and 'control' are not expressions of inflexible import and the exercise of the same can in some cases be of a very nebulous character. The scope as also the manner of the exercise of supervision and control in a given case must of necessity depend on a variety of factors such for instance as the nature of the work done by a person, the circumstances in which and the place where he is asked or permitted to do the work, the skill or technique or method, if any, required of him in performance of the work, the status and the number of persons engaged in performance of the work and in a large majority of cases on the mode or manner or remuneration adopted in respect of the particular work required of a person.

Applying the *prima facie* test of the existence of right to supervise and control the manner in which the work is to be done as determinative of the existence of the relationship of employer and employee and considered in the light of the observations we have made, the facts of the case before us lead to the conclusion that the bidi roller Pandurang Londhe was in the employment of the accused and a 'worker' within the meaning of that expression in s. 2(1) of the Act. The root of the matter in cases of this type lies in the nature of the work and the mode of remuneration adopted by the management. The nature of the work in the case before us being of the simplest and a well-defined task and the remuneration being on the basis of quantity of work done little direct supervision actually needed to be exercised but such supervision as was felt necessary by the management was, of course, there and what is more important there was the right to supervise the manner in which the work was to be done. It is abundantly clear that it was due to these two elements of the simple nature of the operation and payment on the basis of quantity of work actually done that the management had little occasion to give specific directions as to the manner of doing the work or to watch the progress of the work. These aspects appear to us to be the speciality of the situation. The *modus operandi* adopted by the management shows that the right and authority to control the manner in which the work of turning bidis was to be done was also there. It cannot seriously be disputed that the management had the power to control and give directions to the bidi rollers as to the manner of rolling bidis but the nature of the operation being very simple, any occasion for actual exercise of that power could hardly have arisen. But then it was urged on behalf of the accused that the bidi roller was free to go to the factory when he liked and leave it when he liked and was not even bound to put in any minimum quantity of work. Now it would seem that in the circumstances of the case and having regard to the mode of payment and the system of work adopted by the management itself this freedom was more apparent than real or substantial. In any case this freedom even if real and though of some cogency cannot, in our judgment, be regarded as critical or decisive of the relationship. A contrary view founded simply on this element of freedom to work for as much time as the bidi roller liked would enable dexterous employers to avoid

provisions of law otherwise applicable and aimed at protecting those who are *inops consilii* by adopting a *modus operandi* to the ostensible nature of which little objection can be taken and with which an average worker may readily fall in line. But the Court will look at the body and substance of the arrangement and then determine the real relationship of the parties and fasten responsibility according to its true and real character. It is a question of substance and not of mere form. For all these reasons we are of the opinion that the contention pressed on behalf of the State must be upheld.

There remains for consideration a further contention urged on behalf of the accused. It was contended that the order of conviction was not sustainable even if the relationship of employer and employee existed between the parties. The argument was that s. 79 which deals with the question of "leave with wages" cannot apply to a worker who is paid wages according to the quantity of work done by him and not per day or per week. It was said that there being no fixed hours of work and no fixed daily wage in case of such worker s. 79 can have no operation. Sections 79 and 80 read together make it abundantly clear that wages for period of leave are payable to a worker at a rate equal to the daily average of the total full time earnings for the days on which he has worked and in our opinion the right to claim wages for leave can be claimed by a worker whose wages are regulated on the basis of the amount of work put in by him. The present contention must, therefore, be negatived.

In the result the order of conviction and sentence passed by the learned Magistrate must be upheld and there will be no other order on the Reference.

GENERAL INDEX

"A" Summary. See CRIMINAL PROCEDURE CODE, 1898, S. 173. 61 Boml. L. R. 591.

ACTS (Berar):

—1951—XXIV.
See BERAR REGULATION OF AGRICULTURAL LEASES ACT.

ACTS (Bombay):

—1879—V.
See BOMBAY LAND REVENUE CODE.

—1888—III.
See MUNICIPAL ACT (CORPORATION).

—VI.
See GUJARAT TALUQDARS' ACT.

—1901—III.
See MUNICIPAL ACT (DISTRICT).

—1915—I.
See BOMBAY TOWN PLANNING ACT.

—1925—XVIII.
See MUNICIPAL ACT (BOROUGH).

—1939—XXII.
See BOMBAY AGRICULTURAL PRODUCE MARKETS ACT.

—XXIX.
See BOMBAY TENANCY ACT.

—1947—XI.
See BOMBAY INDUSTRIAL RELATIONS ACT.

—XXII.
See BOMBAY HINDU DIVORCE ACT.

—XXVII.
See BOMBAY AGRICULTURAL DEBTORS RELIEF ACT.

—XXXI.
See BOMBAY MONEY-LENDERS ACT.

—LVII.
See BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT.

—1948—XXXIII.
See BOMBAY LAND REQUISITION ACT.

—LXVII.
See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT.

—1949—XXV.
See BOMBAY PROHIBITION ACT.

—LIX.
See MUNICIPAL ACT (CORPORATIONS) (PROVINCIAL).

—1951—XXII.
See BOMBAY POLICE ACT.

ACTS (Bombay)—(Contd.)

—1953—III.
See BOMBAY SALES TAX ACT.

—1956—XIII.
See BOMBAY TENANCY AND AGRICULTURAL LANDS (AMENDMENT) ACT.

—XXXI.
See BOMBAY HINDU PLACES OF PUBLIC WORSHIP (ENTRY AUTHORIZATION) ACT.

—1957—XXXVIII.
See BOMBAY TENANCY AND AGRICULTURAL LANDS (SECOND AMENDMENT) ACT.

—1958—VIII.
See BOMBAY COMMISSIONERS OF DIVISIONS ACT.

—1959—XXII.
See BOMBAY SALES TAX LAWS (VALIDATING PROVISIONS AND AMENDMENT) ACT.

ACTS (C.P.):

—1917—I.
See C.P. AND BERAR COURTS ACT.

—1922—II.
See MUNICIPALITIES ACT.

—1930—VI.
See C.P. AND BERAR MATERNITY BENEFIT ACT.

—1947—XXI.
See C.P. AND BERAR SALES TAX ACT.

—XXIII.
See C.P. AND BERAR INDUSTRIAL DISPUTES SETTLEMENT ACT.

—1950—II.
See CITY OF NAGPUR CORPORATION ACT.

ACTS (India):

—1860—XLV.
See PENAL CODE.

—1861—V.
See POLICE ACT.

—1870—VII.
See COURT-FEES ACT.

—1872—I.
See EVIDENCE ACT.

—IX.
See CONTRACT ACT.

—1878—VIII.
See SEA CUSTOMS ACT.

—1879—XVII.
See DEKKHAN AGRICULTURISTS' RELIEF ACT.

ACTS (India)—(Contd.)

- 1881—XXVI.
See NEGOTIABLE INSTRUMENTS ACT.
- 1882—IV.
See TRANSFER OF PROPERTY ACT.
- V.
See EASEMENTS ACT.
- XV.
See PRESIDENCY SMALL CAUSE COURTS ACT.
- 1890—VIII.
See GUARDIANS AND WARDS ACT.
- IX.
See RAILWAYS ACT.
- 1894—I.
See LAND ACQUISITION ACT.
- 1897—X.
See GENERAL CLAUSES ACT.
- 1898—V.
See CRIMINAL PROCEDURE CODE.
- 1908—V.
See CIVIL PROCEDURE CODE.
- IX.
See LIMITATION ACT.
- 1909—III.
See PRESIDENCY-TOWNS INSOLVENCY ACT.
- 1913—VII.
See COMPANIES ACT.
- 1920—XXXIV.
See PASSPORT ACT.
- 1922—XI.
See INCOME-TAX ACT.
- 1926—XXXVIII.
See BAR COUNCILS ACT.
- 1932—IX.
See PARTNERSHIP ACT.
- 1936—IV.
See PAYMENT OF WAGES ACT.
- 1937—VI.
See ARBITRATION (PROTOCOL AND CONVENTION) ACT.
- 1939—IV.
See MOTOR VEHICLES ACT.
- 1940—X.
See ARBITRATION ACT.
- XXII.
See DRUGS ACT.
- 1946—XXIV.
See ESSENTIAL SUPPLIES (TEMPORARY POWERS) ACT.

ACTS (India)—(Contd.)

- 1946—XXVI.
See FOREIGNERS ACT.
- 1947—II.
See PREVENTION OF CORRUPTION ACT.
- VII.
See FOREIGN EXCHANGE REGULATION ACT.
- XIV.
See INDUSTRIAL DISPUTES ACT.
- 1948—XI.
See MINIMUM WAGES ACT.
- LXIII.
See FACTORIES ACT.
- 1949—LXVII.
See TAXATION LAWS (EXTENSION TO MERGED STATES AND AMENDMENTS) ACT.
- 1950—XIX.
See EMPLOYEES' PROVIDENT FUNDS ACT.
- XLIII.
See REPRESENTATION OF THE PEOPLE ACT.
- 1951—XLIII.
See REPRESENTATION OF THE PEOPLE ACT.
- 1952—XLVI.
See CRIMINAL LAW AMENDMENT ACT.
- IX.
See COMMISSION OF ENQUIRY ACT.
- 1953—XXV.
See INCOME-TAX (AMENDMENT) ACT.
- XXXIV.
See ESTATE DUTY ACT.
- 1954—XXXVIII.
See PREVENTION OF FOOD ADULTERATION ACT.
- 1955—XI.
See DRUGS (AMENDMENT) ACT.
- XXV.
See HINDU MARRIAGE ACT.
- 1956—I.
See COMPANIES ACT.
- XXVII.
See REPRESENTATION OF THE PEOPLE (SECOND AMENDMENT) ACT.
- XXX.
See HINDU SUCCESSION ACT.
- XXXVII.
See STATE RE-ORGANISATION ACT.
- LXXVII.
See HINDU ADOPTION AND MAINTENANCE ACT.
- CIV.
See SUPPRESSION OF IMMORAL TRAFFIC IN WOMEN AND GIRLS' ACT.

ACTS (India)—(Contd.)

—1957—XXVII.
See WEALTH-TAX ACT.

—1959—I.
See INCOME-TAX (AMENDMENT) ACT.

ACTS (Madhya Pradesh):

—1951—I.
See MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT.

—1955—II.
See MADHYA PRADESH LAND REVENUE CODE.

ACTS (Saurashtra):

—1951—XXV.
See SAURASHTRA LAND REFORMS ACT.

—XXVI.
See SAURASHTRA BARKHALI ABOLITION ACT.

—1952—XXIII.
See SAURASHTRA AGRICULTURAL DEBTORS' RELIEF ACT.

ADMISSION—*Evidentiary value of.*—*Admission by party to suit concerning subject-matter in dispute.*—*Whether Court entitled to consider such admission in subsequent proceeding concerning same subject-matter.*

An admission on a question of fact made by a party in the course of a proceeding can be regarded as a good piece of evidence relying on which the opposing party may contend that the claim made in the subsequent proceeding is unjustifiable. Therefore, the Court is entitled to consider admissions solemnly made by a party concerning the subject-matter in dispute in the course of a proceeding in adjudging upon the truth or otherwise of the claim made by the party in a subsequent proceeding concerning the same subject-matter.

DATTATRAYA SHRIPATI v. SHANKAR.
61 Bom. L. R. 792.

ADVOCATE—*Compromise by.*—*Whether advocate who has filed vakalatnama has implied authority to compromise on behalf of his client.*—*Limitations on such implied authority.*

The authority of an advocate who has filed vakalatnama to enter into a compromise on behalf of his client is implicit in the appointment of the advocate unless it is expressly countermanded by the client. The implied authority of the advocate to enter into the compromise is, however, limited to the action in which he has been engaged and does not extend to matters which are extraneous to the action or which are merely collateral to it.

SURENDRA SHANKAR v. LAXMAN.
61 Bom. L. R. 757.

AGENCY, Election Cases.

The correct legal position regarding agency in elections is that the relation is not the common law one of principal and agent, but the candidate may be responsible for the acts of one acting on his behalf, through such acts are

AGENCY—(Contd.)

beyond the scope of the authority given, or in violation of express injunction.

SUDHIR LAXMAN v. S. A. DANGE.
61 Bom. L. R. 500.

ARBITRATION ACT (X of 1940), S. 31.—*Dispute between plaintiff and defendants relating to breach of agreement by defendants and refund of earnest money paid by plaintiff referred to arbitration.*—*Court refusing to pass decree on award made by arbitrators on ground that award compulsorily registrable not registered.*—*Suit filed by plaintiff against defendants to recover earnest money.*—*Whether suit barred by virtue of award.*

A dispute between the plaintiff and the defendants relating to a breach of agreement by the defendants to sell certain property to the plaintiff and the refund of earnest money to the plaintiff was referred to arbitration by the parties. When the award made by the arbitrators was sought to be filed in Court under the Arbitration Act, 1940, the Court refused to pass a decree in terms of the award on the ground, alleged by the defendants, that the award which was compulsorily registrable was not registered. The plaintiff then filed a suit against the defendants to recover the earnest money paid by him to the defendants. On the question whether the suit was barred under ss. 31, 32 and 33 of the Arbitration Act, 1940, by virtue of the award:—

Held, that as the award had no legal existence, it did not bar the plaintiff's suit which was based on his original cause of action.

CHANDRABHAGA v. BHUKACHAND.
61 Bom. L. R. 364.

—S. 32. See ARBITRATION ACT, S. 31.
61 Bom. L. R. 364.

—S. 33. See ARBITRATION ACT, S. 31.
61 Bom. L. R. 364.

ARBITRATION (PROTOCOL AND CONVENTION) ACT (VI of 1937), S. 2.—*Indian Independence (International Arrangements) Order, 1947, Schedule, Cls. 1, 3, 4.*—*Indian Limitation Act (IX of 1908), Art. 178.*—*Arbitration Act (X of 1940), Sec. 14.*—*Agreement to refer disputes arising out of contract to arbitration in London in accordance with rules of specified Association.*—*Award obtained in London.*—*Petition for filing award in Court in India under Act VI of 1937.*—*Maintainability of petition.*—*Whether award a foreign award within s. 2 of Act.*—*Award whether made in pursuance of an agreement for arbitration to which Protocol applies.*—*Act VI of 1937 whether has force in India after January 26, 1950.*—*Applicability of art. 178, Indian Limitation Act, to application for filing award under s. 5 of Act VI of 1937.*

Under a contract the respondents agreed to sell to the petitioner Indian groundnut oil on certain terms and conditions set out in the contract including the term that "all other terms and conditions as per London Oil and Tallow Trade Association Contract." One of the terms of the London Oil and Tallow Trade Association Contract was to the effect that "any dispute arising out of this contract shall be settled by arbitration in London in accor-

ARBITRATION (PROTOCOL AND CONVENTION) ACT, S. 2—(Contd.)

dance with the Rules endorsed on this contract." On the petitioner contending that the respondents had failed to supply the goods agreed to be sold by them to the petitioner under the contract, the matter was referred to arbitration in London in accordance with the rules endorsed on the standard form of the contract of the London Oil and Tallow Trade Association. The petitioner obtained an award in his favour and filed a petition under the Arbitration (Protocol and Convention) Act, 1937, in the High Court, praying that the award may be ordered to be filed in Court and a decree may be passed according to it. The respondents resisted the application contending that the arbitral procedure including the constitution of the Arbitral Tribunal was not governed in the instant case by the will of the parties within the meaning of clause 2 in the First Schedule to the Act, but the parties had bound themselves by the provisions contained in the London Oil and Tallow Trade Association contract as regards the arbitral procedure and the constitution of the Arbitral Tribunal and their will in that connection had been expressed and that, therefore, the Protocol set forth in the First Schedule to the Act did not apply and the award was not a foreign award within the meaning of s. 2 of the Act:—

Held, that clause 2 in the First Schedule to the Act does not preclude the will of the parties in connection with the arbitral procedure and the constitution of the Arbitral Tribunal being expressed in the instrument whereby the parties agree to refer disputes that may arise in connection with the contract to arbitration, and

that, therefore, the agreement for arbitration in the instant case was one to which the Protocol applied and the award was a foreign award within the meaning of s. 2 of the Act.

Clause 2 in the First Schedule to the Arbitration (Protocol and Convention) Act, 1937, requires that the constitution of the Arbitral Tribunal should be governed by the will of the parties and that will can be expressed in the agreement of reference. By the expression of that will the Protocol is not excluded.

The Arbitration (Protocol and Convention) Act, 1937, has not ceased to have force in India after January 23, 1950.

Article 178 of the Indian Limitation Act, 1908, does not apply to an application for filing an award under s. 5 of the Arbitration (Protocol and Convention) Act, 1937.

FRANCESCO CORBI v. GORAKHBHAI.

61 Bom. L. R. (O.C.J.) 1195.

—S. 4(1). *See* ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937, S. 2.

61 Bom. L. R. (O.C.J.) 1195.

—S. 5. *See* ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937, S. 2.

61 Bom. L. R. (O.C.J.) 1195.

ARMY INSTRUCTION. *See* CONSTITUTION OF INDIA, ART. 360.

61 Bom. L. R. (O.C.J.) 1185.

AVYAVAHARIKA DEBT. *See* HINDU LAW, DEBTS. 61 Bom. L. R. (S.C.) 638.

AWARD. *See* FOREIGN JUDGMENT.

61 Bom. L. R. (O.C.J.) 333.

"B" SUMMARY. *See* CRIMINAL PROCEDURE CODE, 1898, S. 178.

61 Bom. L. R. 1656.

BAR COUNCILS ACT (XXXVIII of 1926), S. 4(3)—Constitution of India, Art. 14—Whether s. 4(3) and resolution passed by Bombay High Court in pursuance of that section violate art. 14—Constitution whether guarantees right of franchise and right to be elected to political institution—Power of High Court to strike down law enacted by Parliament on ground that it violates fundamental right.

Section 4 (3) of the Indian Bar Councils Act, 1926, and the resolution passed by the Bombay High Court on April 10, 1952, in pursuance of the provisions of that section cannot be challenged on the ground that art. 14 of the Constitution of India is violated by them.

Where the right conferred on a person is not guaranteed by the Constitution and does not flow from it and is neither a fundamental right, nor a common law right, nor a natural, inherent or unalienable right, but a franchise dependent upon the law and is thus merely a creature of a statute, it can be asserted only to the extent and subject to the conditions specified in the statute creating it. Therefore, where the Legislature brings into existence a political institution and makes any provisions concerning its constitution or composition, the provisions of the law which bring that institution into existence cannot be challenged under art. 14 of the Constitution, on the ground that the various interests concerned are unequally represented thereon.

The power of the High Court to strike down the provisions of a law enacted by the Parliament, if it finds that the impugned provision as enacted violates a fundamental right claimed by a petitioner, is not in any way limited by the fact that the impugned law was enacted by Parliament and not by the State Legislature.

MANILAL v. UNION OF INDIA.

61 Bom. L. R. (O.C.J.) 976.

BARKHALIDAR. *See* SAURASHTRA BARKHALI ABOLITION ACT, 1951, S. 2(1).

61 Bom. L. R. 939.

BENAMI TRANSACTION, burden of proof.

The burden of proof that a transaction is a *benami* transaction is on the party who alleges that the transaction is *benami* and the burden must be strictly discharged. In order to succeed the party so alleging must put the Court in possession of legal and satisfactory evidence and it will not suffice to point to matters of suspicion or even to plausible conjecture.

ULHASIBAI JETHMAL v. BHAGCHAND.

61 Bom. L. R. 103.

BERAR LAND REVENUE CODE, 1928—
Default in payment of land revenue—Land put up to auction and sold by revenue authorities without notice of sale to defaulter—Necessity of such notice—Whether sale void for want of notice—Applicability of principle of natural justice.

Though the provisions of the Berar Land Revenue Code, 1928, do not prescribe that a notice shall be given before the property of a defaulter is sold, it is a principle of natural justice that the defaulter must receive such a notice before his property is sold. In the absence of any notice the sale is liable to be set aside.

GANGARAM V. DHARAMCHAND.

61 Bom. L. R. 1639.

—S. 73(1)—*Whether proviso to s. 73(1) applies in cases where commencement of tenancy known—Meaning of expression “commencement of tenancy”—Proviso, interpretation of, in relation to provision of which it is a proviso—Statement of Objects and Reasons when can be referred to in relation to enactment.*

The proviso to s. 73(1) of the Berar Land Revenue Code, 1928, does not apply in cases in which the commencement of tenancy is known. Therefore, a tenant cannot, under this proviso, claim the status of a tenant of antiquity if the date of commencement of his tenancy is known.

The words ‘commencement of tenancy’ refer to the original or the first tenancy under which the tenant or his predecessor-in-title entered into possession of the land as a tenant and since the time of which tenancy he and his predecessors-in-title have been in continuous and uninterrupted possession of the land.

The duty of the Court is to effect a harmonious construction between a proviso and the provision to which it is a proviso and so far as possible the proviso must be so interpreted and its meaning so restricted as to bring it within the ambit and purview of the main provision itself.

The Statement of Objects and Reasons which led to the enactment of a statute is not admissible as an aid to the construction of the statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy.

SHIEKH RAHMAN V. RAJE NULKANTHARAO.

61 Bom. L. R. (F.B.) 1203.

—S. 73-A. See BERAR LAND REVENUE CODE, 1928, S. 73(1).

61 Bom. L. R. (F.B.) 1203.

—S. 88. See BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 9B(a).

61 Bom. L. R. 1351.

—S. 91. See BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 9B(a).

61 Bom. L. R. 1351.

—S. 220. See BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 9B(a).

61 Bom. L. R. 1351.

BERAR REGULATION OF AGRICULTURAL LEASES ACT (XXIV of 1951), S. 2

(b)—*Cultivation by servants under supervision of separated father on behalf of his minor son—Whether such cultivation personal cultivation by son within s. 2(b)—Whether notice terminating tenancy under s. 9(1) given by telegram a valid notice—Party inviting decision of Revenue Tribunal on question of fact and advancing elaborate arguments on it—Whether such party can later challenge decision of Tribunal on such question on ground of want of jurisdiction of Tribunal.*

A cultivation by servants under supervision of a separated father on behalf of his minor son is personal cultivation by the son within the meaning of s. 2(b) of the Berar Regulation of Agricultural Leases Act, 1951.

A notice given by telegram is a notice in writing within the meaning of s. 9(1) of the Berar Regulation of Agricultural Leases Act, 1951.

Where a party had advanced elaborate arguments on a question of fact before the Bombay Revenue Tribunal after having chosen to invite its decision on it and the arguments were considered by the Tribunal and the Tribunal had recorded its decision thereon, held that it was not then open to such party to say that the decision of the Tribunal on this question of fact was without jurisdiction.

APPA SHIVLING V. VITHAL BABA.

61 Bom. L. R. 1671.

—S. 4—*Person holding more than fifty acres of land failing to make selection as required under s. 4(2)—Application by such person under s. 19(2) of Act for reinstatement in possession of other land—Whether such person can be deemed to be protected lessee of the land in his possession—Maintainability of application.*

If at any time the area in possession of a person claiming to be a protected lessee under the Berar Regulation of Agricultural Leases Act, 1951, exceeds fifty acres, it is incumbent on him to make a selection of an area upto fifty acres and give intimation to the landholder and Revenue Officers as required by s. 4(2) of the Act. If he does not do so, he cannot be deemed to be a protected lessee at all, in respect of any area in his possession.

SHIOBINGH V. B'RAY REV. TRIBUNAL.

61 Bom. L. R. 210.

—S. 8—*Lease terminated by landlord under s. 9(1) on ground that land required for personal cultivation—Possession delivered by lessee—Application by lessee under s. 9(6) stating that land leased out by landlord to another person—Maintainability of such application—Whether operation of s. 8 excluded when lease terminated on ground that landlord requiring land for personal cultivation.*

The operation of s. 8 of the Berar Regulation of Agricultural Leases Act, 1951, is altogether excluded in the one case contemplated by s. 9(1) of the Act, viz. where the lease was terminable on the ground that the landholder required the land for cultivating the land personally.

The words in s. 8(1) (g) of the Act “as provided in s. 9” only qualify the word “notice” occurring in that clause of s. 8(1). Therefore, s. 8(1)(g) merely refers to the notice and its

BERAR REGULATION OF AGRICULTURAL LEASES ACT, S. 8—(Contd.)

various requirements mentioned in s. 9(1) and to nothing further. It has no reference to the remaining sub-sections of s. 9.

Under ss. 8(1)(g) and 9 of the Berar Regulation of Agricultural Leases Act, 1951, so far as termination of any lease of land held by a protected lessee is concerned the landholder has two options: (a) to terminate by notice on the ground that he requires the land for cultivating it personally, [s. 9(1)] and (b) to terminate by notice in other cases, [s. 8(1)(g)]. In the former case, he need not have recourse to any authority or obtain orders of a Revenue Officer, but the right is given in such a case to the tenant to challenge the notice on the two grounds mentioned in s. 9(5) and in that event the Revenue Officer has to adjudicate in accordance with sub-ss. (3) to (9) of s. 9. The notice in this case must fulfil the requirements of s. 9(1). In the latter case, the notice also must fulfil all the requirements of s. 9(1) excepting obviously the requirement as to the landholder requiring the land for cultivating it personally. In this case the landholder must obtain the orders of the Revenue Officer to terminate the lease.

TARABAI D. B'RAY REV. TRIBUNAL.

61 BOM. L. R. 41.

—S. 8. See BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 10.

61 BOM. L. R. 633.

—S. 9. See BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 8.

61 BOM. L. R. 41.

—S. 9(1). See BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 9(6).

61 BOM. L. R. 1156.

—S. 9(1). See BERAR REGULATION OF AGRICULTURAL LEASES ACT, S. 2(b).

61 BOM. L. R. 1671.

—S. 9(3). See BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 9(6).

61 BOM. L. R. 1156.

—S. 9(6)—Rule 9 framed under Act—Landholder taking over land from tenant for personal cultivation—Landholder selling land before lapse of two years from date of re-entry—Whether condition laid down in s. 9(6) fulfilled—Expression "two years" in r. 9 whether means two cultivating seasons—Failure of landlord to cultivate land for even short period during prescribed period whether would entail forfeiture—Whether under s. 9(6) tenant can claim as compensation income of land or value of crops for two years.

The period of two years fixed in r. 9 of the Rules made under the Berar Regulation of Agricultural Leases Act, 1951, is the minimum period during which the landholder is expected to cultivate the land personally after taking over the land from the tenant on the ground of personal cultivation. The rule does not in terms prohibit the transfer or sale of the land before the lapse of two years from the date of re-entry, but the fact that lands have been sold is conclusive that after the sale the land-

BERAR REGULATION OF AGRICULTURAL LEASES ACT, S. 9—(Contd.)

lord would be incapable of cultivating the land personally for himself unless there is a stipulation in the sale deed that the landlord was to relinquish the possession at some later date mentioned in the deed itself. Therefore, *prima facie*, the fact of sale before the lapse of two years from the date of re-entry would show that the landholder was putting himself beyond the possibility of fulfilling the requirement of personal cultivation for the prescribed period under s. 9(6) of the Berar Regulation of Agricultural Leases Act, 1951.

In r. 9 the expression "two years" cannot be construed to mean two cultivating seasons. The two years are to be computed from the specific and definite date of the re-entry by the landholder.

The words, in s. 9(6) of the Act, "a landholder fails at any time during such period as may be prescribed" indicate that the landholder is expected to cultivate the land during the entire period so prescribed; failure of the landholder to cultivate the land even for a short period will entail the consequence of forfeiture.

When an order under s. 9(6) of the Act is passed in favour of the tenant for restoration of the possession the right of the tenant to claim compensation flows from the order and begins from the next agricultural year. Therefore, the word "compensation" must be construed in a restricted sense, namely, that the tenant would be entitled to compensation for the damage caused by injury to the field but there would be no legal basis for the claim either for the income of the land or for the value of the crops for two years.

DHANANJAYA D. BOMBAY REVENUE TRIBUNAL.

61 BOM. L. R. 1156.

—S. 9B(a)—Berar Land Revenue Code, 1896, Secs. 88, 91, 220—Berar Waste Land Rules, 1865—Applicability of s. 9B(a) of Act XXIV of 1951—Bare declaration of liability to pay land-revenue whether equivalent to announcing it at settlement.

In order to obtain the benefit of the provisions of s. 9B(a) of the Berar Regulation of Agricultural Leases Act, 1951, it is necessary to prove that land-revenue could be legally fixed and was in fact fixed. The burden to do so rests on the tenant and that burden cannot be discharged by saying merely that by virtue of some law the landlord has now become liable to pay to the Government a sum of money by way of land-revenue. A bare declaration of liability to pay land-revenue is not equivalent to fixing of land revenue and announcing it at a settlement.

VATBALABAI D. TOGYA MISHRA.

61 BOM. L. R. 1351.

—S. 10—Whether landlord can apply for enhancement of lease-money agreed upon at time of lease—Rights of lessee safeguarded under s. 23 whether rights granted to lessee by Act or rights already the Act—Whether s. 3 overrides other provisions of Act.

Under s. 10(2) of the Berar Regulation of Agricultural Leases Act, 1951, a landholder can apply for enhancement of the lease-

BERAR REGULATION OF AGRICULTURAL LEASES ACT, S. 10—(Contd.)

money which was agreed upon at the time of the lease.

The purpose of s. 23 of the Berar Regulation of Agricultural Leases Act, 1951, is to provide that if a lessee possesses any rights independently of the Act, those rights are not limited or abridged by any of the provisions of the Act except the provisions contained in s. 7(1) of the Act. Therefore, the rights safeguarded are the rights which the lessee has acquired independently of the Act and not the rights granted to the lessee by the Act itself.

Section 8 of the Act must be read along with other sections of the Act, and not so that its provisions override other provisions of the Act.

MOHANLAL CHANDULAL D. JANU DASRAJI.
61 Bom. L. R. 633.

—S. 11(1). See **BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 14.**
61 Bom. L. R. 1285.

—S. 14—Word “lease-money” in s. 14 whether refers to cash only—Applicability of s. 14 where lease-money payable in kind—Commutation under s. 11(1) whether applies with respect to liability completely discharged before commutation made.

The word “lease-money” in s. 14 of the Berar Regulation of Agricultural Leases Act, 1951, refers to cash only and, therefore, s. 14 of the Act applies only where the lease-money is payable in cash and not where it is payable in kind.

The commutation made by the Revenue Officer under s. 11(1) of the Act is regarding the prospective liability of the lessee or of the liability of a lessee which is yet to be discharged.

WISHWANATH D. BOMBAY REV. TRIBUNAL.
61 Bom. L. R. 1285.

—S. 19(2). See **BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 8.**
61 Bom. L. R. 41.

—S. 19(2). See **BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 4.**
61 Bom. L. R. 210.

—S. 23. See **BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 10.**
61 Bom. L. R. 633.

BOMBAY AGRICULTURAL DEBTORS RELIEF ACT (Bom XXVIII of 1947), S. 4. See BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, 1947, S. 51-A.
61 Bom. L. R. 1607.

—S. 14. See **BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, 1947, S. 51-A.**
61 Bom. L. R. 1607.

—S. 15. See **BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, 1947, S. 51-A.**
61 Bom. L. R. 1607.

—S. 22. See **BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, 1947, S. 24.**
61 Bom. L. R. 666.

BOMBAY AGRICULTURAL DEBTORS RELIEF ACT—(Contd.)

—S. 24—Transfer declared to be a mortgage under s. 24(1)—Whether mortgagee liable to account for rents and profits received by him from date of application or from date of award.

Where under s. 24(1) of the Bombay Agricultural Debtors Relief Act, 1947, a transfer is declared to be a mortgage, the mortgagee will be liable to account for the rents and profits received by him from the date of the institution of the debt adjustment proceedings.

By adjudicating the true nature of a transaction under s. 24 of the Act the Court is not converting a transfer in the nature of a sale or other transfer into a mortgage. The Court being authorised to declare the real nature of the transaction, the declaration operates as from the date of the transaction.

GANGARAM ICHHARAM D. BHUKASING.
61 Bom. L. R. 666.

—S. 51-A—Dekhan . *Agriculturists' Relief Act (XVII of 1879), Sec. 15D*—Plaintiff filing applications under s. 4 but not mentioning therein mortgages executed by him and mortgagees as his creditors—General notice issued under s. 14—Plaintiff thereafter filing civil suit under D.A.R. Act for accounts of mortgages and civil Court passing decree—B.A.D.R. Court holding plaintiff debtor and his debts below Rs. 15,000—Plaintiff's suit for declaration that decree passed by civil Court void and not binding on plaintiff—Whether decree without jurisdiction in view of ss. 51A & 56—Civil Court whether had jurisdiction to pass decree—General notice under s. 14(b) whether binding on creditors whose names and debts not included in application under s. 4—Whether such creditors' debts governed by s. 15(1).

The plaintiff filed applications under s. 4 of the Bombay Agricultural Debtors Relief Act for adjustment of his debts, and in these applications he did not mention certain mortgages created by him in favour of the defendants and that the defendants were his creditors. A general notice under s. 14 of the Act was ordered to be issued by the Court. Thereafter the plaintiff filed a civil suit against the defendants under s. 15-D of the Dekkhan Agriculturists' Relief Act, 1879, for taking accounts of the mortgages, and the civil Court decreed that a certain amount was due to one of the defendants from the plaintiff. In the meantime the Bombay Agricultural Debtors Relief Court held that the plaintiff was a debtor and his debts were below Rs. 15,000. A final award was then passed but the award did not mention the debts of the defendants nor did it mention the defendants as creditors. The plaintiff filed a suit for a declaration that the mortgage debts of the defendants were extinguished and that the decree in the civil suit was void and not binding on the plaintiff. On the question whether the decree in the civil suit was without jurisdiction in view of s. 51-A and s. 56 of the Bombay Agricultural Debtors Relief Act:—

Held, that the issue of the notice under s. 14 of the Bombay Agricultural Debtors Relief Act did not bring the debts under the mortgage before the Bombay Agricultural Debtors

BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, S. 51-A—(Contd.)

Relief Court, as neither the names of the defendants-creditors nor their debts were mentioned in the plaintiff's applications and in the award made, and, therefore, it could not be said that the civil suit was in respect of any matter pending before the Court within s. 51-A of the Bombay Agricultural Debtors Relief Act; but that, as the plaintiff was held to be a debtor and his debts did not exceed Rs. 15,000, the mortgage transactions in suit would be governed by the Bombay Agricultural Debtors Relief Act and could not have been made the subject-matter of any proceedings under the Dekkhan Agriculturists' Relief Act, and, therefore, the decree passed by the civil Court was without jurisdiction and did not bind the plaintiff.

Where the names of certain creditors and their debts are not mentioned in the application for adjustment of debts under s. 4 of the Bombay Agricultural Debtors Relief Act, and a general notice is issued under s. 14(b) of the Act, then the general notice will be binding on the creditors whose names and debts are not included in the application, and their debts would be governed by s. 15(1) of the Act.

MADANLAL MULCHAND v. SHAIKH MAHIBOOB.
61 Bom. L. R. 1607.

—S. 56. See BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, 1947, S. 51-A.
61 Bom. L. R. 1607.

BOMBAY AGRICULTURAL PRODUCE MARKETS ACT (Bom. XXII of 1939), S. 17—Bombay Agricultural Produce Markets Rules, 1941, r. 74—Kolhapur Market Committee, Bye-law 35A, r. 12—Whether term "trade allowance" in s. 17 comprises allowance not consisting of a deduction—Explanation to s. 17 whether exhaustive of meaning of "trade allowance."

The term "trade allowance" in s. 17 of the Bombay Agricultural Produce Markets Act, 1939, means deductions allowed by custom either in the weight of goods sold or in the purchase price.

Quære: Whether the Bombay Agricultural Produce Markets Act, 1939, the Rules made thereunder and the Bye-laws of the Kolhapur Market Committee apply to the sale of agricultural produce by one trader to another.
STATE v. BABULAL FAKIRCHAND.

61 Bom. L. R. 1478:

BOMBAY COMMISSIONERS OF DIVISIONS ACT (VIII of 1958), S. 9—Constitution of India, art. 226—Bombay Revenue Tribunal whether an "authority" within s. 8—Whether word "authority" in art. 226 of Constitution includes a purely judicial tribunal.

The Bombay Revenue Tribunal does not fall within the term "authority" as used in s. 8 of the Bombay Commissioners of Divisions Act, 1957.

The word "authority" in art. 226 of the Constitution of India does not include a purely judicial tribunal. A quasi-judicial body or tribunal (that is, an administrative or executive body or tribunal entrusted with judicial functions) will fall within the ambit of the

BOMBAY COMMISSIONERS OF DIVISIONS ACT, S. 8—(Contd.)

word "authority". But where the sole function of a tribunal is to administer justice judicially, it cannot fall within the expression "authority."

BEAGWANDAS v. B'RAY REV. TRIBUNAL.
61 Bom. L. R. 1406.

BOMBAY DRUGS RULES, 1946—Drugs Act (XXIII of 1940), Secs. 33(1), 18(c)—The Drugs (Amendment) Act (XI of 1955), Sec. 15—General Clauses Act (X of 1897), Secs. 24, 3(19)—Whether Bombay Drugs Rules, 1946, stood repealed on amendment of s. 33(1) of Drugs Act by Act XI of 1955.

The Bombay Drugs Rules, 1946, did not stand repealed on the amendment of s. 33(1) of the Drugs Act, 1940, by the Drugs (Amendment) Act, 1955, but must be deemed to have been re-enacted and to have remained in force under the amended s. 33(1) of the Act by virtue of s. 24 of the General Clauses Act, 1897, till they were repealed by fresh rules framed by the Central Government in 1957.

STATE v. CHUNILAL VALLABHJI.
61 Bom. L. R. 807.

BOMBAY HINDU DIVORCE ACT (Bom. XXII of 1947), S. 8(1). See BOMBAY HINDU DIVORCE ACT, 1947, S. 15.

61 Bom. L. R. (O.C.J.) 1565.

—S. 15—Hindu Marriage Act (XXV of 1955), Secs. 29(3), 30, 26, 26—Decree for dissolution of marriage passed before coming into operation of Central Act—Petition under s. 15 of Bombay Act for custody of minor filed after coming into operation of Central Act—Prayer for custody of minor not made in suit for dissolution of marriage—Maintainability of petition.

Where in a proceeding under the Bombay Hindu Divorce Act, 1947, the relief in respect of the marriage itself had already been decreed before the coming into operation of the Hindu Marriage Act, 1955, and there was no prayer for custody of children in the plaint as originally filed, a subsequent petition under s. 15 of the Bombay Hindu Divorce Act, 1947, for custody of children is maintainable after the coming into operation of the Hindu Marriage Act, 1955.

SUMATIBEN v. JASVANT BHOGILAL.
61 Bom. L. R. (O.C.J.) 1565.

BOMBAY HINDU PLACES OF PUBLIC WORSHIP (ENTRY AUTHORIZATION) ACT (Bom. XXXI of 1956), S. 2—Constitution of India, Arts. 25(1), 25(2)(b), 26—Temples belonging to Swaminarayan Sampradaya sect whether come within ambit of Act—Such temples whether Hindu religious institutions and "places of public worship"—Swaminarayan Sampradaya whether distinct religion from Hinduism—Whether Act ultra vires art. 25(1) of Constitution.

The Swaminarayan Sampradaya is not a different religion from Hinduism and, therefore, the temples belonging to the Swaminarayan Sampradaya sect are Hindu religious institutions within the meaning of art. 25(2)(b) of the Constitution of India and are also "places of public worship" within the meaning

BOMBAY HINDU PLACES OF PUBLIC WORSHIP (ENTRY AUTHORISATION) ACT, S. 2—(Contd.)

of s. 2 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1950.

The Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1950, is not *ultra vires* the provisions of art. 25(1) of the Constitution of India.

STATE OF B'RAY V. SHASTRI PURUSHADASJI.

61 Bom. L. R. 700.

BOMBAY INDUSTRIAL RELATIONS ACT (Bom. XI of 1947), S. 13—Two or more unions applying for registration as Representative Union in respect of same industry in a local area—Whether Registrar entitled to register one of these unions without deciding which of applying unions has larger membership of employees—Point of time referred to in s. 13(1) whether relevant for determining comparative strength between rival unions applying for registration.

Where more than one application for registration as a Representative Union is pending before the Registrar, he must refrain from registering any union until and unless he has discharged his duties under the third proviso to s. 14 of the Bombay Industrial Relations Act, 1946, i.e. unless he has decided which of the applying unions has the larger membership of employees employed in the industry concerned.

The point of time referred to in s. 13(1) of the Bombay Industrial Relations Act, 1946, is not relevant for determining the comparative strength between rival unions where applications are made for registration by the rival unions. In such cases the relevant time would be time when an occasion arises for exercising the powers and performing the duties contained and laid down in the third proviso to s. 14 of the Act. Therefore, the point of time with reference to which the membership of rival unions applying for registration is to be considered is not the date of the application or the month of the application made by them but is the occasion when the claims of the other unions fall to be considered.

B. R. S. T. WORKERS' UNION V. STATE.

61 Bom. L. R. (O.C.J.) 967.

—S. 14. See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 13.

61 Bom. L. R. (O.C.J.) 967.

—S. 16(3). See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 13.

61 Bom. L. R. (O.C.J.) 967.

—S. 27A. See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 78(1A)(c).

61 Bom. L. R. 456.

—S. 31. See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 13.

61 Bom. L. R. (O.C.J.) 967.

—S. 32. See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 78(1A)(c).

61 Bom. L. R. 456.

BOMBAY INDUSTRIAL RELATIONS ACT—(Contd.)

—S. 33. See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 78(1A)(c).

61 Bom. L. R. 456.

—S. 78(1A)(c)—Whether employees can initiate proceedings under s. 78(1A)(c) where there is in existence a representative union of industry wherein employee employed—Right of employee to appear and conduct proceedings initiated by him—Agreement referred to in s. 115A whether agreement arrived at when no industrial dispute pending before relevant authority.

Section 79 of the Bombay Industrial Relations Act, 1946, confers a right to initiate proceedings under s. 78(1A)(c) of the Act on the employee directly affected, notwithstanding the fact that in the particular industry where the employee is employed there is in existence a representative union.

Under ss. 27A, 32 and 33 of the Bombay Industrial Relations Act, 1946, the right of an individual employee to appear and conduct the proceedings initiated by him is not destroyed unless and until the representative union appears in the case on behalf of that employee whose grievance is being ventilated before the authorities concerned. Section 27A of the Act does not contemplate an appearance of the representative of the employees which might be contrary to the interests of the individual employees who might have initiated a proceeding under the Act.

The agreement referred to in s. 115A of the Bombay Industrial Relations Act, 1946, is an agreement arrived at between the employer and the representative union reached after the commencement of the industrial dispute before an Arbitrator, Wage Board, Labour Court or Industrial Court. Therefore, an agreement which is arrived at at a time when no such dispute is pending before any of these authorities will not fall under the terms of s. 115A of the Act.

N. M. NAIK V. COLABA LAND MILLS.

61 Bom. L. R. 456.

—S. 79. See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 78(1A)(c).

61 Bom. L. R. 456.

—S. 114. See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 78(1A)(c).

61 Bom. L. R. 456.

—S. 115A. See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 78(1A)(c).

61 Bom. L. R. 456.

BOMBAY LAND REQUISITION ACT (Bom. XXXIII of 1948), S. 2. See BOMBAY LAND REQUISITION ACT, 1948, S. 4.

61 Bom. L. R. (O.C.J.) 263.

—S. 4—Bombay Land Requisition Ordinance, 1947, Sec. 4(1)—Premises let out prior to January 1947 but thereafter till November 1955 used as lodging houses—Order of requisition made in October 1957—Landlord alleging that premises occupied by licensees on date of order

BOMBAY LAND REQUISITION ACT,
S. 4—(Contd.)

—Whether premises intended to be let within s. 4(3) and therefore premises liable to be requisitioned—Notification under s. 6(1) whether necessary before s. 6 can apply to scheduled areas mentioned in s. 2(1).

Certain rooms in a building situated in the city of Bombay were let out by the landlord before January 1, 1947. From January 1, 1947, to November 1955 these rooms were used as a lodging house. After November 1955 they were occupied by certain persons and it was alleged by the landlord that the occupation by these persons was as licensees and not as tenants. On October 10, 1957, an order for requisitioning these rooms was made under s. 6(4)(a) of the Bombay Land Requisition Act, 1948. The order was challenged by the landlord *inter alia* on the ground that the rooms did not constitute premises within the meaning of the Act as these were not intended to be let, because they had never been in fact let after the Bombay Land Requisition Ordinance, 1947, came into force on December 4, 1947, or the Act came into force on April 11, 1948. On the question whether it could be said of the premises, assuming that these were given to licensees on October 10, 1957, that they were intended to be let as defined in s. 4(3) of the Act and were, therefore, premises which were liable to be requisitioned under the Act—

Held, that as the landlord had expressed his volition by letting out the rooms prior to January 1, 1947, he could be said to have intended the rooms to be let within s. 4(3) of the Act, although these were not let when the Act came into force, and

that, therefore, the rooms were premises within the meaning of the Act and the Government could exercise its power under s. 6 of the Act in respect of the premises.

The Notification referred to in s. 6(1) of the Bombay Land Requisition Act, 1948, is an entirely different notification to the notification mentioned in s. 2(2) of the Act.

Section 6(1) of the Bombay Land Requisition Act, 1948, provides that even in the scheduled areas mentioned in s. 2(1) of the Act the provisions of s. 6 are not automatically to apply. A notification by Government issued under s. 6(1) is necessary before the provisions of s. 6 can apply to a scheduled area as a whole or any part of it.

The observation made in *State of Bombay v. Virendra Mohabbay*, (1950) 52 Bom. L.R. 627, to the effect that there was a drafting error in s. 6(1) of the Act because it refers to premises situated in the areas specified by the Provincial Government by a notification in the Official Gazette and it does not refer to areas specified by the Act itself under s. 2(1) is not justified by the language used in the Act.
STATE OF BOMBAY v. KULSUMBAI.

61 Bom. L. R. (O.C.J.) 263.

—S. 4. See BOMBAY LAND REQUISITION ACT, 1948, S. 5.

61 Bom. L. R. (O.C.J.) 1344.

—S. 5—Declaration made under s. 5(9) whether conclusive evidence as regards person

BOMBAY LAND REQUISITION ACT,
S. 5—(Contd.)

entitled to reside in premises to be requisitioned—Whether declaration precludes real tenant or landlord from showing that he is the real tenant or landlord and not person mentioned therein.

The declaration made under s. 5(2) of the Bombay Land Requisition Act, 1948, is not conclusive evidence as regards the person entitled to reside in the premises which are sought to be requisitioned.

Under s. 5 of the Bombay Land Requisition Act, 1948, the declaration is made conclusive as regards the actual non-residence of the person referred to in the order for a continuous period of six months immediately preceding the date of order. The declaration does not preclude the real owner, landlord or tenant from showing that he is the real owner, landlord or tenant and not the person mentioned in the declaration.

BHARAT MANILAL v. STATE OF BOMBAY.

61 Bom. L. R. (O.C.J.) 81.

—S. 5—Premises derequisitioned under s. 9(1)—Whether State Government can make fresh requisition order under s. 5(1) in respect of such premises.

The State Government has jurisdiction to make a fresh requisition order under s. 5(1) of the Bombay Land Requisition Act, 1948, in respect of premises which have been derequisitioned under s. 9 of the Act.

RATILAL VIRCHAND v. STATE.

61 Bom. L. R. (O.C.J.) 990.

—S. 5—Part of flat in building in which landlord or tenant has not actually resided for continuous period of six months preceding date of requisition order—Whether such part of flat can be requisitioned under s. 5(1).

Under s. 5(1) of the Bombay Land Requisition Act, 1948, no limitation is placed as to the parts of land or parts of buildings which may be requisitioned by the Government under the section. Therefore, under this section, the Government can requisition a part of a flat in a building in which the landlord or the tenant has not actually resided for a continuous period of six months immediately preceding the date of the order of requisition.

TULSIBAI v. STATE OF BOMBAY.

61 Bom. L. R. (O.C.J.) 1344.

—S. 6—Constitution of India, Arts. 226, 227—Whether Court can go behind declaration of vacancy made under s. (4)(a) on question of fact or law—Such a declaration when can be challenged—Assignment by tenant of premises whether creates vacancy within Act although assignee in occupation of premises.

A declaration of vacancy made under s. 6(4)(a) of the Bombay Land Requisition Act, 1948, cannot be challenged either on the facts on which the declaration is based or on the ground that in law such a declaration cannot be made.

A declaration that there is a vacancy can be challenged under art. 226 or under art. 227 of the Constitution of India only on the ground that the declaration was *malā fide* or that there was some extraneous factor which led

BOMBAY LAND REQUISITION ACT,
S. 6—(Contd.)

the Government or the officer concerned to make that declaration.

On an assignment by a tenant of the premises in his occupation to a third party there is a vacancy within the meaning of the Explanation to s. 6 of the Bombay Land Requisition Act, 1948, although the assignee may be in occupation of the premises. Under the Act the State has the right to requisition the premises, if they are vacant as understood by the Act, even though the premises be in possession of a statutory tenant and even though his possession may be protected against the landlord.

STATE OF BOMBAY v. M. C. MENON.

61 Bom. L. R. (O.C.J.) 75.

—S. 6—Intimation of vacancy given by landlord to authorised officer in prescribed form—Intimation sent by ordinary post and beyond time prescribed under s. 6(2)—Intimation received by officer—Whether such intimation effective—Mode prescribed by s. 6(2) that intimation to be given by registered post whether mandatory or directory—Intimation referred to in s. 6(3) whether intimation referred to in s. 6(1) or whether such intimation must fulfil requirements of ss. 6(1) and 6(2)—Failure to give intimation under s. 6(2) whether precludes landlord from giving intimation subsequently—When Court can construe expression "shall" in statute as directory or procedural.

Where an intimation of vacancy of premises was given by the landlord under s. 6(1) of the Bombay Land Requisition Act, 1948, to an authorised officer in the prescribed form, but it was given by ordinary post and not within the time prescribed by s. 6(2) of the Act, and it was established that the officer had received it, such an intimation would be an intimation within s. 6(3) of the Act, and the landlord could occupy the premises after the lapse of one month from the date of the receipt of the intimation by the officer and it is not open to the State Government to requisition the premises after the lapse of such period unless there was a fresh vacancy.

In order to get relief from the Court on a writ petition, not only must the petitioner come with clean hands, not only must he not suppress any material facts, not only must he show the utmost good faith, but he must also satisfy the Court that the making of the order will do justice and that justice lies on his side.

The mode prescribed by s. 6(2) of the Bombay Land Requisition Act, 1948, that the intimation shall be given by registered post is directory.

The intimation referred to in s. 6(3) of the Bombay Land Requisition Act, 1948, is the intimation referred to in s. 6(1) of the Act.

The failure on the part of the landlord to give the intimation required by s. 6(1) of the Act does not debar him from giving a subsequent intimation.

In order to place a proper construction on the expression "shall" in a statute the Court must look to the scheme of the Act in order to determine what are the consequences which the law has laid down as a result of non-compliance with that mandatory direction. The consequence may be penal, the conse-

BOMBAY LAND REQUISITION ACT,
S. 6—(Contd.)

quence may be that a particular order passed is invalidated, the consequence may be that a particular right is not acquired or a particular obligation is imposed, or the consequence may be not stated in the law at all. When no consequence is apparent in the law it is possible for the Court to take the view that although the statute has used the expression "shall" it must be construed as being directory or procedural rather than mandatory in the strict sense of the term.

STATE OF BOMBAY v. MORARJI.

61 Bom. L. R. (O.C.J.) 318.

—S. 6. See BOMBAY LAND REQUISITION ACT, 1948, S. 5.

61 Bom. L. R. (O.C.J.) 990.

—S. 6—Word "release" in ss. 6(1) and 9(1) whether means restoration of physical possession—Whether de-requisition order made under s. 9(1) complete before its service on landlord and before physical possession of premises transferred to appropriate person—Whether vacancy under s. 6 can arise by reason of mere order of de-requisition of premises—Order of requisition whether effective without transfer of physical possession of premises to Government.

The word "release" used in ss. 6(1) and 9(1) of the Bombay Land Requisition Act, 1948, does not mean restoration of physical possession. The word is used not as other word for restoration of possession, but as something precedent to transfer and/or restoration of physical possession of the premises.

A de-requisition order made under s. 9(1) of the Act is complete in all its effects and aspects when it is made. It is, therefore, complete before service or communication thereof on the landlord and even if physical possession is not transferred to the appropriate person.

Under s. 6 of the Act a vacancy can arise by reason of release of the premises from requisition under s. 9(1) notwithstanding the fact that the de-requisition order is not communicated to the person concerned and physical possession of the premises in question is not given to such person.

An order of requisition under the Act in all its aspects is completed by merely making an order for the purpose. Even when physical possession is not transferred to the Government and/or taken on behalf of the Government, a requisition order made would exist in all its effects.

SHIRINBAI v. STATE OF BOMBAY.

61 Bom. L. R. (O.C.J.) 1191.

—S. 6(1). See BOMBAY LAND REQUISITION ACT, 1948, S. 4.

61 Bom. L. R. (O.C.J.) 263.

—S. 6(4). See BOMBAY LAND REQUISITION ACT, 1948, S. 4.

61 Bom. L. R. (O.C.J.) 263.

—S. 9. See BOMBAY LAND REQUISITION ACT, 1948, S. 5.

61 Bom. L. R. (O.C.J.) 990.

—S. 9. See BOMBAY LAND REQUISITION ACT, 1948, S. 5.

61 Bom. L. R. (O.C.J.) 990.

BOMBAY LAND REQUISITION ORDINANCE, 1947, S. 4(1). See **BOMBAY LAND REQUISITION ACT, 1948, S. 4.**

61 Bom. L. R. (O.C.J.) 236.

BOMBAY LAND REVENUE CODE (Bom. V of 1879), S. 3(5).

The words of the definition of "estate" contained in s. 3(5) of the Bombay Land Revenue Code, 1879, mean "any interest in lands" which comprise within their scope alienated as well as unalienated lands and cover holdings of occupants within the meaning thereof.

SURI RAM RAM NARAIN V. STATE.

61 Bom. L. R. (S.C.) 811.

—S. 117R—*Gujarat Taluqdars' Act (Bom. VI of 1888), Secs. 22, 23(1)—Bombay Taluqdari Tenure Abolition Act (Bom. LXI of 1949), Sec. 5(2)—Expression "settlements of land revenue" in s. 117R, B. L. R. Code, whether includes declaration under s. 22 or agreement of jama mentioned in s. 23(1) of Bom. Act VI of 1888.*

The declaration under s. 22 of the Gujarat Taluqdars' Act, 1888, or the agreement of jama mentioned in s. 23(1) of the Act, is not a settlement of land-revenue within the meaning of s. 117R of the Bombay Land Revenue Code, 1879.

JAYAVANTINHLI V. STATE OF BOMBAY.

61 Bom. L. R. (S.C.) 945.

—S. 155.

The words "right, title and interest" occurring in s. 155 of the Bombay Land Revenue Code, 1879, have the same connotation as they had in the corresponding words used in the Civil Procedure Code existing at the time the Bombay Land Revenue Code was enacted.

S. M. JAKATI V. S. M. BORKEAR.

61 Bom. L. R. (S.C.) 688.

BOMBAY MONEY-LENDERS ACT (Bom. XXXI of 1947), S. 24—Court-fees Act (VII of 1870), Sch. II, Item 17(vii)—Civil Procedure Code (Act V of 1908), Secs. 2(2), 47, 104; O. XLIII, O. XX, rr. 12, 11(2)—Whether order under s. 24 of Bom. Act XXXI of 1947 appealable—Proper Court-fee leviable on memorandum of appeal from such order.

An order under s. 24 of the Bombay Money-lenders Act, 1947, granting or refusing to grant instalments for the payment of the amount decreed, is appealable as a decree. The proper Court-fee to be levied on a memorandum of appeal from such an order would be the Court-fee mentioned in Sch. II, item 17(vii), of the Court-fees Act, 1870, as amended in the Bombay State.

The subject-matter in dispute in such an appeal is not the amount of the decree, but the mode in which the amount is to be paid. As such, it is not possible to estimate at a money value the subject-matter in dispute.

LAXMAN DHULSHET V. GANPAT.

61 Bom. L. R. 1591.

BOMBAY POLICE ACT (Bom. XXII of 1951), S. 57—City of Bombay Police Act (Bom. IV of 1902), Sec. 27—Accused convicted under ss. 618 & 114 of Indian Penal Code in 1959—

BOMBAY POLICE ACT, S. 57—(Contd.)

Order of externment made by Deputy Commissioner of Police against accused under s. 57 of Act XXII of 1951—Validity of order.

Before an order can be made under s. 57 of the Bombay Police Act, 1951, the person against whom the order is to be made must be convicted of an offence under Chapter XII, XVI or XVII of the Indian Penal Code, 1860, after the coming into force of s. 57 of the Act.

VISHNOO RAMCHANDRA V. STATE.

61 Bom. L. R. 498.

BOMBAY PROHIBITION ACT (XXV of 1949)—Criminal Procedure Code (Act V of 1898), Secs. 157, 4(1)—Indian Penal Code (Act XLV of 1860), Secs. 353, 352, 97, 99, 52—Whether police officers empowered by law to forcibly take person suspected or accused of offence under Prohibition Act for medical examination—Person forcibly taken for such examination whether can exercise right of private defence—Whether such person in so exercising his right can be convicted under s. 353 or 352 of I.P. Code—Section 157 of Cr. P. Code whether grants on investigating officers general overriding power to act in curtailment of rights and liberties of subject for purposes of investigation—Applicability of exception in first para. of s. 99, I.P. Code—Police officers acting outside scope of their powers whether can be said to have acted in "good faith."

In the case of a person suspected or accused of an offence under the Bombay Prohibition Act, 1949, the police officers are not empowered by law to take that person, against his will, to a doctor for medical examination. If force is sought to be used by the police officers in taking such a person to a doctor, he can lawfully exercise the right of private defence against them under s. 97 of the Indian Penal Code, and if he does so exercise the right, he cannot be convicted either under s. 353 or 352 of the Indian Penal Code.

Section 157 of the Criminal Procedure Code, 1898, lays down some of the duties, and none of the rights, of an officer in charge of a police station. That section has no relevance whatever to the consideration of the extent to which a police officer can act in curtailment of the rights of the subject as regards his person or his property.

The exception contained in the first paragraph of s. 99 of the Indian Penal Code, 1860, applies where a public servant acts irregularly in the exercise of his powers, and not where he acts outside the scope of his powers.

DEOMAN SHAMJI V. THE STATE.

61 Bom. L. R. 30.

—S. 116.

In a trial under the Bombay Prohibition Act, 1949, by virtue of s. 116 of the Act it is incumbent upon the Magistrate to record the substance of the evidence of each witness when the evidence is led in Court. Failure to record such evidence would generally vitiate the trial.

KRISHNA NAYAR V. STATE.

61 Bom. L. R. 684.

BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT (Bom. LVII of 1947), S. 15—*Indian Contract Act (IX of 1872), Sec. 23—Agreement between landlord and tenant permitting tenant to sub-let premises—Enforceability of such agreement—Waiver—Agreement to waive an illegality—Whether such agreement enforceable.*

Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, expressly prohibits subletting and, therefore, a contract to the contrary cannot neutralise its prohibitory effect. Therefore, an agreement between a tenant and his landlord whereby the tenant was permitted to sub-let the premises is void under s. 15 of the Act and s. 23 of the Indian Contract Act, 1872, and is unenforceable.

The *non obstante* clause in s. 15 of the Act means that even if any other law allowed subletting, e.g. s. 108 of the Transfer of Property Act, 1882, the subletting would, because of s. 15, be unlawful. This would apply to contracts also as all contracts would fall under the provisions of the law relating to contracts i.e. the Indian Contract Act.

An agreement to waive an illegality is void on grounds of public policy and is unenforceable.

WAMAN SHRINIWAS D. RATHILAL.

61 Bom. L. R. (S.C.) 1011.

—S. 15. See **BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT**, 1947, S. 28. 61 Bom. L. R. 1087.

—S. 18(1)—*Whether expression "consideration" in s. 18(1) restricted to consideration other than pecuniary consideration—"Other like sum," meaning of expression.*

The expression "consideration" in s. 18(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, is used in its normal connotation and includes pecuniary as well as non-pecuniary consideration.

The expression "other like sum" in s. 18(1) of the Act must be read *ejusdem generis* with fine or premium.

VITHAL KRISHNAJI D. STATE.

61 Bom. L. R. 1662.

—S. 28—*Applicability of s. 28—Suit not between landlord and tenant and in which no claim or question arises out of the Act or its provisions as disclosed in plaint—Defendant in suit contending that he is a tenant—Whether such suit covered by s. 28—Sub-tenancy as between tenant and sub-tenant whether unlawful under s. 15.*

In order to decide whether a suit comes within the purview of s. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, what must be considered is what the suit as framed in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of a claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by s. 28 of the Act.

A suit which is essentially one between the landlord and tenant does not cease to be such a suit merely because the defendant denies the claim of the plaintiff. In the same way, a suit

BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT, S. 28—(Contd.)

which is not between the landlord and tenant and in which judging by the plaint no claim or question arises out of the Act or any of its provisions does not become a suit covered by the provisions of s. 28 of the Act as soon as the defendant raises a contention that he is a tenant.

Under s. 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, there can be no valid sub-tenancy after the coming into operation of the Act notwithstanding anything contained in any other law. Therefore, under s. 15 what has been made unlawful is not only a sub-tenancy as against the landlord but also a sub-tenancy as between the tenant and the sub-tenant.

JASWANTILAL D. "WESTERN COMP., INDIA".

61 Bom. L. R. 1087.

BOMBAY SALES TAX ACT (Bom. III of 1953), S. 8(a)—*Assessee, dealers in tea, purchasing different brands of tea from registered dealers and after mixing these, selling the mixture—Whether assessee entitled to deduct from their turnover value of tea purchased from registered dealers—Tea purchased whether processed or altered after purchase.*

The assessee, who carried on business as dealers in tea, purchased diverse brands of tea from registered dealers and without the application of any mechanical or chemical process mixed up the brands of tea purchased in bulk by them and sold the tea as tea mixture. The mixing was according to the formulae evolved by the assessee. In the assessment of sales-tax the assessee claimed that the value of the tea purchased by them should be deducted from the turnover under s. 8 of the Bombay Sales-tax Act, 1953. The Sales-tax authorities having regard to the proviso to s. 8(a) of the Act did not allow the deduction. On the question whether the assessee were entitled to deduct from their turnover the value of the tea purchased from the registered dealers—

Held, that as there was neither processing nor alteration in any manner of the tea purchased by the assessee within the meaning of the proviso to s. 8(a) of the Act, the assessee were entitled to a deduction from their turnover of sales, the value of the tea purchased, under s. 8(a) of the Act.

NILGIRI CEYLON TEA ETC. CO. D. STATE OF BOMBAY.

61 Bom. L. R. 1383.

—S. 15—*Bombay Sales Tax Laws (Validating Provisions and Amendment) Act* (Bom. XXII of 1959), Sec. 3—*Power of revision under s. 31 whether can be exercised beyond period prescribed under s. 15.*

The widest retrospective operation is given to the provisions made in s. 15 (2) (a) (i) of the Bombay Sales Tax Act, 1953, by the Bombay Sales Tax Laws (Validating Provisions and Amendment) Act, 1959. The retrospective operation is given to all proceedings and notices and even to proceedings which have been concluded by judgments, decrees or orders of Courts or Tribunals. Therefore, in construing the provisions of s. 31 of the Act,

BOMBAY SALES TAX ACT, S. 15—(Contd.)

the obligation to initiate proceedings within the period not longer than the period prescribed by s. 15 will be implied.

MANORDAS KALIDAS v. V. V. TATKE.

61 Bom. L. R. (O.C.J.) 1560.

—S. 31. See BOMBAY SALES TAX ACT, 1953, S. 15. 61 Bom. L. R. (O.C.J.) 1560.

BOMBAY SALES TAX LAWS (VALIDATING PROVISIONS AND AMENDMENT) ACT (Bom. XXII of 1959), S. 3. See BOMBAY SALES TAX ACT, 1953, S. 15.

61 Bom. L. R. (O.C.J.) 1560.

BOMBAY TENANCY ACT (Bom. XXIX of 1939), S. 24. See BOMBAY TENANCY ACT, 1939, S. 28. 61 Bom. L. R. 408.

—S. 28—*Bombay Land Revenue Code (Bom. V of 1879), Secs. 212, 211—Order made by Mamlatdar under s. 24(2) or by Collector under s. 24(3)—Whether Government had jurisdiction to revise such orders—Jurisdiction conferred upon Government under s. 28 whether jurisdiction of a revisional character.*

Under s. 28 of the Bombay Tenancy Act, 1939, the Provincial Government had power to revise an order made by the Mamlatdar under s. 24(2) or by the Collector in appeal under s. 24(3) of the Act.

The jurisdiction conferred upon the Government under s. 28 of the Act was jurisdiction of a revisional character and not a mere administrative or executive jurisdiction.

BURKHU v. WRAJLAL JECHAND.

61 Bom. L. R. 408.

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (Bom. LXVII of 1948), S. 5(1)—Bombay Tenancy Act (Bom. XXIX of 1939), Sec. 23(1)(a) and (b)—Rights conferred on tenant under s. 5 as it stood before amending Act of 1956—Contractual tenancy for a period less than ten years whether under s. 5(1) extended to contractual tenancy of ten years—Tenancy rights of statutory tenant whether heritable—Applicability of s. 29 where person in possession a trespasser.

Section 5(1) of the Bombay Tenancy and Agricultural Lands Act, 1948 (as it stood before the amending Act XIII of 1956 came in to force) prohibited tenancies of a period less than ten years and created a statutory tenancy whose period could not be less than ten years. The section did not create an artificial fiction extending the contractual character of the tenancy from a period of less than ten years to a period of ten years.

The tenancy rights of a statutory tenant under s. 5(1) of the Act are not heritable rights.

BAI JAMNA v. BAI DHANI.

61 Bom. L. R. 419.

—S. 10—*Tenant tendering amount under s. 25(1) to obtain relief against forfeiture—Application made by tenant under s. 10 to Mamlatdar for refund of excess amount tendered under s. 25(1)—Whether Mamlatdar has jurisdiction to decide such application.*

The Mamlatdar has no jurisdiction under

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 10—(Contd.)

s. 10 of the Bombay Tenancy and Agricultural Lands Act, 1948, to decide a tenant's application for the refund of a portion of the amount tendered by him to the landlord under s. 25(1) of the Act for obtaining relief against forfeiture. SHAM KEXHUSHRU v. N. P. SHAH.

61 Bom. L. R. 289.

—S. 14—*Landlord seeking to eject tenant for acts of destruction and permanent injury to land—Whether landlord must give two separate notices to tenant under s. 14 and s. 24 respectively—Landlord whether absolved from giving notice to tenant under s. 24 if notice given under s. 14—Landlord by notice under s. 14 calling upon tenant to hand over possession of land upon expiry of three months from date of its receipt—Whether such notice valid—Validity of notice under s. 14 terminating tenancy forthwith by such notice.*

Under the Bombay Tenancy and Agricultural Lands Act, 1948, when a landlord seeks to eject the tenant upon the ground that the tenant had done acts of destruction and permanent injury to the land, he must give two separate notices to the tenant, one under s. 14 of the Act intimating to him that he had done an act which was destructive of or permanently injurious to the land, and another under s. 24 of the Act after the expiry of three months from the date of the first notice i.e. after the tenancy of the tenant had terminated, specifying the act of destruction or injury and intimating to the tenant that if he failed within a period of one year from the date of the receipt of the notice to restore the land to the condition in which it was before the act of destruction or injury was done to it, he would be ejected from the land.

By a notice under s. 14 of the Act the landlord can only communicate to his tenant his decision to terminate his tenancy after the lapse of three months from the service of the notice. If the landlord goes beyond it and calls upon the tenant to do something which the landlord is not entitled to ask the tenant to do under the provisions of s. 14, e.g. calls upon the tenant to hand over possession of the land to him upon the expiry of three months from the date of receipt of the notice then, in so far as he calls upon the tenant to do something which he cannot ask him to do under s. 14 the notice is an invalid notice. A notice under s. 14 does not terminate a tenancy forthwith i.e. with effect from the date of its receipt and, therefore, a notice under s. 14 would also be invalid if it tells the tenant distinctly that by that notice itself his tenancy is terminated.

SATYANARAYAN v. VITHOBA.

61 Bom. L. R. 159.

—S. 25(1). See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 29.

61 Bom. L. R. 156.

—S. 25(1). See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 10.

61 Bom. L. R. 289.

—S. 27—*Transfer of Property Act (IV of 1882), Sec. 108(j)—Tenant sub-letting portion*

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 27—(Contd.)

of land held by him under lease—Whether such sub-letting entails forfeiture of lease.

Under s. 27 of the Bombay Tenancy and Agricultural Lands Act, 1958 (as it stood before its amendment) sub-letting by a tenant of a portion of the lands held by him under a lease does not entail a forfeiture of the lease.

Quære: Whether the Mamlatdar has power to grant relief against forfeiture where the tenant has sub-let any portion of the leased land without the permission of his landlord.
ANANDRAO V. EKNATH. 61 BOM. L. R. 1123.

—S. 29—*Whether Mamlatdar can extend time originally granted by him to tenant to pay arrears of rent—Prant Officer whether has also such jurisdiction to enlarge time.*

Under s. 29(3) of the Bombay Tenancy and Agricultural Lands Act, 1948, the Mamlatdar has jurisdiction to extend the time originally granted by him to the tenant under s. 28(1) of the Act to pay up the arrears of rent. The Prant Officer, as an appellate authority, has also jurisdiction to enlarge the time granted by the Mamlatdar within which the tenant was called upon to pay up the arrears of rent.

SOMAJEE KRISHNAJEE V. NATHU.
61 BOM. L. R. 156.

—S. 31. *See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 31A(b).*

61 BOM. L. R. 415.

—S. 31—*Whether widow can terminate tenancy of her tenant—Words “cultivating personally” in s. 31(1)(a) whether include cultivation through tenant.*

Under s. 31 of the Bombay Tenancy and Agricultural Lands Act, 1948, a widow can terminate the tenancy of her land and can apply for possession of the land under s. 29 of the Act.

The words “cultivating personally” occurring in s. 31(1)(a) of the Bombay Tenancy and Agricultural Lands Act, 1948, do not in the case of a widow include cultivation through a tenant.

JIVDEEN V. BOMBAY REV. TRIBUNAL.
61 BOM. L. R. 1475.

—S. 31A(b)—*Land cultivated by landlord less than ceiling area prescribed under Act—Whether landlord to make up his ceiling area, can recover possession of more than half area of land leased to his tenant—Applicability of s. 31B(1) where landlord bases his claim under s. 34(1).*

Section 31B(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, is an independent provision which stands by itself and controls s. 31A(b) of the Act; it is not subject to the provisions of s. 31A(b). Therefore, if the land cultivated by the landlord personally is less than the ceiling area prescribed for that land under the Act, the landlord cannot, in order to make up his ceiling area, recover possession of more than half the area of the land leased out to his tenant.

Section 31 of the Bombay Tenancy and Agricultural Lands Act, 1948, has nothing to do with a case where a landlord claims to

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 31A—(Contd.)

recover possession of his land from the tenant upon the ground that the tenant has got in his possession lands in excess of the ceiling area. Therefore, where a landlord bases his claim upon the ground stated in s. 34(1) of the Act, the provisions of s. 31B(1) will not apply.
HASANBHAI V. ADAMBHAI. 61 BOM. L. R. 415.

—S. 31A(d)—*Transfer of Property Act (IV of 1882), Sec. 109—Civil Procedure Code (Act V of 1908), Sec. 65; O. XXI, r. 96—Landlord judgment-debtor’s name standing in record of rights as occupant of lands since before January 1, 1952, till appointed day—Opponent in occupation as tenant of lands—Petitioner purchasing lands at court sale and his rights as landlord coming into existence after appointed day—Petitioner giving notice to opponent under s. 31(2) and applying for possession—Whether petitioner can terminate tenancy of opponent—Applicability of s. 31-A(d).*

The term “landlord” occurring in s. 31-A(d) of the Bombay Tenancy and Agricultural Lands Act, 1948, includes any person from whom or through whom a landlord derives his right as such landlord, and for the proper compliance with the conditions mentioned in cl. (d) of s. 31-A of the Act, it is sufficient if either the name of the claimant or that of his predecessor-in-title stands in the record of rights or any public record or similar revenue record on the 1st day of January, 1952, and thereafter during the period between the said date and the appointed day.

WAMAN GANESH V. GANU.
61 BOM. L. R. 1267.

—S. 31B(1)—*Termination of tenancy with dissection of lands originally leased out to tenant whether permissible under Act—Whether notice of termination of tenancy can relate to a part of property leased and sought to be possessed or must relate to the entire property.*

Under s. 31B(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, a tenancy can be terminated in such a way as would result in a landlord getting back possession of only a part of the land leased out to the tenant. A notice given under s. 31 of the Act terminating the tenancy of only a part of the property leased out, of which part the possession is sought by the landlord, is a good notice.

MARSHAN HUSTOMJI V. KHUSHALBHAI.
61 BOM. L. R. 294.

—S. 31 B(1). *See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 31A(b).*
61 BOM. L. R. 415.

—S. 34. *See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 31A(b).*
61 BOM. L. R. 415.

—S. 44—*Bombay Tenancy and Agricultural Lands Rules, 1956, Rule 33—State Government taking over management of lands belonging to landholder—Whether State Government liable to render account of its management during pendency of management—Suit filed by landholder for such rendition of accounts whether can be entertained by civil Court.*

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 44—(Contd.)

The State Government, where it has taken over management of lands belonging to a landholder under Chapter IV of the Bombay Tenancy and Agricultural Lands Act, 1948, is liable to render an account of its management to the landholder during the pendency of the management and to pay the balance left, after making provision for the payment of items mentioned in s. 48 of the Act, at the end of the year.

The ownership of lands taken under management under Chapter IV of the Act does not vest in the State Government. The only thing that vests in the State Government or in the Manager appointed is the right to possession and of management together with all powers for the purposes of such management which the landholder, but for the notification issued under s. 44 of the Act, could have exercised.

A suit filed by a landholder against the State Government for rendition of accounts of its management and for the payment of balance can be entertained by a civil Court and is not barred by s. 85(1) of the Bombay Tenancy and Agricultural Lands Act, 1948.

Under s. 85(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, a civil Court is barred from entertaining questions dealing with the exercise of powers conferred upon the Manager by Chapter IV of the Act.

STATE OF BOMBAY v. ESTATE INVESTMENT CO.
61 BOM. L. R. 660.

—S. 45. See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 44
61 BOM. L. R. 660.

—S. 64. See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 84C.
61 BOM. L. R. 1276.

—S. 70—Application filed by landlord before Mamlatdar for declaration that opponent not his tenant under Act—Whether Mamlatdar can entertain and decide such application—“For the purposes of this Act”, meaning of expression in s. 70.

Under the Bombay Tenancy and Agricultural Lands Act, 1948, the Mamlatdar can entertain and decide an application filed by a landlord for a declaration that his opponent, who claims to be his tenant, is not a tenant under the Act.

The words “for the purposes of this Act” in s. 70 of the Bombay Tenancy and Agricultural Lands Act, 1948, mean for the purposes of deciding any question relating to a matter, which is regulated or governed by the provisions of the Act.

NIVRUTTI LAXMAN D. SHIVDAYAL.
61 BOM. L. R. (F.B.) 957.

—S. 74. See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 70.
60 BOM. L. R. (F.B.) 957.

—S. 76A—Bombay Tenancy and Agricultural Lands (Second Amendment) Act (Bom. XXXVIII of 1957), Secs. 25, 34—Orders made by Mamlatdar or Tribunal before coming into force of s. 76A whether can be revised under that section.

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 76A—(Contd.)

Orders made by a Mamlatdar or Tribunal before the coming into force of s. 76A of the Bombay Tenancy and Agricultural Lands Act, 1948, cannot be revised under this section.

PHIRODOSH v. STATE OF BOMBAY.

61 BOM. L. R. 1559.

—S. 84C—Constitution of India, Arts. 31(1) & (2)—Provision in s. 84C as to forfeiture of land on declaration made by Mamlatdar whether constitutional—Whether open to State Government on such forfeiture to recover purchase price from seller or purchaser—Section 84C whether violates art. 31(2).

Section 84C of the Bombay Tenancy and Agricultural Lands Act, 1948, in so far as it refers to the forfeiture of the land to the State Government by reason of the sale being declared invalid is constitutional; but on such forfeiture it is not open to the State Government to recover the purchase price belonging to the purchaser either from him or from the seller as an arrear of land revenue.

Section 84C of the Act is not violative of art. 31(2) of the Constitution of India as it does not deal with acquisition of property for a public purpose.

KUBERDAS v. STATE OF BOMBAY.

61 BOM. L. R. 1276.

—S. 85. See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 70.
61 BOM. L. R. (F.B.) 957.

—S. 85(1). See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 44.
61 BOM. L. R. 660.

—85(1). See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 70.
61 BOM. L. R. (F.B.) 957.

—S. 88(1)(c)—Greater Bombay Lands and the Bombay High Court (Declaration of Limits) (Amendment) Act (Bom. 8 of 1950), Sec. 6—Bombay General Clauses Act (1 of 1904), Secs. 3(21), 7(b) & (c)—Greater Bombay Lands and the Bombay High Court (Declaration of Limits) Act (17 of 1945), Sec. 2(2)—Tenant acquiring protected tenancy rights by virtue of s. 3A of Tenancy Act, 1939, since November 8, 1947—Act 8 of 1950 making village where lands situated part of Greater Bombay on April 15, 1950—Section 88(1)(c) applicable to lands in village—Suit by landlord for possession of lands—Whether provisions of s. 88 such express provision as could effect the tenant's rights as contemplated in s. 89(2)(b).

The defendant, who was in occupation as tenant of certain lands since 1946, became a protected tenant by virtue of s. 8A of the Tenancy Act of 1939, under the Bombay Tenancy and Agricultural Lands Act, 1948. On April 15, 1950, by virtue of Bombay Act 8 of 1950 the village in which these lands were situated became a part of Greater Bombay and, therefore, ss. 88(1)(c) of the Act became applicable to the village and none of the provisions of ss. 1 to 87 of that Act applied to the lands. In a suit filed on May 26, 1953, by the plaintiffs-landlords for possession of the lands, the defendant contended that he was a

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 88—(Contd.)

protected tenant of the lands by virtue of s. 89 of the Act and his rights as such protected tenant remained unaffected, he having become a protected tenant since November 8, 1947:—

Held, that the provisions of s. 88(1)(c) of the Act are an express provision in the Act as contemplated under s. 89(2)(b) of the Act, and, that, therefore, after the village became a part of Greater Bombay on April 15, 1950, the protected tenancy right of the defendant ceased to have the protection of the provisions of ss. 1 to 87 of the Act.

JASIN TOMU v. HARISCHANDRA.

61 Bom. L. R. 1112.

—S. 89(2)(c). See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 88 (1) (c). 61 Bom. L. R. 1112.

BOMBAY TENANCY AND AGRICULTURAL LANDS (AMENDMENT) ACT (Bom. XIII of 1956), S. 5—Constitution of India, Arts. 31A, 14, 19, 31; Seventh Sch., List II, Entry 18—Bombay Land Revenue Code (Bom. V of 1919), Sec. 3(5)—Whether Bom. Act XIII of 1956 a legislation with reference to "land" within Entry 18 in List II—Competency of the State Legislature to enact the Act—Act whether protected by art. 31A—"Estate" defined in s. 3(5) of Bombay Land Revenue Code whether includes unalienated lands held by occupants—Whether s. 7 of Bom. Act XIII of 1956 void on ground of excessive delegation of legislative power.

The Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, is covered by Entry 18 in List II of the Seventh Schedule to the Constitution of India and is a legislation with reference to "land" and, therefore, the State Legislature was competent to enact the Act.

The Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, is covered by art. 31A of the Constitution and is, therefore, not unconstitutional on the ground of its having violated the fundamental rights enshrined in arts. 14, 19 and 31 of the Constitution.

The words of the definition of "estate" contained in s. 3(5) of the Bombay Land Revenue Code, 1919, mean "any interest in lands" which comprise within their scope alienated as well as unalienated lands and cover holdings of occupants within the meaning thereof.

Section 7 of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, is not void on the ground of excessive delegation of legislative power.

"Any other factors which may be prescribed" referred to in s. 7(b) of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, are factors *ejusdem generis* to the factors mentioned earlier in the section and not any and every factor which might cross the mind of the executive.

SHRI RAM RAM NARAIN v. STATE.

61 Bom. L. R. (S.C.) 811.

—S. 6. See BOMBAY TENANCY AND AGRICULTURAL LANDS (AMENDMENT) ACT, S. 5. 61 Bom. L. R. (S.C.) 811.

BOMBAY TENANCY AND AGRICULTURAL LANDS (AMENDMENT) ACT, S. 7. See BOMBAY TENANCY AND AGRICULTURAL LANDS (AMENDMENT) ACT, S. 5.

61 Bom. L. R. (S.C.) 811.

BOMBAY TENANCY AND AGRICULTURAL LANDS (SECOND AMENDMENT) ACT (Bom. XXXVIII of 1957), S. 25. See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 76A.

61 Bom. L. R. 1559.

BOMBAY TOWN PLANNING ACT (I of 1915), S. 14—Land Acquisition Act (I of 1894), Sec. 6—Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Secs. 63, 66—Land included in sanctioned draft Town Planning Scheme awaiting final scheme—Whether such land can be acquired by Government under s. 6 of Land Acquisition Act—Word "land" in s. 51 of Bom. Act I of 1915 whether covers land within town planning area—Interpretation of statute.

A land included in a sanctioned draft Town Planning Scheme under the Bombay Town Planning Act, 1915, can be acquired by Government under s. 6 of the Land Acquisition Act, 1894.

The word "land" used in s. 51 of the Bombay Town Planning Act, 1915, covers land situated within a town planning area or outside it.

If a statute is clear and unambiguous, then, subsequent legislation cannot affect its interpretation. It is the duty of the Court to interpret a statute and not for the Legislature to do so and this has to be done with reference to the language used in the statute itself. An amendment is not necessarily made to remove a lacuna. It may be introduced *ex mero motu*.

The meaning of s. 66 of the Bombay Municipal Boroughs Act, 1925, read with s. 62 of the Act, is that, though a municipality may acquire land outside its limits, it must utilise that property for the purpose of the Act within the limits of the municipal borough only i.e., for the benefit of the citizens residing within the municipal borough.

STATE OF BOMBAY v. DAVALBHAI.

61 Bom. L. R. 1247.

—S. 30. See BOMBAY TOWN PLANNING ACT, 1915, S. 14. 61 Bom. L. R. 1247.

—S. 51. See BOMBAY TOWN PLANNING ACT, 1915, S. 14. 61 Bom. L. R. 1247.

—S. 51A. See BOMBAY TOWN PLANNING ACT, 1915, S. 14. 61 Bom. L. R. 1247.

BOMBAY VILLAGE PANCHAYATS ACT (Bom. VI of 1933), S. 4—Person elected from ward in list of voters pertaining to which his name does not appear as voter—Validity of such election.

Under the Bombay Village Panchayats Act, 1933, a person whose name appears in the list of voters of a particular ward can stand for

BOMBAY VILLAGE PANCHAYATS ACT, S. 4—(Contd.)

election from that ward only and not from any other ward in which his name does not appear in the list of voters.

BIKHU SAKHARAM V. B. K. POTDAR.

61 Bom. L. R. 960.

———S. 7B. *See BOMBAY VILLAGE PANCHAYATS ACT, 1933, S. 4.*

61 Bom. L. R. 960.

———S. 7C. *See BOMBAY VILLAGE PANCHAYATS ACT, 1933, S. 4.*

61 Bom. L. R. 960.

BUILDING CONTRACT. *See CENTRAL PROVINCES AND BERAR SALES TAX ACT, 1947, S. 2.*

61 Bom. L. R. 132.

BURDEN OF PROOF.

The bare word of an accused person is not sufficient to discharge the burden of proof of an exception. There must be some corroboration, direct or indirect, of the statement of the accused person.

JAIRAM CHANDRABHAN V. STATE.

61 Bom. L. R. 35.

———*See HINDU MARRIAGE ACT, 1955, S. 12.*

61 Bom. L. R. 431.

———*See LIMITATION ACT, 1922, S. 14.*

61 Bom. L. R. (S.C.) 531.

———*See HINDU MARRIAGE ACT, 1955, S. 10.*

61 Bom. L. R. 1549.

———*See HINDU LAW, JOINT FAMILY PROPERTY.*

61 Bom. L. R. 1651.

BUSINESS, reconstruction of. *See INCOME-TAX ACT, 1922, S. 15C.*

61 Bom. L. R. 380.

"C" SUMMARY. *See CRIMINAL PROCEDURE CODE, 1898, S. 178.*

61 Bom. L. R. 1656.

CENTRAL PROVINCES AND BERAR COURTS ACT (I of 1917), S. 20—Hindu Marriage Act (XXV of 1955), Secs. 19, 3(b), 23—Suits Valuation Act (VII of 1887), Sec. 9 and Rule 311 framed under Act—Additional District Judge deciding proceedings under Hindu Marriage Act—Whether appeal from such decision lies to District Court or High Court.

Under s. 20(c) of the Central Provinces and Berar Courts Act, 1917, an appeal from a decision in a matrimonial proceeding under the Hindu Marriage Act, 1955, given by the District Judge or by an Additional District Judge lies to the High Court.

AMBI PUNDALIK V. PUNDALIK SHANKAR.

61 Bom. L. R. 1167.

CENTRAL PROVINCES AND BERAR INDUSTRIAL DISPUTES SETTLEMENT ACT (XXIII of 1947), S. 2—Relaiwala whose name is entered in attendance register of bidi factory and who works in factory under supervision and control of management—

CENTRAL PROVINCES AND BERAR INDUSTRIAL DISPUTES SETTLEMENT ACT, S. 2—(Contd.)

Whether such relaiwala, whose work in factory consists of rebanding and wrapping bidis, an employee within s. 2(10).

A relaiwala, whose name is entered in the attendance register of a bidi manufacturing factory and who works in the factory under the supervision and control of the management, can be regarded as an "employee" within the meaning of that word as used in s. 2(10) of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947.

RAMKRISHNA V. STATE IND. COURT.

61 Bom. L. R. 1312.

———S. 2—C.P. and Berar Industrial Disputes Settlement Rules, rr. 36(b) & (c)—*Industrial Disputes Act (XIV of 1947), Sec. 2(a)—Employee as defined in s. 2(10) whether must be an employee on date he moves District Industrial Court—Whether under Standing Order 14(1) employee entitled to money compensation for period of accumulated sick leave after date of his retirement.*

An employee as defined in s. 2(10) of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, need not in fact be an employee on the date he moves the Industrial Court. So long as he was employed by the employer against whom he wishes to raise the industrial dispute or a dispute relating to an industrial matter and the dispute raised by him is of the nature required by the definitions of 'industrial dispute' and 'industrial matter' in the Act, he is an employee falling within the definition of s. 2(10) of the Act.

Under clause 14(1) of the Standing Orders (for clerical staff employed in Textiles Mills in Madhya Pradesh, effective from August, 1949, as certified under the Industrial Employment (Standing Orders) Act, 1946) an employee is entitled to receive after retirement money compensation in lieu of the accumulated sick leave.

SAWATRAM ETC. MILLS V. KUNDANMAL.

61 Bom. L. R. 1511.

———S. 14—C.P. and Berar General Clauses Act (I of 1914), Sec. 14—*Person appointed to function as Registrar under s. 14—Whether such person can only be appointed by name.*

There is no requirement under the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, or the rules framed thereunder for publishing the name of the person appointed to function as Registrar of recognised unions. Therefore, under s. 14 of the Act the appointment of the Registrar can be made by virtue of office also.

RASHTRIYA MILL ETC. V. STATE IND. COURT.

61 Bom. L. R. 1279.

CENTRAL PROVINCES AND BERAR LETTING OF HOUSES AND RENT CONTROL ORDER, 1949, Cl. 13—Landlord granted permission to terminate tenancy on ground specified in cl. 13(3)(vii)—Tenant vacating premises—Application made by tenant to Additional Deputy Commissioner, after premises repaired, for reinstatement under cl. 13(7)—

CENTRAL PROVINCES AND BERAR LETTING OF HOUSES AND RENT CONTROL ORDER, CL 13—(Contd.)

Whether Additional Deputy Commissioner has jurisdiction to grant relief to tenant—Jurisdiction conferred under s. 28(1) upon Deputy Commissioner whether restricted to orders made by Rent Control authorities under Order.

Where the tenant, as a result of the permission granted to his landlord to terminate his tenancy under cl. 18(3)(vi) of the C.P. and Berar Letting of Houses and Rent Control Order, 1940, has vacated the premises, the Additional Deputy Commissioner on an application made to him by the tenant under cl. 18(7) of the Order for reinstatement, after the premises are repaired, has jurisdiction under s. 28(1) of the Order to put the tenant in possession of the premises.

The jurisdiction conferred upon the Deputy Commissioner under s. 28(1) of the Order is to secure compliance with the provisions of the Order itself or to prevent contravention of the Order itself and is not restricted to the orders made by the Rent Control authorities under the Order.

JETHALAL LAKHAMJI V. JANKIRAL.

61 Bom. L. R. 427.

—CL. 28. See CENTRAL PROVINCES AND BERAR LETTING OF HOUSES AND RENT CONTROL ORDER, 1940, CL. 18.

61 Bom. L. R. 427.

CENTRAL PROVINCES AND BERAR MATERNITY BENEFIT ACT (VI of 1930), S. 2—Factories Act (LXIII of 1948), Sec. 2(m)—General Clauses Act (X of 1897), Sec. 8(1)—Central Provinces and Berar General Clauses Act (I of 1914), Sec. 7—Factory as defined in s. 2(a) of C. P. & Berar Maternity Benefit Act, 1930, whether means factory as defined in s. 2(m) of Factories Act of 1948—Construction of s. 8(1) of General Clauses Act.

References to the Factories Act, 1934, in s. 2(a) of the Central Provinces and Berar Maternity Benefit Act, 1930, must be construed as references to Factories Act, 1948, by virtue of s. 8(1) of the General Clauses Act, 1897. Therefore, the definition of "factory" contained in s. 2(m) of the Factories Act, 1948, must be read into s. 2(a) of the Central Provinces and Berar Maternity Benefit Act, 1930.

The words "unless a different intention appears" in s. 8(1) of the General Clauses Act, 1897, qualify the precedent words of the section viz., "references in any other enactment or in any instrument" or "this Act or any Central Act or Regulation." Therefore, the contrary intention must be found in the repealing Act or in the other enactment or instrument, and it is not permissible to turn to circumstances outside those Acts or instruments to find whether a contrary intention appears or not.

RADHAKISHAN RAMNATH V. STATE.

61 Bom. L. R. 711.

CENTRAL PROVINCES AND BERAR SALES TAX ACT (XXI of 1947), S. 2—Building materials purchased by contractor to carry out building contract—Whether such materials sold by contractor to owner of building

CENTRAL PROVINCES AND BERAR SALES TAX ACT, S. 2—(Contd.)

within s. 2(g) of Act—Such materials whether liable to sales tax.

Building materials in a building contract which are purchased by a building contractor from third parties and which are used by him in the construction of a building and the property in which, under the contract, was not to pass to the owner when the goods were purchased by the contractor cannot be said to be sold by him to the owner of the building within the meaning of s. 2(g) of the Central Provinces and Berar Sales Tax Act, 1947, and are not, therefore, liable to any sales tax under the Act.

MANJI V. UNION OF INDIA.

61 Bom. L. R. 132.

—S. 11(2). See CENTRAL PROVINCES AND BERAR SALES TAX RULES, 1947, R. 19.

61 Bom. L. R. 1517.

—S. 22. See CENTRAL PROVINCES AND BERAR SALES TAX ACT, 1947, S. 22B.

61 Bom. L. R. 90.

—S. 22B—Assessment order passed by Regional Assistant Commissioner passed prior to coming into force of s. 22B—Whether Sales Tax Commissioner can exercise his revisional powers under s. 22B in respect of such order—Construction of statute—When can statute be presumed not to be retrospective in operation—Whether presumption against retrospective construction applicable to enactments which affect only procedure and practice of Courts or tribunals.

The revisional powers under s. 22B of the Central Provinces and Berar Sales Tax Act, 1947, can be exercised by the Commissioner of Sales Tax even in respect of orders of subordinate authorities passed prior to December 1, 1953 (when s. 22B came into force), provided the revisional order is passed by him before the expiry of two years from the date of the order sought to be revised.

Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation. But the presumption against retrospective construction has no application to enactments which affect only the procedure and practice of Courts or tribunals.

REKHCAND MILLS V. COMM. SALES TAX.

61 Bom. L. R. 90.

CENTRAL PROVINCES AND BERAR SALES TAX RULES, 1947, R. 19—Central Provinces and Berar Sales Tax Act (XXI of 1947), Sec. 11(2)—Whether Sales Tax Officer can transfer case to Assistant Commissioner—Validity of issue of notice under s. 11(2) by Sales Tax Officer when case transferred by him to Assistant Commissioner.

Under the relevant rules framed under the Central Provinces and Berar Sales Tax Act, 1947, the Sales Tax Officer or the Assistant Commissioner has jurisdiction in the first instance to deal with all the cases of registered

CENTRAL PROVINCES AND BERAR
SALES TAX RULES, 1957, R. 19—(Contd.)

dealers in the Vidarbha region and scrutinize their returns, and it is only when he finds from the material on record or it is established that the gross turnover or taxable turnover of the assessee in the year preceding the year of assessment exceeds the pecuniary limit, he has to transfer the case to the Assistant Commissioner. The Act has by necessary implication conferred jurisdiction on the Sales Tax Officer to determine what are the cases which fall within his jurisdiction. Therefore, whatever he does upto that stage, e.g. issue of a notice under s. 11(2) of the Act, is done by him within his jurisdiction, even if he thereafter reaches a conclusion that the case is triable by an Assistant Commissioner.

GOPIKISHAN v. SALES TAX OFFICER.

61 Bom. L. R. 1517.

—R. 67. See CENTRAL PROVINCES AND BERAR SALES TAX RULES, 1947, R. 19.

61 Bom. L. R. 1517.

CITY OF NAGPUR CORPORATION ACT (II of 1950), S. 9—*Rules framed under Act, r. 9(2)—Voter entering polling booth before closing hour but not obtaining voting paper before closing hour—Whether such voter could be excluded from voting under r. 9(2).*

Under r. 9(2) of the Rules framed under s. 9(3) read with s. 420(2)(f) of the Nagpur Corporation Act, 1948, if a voter has entered the polling booth before the closing hour appointed in this behalf, then, whether he has obtained a voting paper or not, he would be entitled to vote.

SHANKARRAO v. 2ND ADD. DIST. JUDGE, NAGPUR.

61 Bom. L. R. 218.

—S. 20A. See CITY OF NAGPUR CORPORATION ACT, 1950, S. 57.

61 Bom. L. R. 1299.

—S. 57—*C. P. and Berar Local Fund Audit Act—Corporation passing resolution to send at its expense delegates at Health Conference in England—Whether resolution beyond powers of Corporation and, therefore, ultra vires—Right of Corporation to incur expenditure—Court's power to issue writ of mandamus or other appropriate writ or order.*

The City of Nagpur Corporation passed a resolution at a meeting of the Corporation accepting an invitation received from the Secretary of the Royal Society for the Promotion of Health, London, requesting it to send delegates at the Health Conference of representatives of Commonwealth countries to be held in England. In pursuance of an order of the Government of India allotting foreign exchange for meeting the expenses out of India for two delegates it was decided to send two delegates to the Conference at the expense of the Corporation. On the question whether the City of Nagpur Corporation Act, 1948, conferred a power upon the Corporation to expend money on the object involved in the resolution passed by the Corporation:—

Held, that the resolution of the Corporation which permitted the incurring of expenditure for sending delegates to the Conference was

CITY OF NAGPUR CORPORATION
ACT, S. 57—(Contd.)

beyond the powers of the Corporation and was, therefore, *ultra vires*.

Quaere: Whether the Corporation was competent to pass a resolution at all selecting delegates for attending the Conference at their own costs.

Section 58(s) of the City of Nagpur Corporation Act contemplates that there must be a reasonable and legitimate connection between what is sought to be done and the promotion of public health, safety and convenience of the public.

Under s. 58(c) of the Act the further educational facilities are those intended for the people in general living within the limits of the Corporation. This section, therefore, cannot be interpreted as permitting expenditure by the Corporation for providing special educational facilities to its Councillors.

Mere sanctioning of an expenditure which is of a special nature by the Corporation is not enough. Either the amount proposed to be spent should be included in the budget [s. 84] or should be expressly sanctioned by the Standing Committee [s. 84, proviso (a)]: If it is not included in the budget or if it is not expressly sanctioned by the Standing Committee, the expenditure would be unauthorized.

Every Municipal Corporation is entitled to spend money only when the power to do so is expressly conferred upon it by the Act bringing the Corporation into existence, or is necessarily implied from any power expressly granted by the Act or is essential to the object for which the Corporation is created.

There must be a substantial compliance with the Constitutional or statutory provision as to the right of the municipal corporation to incur expenditure. Such power is to be exercised by the authority named in the Act and by no one else.

The statutory provision prohibiting the incurring of expenditure out of the municipal fund without prior appropriation cannot be transgressed.

Where money is sought to be expended outside the Corporation limit, a very strong case must be made by the Corporation to show that the incurring of this expenditure was essential to the due performance of its duties by the Corporation and that it was bound to result in benefit to the people living within the municipal limits of the Corporation.

Courts may not inquire into the unreasonableness or reasonableness of a municipal act or ordinance but reasonableness of municipal action is subject to review and inquiry by the Courts.

Under the C. P. and Berar Local Fund Audit Act it is only the Examiner of Local Fund Accounts who can take the initiative and report that an expenditure has been wrongly incurred or a payment has been wrongly made by members of the Municipal Corporation voting on a resolution for incurring such expenditure or making such payment. Under the Act no citizen is entitled to move the Government to take action against the members of the Corporation who had voted for the resolution to refund the amount.

CITY OF NAGPUR CORPORATION ACT, S. 57—(Contd.)

The requirement of a demand by a person who seeks the issue of a writ of *mandamus* is necessary where that person seeks to compel a public authority or a public body to perform its duties under the statute.

If the Court comes to the conclusion that the petitioner is entitled to have his grievance removed, then it has the power to issue an appropriate writ or order though it may not strictly be a writ of *mandamus*.

JOHN SERVAGE V. NAGPUR CORP.

61 Bom. L. R. 1299.

—S. 57 (1) (m)—*Central Provinces and Berar Municipalities Act (II of 1922), Secs. 179(1) (b-1), (d), (cc), 180(a) (b) (c) (d)(g), 178(5)—Constitution of India, art. 19—Whether Corporation can regulate markets by merely passing a resolution to that effect—Amount Corporation authorised to demand for occupation of its stalls whether a fee or rent—Constitutionality of bye-laws 1 and 14(i) & (ii).*

Section 57(1)(m) of the City of Nagpur Corporation Act, 1948, confers a power on the Corporation to regulate markets by making bye-laws in that respect and not by merely passing a resolution. Therefore, where the Corporation sought to regulate meat markets and prohibit the sale of meat in weekly markets by merely passing a resolution, *held* that the action of the Corporation in prohibiting the sale of meat in weekly markets could not be upheld under s. 57(1)(m) of the Act.

The Corporation of the City of Nagpur is empowered under the City of Nagpur Corporation Act, 1948, and bye-law 3 to charge an amount for use and occupation of its property and not fees in the legal sense i.e. charges for the service which is rendered by the Corporation to the occupiers of that property. It is not open to the Corporation to charge or claim any amount it likes as rent for the occupation of its property like markets, stalls etc. but the charges must be reasonable.

Bye-law No. 1 and clauses (i) and (ii) of bye-law No. 14 are not *ultra vires* of the Constitution of India.

NAGPUR K. K. SAMAJ V. CORP. NAGPUR.

61 Bom. L. R. 468.

—S. 58. See CITY OF NAGPUR CORPORATION ACT, 1950, S. 57.

61 Bom. L. R. 1299.

—S. 58-A. See CITY OF NAGPUR CORPORATION ACT, 1950, S. 57.

61 Bom. L. R. 1299.

—S. 84. See CITY OF NAGPUR CORPORATION ACT, 1950, S. 57.

61 Bom. L. R. 1299.

—S. 415. See CITY OF NAGPUR CORPORATION ACT, 1950, S. 57(1)(m).

61 Bom. L. R. 468.

—S. 420. See CITY OF NAGPUR CORPORATION ACT, 1950, S. 9.

61 Bom. L. R. 218.

CIVIL COURT, Jurisdiction of.

Under s. 85(i) of the Bombay Tenancy and Agricultural Lands Act, 1948, a Civil Court is barred from entertaining questions dealing with the exercise of powers conferred upon the Manager by Chapter IV of the Act.

STATE OF B'RAY V. ESTATE INVESTMENT CO.

61 Bom. L. R. 660.

Jurisdiction of.

A civil Court would have jurisdiction to consider the validity of decisions and orders made under the provisions of ss. 182 and 188 of the Sea Customs Act, 1878, on the grounds that the provisions of the Act had not been complied with or that the tribunal had not acted in conformity with the fundamental principles of judicial procedure.

MANAHEM YESHOOVA V. UNION OF INDIA.

61 Bom. L. R. (O.C.J.) 1388.

CIVIL PROCEDURE CODE (ACT V of 1908), S. 60(1)(b)—Protection given by s. 60 (1)(b) whether extends to a firm.

The protection given by s. 60(1)(b) of the Civil Procedure Code, 1908, is to individuals and not to a body of individuals, that is, to a firm.

CHAMPAKLAL V. SWASTIK BHARAT ETC.

61 Bom. L. R. 1356.

—S. 63(2). See CIVIL PROCEDURE CODE, S. 78. 61 Bom. L. R. (F.B.) 1665.

—S. 73—*Set off allowed by Court to decree-holder under O. XXI, r. 72, who has purchased property of judgment-debtor—Whether set off affects right, to rateable distribution of purchase money, of another decree-holder who had applied for execution of his decree to another Court and had attached same property before its sale—Liability cast upon decree-holder who is allowed set off to refund amount if required for rateable distribution whether affected by s. 63(2).*

A set-off allowed by a Court under O. XXI, r. 72, of the Civil Procedure Code, 1908, to a decree-holder, who has purchased the property of his judgment-debtor, cannot affect the right under s. 78 of the Code to rateable distribution of the purchase money of another decree-holder, who had applied for execution of his decree to another Court and had got the same property attached before the date of its sale.

Section 63(2) of the Civil Procedure Code does not in any way affect the liability cast upon the decree-holder, who is allowed a set off under O. XXI, r. 72(2), of the Code, to refund or pay back the amount, if it is required for rateable distribution under s. 78 of the Code.

RAMCHANDRA YESHWANT V. DIGAMBAR, N

61 Bom. L. R. (F.B.) 1665.

—S. 86—*Suit against firm one of the partners of which Ruler of former Indian State—Consent of Central Government to filing of suit against Ruler not obtained—Decree passed against firm whether a nullity.*

A decree passed in a suit against a firm in which one of the partners is a Ruler of a former Indian State is not a nullity on the ground that the consent of the Central Government was not obtained under s. 86 of the

CIVIL PROCEDURE CODE, S. 86—(Contd.)

Civil Procedure Code, 1908, to the filing of the suit against the Ruler. That want of consent can be availed of only by the Ruler, but the other partners cannot claim any immunity under s. 86 or s. 87B of the Code.

MANDALSA KUMARI v. RAMNARAIN PRVT. LTD.
61 Bom. L. R. (O.C.J.) 651.

—S. 87B. See CIVIL PROCEDURE CODE, 1908, S. 86.

61 Bom. L. R. (O.C.J.) 651.

—S. 95—Attachment before judgment on insufficient grounds—Whether such attachment itself an "injury" entitling defendant to compensation under s. 95.

The word "injury" in s. 95 of the Civil Procedure Code, 1908, includes injury to reputation and mental pain, and when attachment is got effected on insufficient grounds, such attachment itself without more will be regarded as having caused the defendant such "injury" as to entitle him to general damages under the section.

JIVANLAL MANILAL v. CHEITALAL.
61 Bom. L. R. 1254.

—S. 97. See CIVIL PROCEDURE CODE, 1908, O. XX, R. 12.

61 Bom. L. R. 348.

—S. 109. See CIVIL PROCEDURE CODE, 1908, S. 110.

61 Bom. L. R. 1016.

—S. 110—Constitution of India, art. 133(1)—Amount or value of subject-matter in dispute in Court of first instance less than twenty thousand rupees—Judgment and decree of High Court, on appeal, involving directly or indirectly claim or question respecting property of value of twenty thousand rupees or upwards—Whether party entitled to certificate under art. 133(1)(b).

Under s. 110 of the Civil Procedure Code, 1908, read with art. 133(1) of the Constitution of India, a party would be entitled to a certificate under art. 133(1)(b) of the Constitution provided his case falls under that clause even though the amount or value of the subject-matter in dispute in the Court of first instance is less than twenty thousand rupees.

YAGNAPURUSHDASJI v. MULIDAS.
61 Bom. L. R. 1016.

—O. XX, r. 12—Preliminary decree stating that mesne profits to be awarded until delivery of possession—Whether decree could be constituted as awarding mesne profits only upto three years from date of decree.

When a preliminary decree is passed under O. XX, r. 12, of the Civil Procedure Code, 1908, for payment of mesne profits until delivery of possession of property, mesne profits cannot be awarded for a period of more than three years from the date of the decree.

BHAGWANT VINAYAK v. RADHAKRISHNAN.
61 Bom. L. R. 348.

—O. XXI, r. 46(3)—Indian Income-tax Act (XI of 1922), Sec. 46(5A)—Execution of decrees—Judgment-debtor complying with notice issued against him under s. 40(5A) of Indian Income-tax Act and paying amount to Income-tax Officer payable by assessee

CIVIL PROCEDURE CODE, O. XXI, R. 46.

—(Contd.)

judgment-creditor—Whether judgment-debtor discharged from liability to extent of payment made to Income-tax Officer—Judgment-creditor whether competent to execute decree for such payment made to Income-tax Officer.

Where the liability of the judgment-debtor to pay the decretal amount is discharged by virtue of the provisions contained in s. 46(5A) of the Indian Income-tax Act, 1922, the Court executing the decree must recognise this statutory discharge of liability to the extent of the payment made and the decree-holder becomes incompetent to execute the decree for the amount paid by the judgment-debtor to the Income-tax Officer.

ABDUL KARIM v. HAJI MAHOMED.

61 Bom. L. R. 625.

—O. XXI, R. 72. See CIVIL PROCEDURE CODE, 1908, S. 73.

61 Bom. L. R. (F.B.) 1665.

—O. XXX, R. 1. See CIVIL PROCEDURE CODE, 1908, S. 86.

61 Bom. L. R. (O.C.J.) 651.

—O. XXXII, r. 10—Decree made without formal order of appointment of next friend where minor one of plaintiffs or appellants—Whether such decree a nullity—Applicability of O. XXXII, r. 10(1).

A decree made without a formal order of appointment of a next friend in a case where a minor was one of the plaintiffs or appellants, does not amount to a nullity merely on the ground of failure to appoint a next friend of the minor.

Order XXXII, r. 10(1), of the Civil Procedure Code, 1908, is attracted only when the fact of the death of the next friend is brought to the notice of the Court.

GULABCHAND NANHOOLAL v. FULCHAND.

61 Bom. L. R. 484.

COMMISSIONS OF ENQUIRY ACT (LX

of 1952), S. 3—Constitution of India, Art. 14, Seventh Schedule, List I entry 94, List III entry 45—Meaning of expression "any definite matter of public importance" in s. 3(1) of Act—Whether conduct of individual person or company or group of individual persons could call for inquiry under Act—Nature of functions, performance of which contemplated by s. 3—Law with respect to inquiries for purpose of any matter in Lists I, II and III whether can cover any aspect of the matter and be for administrative purpose—Scope of inquiry under law made under entries 95 and 45 of Lists I and III respectively whether limited to future legislative purpose—Principles to be followed by Courts when constitutionality of law attacked as violating art. 14—Basis of permissible classification whether can be gathered from extraneous materials—Whether Court can deny existence of discretionary power conferred on Government on the bare possibility that such power may be misused or abused.

The expression "any definite matter of public importance" in s. 3(1) of the Commissions of Enquiry Act, 1952, does not mean only some matter involving the public benefit or advantage in the abstract, e.g.

COMMISSIONS OF ENQUIRY ACT,
S. 3—(Contd.)

public health, sanitation or the like or some public evil or prejudice, e.g. floods, famine or pestilence or the like. The conduct of an individual person or company or a group of individual persons or companies may assume such a dangerous proportion and may so prejudicially affect or threaten to affect the public well-being as to make such conduct a definite matter of public importance urgently calling for a full inquiry under the Act.

The functions, the performance of which is contemplated by s. 8 of the Commissions of Enquiry Act, 1952, must be such as are ancillary to and in aid of the inquiry itself and cannot be read as a function independent of or unconnected with such inquiry.

The law to be made by the appropriate Legislature with respect to entry 95 in List I and entry 45 in List III of the Seventh Schedule to the Constitution of India may cover inquiries into any aspect of the matters enumerated in any of the lists mentioned therein and is not confined to those matters as mere heads of legislative topics. The law with respect to inquiries for the purpose of any of the matters in the lists may also be for administrative purposes and the scope of the inquiry under such a law will cover all matters which may properly be regarded as ancillary to such inquiries. The words "for the purposes of" in the aforesaid entries indicate that the scope of the inquiry is not necessarily limited to the particular or specific matters enumerated in any of the entries in the list concerned but may extend to inquiries into collateral matters which may be necessary for the purpose, legislative or otherwise, of those particular matters. Therefore, the inquiry which may be set up by a law made under these two entries is, in its scope or ambit, not limited to future legislative purposes only.

The words "as and by way of securing redress or punishment" in the later part of cl. (10) of notification No. S.R.O. 2993 dated December 11, 1956, issued by the Union of India under s. 8 of the Commissions of Enquiry Act, 1952, go outside the scope of the Act and such provision is not covered by the above two legislative entries and must, therefore, be deleted. The efficacy of the notification is in no way affected by the deletion of the offending words mentioned above.

The following principles must be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws:—

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are

COMMISSIONS OF ENQUIRY ACT
S. 3—(Contd.)

directed to problems manifest by experience and that its discriminations are based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

A statute which may come up for consideration on a question of its validity under art. 14 of the Constitution of India, may be placed in one or other of the following five classes:—

(1) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law.

(2) A statute may direct its provisions against one individual person or thing or to several individual persons or things, but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the Court will strike down the law as an instance of naked discrimination.

(3) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the

COMMISSIONS OF ENQUIRY ACT, S. 3—(Contd.)

selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situated and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such law.

(4) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the Court will uphold the law as constitutional.

(5) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by the Supreme Court, e.g. in *Kathi Rawat v. The State of Saurashtra*, [1952] S. C. R. 435, that in such a case the executive action but not the statute should be condemned as unconstitutional.

The basis of permissible classification under art. 14 of the Constitution need not appear on the face of the law itself but may be gathered from any extraneous materials.

The bare possibility that the wide discretionary powers conferred on the Government by a statute may be misused or abused by the Government cannot *per se* induce the Court to deny the existence of the powers.

RAM KRISHNA DALMIA v. TENDOLKAR J.

61 Bom. L. R. (S.C.) 192.

COMPANIES ACT (VII of 1913), S. 138.

An inspector appointed under s. 138(iv) of the Indian Companies Act, 1913, can by virtue of s. 645 of the Companies Act, 1956, with the prior approval of the Central Government under s. 239(2) of the Companies Act, 1956, exercise the powers under s. 239 of the Companies Act, 1956.

NARAYANLAL BANERJEE v. M. P. MISTRY.

61 Bom. L. R. (O.C.J.) 220.

COMPANIES ACT (I of 1956), S. 155—*Application made under s. 155 involving questions of forgery and fabrication of deed of transfer of shares—Whether such questions can be tried under summary procedure of application under s. 155.*

The summary procedure of trial by petition under s. 155 of the Companies Act, 1956, should not be allowed to be resorted to by the Court where discovery and inspection are necessary and complicated questions such as of forgery and fabrication of documents arise for decision in the petition.

JAYSHREE D. RAJKAMAL KALAMANDIR.

61 Bom. L. R. (O.C.J.) 1245.

S. 166—*Whether elected director continues to hold office as director after expiry of period for calling annual general meeting under s. 166.*

The tenure of office of the elected directors of a company does not continue after the expiry of the statutory period laid down under s. 166 of the Companies Act, 1956, for calling an annual general meeting.

KRISHNAPRABHU D. COLABA LAND & MILLS.

61 Bom. L. R. (O.C.J.) 636.

S. 235—*Indian Companies Act (VII of 1913), Secs. 137, 138, 140, 141—Constitution of India, Arts. 20, 14—Inspector appointed under s. 138(iv) of Act of 1913—Pending investigation, Act of 1956 coming into force—Central Government according approval to inspector under s. 239(2) of Act of 1956 exercising powers of investigation into affairs of managing agent including his personal books and accounts—Whether inspector can exercise powers under s. 239(2)—Accusation referred to in art. 20(3) of Constitution whether an accusation without reference to any criminal proceeding—Investigation held by inspector whether a criminal proceedings—Applicability of art. 20(3) to s. 240(5) of Act of 1956—Obiter of Supreme Court—Whether High Court must accept such obiter as laying down correct law—Supreme Court in interpreting clause of statute or article of Constitution interpreting whole section or article—Whether such interpretation of whole section or article binding upon High Court—Construction of statute—Section saving certain provisions of earlier law generally—Later section in same statute saving particular provision or provisions generally saved in previous section—Whether by reason of such specific mention of particular provision, provisions dealt with by earlier section not saved.*

An inspector appointed under s. 138(iv) of the Indian Companies Act, 1913, can by virtue of s. 645 of the Companies Act, 1956, with the prior approval of the Central Government under s. 239(2) of the Companies Act, 1956, exercise the powers under s. 239 of the Companies Act, 1956.

If the Legislature saves and deals with a particular provision of the law, when in the earlier sections it had dealt generally and saved other provisions of the law, it does not follow that by reason of the specific mention of a particular provision of the law the other provisions dealing with the same subject are not saved and do not fall within the general provisions contained in the earlier sections.

The accusation referred to in art. 20(3) of the Constitution of India is an accusation with

COMPANIES ACT, S. 235—(Contd.)

reference to a criminal proceeding and, therefore, as an investigation held by an inspector appointed under the Companies Act, 1956, to investigate the affairs of a company, is not a criminal proceeding, art. 20(3) of the Constitution is not applicable to the provisions of s. 240(5) of the Companies Act, 1956, under which there is an obligation upon the person examined to answer questions put to him and the possibility of these answers being used in evidence against him although the answers may be of an incriminating nature.

Even an *obiter* of the Supreme Court of India deserves the highest respect and it is incumbent upon the High Court to accept even the *obiter* as correctly laying down the law.

When in a case a particular clause of a section or an article in the Constitution of India calls for interpretation, and in order to interpret it the Supreme Court interprets the whole section or article and lays down the proper canon of construction, that interpretation is binding upon the High Court unless the Supreme Court in any subsequent decision has departed from the interpretation laid down by it in this decision.

NARAYANLAL BANSILAL v. M. P. MISTRY.

61 Bom. L. R. (O.C.J.) 220.

—S. 237. See COMPANIES ACT, 1956, S. 235. 61 Bom. L. R. (O.C.J.) 220.

—S. 239. See COMPANIES ACT, 1956, S. 235. 61 Bom. L. R. (O.C.J.) 220.

—S. 240. See COMPANIES ACT, 1956, S. 235. 61 Bom. L. R. (O.C.J.) 220.

—S. 255. See COMPANIES ACT, 1956, S. 100. 61 Bom. L. R. (O.C.J.) 636.

—S. 256. See COMPANIES ACT, 1956, S. 100. 61 Bom. L. R. (O.C.J.) 636.

—S. 260. See COMPANIES ACT, 1956, S. 100. 61 Bom. L. R. (O.C.J.) 636.

—S. 312—*Transfer of office of managing director by will—Whether such transfer permissible.*

Section 312 of the Companies Act, 1956, prohibits the assignment or transfer of the office of a director as well as a managing director, whether by a deed *inter vivos* or by a will.

ORIENTAL M. P. WORKS v. BHASKAR.

61 Bom. L. R. 1045.

—S. 345. See COMPANIES ACT, 1956, S. 312. 61 Bom. L. R. 1045.

—S. 645. See COMPANIES ACT, 1956, S. 235. 61 Bom. L. R. (O.C.J.) 220.

—S. 646. See COMPANIES ACT, 1956, S. 235. 61 Bom. L. R. (O.C.J.) 220.

COMPROMISE, by Advocate. See ADVOCATE. 61 Bom. L. R. 757.

CONSTITUTION OF INDIA, ART. 13.

Article 13(3) of the Constitution of India does not confer upon the order, rule, regulation, notification, etc. referred to in cl. (a) of art. 13(3), the character identical with the character of the Act of the Legislature. All that it says is that the order, notification etc. shall have the same force, and shall be treated on the same footing as the Act of the Legislature.

BHUKUBA D. SANGAMNER BIDI KAMGAR UNION. 61 Bom. L. R. 764.

—ART. 14.

The following principles must be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws:—

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems manifest by experience and that its discriminations are based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

A statute which may come up for consideration on a question of its validity under art. 14 of the Constitution of India, may be placed in one or other of the following five classes:—

(1) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes

CONSTITUTION OF INDIA, ART. 14 —(Contd.)

such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law.

(2) A statute may direct its provisions against one individual person or thing or to several individual persons or things, but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the Court will strike down the law as an instance of naked discrimination.

(3) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such law.

(4) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the Court will uphold the law as constitutional.

(5) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has

CONSTITUTION OF INDIA, ART. 14 —(Contd.)

been held by the Supreme Court, e.g. in *Kathi Raning Ramat v. The State of Saurashtra*, [1952] S.C.R. 435, that in such a case the executive action but not the statute should be condemned as unconstitutional.

The basis of permissible classification under art. 14 of the Constitution need not appear on the face of the law itself but may be gathered from any extraneous materials.

RAM KRISHNA DALMIA v. TENDOLKAR J.

61 Bom. L. R. (S.C.) 192.

—ART. 14.

Where the right conferred upon a person is not guaranteed by the Constitution and does not flow from it and is neither a fundamental right, nor a common law right, nor a natural, inherent or unalienable right, but a franchise dependent upon the law and is thus merely a creature of a statute, it can be asserted only to the extent and subject to the conditions specified in the statute creating it. Therefore, where the Legislature brings into existence a political institution and makes any provisions concerning its constitution or composition, the provisions of the law which bring the institution into existence cannot be challenged under art. 14 of the Constitution, on the ground that the various interests concerned are unequally represented thereon.

MANILAL v. UNION OF INDIA.

61 Bom. L. R. (O.C.J.) 976.

—ART. 20 (3)—*Criminal Procedure Code (Act V of 1898), Sec. 162—Accused without compulsion furnishing evidence which could be used against him—Whether using such evidence at trial of accused violates constitutional guarantee under art. 20 (3)—Whether asking accused to give his handwriting for purpose of comparison with disputed document amounts to taking statement under s. 162 of Code.*

The constitutional guarantee under art. 20(3) of the Constitution of India protects a person accused against being compelled to furnish evidence against himself. Where the evidence is collected by a police officer under a judicial mandate as in the case where pursuant to a search warrant, documents or things are seized and produced in Court, there is no circumvention of the constitutional guarantee; nor is every volitional act of a person accused which is evidence, or facilitates collection of evidence against him, to be deemed compelled merely because the act is, relied upon in the judicial proceeding against the person accused. Therefore, the Constitution does not prohibit a person accused of an offence from furnishing evidence which may be used against him; it only affords a protection against compulsion in furnishing evidence.

When a person accused of an offence accompanies a police officer in the course of investigation or complies with a request to give his handwriting or thumb impression for comparison, he does not give a statement, proof of which is prohibited by s. 162 of the Criminal Procedure Code, 1898.

ABU ISMAIL MERCHANT v. STATE.

61 Bom. L. R. 345.

CONSTITUTION OF INDIA, ART. 113.

Under s. 110 of the Civil Procedure Code, 1908, read with art. 133(1) of the Constitution of India, a party would be entitled to a certificate under art. 133(1)(b) of the Constitution provided his case falls under that clause even though the amount or value of the subject-matter in dispute in the Court of first instance is less than twenty thousand rupees.

YAGNA PURUSHDASJI D. MULDAS.

61 Bom. L. R. 1016.

ART. 226.

The word "authority" in art. 226 of the Constitution of India does not include a purely judicial tribunal. A quasi-judicial body or tribunal (that is, an administrative or executive body or tribunal entrusted with judicial functions) will fall within the ambit of the word "authority". But where the sole function of a tribunal is to administer justice judicially, it cannot fall within the expression "authority."

BHAGWANDAS D. B'RAY REV. TRIBUNAL.

61 Bom. L. R. 1406.

ART. 248.

The entries in the Lists contained in the Seventh Schedule to the Constitution of India are Legislative heads primarily designed to demarcate the areas of legislative competence of the Union and the State Legislatures. They give *simple enumeration* of categories of legislation and are not designed to circumscribe or logically define the ambit of art. 248 of the Constitution. It would be difficult, therefore, to read in any entry in List I any restriction by implication or otherwise on the residuary legislative power conferred on the Union Legislature by art. 248.

MAHAVIRPRASAD C. M. S. YAGNIK.

61 Bom. L. R. (O.C.J.) 1433.

ART. 310—*Army Instructions in India—Civilian employed in defence service whether entitled to protection under art. 311(2)—Whether non-observance of rules in Army Instructions gives cause of action to such civilian—Army Instructions whether affect art. 310.*

A person holding any post connected with defence within the meaning of art. 310(1) of the Constitution of India is not included in the class of persons holding a civil post under the Union referred to in art. 311(1) of the Constitution. A civilian employed in defence service is not entitled to protection under art. 311 and is not entitled to any reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

The rules contained in Army Instructions in India (No. 212/1949 dated June 25, 1949) do not affect the provisions of art. 310 of the Constitution regarding the tenure of office of persons employed in the service of Government of India or State. The Army Instructions, therefore, are not binding on the Union and the non-observance of the rules contained therein do not give any cause of action to a civilian employed in the defence service.

TARA SINGH V. UNION OF INDIA.

61 Bom. L. R. (O.C.J.) 1185.

CONSTITUTION OF INDIA, ART. 311.

See CONSTITUTION OF INDIA, ART. 310.

61 Bom. L. R. (O.C.J.) 1185.

ART. 311—*Government of India Act, 1935, [25 & 26 Geo. V, Ch. 42], Sec. 240 (8)—Departmental proceedings duly carried out against plaintiff, a police officer, and order of punishment made against him—Government issuing show cause notice against plaintiff for enhancement of punishment—Plaintiff dismissed from service by Government—Whether necessary for Government to mention and include in show cause notice grounds why it wanted to impose enhanced punishment—Plaintiff whether given a reasonable opportunity of showing cause against action proposed to be taken against him—Validity of show cause notice.*

A departmental enquiry duly carried out satisfies the provisions of art. 311(2) of the Constitution of India so far as opportunity is to be afforded to a Government servant in connection with the investigation of charges levelled against him. After such an enquiry is duly carried out, it is unnecessary under the provisions of art. 311(2) to give a second opportunity to the Government servant (defaulter) to once again reargue the matter as regards the conclusions already reached in the departmental enquiry.

Certain departmental inquiry proceedings were duly carried out against the plaintiff who was a police officer and he was reduced in the pay-scale grade for a period of one year. This punishment was confirmed in appeal and the plaintiff accepted the order of punishment as binding and suffered the punishment. Thereafter, by a show cause notice, the State of Bombay considering that the punishment inflicted upon the plaintiff was inadequate, called upon him to show cause why he should not be dismissed from the police force. In reply to this notice the plaintiff in his representations raised all contentions as regards the merits of the charge levelled against him as also the quantum of punishment. The plaintiff was subsequently dismissed from the police force. In a suit filed by the plaintiff against the State it was contended that he was entitled to a show cause notice calling upon him to show cause against the decision arrived at in the departmental inquiry and also that the decision in the departmental inquiry was the ground on which the State had relied for the purpose of enhancement of punishment and that, therefore, he had not been given a reasonable opportunity of showing cause against the action proposed to be taken against him as required under art. 311(2) of the Constitution of India, and his dismissal was, therefore, invalid:

Held, that in the circumstances of the case, the plaintiff had reasonable opportunity of showing cause in respect of the charge levelled against him as also the quantum of punishment that was intended to be inflicted upon him and that it was not necessary that further grounds regarding the intended punishment of dismissal ought to have been mentioned or included in the notice given by the Government, and

CONSTITUTION OF INDIA, ART. 311 (Contd.)

that the notice was in conformity with art. 311(2) and the order of dismissal was valid.
D. A. KRISHNAR V. STATE OF BOMBAY.
61 Bom. L. R. (O.C.J.) 1625.

ART. 311(1).

A person holding any post connected with defence within the meaning of art. 310(1) of the Constitution of India is not included in the class of persons holding a civil post under the Union referred to in art. 311(1) of the Constitution.

TARA SINGH V. UNION OF INDIA.
61 Bom. L. R. (O.C.J.) 1185.

ART. 363.

When a citizen seeks to enforce his contractual right or his rights under the ordinary law of the land, merely because he is asserting those rights against the State, the State cannot rely on the provisions of art. 363 of the Constitution of India for contending that because the liability was taken over by the State from the merging State under a covenant, the right of citizen cannot be adjudicated in a Civil Court as provided by art. 363 of the Constitution. The covenant itself may be looked upon as a waiver by the Covenantee State of its right to ignore private rights of the citizen of the State of which it is the successor.

BHOJRAJJI V. SAURASHTRA STATE.
61 Bom. L. R. (F.B.) 20.

Seventh Schedule. See CONSTITUTION OF INDIA, ART. 248.

61 Bom. L. R. (O.C.J.) 1433.

Seventh Schedule, List II, entry 86.

The expression "individuals" used in entry No. 86 in List I of the Seventh Schedule to the Constitution of India includes an association of individuals such as a Hindu undivided family.

MAHAVIRPRASAD V. M. S. YAGNIK.
61 Bom. L. R. (O.C.J.) 1433.

List I, entry 95.

The law to be made by the appropriate Legislature with respect to entry 95 in List I and entry 45 in List III of the Seventh Schedule to the Constitution of India may cover inquiries into any aspect of the matters enumerated in any of the lists mentioned therein and is not confined to those matters as mere heads of legislative topic. The law with respect to inquiries for the purpose of any of the matters in the list may also be for administrative purposes and the scope of the inquiry under such a law will cover all matters which may properly be regarded as ancillary to such inquiries. The words "for the purposes of" in the aforesaid entries indicate that the scope of the inquiry is not necessarily limited to the particular or specific matters enumerated in any of the entries in the list concerned but may extend to inquiries into collateral matters which may be necessary for the purpose, legislative or otherwise, of those particular matters. Therefore, the inquiry which may be set up by a law made under these two entries is, in its scope or

CONSTITUTION OF INDIA, LIST I ENTRY 95—(Contd.)

ambit, not limited to future legislative purposes only.

RAM KRISHNA DALMIA V. TENDOLKAR J.
61 Bom. L. R. (S.C.) 192.

List III, entry 45. See CONSTITUTION OF INDIA, LIST I, ENTRY 95.

61 Bom. L. R. (S.C.) 192.

CONSTRUCTION OF STATUTE—*Bombay Rents, Hotel and Lodging House Rents Control Act, s. 28.*

In order to decide whether a suit comes within the purview of s. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, what must be considered is what the suit as framed in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of a claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by s. 28 of the Act.

JASWANTILAL V. "WESTERN COMP., INDIA".
61 Bom. L. R. 1087.

General and special provisions relating to public matter.

Where there are two sets of provisions dealing with same public matter, one section being unqualified and the other containing a qualification, effect must be given to those provisions containing qualifications. But for this principle to apply, the general and special provisions must be applicable to the same set of circumstances. Where the general principles deal with one set of circumstance and the special provisions deal with another set of circumstance, the latter provisions will apply only where those other circumstances exist.

PARBHANI TRANSPORT, LTD. V. BEDEKAR.
61 Bom. L. R. 1572.

Implied powers, doctrine of.

The doctrine of implied powers under a statute can be applied only where the following conditions are fulfilled:—

(1) There must be duty imposed or power prescribed.

(2) On a reasonable construction of the statute there must be an impossibility in the exercise or fulfilment of that power, resulting in making its object or purpose nugatory.

(3) The impossibility must be such that it is not an impossibility in an individual case because there the law cannot permit powers by implication, but the impossibility must be of a general nature so that the purpose and object of the duty or power is rendered impossible of achievement in every case. It is only then that powers by implication can be inferred.

(4) The implication cannot contradict the expressed intent which must always prevail and where it becomes necessary to read an implication into an enactment the scope of the implication must be limited only to what is reasonably necessary and no more.

BIDI & TOBACCO MERCHANTS ASS'N V. STATE.
61 Bom. L. R. 890.

CONSTRUCTION OF STATUTE —(Contd.)

Legislative practice.

If the Legislature of a country has been accustomed to use any word or expression with a more restricted or extended meaning than might be commonly attributed to it in its ordinary sense, the Court should not blandly shut out that consideration but should avail of that assistance, albeit limited, in the process of interpretation. Legislative practice is one of the accepted aids to construction and furnishes extrinsic evidence to which resort may legitimately had when the Court has to construe a word or phrase and the task of preferring one meaning to another can really be said to have arisen.

MAHAVIRPRASAD v. M. S. YAGNIK.

61 Bom. L. R. (O.C.J.) 1433.

Penal statute.

Penal statutes are construed with reference to the true meaning and the real intention of the Legislature.

PARMAR & Co. v. V. R. GUPTA.

61 Bom. L. R. (O.C.J.) 1482.

Proviso.

The duty of the Court is to effect a harmonious construction between a proviso and the provision to which it is a proviso and so far as possible the proviso must be so interpreted and its meaning so restricted as to bring it within the ambit and purview of the main provision itself.

SHEIKH RAHMAN v. RAJE NILKANTHARAO.

61 Bom. L. R. (F.B.) 1203.

Reasonableness how adjudged.

In ascertaining whether the impugned statute is unreasonable, no abstract tests can be laid down. Reasonableness or otherwise of the statute has to be adjudged in the light of the nature of the right infringed, the object of imposing the restriction, the extent and the gravity of the evil to be remedied, the degree of harm or inconvenience to the aggrieved citizen in the context of the benefit intended to be achieved for the benefit of society and similar other considerations. Even serious inconvenience or hardship resulting to a citizen by the imposition of a restriction on the exercise of his fundamental rights cannot be decisive of unreasonableness of a statute. Nor can the restriction be called unreasonable because its degree or extent is delimited by reference to a point of time or some period in the past.

STATE v. DHANRAJ MILLS.

61 Bom. L. R. 1291.

Rule of construction relating to provisions of enactment in pari materia—Decisions of English Courts on analogous provisions of English law how far to be adhered to.

On analogous provisions of the Indian law unaffected by the specialities of the English law and on fundamental concepts and on broad general principles, decisions of Courts in England may be useful and of considerable guidance if utilised with due care and caution. Danger, however, lies in phrases used aptly enough in a particular context and opinions weighty and useful in their own sphere and

CONSTRUCTION OF STATUTE —(Contd.)

context being treated as doctrine of universal application or adopting those principles as riders to the actual statutory language. Rigid adherence to decisions of Courts in England must be deprecated and particularly when they have a bearing on the English law of property with its highly technical and overrefined rules affecting realty which operated when the English enactment came into force.

The rule of construction relating to provisions of enactments *in pari materia* is one of great convenience, and aid from outside may legitimately be derived when any doubtful point of interpretation of any provision has to be solved. But reference to it simply on the ground of similarity has to be avoided.

KHATIBABAI v. CONTROLLER OF ESTATE DUTY.

61 Bom. L. R. 719.

"Shall", how to be construed.

In order to place a proper construction on the expression "shall" in a statute the Court must look to the scheme of the Act in order to determine what are the consequences which the law has laid down as a result of non-compliance with that mandatory direction. The consequence may be penal, the consequence may be that a particular order passed is invalidated, the consequence may be that a particular right is not acquired or a particular obligation is imposed, or the consequence may be not stated in the law at all. When no consequence is apparent in the law it is possible for the Court to take the view that although the statute has used the expression "shall" it must be construed as being directory or procedural rather than mandatory in the strict sense of the term.

STATE OF BOMBAY v. MORARJI.

61 Bom. L. R. (O.C.J.) 318.

Speech made in Parliament.

Speech made in the Parliament by the sponsor of a Bill may be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce it and the extent and urgency of the evil which he sought to remedy.

PUKHRAJ v. D. R. KOHLI.

61 Bom. L. R. 1230.

Statement of Objects and Reasons.

The Statement of Objects and Reasons which led to the enactment of a statute is not admissible as an aid to the construction of the statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy.

SHEIKH RAHMAN v. RAJE NILKANTHARAO.

61 Bom. L. R. (F.B.) 1203.

Statement of Objects and Reasons.

In interpreting the words used in a statute, especially when the words used are plain, the Statement of Objects and Reasons cannot be pressed into service. In construing a statute the Court may consider the legislative history,

CONSTRUCTION OF STATUTE (Contd.)

may also consider what was the understanding of the law prior to the amendment and may even ascertain what the defect sought to be remedied by enacting the amending Act was. But the Courts are not entitled to interpret the Act by assuming that the Legislature has effectuated the purpose which it had in mind as set out in the Objects and Reasons and has only effectuated that purpose and no other purpose.

ONKARMAI MEGHRAJ V. COMMR. INC.-TAX.
61 Bom. L. R. 1373.

Subsequent legislation, effect on.

If a statute is clear and unambiguous, then, subsequent legislation cannot affect its interpretation. It is the duty of the Court to interpret a statute and not for the Legislature to do so and this has to be done with reference to the language used in the statute itself. An amendment is not necessarily made to remove a lacuna. It may be introduced *ex majore causa*.

STATE OF BOMBAY V. DAVALBHAI.
61 Bom. L. R. 1247.

Taxing statute, provision relating to exemption in.

A provision relating to exemption in a taxing statute must as far as possible be liberally construed and in favour of the assessee, provided in doing so no violence is done to the language used.

COMMR., I. TAX V. GAEKWAB F. & R. Co.
61 Bom. L. R. 380.

CONTRACT ACT (IX of 1878), S. 23.
See BOMBAY RENTS, HOTEL AND LODGING
HOUSE RATES CONTROL ACT, 1947, S. 15.
61 Bom. L. R. (S.C.) 1011.

CORRUPT PRACTICE. See REPRESENTATION
OF THE PEOPLE ACT, 1951, S. 123.
61 Bom. L. R. 500.

COTTON TEXTILES (CONTROL)
ORDER, 1948, Cl 3—*Essential Supplies (Temporary Powers) Act (XXIV of 1946), Secs. 7, 8, 9—Constitution of India, art. 19—Whether "yarn" in cl. 3 (aa) includes yarn manufactured from cotton waste—Obligation to pack yarn under cl. 21(3) (c) whether restricted to type of yarn packed in basic period—Reasonableness of statute how to be adjudged—Whether serious inconvenience or hardship resulting to citizen by restriction imposed on his fundamental rights decisive of unreasonableness of statute.*

The expression "yarn" used in cl. 3 (aa) of the Cotton Textiles (Control) Order, 1948, includes yarn manufactured from cotton waste.

Under cl. 21(3)(c) of the Cotton Textiles (Control) Order, 1948, the obligation to pack yarn is not restricted to the particular type of yarn which was packed in the basic years 1949 and 1950.

In ascertaining whether the impugned statute is unreasonable, no abstract tests can be laid down. Reasonableness or otherwise of the statute has to be adjudged in the light of the nature of the right infringed, the object of imposing the restriction, the extent and the

COTTON TEXTILES (CONTROL) ORDER, 1948, Cl. 3—(Contd.)

gravity of the evil to be remedied, the degree of harm or inconvenience to the aggrieved citizen in the context of the benefit intended to be achieved for the benefit of society and similar other considerations. Even serious inconvenience or hardship resulting to a citizen by the imposition of a restriction on the exercise of his fundamental rights cannot be decisive of unreasonableness of a statute. Nor can the restriction be called unreasonable because its degree or extent is delimited by reference to a point of time or some period in the past.

STATE V. DHANRAJ MILLS.
61 Bom. L. R. 1291.

Cl. 21. See COTTON TEXTILES
(CONTROL) ORDER, 1948, Cl. 3.
61 Bom. L. R. 1291.

COURT, jurisdiction of.

In every plaint the plaintiff has to aver that the Court in which it is filed has jurisdiction over the subject-matter of the claim made therein. In the absence of such an averment, the Court must reject it, unless the Court is satisfied from the other averments in the plaint that it has, *prima facie*, jurisdiction to entertain the plaint and that the plaintiff's omission to make the averment as to jurisdiction is a mere clerical or accidental error. But where a plaintiff lodges his claim and denies the jurisdiction of the Court to entertain it, the Court must throw it out forthwith. The position is not different where an initial averment as to the Court's jurisdiction is withdrawn by the plaintiff, either expressly or by necessary implication, later on.

MUNICIPAL CORP. V. AKBAR SARELA.
61 Bom. L. R. 1097.

powers of, in cases of writs.

The reason why the Courts refuse to entertain writs when an alternative remedy is available is that the Legislature has set up tribunals for decision in appeals and that the remedy which the Court could give, the petitioner could obtain from these tribunals. But whether the petitioner should be disentitled to maintain the petition or not is a matter of discretion with the Court, and if the Court is satisfied that the petitioner will not get justice from the appellate tribunal or that he would have no confidence in the decision of the tribunal or that the appeal would be nothing more than an appeal from Caesar to Caesar, then the Court is not bound to accede to the submission of the State that it should not hear the petitioner and the petitioner should be referred to the appellate tribunal set up under the Act.

GLAXO LABORATORIES V. VENKATESWARAN.
61 Bom. L. R. (O.C.J.) 1.

COURT-FEES ACT (VII of 1870), S. 6(1)
—*Government of India Act, 1935 [25 & 26 Geo. V, Ch. 42], Secs. 292, 100(3); Seventh Schedule, List II, Item 1—Constitution of India, arts. 327 (1), 246 (3), 266; Seventh Schedule, List II, Items 3, 66—Court-fee paid on plaint filed in Court at Delhi—Plaint after its return by Delhi Court presented in Bombay High Court—*

COURT-FEES ACT, S. 6—(Contd.)

Whether fresh Court-fee payable in Bombay Court in respect of plaint.

The provision in s. 6(1) of the Court-fees Act, 1870, about payment of Court-fees mean payment to the Government of the State within which State the particular Court in which the Court-fee is payable is situated.

BRINDALAL V. GOKAL & HAFMAN.

61 Bom. L. R. (O.C.J.) 996.

—S. 7 (iv) (f)—*Plaintiff valuing suit for accounts—Defendant not challenging such valuation in Court of first instance—Whether defendant in filing appeal against preliminary decree for accounts can alter valuation made by plaintiff.*

Where the plaintiff has made a valuation of a suit for accounts under s. 7(iv)(f) of the Court-fees Act, 1870, and the defendant has not challenged that valuation in the Court of first instance, it is not open to the defendant in filing an appeal against the preliminary decree for accounts to alter the valuation made by the plaintiff for purposes of court-fee.

DATTATRAYA NAGESH V. GANESH.

61 Bom. L. R. 599.

—Sch. II, item 17 (vi). See BOMBAY MONEY-LENDERS ACT, 1947, S. 24.

61 Bom. L. R. 1591.

CRIMINAL LAW AMENDMENT ACT (XLVI of 1952), S. 6. See CRIMINAL PROCEDURE CODE, 1898, S. 173.

61 Bom. L. R. 591.

—S. 7. See CRIMINAL PROCEDURE CODE, 1898, s. 173.

61 Bom. L. R. 591.

—S. 8. See CRIMINAL PROCEDURE CODE, 1898, S. 173.

61 Bom. L. R. 591.

CRIMINAL PROCEDURE CODE (Act V of 1898), S. 154—*Indian Penal Code (Act XLV of 1860), Sec. 30—Bombay Sales Tax Act (Bom. III of 1903), Secs. 9 proviso (1), 12—Bombay Sales Tax (Registration, Licensing and Authorisation) Rules, 1954, Rule 13(2)—First information report in cognisable case reduced to writing but not signed by person giving it—Whether such information inadmissible in evidence—"K" Form of Bombay Sales Tax Office whether "valuable security" within s. 30, Indian Penal Code—Whether fact that purchasing dealer giving "K" Form not a licensed dealer makes Form not a "valuable security."*

Under s. 154 of the Criminal Procedure Code, 1898, the condition as to a first information report being reduced to writing and that it shall be signed by the person giving it, is a mere matter of procedure and failure to observe the procedure as to signature will not make the information given, if it is reduced to writing, inadmissible.

The "K" Form of the Bombay Sales Tax Office which contains a declaration that the goods purchased are intended for resale, creates the legal right in the purchasing dealer to get exemption from payment of general

CRIMINAL PROCEDURE CODE S. 154

—(Contd.)

sales tax as provided under cl. (1) of the proviso to s. 9 of the Bombay Sales Tax Act, 1958, and is a valuable security within the definition of that term under s. 30 of the Indian Penal Code, 1860. The mere fact that the purchasing dealer has no licence under s. 12 of the Act will not make the "K" Form furnished by him not a valuable security under s. 30 of the Code.

RATANCHAND V. THE STATE.

61 Bom. L. R. 1161.

—S. 157.

Section 157 of the Criminal Procedure Code, 1898, lays down some of the duties, and none of the rights, of an officer in charge of a police station. That section has no relevance whatever to the consideration of the extent to which a police officer can act in curtailment of the rights of the subject as regards his person or his property.

DEOMAN SHAMJI V. THE STATE.

61 Bom. L. R. 30.

—S. 162.

When a person accused of an offence accompanies a police officer in the course of investigation or complies with a request to give his handwriting or thumb impression for comparison, he does not give a statement, proof of which is prohibited by s. 162 of the Criminal Procedure Code, 1898.

ABU ISMAIL MERCHANT V. STATE.

61 Bom. L. R. 345.

—S. 173—*Police Manual, Vol. III, rr. 202, 203—Criminal Law Amendment Act (XLVI of 1952), Secs. 6, 7, 8—Prevention of Corruption Act (II of 1947), Secs. 5A, 6—Final report in connection with offence under s. 161, I. P. Code and s. 5 of Prevention of Corruption Act submitted by police officer to Magistrate under s. 173, Cr. P. Code with request for issue of 'B' summary—Magistrate on merits by order granting 'A' summary—Whether Magistrate had jurisdiction to consider and act on report—Magistrate whether empowered to take cognizance of offence—Whether cognizance of offence taken by Magistrate by issuing 'A' summary—What constitutes cognizance under s. 190.*

On a report submitted to a Magistrate of the first class under s. 173 of the Criminal Procedure Code, 1898, by a police officer after completing investigations with reference to offences which are exclusively triable by a Special Judge under s. 7(1) of the Criminal Law Amendment Act, 1952, the Magistrate has jurisdiction to consider the report and grant the type of summary (as contemplated in the Police Manual) which according to him is appropriate in the circumstances of the case.

Before it could be said that a Magistrate has taken cognizance under s. 190 of the Criminal Procedure Code, 1898, it is not sufficient that he should have applied his mind to the report submitted to him by a police officer under s. 173 of the Code, but he must do something for proceeding under the subsequent provisions of the Code, e.g., under s. 200, under which the Magistrate has to examine the complainant on taking cognizance of an offence.

CRIMINAL PROCEDURE CODE, S. 173
—(Contd.)

- A police officer after completing investigation in connection with an offence under s. 161 of the Indian Penal Code, 1860, and s. 5 of the Prevention of Corruption Act, 1947, submitted a report to a First Class Magistrate under s. 173 of the Criminal Procedure Code, 1898, and requested that 'B' summary may be issued in respect thereof. The Magistrate on merits passed an order granting 'A' type of summary on the report. On the question whether the Magistrate had power to consider the report and act on it, it was contended that the Magistrate was not empowered to take cognizance of the offence which was exclusively triable by a Special Judge under s. 7(1) of the Criminal Law Amendment Act, 1952, and that he could not take cognizance of the offence by refusing to issue 'B' summary and in issuing 'A' summary in contravention of the provisions of s. 6 of the Prevention of Corruption Act, 1947:—

Held, that the Magistrate was not deprived of his power to take cognizance of the offence even though it was exclusively triable by a Court of a Special Judge and, therefore, the submission of the report by the police officer and his request for the issue of 'B' summary and the order passed granting 'A' summary were not without jurisdiction,

that as no further proceedings were intended to be taken by the Magistrate it could not be said that the Magistrate in issuing 'A' summary had taken cognizance of the offence, and

that, therefore, the order could not be challenged on the ground that it was bad as the Magistrate took cognizance of the offence without any previous sanction as contemplated under s. 6 of the Prevention of Corruption Act.

STATE V. SHANKAR BHARAO.
61 Bom. L. R. 591.

—S. 173—*Bombay Police Manual, Rule 203; Summary "A", "B", "C"—Investigation Officer in investigation of cognizable offence not filing charge-sheet and in submitting report under s. 173 requesting issue of Summary "A", "B" or "C"—Whether magistrate can direct such Officer to submit charge-sheet.*

A magistrate has jurisdiction to direct an Investigation Officer to submit a chargesheet when that officer in the investigation of a cognizable offence has not filed a charge-sheet and has in submitting his report under s. 173 of the Criminal Procedure Code, 1898, requested that Summary "A", "B" or "C" be issued.

A magistrate may not lightly pass an order that a charge-sheet be filed. It is only after a careful consideration of the materials placed by a police officer in his report if a magistrate is satisfied that there are sufficiently compelling grounds which require him to disagree with the opinion of the police officer and to reject the prayer for a summary asked for that he will be justified in calling for a charge-sheet.

STATE V. MURLIDHAR.

61 Bom. L. R. 1656.

—S. 173 (4)—*Accused, before commencement of trial, not supplied with copies of police statements of prosecution witnesses—Whether*

CRIMINAL PROCEDURE CODE, S. 173
—(Contd.)

prosecution debarred from examining such witnesses where copies of such statements not supplied to accused before trial—Discretion of Magistrate to disallow additional evidence when can be exercised.

Where the accused before the commencement of his trial is not supplied with copies of the police statements of prosecution witnesses as required under s. 173(4) of the Criminal Procedure Code, 1898, the prosecution is not thereby debarred from examining these witnesses.

If the prosecution intends to lead evidence copies of which have not been supplied to the defence, the Magistrate might put the prosecution on terms and insist that the additional evidence should not be allowed to go on record unless and until copies of the police statements of witnesses are supplied in advance to the defence.

Where, however, the Magistrate feels that prejudice is likely to be caused to the defence by reason of the fact that the witnesses, who have already been examined, could not thereafter be examined with a view to falsify the additional evidence, which was about to be tendered, the Magistrate in his discretion might disallow the prosecution to tender the additional evidence.

STATE V. DARGOA.
61 Bom. L. R. 118.

—S. 190 (1)—*Complaint filed before Magistrate and complainant examined—Subsequent police challan filed before same Magistrate alleging same facts and offence—Magistrate dismissing complaint on ground that there could not be two proceedings against same accused by same parties—Validity of order dismissing complaint—Whether grounds specified in s. 190(1) upon which Magistrate empowered to take cognizance of offence mutually exclusive.*

The grounds upon which under s. 190(1) of the Criminal Procedure Code, 1898, a Magistrate is empowered to take cognizance of an offence are not mutually exclusive, and, therefore, if one of the grounds is already there, the Magistrate cannot reject a request to proceed on other grounds.

SHANKARLAL V. MOHAMMAD.

61 Bom. L. R. 1642.

—S. 190(1)(b). See CRIMINAL PROCEDURE CODE, 1898, S. 173.

61 Bom. L. R. 591.

—S. 190(1)(b). See CRIMINAL PROCEDURE CODE, 1898, S. 173.

61 Bom. L. R. 1656.

—S. 198. See CRIMINAL PROCEDURE CODE, 1898, S. 198-B.

61 Bom. L. R. 450.

—S. 198-B—*Complaint filed by Public Prosecutor alone under s. 193-B in Court of Session—Validity of such complaint—Jurisdiction of Court to take cognizance of complaint—Effect of s. 193-B(18).*

A Court of Session can take cognizance of a complaint filed by the Public Prosecutor under s. 193-B of the Criminal Procedure Code.

CRIMINAL PROCEDURE CODE, S. 198-B
—(Contd.)

1898, notwithstanding the fact that the public servant aggrieved by the alleged defamation has not joined in the complaint.

The effect of s. 198-B(13) of the Criminal Procedure Code, 1898, is that the right of any public servant to file a complaint about an offence of defamation under s. 198 of the Code is not taken away by virtue of s. 198-B of the Code.

C. M. TRIVEDI v. BHATNAGAR.

61 Bom. L. R. 450.

———S. 203. See CRIMINAL PROCEDURE CODE, 1898, S. 190(1). 61 Bom. L. R. 1642.

———S. 207A—*Whether Magistrate can examine accused for enabling him to explain circumstances appearing in documents referred to in s. 173—Statement of accused recorded by Magistrate after such examination whether admissible in evidence.*

Under s. 207A of the Criminal Procedure Code, 1898, the Magistrate may examine the accused for the purpose of enabling him to explain any circumstances appearing in the documents referred to in s. 178 of the Code. If the Magistrate so examines the accused and records his statement, that statement will be admissible in evidence under s. 287 of the Code.

RAMDAS KIKABHAI v. STATE.

61 Bom. L. R. 1173.

———S. 207A(3). See CRIMINAL PROCEDURE CODE, 1898, S. 178(4).

61 Bom. L. R. 118.

———S. 207A(3).

The right given to an accused by s. 207A(3) of the Criminal Procedure Code, 1898, to be furnished with copies of all the documents mentioned in s. 178 of the Code, particularly the case diary statements recorded by the police, can only arise where such statements are recorded and not otherwise.

STATE OF BOMBAY v. MOHAMADKHAH.

61 Bom. L. R. 1644.

———S. 222(2)—*Charge framed contravening proviso to s. 222(2)—Whether such contravention cured by s. 537—Trial held on such charge whether vitiated.*

A charge framed relating to criminal breach of trust or dishonest misappropriation of money and which covers a period exceeding one year between which the offence is alleged to have been committed and thereby contravenes the proviso to s. 222(2) of the Criminal Procedure Code, 1898, is an illegal charge and a trial held on such a charge is vitiated.

An infringement of a provision as to the manner of a trial cannot be cured by s. 537 of the Criminal Procedure Code, 1898, but an infringement of a provision which prescribes even mandatorily a matter relating to the conduct of a trial can be cured by s. 537 of the Code, if there be no prejudice caused to the accused. The proviso to s. 222(2) of the Criminal Procedure Code, 1898, relates to the manner in which the trial is to be held, and if there is an infringement of its provisions, the

CRIMINAL PROCEDURE CODE, S. 222
—(Contd.)

infringement cannot be cured by s. 537 of the Code.

UMMER SAHIB v. STATE.

61 Bom. L. R. 1001.

———S. 233. See CRIMINAL PROCEDURE CODE, 1898, S. 222(2).

61 Bom. L. R. 1001.

———S. 234. See CRIMINAL PROCEDURE CODE, 1898, S. 222(2).

61 Bom. L. R. 1001.

———S. 244. See CRIMINAL PROCEDURE CODE, 1898, S. 178(4). 61 Bom. L. R. 118.

———S. 264—*Bombay Prohibition Act (Bom. XXV of 1949), Sec. 116—Substance of evidence required to be recorded under s. 264—Whether substance of evidence embodied in judgment from memory or short notes made when evidence given amounts to compliance with s. 264—“Substance of the evidence.” meaning of expression—Whether in trial under Bombay Prohibition Act incumbent upon magistrate to record substance of evidence of witnesses.*

Under s. 264 of the Criminal Procedure Code, 1898, the substance of the evidence is to be recorded at the time when the evidence is given in Court. Therefore, where the substance of the evidence is embodied in a judgment from memory or from short notes made at the time when evidence was given it does not amount to compliance with s. 264 of the Code.

The expression “the substance of the evidence” occurring in the Criminal Procedure Code, 1898, implies that all the important or substantial part of the deposition of each witness should be recorded by the presiding authority.

In a trial under the Bombay Prohibition Act, 1949, by virtue of s. 116 of the Act it is incumbent upon the magistrate to record the substance of the evidence of each witness when the evidence is led in Court. Failure to record such evidence would generally vitiate the trial.

KRISHNA NAYAR v. STATE.

61 Bom. L. R. 684.

———S. 286—*Witnesses not examined before committing Magistrate—Whether prosecution can examine such witnesses in Sessions Court—Prosecutor’s right to examine witness whether limited to witnesses summoned for examination by prosecution—Right given to accused by s. 207A(3) when exercisable.*

Under s. 286 of the Criminal Procedure Code, 1898, the prosecution may examine in the Sessions Court witnesses other than those mentioned before the committing Magistrate.

Section 286(2) of the Criminal Procedure Code, 1898, does not limit the right of the prosecutor to examine such witnesses as have been summoned only. If the prosecution have additional witnesses ready and available to them for giving evidence and keep them in attendance, their evidence can be recorded. Where the evidence of such witnesses is allowed to be led, the Court in its discretion may give sufficient time to the defence to prepare itself

CRIMINAL PROCEDURE CODE, S. 286
—(Contd.)

for cross-examination and if need be, the Court may ask the prosecution to state in writing the gist of what these witnesses are going to depose.

The right given to an accused by s. 207A(3) of the Criminal Procedure Code, 1898, to be furnished with copies of all the documents mentioned in s. 178 of the Code, particularly the case diary statements recorded by the police, can only arise where such statements are recorded and not otherwise.

STATE OF BOMBAY V. MOHAMADKHAN.

61 BOM. L. R. 1644.

—S. 287. See CRIMINAL PROCEDURE CODE, 1898, S. 207A.

61 BOM. L. R. 1173.

—S. 288. See EVIDENCE ACT, 1872, S. 157.

61 BOM. L. R. 447.

—S. 304—Sessions Judge finding verdict of jury wrong due to their making a mistake on question of law—Whether Sessions Judge competent to re-charge or give further directions to jury.

If the Session Judge finds that the verdict of the jury is wrong due to their misunderstanding or making a mistake on a question of law, he is competent, under s. 304 of the Criminal Procedure Code, 1898, to invite the attention of the jury to that mistake and to give his reasons therefor. To that extent alone he can re-charge or give further directions to the jury.

BASTAV VICTORY RODRIGUES V. STATE.

61 BOM. L. R. (F.B.) 670.

—S. 522—Indian Penal Code (Act XLV of 1860), Secs. 341, 339—Accused breaking open lock of complainant's room and occupying it—Complainant coming to know of trespass for first time about a month after his locking the room—Complainant when attempting to enter room next day after receiving information of trespass, obstructed from entering by accused—Accused convicted of wrongful restraint under s. 341, I. P. Code and further ordered under s. 522, Cr. Pr. Code to restore possession of premises to complainant—Whether Magistrate competent to pass order under s. 522—Complainant whether dispossessed by show of force employed by accused.

The complainant, who had locked and left his room on January 16, 1958, came to know for the first time on February 22, 1958, that the accused had broken open the lock and occupied the room. Next day, i.e. on February 23, 1958, when the complainant tried to enter the room the accused personally obstructed the complainant from entering the room. On a complaint being filed by the complainant, the accused was convicted by the Magistrate of the offence of wrongful restraint under s. 341 of the Indian Penal Code and it was further ordered under s. 522 of the Criminal Procedure Code, 1898, that possession of the premises in dispute be restored to the complainant by the accused. On the question whether the Magistrate was in law justified in passing the order under s. 522 of the Criminal Procedure Code, it was contended by the accused that the

CRIMINAL PROCEDURE CODE, S. 522
—(Contd.)

complainant was dispossessed sometime between January 16, 1958, and February 22, 1958, and not when he tried to enter the room on February 23, 1958, and that, therefore, his dispossession was not brought about by the wrongful restraint at the hands of the accused on February 23, 1958:—

Held, that the dispossession of the complainant took place when he was wrongfully restrained from entering the room in dispute on February 23, 1958, and

that, therefore, the Magistrate was competent to pass the order under s. 522 of the Criminal Procedure Code.

FRANCIS D'SOUZA V. EDWARD.

61 BOM. L. R. 1180.

—S. 537. See CRIMINAL PROCEDURE CODE, 1898, S. 222(2).

61 BOM. L. R. 1001.

—S. 540. See CRIMINAL PROCEDURE CODE, 1898, S. 286.

61 BOM. L. R. 1644.

CUSTOM—Whether custom should be in existence from time immemorial to be recognised by Court—Kumbhars of village taking earth from particular place for about thirty years for preparing earthen pots—Whether Kumbhars had acquired customary right to remove earth.

Where it was established that the Kumbhars of a village used to take earth from the pit on the western side of a field, mix it with the earth of the village tank and then prepare earthen pots out of their mixture and that they had been doing so for about thirty years, held that this was a good custom which could be recognised by the Court on the ground that it had been in existence for a long time and, therefore, it could be held that the Kumbhars of the village had acquired a customary right to take earth from the aforesaid pit.

BARI RAJESHWAR V. TUKARAM.

61 BOM. L. R. 1041.

DECREE—Antedating of,—Power of High Court in its appellate jurisdiction to antedate decrees passed by it—Petition for judicial separation filed under Hindu Marriage Act, 1955, dismissed by trial Court—High Court on appeal passing decree for judicial separation—When open to High Court to antedate its decree so that it could bear the date of the decree of the trial Court—Civil Procedure Code (Act V of 1908), O. XLI, rr. 35, 33—Bombay High Court Appellate Side Rules, r. 161.

A petition filed before the City Civil Court for judicial separation under the Hindu Marriage Act, 1955, was dismissed, and the High Court, on appeal, set aside the order of the trial Court and passed a decree for judicial separation. On the question whether it was open to the High Court to antedate the decree passed by it and direct that it should bear the same date as the decree passed by the trial Court:—

Held, that the specific period of two years laid down in s. 13(1)(viii) of the Act is the period commencing after a decree is passed by a competent Court,

DECREE—(Contd.)

that in the present case it could not be said that any decree for judicial separation was passed by the trial Court which would start the period laid down in s. 13(1)(iii),

that the period in this case under the section only commenced after the decree was pronounced by the High Court, and

that, therefore, even assuming that the High Court had the power to so antedate the decree, the High Court could not, in the instant case, exercise it, in view of the law.

The power of the High Court in its appellate jurisdiction is not fettered by the mandatory provisions of O. XLI, r. 35, of the Civil Procedure Code, 1908.

The Appellate Side Judges of the High Court can direct the Registrar to draw up the decree and either antedate it or post-date it.
SHIRIN VISHNU D. VISHNU KIRPALANI.

61 Bom. L. R. 100.

DEFAMATION—Privilege—Defamatory statements made before police officers in course of regular investigation—Whether such statements absolutely privileged.

Defamatory statements made before police officers in the course of a regular investigation under the Criminal Procedure Code, 1898, are not absolutely privileged but only a qualified privilege attaches to them which is liable to be destroyed by proof of malice.

MAROTI SADASHIV D. GODABHAI.

61 Bom. L. R. 143.

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII of 1879), S. 15D. See BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, 1947, S. 51-A.

61 Bom. L. R. 1607.

DEPUTY COMMISSIONER, jurisdiction of. See O. P. and Berar Letting of Houses and Rent Control Order, 1949, Cl. 18.

61 Bom. L. R. 427.

DESERTION. See HINDU MARRIAGE ACT, 1955, S. 10.

61 Bom. L. R. 1549.

DIRECTOR, company. See Companies Act, 1956, s. 166.

61 Bom. L. R. 636.

DIVERTED LANDS REVISION OF ASSESSMENT RULES, 1952, R. 1(2)—Central Provinces Land Revenue Act (II of 1917), Secs. 104-A, 106, Chap. VI—Central Provinces Settlement Act (VI of 1929), Sec. 2—Central Provinces Tenancy Act (I of 1920), Sec. 36-A—Petitioner declared Malik-makbuz in respect of his holding not assessed at settlement under Chap. VI of C. P. Land Revenue Act and land-revenue fixed under s. 36-A of C. P. Tenancy Act—Proceedings under s. 104-A of C. P. Land Revenue Act started against petitioner for revision of assessment under Assessment Rules of 1952—Applicability of Rules to Malik-makbuz holding of petitioner.

The words "settlement" and "at settlement" occurring in r. 1(2) of the Diverted Lands Revision of Assessment Rules, 1952, mean the

DIVERTED LANDS REVISION OF ASSESSMENT RULES, 1952, R. 1—(Contd.)

settlement under Chapter VI of the Central Provinces Land Revenue Act, 1917.

The petitioner who was the holder of a land as an occupancy tenant, on which no assessment was levied at the settlement under Chapter VI of the Central Provinces Land Revenue Act, 1917, was declared to be a Malik-makbuz in regard to his holding, and under s. 36A of the Central Provinces Tenancy Act a certain amount was fixed as land-revenue payable for the holding. Thereafter, proceedings under s. 104A of the Central Provinces Land Revenue Act were started against the petitioner for revision of the assessment levied on the land, on the ground that he had diverted his holding to non-agricultural purposes. The assessment was accordingly revised under the Diverted Lands Revision of Assessment Rules, 1952. On the question whether the Rules applied to the Malik-makbuz holding:—

Held, that although land-revenue came to be fixed by the revenue officer during the currency of the settlement under Chapter VI of the Central Provinces Land Revenue Act, the Malik-makbuz holding could not be regarded as having been assessed at settlement within r. 1(2) of the Assessment Rules, and that, therefore, the Rules did not apply to such holding and the revision of assessment in accordance with the Rules was illegal.

STATE OF BOMBAY D. MATHURADAS.

61 Bom. L. R. 1102.

DRUGS ACT (XXII of 1940), S. 18(c). See BOMBAY DRUGS RULES, 1946.

61 Bom. L. R. 807.

—S. 33(1). See BOMBAY DRUGS RULES, 1946.

61 Bom. L. R. 807.

DRUGS (AMENDMENT) ACT (XI of 1955), S. 15. See BOMBAY DRUGS RULES, 1946.

61 Bom. L. R. 807.

DRUGS RULES, 1945, R. 64—Drugs Act (XXIII of 1940)—Whether r. 64(1) governs application for renewal of licence—Licensing authority whether can refuse renewal of licence on ground that licensee has committed breach of Act or Rules.

Rule 64(1) of the Drugs Rules, 1945, governs both an application for initial grant of licence as well as an application for renewal of licence.

The opinion of the licensing authority that the licensee has contravened any of the provisions of the Drugs Act, 1940, or any of the Drugs Rules framed under the Act, by itself, is not a ground under r. 64 of the Rules for refusing renewal of a licence. The grounds on which renewal of a licence could be refused are the inability of the licensee to fulfil the conditions mentioned in r. 64(1) to the satisfaction of the authority concerned and the conviction of the applicant of an offence under the Act or rules or previous cancellation or suspension of his licence.

JAISWAL STORES D. ASST. DRUGS CONTROLLER.

61 Bom. L. R. 1531

EASEMENTS ACT (V of 1882), S. 60—*Parties agreeing that licence to occupy premises granted by one to the other to be irrevocable for certain duration—Whether licensor can terminate such licence at will.*

If parties enter into a contract and arrive at an agreement to the effect that a licence shall be irrevocable or shall be limited for a particular duration, the licensor will not be entitled to terminate or revoke the licence at his will.

The plaintiff, who had lost his suit in the first Court for possession of a room in the defendant's occupation, during the pendency of his appeal entered into a compromise with the defendant. The appeal Court passed a consent decree whereby the plaintiff agreed to allow the defendant to be in exclusive possession of one-third portion of the room and further agreed that the defendant's right as a licensee to occupy it was irrevocable so long as the Bombay Rent Act remained in force. In a subsequent suit by the plaintiff for possession of the one-third portion of the room in occupation of the defendant, it was contended by the plaintiff that the licence was revocable at his will as it did not fall in any of the two classes of cases of irrevocable licences set out in s. 60 of the Indian Easements Act, 1882:—

Held, that apart from s. 60 of the Indian Easements Act which means that where a case falls in either of the two categories mentioned therein the licence is made irrevocable, under the law of contract the plaintiff was precluded from revoking the contract because of the contractual engagement into which he had entered.

M. F. DESOUSA v. CHILDREN'S EDUC'NAL SOCIETY.

61 Bom. L. R. 750.

EMPLOYEES' PROVIDENT FUNDS ACT (XIX of 1952), S. 2—*Employees' Provident Funds Scheme, Rr. 29, 30, 32—Standing Orders providing for termination of employment of operatives and clerks by payment of thirteen days' wages and one month's pay respectively, in lieu of notice—Employer terminating services of operatives and clerks by payment of thirteen days' wages and one month's pay—Whether such amounts paid "basic wages" or dearness allowance under Act and Scheme—Provident fund contribution whether payable in respect of such amounts.*

Amounts paid by the employer under Standing Orders settled under the Bombay Industrial Relations Act, 1946, for securing the due termination of the employment of the employees without notice, are not amounts drawn by the employees as "basic wages" or dearness allowance and the provisions of the Employees' Provident Funds Act, 1952, and the Employees' Provident Funds Scheme are not applicable thereto. No amount is, therefore, payable in connection therewith by way of provident fund contribution under the Act or the Scheme.

The expression "emoluments which are earned by an employee while on duty" in s. 2(b) of the Employees' Provident Funds Act, 1952, represents the amounts actually earned by an employee during the period of his employment while he is actually on duty.

INDIA UNITED MILLS v. REG. PROV. F. COMMR.

61 Bom. L. R. (O.C.J.) 1385.

EMPLOYEES, PROVIDENT FUNDS ACT S. 6. See EMPLOYEES' PROVIDENT FUNDS ACT, 1952, S. 2.

61 Bom. L. R. (O.C.J.) 1385.

ESSENTIAL SUPPLIES (TEMPORARY POWERS) ACT (XXIV of 1946), S. 7. See COTTON TEXTILES (CONTROL) ORDER, 1948, CL. 8.

61 Bom. L. R. 1291.

—S. 8. See COTTON TEXTILES (CONTROL) ORDER, 1948, CL. 8.

61 Bom. L. R. 1291.

—S. 9. See COTTON TEXTILES (CONTROL) ORDER, 1948, CL. 8.

61 Bom. L. R. 1291.

ESTATE DUTY ACT (XXXIV of 1953), S. 5—Finance Act, 1894 (57 & 58 Vict. Ch. 30), Secs. 1, 3(b)—Settlement of property where interest reserved by settlor for life and settlement not taking effect as will—Lesser part of property i.e. interest reserved could pass by application of general rule laid down in s. 5—Whether whole of settled property to be deemed to pass—Applicability of s. 12—"Property passing on the death," definition of—Decisions of English Courts on analogous provisions of English law how far to be adhered to—Rule of construction relating to provisions of enactments in pari materia.

Section 12 of the Estate Duty Act, 1953, lays down the special rule that in case of a settlement of any property with reservation to the settlor of any interest in such property for life, although less may pass by application of the general rule laid down in s. 5 of the Act (i.e. only the interest which was reserved), the whole of such property of the settlor, the subject-matter of the settlement in which he has reserved interest for life, must be deemed to pass on the settlor's death.

The object of the Legislature in enacting s. 12 of the Act was that where an interest, however small, is reserved by a settlor under any settlement not taking effect as a will for life or any other period determinable by reference to death, the whole of the property would be deemed to pass even though otherwise a lesser part thereof might pass, and that if he has reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property, the whole property would pass whether he has reserved any aliquot share in the income of any other interest in the property or not.

By a *wakf-ul-ud* certain properties were transferred to Mutavalls by the settlor, a Sunni Hanafi Mohammedan, who reserved for the maintenance during her lifetime 62½ per cent. of the net income of the property and the remaining income was given in certain proportion to her daughter and her children for their maintenance. Under this deed it was further provided that after the death of the settlor the entire income of the property was to be paid in certain proportion to her daughter and her children from generation to generation.

ESTATE DUTY ACT, S. 5—(Contd.)

There was, in the deed, an ultimate provision for the benefit of the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. After the death of the settlor, the Collector of Estate Duty included all the properties in the estate duty assessment under s. 12 of the Estate Duty Act, 1958. On the question whether the entire Wakf property or only 62½ per cent. of the Wakf was chargeable to estate duty, it was contended that there was actual passing of the interest of the settlor on her death which was 62½ per cent. of the income of the properties, and that, therefore, the property that could be brought to estate duty under s. 5 of the Act could only be 62½ per cent. of the corpus and the fact that the case was wholly covered by the language and scope of s. 12 of the Act which expressly deals with such a settlement and such reservation of interest, was of no consequence:—

Held, that s. 12 in terms applied to the settlement in the case and, therefore, the entire Wakf property was chargeable to estate duty.

To ascertain whether a property has passed on the death of person within the meaning of the Estate Duty Act, 1958, the comparison must be made between the persons beneficially interested the moment before the death and the persons so interested the moment after the death.

The scheme of the Estate Duty Act, 1958, is substantially the same as the scheme of the English Finance Act of 1894.

On analogous provisions of the Indian law unaffected by the specialities of the English law and on fundamental concepts and on broad general principles, decisions of Courts in England can be useful and of considerable guidance if utilised with due care and caution. Danger, however, lies in phrases used aptly enough in a particular context and opinions weighty and useful in their own sphere and context being treated as expressing doctrines of universal application or adopting those principles as riders to the actual statutory language. Rigid adherence to decisions of Courts in England must be deprecated and particularly when they have some bearing on the English law of property with its highly technical and overrefined rules affecting realty which operated when the English enactment came into force.

The rule of construction relating to provisions of enactments *in pari materia* is one of great convenience and aid from outside may legitimately be derived when any doubtful point of interpretation of any provision has to be solved. But reference to it simply on the ground of similarity has to be avoided.

KHATIBABAI V. CONTROLLER OF ESTATE DUTY.
61 Bom. L. R. 719.

—S. 10. See ESTATE DUTY ACT, 1958,
S. 5.

61 Bom. L. R. 719.

—S. 12. See ESTATE DUTY ACT, 1958,
S. 5.

61 Bom. L. R. 719.

EVIDENCE—Notes of post-mortem examination recorded by medical officer—Whether such notes admissible in evidence—Practice (Criminal)—Whether notes of post-mortem examination where evidence relating to such examination relevant should be taken on record—Indian Evidence Act (I of 1872), Sec. 159.

Notes of post-mortem examination prepared by a medical officer are admissible in evidence where the same are duly proved by the testimony of the medical officer who has performed the examination and has recorded the same. As a matter of practice such notes of post-mortem examination, where the evidence relating to the post-mortem examination is relevant, should be taken on the record.

The notes of the post-mortem examination are not intended to be mechanically admitted on the record of the case. In every case when the medical officer is examined before the Court to establish the cause of death disclosed by a post-mortem examination, he must be called upon to give evidence about the matters which have a bearing on the questions to be decided by the Court and he must also be called upon to depose whether the record made by him in the notes of the post-mortem examination are true and if the medical officer deposes to the truth of the record made by him, the record itself may be treated as evidence.

LOKU BARAPPA V. THE STATE.

61 Bom. L. R. 1271.

EVIDENCE ACT (I of 1872), S. 11. See EVIDENCE ACT, 1872, S. 48.

61 Bom. L. R. (O.C.J.) 1033.

—S. 13. See EVIDENCE ACT, 1872,
S. 48.

61 Bom. L. R. (O.C.J.) 1033.

—S. 27—Information received from person who is not accused when information given but becomes accused when such statement sought to be given in evidence—Whether statement admissible under s. 27—Person making statement before police officer showing that offence committed by him—Such person whether deemed to be in police custody within s. 27.

The words "information received from a person accused of any offence" in s. 27 of the Indian Evidence Act, 1872, cannot be read to mean that he must be an accused when he gives the information but would include a person if he became subsequently an accused person, at the time when that statement is sought to be received in evidence against him.

Where a person goes to a police officer and makes a statement which shows that an offence has been committed by him, he accuses himself and though he is formally not arrested, since he is not free to move wherever he likes after disclosure of the information to the police he must be deemed to be in custody of the police within s. 27 of the Indian Evidence Act, 1872.

STATE V. MEMON MOHMAD.

61 Bom. L. R. 715.

—S. 32—Written complaint by deceased expressing apprehension of death at hands of

EVIDENCE ACT, S. 32—(Contd.)

accused who is subsequently charged with murder of such complainant—Whether complaint inadmissible under s. 32(1)—Admissibility of such complaint under s. 8—Statement made by person since deceased admissible under a provision other than s. 32—Whether such statement inadmissible because it does not fall under s. 32.

A complaint in writing made by a person who dies sometime thereafter, expressing apprehension of death at the hands of a person is admissible in evidence under s. 32(1) of the Indian Evidence Act, 1872, when the person whose conduct is the source of the apprehension is charged with the offence of murder of the person making the complaint.

If the fact to be proved is a statement made by a person since deceased, and it is admissible under a provision other than s. 32 of the Indian Evidence Act, its admissibility cannot be denied because it does not fall within the provisions contained in s. 32 of the Act.

The deceased had submitted a written complaint against her husband on August 15, 1958, to the Commissioner of Police which *inter alia* stated: "As this concerns with my whole life, I am afraid, if no prompt action is taken, a poor life would be destroyed." At the trial of the husband for the murder of his wife, which was committed on October 27, 1958, it was contended that the complaint submitted by the deceased was inadmissible in evidence under s. 32(1) of the Indian Evidence Act:—

Held, that the statement showing apprehension of death on account of the conduct of the husband was admissible as a statement relating to the circumstances of the transaction under s. 32(1) of the Act:

that the fact that the deceased had made a complaint against her husband, which may have constituted a motive for the husband to commit the offence charged, was a fact, which could be proved under s. 8 of the Indian Evidence Act, and production of the original complaint would be probative of that fact.

ALLIJAN MUNSHI v. STATE.

61 Bom. L. R. 1620.

S. 43—Judgment in Land Acquisition Reference not inter partes and relating to property in vicinity of land subject of Land Acquisition Reference—Whether such judgment admissible as an instance from which market value of land in question can be deduced—Such judgment whether transaction or instance within cls. (a) & (b) of s. 13—Whether such judgment relevant as fact under s. 11.

A judgment in another Land Acquisition Reference not *inter partes* and with reference to another property situate in the vicinity of the land in question is not admissible as an instance from which the market value of the land in question can be deduced.

Such a judgment is neither a transaction nor an instance under cls. (a) and (b) of s. 13 of the Indian Evidence Act, 1872, and it is not a fact which would be relevant under s. 11 of the Act, but is a mere opinion as to the existence or otherwise of a fact.

SPECIAL LAND ACQ. OFFICER v. LAKHAMJI.

61 Bom. L. R. (O.C.J.) 1033.

EVIDENCE ACT, S. 78(6). See FOREIGN JUDGMENT.

61 Bom. L. R. (O.C.J.) 33.

S. 114.

Section 114 of the Indian Evidence Act, 1872, is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence.

Where a copy of the judgment of a foreign Court duly certified by the legal keeper thereof and with a proper certificate obtained from the Indian Consul was sought to be admitted in the evidence but its production was objected on the ground that under s. 78(6) of the Indian Evidence Act, 1872, further proof of the character of the document according to the law of the foreign country was not given:—

Held, that this was a clear case where the necessary presumption as to the character of the document could be drawn under s. 114 of the Indian Evidence Act, 1872, and, therefore, the failure to tender formal evidence as to the nature of the document did not prevent the document from being admitted in evidence. EAST INDIA TRADING CO. v. BADAT & CO.

61 Bom. L. R. (O.C.J.) 333.

S. 157—Criminal Procedure Code (Act V of 1898), Sec. 288—Evidence of witness given in committing Magistrate's Court brought on record in Sessions Court under s. 288 of Code—Whether such evidence "testimony" within s. 157 of Indian Evidence Act—Corroboration of such evidence.

The evidence of a witness given in the committing Magistrate's Court which is brought on record in the Sessions Court under s. 288 of the Criminal Procedure Code, 1898, stands on exactly the same footing as evidence given in the Sessions Court and it would be "testimony" within the meaning of s. 157 of the Indian Evidence Act, 1872, which could be corroborated under s. 157.

NARAYAN GANPATI v. THE STATE.

61 Bom. L. R. 447.

S. 157—Meaning of word 'Statement' in s. 157—Whether section requires that such statement must be communicated by maker of it to any other person—Notes of attendance prepared by solicitor of certain conversation between himself and others—Prosecution producing such notes of attendance in examination-in-chief of solicitor to corroborate his evidence in Court—Admissibility of notes of attendance under s. 157.

The word 'statement' used in s. 157 of the Indian Evidence Act, 1872, means only 'something that is stated' and the element of communication to another person is not necessary before 'something that is stated' becomes a statement under that section.

Where certain conversation took place between the accused and the prosecution witnesses and one of the prosecution witnesses who was a solicitor, prepared notes of attendance of this conversation soon afterwards, and these notes of attendance were produced by the prosecution to corroborate the testimony of the solicitor when he deposed to what had taken place between him and these persons, *held* that the notes of attendance prepared by

EVIDENCE ACT, S. 157—(Contd.)

the solicitor were statements within the meaning of s. 157 of the Indian Evidence Act, 1872, and were admissible in evidence.

RHOJILAL CHUNILAL v. STATE OF BOMBAY.

61 Bom. L. R. (S.C.) 746.

———S. 159. See EVIDENCE ACT, 1872, S. 157.

61 Bom. L. R. (S.C.) 746.

FACTORIES ACT (LXIII of 1948), S. 2(1), —Partners of concern where manufacturing process going on working in such factory—Whether persons workers within s. 2(1).

The factory inspector visited the premises of a saw mill where certain manufacturing process was going on with the aid of power and found thirty workers engaged in some job or other. The accused produced a register containing nineteen names in one place and nine additional names at another place. The factory inspector finding that all the thirty persons engaged in the factory were workers within the meaning of the Factories Act, 1948, lodged a complaint for the violation of s. 7(1) read with s. 92 of the Act and also of r. 4 of the Bombay Factories Rules, 1950. The accused contended that the mill was a partnership concern and the nineteen names mentioned in the register were the names of the partners, that the nine additional names appearing in it were the names of workers who were working on wages in the mill and that the remaining persons were partners of another concern which was situated on the same premises as the mill. It was contended for the prosecution that as the partners in the mill had engaged themselves in doing the work on the premises of the factory, they fell within the definition of the word 'worker' in s. 2(1) of the Act, and inasmuch as the number of such workers exceeded ten, the provisions of the Act were violated:—

Held, that the partners of the mill who were found working in the factory could not be considered as employees, because so far as they were concerned, there was neither any employer nor any contract of employment, and

that, therefore, they were not workers within the meaning of s. 2(1) of the Act.

STATE v. M. M. PINTO.

61 Bom. L. R. 1617.

———S. 2(1)—Bidi roller engaged in factory and paid at fixed rates on quantities of bidis turned out—No compulsion on him to attend factory during working hours and no actual supervision on his work—Whether such bidi roller a 'worker' within s. 2(1)—Right to claim wages for leave whether can be claimed by worker whose wages are paid according to quantity of work done by him.

A person was engaged as a bidi roller by the owner and occupier of a bidi factory and his hours of work were fixed but there was no compulsion on him to attend the factory during those hours. He could attend the factory and leave it at any time he chose during the working hours and could remain absent. There was no actual 'supervision' on his work in the ordinary sense of that expression. He was not paid a fixed daily or weekly

FACTORIES ACT, S. 2 (1)—(Contd.)

wage but was paid at fixed rates on the quantities of bidis turned out by him. There was no express contract between the owner and occupier of the factory and the bidi roller about the 'work' and there was no stipulation about the minimum quantity of work to be done by him every day. On the question whether the bidi roller could be said to be 'employed' within the meaning of that expression in s. 2(1) of the Factories Act, 1948:—

Held, that in the instant case, the nature of the work being of the simplest and a well-defined task and the remuneration being on the basis of quantity of work done, little direct supervision was actually needed to be exercised but such supervision as was felt necessary by the management was there and there was the right to supervise the manner in which the work was to be done, and

that applying the *prima facie* test of the existence of right to supervise and control the manner in which the work is to be done as determinative of the existence of the relationship of employer and employee, the bidi roller, in the present case, was in the employment of the management and a 'worker' within the meaning of that expression in s. 2(1) of the Act.

Under ss. 79 and 80 of the Factories Act, 1948, the right to claim wages for leave can be claimed by a worker whose wages are regulated on the basis of the amount of work put in by him.

SHANKAR BALAJI v. STATE OF BOMBAY.

61 Bom. L. R. 1676.

———S. 2(m).

References to the Factories Act, 1934, in s. 2(a) of the Central Provinces and Berar Maternity Benefit Act, 1930, must be construed as reference to Factories Act, 1948, by virtue of s. 8(1) of the General Clauses Act, 1897. Therefore, the definition of "factory" contained in s. 2(m) of the Factories Act, 1948, must be read into s. 2(a) of the Central Provinces and Berar Maternity Benefit Act, 1930.

RADHAKISHAN RAMNATH v. STATE.

61 Bom. L. R. 711.

———S. 7. See FACTORIES ACT, 1948, S. 2(1).

61 Bom. L. R. 1617.

———S. 21—Degree of safety by position of transmission machinery—Whether such safety should be absolute safety—Such absolute safety whether should be against only reasonably foreseeable risks and dangers—Provision against danger arising by reason of shifting or repairing machinery whether contemplated by s. 21(1).

Under s. 21(1)(a)(b) of the Factories Act, 1948, the safety contemplated either by securely fencing the transmission machinery or by its position or by its construction is absolute safety but such absolute safety must be only against reasonably foreseeable risks and dangers of coming into contact with the transmission machinery.

Section 21 of the Factories Act, 1948, gives protection not merely to the careful, the vigilant and the conscientious workman, but to the careless, the indolent, the inadvertent, the weary, and even perhaps in some cases, the

FACTORIES ACT, S. 21—(Contd.)

disobedient. But the carelessness, the indolence, the inadvertence, the weariness and even the disobedience of a workman are things which an occupier of a factory can and is expected to reasonably foresee and should, therefore, provide against. Such risks and dangers are foreseeable and must under s. 21 of the Act be provided against. But s. 21 cannot be given the meaning that it imposes a duty upon an occupier of a factory to provide for safety against even unforeseeable risks and dangers.

Section 21 of the Factories Act, 1948, does not contemplate a provision being made for the safety of an employee who is assigned the work of repairing machinery or of shifting machinery or of installing new machinery.

Some carding machines in the carding department of a mill, which was a factory within the meaning of the Factories Act, 1948, were being shifted to some other place during the recess time, when the machinery was not in motion. Instructions were issued to do the shifting only during the recess when the shaft and pulleys were not in motion. One of the carding machines had been stopped working as it was to be shifted on the following day. On this day a few minutes before the recess a workman placing a ladder against a steam pipe stood up on it and attempted to take a belt of this carding machine which was lying idle on a hanger on the other side of the shaft and pulley which were in motion. In doing so the workman was entangled in the belt and the moving shaft and died as a result of the injuries sustained by him. On these facts the accused, who was the manager of the mill, was charged under s. 21(1)(iv)(b) of the Factories Act, 1948, for having failed to securely fence the shaft and pulleys of the carding department of the factory which formed part of the transmission machinery. The prosecution contended that the safety aimed at by s. 21(1)(iv) of the Act whether by fencing or by position or by construction, is absolute safety and that the shaft and pulleys in the instant case were not, by their position, absolutely safe to every person employed in the factory. The accused contended that the safety provided by s. 21(1)(iv), though absolute, could be only against foreseeable risks and dangers and not otherwise and that, therefore, the shaft and pulleys did not require to be fenced as they were in such a position as to be safe to every person employed in the factory as they would have been if they were securely fenced:—

Held, that in the circumstances of the case, the risk from the unfenced overhead shaft and pulleys was not foreseeable risk, and

that, therefore, there was no breach of the provisions of s. 21(1)(iv)(b) committed by the accused.

STATE V. L. C. PATEL.

61 Bom. L. R. 1021.

—S. 22. See FACTORIES ACT, 1948, S. 21.

61 Bom. L. R. 1021.

—S. 79. See FACTORIES ACT, 1948, S. 2(d).

61 Bom. L. R. 1676.

FACTORIES ACT, S. 80. See FACTORIES ACT, 1948, S. 2(f).

61 Bom. L. R. 1676.

—S. 85. See FACTORIES ACT, 1948, S. 2(f).

61 Bom. L. R. 1617.

FOREIGN EXCHANGE REGULATION ACT (VII of 1947), S. 23A.

The effect of s. 23A of the Foreign Exchange Regulation Act, 1947, is not to incorporate the provisions of the Sea Customs Act, 1878, into the Foreign Exchange Regulation Act, 1947, but the effect is of incorporating the restrictions imposed by sub-ss. (1) and (2) of s. 8, sub-s. (1) of s. 12 and cl. (a) of sub-s. (1) of s. 18 in the Sea Customs Act, 1878, with certain modifications in s. 188 of the Sea Customs Act, 1878. PUKHRAJ V. D. R. KOHLI.

61 Bom. L. R. 1230.

FOREIGN JUDGMENT—Decree passed by foreign Court on award of domestic tribunal—Suit by plaintiff based on award—Pleadings establishing that defendants carrying on business within jurisdiction accepting terms of business including submission to arbitration—Whether cause of action had arisen within jurisdiction—Suit on award where foreign judgment passed on it whether maintainable—Whether suit can be filed only on award enforceable as such—Civil Procedure Code (Act V of 1908), Secs. 13, 14—Award given by domestic tribunal not set up by laws of foreign country—Whether open to party to such award to contend that award not given on merits—Whether an ex parte decision necessarily a decision not on merits—Copy of judgment of foreign Court duly certified by legal keeper thereof and with proper certificate from Indian Consul but evidence to prove character of such document not led—Whether such document admissible in evidence—Indian Evidence Act (I of 1872), Secs. 78(8), 74(1) (iii).

A suit was filed in the High Court by the plaintiffs, a company incorporated in the State of New York, which was based on an award given by a domestic tribunal in New York and on which award a decree was obtained from the Supreme Court of the State of New York. It was established on the pleadings that the defendants, who were alleged to be carrying on business in Bombay, had accepted the terms of business in Bombay which terms of business included a submission to arbitration to the tribunal in New York. On the question whether the Court had jurisdiction to entertain the suit, it was contended by the defendants that no part of the cause of action had arisen in Bombay, that as a foreign judgment was passed on the award, the only suit that could be filed was a suit on the foreign judgment and not on the award and that a suit could be filed only on an award which was enforceable by itself and which did not require in any way to be completed in order that it should become enforceable:—

Held, that the agreement to go to arbitration constituted an important material and necessary part of the cause of action and that part of the cause of action had arisen in Bombay.

FOREIGN JUDGMENT—(Contd.)

that as it is open to a party who has obtained a foreign judgment to sue in the alternative on the original cause of action which resulted in his obtaining the foreign judgment, it was competent to the plaintiffs who had obtained a foreign judgment on the award to rely on the original cause of action which in the present case was the award,

that the plaintiffs were suing on the award which could be enforced in the State of New York and it was made enforceable and complete by obtaining the foreign judgment, and

that, therefore, the suit on the award was maintainable and the Court had jurisdiction to hear the suit on the award.

Section 114 of the Indian Evidence Act, 1872, is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence.

Where a copy of the judgment of a foreign Court duly certified by the legal keeper thereof and with a proper certificate obtained from the Indian Consul was sought to be admitted in evidence but its production was objected on the ground that under s. 78(6) of the Indian Evidence Act, 1872, further proof of the character of the document according to the law of the foreign country was not given:—

Held, that this was a clear case where the necessary presumption as to the character of the document could be drawn under s. 114 of the Indian Evidence Act, 1872, and, therefore, the failure to tender formal evidence as to the nature of the document did not prevent the document from being admitted into evidence.

Where an award is given by a tribunal selected by the parties and when the tribunal is a domestic tribunal and not a tribunal set up by the laws of a foreign country, it is not open to a party, who is a party to the award, to contend that the award was not given on merits. If the award was given against the rules of natural justice or it was fraudulently obtained, the party may not be prevented from putting forward that contention.

It is only in those cases where the Court for some reason or other passes a judgment against a party without investigating into the merits of the matter that it could be said that the decision is not given on the merits. The mere fact that the decision is *ex parte*, the mere fact that the defendant after being served does not choose to appear, does not make an *ex parte* decision a decision not on merits.

There are cases where it can be said that a Court or a tribunal has not considered the point and therefore the decision, in the absence of such consideration, is not a decision on a particular matter. But there are also cases where the point is so obvious that it would have been taken if it was a good point, and then it is open to the Court to say that indirectly the matter has been decided by that Court because the decision was not based upon the acceptance of that particular submission.

EAST INDIA TRADING CO. v. BADAT & CO.

61 Bom. L. R. (O.C.J.) 333.

FOREIGNERS ACT (XXVI of 1946),
S. 2(a)—*Foreigners Order, 1948, Para. 7—*

FOREIGNERS ACT, S. 2^a—(Contd.)

Accused, a natural born British subject, entering India on Pakistan passport on July 12, 1956—Visa obtained by accused valid for certain period after entry into India—Accused failing to leave India after expiry of such period—Whether accused a foreigner, when he entered India, within s. 2(a) of Act before its amendment—Accused whether had contravened para. 7 of Order—Words "said period" in para. 7 whether refer to period mentioned in visa.

The accused who was a natural born British subject within the meaning of s. 2(a)(i) of the Foreigners Act, 1946, (before the section was amended by the Foreigners Laws (Amendment) Act, 1957) entered India on July 12, 1956, on a passport obtained from the Government of Pakistan. He had obtained a visa from the High Commissioner for India in Pakistan which was valid for three months from the date of entry into Indian territory. The accused did not leave India after the expiry of this period and he was thereupon prosecuted for an offence under s. 14 of the Foreigners Act, 1946, for having contravened para. 7. of the Foreigners Order, 1948, and s. 18 of the Act:—

Held, that the accused was not a foreigner when he entered India on July 12, 1956, as defined in s. 2(a)(i) of the Act as it stood then and therefore he was not obliged to comply with the provisions of para. 7 of the Order.

The words "the said period" occurring in para. 7 of the Foreigners Order, 1948, refer to the period indicated in the permit issued by the Registration Officer and not to the period mentioned in the visa.

STATE P. MAHOMMEDHAN.

61 Bom. L. R. 164.

—S. 2(a)—*Foreigners Order, 1948, Rule 7—Foreigners Laws (Amendment) Act (XI of 1957)—Citizenship Act (No. LVII of 1955), Sec. 9(2)—Citizenship Rules, 1956, Rule 30—British subject claiming that he was not foreigner in India before passing of Act XI of 1957—Such person entering India in 1956 and continuing to stay in India beyond period of stay specified in visa—Notice issued by Superintendent of Police directing person to leave India within specified time—Person claiming status of citizen of India—Validity of notice issued by Superintendent of Police.*

Persons who, before the date on which the Foreigners Laws (Amendment) Act, 1957, was enacted, were entitled as British subjects to claim that they were not foreigners in India, must since the date on which the Act came into force establish that they hold the status of a citizen of India before they can resist enforcement of an order validly passed against them in exercise of the authority conferred under s. 8 of the Foreigners Act, 1946.

Prima facie, when a person enters India under a passport issued by a foreign country and under a visa obtained by him on an application submitted by him claiming that he was a national of a foreign country and that he desired to visit India for a limited period, it may be assumed that he is not a citizen of India. If after entering India such a person claims the status of a citizen by virtue of r. 80 of the Citizenship Rules of 1956 issued

FOREIGNERS' ACT, S. 2—(Contd.)

under the Citizenship Act, 1955, the question whether, when or how he has acquired the citizenship of another country, must be determined, for purposes of s. 9(2) of the Citizenship Act, 1955, by the Central Government.

By virtue of Notification issued by the Government of India on October 17, 1955, (No. 949/48/68/409-A) power under s. 3(2)(c) of the Foreigners Act, 1946, may be deemed to be conferred upon the State Governments in respect of foreigners and enemy foreigners. But in the absence of any order issued by the Central Government or competently by the State Government which has delegated the authority under s. 3(2)(c) of the Act upon the Superintendent of Police, an order passed by a Superintendent of Police requiring a person who is a foreigner within the Act as amended under the Foreigners Law (Amendment) Act, 1957, to leave India, must be regarded as unauthorised, and failure to carry out the requisition contained in that order cannot be penalised under s. 14 of the Foreigners Act.

STATE v. IBRAHIM NABIJI.

61 Bom. L. R. 803.

—S. 3. See FOREIGNERS ACT, 1946, S. 2(a).

61 Bom. L. R. 164.

—S. 3. See FOREIGNERS ACT, 1946, S. 2(a).

61 Bom. L. R. 803.

—S. 12. See FOREIGNERS ACT, 1946, S. 2(a).

61 Bom. L. R. 803.

—S. 13. See FOREIGNERS ACT, 1946, S. 2(a).

61 Bom. L. R. 164.

—S. 14. See FOREIGNERS ACT, 1946, S. 2(a).

61 Bom. L. R. 164.

—S. 14. See FOREIGNERS ACT, 1946, S. 2(a).

61 Bom. L. R. 803.

FOREIGNERS LAWS (AMENDMENT) ACT (LXI of 1957). See FOREIGNERS ACT, 1946, S. 2(a).

61 Bom. L. R. 803.

FOREIGNERS ORDER, 1948, Para. 7. See FOREIGNERS ACT, 1946, S. 2(a).

61 Bom. L. R. 164.

—CL 11—*Foreigners Act (XXXI of 1946), Sec. 3—Whether under cl. 11(2) of Order civil authority has jurisdiction to order foreigner to report to police every day—Connotation of word "movements" in cl. 11(2).*

Under sub-cl. (2) of cl. 11 of the Foreigners Order, 1948, the civil authority is empowered to give directions to a foreigner to report to the Inspector of Police, Registration of Foreigners Branch, at his office at a specified time every day.

General conditions as to activities or a particular condition with reference to any

FOREIGNERS ORDER, CL 11—(Contd.)

activity of a foreigner can be validly imposed under cl. 11 of the Foreigners Order, 1948.

BAWALKHAN v. B. C. SHAH.

61 Bom. L. R. (O.C.J.) 994.

GENERAL CLAUSES ACT (X of 1897), S. 8. See CENTRAL PROVINCES AND BEHAR MATERNITY BENEFIT ACT, 1930, S. 2.

61 Bom. L. R. 711.

—S. 24. See BOMBAY DRUGS RULES, 1946.

61 Bom. L. R. 807.

GIFT. See MAHOMEDAN LAW.

61 Bom. L. R. 761.

GIRASDAR. See SAURASHTRA LAND REFORMS ACT, 1956, S. 2(i).

61 Bom. L. R. 44.

GOVERNMENT OF INDIA ACT, 1935 [25 & 26 Geo. V, Ch. 42], S. 100—*Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 73—Whether entry 50 contemplates law restricted to imposing taxes on persons who receive or enjoy the luxuries or the entertainments or the amusements—Section 73 of Bom. Act XVIII of 1925 whether law with respect to matters enumerated in entry 46.*

The words "taxes on luxuries or entertainments or amusements" in entry 50, List II, Seventh Schedule to the Government of India Act, 1935, have not a restricted meaning so as to confine the operation of the law to be made thereunder only to taxes on persons receiving the luxuries, entertainments or amusements. The entry contemplates luxuries, entertainments and amusements as objects on which the tax is to be imposed. Therefore, a law which imposes tax on the act of entertaining is within the entry whether it falls on the giver or the receiver of that entertainment.

Section 78 of the Bombay Municipal Boroughs Act, 1925, is a law with respect to matters enumerated in entry 50 and not entry 46, List II, Seventh Schedule to the Government of India Act, 1935, and the Bombay Legislature had ample power to enact this law.

WESTERN INDIA THEATRES v. C. B., POONA.

61 Bom. L. R. (S.C.) 950.

—SCH. VII, LIST II, entry 46. See GOVERNMENT OF INDIA ACT, 1935, S. 100.

61 Bom. L. R. (S.C.) 950.

—SCH. VII, LIST II, entry 50. See GOVERNMENT OF INDIA ACT, 1935, S. 100.

61 Bom. L. R. (S.C.) 950.

GUARDIANS AND WARDS ACT (VIII of 1890), S. 3. See GUARDIANS AND WARDS ACT, 1890, S. 25.

61 Bom. L. R. (O.C.J.) 1570.

—S. 25—*Petition under s. 25 by Muslim woman for custody of her minor child—Whether Court can make order for such custody under its general and inherent jurisdiction—Circumstances under which such order can be made.*

GUARDIANS AND WARDS ACT, S. 25 —(Contd.)

In a case where the Court has no jurisdiction to make an order under s. 25 of the Guardians and Wards Act, 1890, the Court can exercise its general and inherent jurisdiction where an order for custody is necessary for the welfare and in the interest of the minor.

NURJEHAN V. SULTAN AHMED.

61 BOM. L. R. (O.C.J.) 1570.

GUJARAT TALUQDARS' ACT (Bom. VI of 1888), S. 22.

The declaration under s. 22 of the Gujarat Taluqdars' Act, 1888, or the agreement of jama mentioned in s. 23(1) of the Act, is not a settlement of land-revenue within the meaning of s. 117R of the Bombay Land Revenue Code, 1879.

JAYAVANTRINEJI V. STATE OF BOMBAY.

61 BOM. L. R. (S.C.) 945.

—S. 23(s). See GUJARAT TALUQDARS' ACT, 1888, S. 22.

61 BOM. L. R. (S.C.) 945.

HIGH COURT, Power of.

The power of the High Court to strike down the provisions of a law enacted by the Parliament, if it finds that the impugned provision as enacted violates a fundamental right claimed by a petitioner, is not in any way limited by the fact that the impugned law was enacted by Parliament and not by the State Legislature.

MANILAL V. UNION OF INDIA.

61 BOM. L. R. (O.C.J.) 976.

HINDU LAW.

1. ADOPTION AND MAINTENANCE.
2. DEBTS.
3. FEMALE POSSESSOR OF PROPERTY.
4. JOINT FAMILY PROPERTY.
5. MARRIAGE.
 - (a) DECREE FOR NULLITY.
 - (b) DESERTION.
 - (c) JURISDICTION OF COURT.
6. STRIDHAN.
7. SUCCESSION.
1. ADOPTION AND MAINTENANCE.

HINDU ADOPTIONS AND MAINTENANCE ACT (LXXVIII of 1956), S. 4—
Plaintiff's adoption made in former Kolhapur State before coming into force of Act—Vat Hukum passed by Kolhapur State providing for ex post facto sanction to adoptions—State Government according ex post facto sanction to plaintiff's adoption after coming into force of Act—Competency of State Government to accord such sanction.

The plaintiff's adoption took place in 1900 in the former Kolhapur State. In a Vat Hukum passed by the Kolhapur Government in connection with adoptions there was a provision under which the Kolhapur Darbar could accord *ex post facto* sanction to adoptions which affected Inam properties and which were made without getting the sanction of the Kolhapur Darbar. The Hindu Adoptions and Maintenance Act, 1956, came into force on December 31, 1956, and on June 26, 1957, the State Government accorded *ex post facto* sanction to the plaintiff's adoption. On the question whether the State Government on

HINDU ADOPTIONS AND MAINTENANCE ACT, S. 4—(Contd.)

the date that the sanction was given was competent to accord that sanction by virtue of the provisions of s. 4 of the Act:—

Held, that as the adoption of the plaintiff took place long before the Act came into force, under s. 30 of the Act none of the provisions of the Act could affect that adoption.

that under the Kolhapur Vat Hukum the giving of *ex post facto* sanctions to adoptions was contemplated and such sanctions have been held to be valid sanctions by the High Court, and

that the State Government continued to have the power of according *ex post facto* sanctions to adoptions which had taken place prior to December 31, 1956, and, therefore, the State Government was competent to accord sanction to the plaintiff's adoption.

BALGONDA APPANNA V. BHIMGONDA.

61 BOM. L. R. 184.

—S. 30. See HINDU ADOPTIONS AND MAINTENANCE ACT, 1956, S. 4.

61 BOM. L. R. 184.

2. DEBTS.

Debts—Debt by father—Avyavaharika debt, what is—Father, managing director of bank drawing salary, incurring liability as result of negligence in discharge of his duties as such director—Whether such liability incurred an Avyavaharika debt—Pious obligation of sons to discharge debts of father not tainted with immorality or illegality whether comes to an end on partition of joint family property—Partition taking place after decree and pending execution proceedings—Sale of whole joint family estate in execution—Whether partition saves shares of sons or impairs rights of creditors—Sons not challenging the liability of their interest in execution of decree against father and Court ordering sale of whole estate—Whether auction-purchaser's right defeated on ground that sons not brought on record—What passes to auction-purchaser where right, title and interest of judgment-debtor are sold—Words "right, title and interest" in s. 165 of Bombay Land Revenue Code (Bom. V of 1879).

Under Hindu law an *Avyavaharika* debt is any debt for a cause repugnant to good morals.

Where as a result of certain proceedings taken against a father, who was a managing director of a co-operative bank receiving a salary, by the liquidator of the bank, a payment order for a certain amount was made against him by the Deputy Registrar of Co-operative Societies, *held* that the liability incurred by the father as a result of negligence in the discharge of his duties as a managing director was not an *Avyavaharika* debt.

Under Hindu law the liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and it does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make alienation comes to an end.

HINDU LAW—Debts—(Contd.)

Where the pious obligation exists and partition takes place after the decree and pending execution proceedings, the sale of the whole estate in execution of the decree cannot be challenged except on proof by the sons of the immoral or illegal purpose of the debt and partition cannot relieve the sons of their pious obligation or their shares of their liability to be sold or be a means of reducing the efficacy of the attachment or impair the rights of the creditor.

In cases where the sons do not challenge the liability of their interest in the execution of the decree against the father and the Court after attachment and proper notice of sale sells the whole estate and the auction-purchaser purchases and pays for the whole estate, the mere fact that the sons were *ex nomine* not brought on the record would not be sufficient to defeat the rights of the auction-purchaser or put an end to the pious obligation of the sons.

Where the right, title and interest of a judgment-debtor are set up for sale as to what passes to the auction-purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for.

The words "right, title and interest" occurring in s. 155 of the Bombay Land Revenue Code, 1879, have the same connotation as they had in the corresponding words used in the Civil Procedure Code existing at the time the Bombay Land Revenue Code was enacted.

In execution proceedings it is not necessary to implead the sons or to bring another suit if severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property.

S. M. JAKATI v. S. M. BORKAR.

61 Bom. L. R. (S.C.) 688.

3. FEMALE POSSESSED OF PROPERTY.

—Hindu female possessed of property—Effect of Hindu Succession Act on legal rights of.

The effect of the provisions of the Hindu Succession Act, 1956, on the legal rights of a Hindu female possessed of property and those of the reversionary heirs of the last male holder is that:—

(1) a female Hindu would now become the full owner of the property of which she is possessed, whether she acquired the property before or after the commencement of the Act;

(2) as she would now hold the property of the last male holder as a full and not limited owner, the other heirs of the last male holder can no longer be called reversionary heirs;

(3) the provisions of s. 14 of the Act being retrospective in operation would affect suits filed before the commencement of the Act, i.e. June 17, 1956, so that any such suit in which the reversionary heir claims a declaration about his or her reversionary right regarding the property of the last male holder or any relief that "would, in any manner, be inconsistent

HINDU LAW—Female Possessed of Property—(Contd.)

with the full proprietary rights conferred on the female Hindu by s. 14 of the Act, would become incompetent by reason of the fact that the heir has ceased to be a reversionary heir.

SUGANDBARAI SHIVRAM v. SUNDARAI.

61 Bom. L. R. 560.

4. JOINT FAMILY PROPERTY.

—Joint family property—Nucleus of joint property—Burden of proof how discharged where plaintiff alleges that certain property acquired with help of nucleus of joint family property.

When a plaintiff files a suit alleging that a certain property belongs to a joint family, the initial burden is on the plaintiff to prove his assertion that the property in question is joint family property. This burden can be discharged by the plaintiff by showing that the property was purchased from joint family funds or by joint labour or by showing that the joint family possessed joint family property, that the nucleus of joint family property either proved or admitted was of such a nature that with its help the property in controversy could have been acquired. If the existence of a joint family nucleus or property is either admitted or proved, it must be shown that the nucleus was of such a character that with its help the property in controversy could have been acquired.

If the initial burden of proof resting on the plaintiff is thus discharged, then the burden would shift to the defendant to prove that the property in question was acquired by himself with his own self-acquired property and without the aid of the joint property or joint family funds or income, or that the income derived from the ancestral lands had been kept intact or was not available to him.

GULABRAO AMANDRAO v. RAMJI.

61 Bom. L. R. 1651.

5. MARRIAGE.

(a) Decree for nullity.

HINDU MARRIAGE ACT (XXV of 1955), S. 12—Proceeding instituted under s. 12(1)(d) for decree of nullity of marriage—Respondent alleging in written statement that she was pregnant by petitioner—Burden of proof—Whether petitioner must prove beyond reasonable doubt that respondent was pregnant at time of marriage by some one other than petitioner.

In proceedings instituted under s. 12(1)(d) of the Hindu Marriage Act, 1955, the petitioner must prove beyond reasonable doubt that the respondent was pregnant at the time of marriage and that she was pregnant by some one other than the petitioner.

SUSHILA MAHENDRA v. MAHENDRA MANILAL.

61 Bom. L. R. 431.

(b) Desertion.

S. 10—Desertion—Essential ingredients of.—Wilful neglect, what amounts to—Whether animus deserendi necessary where

HINDU LAW—Desertion—(Contd.)

offence charged is wilful neglect—Reasonable excuse or just cause as answer to charge of desertion.

Under s. 10 of the Hindu Marriage Act, 1955, proof of the requisite *animus deserendi* is necessary where the matrimonial offence charged is wilful neglect of the petitioner by the other party to the marriage.

Conduct of a spouse to amount to wilful neglect must be deliberate and intentional failure to perform the obligations of married life indicative of a total repudiation of the obligations of marriage. Mere neglect of opportunities of consorting or every indifference or want of proper solicitude for the other spouse is not wilful neglect within the meaning of the Explanation to s. 10(1) of the Act.

The burden of proving desertion is upon the spouse who alleges desertion.

In order to establish a plea of desertion there must be a separation in fact between the two spouses and there must also be, on the part of the deserting spouse, an intention to forsake or abandon the other spouse. From the point of time when it is claimed that desertion has commenced, the two conditions must co-exist, though it is not necessary that when separation commenced there must be *animus deserendi*, i.e. intention to forsake or abandon the other spouse. But it is not merely on proof of separation and the existence of the requisite *animus deserendi* that a decree for judicial separation will be passed. There must be two other elements on the co-existence of which alone the deserted spouse will be entitled to a decree for judicial separation, and those elements are (i) the absence of consent on the part of the deserted spouse and (ii) the absence of conduct on the part of the deserted spouse giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention.

In a matrimonial dispute, the matrimonial offence must be established to the satisfaction of the Court beyond reasonable doubt, and, though not as a matter of law, as a rule of prudence, independent corroboration of the version of the parties is sought. Such corroboration, however, need not be by direct testimony: it may be obtained from the conduct of the parties and the surrounding circumstances.

Per S. T. Desai J.: Wilful neglect, in the context of the matrimonial offence of desertion, must be such neglect as can be regarded as the "withdrawal from a state of things." The neglect, wilful neglect, must be in the discharge of matrimonial obligations, and there must be such a failure of the fulfilment of those obligations—the common obligations of the marital state—as would amount to a total forsaking or abandonment of those obligations. Therefore, this failure, this total forsaking or abandonment of consortium evidences the factum of separation and the wilful manner of inflicting it evidences the requisite *animus deserendi*. It would not be appropriate to dissociate *animus deserendi*, which is the essence of desertion even when one speaks of desertion by wilful neglect. It is implicit in the concept of desertion, and it is implicit in wilful neglect. *Animus deserendi* is not merely an attribute

HINDU LAW—Desertion—(Contd.)

or an incidence of the matrimonial offence of desertion. It is of the very nature of that offence and of the essence of it. Therefore, it would be fallacious to say that there need be no proof of *animus deserendi* in a case of desertion founded on the plea of wilful neglect.

A petition founded on the charge of desertion can be resisted by the opponent-spouse if she or he is able to show that there was reasonable excuse or just cause for the separation. The "just cause" must be "grave and weighty" or "grave and convincing". But it can be something which falls short of a matrimonial offence.

MEENA LACHMAN V. LACHMAN UTAMCHAND.

61 Bom. L. R. 1549.

—S. 25. See BOMBAY HINDU DIVORCE ACT, 1947, S. 15.

61 Bom. L. R. (O.C.J.) 1565.

—S. 26. See BOMBAY HINDU DIVORCE ACT, 1947, S. 15.

61 Bom. L. R. (O.C.J.) 1565.

(c) JURISDICTION OF COURT.

—S. 28—*Bombay Civil Courts Act (Bom. XIV of 1869), Sec. 8—Civil Judge, Senior Division, notified as having jurisdiction in matters dealt with in Act—Decree passed by such Judge in petition for divorce or judicial separation—Appeal against such decree whether lies to District Court or High Court.*

When a Court of Civil Judge, Senior Division, notified by the State Government as having jurisdiction in respect of matters dealt with in the Hindu Marriage Act, 1955, passes a decree in a petition under the Act, an appeal against the decree lies to the District Court of the district and not to the High Court.

GANGADHAR RAKHAMAJI V. MANJULA.

61 Bom. L. R. 442.

—S. 29(3). See BOMBAY HINDU DIVORCE ACT, 1947, S. 15.

61 Bom. L. R. (O.C.J.) 1565.

—S. 30. See BOMBAY HINDU DIVORCE ACT, 1947, S. 15.

61 Bom. L. R. (O.C.J.) 1565.

6. STRIDHAN.

—Stridhan—*Non-Saudayika stridhan—Wife separated from husband and living apart from him as husband addicted to vices—Whether wife competent to dispose of by will her non-saudayika stridhan.*

Under Hindu law a wife, who on account of incompatibility of temperament or other cause is separated from her husband and the marital home is broken up, is competent to dispose of her non-saudayika stridhan by will without the consent of her husband who is separated from her.

SHANTABAI BABURAO V. RAMCHANDRA.

61 Bom. L. R. 627.

7. SUCCESSION.

HINDU SUCCESSION ACT (XXX of 1956), S. 4—*Widow of last male holder of Inam pro-*

HINDU LAW—Succession—(Contd.)

property recognised as Navawali of property by former Kolhapur State—Defendant adopted by widow in 1949 without obtaining sanction of adoption from Kolhapur authorities—Plaintiff, another widow of deceased holder, inheriting property—Defendant granted ex post facto sanction to his adoption in 1958—Whether defendant could divest plaintiff's title to property acquired under s. 14—What is possession contemplated by s. 14.

The last male holder of certain Inam property died leaving him surviving his two widows, A and the plaintiff, but no lineal descendants. A was recognised as the Navawali of the property by the former Kolhapur State. On March 14, 1949, defendant No. 1 was adopted by A as a son to her deceased husband. A died on March 18, 1949, and the plaintiff became entitled by inheritance to the property as the sanction of the Kolhapur State authorities to the adoption of defendant No. 1 was not obtained. On June 6, 1958, defendant No. 1 was informed by the Government of Bombay that orders granting sanction *ex post facto* to his adoption by A on March 14, 1949, were issued. Defendant No. 1 relying on this sanction claimed the property as the adopted son. The plaintiff contended that on A's death the property had devolved upon her by inheritance and as she had acquired rights of full ownership in the property on the coming into force of the Hindu Succession Act, 1956, on December 21, 1956, defendant No. 1 could not divest her of her title which was by law made absolute and indefeasible:—

Held, that the estate possessed by the plaintiff, which had become absolute by virtue of s. 14 of the Hindu Succession Act, was not liable to be divested on the grant of the sanction *ex post facto* to the adoption of defendant No. 1.

A sanction *ex post facto* to an adoption may have the effect of divesting property vested in another person by inheritance from the sole surviving coparcener, or a limited owner, but that rule in so far as it is inconsistent with s. 14 of the Hindu Succession Act, 1956, is superseded by cl. (b) of s. 4 of the Act.

Full ownership contemplated by s. 14 of the Hindu Succession Act, 1956, is not subject to any incident of divestiture by adoption.

The possession contemplated by s. 14 of the Hindu Succession Act, 1956, is legal possession and property in the wrongful occupation of a trespasser either directly or through his tenants is nonetheless possessed by a Hindu female within the meaning of s. 14 of the Act. *YAMUNABAI V. RAM MAHARAJ.*

61 Bom. L. R. 1316.

—S. 5. See HINDU SUCCESSION ACT, 1956, S. 4. 61 Bom. L. R. 1316.

—S. 14. See HINDU SUCCESSION ACT, 1956, S. 4. 61 Bom. L. R. 1316.

—S. 14—Specific Relief Act (I of 1877), Sec. 42.—Last male holder leaving widow and daughters—Widow adopting son to her husband after extinguishment of her right to adopt—Suit by daughters for declaration that adoption invalid and not binding upon them—Maintainability of suit—Effect of Hindu Succession Act on legal

HINDU LAW—Succession—(Contd.)

rights of Hindu female possessed of property and of reversionary heirs of last male holder.

Under s. 15(1)(a) read with s. 16 of the Hindu Succession Act, 1956, the sons and daughters (including the children of a deceased son or daughter) and the husband of a female dying intestate, are entitled to inherit her property simultaneously. Therefore, under s. 42 of the Specific Relief Act, 1877, a daughter can challenge the validity of any adoption made by her widowed mother and its binding character in so far as it affects her legal status as the heir of her mother inasmuch as, by virtue of the adoption, the adopted boy would be introduced as an heir to the mother, in respect of property held by her, if she were to die intestate.

The effect of the provisions of the Hindu Succession Act, 1956, on the legal rights of a Hindu female possessed of property and those of the reversionary heirs of the last male holder, is that—

(1) a female Hindu would now become the full owner of the property of which she is possessed, whether she acquired the property before or after the commencement of the Act;

(2) as she would now hold the property of the last male holder as a full and not a limited owner, the other heirs of the last male holder can no longer be called reversionary heirs;

(3) the provisions of s. 14 of the Act being retrospective in operation would affect suits filed before the commencement of the Act, i.e. June 17, 1956, so that any such suit in which the reversionary heir claims a declaration about his or her reversionary right regarding the property of the last male holder or any relief that would, in any manner, be inconsistent with the full proprietary rights conferred on the female Hindu by s. 14 of the Act, would become incompetent by reason of the fact that the heir has ceased to be a reversionary heir.

SUGANDHABAI SHIVRAM V. SUNDRAHAI.

61 Bom. L. R. 560.

—S. 15(1)(a). See HINDU SUCCESSION ACT, 1956, S. 14. 61 Bom. L. R. 560.

—S. 16. See HINDU SUCCESSION ACT, 1956, S. 14. 61 Bom. L. R. 560.

HYDERABAD GENERAL SALES TAX ACT, 1950, S. 2—Hyderabad General Sales Tax Rules, 1950, r. 5(3)—Constitution of India, Seventh Sch. List II, item 54—Whether s. 2(m), Explan. I(1)(iv) ultra vires Legislature—Rule 5(3) whether ultra vires Constitution—Printing press purchasing stationery and doing printing work upon it and supplying for price printed stationery to its constituents—Whether such transaction amounts to sale or works contract.

Section 2(m), Explanation I cl. (4) of the Hyderabad General Sales Tax Act, 1950, and r. 5(3) of the Hyderabad General Sales Tax Rules, 1950, are not hit by item No. 54 of List II in the Seventh Schedule to the Constitution of India, and are not, therefore, *ultra vires* the legislative competence of the Legislature of the former State of Hyderabad.

Rule 5(3) of the Hyderabad General Sales Tax Rules, 1950, is *ultra vires* the Constitution

HYDERABAD GENERAL SALES TAX ACT, S. 2—(Contd.)

of India as it is arbitrary and not based upon any rational basis.

Where a printing press itself purchases stationery and does printing work upon it and supplies the product to its constituents for a price, the transaction of the press with its constituents amounts to a sale of commercial commodity viz. the printed stationery.

SARASWATI PRINTING PRESS v. COMM., SALES-TAX.
61 Bom. L. R. 607.

HYDERABAD TENANCY AND AGRICULTURAL LANDS ACT, S. 11—Whether

s. 11 of Act as amended in 1954 retrospective—Application for fixation of standard rent relating to period prior to amendment—Rent whether to be determined with reference to law existing before coming into operation of amendment.

Section 11 of the Hyderabad Tenancy and Agricultural Lands Act, 1950, as amended by the Hyderabad Tenancy and Agricultural Lands Amendment Act, 1954, is not retrospective but it is prospective.

If an application comes to be made under s. 17 of the Act, then that application will have to be decided on the basis as to whether the application relates to rent for the period prior to the date of the amendment or subsequent to the date of the amendment. If the application relates to a period which is prior to the date of the amendment, then, the rent must be determined with reference to the law existing before the amendment came into operation, and, if the application relates to a period subsequent to the date of the amendment, then, the rent will have to be decided with reference to the subsequent amendment.

NAMDEV BHUKHA v. RAMNATH.
61 Bom. L. R. 351.

S. 17. See HYDERABAD TENANCY AND AGRICULTURAL LANDS ACT, S. 11.

61 Bom. L. R. 351.

ILLEGALITY, Waiver of.

An agreement to waive an illegality is void on grounds of public policy and is unenforceable.

WAMAN SHREINWAS v. RATILAL.
61 Bom. L. R. (O.C.J.) 1001.

INCOME-TAX ACT (XI of 1922)—Assessee receiving earnest money in 1946 for sale of his land—Conveyance executed by assessee in 1950 in favour of purchaser—Profit made by assessee whether liable to be apportioned as income for assessment years 1946-47 and 1951-52—Applicability of s. 4 of Act.

The assessee purchased leasehold interest in certain land and the right to purchase it from a person who had obtained these from the owner of the land. The assessee then purchased a half share in the reversion from the owner and on May 5, 1946, he entered into an agreement with a housing society for sale of his right in the land and obtained Rs. 60,000 as earnest money. The assessee then purchased from the owner his right of reversion in the remaining half share. In 1950 the assessee executed a conveyance in favour of the society

INCOME-TAX ACT—(Contd.)

conveying the land to the society for Rs. 1,23,677 odd. The assessee made a profit of Rs. 96,796 in this transaction. On the question whether the amount of Rs. 96,796 was liable to be apportioned as income for the assessment years 1946-47 and 1951-52, it was contended by the assessee that tax appropriate to the amount of Rs. 60,000 received by the assessee as part of the price in the year 1946 was payable in the assessment year 1946-47 and the tax on the balance was payable by the assessee in the year of assessment 1951-52, and that even if the amount of Rs. 60,000 was earnest money, when the sale deed was executed, and the assessee received the full price of Rs. 1,23,677 odd, in the amount of Rs. 60,000 which was appropriated towards the price at the date of the sale-deed must be regarded as embedded the characteristic of income received in the year 1946 and that amount was liable to be taxed in the year in which it was initially received and not in the year in which the sale-deed was executed and the amount was appropriated towards the price:—

Held, that on the facts of the case the amount of Rs. 60,000 was earnest money and not part payment of the price,

that the principle of s. 4 of the Indian Income-tax Act, 1922, did not apply to the present case where the amount of Rs. 60,000 was left in deposit with the assessee for due performance of a contract which amount was subsequently appropriated towards the price on the execution of the sale-deed, and

that the amount of Rs. 96,796, which was the profit made by the assessee in the transaction, was taxable in the year of assessment 1951-52 and was not liable to be apportioned as income for the assessment years 1946-47 and 1951-52.

HASMUKHLAL PARIKH v. COMM., INC.-TAX.
61 Bom. L. R. 1339.

Payment made by managed company to managing agent of company for deterioration of the managing agency as a profit making apparatus—Character of such payment—Whether a revenue or capital receipt—Company agreeing to pay to its managing agent, appointed for certain period, commission at certain rate on its annual profits—Subsequent agreement between company and managing agent whereby rate of commission reduced for remaining term of managing agency—Compensation paid by company to managing agent for releasing company from onerous term as to remuneration in previous agreement—Whether such amount of compensation paid by company and received by managing agent a revenue or a capital receipt.

The assessee firm was appointed the managing agent of a company for a period of thirty years from November 9, 1888, and the company agreed to pay to the firm a commission during every year at the rate of twenty per cent. on the net profits of the company. Thereafter a supplementary agreement was made between the firm and the company whereby the remuneration of the firm from September 1, 1946, was reduced to ten per cent. of the net annual profits of the company and in consideration the company agreed to pay Rs. 7,50,000 as compensation, for the remaining

INCOME-TAX ACT—(Contd.)

term of the managing agency, "for releasing the company from the onerous term as to remuneration contained" in the previous agreement. The sum of Rs. 7,50,000 paid by the company and received by the firm was, for the relevant assessment year, treated by the Income-tax Officer as a revenue receipt in the hands of the firm and taxed as such. On the question whether this sum was a revenue receipt liable to tax:—

Held, that the sum of Rs. 7,50,000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be,

that so far as the company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the firm for the rest of the term of the managing agency and, therefore, a capital expenditure and so far as the firm was concerned, it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore, a capital receipt, and

that, therefore, the sum was not a revenue receipt liable to tax.

GODFREY & Co. v. COMM. INC.-TAX.

61 Bom. L. R. (S.C.) 1602.

—S. 4. See INCOME-TAX ACT, 1922.

61 Bom. L. R. 1339.

—S. 4(3)(i)—Insurance Act (IV of 1938).—*Assessee firm principal agents of insurance company—Business conducted by assessee as principal agents settled on trust exclusively for charitable purposes—Whether income arising from such business exempt from tax under s. 4(8)(1)—Whether principal agency property within s. 4(8)(1)—Applicability of proviso to s. 4(8)(1) as amended by Indian Income-tax Amendment Act (26 of 1953).*

The assessee, which was a partnership firm, were appointed principal agents of an insurance company and remuneration was paid for conducting the business as principal agents. The appointment was subject to termination by either party giving to the other party one month's notice in writing. Thereafter the business conducted by the assessee as principal agents was settled on trust exclusively for charitable purposes. On the question whether the income arising to the assessee in respect of the assessment years 1951-52 to 1954-55, as chief agent of the insurance company was exempt from tax under s. 4(3)(i) of the Indian Income-tax Act, 1922, it was *inter alia* contended by the Department (1) that the principal agency was nothing but a right of service and it could not be regarded as business and, therefore, not property held upon charitable trust and (2) that in respect of the assessment years 1952-53 to 1954-55, the case fell within the proviso to s. 4(3)(i) of the Act as amended by the Indian Income-tax (Amendment) Act, 1953:—

Held, that the principal agency conducted by the assessee was a business and, therefore, "property" within the meaning of s. 4(3)(i) of

INCOME-TAX ACT—(Contd.)

the Act, which was capable of being lawfully settled upon trust for charitable purposes;

that the business of the assessee, not being one which was carried on on behalf of a religious or charitable institution, was not governed by the proviso to s. 4(3)(i) of the Act as amended by the Indian Income-tax (Amendment) Act, 1953, and that the income was governed by the operative part of s. 4(3)(i), and that, therefore, the income arising to the assessee, in respect of the four assessment years, as chief agent of the insurance company, was exempt from tax under s. 4(3)(i) of the Act.

The business referred to in cl. (b) of the proviso to s. 4(3)(i) of the Indian Income-tax Act, 1922, need not be business which is held for religious or charitable purposes, provided it is business carried on on behalf of a religious or charitable institution.

DHARMA VIJAYA AGENCY v. COMM. INC.-TAX.
61 Bom. L. R. 1421.

—S. 4(3)(i)—Trust created for relief of members of Jewish or other communities and other public charitable purposes—Trust-deed providing that preference to be given to relations and members of settlor belonging to Jewish faith and not less than half the income of trust fund to be given to members of Jewish faith including settlor's relations—Whether such trust a public charitable trust and exempt from taxation under s. 4(8)(1).

Under a Deed of Declaration of Trust executed by Sir Sassoon David, Bart. and others, the trust fund was declared to be held by the trustees upon trusts to apply the net income thereof, for all or any of the six purposes enumerated in clause 13 therein, namely, (a) the relief and benefit of the poor and indigent members of Jewish or any other community of Bombay or other parts of India, or of the world, (b) the institution, maintenance and support of hospitals and schools, colleges or other educational institutions, (c) the relief of any distress caused by the elements of nature such as famine, pestilence, fire, tempest, flood, earthquake or any other such calamity, (d) the care and protection of animals useful to mankind, (e) the advancement of religion and (f) other purposes beneficial to the community not falling under any of the foregoing purposes. Clause 13 contained certain provisos which *inter alia* stated: "Provided always that in applying the income as aforesaid the Trustees shall give preference to the poor and indigent relations or members of the family of the said Sir Sassoon David, Bart., including therein distant and collateral relations; provided further that in the application of income of the said Charitable Trust Fund the said Trustees for the time being shall observe the following proportions, viz: that not less than half the income of the said funds shall at all times be applied for the benefit to the members of the Jewish Community of Bombay only (including the relations of Sir Sassoon David, Bart. as aforesaid) and Jewish objects and particularly in giving donations to the members of the Jewish Community of Bombay on the anniversary of the death of the said Sir Sassoon David, Bart. and his wife... and the remaining income for the benefit of all persons and objects

INCOME-TAX ACT, S. 4—(Contd.)

including Jewish persons and objects and in such proportions as the said Trustees may think proper". On the question whether the trust fund was exempt from taxation under s. 4(3)(i) of the Indian Income-tax Act, 1922, it was contended by the Department that the trust was primarily for the benefit of the relations or members of the family of Sir Sassoon David, Bart.:—

Held, that the earlier part of cl. 18 of trust-deed, omitting the proviso, constituted a public charitable trust,

that the circumstance that in selecting the beneficiaries under cl. 18(a) preference is given under the proviso to the relations or members of the family of Sir Sassoon David, Bart., did not affect that public charitable trust, and

that, therefore, the income from the trust properties came within the scope of s. 4(3)(i) of the Act, and was entitled to exemption from tax.

TRUSTEES, CHARITY FUND v. COMR. INC.-TAX.
61 Bom. L. R. (S.C.) 1452.

—S. 4(3)(vii)—*Manufacturing company agreeing to sell certain electrical goods only to firm doing business in electrical goods and firm undertaking not to deal in any competing business in such goods—Agreement determined by notice served by the company and firm continuing its original business in electrical goods—Compensation paid by company to partners of firm for apprehended loss to firm by determination of agreement—Amount of such compensation received by partners, capital receipt or revenue receipt—Whether monopoly rights under agreement constitute asset of firm—Such amount whether accepted under s. 4(3)(vii).*

Under an agreement a manufacturing company agreed to sell their electric lamps only through a partnership firm, which was doing business in electrical goods and as commission agents, in a specified territory and the firm in its turn undertook not to sell the lamps sold to it to any one outside the territory nor to deal in any competing business in electric lamps. This agreement was determined by notice served by the company on the firm. The firm continued to carry on its original business in electric goods including electric lamps and could sell the company's lamps as regular lamp dealers. The company "as a gesture of goodwill" offered to compensate for the loss which it was apprehended would be caused to the firm by agreeing to pay a certain amount per annum to each of the partners for a period of three years and this compensation was expressly designated "three years remuneration". On the questions whether the amount so received by each of the partners was a taxable receipt for the purpose of the Indian Income-tax Act, 1922, and if so, whether it was liable to be not included in the total income of the recipient by reason of s. 4(3)(vii) of the Act:—

Held, that as the monopoly rights under the agreement did not constitute an asset, the extinction of those rights did not affect the conduct of the business of the firm and, therefore, the compensation paid for extinguishing the rights cannot be regarded as a capital asset, and the receipt of the amount was a taxable receipt for the purpose of the Act and

INCOME-TAX ACT, S. 4—(Contd.)

that the amount being receipt arising from business, has to be included in the total income notwithstanding s. 4 of the Act.

P. H. DIVECHA v. COMMR. INC.-TAX.
61 Bom. L. R. 1584.

—S. 6. See INCOME-TAX ACT, 1922, S. 25(3).
61 Bom. L. R. 847.

—S. 7. See INCOME-TAX ACT, 1922, S. 25(3).
61 Bom. L. R. 847.

—S. 7(1), Explanation 2—*Amount paid by employer to employee after termination of service as gift "in consideration of having rendered loyal and meritorious services"—Whether such amount a taxable receipt in hands of employee.*

A certain amount was paid by the employer to his employee, after he had ceased to be in his service, as a gift "in consideration of... having rendered loyal and meritorious services". On the question whether this amount could be brought to tax in the hands of the employee as a taxable receipt within s. 7(1) read with Explanation 2 (as it stood before its amendment by the Finance Act, 1955) of the Indian Income-tax Act, 1922:—

Held, that, in the circumstances of the case, the amount was given to the employee to recompense or remunerate past services and, therefore, the amount could be brought to tax under s. 7(1) read with Explanation 2 of the Act.

Explanation 2 to s. 7(1) of the Act even before its amendment applied to cases of remuneration for past services received by an employee from his quondam employer.

MAHESH ANANTRAI v. COMMR., I.-TAX.
61 Bom. L. R. 386.

—S. 9. See INCOME-TAX ACT, 1922, S. 25(3).
61 Bom. L. R. 847.

—S. 10—*Assessee in course of their business submitting tender to supply certain commodities—Assessee under terms of tender depositing certain amount as security for carrying out contract—Forfeiture of amount deposited on failure of assessee to carry out contract—Whether assessee can claim deduction of amount forfeited as trading loss.*

The assessee firm, which carried on business in several commodities, in the course of their business submitted a tender to a railway company and undertook to supply certain commodities to the company. In accordance with the terms of the tender the assessee deposited a certain amount as a security for properly carrying out the contract. The assessee failed to carry out the contract with the result that the company forfeited the amount which was deposited with it in respect of the tender. On the question whether in computing the business profits of the assessee under s. 10 of the Indian Income-tax Act, 1922, the assessee was entitled to claim deduction of the amount forfeited as a trading loss:—

Held, that as the making of the deposit was incidental to the business which the assessee was carrying on, the deposit could be looked upon as a business expenditure and as it was

INCOME-TAX ACT, S. 10—(Contd.)

forfeited it was a business loss in respect of which the assessee could claim deduction.
 NARANDAS MATHURADAS v. COMM. INCOME-TAX.
 61 Bom. L. R. 361.

—S. 10—Partner bound to attend to partnership business engaging, with permission of other partners, person to discharge his duty—Whether remuneration paid to such person an admissible deduction—Partner making gifts out of amount standing to his credit in partnership account—Entries made in books of firm, with consent of partners, debiting partner's account with sums representing the amount of gifts and crediting such sums to account of donees—Firm paying interest on such sums and allowing donees to withdraw moneys from time to time—Whether such transactions evidence a completed and legally valid gift.

Where it is incumbent on a partner to attend to the management and affairs of the partnership business and he finds he is unable or disabled to do so and the other partners permit him to have some other person to discharge his duty by the firm or to depute for him, the remuneration paid to that person will be an admissible deduction under s. 10 of the Indian Income-tax Act, 1922.

One of the two partners of a firm executed certain writings under which he made a gift of certain sums to his daughter-in-law and his grandchildren out of the amount standing to his credit in the partnership account. Entries were accordingly made in the firm's books with the knowledge and consent of the partners whereby out of the moneys which stood to the credit of the partner the amount of the gift was debited to his account with such consent and credited to the account of the donees with the intention of making them creditors of the firm. The donees accepted the transaction of gift, the firm accepted the transaction and not only paid interest on the amount accepted as due to the donees but also allowed the donees to withdraw moneys from time to time. Held, that in the circumstances of the case a completed and legally valid gift of the aforesaid sums was made by the partner in favour of his daughter-in-law and grandchildren.
 COMM. INC.-TAX v. DIGVIJAYBINJI TIN FACTORY.
 61 Bom. L. R. 566.

—S. 10(2)(vi), proviso. See INCOME-TAX ACT, 1922, S. 15C.

61 Bom. L. R. 1380.

—S. 10(2)(vi-b)—Word "plant" in s. 10(2)(vi-b) whether includes motor cars and bicycles.

The word "plant" in s. 10(2)(vi-b) of the Indian Income-tax Act, 1922, includes vehicles such as motor cars and bicycles.

COMM. INC.-TAX v. SARASPUR MILLS.

61 Bom. L. R. 1338.

—S. 10(2)(xx)—Allowances permissible on ground that expenditure laid out for purpose of assessee's business—Principle governing such allowances—Expenditure of nature of compensation for termination of employee's services whether a permissible deduction—Applicability of test of commercial expediency where such deduction

INCOME-TAX ACT, S. 10—(Contd.)

claimed—Whether income-tax department can frame its own standard of commercial prudence where amount of compensation claimed as permissible deduction.

For claiming a deduction under s. 10(2)(xx) of the Indian Income-tax Act, 1922, what is required is that the expenditure must be germane to the business of the assessee and not something which is *de hors* the business of the assessee. If it is an expenditure of the nature of compensation for termination of the services of an employee, the closer test would be that of commercial expediency. If the payment is made under the honest belief that the claim by the employee for compensation or damages is justified and the assessee has acted in the matter of the settlement of the claim as an ordinary prudent businessman would act, it would not be for the income-tax department to say that the claim would not have succeeded in its entirety or even partly in a Court of law. In such a case the Department cannot insist on framing its own standard of reasonableness or prudence. It cannot claim the right or discretion to look at the matter subjectively but must examine it objectively. If the Department reaches the conclusion that the payment does not reflect a genuine transaction, it can object to it, or if the payment appears to have been made for a collateral purpose, it may not accept the claim for allowance. So also if the payment is made with an indirect or improper motive or for some consideration *attende* the business or out of sheer generosity. The test, in fine, must be of commercial expediency.

F. E. DINSHAW LTD. v. COMM. I.-TAX.

61 Bom. L. R. 393.

—S. 10(2)(xx)—Leases granted by Government, under leases, right to enter upon lands and win manganese ore—Leases transferring such right to assessee for consideration—Whether consideration paid by assessee a capital or revenue expenditure.

By certain leases the Government granted to a mining syndicate the beds, veins and seams of manganese ore lying in or under the lands described in the leases with certain rights and subject to certain restrictions. All these rights of the mining syndicate under the leases were transferred to the assessee company under an agreement. On the question whether the consideration paid by the assessee for purchasing the rights of the mining syndicate under the mining leases was capital expenditure and as such not an allowable deduction, it was contended by the assessee that the manganese ore lying underground though unascertained—but nonetheless ascertainable—was sold to the mining syndicate and by transfer of the rights the assessee had in substance acquired a stock of manganese ore for the purposes of its business and, therefore, the expenditure incurred by the assessee for acquiring the stock-in-trade of a business was revenue expenditure.

Held, that the consideration paid for acquiring the means to obtain the stock-in-trade could not be regarded as consideration paid for acquiring the stock-in-trade itself, and

that, therefore, the consideration paid by the assessee for purchasing the benefits and the rights under the leases to win the manganese

INCOME-TAX ACT, S. 10—(Contd.)

so ore from the lands described in the leases must be regarded as capital expenditure.
MADHYA PRADESH INDUSTRIES v. COMMR. INC.-TAX.
 61 Bom. L. R. 1333.

—S. 10(5). See INCOME-TAX ACT, S. 10(2)(vi-b).
 61 Bom. L. R. 1338.

—S. 10(5)(b). See INCOME-TAX ACT, 1922, S. 35.
 61 Bom. L. R. (S.C.) 1395.

—S. 12(4)—*Applicability of s. 12(4)—Whether section applies where there is letting of building for running hotel and furniture and fixtures installed therein for such purpose.*

Section 12(4) of the Indian Income-tax Act, 1922, will apply only if the primary letting is of machinery, plant or furniture and the secondary letting is of the buildings and the two lettings are inseparable.

SULTAN BROS. v. COMMR. INC.-TAX.
 61 Bom. L. R. 1514.

—S. 12B. See INCOME-TAX ACT, 1922, S. 23A.
 61 Bom. L. R. 373.

—S. 15C—*Assessee company purchasing assets and goodwill of partnership firm doing business since July 1, 1948—Payment of consideration made by allotting to partners fully paid up shares of assessee company—Whether assessee company can claim benefit of exemption from tax under s. 15C—What is reconstruction of a business—Construction of statute—Provision for exemption in taxing statute whether to be liberally construed.*

Under an agreement of sale the assessee company which was registered on July 21, 1949, took over all the assets (namely building, machinery, plant, furniture and tools) of the business of a partnership firm which had started doing business from July 1, 1948, including its goodwill for a consideration. Payment of consideration was made by the assessee company by allotting a certain number of fully paid up shares of the assessee company. Neither the credits and outstandings nor the debts and liabilities of the partnership firm were taken over by the assessee company. For the relevant assessment year the assessee company claimed the benefit of an exemption from tax under s. 15C of the Indian Income-tax Act, 1922, on the ground that it was a newly established industrial undertaking. The Department contended that this was a case of reconstruction of a business already in existence within s. 15C(2)(f) of the Act and, therefore, the assessee company could not claim exemption under s. 15C:—

Held, that this was not a case of a newly established industrial undertaking formed by reconstruction of a business already in existence and, therefore, the assessee company was entitled to relief from tax under s. 15C of the Act.

The underlying idea of a reconstruction must be of a "business in existence". There must be a continuation of the activities and business of the same industrial undertaking. The undertaking must continue to carry on the same business though in some altered or varied form. If the alterations and changes are substantial,

INCOME-TAX ACT, S. 15C—(Contd.)

there would be little scope for describing what emerges as a reconstruction of the business. Thus, if the ownership of a business or an undertaking changes hands not ostensibly but in reality and effectively, that would not be reconstruction or if the very nature of the business is changed, that again would not be reconstruction. On the other hand, reorganization of the business on sounder lines or alterations in the mode or method or scope of the activities of the business or in its personnel or control of the business which may even be by some changes in the constitution of persons interested in the undertaking would be no more than reconstruction of the business if it is substantially the same business carried on by substantially the same persons.

A provision relating to exemption in a taxing statute must as far as possible be liberally construed and in favour of the assessee, provided in doing so no violence is done to the language used. *Id.*

COMMR. I-TAX v. GARKWAR F. & R. Co.
 61 Bom. L. R. 380.

—S. 15C—*Assessee, newly established industrial undertaking, making profit in year of account—Income-tax Officer in making assessment for relevant year deducting, out of profit, losses carried forward from previous year—Benefit of s. 15C not given to assessee as total income of assessment year exhausted—Priority between benefit of exemption from payment of tax under s. 15C and set off in respect of loss of previous year under s. 24(2).*

In the year of account the assessee, which was a newly established industrial undertaking, made a profit. The Income-tax Officer in assessing the total income of the assessee for the relevant assessment year, deducted out of the net profits the losses carried forward from the previous years and the unabsorbed depreciation of the previous years and when it was found that the total income of the assessment year was exhausted, he did not give to the assessee the benefit of s. 15C of the Indian Income-tax Act, 1922. On the question whether the losses brought forward from the preceding years should be set off against the profits of the year of account before allowing the assessee the benefit of s. 15C of the Act:—

Held, that s. 15C of the Act merely provides a partial exemption from payment of tax by newly established undertakings, and therefore, in the computation of tax, the amount of losses carried forward is liable to be deducted out of the income of the year of account and it is only after the quantum of tax is ascertained that exemption from payment under s. 15C could be given by the taxing authorities, and

that, therefore, in the instant case the losses brought forward from the preceding years could be set off against the profits of the year of account before allowing the assessee the benefit of s. 15C.

COMMR. INC.-TAX v. NATIONAL ELECTRICAL INDUSTRIES.
 61 Bom. L. R. 1380.

—S. 16(3). See INCOME-TAX ACT, 1922, S. 23A.
 61 Bom. L. R. 1342.

INCOME-TAX ACT, S. 16(3)(a)(iv)—*Assessee making gift of his shares in company to his minor son—Company issuing bonus shares and assessee's minor son allotted bonus shares on his original holding—Dividend income from bonus shares whether taxable in hands of assessee—Whether income from accretions to assets transferred by assessee to his minor children taxable in his hands.*

Income arising from accretions to the assets transferred by the assessee to his minor children cannot be taxed in the hands of the assessee under s. 16(3)(a)(iv) of the Indian Income-tax Act, 1922.

The assessee, who was the holder of certain shares in a company, gifted these shares to his minor son. The company, thereafter, issued bonus shares by increasing its capital and the assessee's minor son was allotted certain bonus shares in respect of his original holding of shares. On the question whether the dividend income from the bonus shares held by the assessee's minor son was taxable in the hands of the assessee under s. 16(3) of the Indian Income-tax Act, 1922:—

Held, that the source of the dividend income from the bonus shares was not the assets transferred but the accretion thereto and that income could not be regarded as arising even indirectly from the assets transferred by the assessee, and

that, therefore, the dividend income from the bonus shares held by the assessee's minor son was not taxable in the hands of the assessee under s. 16(3) of the Act.

POPATLAL BHIKAMCHAND D. COMMOR. INC.-TAX.

61 BOM. L. R. 1332.

—S. 16(3)(b)—*Assessee creating trust-deed setting aside amount, and deed providing for adding interest to corpus and his minor daughter to start receiving interest from such augmented corpus on attaining age of eighteen years in 1959—Income derived from trust fund in assessment year 1964-65 whether could be included in assessee's income under s. 16(3)(b)—Trust-deed requiring trustees to pay certain amount to assessee and by the same deed assessee holding amount for his and his wife's and children's maintenance—Whether such amount received by assessee could be included in his total income.*

To attract the provisions of s. 16(3)(b) of the Indian Income-tax Act, 1922, an income or benefit must be received or derived by the wife or the minor in the year of account. What is sought to be taxed under the section is not a non-existent income but an existing income which is received by someone other than the assessee. Therefore, under this section an assessee can only be taxed on the income from a trust-deed created by him for the benefit of the minor provided in the year of account the income is either received by the minor or the benefit is derived by the minor under the trust-deed.

By a trust-deed dated January 12, 1953, the assessee set aside a certain amount, and the deed provided that the interest on that amount should be accumulated and added to the corpus and his minor daughter was to receive the income from the corpus increased by the addition of interest when she attained the age of

INCOME-TAX ACT, S. 16—(Contd.)

eighteen years on February 1, 1959. She was then to receive the income during her lifetime, and after her, the corpus was to go to other persons. In computing the total income of the assessee for the assessment year 1964-65 the Income-tax Officer included a sum of Rs. 410 which amount represented the income derived in the year of account from the trust fund. On the question whether the sum of Rs. 410 could be so included in the assessee's total income under s. 16(3)(b) of the Indian Income-tax Act, 1922:—

Held, that under s. 16(3)(b) of the Act the assessee cannot be assessed to Rs. 410 which amount was not received by his minor daughter and in respect of which his daughter could not claim any benefit in the year of account.

Under a trust-deed created by the assessee's father the trustees were to hold the trust funds upon trust to pay the net interest and income thereof to the assessee for the maintenance of himself and his wife and for the maintenance, education and benefit of all his children till his death. The assessee received a certain amount under the trust-deed and the Income-tax Officer under s. 41(2) of the Indian Income-tax Act, 1922, included this amount in the total income of the assessee for the relevant assessment year. On the question whether this amount could be properly included in the income of the assessee:—

Held, that under the terms of the trust-deed the assessee was not the sole beneficiary and the amount was received by him in the capacity of a trustee, and

that the assessee could, therefore, be assessed under s. 41(1) of the Act, and the amount received by him under the trust-deed could not be added to his total income.

MANILAL DHANJI D. COMMOR. INC.-TAX.

61 BOM. L. R. 187.

—S. 17(6). See INCOME-TAX ACT, 1922, S. 28A. 61 BOM. L. R. 373.

—S. 18. See INCOME-TAX ACT, 1922, S. 18(4)(6). 61 BOM. L. R. 1521.

—S. 18A(6)—*Dividend income of resident assessee whether falls within s. 18—Whether penal interest can be levied on such income under s. 18A(6).*

Dividend income of an assessee who is a resident is not exempt from the operation of s. 18A(6) of the Indian Income-tax Act, 1922, and, therefore, penal interest can be levied under that section in case of such income.

S. T. Desai J. The words "income to which the provisions of section 18 do not apply" in s. 18A(6) of the Indian Income-tax Act, 1922, read contextually can only mean that while determining the amount of penal interest under s. 18A(6) and applying the ratio of eighty per cent. to the amount of tax paid in advance and the amount of tax determined at the regular assessment, the Income-tax Officer must exclude from the amount of tax determined at the regular assessment the amount of tax for which provision is made under s. 18, that is the amount of tax which is deducted at source under sub-ss. (2) to (3D) and the amount of tax

INCOME-TAX ACT, S. 18A(6)—(Contd.)

which is to be treated as paid by the assessee under sub-s. (5) of s. 18.

COMM. INC.-TAX V. PURSHOTTAMDAS.

61 Bom. L. R. 1521.

—S. 22. See INCOME-TAX ACT, 1922, S. 24. 61 Bom. L. R. (S.C.) 1458.

—S. 23(4)—Income-tax Officer calling upon assessee by notice under s. 22(4) to produce suppressed books—Order passed under s. 23(4) on non-compliance of notice by assessee—Assessee not applying under s. 27 for cancellation of assessment under s. 23(4)—Assessee in appeal under s. 30 challenging validity of assessment under s. 23(4) and seeking to contend that books required to be produced not in existence—Whether open to assessee to challenge validity of assessment under s. 23(4) in appeal under s. 30.

The Income-tax Officer on certain evidence produced before him came to the conclusion that the assessee was maintaining a separate set of books which had not been produced before him and which recorded the transactions which had not been entered in the account books that the assessee had produced. On that the Income-tax Officer issued a notice under s. 22(4) of the Indian Income-tax Act, 1922, and on the failure of the assessee to comply with the notice, he proceeded to assess the assessee under s. 23(4) of the Act. The assessee appealed to the Assistant Appellate Commissioner under s. 30 and attempted to argue the question whether the Income-tax Officer was right in the view that he took that the assessee maintained two sets of books of account and also whether the Income-tax Officer was right in assessing the assessee under s. 23(4). The Appellate Assistant Commissioner held that it was not open to the assessee to argue that question as he had not made an application under s. 27 for cancellation of the assessment made under s. 23(4):—

Held, that in the circumstances of the case the assessee could have made an application under s. 27 and that as he had failed to do so, it was not open to him to challenge the validity of the assessment under s. 23(4) in an appeal under s. 30.

The question whether on a notice issued under s. 22(4) of the Indian Income-tax Act, 1922, the assessee was justified in not producing books which were held by the Income-tax Officer to be suppressed and which the assessee contended did not exist, is a question which falls within the ambit of s. 27 of the Act, and therefore, the assessee cannot agitate this question in an appeal under s. 30 of the Act against the order passed by the Income-tax Officer under s. 23(4) of the Act on the failure of the assessee to comply with the notice under s. 22(4).

MAULADIN AYUB V. COMM. INC.-TAX.

61 Bom. L. R. 354.

—S. 23(5)—Unregistered firm not assessed—Partner in firm whether can claim to set-off his share of losses of such firm against his other income from business.

An assessee, whether an individual or a registered firm, can, as against the profits of

INCOME-TAX ACT, S. 23—(Contd.)

his business, claim to set-off his share of loss of a firm in which he is a partner although the partnership firm is unregistered if the Department does not assess the unregistered firm and determine the loss incurred by such firm.

JADAVJI NARSIDAS V. COMM. INC.-TAX.

61 Bom. L. R. 582.

—S. 23(5)(b)—Income-tax Officer applying s. 23(5)(b) to unregistered firm on finding that firm had made profit during relevant assessment year—Assistant Appellate Commissioner on appeal holding that loss sustained by firm in assessment year and directing Income-tax Officer to modify assessment—Income-tax Officer carrying loss to partners of firm in their assessments—Maintainability of Income-tax Officer's Order—Applicability of proviso (d) to s. 24(2).

The Income-tax Officer in assessing a partnership firm which was unregistered found that it had made a profit during the relevant assessment year and applying s. 23(5)(b) of the Indian Income-tax Act, 1922, he assessed the partners of the firm carrying the profit into their individual returns and made no demand upon the firm. On appeal by the firm the Appellate Assistant Commissioner found that there was error in the computation of income made by the Income-tax Officer and held that in the assessment year there was a loss in the total world income of the firm. The Appellate Assistant Commissioner directed the Income-tax Officer to modify the assessment made by him. The Income-tax Officer thereafter gave effect to the order of the Appellate Assistant Commissioner under s. 31 of the Act and carried the loss to the partners in their assessments and granted a refund to them. On the question whether the order of the Appellate Assistant Commissioner left the Income-tax Officer free of his earlier order and whether he was under a duty to re-consider the position under s. 23(5)(b) of the Act:—

Held, that the reversal of the finding of profit destroyed the substratum of the jurisdiction of the Income-tax Officer to act under s. 23(5)(b) and his order automatically fell through, and

that in the light of the losses determined by the Appellate Assistant Commissioner, the Income-tax Officer was under a duty to apply his mind *de novo* to determine whether he should, in the altered circumstance, apply s. 23(5)(b) to the case or not.

Section 23(5)(b) and proviso (d) to s. 24(2) of the Indian Income-tax Act, 1922, must be read in harmony, and when so read, yield the only result that proviso (d) is to be invoked, subject to the conditions under s. 23(5)(b) to obtain more revenue for the State by applying s. 23(5)(a) of the Act.

Proviso (d) to s. 24(2) could only be resorted to when, in spite of taking the losses to the accounts of the partners, more revenue would be available to the State. The proviso is an enabling one. An unregistered firm, treated as such in the previous years, may, during any year, be treated as a registered firm provided the Revenue would benefit. It may be that the firm may have a loss in that year or was carrying a loss from the previous years but, if

INCOME-TAX ACT, S. 23—(Contd.)

by treating the firm as registered, the Revenue would be benefited, the proviso can be used.
SARUPCHAND V. UNION OF INDIA.

61 Bom. L. R. (S.C.) 1444.

—S. 23A—Order under s. 23A(1) made on company and undistributed portion of assessable income determined—Total income of company as determined including a sum directly taken to general reserve by company—Sum so taken taxed as capital gains in hands of company—Proportionate share in undistributed income of company included in total income of assessee—shareholders of company—Whether portion of s. 23A dividend attributable to capital gains of company should be taxed as capital gains of assessee under s. 17(6).

The Income-tax Officer made an order in the case of a company under s. 23A(1) of the Indian Income-tax Act, 1922 (as it stood before its amendment in 1955). In making the order of assessment on the company the Income-tax Officer determined the total income of the company and determined the undistributed portion of the assessable income of the company for the relevant year. The total income of the company as determined included a certain amount which the company had taken directly to the general reserve fund and not to the profit and loss account and no part of it was distributed as dividend. This sum was brought to tax in the hands of the company as "capital gains" under s. 12B of the Act. The Income-tax Officer in assessing the assessee, who was a shareholder of the company, for the relevant year, included in his total income his proportionate share in the amount of the undistributed portion of the income of the company. The assessee contended that the portion of s. 23A dividend attributable to capital gains in the hands of the company should be taxed in his hands also at the rate appropriate to "capital gains" as indicated in s. 17(6) of the Act:—

Held, that an equation could not be established between the capital gains of the company and the dividend which the assessee was deemed to have received by operation of s. 23A of the Act, and

that by reason of the legal fiction contained in s. 23A, the proportionate undistributed income of the company had become the dividend income of the assessee and was liable to be taxed as such.

EXECUTORS, SIR COWASJI JEHLANGIR V. COMM. INCOME-TAX.

61 Bom. L. R. 373.

—S. 23A—Assessee's wife holding shares in company purchased by assessee—Order under s. 23A passed in assessment of company—Income deemed to have been distributed as dividend under s. 23A in hands of wife of assessee whether assessable in hands of assessee under s. 16(8).

The assessee's wives held shares in a private limited company which were purchased with funds provided by the assessee. For the assessment years 1949-50 and 1950-51 an order under s. 23A of the Indian Income-tax Act, 1922, was passed in making the assessment of the company, and the income deemed to have been distributed as dividend under s. 23A of the Act in the hands of the wives of the

INCOME-TAX ACT, S. 23A—(Contd.)

assessee was sought to be included in the income of the assessee under s. 16(8) of the Act. On the question whether such dividend income was so assessable in the hands of the assessee:—

Held, that where by a mere fiction the income is deemed to have been received but which has not in fact been received, s. 16(8) of the Act can have no application, and

that, therefore, the dividend income in the present case which was deemed to have been distributed to the assessee's wives under s. 23A was not assessable in the hands of the assessee under s. 16(8) of the Act.

Quære: Whether in the event of actual distribution of the undistributed profits by the company as dividend hereafter, the income received by the wives will be liable to be included in computing the total assessable income of the assessee.

COMM. INCOME-TAX V. PHIROSHAW P. MISTRY.

61 Bom. L. R. 1342.

—S. 23A—Proper order under s. 23A when may be passed—Net commercial profits how to be ascertained—Tax to be deducted from commercial profits whether to be computed on commercial profits.

Under s. 23A of the Indian Income-tax Act, 1922, (as it stood before its amendment by the Finance Act, 1955), it is for the Income-tax Officer to ascertain, having regard to the profits, the anticipated amount of tax which would have to be deducted to find out the net commercial profits, in the light of all the circumstances then present to his mind, and thereafter to relate the same to the amount of dividend declared. If, having regard to the net commercial profits so ascertained, it appeared to the Income-tax Officer that it would not be unreasonable to distribute sixty per cent. of such income as dividend amongst the shareholders, an order under s. 23A of the Act may properly be passed.

NEW MAHALAXMI MILLS V. COMM. INCOME-TAX.

61 Bom. L. R. 1369.

—S. 24. See INCOME-TAX ACT, 1922, S. 23(5).

61 Bom. L. R. 582.

—S. 24(2). See INCOME-TAX ACT, 1922, S. 15C.

61 Bom. L. R. 1380.

—S. 24(2)—Assessee carrying on business in cloth and also business in speculation in gold silver, cotton etc.—Assessee in its return setting off against profits, in year of account, from cloth business, losses in speculation brought forward from preceding years of account—Assessee maintaining one set of books of account for both businesses—Both businesses carried on at same place with same staff—Capital employed for both businesses same—Receipts of one business utilised for the other business and overhead and other expenses common to both businesses—Whether cloth business and business in speculation constitute "the same business" within s. 24(2).

The assessee carried on business as a wholesale dealer in cloth and it also carried on business in speculation in gold, silver, cotton, etc. For the assessment year 1949-50 the assessee made a return of its total income from business and in arriving at the figure of the

INCOME-TAX ACT, S. 24—(Contd.)

total income it deducted from the gross income a certain amount brought forward as loss suffered in the speculation business in the assessment years 1947-48 and 1948-49. It was claimed by the assessee that the cloth business and the business in speculation constituted the same business within the meaning of s. 24(2) of the Indian Income-tax Act, 1922. It was found that only one set of accounts was maintained i.e. in the set of books maintained for the assessee's cloth business, the dealings in speculation were also entered. There was one cash book and the bank accounts were also the same, both for the dealings in cloth as well as in speculation. Receipts either from the assessee's dealings in cloth or from speculation were deposited in these books and similarly withdrawals for purposes of payment either in regard to dealings in cloth or dealings in speculation were made from these books and accounts. The capital employed for both the businesses was the same and the receipts of one business were utilised for purposes of the other business indiscriminately and vice versa and the items of overhead and other expenses were common. Both the businesses were carried on from the assessee's shop and the businesses were carried on with the help of the same staff:—

Held, that on the facts and in the circumstances of the case, the business in speculation and the cloth business conducted by the assessee did not constitute one and the same business, and

that, therefore, the assessee was not entitled to set off against the profits from the cloth business in the year of account the losses in the speculation business brought forward from the preceding years of account.

Though not a conclusive test, an important test which may properly be applied in a case like this, is, whether one of the two businesses conducted by the assessee could be stopped without affecting the texture or framework of the other.

Normally where the assessee carries on two different lines of business, it is a question of fact whether they constitute two separate and distinct businesses or whether they are in truth branches or departments of one and the same business. The conclusion of the Tribunal, which is founded on no evidence or which is unreasonable or perverse, may not be regarded as binding even if it is apparently on a question of fact. If the question is one of legal inference to be drawn from the facts proved, it may be regarded as a question of law.

Per S. T. Desai J. In determining the question whether two businesses can be called the same business or not, consideration must be directed to the concordant activities, if any, and to the basic singleness, if any, of the two businesses. If the activities are diverse and distinct and there is no basic oneness in the nature of the two businesses, then it cannot be said that they are the same business for the purpose of s. 24(2) of the Income-tax Act.

MANILAL DAHIVARHAI v. COMMR. INCOME-TAX.
61 Bom. L. R. 1359.

INCOME-TAX ACT, S. 24B—*Death of partner in firm of attorneys and his son joining partnership—Arrangement between son of deceased partner and continuing partners that realisation of work done prior to death of partner to be divided between previous partners—Sums of moneys realised after death of partner and certain amount paid to estate of deceased partner—Whether such amounts liable to tax under s. 24B in hands of the deceased by his legal heirs and representatives.*

One Amarchand N. Shroff, who was a partner in a firm of attorneys, died and his son joined the firm as a partner. An arrangement was arrived at between him and the continuing partners that in respect of the work done prior to the death of his father, the realisation was to be divided between the three previous partners. Certain sums of moneys were realised during the subsequent five years after the death of the aforesaid partner and five amounts were paid to his estate. The Income-tax Department initiated proceedings under s. 84 of the Indian Income-tax Act, 1922, in respect of these realisations as income in the hands of an entity styled as "Shri Amarchand N. Shroff by his legal heirs and representatives" and the status of that entity was given to be that of an individual. On the question whether these realisations were assessable to income-tax in the hands of the assessee "Amarchand N. Shroff by his legal heirs and representatives," the Department contended that the case fell within the ambit of s. 24B of the Act:—

Held, that the receipt of the realisations could not be equated with income but could be regarded as a capital receipt and, therefore, s. 24B was not applicable to the present case.

COMMR. INCOME-TAX v. AMARCHAND.

61 Bom. L. R. 399.

S. 25(3)—*Securities constituting stock-in-trade of business of assessee firm which had paid tax on its business under Indian Income-tax Act, 1918—Dissolution of assessee firm—Assessee firm claiming benefit under s. 25(3) in respect of interest on securities—Whether assessee firm entitled to such benefit.*

The words "income, profits and gains" appearing in s. 25(3) of the Indian Income-tax Act, 1922, refer to the income, profits and gains made in connection with a discontinued business under whatever head the same may have to be shown and they do not refer to any particular head of income, profits and gains with its varying nomenclature and varying content.

The expression business in s. 25(3) of the Act refers to the activity which is styled business. What has to be discontinued is that activity before the section can apply and the tax which is referred to in connection with that activity business refers to the tax charged under any of the heads under which the income, profits and gains made as a result of such activity may have been entered. If such income, profits and gains included interest on securities which constituted the stock-in-trade of that business, the tax paid under the head "Interest on securities" would be covered.

INCOME-TAX ACT, S. 25(3)—(Contd.)

The assessee firm was a dealer in securities and securities constituted the stock-in-trade of its business. It received certain sums as interest on securities during the accounting year 1946 and the accounting period January 1, 1947, to June 30, 1947. The assessee firm was dissolved on June 30, 1947, and as it had paid tax in connection with its business under the Indian Income-tax Act, 1918, it became entitled to the benefit of the provisions of s. 25(3) of the Indian Income-tax Act, 1922. On the question whether the assessee firm was entitled to the benefit of s. 25(3) of the Act in respect of the interest on securities:—

Held, that the assessee firm was entitled to the benefit of s. 25(3) of the Act in respect of the interest on securities.

COMMR., INCOME-TAX V. GHUGANDAS & Co.
61 Bom. L. R. 847.

—S. 26. See INCOME-TAX ACT, 1922,
S. 25(3). 61 Bom. L. R. 847.

—S. 26A. See INCOME-TAX ACT, 1922,
S. 33B. 61 Bom. L. R. (S.C.) 541.

—S. 27. See INCOME-TAX ACT, 1922,
S. 23(4). 61 Bom. L. R. 354.

—S. 30. See INCOME-TAX ACT, 1922,
S. 23(4). 61 Bom. L. R. 354.

—S. 31. See INCOME-TAX ACT, 1922,
S. 23(5)(b). 61 Bom. L. R. (S.C.) 1444.

—S. 33B—Income-tax Officer granting registration to assessee firm and passing assessment order in respect of firm—Appeal by assessee against assessment made by Income-tax Officer disposed of by Appellate Assistant Commissioner—Whether Commissioner can under s. 33B(1) set aside order of registration made by Income-tax Officer—Order of registration whether merges in appellate order—Exercise of Commissioner's power under s. 33B(1) to set aside registration of assessee firm where assessee's appeal against assessment pending before Appellate Assistant Commissioner.

An order passed by the Income-tax Officer granting registration to an assessee firm continues to be an order passed by the Income-tax Officer even after the assessee's appeal against the assessment made by the Income-tax Officer on the basis that the assessee was a registered firm has been disposed of by the Appellate Assistant Commissioner. Such an order of registration passed by the Income tax Officer does not merge in the appellate order and the Commissioner can, under s. 33B(1) of the Indian Income-tax Act, 1922, exercise his revisional powers in respect of it.

An order of registration of an assessee firm made by the Income-tax Officer in respect of a particular assessment year can be made the subject-matter of the exercise of the Commissioner's revisional power under s. 33B(1) of the Act even though the assessee's appeal against the assessment for the said year is pending before the Appellate Assistant Commissioner at the material time.

COMMR. INCOME-TAX V. AMRITLAL BHOGILAL.
61 Bom. L. R. (S.C.) 541.

INCOME-TAX ACT, S. 34—Assessee making 'voluntary' return showing income below maximum not chargeable to tax—Income-tax Officer issuing notice under s. 34 upon assessee to submit return—Assessee submitting similar return and Income-tax Officer completing the assessment of assessee—Whether notice under s. 34 and assessment thereon valid.

For the assessment year 1945-46 a public notice under s. 22(1) of the Indian Income-tax Act, 1922, was published on May 1, 1945. On January 5, 1950, the assessee submitted a "voluntary" return of his income for the assessment year 1945-46 showing a total net income which was below the maximum not chargeable to tax. The Income-tax Officer did not act on this return, but on February 27, 1950, he issued a notice purporting to be under s. 34 of the Act calling upon the assessee to submit his return. This notice was served on the assessee on March 8, 1950, and the assessee submitted a return similar to his previous return. The Income-tax Officer then completed the assessment of the assessee for the assessment year 1945-46 on February 26, 1951. On the question whether the notice issued under s. 34 and the assessment thereon were valid in law:—

Held, that as the return was already filed by the assessee on January 5, 1950, there was neither an omission nor a failure on the part of the assessee nor was there any question of assessment 'escaping' and, therefore, the notice under s. 34(1) and the consequent assessment were invalid.

COMMR. INCOME-TAX V. RANCHHODDAS.
61 Bom. L. R. (S.C.) 1458.

—S. 35—Indian Income-tax (Amendment) Act (XXV of 1953), Secs. 1(2), 13, 3(2), 7(2), 30(2)—Income-tax Officer in order passed before coming into force of Amending Act giving credit to assessee under s. 18A(5) for amount representing interest on tax paid in advance—After coming into force of Amending Act, Income-tax Officer under s. 35 making an order that assessee entitled to interest only on difference between advance payment made and amount assessed to tax—Applicability of s. 35—Whether previous order made by Income-tax Officer disclose a mistake apparent from the record.

The Income-tax Officer by his assessment order made on October 9, 1952, for the relevant assessment year, assessed a company under the Indian Income-tax Act, 1922, and in the order the company was given credit for a certain amount under s. 18A(5) of the Act as it stood then, as representing interest on tax paid in advance. After the coming into force of the Indian Income-tax (Amendment) Act, 1953, on May 24, 1953, whereby a proviso was added to s. 18A(5) of the Act which proviso was deemed to have come into force on April 1, 1952, the Income-tax Officer exercised his power under s. 35 of the Act and purported to rectify the mistake apparent from the record in regard to the credit for the amount allowed by him to the company by making an order that the company was entitled to get interest not on the whole of the advance amount of tax paid by the company, but only on the difference between the payment made and the

INCOME-TAX ACT, S. 35—(Contd.)

amount which the company was assessed to tax under s. 28. On the question whether the order made by the Income-tax Officer on October 9, 1952, which was proper and valid when it was made, could be said to disclose a mistake apparent from the record, as the said order would be erroneous in view of the subsequent amendment made by the Amending Act which was intended to operate retrospectively:—

Held, that the subsequently inserted proviso must be read as forming part of s. 18A(5) of the principal Act as from April 1, 1952,

that the order passed by the Income-tax Officer on October 9, 1952, was, therefore, inconsistent with the provisions of the proviso and must be deemed to suffer from a mistake apparent from the record, and

that, therefore, the Income-tax Officer was justified in exercising his power under s. 35 of the Act.

VENKATACHALAN D. B'RAY DYU. & MFG. CO.
61 Bom. L. R. (S.C.) 356.

—S. 35—Necessity of notice under first proviso to s. 35(1)—Whether want of such notice renders adverse order against assessee invalid where he knows of rectification proceedings and matter discussed with him—Written down value determined under s. 35 whether can be redetermined in following assessment years—Whether Income-tax Officer can redetermine figure of original cost—Record referred to in expression "apparent from record" in s. 35 whether means only order of assessment—Whether recalculation of written down value, rectifying mistake apparent from record.

The rule laid down as to notice in the first proviso to s. 35(1) of the Indian Income-tax Act, 1922, is not so rigid that if, as a matter of fact, the assessee knows of the proceedings and the matter has been discussed with him then an adverse order would be invalid merely because no notice under s. 63 of the Act was given.

The limit to which the Income-tax Officer can go back does not stop at the written down value of the previous year but extends up to the figure of the original cost, and the method enjoined by s. 10(5)(b) is not that the Income-tax Officer should merely scale down the written down value of the previous year but that he should take into consideration the actual cost, determining it for himself, if necessary, take also into consideration the allowances granted in the past and then make his own computation as to the written down value for the assessment year with which he is concerned. Therefore, merely because under s. 35 of the Act some written down value and the depreciation amount have been determined they are not a final determination binding for all times to come nor does the determination operate as estoppel or *res judicata* for the following years.

The record referred to in the expression "apparent from the record" in s. 35 of the Indian Income-tax Act, 1922, does not mean only the order of assessment but it comprises all proceedings on which the assessment order is based and the Income-tax Officer is entitled for the purpose of exercising his jurisdiction under

INCOME-TAX ACT, S. 35—(Contd.)

s. 35 to look into the whole evidence and the law applicable to ascertain whether there was an error. If, therefore, he doubts the written down value of the previous year it is open to him to check up the previous calculations in accordance with the law applicable including the rules made thereunder.

A mistake contemplated by s. 35 of the Act is not one which is to be discovered as a result of an argument, but it is open to the Income-tax Officer to examine the record including the evidence, and if he discovers any mistake, he is entitled to rectify the error provided that if the result is enhancement of assessment or reducing the refund then notice has to be given to the assessee and he should be allowed a reasonable opportunity of being heard.

MAHARANA MILLS V. INC.-TAX OFFICER.
61 Bom. L.R. (S.C.) 1395.

—S. 35(10)—Income-tax Officer allowing rebate on undistributed profits of assessee company under Part I, Para B, proviso (i) of Schedules of Finance Acts of 1950-52 for calendar years 1949-51—Assessee company showing loss in calendar year 1952, but paying dividend for that year out of profits made by it in 1949-51—Income-tax Officer passing order under s. 35(10)—Whether Income-tax Officer had power to pass such order.

For the assessment years 1950-51, 1951-52 and 1952-53 the Income-tax Officer passed orders on various dates assessing the total income of the assessee company for the relevant assessment years, the previous years being calendar years 1949, 1950 and 1951. At the time of making these assessments the Income-tax Officer allowed a rebate of income-tax on undistributed profits under Part I, Para. B, proviso (i) of the relevant Schedules to the Finance Acts of 1950, 1951 and 1952. For the assessment year 1953-54, the calendar year being 1952, the assessment order showed that the assessee company had incurred losses. The assessee company, however, declared and paid dividend for the calendar year 1952 and these were paid out of the reserves formed out of the profits of the previous years viz. 1949, 1950 and 1951, which had been subjected to tax. The Income-tax Officer called upon the assessee company to show cause why action should not be taken under s. 35(10) of the Indian Income-tax Act, 1922, as, according to him, dividends declared by the assessee company for the assessment year 1953-54 had come out of reserves of earlier years on which rebate was allowed on undistributed profits. The Income-tax Officer ultimately passed orders on the assessee company under s. 35(10) of the Act. The assessee company challenged the orders contending that as the provisions of s. 35(10), which were added by the Finance Act, 1956, and came into force on April 1, 1956, became operative only from April 1, 1956, the original assessment orders which had been made before that date, had become final and conclusive before that date and these assessments could not be affected or touched or altered in any manner by the subsequent legislation introduced for the first time by s. 35(10):—

Held, that on a fair reading of s. 35(10) of the Act the Income-tax Officer in the instant case

INCOME-TAX ACT, S. 35 (10)—(Contd.)

was authorised to recompute the tax payable by the assessee company by reducing the rebate originally allowed as if the recomputation was a rectification of a mistake apparent from the record and, therefore, he had the power to pass the impugned order under s. 35(10).
NEW SHORROCK SFG & MFG. CO. v. RAVAL.

61 Bom. L. R. 618.

—S. 41. See INCOME-TAX ACT, 1922, S. 16(3) (6). 61 Bom. L. R. 187.

—S. 42 (1)—Indian company doing business of non-resident assessee company—Under terms of agreement between companies, Indian company appointed sole agents of assessee company and Indian company not to buy products of any other company—Commission, advertising and propaganda allowances to be paid by assessee company to Indian company in the latter's territory—No difference in rate at which goods sold by assessee company to Indian company or to an Indian constituent—Whether assessee company liable under s. 42(1) in respect of products supplied and shipped directly to Indian company by assessee company.

The assessee company which was registered in the United Kingdom was doing the business of manufacturing and selling pharmaceutical preparations and medicines. Prior to 1947 it had a branch in India which used to sell its goods in the taxable territories, but early in 1947 the business of the assessee company came to be carried on by an Indian company incorporated and registered under the Indian law. An agreement was arrived at between the two companies whereby *inter alia* it was provided that the assessee company appointed the Indian company their sole authorised agents in India; that the assessee company would allow the Indian company commission on all goods supplied to the Indian company's territory; that the assessee company would grant the Indian company an advertising and propaganda allowance on its supplies, calculated at 20 per cent. on the net invoice value after deduction of commissions on such supplies; that all goods invoiced by the assessee company direct to the Indian company would be charged at normal prices, a separate credit note to be sent to the Indian company for commission and advertising and propaganda allowance; that on shipments made to customers in the Indian company's territory, a credit note covering commission and advertising allowance to be sent by the assessee company to the Indian company; that the assessee company would charge the Indian company for supplies shipped direct to the Indian company at current export prices; that the Indian company would undertake to effect an energetic advertising and propaganda campaign in connection with the products of the assessee company upto the extent of the total advertising allowances received by the Indian company from the assessee company and that the Indian company would undertake not to buy or interest itself in any products other than those obtained from the assessee company. The Income-tax Department contended that there was a business connection in regard to all the dealings of the assessee company in respect of the sale of its

INCOME-TAX ACT, S. 42 (1)—(Contd.)

products in the taxable territories and relied on s. 42 of the Indian Income-tax Act, 1922. The assessee company did not dispute its liability in respect of goods sold directly to its customers in India nor did it raise any dispute in respect of goods invoiced by it to the Indian company, but it raised a dispute in respect of products supplied and shipped directly to the Indian company, alleging that the sales made by the assessee company which had taken place outside the taxable territories were between principal and principal and as such there was no business connection in the taxable territories within the meaning of s. 42(1) of the Act.

Held, that, in the circumstances of the case, in regard to the goods in question there was a business connection within the meaning of s. 42(1) of the Act.

COMB. I. TAX v. EVANS MEDICAL SUPPLIES.

61 Bom. L. R. 490.

—S. 42 (2)—Assessee company incorporated in India and doing business as ship repairers—Share capital of assessee company beneficially owned by non-resident shipping companies—Assessee company under agreement with non-resident companies repairing ships of these companies at cost and without charging profits—Whether assessee company chargeable to tax under s. 42 (2).

The assessee was a private limited company incorporated under the Indian Companies Act and was carrying on business as marine engineers and ship repairers. Its registered office was in Bombay and it was resident and ordinarily resident in India. Its entire share capital was beneficially owned by two British companies whose business consisted in plying ships for hire. Under an agreement entered into with the two non-resident companies, the assessee repaired their ships at cost and charged no profits. On the question whether on these facts the assessee was chargeable to tax under s. 42(2) of the Indian Income-tax Act, 1922, it was contended by the assessee (1) that s. 42(2) of the Act imposes a charge only on a business carried on by a non-resident, and that, therefore, no tax could be imposed under that provision on the business of the assessee who was a resident; and (2) that it is a condition for the levy of a charge under s. 42(2) that the non-resident must carry on business with the resident, and that in the instant case that condition was not satisfied:—

Held, that the business which is the subject-matter of taxation under s. 42(2) is that of the resident and not of a non-resident.

that having regard to the course of dealings between the non-resident companies and the assessee it could be said of the former that they carried on business with the latter within the meaning of s. 42(2), and

that, therefore, the assessee was chargeable to tax under s. 42(2).

A non-resident must be held to carry on business with a resident within s. 42(2) of the Act, if the dealings between them form concerted and organised activities of a business character.

MARAGAON DOCK LTD. v. COMMR. INC.-TAX.

61 Bom. L. R. (S.G.) 554.

INCOME-TAX ACT, S. 60—*Notification No. 878F of March 21, 1922 and Notification No. 8 of March 24, 1922—Managing Director receiving monthly salary from company—Certain amount out of salary disallowed in assessment of company—Whether such amount liable to be taxed in hands of assessee managing director—Applicability of Notification.*

The assessee, who was the managing director of a private limited company, received a certain amount per month as salary from the company. In the relevant assessment year the Taxing Authorities disallowed the claim of the company for a certain amount out of the salary paid to the assessee, as in their view, it was not an expenditure laid out or expended wholly or exclusively for the company's business within the meaning of s. 10(2)(iv) of the Indian Income-tax Act, 1922. In the hands of the assessee, his entire remuneration received from the company was sought to be taxed and it was contended by the assessee that the salary paid to him in excess of the amount allowed as deduction in the assessment of the company having already been taxed in the hands of the employers was not liable to be taxed over again in his hands. In support of his contention the assessee relied upon Notification No. 878F dated March 21, 1922, as amended by Notification No. 8 of March 24, 1922:—

Held, that under the Notification it is only where the sum paid is out of or determined with reference to the profits of the business and that by reason of the mode of payment or determination of the sum paid, the same has not been allowed as a deduction but has been included in the profits of the business, that the benefit of the Notification may be given to the assessee.

that, in the instant case, the salary was paid at a stipulated rate per month to the assessee and was not paid out of or determined with reference to the profits of the business, and the disallowance of the amount was not by reason of the mode of payment or determination of the salary out of the profits of the business, and

that as these conditions under the Notification were not fulfilled, the assessee could not have the benefit of the Notification and the amount in question could be taxed in the hands of the assessee.

COMM. INC.-TAX V. MURAJ KARSONDAS.
61 Bom. L. R. 1543.

—S. 63. See **INCOME-TAX ACT, 1922**, S. 85.

61 Bom. L. R. (S.C) 1395.

—S. 66 (4)—*Nature, scope and extent of jurisdiction vested in High Court under s. 66 (4)—Whether High Court can raise a new question of law not arising out of Tribunal's order and submit supplementary statement of case—Scope of directions given by High Court under s. 66 (4).*

Section 66(4) of the Indian Income-tax Act, 1922, does not enable the High Court to raise a new question of law which does not arise out of the Tribunal's order and direct the Tribunal to investigate new or further facts necessary to determine this new question which had not been referred to it under s. 66(1) or s. 66(2) of the

INCOME-TAX ACT, S. 66 (4)—(Contd.)

Act and direct the Tribunal to submit a supplementary statement of case.

Even though the terms of s. 66(4) are wide enough to comprise "such additions thereto or alterations therein as the Court may direct in that behalf" the scope of such directions has got to be read in the context of and in conjunction with the provisions of ss. 66(1) and 66(2) and under the guise of that direction the High Court cannot refer the case back to the Tribunal to find new facts or embark upon a new line of enquiry which would enable either the assessee or the Commissioner to make out a case which had never been made during the course of the proceedings before the Income-tax authorities or the Tribunal so far. Such additions thereto or alterations therein as the Court may direct in that behalf are additions of facts to the statement of case or alterations therein which though they were part of the record before the Income-tax authorities or the Tribunal were not incorporated in the statement of case drawn up by the Tribunal either because such facts or statements though contained in the record were not found by the Tribunal or were omitted to be incorporated in the statement of case drawn up by it.

NEW JEHANGIR VAKIL MILLS V. COMM. INC.-TAX.
61 Bom. L. R. (S.C) 1464.

INCOME-TAX (AMENDMENT) ACT (XXV of 1953). See **INCOME-TAX ACT, S. 4(3) (1).**
61 Bom. L. R. 1421.

INCOME-TAX (AMENDMENT) ACT (I of 1959), S. 2—Indian Income-tax Act (XI of 1922), Sec. 34—Notice issued under s. 34 after April 1, 1956, whether can be challenged on ground that notice not issued within period prescribed by unamended s. 34(1)(a)—Such notice issued before April 1, 1956, whether affected by bar of limitation prescribed under unamended s. 34(1)(a)—Interpretation of statute—Whether Statement of Objects and Reasons can be pressed into service in interpreting words in statute.

Under s. 4 of the Indian Income-tax (Amendment) Act, 1959, a notice issued under s. 34 of the Indian Income-tax Act, 1922, after April 1, 1956, for reopening assessment cannot be called in question on the ground that the notice was not issued within the period prescribed by s. 34(1)(a) of the Indian Income-tax Act before its amendment by the Finance Act, 1956, but all other pleas which circumscribe the jurisdiction of the Income-tax Officer can be entertained. To a notice for assessment or reassessment under s. 34(1)(a) issued before April 1, 1956, and to an assessment or reassessment pursuant to such notice, by s. 4 of the Indian Income-tax (Amendment) Act, 1959, the plea of a bar of limitation under s. 34 before it was amended by the Finance Act, 1956, cannot be entertained.

In interpreting the words used in a statute, especially when the words used are plain, the Statement of Objects and Reasons cannot be pressed into service. In construing a statute the Court may consider the legislative history, may also consider what was the understanding of the law prior to the amendment and may even ascertain what the defect sought to be

INCOME-TAX (AMENDMENT) ACT, S. 2—(Contd.)

remedied by enacting the amending Act was. But the Courts are not entitled to interpret the Act by assuming that the Legislature has effectuated the purpose which it had in mind as set out in the Objects and Reasons and has only effectuated that purpose and no other purpose.

ONKARMAI MEGHRAJ D. COMMER. INC.-TAX.

61 Bom. L. R. 1373.

—S. 4. See INCOME-TAX (AMENDMENT) ACT, 1959, S. 2.

61 Bom. L. R. 1373.

INDEPENDENCE (INTERNATIONAL ARRANGEMENTS) ORDER, 1947, SCHEDULE, CL 1. See ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937, S. 2.

61 Bom. L.R. (O.C.J.) 1195.

—CL. 3. See ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937, S. 2.

61 Bom. L. R. (O.C.J.) 1195.

—CL. 4. See ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937, S. 2.

61 Bom. L.R. (O.C.J.) 1195.

INDUSTRIAL DISPUTES ACT (XIV of 1947), S. 2 (b)—Parties to industrial dispute, pending references to Industrial Tribunal under s. 10, arriving at settlement to refer disputes to private arbitration—Application by such parties to Tribunal for permission to withdraw pending cases—Terms of settlement, stating that dispute should be referred to specified arbitrators, attached to application—Tribunal by order giving "award as per terms of settlement"—Order published in Official Gazette—Complaint made by party to dispute under s. 33-A of dismissal within one month of publication of award—Whether order made by Tribunal, award within meaning of Act—Effect of the order passed by Tribunal.

During the pendency of certain references made to the Industrial Tribunal under s. 10 of the Industrial Disputes Act, 1947, the parties arrived at a settlement, by which they agreed to refer the dispute between them to private arbitration. Accordingly the parties applied to the Industrial Tribunal for permission to withdraw the cases pending before it and to this application they attached the terms of the settlement which stated that the disputes should be referred for decision to certain specified arbitrators. On this application the Industrial Tribunal made the following order: "The terms of agreement have been filed by the parties. I, therefore, give my award as per terms of settlement appended herewith." This order was published as an award in the Government Gazette. Thereafter complaints were made to the Industrial Tribunal under s. 33-A of the Act by the petitioners, one of the parties to the dispute, in which they contended that as they had been dismissed within one month from the date of the publication of the award, there had been a contravention of the provisions of s. 33 of the Act:—

Held, that the effect of the order passed by the Industrial Tribunal was that the proceed-

INDUSTRIAL DISPUTES ACT, S. 2 (b) —(Contd.)

ings before it came to an end when it passed the order, but the disputes still continued and there was no determination thereof by the Tribunal and consequently the order made by the Tribunal was not award within the meaning of the Act and

that as no proceedings were pending before the Tribunal when the petitioners were dismissed, the provisions of s. 33 could not, therefore, be said to have been contravened.

MAHARANA MILL KAMDAR UNION D. VYAS.

61 Bom. L. R. 678.

—S. 2 (j)—Constitution of India, arts. 19(1)(g), 276—Bombay Shops and Establishments Act (Bom. LXXIX of 1948), Sec. 2(4)—Solicitor's profession whether an industry within the meaning of Industrial Disputes Act—Dispute between firm of solicitors and its employees whether can be subject of reference under Act.

The profession of a solicitor is not an industry within the meaning of the word in the Industrial Disputes Act, 1947, and therefore a dispute between a firm of solicitors and its employees is not an industrial dispute which could be the subject of a reference under the Act.

An essential requisite of industry is the existence of relationship of master and servant. This relationship must exist in the industry itself. Only that business, trade, undertaking or calling can be held to be an industry, which requires the co-operation of both the employer and the employees for carrying on that business, trade, undertaking or calling.

NAT. UNION COMMER. EMPLOYEES D. MEHER.

61 Bom. L. R. 642.

—S. 10—Reference of dispute by Government under s. 10(1)(d)—Dispute contained in demand made by employees whether must be wholly referred to Court or tribunal—Whether Government can make reference in respect of modified demand or dispute.

Under s. 10 of the Industrial Disputes Act, 1947, the question of the subject-matter of reference is left to the subjective decision and opinion of the Government. There is no obligation on the Government under this section while making a reference to a Court of inquiry or a tribunal to make a reference of the whole of the dispute and/or of the whole demand made.

ENGINEERING STAFF UNION D. STATE.

61 Bom. L.R. (O.C.J.) 1347.

—S. 12 (6)—Whether open to Government not to refer dispute to adjudication on ground that demands of workers not justified or not appropriate in context of times or financial conditions—Statutory satisfaction of Government whether must be based only on report of Conciliation Officer—Such satisfaction arrived at whether a judicial or quasi judicial act—When reasons given by Government for not making reference disclose extraneous matter taken into consideration or reasons disclose failure to consider relevant factor required by law, whether in such case Court can compel Government to give proper reasons—Whether incumbent on Government to give particulars for reasons given—Whether

INDUSTRIAL DISPUTES ACT, S. 12 (5)
—(Contd.)

competent to Court to make reference where Court satisfied that it should be made.

Under s. 12(5) of the Industrial Disputes Act, 1947, it is open to Government to consider in each case whether conciliation has failed and whether the demands of the workers are such as required adjudication. Not only when the demands are frivolous, but even if they are not justified, even if they are not appropriate in the context of the times or in the context of financial conditions, it would be open to Government not to refer the disputes to adjudication.

Section 12(5) of the Industrial Disputes Act, 1947, makes it obligatory upon the Government to consider the report of the Conciliation Officer. The section does not provide that the satisfaction ultimately required by the Government is a satisfaction that can only be based upon the report of the Conciliation Officer. It would, therefore, be open to Government to rely on other materials, other facts, other statistics other than those which appear in the report of the Conciliation Officer. All that is relevant and germane to the statutory satisfaction can be availed of by the Government in coming to its conclusion.

The satisfaction that the Government has got to arrive at is not a judicial or quasi judicial act. It does not call for any judicial process, although it would be more satisfactory if Government were to discuss various matters in the presence of both the parties before it came to a particular conclusion.

When reasons are given by Government under s. 12(5) of the Industrial Disputes Act, 1947, for not making a reference, and the Court is considering those reasons, if the reasons disclose any extraneous matter taken into consideration by the Government, or if they disclose a failure on the part of the Government to take into consideration any relevant factor required by law, the Court can say that these reasons are not reasons which fall within the ambit of s. 12(5) and compel the Government to give proper reasons.

The reasons must disclose the mental process which has resulted in Government not being satisfied. The Court will not be concerned with how that mental process worked or how the conclusion was arrived at. But if the conclusion is germane to the failure on the part of the Government to be satisfied, then the Court cannot ask the Government to give particulars for the reasons given so that the particulars could be considered and investigated by the Court.

The satisfaction of the Government is a condition precedent to the making of a reference under s. 12(5) of the Industrial Disputes Act, 1947, and, therefore, however satisfied the Court may be, the Court, on a petition made to it to direct the Government to make a reference, cannot place itself in the position of the Government and make a reference by reason of its own satisfaction.

ENGINEERING STAFF UNION v. STATE.

61 Bom. L. R. (O.C.J.) 298.

—S. 12 (5). See INDUSTRIAL DISPUTES ACT, 1947, S. 20 (2) (b).

61 Bom. L. R. (S.C.) 1408.

INDUSTRIAL DISPUTES ACT, S. 15.
See INDUSTRIAL DISPUTES ACT, 1947, S. 2(b).
61 Bom. L. R. 678.

—S. 20 (2) (b)—*Whether conciliation proceedings end when report under s. 12(6) made by Conciliation Officer—Conciliation proceedings continuing beyond fourteen days or report under s. 12(6) not made within fourteen days—Whether such proceedings come to an end after fourteen days.*

Under s. 20(2)(b) of the Industrial Disputes Act, 1947, the conciliation proceedings do not end when the report under s. 12(6) of the Act is made by the Conciliation Officer but when that report is received by the appropriate Government.

If conciliation proceedings are not closed but are carried on beyond a period of fourteen days, or if the Conciliation Officer does not make his report within fourteen days as required by s. 12(6) of the Industrial Disputes Act, 1947, in law the proceedings do not automatically come to an end after fourteen days but only terminate as provided in s. 20(2)(b) of the Act.

ANDHRA ETC. BUS SERVICE v. BOMBAY STATE.

61 Bom. L.R. (S.C.) 1408.

—S. 20 (3). See INDUSTRIAL DISPUTES ACT, 1947, S. 2(b). 61 Bom. L. R. 678.

—S. 22 FF. See INDUSTRIAL DISPUTES ACT, 1947, S. 2 (j). 61 Bom. L. R. 642.

—S. 33—*Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), Secs. 23, 12—Meaning of expression "concerned in such disputes" in s. 33—Workers in ring frame department of mill dismissed pending dispute before Industrial Tribunal relating to seniority between workers in bleaching department of same mill—Mill not obtaining permission of Tribunal before dismissing workmen—Application by dismissed workers under s. 33A to Tribunal whether maintainable—Whether such workmen "concerned" in disputes pending before Tribunal.*

The expression "concerned in such dispute" in s. 33 of the Industrial Disputes Act, 1947, means really concerned or directly, personally or primarily concerned in such dispute, and not merely interested in such dispute.

Certain workers of a mill belonging to the ring frame department of the mill, who were working as doffers, were dismissed by the mill for misconduct. The workers made an application under s. 33A of the Industrial Disputes Act, 1947, to the Industrial Tribunal contending that at the date of their dismissal certain disputes between the mill and its workmen were pending before the Tribunal, that it was obligatory upon the mill to take permission of the Tribunal before dismissing them and that as the mill did not obtain such prior permission, the mill violated the provisions of s. 33 of the Act. The disputes pending before the Tribunal when these workers were dismissed related to determination of seniority between certain workers of the bleaching department of the mill and the change over which was to be effected upon the basis of the seniority. On the question of the maintainability of the application under s. 33A of the Act:—

INDUSTRIAL DISPUTES ACT, 8. 33 —(Contd.)

Held, that the applicant workers were not the workmen concerned in the disputes which were pending before the Tribunal at the date upon which they were dismissed and that, therefore, the provisions of s. 33 of the Act were not attracted and the Tribunal had no jurisdiction to entertain the application under s. 33A of the Act.

NEW JEHANGIR VAKIL MILLS v. VYAS.
61 Bom. L. R. 137.

—S. 33. See INDUSTRIAL DISPUTES ACT, 1947, S. 2(b). 61 Bom. L. R. 678.

—S. 33A. See INDUSTRIAL DISPUTES ACT, 1947, S. 33. 61 Bom. L. R. 137.

—S. 33A. See INDUSTRIAL DISPUTES ACT, 1947, S. 2(b). 61 Bom. L. R. 678.

—S. 36. See INDUSTRIAL DISPUTES ACT, 1947, S. 33. 61 Bom. L. R. 137.

JURY. See CRIMINAL PROCEDURE CODE, 1898, S. 304. 61 Bom. L. R. (F.B.) 670.

KOLHAPUR STATE (APPLICATION OF LAWS) ORDER, 1949, CLS. 3, 5—Land Revenue Rules, 1921; rr. 87(a), 81(2) and (3)—Whether Vat Hukum No. 14 of former Kolhapur State good law after March 1, 1949, in areas which formed part of that State—Revision of assessment whether absolutely banned by r. 87 (a) before expiry of period mentioned therein—Whether obligatory on Collector under r. 81 (2) & (3) to give reasons where land assessed by him at maximum rate.

By virtue of the Kolhapur State (Application of Laws) Order, 1949, Vat Hukum No. 14 of July 4, 1891, issued by the Maharaja of Kolhapur is not a law in force in the areas forming part of the former Kolhapur State after March 1, 1949.

Under r. 87(a) of the Land Revenue Rules, 1921, there is no absolute ban on revising the assessment once made before the expiry of the period of thirty years. All that the rule provides is that assessment shall ordinarily be not revised.

Sub-rules (2) and (3) of r. 81 of the Land Revenue Rules, 1921, require the Collector to give reasons only if he assessed the land revenue higher than the maximum rate fixed. So long as the assessment is upto the limit of the highest rate fixed, it is not obligatory on the Collector to give his reasons thereof.

JAYASINGPORN MILLS v. COLLECTOR OF KOLHAPUR.

61 Bom. L. R. 1322.

LAND ACQUISITION ACT (I of 1894)—Compensation—Market value of land assessed on basis of hypothetical scheme for residential buildings by laying out plots—Valuation how to be arrived at—Whether price received on sale of one plot by claimant without benefit of normal amenities given to purchaser in respect of such plot decisive of value of land—Whether permissible to award claimant value of separate plot in which is reflected value of amenity of well laid-

LAND ACQUISITION ACT—(Contd.)

out road—Such claimant whether could also be separately paid value of land reserved for road.

In proceedings under the Land Acquisition Act, 1894, in assessing the market value of land on the basis of a hypothetical scheme for residential buildings by laying out the land in plots, it is not what the claimant may have expected to receive by sale of the area of one or two plots out of the land which is to be decisive of the value of the land, but what the valuer may regard as the value of the plots aggregated after deducting the expenses of providing such amenities as water connections, well laid-out roads, drainage facility and electrical connections, which the purchasers may normally expect to obtain in the sector in which the land is situate.

In the valuation of land on the basis of a hypothetical building scheme it would be unfair to award to the claimant the value of the separate plots, in which is fully reflected the value of the additional amenity of having well laid-out roads and also separately to pay to the claimant the value of the land reserved for the road.

ADD'L SPL. ACQ. OFFICER v. SHANTARAM.
61 Bom. L. R. 95.

—S. 3—Land assessed as agricultural land and valued as such in assessing compensation payable to occupants—Whether such land can be treated as fit for non-agricultural use in valuing interest of claimant—Whether Land Acquisition Officer can assess compensation payable to occupants and claimant in separate proceedings—Compensation whether can be awarded to claimant on account of circumstances that land may be put to non-agricultural use after acquisition—Whether compensation payable to claimant in award can be awarded as market value or as compensation for damage.

Lands which are assessed to land revenue as agricultural land and which are valued in assessing compensation payable to the occupants as land fit only for agricultural use, cannot in valuing the interest of the claimant therein be treated as fit for non-agricultural use.

When land is acquired, all the interests of the owners of the land but not the interest of the State are notified for acquisition and after the composite value for all these interests is assessed the compensation is distributed amongst the owners of the diverse interests in the land in apportionment proceedings. Where, therefore, the Land Acquisition Officer proceeds to assess the compensation payable to the occupants in one proceeding and the compensation payable to the claimant in a separate proceeding, such proceedings would be irregular.

The circumstance that the land under acquisition may be put to non-agricultural use after it is acquired by the State has to be ignored under s. 24 of the Land Acquisition Act, 1894, and compensation cannot be awarded to the claimant on that account.

A benefit to arise out of land is "land" within the meaning of s. 23 of the Land Acquisition Act, 1894, and by the acquisition of that interest the claimant becomes entitled to the market value thereof on the date of

LAND ACQUISITION ACT, S. 3—(Contd.)

the publication of the notification. Therefore, compensation payable to a claimant for extinction of his interest as Inamdar of the land can be awarded as market value of that interest and not as compensation for damage and he is entitled to the 15 per cent. solatium on the amount awarded to him.

Every piece of land within a municipal area may not be assumed to have an immediate building potentiality.

VAKRATUNDA v. SP. LAND ACQUISITION OFFICER.
61 Bom. L. R. 1501.

—S. 23—*Salsette Estates Land Revenue Exemption Abolition Act (Bom. XLVII of 1951)*—Facts occurring after date of notification under s. 4 and relevant for determination of value of land at date of notification—Whether evidence as to such facts relevant—Amount of compensation payable to Khot for loss of privilege of levying non-agricultural assessment on date of notification issued before coming into force of Bombay Act XLVII of 1951, how to be determined.

Section 23 or section 24 of the Land Acquisition Act, 1894, does not preclude the Court from considering facts, which, though occurring after the date when the right to compensation accrues, help the Court in estimating the value of the property at the relevant date. It would, therefore, be improper to discard facts which have actually occurred, even though after the date of notification, which throw light on the question of the value of the land in question at the relevant date and which assist the Court to a correct ascertainment of such value.

A Notification under s. 4 of the Land Acquisition Act, 1894, in respect of certain lands held by a Khot was issued on January 19, 1950, and the question was as to what amount of compensation was payable to the Khot for the loss of the privilege of levying non-agricultural assessment on the lands accruing on the date of the notification:—

Held, that in view of the Salsette Estates (Land Revenue Exemption Abolition) Act, 1951, (if the Act is held valid and applicable to the claimant Khot), compensation payable to him would be for the period between January 19, 1950, and March 1, 1952, when the Act came into force.

While arriving at the value of the right of compensation for the loss of the privilege of levying assessment accruing on the date of the notification, the Court is entitled to and must look into facts which have actually occurred in preference to mere hypothetical considerations.

SPECIAL LAND ACQ. OFFICER v. KATRAK.
61 Bom. L.R. (O.C.J.) 1259.

—S. 23. See LAND ACQUISITION ACT, 1894, S. 3.
61 Bom. L. R. 1501.

—S. 24. See LAND ACQUISITION ACT, 1894, S. 23.
61 Bom. L.R.(O.C.J.) 1259.

—S. 24. See LAND ACQUISITION ACT, 1894, S. 3.
61 Bom. L.R. 1501.

LAND REVENUE RULES, 1921, R. 81.

Sub-rules (2) and (3) of r. 81 of the Land Revenue Rules, 1921, require the Collector to give reasons only if he assessed the land revenue higher than the maximum rate fixed. So long as the assessment is upto the limit of the market rate fixed, it is not obligatory on the Collector to give his reasons thereof.

JAYASINGPORE MILLS v. COLLECTOR OF KOLHAPUR.
61 Bom. L.R. 1322.

—R. 87.

Under r. 87(a) of the Land Revenue Rules, 1921, there is no absolute ban on revising the assessment once made before the expiry of the period of thirty years. All that the rule provides is that assessment shall ordinarily not be revised.

JAYASINGPORE MILLS v. COLLECTOR OF KOLHAPUR.
61 Bom. L. R. 1322.

LICENCE, Revocation of. See INDIAN EASEMENTS ACT, 1882, S. 69.

61 Bom. L.R. 750.

LIMITATION ACT, (IX OF 1908), S. 14 Plaintiff failing to prove affirmatively that previously instituted suit prosecuted by him in good faith and with due diligence—Whether plaintiff entitled to benefit of s. 14—Burden of proof.

When the plaintiff has not satisfied the initial burden which lies upon him to bring his case within s. 14 of the Indian Limitation Act, 1908, namely, that the previously instituted suit was prosecuted in good faith and with due diligence, the burden would not shift to the defendant to show the contrary.

MADHAVRAO NARAYANRAO v. RAM KRISHNA.
61 Bom. L. R. (S.C.) 531.

—S. 120. See LIMITATION ACT, 1908, S. 144.
61 Bom. L. R. 180.

—S. 134—*Indian Registration Act (XVI of 1908), Secs. 17(1) (b), 49—Mortgagor's suit for possession after redemption—Applicability of art. 134 to such suit—Burden of proof whether on defendant that mortgagee has transferred larger interest than justified by mortgage—Partition severing only joint status of members of Hindu coparcenary without division of property by metes and bounds—Document evidencing such severance whether comes within purview of s. 17(1)(b) of Indian Registration Act.*

Article 134 of the Indian Limitation Act, 1908, contemplates a sale by the mortgagee in excess of his interest as such. Therefore, to attract the operation of art. 134, the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage. If there is no such proof, the shorter period under art. 134 is not available to the defendant in a suit for possession after redemption.

Under Hindu law a partition by allotting specific properties or parcels to individual coparceners may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition, and is, thus, within the mischief of s. 17(1)(b).

LIMITATION ACT, S. 134—(Contd.)

of the Indian Registration Act, 1908. But a partition which is only a severance of the joint status of the members of the coparcenary i.e. what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds, may be brought about by a document and such a document which affects only the status of the member or the members who have separated themselves from the rest of the coparcenary, does not come within the purview of s. 17(1)(b) of the Act, and is, therefore, not compulsorily registrable.

NANI BAI v. GITA BAI.

61 Bom. L. R. (S.C.) 523.

—S. 144—*Suit by purchaser for possession of undivided interest of separated member of joint Hindu family in property kept joint at partition—Whether such suit governed by art. 120 or 144—Such suit whether must be filed within twelve years from date of purchase or within twelve years on which purchaser's title denied.*

Article 144 of the Indian Limitation Act, 1908, applies to a suit for possession by the purchaser of the undivided interest of a separated member of a joint Hindu family in property, which was kept joint at the time of the partition or when members of the joint family separated from each other. The purchaser must file his suit for possession within twelve years from the date on which his title is actually denied.

If a person purchases the share of a separated member in property, which was not actually partitioned but which continues to be held jointly by the separated members of the family by his purchase, such a person acquires all the rights of his vendor, including his right as a co-owner to joint possession of the property jointly held and also his right to obtain by partition separate possession of his share in that property.

VISHVAMATH KRISHNA v. MAHADEO.

61 Bom. L. R. 180.

—ART. 178.

Article 178 of the Indian Limitation Act, 1908, does not apply to an application for filing an award under s. 5 of the Arbitration (Protocol and Convention) Act, 1937.

FRANCESCO CORRI v. GORAKHRAM.

61 Bom. L. R. (O.C.J.) 1195.

—ART. 181—*Civil Procedure Code (V of 1908), O.XXI. r. 11—Plaintiff's suit for possession decreed on December 20, 1947, on condition that plaintiff deposited certain amount in Court—Appeal by parties to suit dismissed on October 31, 1955—Application for execution of decree without deposit of money made on October 8, 1956—Deposit made by October 9, 1958—Whether application barred by time—Applicability of arts. 181 and 182—Whether application not in accordance with law because not accompanied by deposit.*

Plaintiff filed a suit against the defendants for possession of property and the suit was partly decreed on December 20, 1947, whereby possession was granted to the plaintiff on condition that he deposited a certain amount

LIMITATION ACT, ART. 181—(Contd.)

in Court. The parties to the suit appealed and their appeals were dismissed on October 31, 1955. On October 2, 1956, the plaintiff made an application for execution of the decree without depositing any money along with it, but by October 9, 1958, he had deposited the amount in Court. On the questions whether the application for execution was barred by time and whether it was not in accordance with law, the defendants contended that the decree passed by the trial Court was a conditional decree and that to such a decree the appropriate Article of the Indian Limitation Act, 1908, which applied was art. 181 of the Act, and, therefore, the application was barred by time, and that as the plaintiff's application was not accompanied by the deposit, it was not in accordance with law:—

Held, that on general principles, apart from the provisions of item 2 in column 3 of art. 182 of the Indian Limitation Act, where execution is sought of a decree passed in a suit in which an appeal has been preferred and decided, the starting point of limitation would be the date of the appellate decree,

that even though art. 181 of the Act applied to an appellate decree, the deposit of the amount having been made by the plaintiff within three years of that decree and the execution application having also been made during this period, the application was not barred by time.

that the relief which the plaintiff had sought was clearly one which was awarded by the decree and the executing Court had jurisdiction to grant it, but if ultimately the plaintiff failed to deposit the amount within the time allowed by the Court, then the Court could dismiss his application but it could not do so simply on the ground that the amount was not put in along with the application for execution.

Normally the article which is applicable to an application for execution is art. 182, and it is only in those cases where for some reason that article does not apply that art. 181, which is a residuary article, can be pressed in aid. Where the question is whether the main article or the residuary article applies, what the Court must do is to determine whether any of the starting points in art. 182 is applicable to the particular application for execution. If none of the starting points is applicable then only the Court can resort to art. 181.

There is a distinction between a case where an application is liable to be dismissed on the ground that it is not in accordance with law and one where it is liable to be dismissed on the ground that the decree-holder is not entitled to obtain any relief because of non-compliance with the condition laid down in the decree sought to be executed.

JANKU ZIBAL v. SHAMBAO.

61 Bom. L. R. 1410.

—ART. 182—*Application to set aside award decree rejected—Appeal against order of rejection dismissed—Darkhast filed to execute award decree—Whether period of limitation runs from date of award decree or date on which appeal against application dismissed—Word "appeal" whether restricted to appeal from order or decree sought to be executed.*

LIMITATION ACT, ART. 182—(Contd.)

The word "appeal" in column 3 of art. 182 of the Indian Limitation Act, 1908, is not restricted to an appeal from an order or decree which is sought to be executed, but includes an appeal from an order having direct and immediate connection with the decree which is sought to be executed.

In a suit filed by the plaintiff to set aside a sale-deed in respect of property valued at about Rs. 17,000, an award decree was passed on October 19, 1950, for Rs. 4,000. The plaintiff then filed an application to set aside the award decree praying that the decree should have been passed for an amount of Rs. 17,000 and odd. This application was rejected, and an appeal from this order of rejection was dismissed by the High Court on July 8, 1953. The plaintiff on November 11, 1954, filed a darkhast to execute the award decree. On the question whether the darkhast was in time:—

Held, that the order which was passed on the plaintiff's application had a direct and immediate connection with the award decree sought to be executed,

that the starting point of limitation was, therefore, July 8, 1953, on which date the High Court dismissed the appeal filed by the plaintiff from the order rejecting his application, and

that, therefore, the darkhast was in time.
SARDARSINGH V. RAKARAN.

61 Bom. L.R. 984.

—ART. 182. See LIMITATION ACT, 1908, ART. 181. 61 Bom. L.R. 1410.

MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT (I of 1951), S. 4—Central Provinces Land Revenue Act (II of 1917)—Central Provinces Tenancy Act (I of 1920)—Home-farm land held as khudkash and in possession of persons on date of vesting under Act I of 1951—Title of other persons in such land subsisting at time of coming into force of Act—Whether title of such persons affected by Act—Dispute as to title to land how to be decided.

Under the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 where a home-farm land stands in the name of certain persons as *khudkashi* land and is in their possession on the date of vesting under the Act, the rights and interests of other persons in this land which were subsisting at the time of the coming into force of the Act are not affected by the Act but are kept intact, and if any dispute arises as to the title to this land, that dispute will have to be decided by the civil Court as contemplated under s. 38 of the Act. If, however, before the coming into force of the Act the persons in whose name the land stands had obtained exclusive title to the land against the other persons who were co-owners of the land, by virtue of adverse possession or by relinquishment or otherwise, then under s. 4(2) of the Act they would be entitled to retain possession of the land and they would become *malik makbuzas* of the land under s. 38(1) of the Act.
GAJANAN DHUNDIRAJ V. SHRIDHAR.

61 Bom. L.R. 170.

MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT S. 17. See MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT, 1951, S. 43.

61 Bom. L.R. 698.

—S. 38. See MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT, 1951, S. 4.

61 Bom. L.R. 170

S. 40—Madhya Pradesh Land Revenue Code (II of 1955), Secs. 241, 147, 240(2) 239, 104—C.P. Land Revenue Act (II of 1917) Sec. 46—Application for conferral of *Malik Makbuzas* under s. 41 of Act I of 1951 based on accrual of right of occupancy tenant under s. 40 of Act—Appeal against order made on application pending when Act II of 1955 came into force which repealed s. 40 of Act—Whether appeal lapsed because of repeal of s. 40.

The applicant made an application under s. 40 of the Madhya Pradesh Abolition of Proprietary Rights Act, 1950, for conferral of *malik makbuzas* right in respect of certain land, contending that under s. 40 of the Act read with r. 1 framed thereunder he had become an occupancy tenant of the land and, therefore, he was entitled under s. 41 of the Act to be declared a *malik makbuzas* of the land upon payment by him of the requisite rent. On July 12, 1955, the applicant filed an appeal against the order made on his application to the M.P. Board of Revenue under s. 40 of the Act. Pending the appeal the M.P. Land Revenue Code, 1954, came into force on October 1, 1955, and it repealed, among other provisions, s. 40 of the Madhya Pradesh Abolition of Proprietary Rights Act, 1950. On the question whether the appeal lapsed because of the repeal of s. 40 of the Act, upon which the applicant's right was founded:—

Held, that the foundation of the application under s. 41 of the Act was the right conferred by s. 40 of the Act which right had already accrued to the applicant and was not taken away by any of the provisions of the Code,

that as the proceedings before the Tribunal arose out of the application made by the applicant under s. 41 of the Act, the application was saved by s. 241 of the Code,

that the order made under s. 41 of the Act was made appealable under s. 84 of the Act and that section was not repealed by the Code, and

that, therefore, the appeal did not lapse.

A right acquired under s. 40 of the Madhya Pradesh Abolition of Proprietary Rights Act, 1950, is saved by s. 239 of the M.P. Land Revenue Code, 1954, read with ss. 147 and 240 of the Code.

KODAM RANGLAL V. B'BAY REV. TRIB.

61 Bom. L.R. 86.

S. 41. See MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT, 1951, S. 40.

61 Bom. L.R. 86.

MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT.

S. 43—Civil Procedure Code (Act V of 1908), O. XX, r. 16—Preliminary decree declaring partnership dissolved, plaintiff to render accounts and accounts to be taken—Such decree passed before coming into force of M.P. Act, but final decree against plaintiff for payment of specified amount passed after coming into force of M.P. Act—Attachment of plaintiff's sir fields in execution of decree—Applicability of s. 43.

A preliminary decree for dissolution of partnership and for partnership accounts does not amount to a "debt" within the meaning of s. 43 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950.

BALIRAMBHAU D. CHATURBHUI.

61 Bom. L.R. 698.

MADHYA PRADESH LAND REVENUE CODE (II of 1955)—States Reorganisation Act (XXXVII of 1956), Sec. 122, Notification issued under—Order terminating services of Patel passed by Deputy Commissioner under Code after reorganisation of States—Whether such order appealable to Bombay Revenue Tribunal—Meaning and connotation of expression "Revenue Cases" in Schedule to notification.

An order passed under the Madhya Pradesh Land Revenue Code, 1955, by a Deputy Commissioner terminating the services of a Patel, which order came into effect after the coming into force of the States Reorganisation Act, 1956, is by reason of the notification issued by the State Government under s. 122 of the Act, appealable to the Bombay Revenue Tribunal.

YADORA O. B'RAY REV. TRIBUNAL.

61 Bom. L.R.(F.B.) 213.

MAHOMEDAN LAW—Gift—Deed of gift—Gift of immovable property by grandfather to his minor grandsons—Delivery of possession accepted on behalf of minors by mother and not by father of minors—Whether such gift complete and valid in law.

Under Mahomedan law where a deed of gift in respect of immovable property is executed by a grandfather in favour of his minor grandsons and delivery of possession is accepted on behalf of the minors, not by their father, but by their mother, the deed of gift is not complete and is, therefore, not valid.

ABDUL RAHMAN D. MISHRIMALL.

61 Bom. L.R. 761.

MAMLATDAR, Jurisdiction of.

The Mamlatdar has no jurisdiction under s. 10 of the Bombay Tenancy and Agricultural Lands Act, 1948, to decide a tenant's application for the refund of a portion of the amount tendered by him to the landlord under s. 25(7) of the Act for obtaining relief against forfeiture.

SHAM KAKHUSHRU D. N.P. SHAH.

61 Bom. L.R. 289.

Under the Bombay Tenancy and Agricultural Lands Act, 1948, the Mamlatdar can entertain and decide an application filed by a

MAMLATDAR—(Contd.)

landlord for a declaration that his opponent, who claims to be his tenant, is not a tenant under the Act.

NIVRUTHI LAXMAN D. SHIVDAYAL.

61 Bom. L.R. (F.B.) 957.

MANDAMUS, issue of.

The requirement of a demand by a person who seeks the issue of a writ of *mandamus* is necessary when that person seeks to compel a public authority or a public body to perform its duties under the statute.

If the Court comes to the conclusion that the petitioner is entitled to have his grievance removed, then it has the power to issue an appropriate writ or order though it may not strictly be a writ of *mandamus*.

JOHN SERVAGE D. NAGPUR CORPN.

61 Bom. L.R. 1299.

MASTER AND SERVANT—Disciplinary action—Whether misconduct of servant must arise within his employment to enable master to take disciplinary action—Public servants—Whether disciplinary action can be taken against them for their misconduct outside their employment—Central Provinces and Berar Police Regulations, Rr. 64(11), 214, 217, 226—Police Act (V of 1861), Sec. 7.

In order to enable a master to take disciplinary action against his servant it is not a condition precedent that the misconduct on the part of the servant must arise within his employment and not outside his employment. The test in each case will be whether the servant is conducting himself in a way inconsistent with the faithful discharge of his obligations undertaken by him either expressly or impliedly in accepting the service. The inconsistency may arise on account of any act of the servant, either in the course of his employment or outside it, which injures or has the tendency to injure his master's business or interests or reputation. In the case of a private servant it is the master who in his own discretion decides the question of the disciplinary action to be taken against his servant. In the case of a public servant it is not the master but certain officers of the common master who decide this question, but their powers in that respect are regulated by the Act or rules framed thereunder.

On a Departmental Inquiry being held by the District Superintendent of Police, Wardha, on the conduct of a police constable, it was found that he had behaved very rudely with a member of the public, outside his employment. The District Superintendent of Police passed an order whereunder the police constable was reduced in pay by a certain amount per month for a period of two years and it was further ordered that the reduction would postpone his future increments. On the question whether it was open to the Police authorities to take any disciplinary action against the police constable as the misconduct as found was committed by him not during the course of employment but was outside the employment and whether the District Superintendent of Police had acted within his authority in awarding the punishment which he had awarded for the misconduct found:—

MASTER AND SERVANT—(Contd.)

Held, that the police constable had conducted himself in a way inconsistent with the faithful discharge of his service inasmuch as he had acted contrary to the discipline prescribed for a police officer in cl. (11) of Regulation 64 of the Central Provinces and Bearar Police Regulations, and as his conduct was likely to bring disrepute to the police force, he had exposed himself to a disciplinary action, but,

that the punishment awarded by the District Superintendent of Police was in excess of the authority and powers conferred on him under the provisions of Regulation 226, and that the punishment awarded contravened the specific provisions of cl. (a) of Regulation 217.

MADHOSING V. STATE OF BOMBAY.

61 Bom. L.R. 1537.

—Dismissal From Service—*Contravention of express or implied conditions of service by servant whether justifies his dismissal—Types of misconduct illustrative of contravention of implied conditions of service—Indian Railway Establishment Code—Discipline and Appeal Rules (Non-Gazetted), Br. 1702, 1706, 1736.*

To justify dismissal of a servant by his master, the servant must contravene the express or implied conditions of his service, irrespective of the fact whether such contravention was during or outside the course of his employment. The following types of misconduct are illustrative of the contravention of the implied conditions of service, viz., (i) where the act or conduct of the servant is prejudicial or likely to be prejudicial to the interests of the master or to the reputation of the master; (ii) where the act or conduct of the servant is inconsistent or incompatible with the due or peaceful discharge of his duty to his master; (iii) where the act or conduct of a servant makes it unsafe for the employer to retain him in service; (iv) where the act or conduct of the servant is so grossly immoral that all reasonable men will say that the employee cannot be trusted; (v) where the act or conduct of the employee is such that the master cannot rely on the faithfulness of his employee; (vi) where the act or conduct of the employee is such as to open before him temptations for not discharging his duties properly; (vii) where the servant is abusive or if he disturbs the peace at the place of his employment; (viii) where the servant is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant; (ix) where the servant is habitually negligent in respect of the duties for which he is engaged and (x) where the neglect of the servant, though isolated, tends to cause serious consequences.

SHARDAPRASAD V. DIVISIONAL SUPDT. C. RY.

61 Bom. L.R. 1896.

—Liability of Master—*Servant selling adulterated article of food in absence of master—Whether master liable.*

Under s. 7 of the Prevention of Food Adulteration Act, 1954, the master is liable for the acts of his servant committed by him in the course of his ordinary duties, and when a servant sells any commodity or any article of food stocked for sale by the master of the shop,

MASTER AND SERVANT—(Contd.)

the master is deemed to have authorised the sale of such article by the servant. Therefore, if the servant sells any such article of food which is adulterated within the meaning of s. 2(1)(a) of the Act, the master, though not present when the sale is made can be convicted of an offence under s. 16(1)(a) of the Act.

BUDEHMAL FOUJMAL V. THE STATE.

61 Bom. L.R. 444.

—Suspension From Service—*Authority empowered to inflict penalty of suspension whether can pass order of suspension making it operative for period when servant has actually rendered service.*

The authority empowered to inflict the penalty of suspension cannot make the penalty operative for a period during which the person upon whom the penalty is imposed was either in service or in law must be deemed to have been in service. Therefore, the authority cannot pass an order of suspension as a penalty so as to make it retrospective and operate for a period in the past when the servant on whom the penalty is proposed to be imposed has already either actually rendered the service or in law must be deemed to have been in service.

V.M. DORLIKAR V. CHIEF EXECUTIVE OFFICER.

61 Bom. L.R. 1106.

MESNE PROFITS—award of. *See* CIVIL PROCEDURE CODE, 1908, O. XX, R. 12.

61 Bom. L.R. 348.

MINIMUM WAGES ACT (XI of 1948), S. 2 (b). *See* MINIMUM WAGES ACT, 1948, S. 5.

61 Bom. L.R. 890.

—S. 3—*Constitution of India, Arts. 13, 14—Whether obligatory upon State Government to fix or revise rates of minimum wages according to cost of living index—Section 3(3)(a) (iv) of Act whether discriminatory—Burden of proof where notification issued under statute challenged as being discriminatory—Whether necessary to prove that discrimination intentional and purposeful.*

The Minimum Wages Act, 1948, does not cast a statutory obligation upon the State Government to fix or revise the rates of minimum wages strictly according to the cost of living index. Therefore, if the cost of living index in a particular locality is not strictly followed while fixing or revising the rates of minimum wages under s. 3 of the Act, no breach of a statutory duty is committed.

Section 3(3)(a)(iv) of the Minimum Wages Act, 1948, is not discriminatory and it, therefore, does not violate the provisions of art. 14 of the Constitution of India.

When a notification issued by Government in pursuance of the power conferred upon it by the statute is challenged under art. 14 of the Constitution of India as being discriminatory, the challenger must prove not only that the notification is not based on any classification or that it is based on classification which is not founded upon intelligible differentia having rational relation to the object which the Legislature has sought to attain by enacting the statute, but further that the discrimination is intentional and purposeful.

MINIMUM WAGES ACT, S. 3—(Contd.)

Article 13(3) of the Constitution of India does not confer upon the order, rule, regulation, notification etc. referred to in cl. (a) of art. 13(3) the character identical with the character of the Act of the Legislature. All that it says is that the order, notification etc. shall have the same force, and shall be treated on the same footing, as the Act of the Legislature.

BHUKURA v. SANGAMNER BIDI KAMGAR UNION.
61 Bom. L.R. 764.

—S. 3. See MINIMUM WAGES ACT, 1948, S. 5.

61 Bom. L.R. 890.

—S. 4. See MINIMUM WAGES ACT, 1948, S. 5.

61 Bom. L.R. 890.

—S. 5—Notification issued under Act revising minimum rates of wages in respect of employment in tobacco manufactory in Vidharbha—Validity of provisions of notification—Power conferred on State Government to fix minimum rate of wage, how far can interfere with terms of contract between employer and employee—Whether Authority constituted under s. 20 can deal with every kind of wage dispute between employer and employee—Government whether can constitute tribunal to decide disputes relating to ascertainment and fixation of rate of wage to employee—Doctrine of implied powers under statute, scope and ambit of.

The second part of cl. 6, cl. 7 and the Explanation contained in the Schedule to the notification No. MWA-1557-J, dated June 11, 1958, issued by the State of Bombay under s. 5(2) read with s. 5(1) (b) of the Minimum Wages Act, 1948, are *ultra vires* of the powers of the State Government. The remaining provisions of the notification are *intra vires* of the powers of Government and, therefore, valid and effective.

Sections 2(A), 8 and 4 of the Minimum Wages Act, 1948, cast a duty on the appropriate Government to fix a minimum rate of wage (which is only a bare subsistence wage) which should be paid to the employee in respect of his employment or in respect of the work done by him in such employment on his fulfilment of the terms of the contract of employment, express or implied. The power thus conferred on the appropriate Government includes the power to interfere with the terms of the contract between the employer and the employee so far as they relate to the fixation of the wage rate, and the appropriate Government has powers by necessary implication to do all acts necessary to so fix the minimum rate of wage as would effectively compensate or remunerate the employee in respect of his employment or in respect of the work done by such employee in his employment.

The powers conferred on the appropriate Government under the Act to interfere with the terms of the contract between the employer and the employee are limited. Those powers are to interfere with the terms of the contract so far as they relate to fixation of wage for the work done in the employment. It is, therefore, not open to the State Government in fixing minimum rate of wages to interfere with the other terms of the contract between the employer and the employee.

MINIMUM WAGES ACT, S. 5—(Contd.)

The words "in any other case" in s. 20(3)(4) of the Minimum Wages Act, 1948, relate only to the three types of claims other than the fixed minimum rate of wage, mentioned in s. 20(1) of the Act. These words do not confer jurisdiction on the Authority constituted under s. 20 to deal with all and every kind of wage dispute arising between the employer and the employee, e.g. disputes relating to the ascertainment and fixation of minimum rate of wage payable to the employee.

In the absence of any provision in the Minimum Wages Act, 1948, for a decision of disputes between the employer and the employee relating to the ascertainment and fixation of minimum rate of wage payable to an employee, by necessary implication it has to be assumed that it is left to the State Government to constitute a tribunal for the said purpose wherever found necessary.

Section 8(3)(b)(iv) of the Minimum Wages Act, 1948, does not relate to a fixation of wage. It directs the appropriate Government to indicate the manner of calculation for purposes of conversion of the rate fixed by it per month into a rate per day and vice versa.

The doctrine of implied powers under a statute can be applied only where the following conditions are fulfilled:—

(1) There must be a duty imposed or power prescribed.

(2) On a reasonable construction of the statute there must be an impossibility in the exercise or fulfilment of that power, resulting in making its object or purpose nugatory.

(3) The impossibility must be such that it is not an impossibility in an individual case because then the law cannot permit powers by implication, but the impossibility must be of a general nature so that the purpose and object of the duty or power is rendered impossible of achievement in every case. It is only then that powers by implication can be inferred.

(4) The implication cannot contradict the expressed intent which must always prevail and where it becomes necessary to read an implication into an enactment the scope of the implication must be limited only to what is reasonably necessary and no more.

BIDI & TOBACCO MGR. ASS'N v. STATE.

61 Bom. L.R. 890.

—S. 5. See MINIMUM WAGES ACT, 1948, S. 3.

61 Bom. L.R. 764.

—S. 6. See MINIMUM WAGES ACT, 1948, S. 26 (2).

61 Bom. L.R. 148.

—S. 6. See MINIMUM WAGES ACT, 1948, S. 3.

61 Bom. L.R. 764.

—S. 7. See MINIMUM WAGES ACT 1948, S. 3.

61 Bom. L.R. 764.

—S. 8. See MINIMUM WAGES ACT, 1948, S. 3.

61 Bom. L.R. 764.

—S. 10. See MINIMUM WAGES ACT, 1948, S. 3.

61 Bom. L.R. 764.

MINIMUM WAGES ACT, S. 20 See MINIMUM WAGES ACT, 1948, S. 8.

61 Bom. L.R. 764.

—S. 26. See MINIMUM WAGES ACT, 1948, S. 8. 61 Bom. L.R. 764.

—S. 26 (2)—Notification issued by Government under s. 26(2) withdrawing exemption from application of Act whether a quasi-judicial or an administrative act—Whether before issuing such notification necessary for Government to conform to principles of natural justice—Notification when can be challenged as an arbitrary act.

A notification issued by the State Government under s. 26(2) of the Minimum Wages Act, 1948, withdrawing an exemption from the application of the Act previously granted by it is an administrative act, and therefore before issuing the notification it was not necessary for the Government to conform to the principles of natural justice.

Such a notification can be challenged as an arbitrary administrative act, if only one party is heard before issuing the notification and no opportunity to be heard is given to the other side.

RAMBHAU SAKHARAM V. TATKE.

61 Bom. L.R. 148.

MINOR—Decree made without formal order of appointment of next friend where minor one of plaintiffs or appellants.

A decree made without a formal order of appointment of a next friend in a case where a minor was one of the plaintiffs or appellants, does not amount to a nullity merely on the ground of failure to appoint a next friend of the minor.

GULABCHAND NANHOOLAL V. FULCHAND.

61 Bom. L.R. 484.

MORTGAGE—Equitable mortgage—Sole mortgaging coparcener mortgaging property vested in him to bank—Cash credit loan account for specified amount opened with bank as consideration for mortgage—Mortgagor covenanting to repay loan after one year, and on failure to do so, bank entitled to recover amount due by sale of mortgaged property—Two extensions of one year each granted by bank of cash credit loan arrangement—Enforcement of mortgage by bank on failure of mortgagor to pay amount found due at foot of account—Suit by son of mortgagor born after date of execution of mortgage and not conceived on or before that date for declaration that mortgage not binding upon his share in mortgaged property—Whether son can challenge mortgage—Mortgage whether continued to remain in operation notwithstanding the two extensions of cash credit arrangement—Whether mortgage became effective on the date of its execution.

The defendant on June 4, 1947, executed a mortgage deed, called a deed of equitable mortgage, in respect of certain property belonging to him, in favour of a co-operative bank to secure a loan for a certain amount. On the date of the execution of the deed the defendant was the sole coparcener in a joint Hindu family. The deed *inter alia* stated that the defendant had opened a cash credit loan account with the bank for developing his business and the defendant could from time to time withdraw upto

MORTGAGE—(Contd.)

the amount of the mortgage loan. Under the deed the defendant covenanted to repay to the bank on or before June 3, 1948, the amount received by him or whatever amount he might withdraw from the cash credit loan account and it was stipulated that the mortgage documents were to remain in possession of the bank till the mortgage amount was repaid by the defendant. It was also provided that if the defendant failed to repay the loan within the time stipulated, the bank was entitled to recover it by sale of the mortgaged property. On May 4, 1948, and again on June 3, 1949, the defendant made applications for extension of the cash credit loan arrangement for a period of one year respectively and both the extensions were granted. On June 3, 1950, a certain amount remained due to the bank at the foot of the account and as the defendant remained indebted in that account till 1952, proceedings were taken against him under the Bombay Co-operative Societies Act, 1925. An award was obtained by the bank under which the defendant was directed to pay the amount due out of the mortgaged property. The plaintiff, who was the son of the defendant, born on April 28, 1948, and who was not conceived on or before June 4, 1947, filed a suit *inter alia* for a declaration that the mortgage of the property executed by the defendant in favour of the bank and the award in favour of the bank were not binding upon his share in the property mortgaged.

Held, that the mortgage was binding upon the defendant who as the sole surviving coparcener was competent to dispose of the property vested in him and the plaintiff not being in existence at the date of the mortgage could not challenge it.

that notwithstanding the applications for renewal of the agreement under which the cash credit arrangement was extended, the mortgage continued to operate on the property,

that when the deed of mortgage was executed for a consideration which was to be advanced in future, the mortgage became effective and enforceable against the totality of the interest of the joint family of which the defendant was the sole surviving coparcener and the birth of the plaintiff subsequently did not affect the enforceability of that mortgage against that interest, and

that, therefore, the award obtained by the bank against the defendant was binding upon the plaintiff's share in the property mortgaged.

AHMEDABAD PEOPLES' CO-OP. BANK V. PRADIP.

61 Bom. L.R. 612.

MORTGAGEE, liability of. See BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, 1947, S. 24. 61 Bom. L.R. 666.

MOTOR VEHICLES ACT (IV of 1939), S. 47—Constitution of India, Art. 19(6)—Road Transport Corporations Act (LXIV of 1960), Secs. 3, 19—Whether State Transport Undertaking can apply under s. 47 for grant of permit—Regional Transport Authority whether can grant permit to State Transport Undertaking and refuse it to private undertaking solely on ground of giving effect to policy of nationalisation of Government—Construction of statute—

MOTOR VEHICLES ACT, S. 47—(Contd.)

General and special provisions relating to public matter—How effect to be given to.

It is open to a State Transport Undertaking to make an application for grant of a stage carriage permit under s. 47 of the Motor Vehicles Act, 1939.

Section 68C of the Motor Vehicles Act, 1939, contemplates the preparation of a scheme by the Corporation, and it is only when such a scheme is decided upon that the provisions of that section apply. Where the Corporation does not prepare a scheme, the provisions of s. 68C cannot be availed of. In those circumstances, the provisions of s. 47 which are wide and general in their terms can be availed of by the Corporation.

It is not open to the Regional Transport Authority in exercising its powers under Chapter IV of the Motor Vehicles Act, 1939, to grant a permit to a State Transport Undertaking and to refuse to a private undertaking solely with the object of giving effect to the policy of nationalisation of road transport which has been decided upon by the Government. The comparative merits of both must be considered and the applications for grant of permit must be decided bearing the respective merits in mind.

Where there are two sets of provisions dealing with some public matter, one section being unqualified and the other containing a qualification, effect must be given to those provisions containing qualifications. But for this principle to apply, the general and special provisions must be applicable to the same set of circumstances. Where the general principles deal with one set of circumstance and the special provisions deal with another set of circumstance, the latter provisions will apply only where those other circumstances exist.

PARBHANI TRANSPORT, LTD. v. BUDDEKAR.

61 Bom. L.R. 1572

—S. 64. See MOTOR VEHICLES ACT, 1939, S. 47. 61 Bom. L.R. 1572.

—S. 68. See MOTOR VEHICLES ACT, 1939, S. 47. 61 Bom. L.R. 1572.

—S. 68B. See MOTOR VEHICLES ACT, 1939, CHAP. IV. 61 Bom. L.R.(O.C.J.) 1145.

—S. 68B. See MOTOR VEHICLES ACT, 1939, S. 47. 61 Bom. L.R. 1572.

—S. 68C. See MOTOR VEHICLES ACT, 1939, CHAP. IV. 61 Bom. L.R.(O.C.J.) 1145.

—S. 68C. See MOTOR VEHICLES ACT, 1939, S. 47. 61 Bom. L.R. 1572.

—S. 68F (2) (a). See MOTOR VEHICLES ACT, 1939, S. 47. 61 Bom. L.R. 1572.

—CHAPTER IV.—*Chap IV-A whether debar State transport undertaking from making application under Chap. IV—Whether such undertaking can make application for stage carriage permit only under Chap. IV-A—Section*

MOTOR VEHICLES ACT, CHAPTER IV—(Contd.)

68-C whether makes it compulsory for State transport undertaking to prepare scheme.

Chapter IV-A of the Motor Vehicles Act, 1939, does not debar a State transport undertaking from making an application under Chapter IV of the Act for a stage carriage permit.

Section 68-C of the Motor Vehicles Act, 1939, is merely an enabling section, and, therefore, it does not make it compulsory or mandatory for a State transport undertaking to prepare a scheme as envisaged in that section.

AMTICHAND v. DIVISIONAL OFFICER, BOMBAY.

61 Bom. L.R. (O.C.J.) 1145.

MUNICIPAL ACT (BOROUGH) (Bom. XVIII of 1925) S. 12—*Bombay Primary Education Act (Bom. LXI of 1947)—Wife of municipal councillor working as teacher in municipal school before his election as councillor and continuing to do so thereafter—Whether councillor disqualified under s. 12(2)(b) of Municipal Boroughs Act—Applicability of s. 28(1).*

The respondent was elected a councillor of a municipality governed under the Bombay Municipal Boroughs Act, 1925. The wife of the respondent was working as a teacher for the past several years before his election, in a school conducted by the municipality and she continued to do so thereafter. On the question whether the respondent was disqualified to remain as a councillor it was contended that the respondent could be said to have directly or indirectly an interest in the employment of his wife with or under the municipality within the meaning of s. 12(2)(b) of the Act and that s. 28(1) of the Act was applicable though the disqualification had commenced before the election of the respondent:—

Held, that the respondent's duty as a councillor was or at any rate was likely to be in conflict with his interest in his wife's employment with municipality and, therefore, he suffered from disqualification within the meaning of s. 12(2)(b) of the Act; and

that the bar of s. 28(1) of the Act applied to the case of the respondent as the disqualification was not only a pre-existing one but one which continued after his election.

RAMRAYA VENKAT v. STATE OF BOMBAY.

61 Bom. L.R. 654.

—S. 28. See MUNICIPAL ACT (BOROUGH), S. 12. 61 Bom. L.R. 654.

—S. 58—*Nadiad Borough Municipality Rules, rr. 43, 2(5)—Whether word "Officer" in r. 43 includes president of municipality—Procedure for electing president where no statutory provision thereto made or in absence of precedent of local body.*

The word "officer" occurring in r. 43 of the Rules framed by the Nadiad Borough Municipality under s. 58(a) and (b) read with s. 46 of the Bombay Municipal Boroughs Act, 1925, must be understood in a wider sense, and not in the narrower sense as defined in r. 2(5) of the Rules. Therefore, the president would be included in the word "officer" as used in r. 43 and the procedure prescribed in that rule for

MUNICIPAL ACT (BOROUGH), S. 58

—(Contd.),
the purpose of voting would apply for electing a president.

In the absence of any statutory provision or precedent of a Local Government body, the person presiding over that body should adopt some well recognised procedure relating to the business which the meeting is convened to transact. For electing a president any one of the three well-established rules of procedure could be adopted, viz. (1) the procedure for election of mayor of the Bombay Municipal Corporation as set out in r. 10 of the Bombay Municipal Corporation Rules and Regulations, (2) the procedure relating to the election of the Speaker set out in r. 6, cl. 3 of the Bombay Legislative Assembly Rules and (3) the procedure relating to the election of the Speaker of the House set out in r. 6, cl. 4, of the Rules of Procedure and Conduct of Business in the House of the People. It is a basic principle of the above rules of procedure that a person declared elected as the president of a body has the vote of the majority of its members in his favour.

DESAIBHAI D. S.M. DUDANI.

61 Bom. L.R. 1326.

—S. 60. (1).

The word "modify" in s. 60(1) of the Bombay Municipal Boroughs Act, 1925, means not only "to reduce" but means also "to enhance".

WESTERN INDIA THEATRES D. M'PAL CORPN,
POONA. 61 Bom. L. R. (S.C.) 954.

—S. 66. See BOMBAY TOWN PLANNING ACT, 1915, S. 14. 61 Bom. L.R. 1247.

—S. 73.

Section 73 of the Bombay Municipal Boroughs Act, 1925, is a law with respect to matters enumerated in entry 50 and not entry 46, List II, Seventh Schedule to the Government of India Act, 1935, and the Bombay Legislature has ample power to enact this law.

WESTERN INDIA THEATRES D. C.B. POONA.
61 Bom. L. R. (S.C.) 950.

MUNICIPAL ACT (CORPORATION)
(Bom. III of 1888), S. 36 (k). See MUNICIPAL ACT (CORPORATION), S. 68.

61 Bom. L. R. (O.C.J.) 1129.

—S. 63—Resolution moved in Corporation to express regret and horror at execution of foreign dignitary and his associates in foreign country—Resolution inter alia describing such persons as fighters for freedom of their country—Whether Corporation competent to discuss and pass such resolution—"Likely to promote public instruction," ambit of expression in s. 63 (k) Expression "business" in s. 36(k), meaning of—Court's power to hold municipal action invalid and ultra vires when to be exercised.

A resolution was moved at a meeting of the Bombay Municipal Corporation by a councillor of the Corporation under which it was sought to express deep regret and horror at the execution of one Imre Nagy, a former Prime Minister of Hungary and his three associates. The resolution drew attention to the fact that

MUNICIPAL ACT (CORPORATION), S. 63—(Contd.)

these persons were "fighters for freedom of their motherland, who by displaying, great courage and steadfastness even at the cost of their lives in the cause of their country's freedom have upheld the dignity of man and rendered great service to the highest value of life, viz. "Freedom." The resolution stressed that the executions were contrary to the doctrine of 'Panchshila' enunciated by the Prime Minister of India and practised by India and accepted by other countries of the world. Finally, by the resolution the Union Government was requested to communicate the same to the families of the late Imre Nagy and his associates with an expression of the Corporation's sympathy in their sad bereavement. On the question whether the action of the Corporation in discussing and passing this resolution would be *ultra vires* the Corporation:—

Held, that the ultimate decision whether a resolution proposed to be moved before a meeting of the Corporation is likely to promote instruction is, under the Act, entrusted to the Corporation and as no appeal is provided against its decision, the Court will not interfere if the question is arguable or if two views are possible, and

that as in the instant case it was arguable that the resolution and the debate on it were likely to educate or instruct the public to love their country and to be ready to fight for its freedom, the resolution could not be said to be beyond the scope and ambit of the Act, and one which the Corporation could not discuss.

The expression "business" in s. 36(k) of the Bombay Municipal Corporation Act, 1888, includes only that business which can be said to relate to municipal administration or Municipal Government of Greater Bombay.

The Court will not hold a municipal action invalid and *ultra vires* the powers of the municipality if it entertains a reasonable doubt on the point and deems the question as fairly and reasonably arguable on the ground that there is room for holding different opinions on the point. It will decline to issue its mandate unless it is satisfied that it is plain and palpable that the act complained of clearly and manifestly transcends the powers conferred on the municipality by statute.

Per S. T. Desai J. The resolution in question and discussion relating to it fall within the ambit of the expression "likely to promote public instruction" in s. 63(k) of the Act, and, therefore, the Bombay Municipal Corporation was competent to discuss and, if the majority of its councillors so decided, to pass the resolution.

The general rule is that the Court will not inquire into the policy, expediency or propriety of a municipal act, and while it has undoubted jurisdiction to determine whether a municipal act is *ultra vires* or not, it will not, in reviewing the vires of the act complained of, probe into the motive or purpose of those initiating or voting on the same.

BOMBAY MUNICIPAL CORP. D. RAMACHANDRA.
61 Bom. L.R.(O.C.J.) 1129.

MUNICIPAL ACT, (CORPORATIONS) (PROVINCIAL) (Bom. LIX of 1949), S. 10.—*Close relationship, without more, with person having contract with, or being in the employment of, a municipal corporation is not sufficient to disqualify a candidate under s. 10(1)(f). Applicability of s. 10(2)(b)(v) to case where disqualification from being elected as member comes up for determination.*

More close relationship with a person having a contract with, or being in the employment of, a municipal corporation is not sufficient to disqualify a candidate under the provisions of s. 10(1)(f) of the Bombay Provincial Municipal Corporations Act, 1949.

Section 10(2)(b)(v) of the Bombay Provincial Municipal Corporations Act, 1949, is applicable only to those cases where the question comes up for determining the qualification of a sitting member. Therefore, when s. 10(1)(f) of the Act has to be considered for the purpose of a disqualification from being elected as a member, s. 10(2)(b)(v) is not applicable to the case. **RAMMING V. MUNICIPAL CORP. POONA.**

61 Bom. L.R. 964.

S. 313—Machinery of printing press completely destroyed except treadle machines—Printing press started again in newly constructed shed after electric installation and purchase of new machinery—Applicability of s. 313(i)—Whether a factory newly established or old factory re-opened or renewed.

Section 313(i) of the Bombay Provincial Municipal Corporations Act, 1949, comes into operation if the facts disclose that a particular factory is completely destroyed and that, in substance, a new factory has been brought into existence. If, on the other hand, the facts establish that the factory was not completely destroyed, but that there was only discontinuance of the factory, then, if the factory comes to be re-opened or renewed, the offence will not be committed unless the prosecution shows that discontinuance was for more than three years, or unless the case comes within the proviso to s. 313 of the Act. The test to be applied in each case is to discover whether the functions performed or capable of being performed by the undestroyed parts are such that the factory cannot efficiently function as a unit and can perform the task of producing the final result or product for the production of which it was erected and for which alone it was intended to exist. The substance of the matter has got to be considered. If, on the evidence, the substance of the matter turns out to be that the old factory has come to be destroyed in the sense that the old factory cannot, in substance, perform its function, then, it would come within the purview of s. 313(i). On the contrary, if the substance of the whole matter is that the factory has not come to be destroyed but it has only come to be discontinued, then, in that case, s. 313(iii) would apply.

KANAKMAL LALCHAND V. STATE.

61 Bom. L.R. 1506.

MUNICIPAL ACT (DISTRICT) (Bom. III of 1901), S. 15. See MUNICIPAL ACT (DISTRICT), S. 22.

61 Bom. L.R. 1151.

S. 22—Election petition filed under s. 22—Whether in such petition validity of

MUNICIPAL ACT (DISTRICT), S. 22—(Contd.)

nomination can be challenged on ground of disqualification under s. 16(1) (ea).

In an election petition filed under s. 22 of the Bombay District Municipal Act, 1901, the petitioner can challenge the validity of the nomination of the opponents of the ground that they were disqualified from standing for election under s. 16(1) of the Act.

KUMBHAV GOVIND V. EXTRA ASST. JUDGE.

61 Bom. L.R. 1151.

S. 46. See MUNICIPAL ACT (DISTRICT), S. 59.

61 Bom. L.R. 795.

S. 59—Bombay Merged States (Laws) Act (Bom. IV of 1950)—Baroda State (Application of Laws) Order, 1949—Whether municipality by framing rules can grant remission of any tax specified in s. 59—Person entitled to refund of part of tax paid to municipality—Municipality admitting its liability to refund but not making the refund—Suit for recovery of such refund whether governed by s. 167-A—Indian Limitation Act (IX of 1908), art. 62.

Under ss. 59, 60 and 48 of the Bombay District Municipal Act, 1901, a municipality has power to provide by rules a scheme for granting remissions in the matter of recovery of any of the taxes specified in s. 59 of the Act including a terminal tax.

Failure by a municipality governed under the Bombay District Municipal Act, 1901, to refund an amount of tax, while accepting liability to refund the same, cannot be said to be an "act done in pursuance or execution or intended execution" of the Act. Therefore, where the plaintiff was in the first instance bound to pay a tax to a municipality and had in fact paid the same, but under the law prevailing the plaintiff was entitled to refund of a percentage of the tax paid and the municipality while admitting liability did not refund the same, a suit filed by the plaintiff for refund of tax would not be governed by s. 167-A of the Act, but by art. 62 of the Indian Limitation Act, 1908.

Quære: Whether it is open to the State to direct by general or special order grant of remission in the matter of levy of a tax by exercising authority under s. 59 of the Bombay District Municipal Act, 1901.

PETLAD MUNICIPALITY V. PETLAD MILLS.

61 Bom. L.R. 795.

S. 59(1) (xi)—Mahabaleshwar Municipality, Rules & By-laws, r. 1—Municipality under rule providing for levy of tax on hotels, boarding houses, eating houses, restaurants, tea or coffee houses and other places where food, meals, drinks etc. provided on payment of money—Municipality seeking to recover such tax from private members' club—Whether such club a hotel within meaning of rule—Expression "other places" whether means places where public or section thereof has access—Club whether liable under rule to pay tax.

Under a rule framed by a municipality under s. 59(1)(xi) of the Bombay District Municipal Act, 1901, the municipality provided for the levy of "a tax in respect of all hotels, boarding houses, eating houses, restaurants, tea or

MUNICIPAL ACT (DISTRICT), S. 59
—(Contd.)

coffee-houses and other places where food, meals, refreshments, tea, coffee or other non-intoxicating drinks are provided on payment of money." The municipality under this rule claimed to levy the tax on an unincorporated private members' club, the property and funds of which belonged to the members for the time being jointly in equal shares, contending that the club was an hotel or that it was covered by the expression "other places etc." appearing in the aforesaid rule:—

Held, that the two elements to constitute an hotel viz. access thereto by the public or a section thereof and supply of articles constituting meals and drinks for a price being absent in the present case, the club was not an hotel within the meaning of the rule framed by the municipality;

that the expression "other places" which follow upon the words "all hotels, boarding houses, eating houses, restaurants, tea or coffee houses" must be interpreted as words describing a place falling within the same genus viz. a place where the public or a section thereof has access, and, therefore, the club falls outside the ambit of the rule; and

that, therefore, the club was not liable to pay any tax under the rule.

"THE CLUB" v. MUNICIPALITY, M'WAR.
61 Bom. L. R. 52.

—S. 59(1)(xi)—*Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 60(1)*—*Whether s. 59(1)(xi) unconstitutional as delegating to municipality legislative functions in excess of permissible limits—Expression "modify" s. 60(1) of Bom. Act XVIII of 1925 whether means "to enhance."*

Section 59(1)(xi) of the Bombay District Municipal Act, 1901, is not unconstitutional.

Section 59(1)(xi) of the Act lays down a principle and fixes a standard which the municipalities have to follow in imposing a tax and the Legislature cannot, in the circumstances, be said to have abdicated itself and, therefore, the delegation of power to impose any tax cannot be struck down as being in excess of the permissible limits of delegation of legislative functions.

The word "modify" in s. 60(1) of the Bombay Municipal Boroughs Act, 1925, means not only "to reduce" but means also "to enhance."
WESTERN INDIA THEATRES v. M'PAL CORP.,
POONA.
61 Bom. L. R. (S.C.) 954.

—S. 60. See MUNICIPAL ACT (DISTRICT), S. 59.
61 Bom. L. R. 795.

—SS. 76-79—*Article on which octroi duty leviable brought by person within octroi limits of municipal district—Refusal by such person to pay octroi duty—Suit filed by municipality against person to recover amount of octroi duty whether maintainable—Expression "distress and sale" in s. 164 whether relates to distress and sale dealt with in Chapter VII of Act.*

If a person brings into the octroi limits of a municipality, governed by the Bombay District Municipal Act, 1901, an article, on which octroi is payable, and refuses to pay the octroi leviable upon it, he is not under the Act

MUNICIPAL ACT (DISTRICT), SS. 76-79
—(Contd.)

civily liable for the recovery of the amount of the octroi duty, and, therefore, a suit to recover the amount is not tenable against him.

The words "distress and sale" which occur in the expression "in lieu of proceeding by distress and sale" in s. 164 of the Bombay District Municipal Act, 1901, relate to distress and sale under Chapter VIII of the Act; they have no relation to distress and sale dealt with under Chapter VII of the Act.

URAN ISLAMPUR MUNICIPALITY SHANKARRAO.
61 Bom. L. R. 284.

—S. 82 (1)(a). See MUNICIPAL ACT (DISTRICT), SS. 76-79.
61 Bom. L. R. 284.

—S. 96(2) See MUNICIPAL ACT (DISTRICT), S. 96A.
61 Bom. L. R. 973.

—S. 96A—*Municipality refusing permission to alter, add to or reconstruct building—No resolution passed by municipality proposing to acquire land on which applicant desiring to alter, add to or reconstruct building—Applicant constructing building in contravention of refusal of permission by municipality—Whether applicant could be penalised under s. 96(5)—Condition requiring house-owner not to build on area proposed to be built upon whether a condition prescribed by s. 96(2).*

Section 96A of the Bombay District Municipal Act, 1901, is not restricted in its application to cases where permission to erect a building is refused absolutely. The section also contemplates cases where there is refusal to sanction permission for construction on a part of the land on which the building is proposed to be constructed. Therefore, if the municipality refuses permission to alter, add to or reconstruct a building, the refusal must be accompanied by a resolution to acquire the land on which the building stands. Where, therefore, the municipality does not pass such a resolution and refuses permission which is applied for under s. 96(1) of the Act, the refusal is invalid and construction of a building in contravention of that refusal is not penalised by s. 96(5) of the Act.

A condition requiring a house-owner not to build on the area proposed to be built upon is not one of the conditions prescribed by s. 96(2) of the Bombay District Municipal Act, 1901.

VYARA MUNICIPALITY v. FULCHAND.
61 Bom. L. R. 973.

—S. 154 (3)—*Publication of notice—Whether open to municipality to prove publication of notice otherwise than by framing by-law prescribing procedure in matter of publication and compliance therewith.*

Section 154(3) of the Bombay District Municipal Act, 1901, is not mandatory regarding the framing of a by-law by a municipality; it is mandatory only in respect of a presumption to be drawn regarding publication of a notice in case a by-law has been framed. Therefore, if no such by-law is framed by a municipality, it is still open to the municipality to prove

MUNICIPAL ACT (DISTRICT), S. 154
—(Contd.)

sufficient publication of the notice in other ways.

Y. S. PARIKAR v. CHINTAMAN MADHAVSA.
61 Bom. L.R. 403.

—S. 164. See MUNICIPAL ACT (DISTRICT), SS. 76-79. 61 Bom. L.R. 284.

—S. 167-A. See MUNICIPAL ACT (DISTRICT), S. 59. 61 Bom. L.R. 795.

—S. 180A. See MUNICIPAL ACT (DISTRICT), S. 59. 61 Bom. L.R. 795.

MUNICIPALITIES ACT (C. P. and Berar II of 1922), S. 12.

The provisions of s. 12(3)(d) of the Central Provinces and Berar Municipalities Act, 1922, refer not only to a disqualification imposed in respect of municipal elections or elections to local bodies but also to a disqualification imposed in respect of elections to State Legislative bodies or to Parliament.

SADADSHIRO v. HEMAJI.
61 Bom. L.R. 1141.

—S. 15—Transfer of Property Act (IV of 1882), Sec. 108—Members of municipality taking leases of rooms belonging to municipality—Whether such members incur disqualification under s. 15(1)—Members whether so disqualified if not in possession of leased rooms.

Under s. 15(1) of the Central Provinces and Berar Municipalities Act, 1922, a member of a municipality incurs a disqualification by taking a lease of property from the municipality. Whether such a person is in possession of the property or not will not take the case out of s. 15(1) of the Act.

NARAYAN v. STATE OF BOMBAY.
61 Bom. L.R. 1284.

—S. 22. See MUNICIPALITIES ACT, S. 15. 61 Bom. L.R. 1284.

—S. 24B. See MUNICIPALITIES ACT, S. 25(1). 61 Bom. L.R. 1288.

—S. 25(1)—Central Provinces and Berar General Clauses Act (I of 1914), Sec. 15—Applicability of cl. (iii) of proviso to s. 25(1)—President's power to employ municipal servants—Limitation on such power.

Clause (iii) of the proviso to s. 25(1) of the Central Provinces and Berar Municipalities Act, 1922, will not apply to a post in which there is a time scale and the maximum salary in that scale exceeds Rs. 40.

Under the Central Provinces and Berar Municipalities Act, 1922, the power to employ servants is reserved with the municipal committee not only by the general provisions of 10(I) of the Act, but expressly by the provisions of s. 25(1) of the Act. This power cannot be exercised by the President of the municipality unless it is delegated to him by a bye law made under s. 25(1) or under s. 27 or unless it is exercised in a case covered by cl. (iii) of the proviso to s. 25(1).

RAMCHANDRA v. MUN'PAL COMMITTEE, KATOL.
61 Bom. L.R. 1288.

MUNICIPALITIES ACT, S. 25(6)—Rules framed under s. 25(6)—Employee of Municipal Committee appealing against his exclusion from promotion by Committee—Competency of such appeal—Whether refusal by Committee to promote employee can be regarded as punishment.

The rules framed under s. 25(6) of the Central Provinces and Berar Municipalities Act, 1922, are limited to appeals against departmental punishments only. They cannot be regarded as general rules enabling any employee of the Municipal Committee who is aggrieved by any decision of the Municipal Committee to prefer an appeal.

No Government servant has a vested right to promotion; if a person though entitled because of the length of his service or of his qualifications to promotion is not promoted in due course, it cannot be said that he has been punished. Where, therefore, the Municipal Committee refuses to promote its employee in due course, it cannot be regarded as a punishment. The action of the Municipal Committee may be regarded as a punishment only where as a result of it the existing position of its employee is worsened.

GAJANAN v. COLLECTOR, BULDHANA.
61 Bom. L.R. 1402.

—S. 27. See MUNICIPALITIES ACT, S. 25(1). 61 Bom. L.R. 1288.

—S. 67(2)—Expression "system of assessment" in s. 67(2), meaning of—Expression whether means draft rules for assessment and collection of tax—Whether incumbent on municipal committee to include such draft rules in proposals made under s. 67(2) and publish them.

The expression "system of assessment" occurring in s. 67(2) of the C. P. and Berar Municipalities Act, 1922, means the principles underlying the ascertainment of the basis upon which a tax is proposed to be computed and it does not mean draft rules for the assessment and collection of tax. Therefore, under the Act it is not incumbent on a municipal committee to include in the proposals made by it under s. 67(2) of the Act, the draft rules for the assessment, collection and refund of the tax proposed and publish them for inviting objections thereto.

VALLABHDAS v. MUNICIPAL COMMITTEE, AKOLA.
61 Bom. L.R. 784.

NEGOTIABLE INSTRUMENTS.

A draft drawn by one branch of a bank on another branch thereof is not a negotiable instrument.

Haji Shiekh v. S. Natesa.
61 Bom. L.R. 1127.

NEGOTIABLE INSTRUMENTS ACT (XXVI of 1881), S. 84(1)—Draft drawn by one branch of bank on another branch thereof—Whether such draft a negotiable instrument—Applicability of s. 84(1).

Section 84(1) of the Negotiable Instruments Act, 1881, is limited in its application to cheques and it does not apply to every negotiable instrument.

A draft drawn by one branch of a bank on another branch thereof is not a negotiable instrument.

Haji Shiekh v. S. Natesa.
61 Bom. L.R. 1127.

NOTICE, by telegram.

A notice given by telegram is a notice in writing within the meaning of s. 9(1) of the Berar Regulation of Agricultural Leases Act, 1951.

APPA SHIVLING V. VITHAL BABA.

61 Bom. L.R. 1671.

NOTICE issue of

Though the provisions of the Berar Land Revenue Code, 1928, do not prescribe that a notice shall be given before the property of a defaulter is sold, it is a principle of natural justice that the defaulter must receive such a notice before his property is sold. In the absence of any notice the sale is liable to be set aside.

GANGARAM V. DHARAMCHAND.

61 Bom. L.R. 1638.

OBITER DICTA, nature of.

Even an *obiter* of the Supreme Court of India deserves the highest respect and it is incumbent upon the High Court to accept even the *obiter* as correctly laying down the law.

NARAYANLAL BANBILAL V. M.P. MISTRY.

61 Bom. L.R. (O.C.J.) 220.

PARTNERSHIP ACT (IX of 1932), S. 14—Indian Trust Act (II of 1882), Sec. 83, III. (d)

—Partnership consisting of two partners dissolved by notice given by partner B to partner P—Notice stating that out of entire amount of profit of partnership lying with P, half to be given to B within four days and that B wishing to break off relations with P—P subsequently purchasing property out of amount of profit belonging to partnership—Whether such property partnership asset and B entitled to a share in it—Benami transaction—Burden of proof—Whether onus of proof on party alleging that transaction is benami—Burden of proof in such case how discharged.

A partnership consisting of two partners B and P was dissolved by a notice given by B to P on September 26, 1946, which stated that till the date of the notice a net profit of Rs. 20,000 was made by the partnership business and that the amount of profit was with P, that out of this amount P should pay half of it to B within four days of the receipt of the notice and that henceforth B wished to break off all relations with P. On April 9, 1947, P purchased certain property for Rs. 10,500. On the question whether the property became a partnership asset so as to give B a share therein on the assumption that P had paid the purchase price of the property out of the amount of profit in his hands belonging to the partnership:—

Held, that as the partnership in the case was dissolved in 1946 and as B had broken off all relations with P and claimed an eight anna share in the profits which he alleged were in the hands of P, the purchase of the property could not be regarded as a transaction of the partnership, in the circumstances of the case, so as to give B a share therein on the ground that he was a partner.

Even during the subsistence of a partnership, if property is purchased out of partnership assets, it does not necessarily become partnership property, and where property is purchased not for the purpose of business or for the

PARTNERSHIP ACT, S. 14—(Contd.)

benefit of the firm the question as to the ownership of the property must depend upon the facts and circumstances of the particular case.

The burden of proof that a transaction is a benami transaction is on the party who alleges that the transaction is benami and the burden must be strictly discharged. In order to succeed the party so alleging must put the Court in possession of legal and satisfactory evidence and it will not suffice to point to matters of suspicion or even to plausible conjecture.

ULHANIBAI JETHMAL V. BHAGCHAND.

61 Bom. L.R. 103.

—S. 16. See PARTNERSHIP ACT, 1932, S. 14. 61 Bom. L.R. 103.

—S. 50. See PARTNERSHIP ACT, 1932, S. 14. 61 Bom. L.R. 103.

PASSPORT ACT (XXXIV of 1930), S. 3—Indian Passport Rules, 1950, Rr. 3, 4—Whether s. 3 of Act and rr. 3 and 4 of Rules apply to Indian citizens.

The provisions of s. 3 of the Indian Passport Act, 1920, and rr. 3 and 4 of the Indian Passport Rules, 1950, apply to all persons including Indian citizens.

ABDUL RAHIM V. STATE OF BOMBAY.

61 Bom. L.R. (S.C.) 1547.

PASSPORT RULES, Rr. 3, 4. See PASSPORT ACT, 1920, S. 3.

61 Bom. L.R. (S.C.) 1547.

PAYMENT OF WAGES ACT (IV of 1936), S. 2—Industrial Disputes Act (XIV of 1947), Secs. 25C, 2(kkk)—Lay-off compensation whether wages within Payment of Wages Act—Whether lay-off terminates contract of employment—Section 2(e) whether applies to lay-off compensation.

Compensation payable for lay-off, under the provisions of the Industrial Disputes Act, 1947, is not wages within the meaning of the Payment of Wages Act, 1936.

Lay-off does not terminate or bring to an end the contract of employment.

Section 2(e) of the Payment of Wages Act, 1936, contemplates a payment under some scheme like a Provident Fund scheme framed under some enactment. It does not apply to any sum payable under the provisions of the Act itself.

ANUSUYABAI VITHAL V. J. H. MEHTA.

61 Bom. L.R. 1417.

—S. 15 (3).

Section 15(3) of the Payment of Wages Act, 1936, does not control the powers granted to the Authority under s. 18 of the Act.

R. R. BIDI FACTORY V. FIRST CIVIL JUDGE, NAGPUR.

61 Bom. L.R. 39.

—S. 18—Civil Procedure Code (Act V of 1908), O. XI—Whether Authority under Act has jurisdiction to order party to make discovery of documents in his possession—Section 18 whether controlled by s. 15 (3).

The Authority under the Payment of Wages Act, 1936, has under s. 18 of the Act jurisdic-

PAYMENT OF WAGES ACT, S. 18—(Contd.)

tion to order a party before it to make discovery of the document in his possession.

The words "all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of...compelling the production of documents" in s. 18 of the Payment of Wages Act, 1936, refer to the provisions of O. XI of the Civil Procedure Code, 1908, which deals with discovery, inspection and production of documents.

Section 15(3) of the Payment of Wages Act, 1936, does not control the powers granted to the Authority under s. 18 of the Act.

R.R. BIDI FACTORY v. FIRST CIVIL JUDGE,
NAGPUR. 61 Bom. L.R. 39.

PENAL CODE (Act XLV of 1860), S. 2—Criminal Procedure Code (Act V of 1898), Secs. 179, 5(1)—Indian Evidence Act (I of 1872), Secs. 16 ill. (b), 88—Foreigner committing offences within India though corporeally present outside India at time of offence—Whether Indian Penal Code applies to such person—Exercise of criminal jurisdiction whether dependent on locality of offence or nationality of offender—Authorship of document whether can be proved by contents of the document—Whether permissible to construe Indian Penal Code in accordance with notions of criminal jurisdiction prevalent when Code enacted—How far legitimate to construe Code with reference to modern needs.

Under s. 2 of the Indian Penal Code, 1860, the Code applies to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside India at the time of the commission of the offence.

The meaning of the phrase "every person" in s. 2 of the Indian Penal Code is that it comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed. The section must be understood as comprehending every person without exception barring such as may be specially exempt from criminal proceedings or punishment thereunder by virtue of the Constitution (see art. 86(2) of the Constitution of India) or any statutory provisions or some well-recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

Exercise of criminal jurisdiction depends on the locality of the offence and not on the nationality of the alleged offender except in a few specified cases such as ambassadors, princes etc.

The fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are juridically attributable to him notwithstanding that he is corporeally present outside India at the time, is not to give any extra-territorial operation to the law; for it is in respect of an offence whose locality is in India, that the liability is fastened on the person and the punishment is awarded by the law, if his presence in India for trial can be secured.

It is implicit in s. 3 of the Indian Penal Code that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time.

PENAL CODE, S. 2—(Contd.)

The authorship of a document may be proved by internal evidence afforded by the contents of the document. This mode of proof may be of considerable value where the disputed document purports to be a link in a chain of correspondence some links in which are proved to the satisfaction of the Court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender, limited though it may be, as also his knowledge of the subject-matter of the chain of correspondence, to speak of its authorship. In an appropriate case the Court may also be in a position to judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship.

Illustration (b) to s. 16 of the Indian Evidence Act, 1872, only means that each one of the facts mentioned therein (the fact that a letter was posted in due course and the fact that it was not returned through the Dead Letter Office) is relevant. It cannot be read as indicating that without a combination of these facts no presumption of the receipt of the letter by the addressee can arise.

Although under s. 88 of the Indian Evidence Act, 1872, no presumption can be drawn as to the person who delivered the message for transmission, the contents of the message received, in the context of the chain of correspondence may furnish proof of authorship of the message at the dispatching end.

Where the charge against the accused is under s. 420 read with s. 84 of the Indian Penal Code, 1860, but the actual findings support a conviction of the accused under s. 430 of the Code, the conviction of the accused under s. 420 would be valid unless prejudice is shown to have occurred.

It is not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible, unless there is anything in the Code or in any particular section to indicate the contrary.

MORARIK ALI v. STATE OF B'RAY

61 Bom. L.R. (S.C.) 58.

—S. 3. See PENAL CODE, 1860, S. 2.
61 Bom. L.R. (S.C.) 58.

—S. 4. See PENAL CODE, 1860, S. 2.
61 Bom. L.R. (S.C.) 58.

—S. 30. See CRIMINAL PROCEDURE CODE, 1898, S. 154. 61 Bom L.R. 1161.

—S. 34. See PENAL CODE, 1860, S. 2.
61 Bom L.R. (S.C.) 58.

—S. 99.

The exception contained in the first paragraph of s. 99 of the Indian Penal Code, 1860, applies where a public servant acts irregularly

PENAL CODE, S. 99—(Contd.)

in the exercise of his powers, and not where he acts outside the scope of his powers.

DEOMAN SHAMJI v. THE STATE.

61 Bom. L.R. 30.

—S. 161.

The expressions "gratification" as used in s. 161 and "valuable thing" as used in s. 165 of the Indian Penal Code, 1860, are not mutually exclusive in their connotation. Acceptance of a valuable thing by a public servant may amount to acceptance of gratification within the meaning of s. 161 of the Code.

STATE v. PUNDLIK BHIKAJI.

61 Bom. L.R. 837.

—S. 279—*Accused prosecuted for offences under ss. 279 and 337—Offence under s. 337 compounded with Court's leave—Whether prosecution of accused under s. 279 can be continued.*

Where the accused is prosecuted for offences under ss. 279 and 337 of the Indian Penal Code, 1860, the compounding of the offences under s. 337 of the Code will not prevent the prosecution from being continued under s. 279 of the Code.

STATE v. KAMLAHAR PRABHAKAR.

61 Bom. L.R. 1674.

—S. 300, Exception 1—*Accused tried for murder of his wife stating that he had seen her coming out of her paramour's house on the night previous to offence—Accused further stating that on his questioning her about it the following morning, the deceased threatening to go and live with her paramour, using foul language and kicking accused—Accused thereupon striking her with knife and causing her death—Whether case of accused fell under Exception 1 to s. 300—Burden of proof of exception whether discharged on bare word of accused person.*

The accused, who was tried for an offence under s. 302 of the Indian Penal Code for the murder of his wife, in his defence stated that he had seen his wife coming out of the house of her paramour on the night previous to the offence, that when he saw her the following morning working in a field and questioned her about it, she talked to him impertinently, threatened to go and live with her paramour and used foul language, that when he caught her hand she kicked him and that, thereupon, he lost his self-control, took out a small pen-knife and dealt five or seven blows with it on his wife's person. On the question whether *Exception 1* to s. 300 of the Code was available to the accused:—

Held, that the incident which the accused alleged had occurred in the field in the morning was not sufficient in law to constitute grave and sudden provocation within the meaning of that expression used in *Exception 1* to s. 300 of the Indian Penal Code.

It is extremely hazardous to apply *Exception 1* to s. 300 of the Indian Penal Code to a case like the above merely on the ground that offences against marital rights are made punishable in India. What has to be considered in a case of this kind is whether provocation which was offered was of a kind which would cause a reasonable man belonging to the same

PENAL CODE, S. 300—(Contd.)

social stratum as the accused person to lose his power of self-control.

The bare word of an accused person is not sufficient to discharge the burden of proof of an exception. There must be some corroboration, direct or indirect, of the statement of the accused person.

JAIRAM CHANDRABHAN v. STATE.

61 Bom. L.R. 35.

—S. 304A—*Rash and negligent act of accused causing death—Whether such act or illegal omission could be a remote cause of death under section 304A.*

Under s. 304A of the Indian Penal Code, 1860, the rash or negligent act of the accused which causes the death of the victim must be the immediate or proximate cause of death and not any act or illegal omission which can be said to be a remote cause of death.

STATE v. CHINUBHAI HARIDAS.

61 Bom. L.R. 1309.

—S. 336. See PENAL CODE, 1860, S. 279.

61 Bom. L.R. 1674.

—S. 337. See PENAL CODE, 1860, S. 279.

61 Bom. L.R. 1674.

—S. 405.

Section 405 of the Indian Penal Code, 1860, does not contemplate that the property in respect of which an offence of criminal breach of trust may be committed must be property which belonged to the complainant. Provided there is entrustment of property, it matters little whether the complainant on whose behalf the property is entrusted is the owner thereof or not.

STATE v. DAHYALAL DALPATRAM.

61 Bom. L.R. 885.

—S. 409—*Accused collecting amount of fine from landholder in his capacity as public servant—Accused misappropriating such amount—State not entitled in law to enforce fine—Whether accused had committed offence under s. 409.*

Section 409 of the Indian Penal Code, 1860, merely requires that there must be entrustment of property to a public servant and breach of the trust committed by him in respect of the property entrusted. It is not necessary under the section that the property in respect of which the offence is committed must be shown to be the property of the State. Therefore, where the State is not entitled in law to collect an amount from the tax-payer, and the amount is received by a person acting as a public servant in exercise of his duties, he holds the amount for and on behalf of the State and in his hand it becomes part of the public fund and if he misappropriates that amount, he commits the offence of criminal breach of trust.

Section 405 of the Indian Penal Code, 1860, does not contemplate that the property in respect of which an offence of criminal breach of trust may be committed must be property which belonged to the complainant. Provided there is entrustment of property, it matters little whether the complainant on whose behalf

PENAL CODE, S. 409—(Contd.)

the property is entrusted is the owner thereof or not.

The accused as a Talati employed under the revenue department was invested with authority to collect land revenue and fines ordered to be received under the Land Revenue Code from landholders. The accused pursuant to an order of the Mamlatdar collected a certain amount of fine from a landholder. The accused misappropriated this amount. It was found that the alleged liability of the landholder for the amount collected by the accused could not have been lawfully enforced by the state by revenue or other lawful process. On the question whether the accused had committed an offence punishable under s. 409 of the Indian Penal Code:—

Held, that as the accused was a public servant and had received in his capacity as a public servant the amount of fine, he was entrusted with that amount and he was bound to pay the same in the Government Treasury or to account for the same under the rules made in that behalf by the Land Revenue Code and as the accused had misappropriated the amount entrusted to him, he had committed criminal breach of trust in respect thereof.

STATE v. DAHYALAL DALPATRAM.

61 Bom. L.R. 885.

—S. 415—*Complainant entering into contract with accused on false representation by latter that they were partners of particular firm—Breach of contract by accused—Whether offence of cheating committed by accused.*

A complaint was filed charging accused Nos. 1 and 2 with having committed an offence under s. 420, Indian Penal Code, 1860, and accused No. 3 with having abetted the commission of that offence. It was alleged in the complaint that accused No. 3 persuaded the complainant to enter into a contract shipping a certain quantity of goods with a firm on a representation that accused Nos. 1 and 2 were partners of that firm and that accused Nos. 1 and 2 confirmed the representation and it turned out, after the contract was broken and the consignment was not booked, that accused Nos. 1 and 2 were not the partners of the firm but some other persons were in truth the partners of that firm and that but for the representations made, the complainant would not have entered into the contract:—

Held, that the use of the expression "cause" in s. 415 of the Indian Penal Code postulates a direct and proximate causal connection between the act or omission and the harm and damage to the victim, and

that as, in the present case, there was no direct relation of cause and effect between the representation alleged to be made and the harm and damage to the complainant as a result of the breach of the contract, an offence under s. 415 of the Code was not committed in consequence of the accused persuading the complainant to enter into the contract for shipment.

RAMJI LAKHAMSI v. HARSHADRAI

61 Bom. L.R. 1648.

—S. 420. See PENAL CODE, 1860, S. 2.
61 Bom. L.R. (S.C.) 58.

PENAL CODE, S. 420. See PENAL CODE, 1860, S. 415. 61 Bom. L.R. 1648.

—S. 482. See PENAL CODE, 1860, S. 486. 61 Bom. L.R. (S.C.) 603.

—S. 486—*Person accused of affixing counterfeit mark—Whether such person can be held guilty of offences under ss. 486, 487 and 488 where existence of genuine mark or goods of true nature not proved.*

Sections 482, 486 and 487 of the Indian Penal Code, 1860, require that before a person can be held guilty of affixing a counterfeit mark or to have affixed a false mark on a receptacle containing goods of a "quality or nature different from the real nature," there must be proof of the existence of some genuine mark or goods of the true nature.

GEOFFREY MANNERS & Co. v. STATE

61 Bom. L.R. (S.C.) 603.

—S. 487. See PENAL CODE, 1860 S. 486. 61 Bom. L.R. (S.C.) 603.

POLICE ACT (V of 1861), S. 7.

There is no provision either in the Police Act, 1861, or Regulations to restrict recourse to taking disciplinary action against a police officer's action to acts done by him during the course of employment only.

MADHOSINGH v. STATE OF BOMBAY

61 Bom. L.R. 1537.

POST MORTEM EXAMINATION. See Evidence. 61 Bom. L.R. 1271.

PRANT OFFICER—*Jurisdiction to enlarge time.*

Under s. 29(3) of the Bombay Tenancy and Agricultural lands Act, 1948, the Mamlatdar has jurisdiction to extend the time originally granted by him to the tenant under s. 25(1) of the Act to pay the arrears of rent. The Prant Officer, as an appellate authority, has also jurisdiction to enlarge the time granted by the Mamlatdar within which the tenant was called upon to pay up the arrears of rent.

SONAJEE KRISHNAJI v. NATHU.

61 Bom. L.R. 156.

PRESIDENCY SMALL CAUSE COURTS ACT (XV of 1882), S. 41—*Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Sec. 28—Defendant subletting premises to plaintiff before coming into force of Bombay Rent Act—Defendant in 1954 filing ejectment application against plaintiff under s. 41 of Act XV of 1882 and obtaining order in his favour—Suit by plaintiff against defendant filed in Bombay City Civil Court under s. 47 of Act XV of 1882 for declaration that defendant's ejectment application act of trespass—Plaintiff in plaint claiming protection under Bom. Act LVII of 1947—Jurisdiction of Bombay City Civil Court to entertain suit—Whether suit within ambit of s. 28 of Bom. Act LVII of 1947.*

The defendant sublet certain premises to the plaintiff in April 1945 on a monthly rent, and the plaintiff continued to be in exclusive possession and occupation of the premises and paid the rent to the defendant. In 1954 the defendant filed an ejectment application against the plaintiff in the Court of Small

PRESIDENCY SMALL CAUSE COURTS ACT, S. 41—(Contd.)

Causes, Bombay, under s. 41 of the Presidency Small Cause Courts Act, 1882, to recover possession of the premises on the basis that they were given to the plaintiff under leave and licence and that the licence was revoked. The plaintiff contended that he was the lawful sub-tenant of the defendant. The Court, however, passed an order in favour of the defendant. The plaintiff then filed a suit in the Bombay City Court under s. 47 of the Presidency Small Cause Courts Act for a declaration that the defendant's ejectment application was an act of trespass and that the defendant was not entitled to recover possession of the premises. In his plaint the plaintiff after describing himself as a lawful sub-tenant of the defendant stated that he was entitled to the protection of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The defendant *inter alia* contended that the plaintiff was not his sub-tenant but was in occupation of the premises as his licensee and that the suit as framed by the plaintiff could not be entertained by the Bombay City Civil Court:—

Held, that as the order of possession obtained by the defendant was under the summary procedure provided under Chapter VII of the Presidency Small Cause Courts Act, the plaintiff was entitled to challenge that order by filing a suit as contemplated by ss. 46 and 47 of the Act,

that merely because of the statement in the plaint that the plaintiff was entitled to the protection under the Bombay Rent Act, the suit did not fall within the ambit of s. 23 of the Bombay Rents, Hotel and Lodging House Rates Control Act, and

that, therefore, the Bombay City Civil Court had jurisdiction to entertain the suit.

ABDUL KAYUM v. EBRAHIM

61 Bom. L.R. 1223.

—S. 46. See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, S. 41.

61 Bom. L.R. 1223.

—S. 47. See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, S. 41.

61 Bom. L.R. 1223.

—S. 74—*Application to sue as pauper before Courts of Small Causes granted and application registered as suit—Whether such application itself becomes plaint in case—Civil Procedure Code (Act V of 1908), O.XXXIII, r. 8.*

Section 74 of the Presidency Small Cause Courts Act, 1882, contemplates a single document which, besides containing a prayer for being allowed to sue as a poor person, also contains a statement of the claim. Therefore, where an application to sue as a pauper before the Court of Small Causes is granted and the application is registered as a suit, such application itself becomes the plaint in the case.

ASSUDOMAL v. MANNINGH.

61 Bom. L.R. 497.

PRESIDENCY-TOWNS INSOLVENCY ACT (III of 1909), S. 9(e)—Civil Procedure Code (Act V of 1908), O.XXI, r. 92—Provincial Insolvency Act (V of 1930), Sec. 6(e)—Act of insolvency when committed under s. 9(e) of Act III of 1909—Whether act of insolvency committed only on sale being confirmed under O. XXI, r. 92, of Code.

For the commission of an act of insolvency under s. 9(e) of the Presidency-Towns Insolvency Act, 1909, it is enough if the property is sold by public auction and knocked down to the highest bidder and it is not necessary that the sale should have been confirmed under O. XXI, r. 92, of the Civil Procedure Code, 1908.

JIVANLAL v. PRAMODCHANDRA.

61 Bom. L.R. (O.C.J.) 110.

PREVENTION OF CORRUPTION ACT (II of 1947), S. 4(1)—Indian Penal Code (Act XLV of 1860), Secs. 161, 165—"Gratification", meaning of expression—Person accused of offence under s. 161 proved to have taken gratification other than legal remuneration—Statutory presumption to be raised by Court under s. 4(1) of Prevention of Corruption Act—Burden of proof—Accused whether bound to prove that gratification not accepted as a reward such as mentioned in s. 161—Natura motive or of such proof.

The expressions "gratification" as used in s. 161 and "valuable thing" as used in s. 165 of the Indian Penal Code, 1860, are not mutually exclusive in their connotations. Acceptance of a valuable thing by a public servant may amount to acceptance of gratification within the meaning of s. 161 of the Code.

Section 4(1) of the Prevention of Corruption Act, 1947, not only dispenses with the proof by the prosecution of one of the essential ingredients of the offence under s. 161 of the Indian Penal Code, 1860, namely, that gratification was accepted or agreed to be accepted or attempted to be obtained as motive or reward for performing an official act, but the section imposes upon the person accused, when it is proved that he has accepted or obtained or agreed to accept or attempted to obtain gratification other than legal remuneration, the burden of proving that it was not as a motive or reward that the gratification was obtained. The Court is required to raise the statutory presumption subject to the limits prescribed by s. 4(3) of the Prevention of Corruption Act when it is proved that the public servant tried for an offence under s. 161 of the Indian Penal Code has received gratification.

The presumption is not one which is required to be rebutted by evidence establishing the defence of the accused beyond reasonable doubt. If the person accused shows a reasonable preponderance of probability enough to support a verdict in a civil action, that the gratification was not as a motive or reward for doing or forbearing to do an official act, the burden may be deemed to be discharged.

STATE v. PUNDLIK BHIKAJI

61 Bom. L.R. 837.

PREVENTION OF FOOD ADULTERATION ACT (XXXVIII of 1954), S. 2. See **PREVENTION OF FOOD ADULTERATION ACT, 1954, S. 7.** 61 Bom. L. R. 444.

—S. 7—*Servant selling adulterated article of food in absence of master—Whether master can be convicted of offence under s. 16 (1)(a).*

Under s. 7 of the Prevention of Food Adulteration Act, 1954, the master is liable for the acts of his servant committed by him in the course of his ordinary duties, and when a servant sells any commodity or any article of food stocked for sale by the master of the shop, the master is deemed to have authorised the sale of such article by the servant. Therefore, if the servant sells any such article of food which is adulterated within the meaning of s. 2(1)(a) of the Act, the master, though not present when the sale is made, can be convicted of an offence under s. 16(1)(a) of the Act.

BUDHIMAL FOJMAL v. THE STATE.

61 Bom. L. R. 444.

—S. 16(1)(a). See **PREVENTION OF FOOD ADULTERATION ACT, 1954, S. 7.**

61 Bom. L. R. 444.

PREVENTION OF FOOD ADULTERATION RULES, 1955, Appendix B, Rule A. 11.05—Butter prepared from Dahi or curd whether comes within definition of butter in r. A. 11.05.

Butter prepared from dahi or curd is butter prepared from milk within the meaning of Rule A. 11.05 in Appendix B to the Prevention of Food Adulteration Rules, 1955.

SADASHIV D. P. V. BHALERAO.

61 Bom. L. R. (F.B.) 1176.

PRIVILEGE—Defamatory statements made before police officers in course of regular investigation.

Defamatory statements made before police officers in the course of a regular investigation under the Criminal Procedure Code, 1898, are not absolutely privileged but only a qualified privilege attaches to them which is liable to be destroyed by proof of malice.

MABOTI SADASHIV v. GODARAI.

61 Bom. L. R. 143.

PUBLIC PROSECUTOR. See **CRIMINAL PROCEDURE CODE, S. 198B.**

61 Bom. L. R. 450.

RAILWAYS ACT (IX of 1890), S. 74-B—Goods consigned in open wagon and booking done at Railway Risk Note I—Goods found short in weight when received by consignee—Suit by consignee against railway for loss of goods—Whether railway protected under s. 74-B—Whether words “destruction, deterioration or damage” in s. 74-B includes loss.

The words “destruction, deterioration or damage” in s. 74-B of the Indian Railways Act, 1890, do not include “loss”. Therefore, the section does not grant immunity to the railway in case of loss where the goods are carried in open wagons.

JIWALI REMALJEE v. UNION OF INDIA.

61 Bom. L. R. 682.

RAILWAYS ACT, S. 74C. See **RAILWAYS ACT, 1890, S. 74-B.** 61 Bom. L. R. 682.

—S. 135—*Railways (Local Authorities' Taxation) Act (XXV of 1941), Sec. 3(1) & (2)—Officer appointed to determine quantum of liability of Railway Administration to pay tax levied by local authority—Whether officer has jurisdiction to determine question as to existence of such liability—Plaint—Averment in plaint that Court has jurisdiction over subject-matter of claim made therein—Absence of such averment, effect of.*

Section 135(2) of the Indian Railways Act, 1890, empowers the Central Government to appoint an officer only for the limited purpose of determining the quantum of the liability of the Railway Administration to pay the tax leviable by the local authority and not for determining the question of the liability of such Administration to pay a tax at all. It is, therefore, not competent to such an officer to consider, in a proceeding before him under s. 135(2) of the Act, the very factum of the liability of the Railway Administration to pay the tax of which the amount, if any, is required to be determined by it. The officer may, however, construe the notification issued under s. 135(1) of the Act or enquire into the existence of the notification. If he hold that there is no notification, he must straightaway proceed to dismiss the application made under s. 135(2) of the Act.

In every plaint the plaintiff has to aver that the Court in which it is filed has jurisdiction over the subject-matter of the claim made therein. In the absence of such an averment, the Court must reject it, unless the Court is satisfied from the other averments in the plaint that it has, *prima facie*, jurisdiction to entertain the plaint and that the plaintiff's omission to make the averment as to jurisdiction is a mere clerical or accidental error. But where a plaintiff lodges his claim and denies the jurisdiction of the Court to entertain it, the Court must throw it out forthwith. The position is not different where an initial averment as to the Court's jurisdiction is withdrawn by the plaintiff, either expressly or by necessary implication, later on.

MUNICIPAL CORP. v. AKBAR SARELA.

61 Bom. L. R. 1097.

REGISTRATION ACT (XVI of 1908), S. 17.

Under Hindu law a partition by allotting specific properties of parcels to individual coparceners may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition and is, thus, within the mischief of s. 17(1)(b) of the Indian Registration Act, 1908. But a partition which is only a severance of the joint status of the members of the coparcenary i.e. what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds, may be brought about by a document and such a document which affects only the status of the member or members who have separated themselves from the rest of the coparcenary

REGISTRATION ACT, S. 17—(Contd.)

does not come within the purview of s. 17(I)(b) of the Act, and is, therefore, not compulsorily registrable.

NANI BAI v. GITA BAI.

61 Bom. L. R. (S.C.) 523.

RELAIWALA. See CENTRAL PROVINCES AND BERAR INDUSTRIAL DISPUTES SETTLEMENT ACT, 1947, S. 2. 61 Bom. L. R. 1312.

REPRESENTATION OF THE PEOPLE ACT (XLIII of 1950), S. 27—Representation of the People Act (XLIII of 1951), Ss. 100(I)(d) (iii) & (iv), 62—Constitution of India, Art. 171 (3)(a), Seventh sch., List II Entry 5—Legislative Councils Act (37 of 1957) Secs. 5(1)(3)(5), 12(c)(ii)—General Clauses Act (I of 1897), Sec. 3(31)—C.P. and Berar Municipalities Act, 1922, Secs. 240, 241, 242—Madhya Pradesh Local Authorities (Electoral Offences) Act (XI of 1952), Sec. 2(2)—C. P. and Berar Local Fund Audit Act (IX of 1933), Sec. 3—C. P. and Berar Local Government Act (XXXVIII of 1948)—Representation 'municipality' in Fourth Schedule of Act XLIII of 1950 whether includes municipal corporation—Whether notified area committee a municipality within the expression in Fourth Schedule—Members selected from urban circles of Janapada Sabhas relating to Bombay State whether have right to get their names entered in electoral roll of local authorities constituency—Electoral Registration Officer erroneously entering names of members of notified area committees in electoral roll of local authorities constituency—Whether such error attracts provisions of s. 100(I)(d)(iii) & (iv) of Act XLIII of 1951.

A municipal corporation is included within the expression "municipality" appearing in the Fourth Schedule of the Representation of the People Act, 1950.

The expression 'municipality' used in the Constitution of India as well as in the Fourth Schedule of the Representation of the People Act, 1950, includes all bodies entrusted with the administration of municipal affairs of a city or a town.

A notified area committee is not included in the expression "municipality" used in the Fourth Schedule of the Representation of the People Act, 1950.

Section 27 of the Representation of the People Act, 1950, confers on all the members of the local authorities specified in the Fourth Schedule of the Act, a right to get their names entered in the electoral roll of the local authorities' constituency. Therefore, under the 7th item [i.e. "Janapada Sabhas (Rural Circle)"] in the Fourth Schedule to the Act relating to the State of Bombay, such a right is conferred not only on members selected from rural circles of the Janapada Sabhas but also on members selected from urban circle of the Janapada Sabhas.

The Electoral Registration Officer erroneously entered the names of the members of certain notified area committees in the Vidarbha electoral roll of the Vidarbha Local Authorities Constituency for electing members to the Bombay Legislative Council. On the question whether this error on the part of the Officer attracted the provisions of s. 100(I)(d)(iii) &

REPRESENTATION OF THE PEOPLE ACT, S. 27—(Contd.)

(iv) of the Representation of the People Act, 1951:—

Held, that there was no improper reception of any vote within the meaning of the first part of cl. (iii) of s. 100(I)(d) of the Act even assuming that all the members of the notified area committees had voted at the election,

that under s. 62 of the Act the votes cast by these members were not void and, therefore, these could not be deemed to be void votes within the meaning of the second part of cl. (iii) of s. 100(I)(d) of the Act, and

that the non-compliance contemplated in cl. (iv) of s. 100(I)(d) of the Act is the non-compliance of the provisions of the Constitution of India or of the provisions of the Act or of the rules or orders made under the Act, and, therefore, non-compliance with the provisions of s. 27(2)(a) read with the Fourth Schedule of the Representation of the People Act, 1950, does not fall within the scope and ambit of cl. (iv) of s. 100(I)(d).

RAMDAYAL v. K. R. PATIL.

61 Bom. L. R. 1210.

REPRESENTATION OF THE PEOPLE ACT (XLIII of 1951), SS. 116A, 116B—Appeal against order of Tribunal filed in High Court—High Court permitting withdrawal of appeal and ordering disposal thereof—Whether such order a decision within s. 116B—Order whether open to review.

The expression "decision of the High Court" in s. 116B of the Representation of the People Act, 1951, means the final order of the High Court disposing of the appeal on merits or otherwise. Therefore, an order of the High Court permitting withdrawal of the appeal filed against the Tribunal under s. 116A of the Act and ordering disposal thereof, is a decision within the meaning of s. 116B of the Act, and such an order is final and conclusive and not open to review by the High Court.

Quære: Whether in view of s. 116A(2) of the Act the provisions relating to the withdrawal of a petition or abatement apply to an appeal filed against the order of the Tribunal.

NARAYAN YESHWANT v. RAJARAM.

61 Bom. L. R. 1274.

S. 123—False statement of fact in relation to conduct of a candidate when constitutes 'corrupt practice' under s. 123(4)—Adverse criticism in relation to political views, position, reputation or action of candidate whether comes within mischief of section—True nature of statement how to be ascertained—Legal aspect of agency in elections.

In order to come within the ambit of the term 'corrupt practice' under s. 123(4) of the Representation of the People Act, 1951, there must be a false statement of fact by a candidate or his agent which is made in relation to the personal character or conduct of any other candidate. Adverse criticism, however severe, however undignified or ill-mannered, however regrettable it might be in the interests of purity and decency of public life, in relation to the political views, position, reputation or action of a candidate, will not bring it within the mischief of the statute. The Court in

REPRESENTATION OF THE PEOPLE ACT, S. 123—(Contd.)

such matters cannot judge these statements in the light of their decency or desirability in so far as they are political statements not calculated to attack the personal character or conduct of any rival candidate. What is objectionable is a false statement of fact, and not a false statement of opinion however unfounded or however unjustified. It is only when the person beneath the politician is sought to be assailed and his honour, integrity and veracity are challenged and such a statement is false that it can be said that a false statement of fact about his personal character and conduct is made; and once it is established that such a statement was made, the question whether there was malice or not is immaterial. In ascertaining the true nature of the statement made, the Court must take into consideration all the surrounding circumstances including the occasion when it was published or made, the person against whom it was made, the person publishing it or making it, the audience or readers to whom it is addressed as also the precautions or care taken by the publisher to verify the truth or otherwise of the statement challenged.

The correct legal position regarding agency in elections is that the relation is not the common law one of principal and agent, but the candidate may be responsible for the acts of one acting on his behalf, though such acts are beyond the scope of the authority given, or in violation of express injunction.

Describing a candidate, who is contesting an election as an independent candidate, as really not independent but as being supported by other parties or prominent persons of other parties will not amount to an attack on his personal character.

SUDHIR LAXMAN v. S. A. DANGE.

61 Bom. L. R. 500.

REPRESENTATION OF THE PEOPLE (SECOND AMENDMENT) ACT (XXVII of 1956), S. 74(2)—*Central Provinces and Berar Municipalities Act (II of 1922), Ss. 12(3) (d), 14(1), 15(1)—General Clauses Act (X of 1897), S. 6—Whether s. 74(2) of Act XXVII of 1956 retrospective in its operation—Section 12(3) (d) of Act II of 1922 whether refers only to disqualification imposed in respect of municipal elections or elections to local bodies.*

Section 74(2) of the Representation of the People (Second Amendment) Act, 1956, was retrospective in operation and removed even the disqualifications incurred by a person prior to the coming into force of that Act on August 28, 1956.

The provisions of s. 12(3)(d) of the Central Provinces and Berar Municipalities Act, 1922, refer not only to a disqualification imposed in respect of municipal elections or elections to local bodies but also to a disqualification imposed in respect of elections to State Legislative bodies or to Parliament.

SADASHIBO P. HEMAJI.

61 Bom. L. R. 1141.

REPRESENTATIVE UNION. See BOMBAY INDUSTRIAL RELATIONS ACT, 1947, S. 18.

61 Bom. L. R. (O.C.J.) 967.

RULE AGAINST PERPETUITY. See TRANSFER OF PROPERTY ACT, S. 11.

61 Bom. L. R. 1170.

RULE NISI, grant of. See SEA CUSTOMS ACT, 1878, S. (37)(c).

61 Bom. L. R. (O.C.J.) 1482.

RULER, entering into contract. See SAURASHTRA ADJUDICATION OF (SPECIAL COURTS) SUITS ORDINANCE, 1949, S. 4.

61 Bom. L. R. (F.B.) 20.

RULER, former Indian State. See CIVIL PROCEDURE CODE, 1908, S. 86.

61 Bom. L. R. (O.C.J.) 651

SAURASHTRA ADJUDICATION OF (SPECIAL COURTS) SUITS ORDINANCE, 1949 (No. LXXXII of 1949), S. 4—*Saurashtra Suits against Government (Abatement and Adjudication) Act (IV of 1961), Sec. 3(1)—Constitution of India, Art. 363—Suits contemplated by s. 4(1)(i) of Ordinance, nature of—Contractual obligation undertaken by Ruler of State previous to its merger with State of Saurashtra—Whether suit to enforce such contract falls within s. 4(1) of Ordinance—Abatement of such suit by virtue of s. 3(1) of Act IV of 1961—Suit whether barred under Art. 363 of Constitution—Liability of merging State taken over by successor State under covenant—Whether covenant can be looked upon as waiver by succeeding State of its right to ignore private rights of citizens of merging State.*

Section 4(1) of the Saurashtra Adjudication of (Special Courts) Suits Ordinance, 1949, contemplates suits which sound in tort and not suits in contract.

Where the Ruler of a State, previous to its integration with the State of Saurashtra, had entered into a contract with the plaintiff and the plaintiff filed a suit against the State of Saurashtra to enforce the contractual obligation undertaken by the Ruler, on the question whether the suit fell within the ambit of s. 4(1) of the Saurashtra Adjudication of (Special Courts) Suits Ordinance, 1949:—

Held, that the expression "anything done or omitted" in s. 4(1)(i) of the Ordinance means anything done or omitted unilaterally,

that what was done by the Ruler was to enter into a contract with the plaintiff which was a bilateral act and the enforcement was not of any right or remedy in respect of anything done or omitted to be done, but the suit was for the enforcement of the contract entered into between the plaintiff and the Ruler, and hence the suit did not fall within s. 4 of the Ordinance, and

that, therefore, the suit did not abate by reason of the provisions of s. 3(1) of the Saurashtra Suits against Government (Abatement and Adjudication) Act, 1961.

When a citizen seeks to enforce his contractual right or his rights under the ordinary law of the land, merely because he is asserting those rights against the State, the State cannot rely on the provisions of art. 363 of the Constitution of India for contending that because the liability was taken over by the State from the merging State under a covenant, the right of the citizen cannot be adjudicated in a civil Court as provided by art. 363 of the Constitution

SAURASHTRA ADJUDICATION OF (SPECIAL COURTS) SUITS ORDINANCE, 1949, S. 4—(Contd.)

The covenant itself may be looked upon as a waiver by the Covenanting State of its right to ignore private rights of the citizen of the State of which it is the successor.

BHOJRAJJI D. SAURASHTRA STATE.

61 Bom. L. R. (F.B.) 20.

SAURASHTRA AGRICULTURAL DEBTORS' RELIEF ACT (XXIII of 1952), S. 5—Saurashtra District and Subordinate Civil Courts Ordinance, 1948 (XI of 1948), Ss. 17, 19—Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1939), Ss. 4, 7, 8, 15—Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947) s. 46—Whether Board constituted under s. 5 of Saurashtra Act XXIII of 1952 a Court—Assistant Judge under Saurashtra ordinance empowered and invested with powers to entertain appeals from decrees of "Subordinate Courts" transferred to him by District Judge—Appeal filed in District Court against award made by Board constituted under Saurashtra Act transferred to Assistant Judge by District Judge—Whether Assistant Judge had jurisdiction to hear such appeal—Tribunal, under statute creating it, a Court for limited purpose—Whether such tribunal a Court.

A Board constituted under s. 5 of the Saurashtra Agricultural Debtors' Relief Act, 1952, is a Court.

Where under Notifications issued by the Government of Saurashtra under ss. 17 and 19 of the Saurashtra District and Subordinate Civil Courts Ordinance, 1948, an Assistant Judge was empowered to try appeals from decrees and orders of "subordinate Courts" as would lie to the District Judge and as may be referred to him by the District Judge concerned and the Assistant Judge was invested with powers to entertain such appeals from the decrees and orders of "subordinate Courts" as would lie to the District Judge:

Held, that the Assistant Judge, to whom an appeal filed against an award made by a Board constituted under s. 5 of the Saurashtra Agricultural Debtors' Relief Act, 1952, was transferred by the District Judge concerned, had jurisdiction to hear the appeal, as the Board was a Court within the meaning of the expression "subordinate Courts" which occurred in the Notifications.

If a statute creating a tribunal says that the tribunal shall be a Court for the limited purpose of certain sections of certain enactments, then the tribunal is not a Court in the sense in which the word "Court" is used in the context of hierarchy of Courts established in the Union of India.

KESHAVAL D. ASST. JUDGE, JUNAGADH.

61 Bom. L. R. 124.

SAURASHTRA BARKHALI ABOLITION ACT (XXVI of 1951), S. 2(1)—Jtval grant by subordinate Girasda—Whether grantee of such grant "Barkhalidar" within definition in Act.

A limited grant such as a grant as Jtval by a subordinate Girasda is covered by the definition of "Barkhalidar" in s. 2(1) of the Saurashtra Barkhali Abolition Act, 1951.

MERAMWALA BHAYAWALA C. VALBAL.

61 Bom. L. R. 939.

SAURASHTRA BARKHALI ABOLITION ACT, S. 8—Tenant deprived of entire or part of land in his possession under s. 8(1)—Whether tenant can pre-empt purchaser of land from barkhalidar—Right of tenant to pre-empt whether conditioned by his being in occupation of land adjacent to land sought to be pre-empted.

A tenant who is deprived of possession of land under s. 8(1) of the Saurashtra Barkhali Abolition Act, 1951, whether it is the entire area of the land in his occupation or a part of the land, may pre-empt a purchaser of the land from the barkhalidar, if the purchase or the lease is within ten years from the date on which the order allotting the land under s. 8(1) of the Act is passed.

CHHAGAN MANGI D. AHER JIVA.

61 Bom. L. R. 50.

SAURASHTRA LAND REFORMS ACT (XXV of 1951), S. 2—Lands granted as 'giras' by former Ruler of State to petitioner continued by United State of Saurashtra on condition that petitioner not to evict tenants on lands—Government of Saurashtra by notification under Act declaring petitioner 'girasdar' and incorporating in notification condition that petitioner not to evict tenants—Application by petitioner for allotment of "garkhed land" under s. 19 of Act—Whether petitioner's application could be granted—Whether there is conflict between, s. 12 and s. 18—Whether Government can impose restrictions upon rights of girasdar.

The former Ruler of a State in Saurashtra granted certain agricultural lands as 'giras' to the petitioner who was a junior member of the ruling family. After the administration of the State was taken over by the United State of Saurashtra, an agreement was arrived at between the Ruler and the Government of India under which the lands were regarded as lawfully granted to the petitioner but subject to the restriction that the grantee was not to evict the tenants on the lands. After the coming into force of the Saurashtra Land Reforms Act, 1951, the Government of Saurashtra by a notification dated July 20, 1954, declared the petitioner a girasdar subject to the provisions of s. 18 of the Act, and conditions imposed by the Government of India that he could not evict tenants were incorporated in the notification. In the meanwhile on March 21, 1952, the petitioner applied for an order of allotment of "garkhed land" under s. 19 of the Act read with r. 4. On the question whether the petitioner's application could be granted:—

Held, that as the condition incorporated in the agreement arrived at between the Ruler and the Government of India was accepted by the petitioner, who had knowledge of it, it ensured for the benefit of the tenants for whose benefit it was imposed,

that as the notification which declared the petitioner a girasdar, expressly preserved the rights of the tenants and imposed a disability upon the petitioner preventing him from evicting the tenants in the lands of which he was declared a girasdar, that declaration also ensured for the benefit of the tenants under s. 18 of the Saurashtra Land Reforms Act, 1951, and

that, therefore, the petitioner's application could not be granted.

SAURASHTRA LAND REFORMS ACT,
S. 2—(Contd.)

The rights which a tenant has and which are not limited or abridged under s. 18 of the Saurashtra Land Reforms Act, 1951, are to be regarded as enforceable so long as the tenancy is subsisting. Therefore, where there is statutory determination of tenancy under s. 12 of the Act as a result of an order of allotment of land to the girasdar passed by the Mamlatdar, the girasdar becomes an occupant of the land under s. 39 of the Act and the rights of the tenant holding that land are extinguished.

There is nothing in the Saurashtra Land Reforms Act, 1951, which requires the Government when declaring a landlord a girasdar, not to impose any conditions upon him, or not to declare the rights of the tenants in the land of which the landlord is declared a girasdar.

K. S. DIGVIJAYSHINJI V. NANJI.

61 Bom. L. R. 44.

—S. 12. See SAURASHTRA LAND REFORMS ACT, 1951, S. 2. 61 Bom. L. R. 44.

—S. 18. See SAURASHTRA LAND REFORMS ACT, 1951, S. 2. 61 Bom. L. R. 44.

—S. 19. See SAURASHTRA LAND REFORMS ACT, 1951, S. 2. 61 Bom. L. R. 44.

—S. 20. See SAURASHTRA LAND REFORMS ACT, 1951, S. 2. 61 Bom. L. R. 44.

—S. 28(1). See SAURASHTRA LAND REFORMS ACT, 1951, S. 2.

61 Bom. L. R. 44.

—S. 39. See SAURASHTRA LAND REFORMS ACT, 1951, S. 2. 61 Bom. L. R. 44.

SEA CUSTOMS ACT (VIII of 1878), S. 29.
See SEA CUSTOMS ACT, 1878, S. 87.

61 Bom. L. R. (O.C.J.) 1.

—S. 29B. See SEA CUSTOMS ACT, 1878, S. 87. 61 Bom. L. R. (O.C.J.) 1

—S. 30. See SEA CUSTOMS ACT, 1878, S. 87. 61 Bom. L. R. (O.C.J.) 1.

—S. 39. See SEA CUSTOMS ACT, 1878, S. 87. 61 Bom. L. R. (O.C.J.) 1.

—S. 86. See SEA CUSTOMS ACT, 1878, S. 107. 61 Bom. L. R. (O.C.J.) 1482.

—S. 87—Constitution of India, Art. 226—Assessment order under s. 87 whether administrative order or quasi-judicial order—Difference between administrative and quasi-judicial orders—Assessing authority to give reasons for making particular assessment order or for issuing short notice levy—Whether Court can consider affidavit disclosing such reasons in absence of reasons in order of assessment itself—Court's power to entertain writs when alternative remedy available to petitioner—Whether customs authority in determining real value of goods bound by price shown on invoice—Evidentiary value of invoice—Indian Income-tax Act (XI of 1922), ss. 23 (3), 37.

SEA CUSTOMS ACT, S. 29—(Contd.)

An assessment order made under s. 87 of the Sea Customs Act, 1878, is an administrative order and not a quasi-judicial order.

The difference between an administrative and a quasi-judicial order does not lie merely in this that in the case of a quasi-judicial order a writ of *certiorari* can be issued. The more fundamental difference between the two orders is that in the case of a quasi-judicial order the Court must require and demand from the authority exercising his functions that he will conform to the judicial process.

In making an assessment or in issuing a short levy notice under the Sea Customs Act, 1878, the assessing authority must give reasons for his decisions i.e. as to how and why the assessing authority came to a particular conclusion or made the assessment in a particular manner.

Where, however, such reasons are not given, but the reasons are disclosed in affidavits at the trial, then the Court could look into those reasons and consider those reasons as if they were the reasons embodied in the order itself.

The reason why the Courts refuse to entertain writs when an alternative remedy is available is that the Legislature has set up tribunals for decision in appeals and that the remedy which the Court could give, the petitioner could obtain from these tribunals. But whether the petitioner should be disentitled to maintain the petition or not is a matter of discretion with the Court, and if the Court is satisfied that the petitioner will not get justice from the appellate tribunal or that he would have no confidence in the decision of the tribunal or that the appeal would be nothing more than an appeal from Caesar to Caesar, then the Court is not bound to accede to the submission of the State that it should not hear the petitioner and the petitioner should be referred to the appellate tribunal set up under the Act.

In determining the real value of goods for the purposes of the Sea Customs Act, 1878, the Customs authorities are not bound by the price shown on the invoice by the importer. The invoice is an important piece of evidence to determine what the real value is. But that piece of evidence may be discarded if the authorities take the view that it is not a genuine document or if they take the view that over and above the price which is being paid some other consideration has passed under the document.

Section 30(b) of the Sea Customs Act, 1878, does not in any way import into its construction any consideration as to the character of the importer. What is emphasised is the cost of the goods, whoever the importer may be.

In order to test the genuineness of the invoice the customs authorities may requisition to their aid any other facts, but only for that purpose. They may consider if they like the cost, in Europe, cost of production, or any other factor. But all those considerations must ultimately be directed to the determination and ascertainment of the only fact which has got to be determined and ascertained under s. 30(b) of the Sea Customs Act, 1878, which is the cost of the goods of like kind and quality at the place of importation.

GLAXO LABORATORIES V. VENKATESWARAN.

61 Bom. L. R. (O.C.J.) 1.

SEA CUSTOMS ACT, S. 167—Imports and Exports (Control) Act (XVIII of 1947), Sec. 3(2)—Constitution of India, Art. 226—Expression "value" in s. 167(37)(c) whether means "real value" as defined in s. 30 or cost price—Value relevant for purpose of offence under s. 167(8)—Practice (Civil)—Prerogative writs—Rule Nisi when should Court grant—Construction of statutes—Penal statutes how to be construed.

The expression "value" in s. 167(37)(c) of the Sea Customs Act, 1878, means "real value" of the goods as required to be stated under s. 29 of the Act and as defined in s. 30 of the Act.

Where the import or export licence speaks only of c.i.f. value of the goods, it is the c.i.f. value of the goods and not the real value of the goods that is relevant for the purpose of the offence alleged to have been committed under s. 167(8) of the Sea Customs Act, 1878.

In cases where small penalties are imposed by the customs authorities and no fundamental right of the subject is violated, the Court should be slow in granting *Rule Nisi* unless it is satisfied that a *prima facie* case has been made out for the interference of the Court by issuance of any of the extraordinary writs, and the circumstances of the case demand its interference. A petitioner who seeks relief from the Court by issuance of any of the prerogative writs should take care to set out in his petition the reasons why he approaches the Court instead of adopting the normal machinery available to him under the Act by appealing to higher authorities.

Penal statutes are construed with reference to the true meaning and the real intention of the Legislature.

PARMAR & Co. v. V. R. GUPTA.

61 Bom. L. R. (O.C.J.) 1482.

—S. 178A—Foreign Exchange Regulation Act (VII of 1947), Sec. 8(1), 23, 23A—Constitution of India, Arts. 19(1)(f)(g), 31—Section 178A of Sea Customs Act in so far as gold concerned whether violative of Art. 19(1)(f) & (g) of Constitution—Restriction imposed by s. 178A in shape of rule of evidence whether reasonable within Art. 19(5)—Whether s. 23A of Foreign Exchange Regulation Act incorporates provisions of Sea Customs Act into former Act—Mere finding that smuggled goods in person's possession whether sufficient to impose penalty under Item 8 of s. 167 of Sea Customs Act—Burden of proof under s. 178A, how discharged—When can Court refer to speech made in Parliament by sponsor of Bill.

Section 178A of the Sea Customs Act, 1878, does not infringe the constitutional guarantees afforded by art. 19(1)(f) and (g) of the Constitution of India so far as gold is concerned.

The effect of s. 23A of the Foreign Exchange Regulation Act, 1947, is not to incorporate the provisions of the Sea Customs Act, 1878, into the Foreign Exchange Regulation Act, 1947, but the effect is of incorporating the restrictions imposed by sub-ss. (1) and (2) of s. 8, sub-s. (1) of s. 12 and cl. (a) of sub-s. (1) of s. 13 in the Sea Customs Act, 1878, with certain modifications in s. 188 of the Sea Customs Act, 1878.

Under Item 8 of s. 167 of the Sea Customs Act, 1878, the liability to pay penalty arises only when it is proved that the person proceeded against is concerned in the importation in

SEA CUSTOMS ACT, S. 178A—(Contd.)

India or exportation from India of goods contrary to the provisions of the law. The mere finding that the goods found in a person's possession were smuggled goods is not sufficient to impose a penalty.

The burden cast on a person under s. 178A of the Sea Customs Act, 1878, from whose possession gold is seized would be discharged by him either by proving that the gold seized from him was on the Indian soil prior to September 4, 1939, or that it was brought on the Indian soil subsequent to that date on the authority of a licence granted in that behalf by the Reserve Bank of India and duty thereon was paid, if any was payable.

Speech made in Parliament by the sponsor of a Bill may be referred to by the Court for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce it and the extent and urgency of the evil which he sought to remedy.

PUKHRAJ D. D. R. KOHLI.

61 Bom. L. R. 1230.

—S. 182. See SEA CUSTOMS ACT, 1878, S. 87. 61 Bom. L. R. (O.C.J.) 1.

—S. 182. See SEA CUSTOMS ACT, 1878, S. 178A. 61 Bom. L. R. 1230.

—S. 182—Civil Procedure Code (Act V of 1908), Sec. 11—Constitution of India, Art. 226—When can civil Court consider validity of decisions or orders made under s. 182 or 188—High Court deciding on merits contentions raised in writ petition under Art. 226—Whether same contention can be re-agitated in suit filed in High Court—Whether suit against Collector of Customs in his official name maintainable.

A civil Court would have jurisdiction to consider the validity of decisions and orders made under the provisions of ss. 182 and 188 of the Sea Customs Act, 1878, on the grounds that the provisions of the Act had not been complied with or that the Tribunal had not acted in conformity with the fundamental principles of judicial procedure.

The principles of s. 11 of the Civil Procedure Code, 1908, are applicable to a matter which is initially decided in a writ petition under art. 226 of the Constitution of India.

The Collector of Customs not being a legal entity, a suit cannot be filed against or in the name of the Collector of Customs.

MANAHEM YESHOOVA v. UNION OF INDIA.

61 Bom. L. R. (O.C.J.) 1388.

—S. 183. See SEA CUSTOMS ACT, 1878, S. 178A. 61 Bom. L. R. 1230.

—S. 188. See SEA CUSTOMS ACT, 1878, S. 87. 61 Bom. L. R. (O.C.J.) 1.

—S. 188. See SEA CUSTOMS ACT, 1878, S. 182. 61 Bom. L. R. (O.C.J.) 1388.

—S. 188—Appeal filed and disposed of on merits under s. 188—Whether order against which appeal preferred merges in decision of appellate Tribunal—Effect of order of confirmation under s. 188.

SEA CUSTOMS ACT, S. 188—(Contd.)

Where an appeal is filed and disposed of on merits under the provisions of s. 188 of the Sea Customs Act, 1878, the order of the first tribunal against which the appeal is preferred merges in the decision of the appellate tribunal.

The effect of an order of confirmation under s. 188 of the Sea Customs Act, is that the operative part of the order of the first tribunal is really the operative part of the order of the appellate tribunal.

HUMAYUN v. M. G. ABROL.

61 Bom. L. R. (O.C.J.) 1633.

—S. 191. See SEA CUSTOMS ACT, 1878, S. 87. 61 Bom. L. R. (O.C.J.) 1.

SESSIONS JUDGE—Power to re-charge the jury.

If the Sessions Judge finds that the verdict of the jury is wrong due to their misunderstanding or making a mistake on a question of law, he is competent, under s. 804 of the Criminal Procedure Code, 1898, to invite the attention of the jury to that mistake and to give his reasons therefor. To that extent alone he can re-charge or give further directions to the jury.

BASTAV VICTORY RODRIGUES v. STATE.

61 Bom. L. R. (F.B.) 670.

SOLICITOR, profession of—Whether industry.

The profession of a solicitor is not an industry within the meaning of the word in the Industrial Disputes Act, 1947, and therefore a dispute between a firm of solicitors and its employees is not an industrial dispute which could be the subject of a reference under the Act.

As essential requisite of industry is the existence of relationship of master and servant. This relationship must exist in the industry itself. Only that business, trade, undertaking or calling can be held to be an industry which requires the co-operation of both the employer and the employees for carrying on that business, trade, undertaking or calling.

NAT. UNION, COMM. EMPLOYEES v. MOHER.

61 Bom. L. R. 642.

STATES REORGANIZATION ACT (XXXVII of 1956), S. 87—*Constitution of India, Art. 311(2)—Meaning of word "liability" in Part VII of Act—Whether "liability" includes obligation to reinstate government servant wrongly dismissed—"Actionable wrong", meaning of expression in s. 88—Dismissal in contravention of Art. 311(3) of Constitution whether actionable wrong within s. 88—Applicability of s. 88(b).*

The word 'liability' used in Part VII of the States Reorganisation Act, 1956, includes not only a financial obligation but also obligations of every other kind, including one of reinstating government servant wrongly dismissed.

The meaning of the term "actionable wrong" in s. 88 of the States Reorganisation Act, 1956, is an illegal or unauthorised act infringing a legal right of another affording him a ground for action in law. Therefore, where the petitioners, who were citizens of India, challenged the orders of their dismissal on the ground of infringement of art. 311(2) of the Constitution of India, the wrong complained of would be an

STATES REORGANISATION ACT, S. 87—(Contd.)

actionable wrong within the meaning of s. 88 of the Act.

To call in aid cl. (b) of s. 88 of the States Reorganisation Act, 1956, it must be shown that the cause of action arose in its entirety within the territories which as from November 1, 1956, formed part of the territories of one of the successor States. Therefore, where the petitioners' claim is that their services had been wrongfully terminated in contravention of art. 311(2) of the Constitution of India, for the purposes of s. 88(b) of the Act they must establish that the entire cause of action, namely, the order for termination of their services and the consequence of that order i.e. the fact that they were removed from their services, had arisen within the aforesaid territories.

W. W. JOSHI v. STATE OF BOMBAY.

61 Bom. L. R. 829.

—S. 88. See STATES RE-ORGANISATION ACT, 1956, S. 87. 61 Bom. L. R. 829.

—S. 116. See STATES RE-ORGANISATION ACT, 1956, S. 87. 61 Bom. L. R. 829.

SUPPRESSION OF IMMORAL TRAFFIC IN WOMEN AND GIRLS ACT (CIV of 1956), S. 3(1)—*Women and girls used for immoral traffic in houses of prostitution whether can be charged under s. 3(1).*

Section 3(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956, penalises persons who establish and maintain houses of prostitution or act or assist in keeping or managing them. But women or girls who are used for immoral traffic in such houses of prostitution are not liable to punishment under this section.

STATE v. GAYA DEEPCHAND.

61 Bom. L. R. 1509.

SUPREME COURT—interpretation of statute by—binding nature of.

When in a case a particular clause of a section or an article in the Constitution of India calls for interpretation, and in order to interpret it the Supreme Court interprets the whole section or article and lays down the proper canon of construction, that interpretation is binding upon the High Court unless the Supreme Court in any subsequent decision has departed from the interpretation laid down by it in this decision.

NARAYANLAL BANERJEE v. M. P. MISTRY.

61 Bom. L. R. (O.C.J.) 220.

SUPREME COURT, Obiter Dicta. See OBITER DICTA.

61 Bom. L. R. (O.C.J.) 220.

SWAMINARAYAN SAMPRADAYA. See BOMBAY HINDU PLACES OF PUBLIC WORSHIP (ENTRY AUTHORISATION) ACT, 1956, S. 2.

61 Bom. L. R. 700.

TAXATION LAWS (EXTENSION TO MERGED STATES AND AMENDMENTS) ACT (LXVII of 1949), SS. 3, 6—*Merged States (Taxation Concessions) Order, 1949; Paras 12, 4—Indian Income-tax Act*

TAXATION LAWS (EXTENSION TO MERGED STATES AND AMENDMENTS) ACT, SS. 3, 6—(Contd.)

(XI of 1922), Secs. 60A, 23A, 18A(8)—*Assessee company, a non-resident, incorporated in former Indian State—After merger of State, Extension Act bringing into force Indian Income-tax Act in merged State from April 1, 1949—Income-tax Officer making order against assessee under s. 23A in respect of assessment years 1947-48 and 1948-49—Whether assessee could claim benefit of exemption granted by para. 12 of Taxation Concessions Order, 1949—Interest added to tax under s. 18A(8) whether tax for purpose of computation under s. 23A.*

The assessee was a private limited company incorporated in a former Indian State. On August 1, 1949, the State was merged in the Province of Bombay and on December 31, 1949, the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, came into operation and under it the provisions of the Indian Income-tax Act, 1922, and the Indian Finance Act, 1949, were brought into force in all the merged States on April 1, 1949. The Income-tax Officer held the assessee to be non-resident for the assessment years 1947-48 and 1948-49 (accounting years 1946 and 1947), and made an order under s. 23A of the Indian Income-tax Act, 1922, against the assessee in respect of these years. The assessee contended that it was entitled to claim the benefit of the exemptions granted by para. 12 of the Merged States (Taxation Concessions) Order, 1949, made under s. 60A of the Indian Income-tax Act, 1922, and the Income-tax Officer was not entitled to make any order against the assessee under s. 23A in respect of its profits and gains of the previous years ended December 31, 1946, and December 31, 1947:—

Held, that incomes which were not touched by the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, could not benefit by the exemption and that as the Merged States (Taxation Concessions) Order, 1949, could not embrace incomes which were not within the ambit of s. 60A, the Income-tax Officer was not precluded from making the impugned order.

The amount of interest added to tax as provided in s. 18A(8) of the Indian Income-tax Act, 1922, does not become tax for the purpose of computation envisaged by s. 23A of the Act.

BHOIR INDUSTRIES LTD. v. COMMR. I-TAX.

61 Bom. L. R. 573.

TENANTS IN COMMON—Ancestral property, after partition between members of joint Hindu family, remaining with one of the members—Such member receiving income of other members from property and mixing it with his own from such property—Purchase of property by member from such income—Separate accounts of income received on behalf of other members not maintained—Whether property so acquired belonged to erstwhile members as tenants in common—Indian Trusts Act (II of 1882), Secs. 90, 94, 96.

The entire immovable property of a joint Hindu family which consisted of ancestral property and subsequent acquisitions remained after severance of the joint family status by

TENANTS IN COMMON—(Contd.)

partition between the plaintiffs and the defendant, who were members of the family, with the defendant. The defendant did not maintain separate accounts of the income received from the properties in which the plaintiffs had a share and the properties acquired by him after the partition. The defendant dealt with the income derived from his share and the share of the plaintiffs. It was contended by the plaintiffs that when the defendant continued to receive the share of the income even after partition in the ancestral and joint family properties and mixed up the income belonging to their share with the income of his own share and acquired properties from time to time, all the properties so acquired must be deemed to be impressed with the character of the fund out of which the properties were acquired i.e. the acquired properties belonged to the plaintiffs and the defendant as tenants in common:—

Held, that because the defendant continued to receive the rents and profits of the share of the plaintiffs in the properties which were originally ancestral or joint family properties he did not thereby become a trustee of the rents and profits so received for the plaintiffs, although he was liable to account for the rents and profits received by him,

that the fact that the defendant failed to maintain separate accounts of the income of the plaintiffs' share collected by him did not impress the fund accumulated by him after severance with the character of a fund belonging to the plaintiffs and the defendant,

that the fund in the hands of the defendant was still a fund of which he was the owner and it was not impressed with any trust in favour of the plaintiffs, and

that the property acquired with the aid of that fund was the exclusive property of the defendant and the plaintiffs had no claim or share in that property.

GULABRAO FAKIRRAO v. BABURAO.

61 Bom. L. R. 752.

TRANSFER OF PROPERTY ACT (IV of 1882), S. 14—Specific Relief Act (I of 1877), Sec. 21—Agreement to sell immovable property in future on demand by party to agreement—Whether such agreement infringes rule against perpetuity.

A bare agreement to sell immovable property in future on demand by a party to the agreement does not infringe the rule against perpetuity enunciated in s. 14 of the Transfer of Property Act, 1882.

RAKHAMA SITARAM v. LAXMAN.

61 Bom. L. R. 1170.

S. 108—Lessee contracting to hand over building erected on demised land to lessors without compensation on expiry of lease—Whether by reason of such contract lessors become owner of building during subsistence of lease.

Under section 108 of the Transfer of Property Act, 1882, there is nothing to prevent the lessee contracting to hand over any building or structure erected on the demised land by them to the lessors at the end of the lease without receiving any compensation:

TRANSFER OF PROPERTY ACT S. 108—(Contd.)

Such a contract, however, does not transfer the ownership in the building to the lessors while the lease subsists.

DR. K. A. DHABRYAWAN V. J. R. THAKUR.

61 Bom. L. R. (S.C.) 548.

ULTRA VIRES—Bar Councils Act, S. 4(3).

Section 4(3) of the Indian Bar Councils Act, 1926, and the resolution passed by the Bombay High Court on April 10, 1952, in pursuance of the provisions of that section cannot be challenged on the ground that art. 14 of the Constitution of India is violated by them.

MANILAL V. UNION OF INDIA.

61 Bom. L. R. (O.C.J.) 976.

Bombay District Municipal Act, 1901, S. 59(i)(xi).

Section 59(1)(xi) of the Bombay District Municipal Act, 1901, is not unconstitutional. WESTERN INDIA THEATRES V. M'PAL CORP., POONA.

61 Bom. L. R. (S.C.) 954.

Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956.

Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956, is not *ultra vires* the provisions of art. 25(1) of the Constitution of India.

STATE OF BOMBAY V. SHASTRI PURUSHADASJI.

61 Bom. L. R. 700.

Bombay Tenancy and Agricultural Lands Act, S. 84C.

Section 84C of the Act is not violative of art. 31(2) of the Constitution of India as it does not deal with acquisition of property for a public purpose.

RUBERDAS V. STATE OF BOMBAY.

61 Bom. L. R. 1276.

Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956.

The Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, is covered by Entry 18 in List II of the Seventh Schedule to the Constitution of India and is a legislation with reference to "land" and, therefore, the State Legislature was competent to enact the Act.

The Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, is covered by art. 31A of the Constitution and is, therefore, not unconstitutional on the ground of its having violated the fundamental rights enshrined in arts. 14, 19 and 31 of the Constitution.

SHRI RAM RAM NARAIN V. STATE.

61 Bom. L. R. (S.C.) 811.

Hyderabad General Sales Tax Act, 1950, S. 2(w), Expl. I, cl. (1).

Section 2 (w), Explanation I, cl. (1) of the Hyderabad General Sales Tax Act, 1950, and r. 5(3) of the Hyderabad General Sales Tax Rules, 1950, are not hit by item No. 54 of List II in the Seventh Schedule to the Constitution of India, and are not, therefore, *ultra vires* the legislative competence of the Legislature of the former State of Hyderabad.

SARASWATI PRINTING PRESS V. COMMR. SALES-TAX.

61 Bom. L. R. 607.

ULTRA VIRES—(Contd.)

Hyderabad General Sales Tax Rules, R. 5(3).

Rule 5(3) of the Hyderabad General Sales Tax Rules, 1950, is *ultra vires* the Constitution of India as it is arbitrary and not based on any rational basis.

SARASWATI PRINTING PRESS V. COMMR. SALES-TAX.

61 Bom. L. R. 607.

Minimum Wages Act, 1948, S. 3 (3)(a)(iv).

Section 3(3)(a)(iv) of the Minimum Wages Act, 1948, is not discriminatory and it, therefore, does not violate the provisions of art. 14 of the Constitution of India.

BHIKUBA V. SANGAMNER BIDI KAMGAR UNION.

61 Bom. L. R. 764.

Notification No. MWA-1557-J.

The second part of cl. 6, cl. 7 and the Explanation contained in the Schedule to the notification No. MWA-1557-J, dated June 11, 1958, issued by the State of Bombay under s. 5(2) read with s. 3(1)(b) of the Minimum Wages Act, 1948, are *ultra vires* of the powers of the State Government. The remaining provisions of the notification are *intra vires* of the powers of Government and, therefore, valid and effective.

BIDI & TOBACCO MFR. ASS'N V. STATE.

61 Bom. L. R. 890.

Notification No. S. R. O. 2993.

The words "as and by way of securing redress or punishment" in the latter part of cl. (iv) of the notification No. S. R. O. 2993 dated December 11, 1956, issued by the Union of India under s. 3 of the Commissions of Enquiry Act, 1952, go outside the scope of the Act and such provision is not covered by the two legislative entries (List I, entry 95 and List III, entry 45) and must, therefore, be deleted.

RAM KRISHNA DALMIA V. TENDOLKAR J.

61 Bom. L. R. (S.C.) 192.

Sea Customs Act, S. 178A.

Section 178A of the Sea Customs Act, 1878, does not infringe the constitutional guarantee afforded by art. 19(1)(f) and (g) of the Constitution of India so far as gold is concerned.

PURHARAJ V. D. R. KOHLI.

61 Bom. L. R. 1230.

Wealth-tax Act, S. 3.

Section 3 of the Wealth-tax Act, 1957, which authorises the levy of wealth-tax on the net wealth of a Hindu undivided family is not *ultra vires* the Union Parliament.

MAHAVIRPRASAD V. M. S. YAGNIK.

61 Bom. L. R. (O.C.J.) 1433.

WAKE-AL-ULAD. See ESTATE DUTY ACT, 1958, S. 5.

61 Bom. L. R. 719.

WEALTH-TAX ACT (XXVII of 1957), S. 3—Constitution of India, Seventh Schedule, List I, entries 86, 97; art. 248—Indian Income-tax Act (XI of 1922), Sec. 3—Whether s. 3 of Wealth-tax Act, in so far as it levies wealth-tax on Hindu undivided families *ultra vires* Parliament—Expression "individuals" in entry 86, List I, Seventh Schedule to

WEALTH-TAX ACT, S. 3—(Contd.)

Constitution whether includes Hindu undivided family—Hindu undivided family whether a corporation—Whether entries in Lists contained in Seventh Schedule to Constitution circumscribe or define ambit of art. 248—Construction of statute—Legislative practice as an aid to construction of word or phrase in statute—When may Court avail itself of such assistance.

Section 3 of the Wealth-tax Act, 1957, which authorises the levy of wealth-tax on the net wealth of a Hindu undivided family is not *ultra vires* the Union Parliament.

The expression "individuals" used in entry No. 86 in List I of the Seventh Schedule to the Constitution of India includes an association of individuals such as a Hindu undivided family.

Quaere: Whether in the residuary powers of the Union Parliament power to legislate on a topic which is partially dealt with by a specific entry in the first List may be regarded as included.

Per S. T. Desai J. The entries in the Lists contained in the Seventh Schedule to the Constitution of India are legislative heads primarily designed to demarcate the areas of legislative competence of the Union and the State Legislatures. They give *simplex enumeration* of categories of legislation and are not designed to circumscribe or logically define the ambit of art. 248 of the Constitution. It would be difficult, therefore, to read in any entry in List I any restriction by implication or otherwise on the residuary legislative power conferred on the Union Legislature by art. 248.

If the Legislature of a country has been accustomed to use any word or expression with a more restricted or extended meaning than might be commonly attributed to it in its ordinary sense, the Court should not blandly shut out that consideration but should avail of that assistance, albeit limited, in the process of interpretation. Legislative practice is one of the accepted aids to construction and furnishes extrinsic evidence to which resort may legitimately be had when the Court has to construe a word or phrase and the task of preferring one meaning to another can really be said to have arisen.

MAHAVIRPRASAD v. M. S. YAGNIK.

61 Bom. L. R. (O.C.J.) 1433.

WORDS AND PHRASES:

"A landholder falls at any time during such period as may be prescribed".

See BEHAR REGULATION OF AGRICULTURAL LEASES ACT, S. 9(6). 61 Bom. L. R. 1156.

"Any definite matter of public importance".

See COMMISSIONS OF ENQUIRY ACT, S. 3.

61 Bom. L. R. (S.C.) 192.

"Any other factors which may be prescribed". *See* BOMBAY TENANCY AND AGRICULTURAL LANDS (AMENDMENT) ACT, S. 5.

61 Bom. L. R. (S.C.) 811.

"Anything done or omitted". *See* SAURASHTRA ADJUDICATION OF (SPECIAL COURTS) SUITS ORDINANCE, S. 4.

61 Bom. L. R. (F.B.) 20.

WORDS AND PHRASES—(Contd.)

"Apparent from the record". *See* INCOME-TAX ACT, S. 85.

61 Bom. L. R. (S.C.) 1395.

"Appeal". *See* LIMITATION ACT, ART. 182.

61 Bom. L. R. 984.

"As approved in section 9". *See* BEHAR REGULATION OF AGRICULTURAL LEASES ACT, S. 8.

61 Bom. L. R. 41.

"At settlement". *See* DIVERTED LANDS REVENUE ASSESSMENT RULES, R. 1(2).

61 Bom. L. R. 1102.

"Authority". *See* BOMBAY COMMISSIONERS OF DIVISIONS ACT, S. 8.

61 Bom. L. R. 1406.

"Business". *See* MUNICIPAL ACT (BOROUGH), S. 43.

61 Bom. L. R. (O.C.J.) 1129.

"Commencement of tenancy". *See* BEHAR LAND REVENUE CODE, S. 73(1).

61 Bom. L. R. (F.B.) 1203.

"Concerned in such dispute". *See* INDUSTRIAL DISPUTES ACT, S. 33.

61 Bom. L. R. 137.

"Consideration". *See* BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT, S. 18.

61 Bom. L. R. 1662.

"Corrupt practice". *See* REPRESENTATION OF THE PEOPLES ACT, S. 128.

61 Bom. L. R. 509.

"Court". *See* SAURASHTRA AGRICULTURAL DEBTORS RELIEF ACT, S. 5.

61 Bom. L. R. 124.

"Cultivating personally". *See* BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 31.

61 Bom. L. R. 1475.

"Debt". *See* MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT, S. 43.

61 Bom. L. R. 698.

"Decision of the High Court". *See* REPRESENTATION OF THE PEOPLES ACT, S. 116A.

61 Bom. L. R. 1274.

"Destruction, deterioration or damage". *See* RAILWAYS ACT, S. 74-B.

61 Bom. L. R. 682.

"Distress and Sale". *See* MUNICIPAL ACT (DISTRICT), SS. 76-79.

61 Bom. L. R. 284.

"Emoluments which are earned by an employee while on duty". *See* EMPLOYEES' PROVIDENT FUNDS ACT, S. 2.

61 Bom. L. R. (O.C.J.) 1385.

"Estate". *See* BOMBAY TENANCY AND AGRICULTURAL LANDS (AMENDMENT) ACT, S. 5.

61 Bom. L. R. (S.C.) 811.

WORDS AND PHRASES—(Contd.)

"Factory". See C. P. AND BEHAR MATERNITY BENEFIT ACT, S. 52.
61 Bom. L. R. 711.

"For the purposes of". See COMMISSIONS OF ENQUIRY ACT, S. 3.
61 Bom. L. R. (S.C.) 192.

"For the purposes of this Act". See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 70.
61 Bom. L. R. (F.B.) 957.

"Gratification". See PREVENTION OF CORRUPTION ACT, S. 4(1). 61 Bom. L. R. 837.

"In any other case". See MINIMUM WAGES ACT, S. 5. 61 Bom. L. R. 890.

"Income, profits and gains". See INCOME-TAX ACT, S. 25(3). 61 Bom. L. R. 847.

"Income to which the provisions of section 18 do not apply". See INCOME-TAX ACT, S. 18A(5). 61 Bom. L. R. 1521.

"Individuals". See WEALTH-TAX ACT, S. 3. 61 Bom. L. R. (O.C.J.) 1433.

"Information received from a person accused of any offence". See EVIDENCE ACT, S. 27.
61 Bom. L. R. 715.

"Injury". See CIVIL PROCEDURE CODE, S. 25. 61 Bom. L. R. 1254.

"Just cause". See HINDU MARRIAGE ACT, S. 10. 61 Bom. L. R. 1549.

"Land". See BOMBAY TOWN PLANNING ACT, S. 14. 61 Bom. L. R. 1247.

"Land". See LAND ACQUISITION ACT, S. 28. 61 Bom. L. R. 1501.

"Lanldlord". See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 31-A(d).
61 Bom. L. R. 1267.

"Lease money". See BEHAR REGULATION OF AGRICULTURAL LEASES ACT, S. 14.
61 Bom. L. R. 1285.

"Liability". See STATES RE-ORGANISATION ACT, S. 57. 61 Bom. L. R. 829.

"Likely to promote public instruction". See MUNICIPAL ACT (CORPORATION), S. 68.
61 Bom. L. R. (O.C.J.) 1129.

"Modify". See MUNICIPAL ACT (DISTRICT), S. 59(1)(a). 61 Bom. L. R. (S.C.) 954.

"Municipality". See REPRESENTATION OF THE PEOPLE ACT, S. 27. 61 Bom. L. R. 1210.

"Ordnance". See MUNICIPAL ACT (BOROUGH), S. 58. 61 Bom. L. R. 1326.

WORDS AND PHRASES—(Contd.)

"Other places". See MUNICIPAL ACT (DISTRICT), S. 59(1)(a). 61 Bom. L. R. 52.

"Plaint". See INCOME-TAX ACT, S. 10(3) (vi-b). 61 Bom. L. R. 1338.

"Property". See INCOME-TAX ACT, S. 4(3) (1). 61 Bom. L. R. 1421.

"Release". See BOMBAY LAND REQUISITION ACT, S. 6. 61 Bom. L. R. (O.C.J.) 1191.

"Right, title and interest". See HINDU LAW, DEFTS. 61 Bom. L. R. (S.C.) 688.

"Settlement". See DIVERTED LANDS REVENUE ASSESSMENT RULES, R. 1(2).
61 Bom. L. R. 1102.

"Shall". See BOMBAY LAND REQUISITION ACT, S. 6. 61 Bom. L. R. (O.C.J.) 318.

"Statement". See EVIDENCE ACT, S. 157. 61 Bom. L. R. (S.C.) 746.

"Such additions thereto or alterations therein as the Court may direct in that behalf". See INCOME-TAX ACT, S. 86(4).
61 Bom. L. R. (S.C.) 1464.

"System of assessment". See MUNICIPALITIES ACT, S. 67(2). 61 Bom. L. R. 784.

"Taxes on luxuries or entertainments or amusements". See GOVERNMENT OF INDIA ACT, 1985, S. 100.
61 Bom. L. R. (S.C.) 950.

"Testimony". See EVIDENCE ACT, S. 157. 61 Bom. L. R. 447.

"The said period". See FOREIGNERS ACT, S. 2(a). 61 Bom. L. R. 164.

"The substance of the evidence". See CRIMINAL PROCEDURE CODE, S. 264.
61 Bom. L. R. 684.

"Trade allowance". See BOMBAY AGRICULTURAL PRODUCE MARKETS ACT, S. 17.
61 Bom. L. R. 1478.

"Two years". See BEHAR REGULATION OF AGRICULTURAL LEASES ACT, S. 9(b).
61 Bom. L. R. 1156.

"Unless a different intention appears". See C. P. AND BEHAR MATERNITY BENEFIT ACT, S. 2. 61 Bom. L. R. 711.

"Value". See SEA CUSTOMS ACT, S. 107. 61 Bom. L. R. (O.C.J.) 1482.

"Yarn". See COTTON TEXTILES (CONTROL) ORDER, 1948, CL. 8. 61 Bom. L. R. 1291.

VOTER. See CITY OF NAGPUR CORPORATION ACT, 1950, S. 9. 61 Bom. L. R. 218.